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Annual Report

OMBUDSMAN

of

New South Wales

Year ended 30 June 1991

The Ombudsman

of

New South Wales

**SIXTEENTH
ANNUAL REPORT**

1 July 1990 - 30 June 1991

TABLE OF CONTENTS

Introduction	1
Charter	1
Aims and objectives	2
Access	2
MANAGEMENT AND STRUCTURE	
<hr/>	
Principal officers	3
Corporate plan	3
Program evaluation	5
Program evaluated	5
Reason for evaluation	5
Relation to other corporate objectives	6
Program objectives	6
Performance indicators	6
Evaluation results	7
Proposed action following evaluation	8
Programs proposed for future evaluation	9
Committees	9
Corporate Planning Committee	9
Equal Employment Opportunity (EEO) Committee	9
Ethnic Affairs Policy Statement (EAPS) Committee	10
Occupational Health and Safety (OH & S) Committee	10
Structural Efficiency Principle (SEP)	
Joint Consultative Committee (JCC)	10
Training Committee	10
Management Committee	11
Promotion and publicity	11
Community awareness	11
Speaking engagements	11
Complaints received	12
Reports to Ministers and to Parliament	13
Reports to Ministers	13
Reports to Parliament	14
Special reports under section 31 of the Ombudsman Act	14

Legal changes and proceedings	14
Changes made	14
Changes proposed	16
Legal proceedings	17
Challenge to Statements of Provisional Findings and Recommendations	17
FOI legal changes	17
Secrecy	18
Establishment of the Joint Committee on the Ombudsman	20
Statutory officers under the Senior Executive Service	23
Appointment of Assistant Ombudsman (Police)	23
Independence of the Ombudsman - services to the public	25
The Ombudsman and the Aboriginal community	29
Telecommunications Interception Inspection Unit	30

GENERAL AREA

Complaints about departments and authorities (other than Department of Corrective Services)	31
Complaints received	31
Finalised complaints	31
Juvenile justice?	32
Prosecution of witnesses	35
Meeting with Members of Parliament about juvenile justice matters . . .	36
Boat licence	36
Real Estate Services Council	38
Unflued gas heaters in schools	39
GIO - denial of liability	42

FREEDOM OF INFORMATION

The Ombudsman's view of the first two years	44
FOI statistics	45
Local government authorities and personal affairs	46
Notification of determinations	46
We shall not, we shall not be moved	47
Closure of the Premier's Department FOI Unit	49
Need for more staff and the permanent establishment of existing staff .	51

LOCAL GOVERNMENT AREA

Complaints about local government	53
New complaints	53
Finalised complaints	53
Lake Macquarie Council - a nice profit!	54
Lake Macquarie Council - what more could they do - or not do	58
Notification of adjoining owners - one step forward, two steps back	62
Not just a city problem	64
Donations to councils	66
Mulwaree Shire Council	67

PRISONS AREA

Complaints about the Department of Corrective Services	75
New complaints	75
Finalised complaints	75
Nature of complaints	76
Prison visits	81
Inquiry into the use of force on various prisoners by prison officers	82
Clocks, thongs and wedding rings - the excess property policy	86
Conditions in Cessnock Prison	88
Forensic patients	92
Conditions in Assessment Prison	94
Maitland Prison	95
Work release at Silverwater	98
Parklea Prison	100
Private prisons	101

POLICE AREA

Police complaint statistics	102
Complaints against police officers (Police Regulation [Allegations of Misconduct] Act, 1978)	102
Complaints finalised	105
Complaints about the Police Service (Ombudsman Act 1974)	105
New complaints	105
Finalised complaints	106
Raid on Redfern	106
Search warrants	107
Investigation into the events leading to the death of Mr David Gundy	110
Investigation into the shooting of Mr Darren Brennan	112
Use of the power of arrest	114

Strip searches by police	117
Sexual harassment	124
The corruption of silence - the second phase	130
Anonymity of police complaints	133
The buck stops where?	134
Accountability - is it carried through?	135
Questioning of Aboriginal people	137
Failure of police to attend court	138
Police cells	140
The will and the capacity or waiting for ICAC	143
Stress management program	146
Amazing grace	147
Traffic and parking complaints	148

CONSTRUCTIVE ACTION BY PUBLIC AUTHORITIES

The Anti-Discrimination Board	149
The Department of Housing	149
The State Rail Authority	150
Sydney Water Board	150
Hornsby Shire Council	151
Strathfield Municipal Council	151
Tumbarumba Shire Council	151
Warringah Shire Council	152
Young Shire Council	152
Department of Corrective Services	153
Police Service	155

OPERATIONAL ASPECTS OF THE OFFICE OF THE OMBUDSMAN

Human resources	157
Numbers and categories of officers and employees	157
Organisation chart	160
Wage movements	161
Personnel policies and procedures	161
Senior Executive Service	161
Recruitment	162
Industrial relations	162
Staff training	163
Restructure	164
Computerised Human Resource System	165
Ethnic affairs policy statement	165
Equal Employment Opportunity	166
Representation and recruitment of Aboriginal employees and employees with physical disability	169
Representation of EEO target groups within levels	169

Occupational Health and Safety (OH & S)	170
Structural Efficiency Principle (SEP)	171
Regular meetings with staff	172
Consultants	173
Accounts payable policy	176
Accrual accounting	176
Witness expenses	177
Financial summary	177
Value of recreation and extended leave	178
Major assets on hand as at 30 June 1991	179
Expenditure of stores	181
FINANCIAL STATEMENTS	182
PERFORMANCE INDICATOR AND STATISTICAL TABLES	193
CASE NOTES	221

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 sixteenth 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 1991. This report also includes an account of the Ombudsman's 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 (August 1991) have been mentioned in some cases in the interest of updating material.

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 that role occurred in February 1984 when the Office of the Ombudsman was given the power of direct reinvestigation of 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 need for independence of the Office of the Ombudsman was 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. The introduction of the Ombudsman Amendment Bill in April 1989 proposed that approval for the appointment of the deputy Ombudsman and assistant Ombudsmen be removed from Cabinet to allow the Ombudsman control over those appointments.

As well, a joint parliamentary committee was established in December 1990 to oversee the Ombudsman's office. These changes are discussed in more detail elsewhere in this report.

In November 1987, 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. The Ombudsman is precluded by law from reporting the results of inspections in the annual report.

On 1 July 1989, the New South Wales Freedom of Information Act commenced. Changes to the Ombudsman Act in January 1991 meant the Office of the Ombudsman was no longer subject to the FOI Act in relation to its complaint handling, investigative and reporting functions. The office maintains its role as a body of external review under the act. These changes are discussed elsewhere 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, including determinations about the release of information under the Freedom of Information Act, 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 many oral and written complaints. The office employs five assistant investigation officers who, amongst other things, deal with enquiries from the public; they assess enquiries and, if a matter falls within the jurisdiction of the Ombudsman, suggest a written complaint be lodged. If this office is unable to help complainants, they are referred to other State or Federal government organisations or non-government organisations which 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.

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

3rd Level
580 George Street
SYDNEY NSW 2000

Telephone: (02) 286 - 1000

Toll free telephone: (008) 451 - 524

Facsimile number: (02) 283 - 2911

The office is open to the public between 9 am and 5 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
Gregory Andrews,	BA (Hons)	Assistant Ombudsman
Kieran Pehm,	BA LLB	Assistant Ombudsman
Peter Wilmshurst,	BA (Syd) B Leg S. (Macq)	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.

Corporate Plan

The Ombudsman's office does not have a corporate plan having been given exemption by the then Premier, Mr Wran, from preparing five year plans. In recent times, with the increasing complexity of the office's operations, competing demands for limited resources and the introduction of the Senior Executive Service, the Ombudsman decided it was now appropriate and important for the office to develop a corporate plan. Having made this decision in early June 1991, preliminary discussions were held with the Director of the Strategic Management Division of the Office of Public Management (OPM) in relation to personnel to assist senior management of the Ombudsman's office, by acting as facilitators at a corporate planning workshop. This approach to OPM followed previous discussions between the Ombudsman and the Director of the Strategic Management Division during which the general services of the division were actively advertised and their expertise in public sector corporate planning area promoted in particular.

The Ombudsman was provided with oral advice that approval had been given by the General Manager of the Office of Public Management for the Director of the Strategic Management Division and a colleague to facilitate a corporate planning workshop - a first step in the development of a corporate plan. The recording of the subsequent sequence of events is important, not only because of the legislative requirements applicable to annual reports, but because it goes to the status of the Office of the Ombudsman.

It should be noted that not only was the use of OPM's consultancy services the most economical available, and thus in line with Government policy of exercising economic restraint, but the personal references provided to the office by other public sector chief executive officers attested to the expertise of these consultants on public sector corporate planning issues. Obviously, these references accorded with the substantial promotional

material issued by the Strategic Management Division of OPM and from time to time in the "Strategic Management Briefs" published by OPM.

When no reply was received to the Ombudsman's letter of 18 June 1991 seeking to confirm oral advice of the availability of the OPM, numerous telephone calls were made to expedite the matter. This was important as a venue had been booked for the conduct of the workshop. While subsequent events are outside the period required to be covered in this report, it is important they be disclosed here.

It was most disappointing and surprising when on 15 July 1991 telephone advice was received from OPM that the Deputy Director-General of the Premier's Department had withdrawn approval for staff of the Strategic Management Division to conduct the workshop. The reasons supplied were that the Ombudsman's office had enough funds to pay a private consultant to conduct the workshop and, in any event, staff of OPM were too busy with other work.

This decision appears to have disregarded the Ombudsman's Report to Parliament of 21 June 1991 on The Effective Functioning of the Ombudsman's Office and a maintenance dispute lodged with the Treasury, both of which reported on the inability of the Office of the Ombudsman to maintain services given the reduction of the office's financial resources. Quite apart from the Deputy Director-General's disregard of these factors, the Ombudsman also was extremely disturbed by this decision given the contradictory direction given in the Premier's memorandum No. 19-17 issued on 26 June 1991 in which he advised:

In the current economic climate, it is imperative to critically assess all expenditure and maintain a tight control on costs.

The Office of the Ombudsman clearly has severe resource limitations and it is imperative that all costs are assessed critically to ensure value for money. The approach to OPM, it would seem, is well justified and in line with government policy.

The Ombudsman spoke directly to the Director-General of the Premier's Department about this matter and wrote to him on 17 July requesting an urgent review of the Deputy Director-General's decision. On 26 July 1991, the Director-General advised that the Premier had given a higher priority to the Strategic Management Division assessing various departments' strategic plans and performance agreements and that perhaps Strategic Management Division staff would be available to assist "later in the year". Nowhere did the Director-General's letter address the prior commitment of OPM's general manager to provide the consulting service to the office or the fact the workshop was to take place on a weekend and require at most two or three days of preparation. The disruption or imposition on OPM staff would thus be negligible.

Subsequently the office was advised, after further negotiation, that OPM staff could be made available for a workshop. Arrangements were made for the workshop to take place on 6-8 September 1991. At the time of writing, the corporate planning process within the

office had commenced, the workshop was highly productive and staff were actively involved and committed to the process continuing. The production of a corporate plan can only enhance the efficient operation of the office.

Program evaluation

During the year a direction was received from the Premier's Department that all agencies, including this office, were required to incorporate program evaluations into their corporate and strategic planning process.

This office was previously exempt from program evaluation, but is now required to report the results of such evaluations in its annual reports.

This office also is required to prepare an annual program of evaluations, which would occur during the annual corporate plan review.

As outlined in the section above, this office has embarked on a corporate planning process and one of the outcomes will be the clear identification of office programs and sub-programs.

Besides the likely changes flowing from the corporate planning process, the office currently has in place a number of programs.

Some of these are likely to continue once the process of identifying all office programs is completed and future programs are settled.

Future annual reports will identify the rolling plan for program evaluation prepared as part of the office management process.

For the purposes of this report, a limited evaluation was made of a currently identifiable program likely to continue in the future. It served as a learning experience and provided a guide to future evaluation.

Program evaluated

The office's Public Enquiry Service (PES) has operated ever since the office was created, but now involves a clearly identified group of staff and requires significant of resources.

Anyone contacting the office for the first time with an enquiry or complaint, other than in relation to FOI matters, is dealt with by PES staff.

Reasons for evaluation

In dealings with government agencies or the police, citizens need a source of information and advice as to their general rights and what to do when a grievance arises. Also, they need to know what remedies are available.

There are several sources of such advice within the community and this office is one such source.

It is a characteristic of any body dealing with complaints and calls about existing or potential problems that it will receive calls seeking advice about any problem or perceived problem, whether the matters are within the ambit of the body's functions or not.

Evaluation of the PES program will help the office to assess more accurately the range and the types of advice needed by the public and to adjust or develop other programs.

The cost of the PES is significant and represents about 10.96 per cent of the recurrent salary expenditure of this office and uses the services of a minimum of five staff (EFT).

Relation to other corporate objectives

The program is related to the primary objective of the office, ie, the receipt and investigation of complaints that might properly be made the subject of an investigation under the Ombudsman Act or the Police Regulation (Allegation of Misconduct) Act.

Program objectives

The PES operates to:

- provide advice to callers about matters that can or cannot be the subject of an investigation by this office;
- provide advice to callers to enable problems to be dealt with in an alternate way, such as by self-help or legal action, so as to deflect contacts with this office that might lead to more costly contacts by way of written approaches requiring written responses and diversion of resources from other programs;
- to provide information, based on the nature of public enquiries, that may be relevant to other activities carried out by the office; and
- to act as a referral point, where possible, in relation to enquiries unrelated to the functions of this office.

Performance indicators

Initially, these comprise a record of the number of calls dealt with and the subject of the call. Some additional categories are included for this exercise.

For the purposes of this preliminary evaluation, the objective was to assess the calls covering matters within the jurisdiction of this office, compared to calls on subjects outside its ambit.

Assessing the quality of advice provided always is a problem in any enterprise, but steps can be taken to do this and may be examined for the future.

Qualitative and quantitative indicators will be developed subsequent to the corporate planning process and will be reported in the future.

Evaluation results

In 1990/91 year 8710 calls were received by the PES. For the purposes of this evaluation, a total of 1133 calls (13 per cent of the total) were examined.

In terms of whether the calls were related to an issue affecting a NSW state or local government or police function, the breakdown was as follows:-

NSW/Local Government or Police: (within jurisdiction)	902	79.9%
Non NSW Government: (outside jurisdiction)	231	20.1%
	<u>1133</u>	<u>100.0%</u>

In looking at those matters covered by the 20.1 per cent of calls unrelated to NSW public authorities, the calls concerned conduct in two areas:

Commonwealth Government activity:	53	23%	(4.6% of total calls)
Private contractual disputes:	178	77%	(15.7% of total calls)

It is to be expected there will be some confusion between Commonwealth and State agencies, but the high number of calls about private disputes can be attributed to a lack of awareness of the role of the Ombudsman.

In particular, this is apparent in relation to the number of calls (about 60 per cent of those 178) received about private banks. There exists a private complaints handling company called the Banking Ombudsman and, quite simply, there is some confusion arising as a result of the use of the name. Comment was made in the 1988/89 Annual Report about the likely misleading effect of the Banking Ombudsman name. Those comments appear to have been justified. As the name has been approved for registration by the appropriate regulatory authorities, no further comment is appropriate, but it must be noted that proposals for an insurance industry ombudsman, if adopted, would result in even more public confusion.

Under the terms of Schedule 1 of the Ombudsman Act, a number of classes of conduct are excluded from the jurisdiction of the office, but in terms of contact with this office a call on an excluded matter still means the person has correctly identified this office as a place to contact for advice, even if the result is advice to pursue some alternate means of redress.

In looking at the calls received about NSW government conduct (including local councils and the police) the numbers were as follows:-

Written complaint suggested:	297	32.9% (26.3% of total calls)
Premature - caller told to raise matter with authority	210	23.1% (18.6% " " ")
Complaint Declined	7	0.7% (0.6% " " ")
Excluded under Schedule 1	100	11.1% (8.8% " " ")
General enquiries about Office	288	31.9% (25.6% " " ")
	902	100.0% (79.9% of total calls)

Notable is the large number of callers who sought the intervention of this office prior to bringing their complaint to the attention of the senior levels of the authorities in question. In some cases, the callers had been dealing unsuccessfully with local staff of the authority. In others, they were simply unaware of how to deal with a large bureaucratic organisation.

Equally notable is the insignificant number of complaints where the advice given was that, even though the complaint was within jurisdiction, its nature it was such that if a written complaint had been made the office would have declined the matter.

General enquiries covered those cases where people wanted to know what the office did or where they might get alternate advice. Usually no specific action was sought from this office, but it may well be the person returned on a subsequent occasion with a more specific request. It was not possible to establish the frequency return calls.

Proposed action following evaluation

This evaluation was only a limited attempt to examine a program, but based on the sample of public contacts a number of issues might be addressed for the future:

- looking at the broad issue of the level of awareness of the existence of the Office of the Ombudsman, as well as its role;
- assessing the results obtained by citizens who acted on the advice given following contact with this office;
- focusing on the public authorities receiving the most volume of telephone complaints to streamline referring complaints received to enable direct resolution between the complainant and the authority without the need for any other direct intervention;
- redesigning the statistical system in conjunction with the staff concerned to record more useful data or to make greater use of ad hoc surveys over short periods; and
- looking at the usage or non-usage of the PES by callers from a non English speaking background.

Programs proposed for future evaluation

It is intended to, maintain focus on the PES, as some form of public advice program will be in operation following completion of the corporate plan.

It is not possible to identify other possible programs until the corporate plan is finalised.

While unlikely to have an impact on the 1991/92 reporting year, the outcome of the current Parliamentary Committee enquiry into the role of the office in dealing with police complaints needs to be assessed so programs that may be discontinued are not evaluated unnecessarily.

Committees

With the introduction of the Senior Executive Service into the Office of the Ombudsman and the recognition of the need to apply broad and systematic management planning, it was clear that work must had to commence on a formal corporate plan. The Corporate Planning Committee was formed to assist in this process.

The work of all the committees has continued under stringent financial constraint and enormous workloads. Committee members have worked to maintain and, where possible, improve, the working conditions within the office and a service standard of excellence for the people of New South Wales. Detailed discussion of the activities of these committees can be found in *Operational Aspects of the Office of the Ombudsman* later in this report.

Corporate Planning Committee

The committee comprises the Deputy Ombudsman, Principal Investigation Officer, Executive Officer, Manager Information Systems, Senior Investigation Officer and a representative of the Public Service Association. The committee was formed in May 1991 and meets monthly. The committee's immediate purpose is the development of a corporate plan for the Office of the Ombudsman.

Equal Employment Opportunity (EEO) Committee

The committee comprises the EEO Co-ordinator, the Human Resource Manager and four elected staff members representing the various operational areas of the office. The committee meets monthly and is responsible for implementing the EEO Management Plan, monitoring its progress and effectiveness and preparing the EEO Annual Report.

During the reporting year, the committee was responsible for the preparation of the EEO Re-Survey Report published and provided to the Director of the Office of the Director of Equal Opportunity in Public Employment.

Ethnic Affairs Policy Statement (EAPS) Committee

The EAPS Committee monitors, reviews and implements the Ethnic Affairs Policy Statement. The committee comprises the EAPS Co-ordinator, Human Resource Manager, Public Relations Officer and a staff elected representative. During the reporting year, a new staff representative was elected. The committee meets monthly and is responsible for preparing, monitoring, implementing and reviewing the EAPS annual report and its strategies.

Occupational Health and Safety (OH & S) Committee

The committee's aim continues to be the provision of a healthy and safe working environment. The committee has six full-time members and a number of alternate members. Apart from two committee members, all other members have received accredited training.

Since last reporting, the committee has completed a number of projects including the preparation of a rehabilitation policy, an entire workplace inspection, fire drill and refresher training for fire wardens and reissued the guidelines for use of computers.

Structural Efficiency Principle (SEP) Joint Consultative Committee (JCC)

The Structural Efficiency Principle Joint Consultative Committee was formed in March 1990 and meets monthly. The committee comprises three representatives of management, namely the Deputy Ombudsman, Human Resource Manager and Executive Officer and three nominated representatives of the Public Service Association (PSA). During the year, with the annual election of the Workplace PSA occurring, the PSA representatives on the SEP JCC changed.

The committee has continued to work on process four of the six processes required for the implementation of the SEP. This process involves the skills analysis of staff to ascertain the skills held by staff in the organisation, the skills required and the areas where further training is necessary. It is anticipated that the skills analysis will be completed by October 1991.

At this stage, no agreement has been reached by the industrial authority or the labour council in relation to a job evaluation methodology.

Training Committee

The Training Committee was established in April 1990 to coordinate the implementation of training within the office. With the restructure of the office into investigative teams, the multiskilling of staff and broadbanding of positions, there has been considerable training required. In addition, with the development of the office's information processing strategic plan, the implementation of an accrual accounting system and general staff development and legislative responsibilities under the Training Guarantee Act, training needs have had to be not only recognised, but prioritised.

The committee meets monthly and has developed a training policy endorsed by the Ombudsman and issued to all staff. During the year, in-house training courses have been undertaken for investigative assistants on investigative techniques, police and prison complaints and freedom of information matters. External training has been undertaken by administrative staff on the new accrual accounting system. Work is currently being undertaken under the committee's auspices to have TAFE conduct advanced English/literacy skills workshops for staff from non-English speaking backgrounds.

Management Committee

The management committee meets weekly to consider matters relating to the office's functions, policy, priorities, budget and overall administration and operation. The committee members are the Ombudsman, Deputy Ombudsman, Assistant Ombudsmen, Principal Investigation Officer, Executive Officer, Senior Investigation Officers (x4), Information Systems Manager, Senior Executive Officer (Police) and a representative of the Public Service Association Workplace Executive. During the year, the management committee decided to develop a corporate plan, to review the role and function of seconded police within the office and to consider strategies for dealing with the office's financial constraints.

Promotion and publicity

Community awareness

Lack of resources during the year meant that only two areas outside the Sydney metropolitan area could be serviced on a regular basis. Public awareness visits continued to Newcastle and Wollongong and large numbers of complaints were taken at each visit. Unfortunately, further budgetary constraints have led to the cancellation of all public awareness visits for the time being.

Despite this setback the Ombudsman continues to reach country complainants by talking to the local media whenever visiting regional centres, by sending copies of all his reports and media releases to country media and making himself available for interviews.

Speaking engagements

During the year the Ombudsman or his officers addressed the following groups:

- Police Academy, Goulburn (detectives training courses and new recruits)
- Police Academy, Sydney (senior officers)
- Police College, Manly
- Commissioned Officers annual dinner (police)
- Newcastle District Police
- Central Coast District Police

Dubbo District Police
Coffs Harbour District Police
Corrective Services Academy, Eastwood (Prison Officers)
Executive program for women, Sydney University
Members of Parliament
Public accounts committee seminar
CEO Conference
Planning for Local Government Seminar
Institute of Municipal Management AGM
Department of Agriculture and Fisheries (executive officers)
University of NSW (administrative law students)
Local court training sessions
Illawarra youth workers
East Sydney Technical College (consumer in law classes)
University of Wollongong (administrative law students)
Charles Sturt University (postgraduate seminar in local government)
Turkish community workers, Lidcombe
Financial Counsellors Workshop (Credit Line)

The Ombudsman continues to contribute regular columns to "Police News" and to place a high priority on meeting with police whenever he visits regional centres.

Complaints received

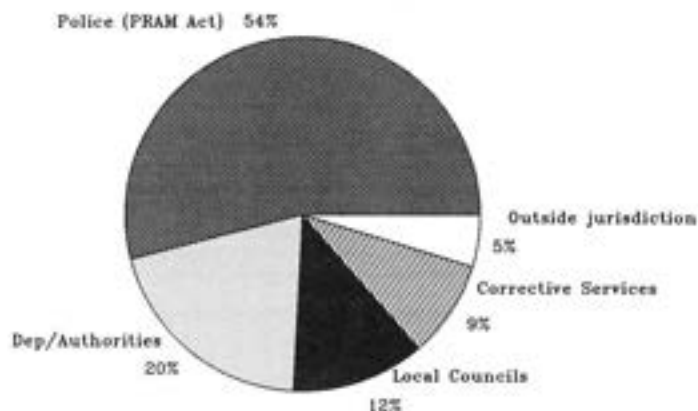
Ombudsman Act:

Departments and authorities (other than Corrective Services)	1173
Local councils	716
Department of Corrective Services	520
Outside jurisdiction	274

Police Regulation (Allegations of Misconduct) Act:

Complaints against police	<u>3152</u>
	<u>5835</u>

TOTAL COMPLAINTS 1990/91 Comparison of Authorities



Total complaints 5835

Reports to Ministers and to Parliament

Reports to Ministers

During the year the following reports of conduct in terms of 26(1) of the Ombudsman Act or Section 28 of the Police Regulation (Allegations of Misconduct) Act, have been made to ministers:

Ombudsman Act

Departments and authorities	6
Local councils	4
Prisons	<u>4</u>
Total	<u>14</u>

Police Regulation (Allegations of Misconduct) Act

Without reinvestigation	136
Following reinvestigation	<u>3</u>
Total	<u>139</u>

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 the report is finalised.

As at 30 June 1990, there were 12 draft reports with the Minister for Police and the Ombudsman was awaiting advice whether the minister wished to consult with him, as follows:

Police Regulation (Allegations of Misconduct) Act	
Without reinvestigation	12
Following reinvestigation	—
Total	12

The Ombudsman also is able to report to the Minister for Police pursuant to Section 33 of the Police Regulation (Allegations of Misconduct) Act, concerning cases involving serious misconduct by police officers. In 1990-1991 one such report was made.

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, four special reports under section 31 of the Ombudsman Act were presented to Parliament.

Special reports under section 31 of the Ombudsman Act

- Appointment of an Assistant Ombudsman
- The Independence and Accountability of the Ombudsman.
- The Effective Functioning of the Office of the Ombudsman.
- Operation Sue

Legal changes and proceedings

Changes made

One of the most significant changes to affect the Office of the Ombudsman was introduced by the Ombudsman (Amendment) Act 1990 which was proclaimed on 18 January 1991. This amendment established a parliamentary committee to be known as the Joint Committee on the Ombudsman, under S.31A of the Ombudsman Act. The establishment of the committee was one of the key recommendations of the Ombudsman's Special

Report to Parliament on the Independence and Accountability of the Ombudsman, tabled in Parliament on 5 September 1990. The functions of the committee, provided under S.31B(1) are:

- (a) to monitor and to review the exercise by the Ombudsman of the Ombudsman's functions under this or any other Act;
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Ombudsman or connected with the exercise of the Ombudsman's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- (c) to examine each annual and other report made by the Ombudsman, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
- (d) to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Office of the Ombudsman; and
- (e) to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.

S.31B(2) imposes limits on the committee's role in monitoring the Ombudsman and provides that nothing in Part 4A of the Ombudsman Act authorises the committee;

- (a) to investigate a matter relating to particular conduct; or
- (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or
- (c) to exercise any function referred to in subsection (1) in relation to any report under section 27; or
- (d) to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27; or
- (e) to exercise any function referred to in subsection (1) in relation to the Ombudsman's functions under the Telecommunications (Interception) (New South Wales) Act 1987.

S.31C(1) provides that the joint committee is to consist of six members appointed by the Legislative Assembly and three members appointed by the Legislative Council. Sections 31D - 31H include provisions governing the filling of vacancies, the appointment of a chairman and vice-chairman, the procedure of the committee, the taking of evidence and confidentiality of evidence.

Matters relating to the membership of the committee and its work are detailed later in this report.

The Ombudsman (Amendment) Act 1990 also amended Ss. 9, 10A and 23 of the principal act to remove the requirement for the Ombudsman to obtain the Premier's consent to:

- the appointment of special officers (investigators) of the Ombudsman;
- the delegation of functions to an Ombudsman of another State, Territory or of the Commonwealth; and
- engaging expert assistance in investigations.

These amendments also were recommended by the Ombudsman in his Special Report to Parliament.

Finally, the Ombudsman (Amendment) Act 1990 also amended the Freedom of Information Act, again as a result of recommendations made by the Ombudsman. The principal amendment was to exempt the Office of the Ombudsman from the provisions of the Freedom of Information Act, so far as its complaint handling, investigative and reporting functions are concerned.

On 3 May 1991, the Ombudsman (Amendment) Act 1991 was proclaimed. This Act empowers the Ombudsman to appoint persons to the statutory offices of deputy Ombudsman and assistant Ombudsman as part of the senior executive service, while preserving Parliament's right to address the governor for the removal of those persons from office.

The reasons for the introduction of this legislation are discussed later in this report.

Changes proposed

The Special Report on the Independence and Accountability of the Ombudsman recommended other far-reaching amendments to the Ombudsman Act to secure the Ombudsman's independence from executive government and his accountability to Parliament. These included:

- the joint committee be empowered to recommend to the Parliament the appointment of the Ombudsman, deputy Ombudsman and assistant Ombudsmen and that such appointments be made by the governor upon an address of both Houses of Parliament;
- the committee be empowered to recommend to the Parliament the appropriation of funds from consolidated revenue for the Office of the Ombudsman;

- the Ombudsman report directly to the Speaker of the Legislative Assembly and the President of the Legislative Council and not to the Premier; and
- the establishment of the Office of the Ombudsman as an independent statutory corporation, not subject to the Public Sector Management Act.

The government failed to adopt any of these recommendations.

Legal proceedings

Challenge to Statements of Provisional Findings and Recommendations

In last years annual report the Ombudsman referred to litigation which had been commenced in the Supreme Court challenging the Ombudsman's practice of issuing a Statement of Provisional Findings and Recommendations as part of his investigation process.

The matter came on for hearing before McInerney J in November 1990, when a jurisdictional issue was argued on behalf of the defendants, the deputy Ombudsman and assistant Ombudsman. The case was adjourned to April 1991, when argument was heard on the merits. On the basis of undertakings given by the defendants the case has been adjourned to a date to be fixed.

The investigation, which had been adjourned pending the litigation, is continuing.

FOI legal changes

As a result of the Ombudsman's Special Report to Parliament on the operation of the FOI Act, the Ombudsman (Amendment) Act, 1990, introduced important amendments to both pieces of legislation.

The principal amendment exempted the Ombudsman's complaint handling, investigation and reporting functions from the operation of the FOI Act, thus removing the potential for conflict between those functions and the Ombudsman's function of external review under the FOI Act.

The amendment also clarified S.54 of the FOI Act by specifying that the period of 60 days, within which a complainant may lodge an appeal to the district court from an external review by the Ombudsman, is to run from the date on which the Ombudsman advises the complainant that he has refused to investigate, has discontinued an investigation or has completed an investigation.

Finally, S.35 of the Ombudsman Act was amended to enable the Ombudsman or an officer of the Ombudsman to give evidence in any appeal in the district court from a determination of the Ombudsman under Ss 24 or 43 of the Act.

Secrecy

The secrecy provisions which constrain the Office of the Ombudsman have been a continuing focus for complaint by the Ombudsman in past annual reports and in his special reports to parliament.

S.34 (1) of the Ombudsman Act provides:

The Ombudsman shall not, nor shall an officer of the Ombudsman, disclose any information obtained by him in the course of his office, unless the disclosure is made -

- (a) where the information is obtained from a public authority, with the consent of the head of the authority or of the responsible Minister;
- (b) where the information is obtained from any other person -
 - (i) with the consent of that person; or
 - (ii) for the purpose of proceedings (including an inquiry under section 45 of the Police Regulation (Allegations of Misconduct) Act 1978) with respect to the discipline of the Police Force before the Commissioner of Police, the Police Tribunal of New South Wales or the Government and Related Employees Appeal Tribunal;
- (b1) for the purpose of any proceedings under Division 2 of Part 5 of the Freedom of Information Act 1989 arising as a consequence of a determination made by the Ombudsman under section 24 or 43 of that Act;
- (c) for the purpose of any proceedings under section 37 or under Part 3 of the Royal Commissions Act 1923 or Part 4 of the Special Commissions of Inquiry Act 1983; or
- (d) for the purpose of discharging his functions under this or any other Act.

Penalty: \$1,000.

The Ombudsman may only disclose information obtained by him in the course of his office where the disclosure is with the consent of the person who provided the information or where the disclosure is for the purpose of discharging his functions. Obtaining the consent of persons who have provided information is a cumbersome and time-consuming procedure and independent legal advice obtained by the Ombudsman is to the effect that there are limits on the Ombudsman's right to disclose information in the execution of his functions.

The Ombudsman has been advised that he is unable to make public statements relating to investigations which he is conducting, even where it would clearly be in the public interest to do so. He also is unable to make a public statement rebutting incorrect or misleading media reports. In 1988, the Illawarra Mercury newspaper published a report that the Ombudsman was investigating the conduct of Mr John Hatton, the independent

member for the South Coast. The report was wrong. Faced with the restriction on his right to make a public statement and with the need to act quickly to remedy any perceived harm to Mr Hatton's reputation, the Ombudsman was forced to prepare a special report to Parliament and to recommend to the Premier that the report be made public forthwith. The Premier promptly published the report.

Also in 1988, when the Ombudsman wished to provide detailed information about the nature of police complaints to the Legislative Council Select Committee inquiring into the Police Regulation (Allegations of Misconduct) Amendment Bill 1988, he was again forced to make a special report to Parliament, with a recommendation that it be made public forthwith, so that the information would be available to the committee in its deliberations.

Two recent cases are further examples of the quite absurd restrictions imposed by S.34 of the Ombudsman Act. On 8 May 1991, the Ombudsman made his report under S.26 of the Act on Operation Sue, a raid by the TRG and other police of ten premises in Eveleigh Street, Redfern, at 4.00 am on 8 February 1990. The report was sent to the Minister for Police and Emergency Services, the Commissioner of Police, the police officers the subject of investigation and the complainant, as provided under the Ombudsman Act. There is no provision, in the circumstances of this case, for the report to be sent to anyone else.

On 16 May 1991, because of the public interest issues raised by his investigation and report, the Ombudsman made a Special Report to Parliament under S.31 Ombudsman Act, annexing his report under S.26. The Ombudsman recommended that the report be made public forthwith. In the meantime, the Chairman of the Police Board sought a copy of the report from the Ombudsman. At that time the board was considering the application for promotion by a senior police officer whose conduct was the subject of adverse comment in the Report. The Ombudsman was unable to provide a copy of the report to the Chairman of the Police Board because of the stringent secrecy provisions. In this instance, the Premier declined to act on the Ombudsman's recommendation for immediate publication of the report which was not tabled in Parliament until the first sitting after the election.

On 16 July 1991, the Chairman of the Joint Committee on the Ombudsman announced that the committee had resolved to

Review and report to Parliament upon the role of the Office of the Ombudsman in investigating complaints against police.

For some time prior to this announcement, the Ombudsman had been preparing a Special Report to Parliament on the role of the Ombudsman in the management of complaints about police. The report reviewed changes which had occurred in the handling of police complaints since the tabling in the Legislative Council on 18 April 1989 of the final report of the Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill 1988.

The Ombudsman sent the report to the Premier on 18 July 1991, and recommended:

To avoid needless waste of valuable resources I therefore request that this Report be made public forthwith, and in particular supplied to all members of the Parliamentary Joint Committee on the Office of the Ombudsman.

Again, the Premier declined to release the report immediately and it was not tabled until August 1991. In this instance, because of an amendment to the Ombudsman Act introduced by the legislation establishing the committee, the Ombudsman could have sent the material contained in the report to the committee as a general submission. He could not, however, do this once he had chosen to make a special report to Parliament.

The combination of the secrecy provisions and the uncertainty about immediate release of his reports, unreasonably restricts the Ombudsman's ability to make public statements about issues affecting his office and which involve considerations of the public interest.

The last attempt to significantly amend S.34 of the Ombudsman Act occurred in 1988, with the introduction of the Ombudsman (Amendment) Bill in that year. The reforms proposed in the amendments, however, were so heavily qualified and so intricate as to be almost unworkable. In any event, the bill was withdrawn following amendments proposed by both the opposition and the democrats. Since that time, the Ombudsman has continued to labour under the chafing restrictions of S.34.

It is now time for these provisions to be amended.

Establishment of the Joint Committee on the Ombudsman

The Joint Committee on the Ombudsman is now one of the most important means by which the principle of the Ombudsman's accountability to Parliament can be ensured. If this principle is to be observed in reality as well as in theory, it will be essential for the committee to adopt a completely non-partisan approach to its role in monitoring the Office of the Ombudsman.

The background to the establishment of the committee, its constitution and functions, has been set out earlier in this report. The committee met for the first time on 28 February 1991, and Mr Andrew Tink MP was elected as its chairman. Members of the committee met with the Ombudsman informally on 12 March 1991. Mr Tink advised the Ombudsman that, initially, the committee would undertake meetings with various public authorities subject to the Ombudsman's jurisdiction, including the Department of Corrective Services and the Police Service, to ascertain whether there were any matters which those authorities wished to raise with the committee concerning the Office of the Ombudsman.

The committee was dissolved when the State election was called and was reconstituted following the election. On 16 July 1991, Mr Tink wrote to the Ombudsman advising that at its first meeting the committee had elected him as chairman and Mr John Turner MP as vice-chairman. Other members of the committee are:

Hon Meredith Burgmann, MLC
Hon Lloyd Coleman, MLC
Hon Stephen Mutch, MLC
Mr John Hatton, MP
Mr Kevin Moss, MP
Mr Malcolm Kerr, MP
Mr Patrick Scully, MP

Ms Ronda Millar is clerk-assistant to the committee.

Mr Tink also advised that, after considering the Ombudsman's Special Report to Parliament, tabled on 2 July 1991, on the Effective Functioning of the Office of the Ombudsman, the committee had resolved to:

Review and report to Parliament upon the role of the Office of the Ombudsman in investigating complaints against police.

Mr Tink advised that in reaching this resolution, the committee noted, in particular, the following matters in the Ombudsman's special report:

- the 34.4 per cent increase in complaints against police during the 1990-91 financial year;
- the reasons for the greater part of that increase remain matters for speculation;
- that extra resources have to be allocated to handling police complaints leading to a lack of resources to deal with complaints under the Ombudsman Act; and
- that police complaints account for 55 per cent of all complaints which the Ombudsman receives.

Of course, as Mr Tink made clear in an interview on 2UE on 16 July, the Ombudsman's special report was a call for the allocation of extra funding and resources for his office to deal with the large increase in complaints.

The Special Report on the Effective Functioning of the Office of the Ombudsman is a detailed analysis, running to 40 pages, on the need for increased resources. It examines the level and mix of complaints, staff levels and funding over the past four years, details structural changes in the functioning of the office implemented by the Ombudsman to achieve greater efficiencies and makes recommendations for minimum funding increases needed to maintain the level of services to the public. The report concludes that in the absence of appropriate increases in funding, the Ombudsman will be forced to reduce services by declining more and more complaints, irrespective of the merits of those complaints.

In the introduction to the report the Ombudsman stated that:

The purpose of this report is to inform the Parliament of the Ombudsman's inability to carry out his statutory functions and the charter of the Office of the Ombudsman due to budgetary constraints imposed on the office.

The Ombudsman went on to observe that:

In the absence of some mechanism to guarantee the budgetary independence of the Ombudsman these constraints amount to an erosion of the Ombudsman's independence.

The issue of his independence from executive government and his accountability to Parliament has been a continuing theme of the Ombudsman and for that reason the Ombudsman proposed and welcomed the establishment of the joint committee.

The Ombudsman was puzzled that the committee apparently sees the focus of the report as raising concerns about the Ombudsman's role in investigating complaints against police. Indeed, in his letter to the Ombudsman of 16 July, Mr Tink stated:

The Police Commissioner Mr Tony Lauer and police association representatives have expressed similar concerns to the committee.

The Ombudsman has stated publicly that he will resist any moves to diminish his public scrutiny of complaints against police. In an interview reported in the *Sydney Morning Herald* on 17 July 1991, the Ombudsman said:

If we can streamline the process [of investigating complaints against police], that's fine. But we are not going to be involved in a process that takes away that public scrutiny of police complaints because that's a very retrograde step.

However, to the extent that the committee's inquiry may again traverse the issue of the role of the Ombudsman to look at minor complaints, the Ombudsman firmly believes that issue was well and truly laid to rest by the Final Report of the Legislative Council Select Committee on the Police Regulation (Allegations of Misconduct)(Amendment) Bill 1988 tabled on 18 April 1989.

In order to inform the Parliament of the steps taken by the Ombudsman to address recommendations by the select committee in the two years since its report, the Ombudsman made a special report to Parliament on 18 July 1991. That report had been in preparation for some time when Mr Tink informed the Ombudsman of the committee's resolution.

Statutory officers under the Senior Executive Service

Appointment of Assistant Ombudsman (Police)

The Assistant Ombudsman (Police) is responsible for coordinating police complaints in the Office of the Ombudsman. The position is a critical one.

In June 1990, the Ombudsman advertised widely to fill the position which had been effectively vacant since 28 February 1990 following injuries to the former assistant Ombudsman in a motor vehicle accident and his subsequent resignation on 4 June 1990.

An advisory selection panel was convened and was unanimous in recommending Mr Kieran Pehm, a senior investigation officer in the Ombudsman's office, for the position. On 13 September 1990 the Director-General of the Premier's Department advised the Ombudsman that Cabinet had rejected the recommendation. He stated:

Cabinet expressed concern that the selection committee was not sufficiently broadly based, and in particular, that it did not contain representatives from the private sector.

and referred to a Premier's memorandum (not in force at the time that the advisory selection panel was convened) which provided:

As a general rule each advisory selection panel is to include a woman and representation from outside the Department/Authority, and the private sector.
(emphasis added)

At no stage, however, was it suggested that the merits of the advisory selection panel's recommendation constituted an issue in Cabinet.

On 2 October the Ombudsman made a special report to Parliament about the matter and referred to his earlier special report on the Independence and Accountability of the Ombudsman, a key recommendation of which was that the appointment of the Ombudsman, Deputy Ombudsman and Assistant Ombudsman be the responsibility of the Parliament on the recommendation of the Joint Committee on the Ombudsman.

Pointing to S.8A(1) of the Ombudsman Act which then provided that:

The Governor may, on the recommendation of the Minister, appoint one or more Assistant Ombudsmen.

The Ombudsman said:

As long as this provision remains the law, the executive will be able to impose its will to influence, directly or indirectly, the appointment of statutory office-holders in the Office of the Ombudsman.

The Ombudsman reconvened the advisory selection panel and included a distinguished representative of the private sector. The panel again unanimously recommended Mr Pehm's appointment.

The recommendation was again rejected by Cabinet.

In the meantime, on 15 January 1991, the Ombudsman had written to the Premier seeking his approval to a recommendation to the Governor for the reappointment of the Deputy Ombudsman and Assistant Ombudsman (Prisons and Local Government) for a further term of three years and had provided detailed reasons for this request.

On 23 January 1991, the Director-General wrote to the Ombudsman advising him that the Premier had acknowledged his letter concerning the reappointment of the Deputy Ombudsman and Assistant Ombudsman (Prisons and Local Government) and advising that Cabinet had again rejected Mr Pehm's appointment as Assistant Ombudsman (Police).

The Director-General went on to advise that Cabinet had agreed to introduce legislation amending the Ombudsman Act to enable the Ombudsman to appoint his own statutory offices as part of the senior executive service.

On 31 January 1991, the Ombudsman wrote to the Director-General advising that:

... Cabinet's proposal is consonant with the principle of the independence of the Ombudsman and resolves the current impasse surrounding the appointment of an Assistant Ombudsman (Police) as well as allowing for the reappointment of the Deputy Ombudsman and Assistant Ombudsman (Prisons and Local Government).

Discussions ensued concerning the precise terms of the amendments and on 18 February 1991, the Ombudsman advised the Director-General that, with some minor qualifications, he supported the legislation.

The salient features of the Ombudsman (Amendment) Act 1991, proclaimed on 3 May 1991 are:

- the offices of Deputy Ombudsman and Assistant Ombudsman are now part of the senior executive service;
- appointments to these offices are made by the Ombudsman; and
- Parliament's right to address the Governor for the removal of persons from these offices is preserved.

On 6 May 1991, the Ombudsman appointed Mr Pehm to the position of Assistant Ombudsman.

Subsequently, on 29 June and 12 July 1991 respectively, the Ombudsman reappointed the Deputy Ombudsman and Assistant Ombudsman (Prisons and Local Government) for terms of three years.

Independence of the Ombudsman - services to the public

The Ombudsman is currently labouring under budgetary constraints imposed on his office by the government.

These constraints amount to an erosion of the Ombudsman's independence and were addressed in detail in a special report to Parliament in June 1991 on the Effective Functioning of the Office of the Ombudsman.

The Ombudsman is generally regarded as an avenue of last resort. The Ombudsman expects complainants to pursue their grievances initially with the public authority concerned. If the public authority is unwilling or unable to deal with the grievance, then this office is often the only practical avenue for redress for those grievances.

The Ombudsman is presently faced with a huge increase in complaints and static or declining resources. There has been a steady increase in the number of complaints about the conduct of members of the police service since 1987/88, culminating in an increase of 34.4 per cent in the 1990/91 financial year. Although starting from a relatively small base number, there has been an explosion in the number of complaints concerning prison administration of almost 70 per cent in the last 12 months.

At the same time the resources of the Office, human and financial, available to deal with complaints under both the Ombudsman Act and the Police Regulation (Allegations of Misconduct) Act have remained virtually static. The following table shows the budgetary positions of the Office of the Ombudsman between 1987/88 and 1990/91.

	1987-88	1988-89	1989-90	1990-91
	\$000	\$000	\$000	\$000
Appropriation from Consolidated Fund	3054	3707	4164	4178

When these figures are adjusted to make allowance for increased funding for functions under the Telecommunications (Interception)(New South Wales) Act, the Freedom of Information Act, a one-off provision for rent associated with the relocation of the Office in 1989/90, and various user charges introduced progressively since 1988/89, the following position is reached.

	1987-88 \$000	1988-89 \$000	1989-90 \$000	1990-91 \$000
Appropriation	3054	3707	4164	4178
Less				
Telecommunications		262	200	200
FOI			123	123
Rent provision			155	
State wide payments (user charges)		129	276	304
TOTAL	3054	3316	3410	3551

The real increases in funding are shown below

	1987-88	1988-89	1989-90	1990-91
		8.6%	2.8%	4.1%

It is estimated that the current increase in funding for the Office of the Ombudsman in 1991/92 will be approximately 3 per cent, insufficient to cover inflationary costs.

The Ombudsman is aware of the difficulties which the current economic climate imposes on the government and the responsibility of the government to frame a budget and determine spending priorities. In such a climate, the Ombudsman has continued to exercise the maximum financial constraint. The Ombudsman is aware that some inner-budget sector agencies have been subject to cuts in expenditure. In the case of the Office of the Ombudsman, however, the Treasury has refused to accept that this office is truly demand driven, being required to respond to the level of complaint which it receives.

The issue can be stated quite simply and succinctly. Unless the Ombudsman is guaranteed sufficient financial independence from the executive government to enable him to perform his statutory functions, then services to the public must be reduced. Whether it is the intention of the government or not, the fact of the matter is that the Ombudsman's independence is now under threat.

Because of these budgetary constraints, the Ombudsman has implemented new procedures to reduce the level of services to the public of New South Wales. Firstly, many more complaints will have to be declined in the exercise of the Ombudsman's statutory discretion under Section 13(4) of the Ombudsman Act and Section 18(1) of the Police Regulation (Allegations of Misconduct) Act. Secondly, all public awareness campaigns and all travel outside the metropolitan area in connection with investigations will cease. Thirdly, there will only be a minimum number of reinvestigations of police complaints under Section 25A of the Police Regulation (Allegations of Misconduct) Act.



The issue continues and is highlighted by the following exchange of correspondence. On 15 August 1991, the secretary of the Treasury wrote to the Ombudsman in the following terms:

I refer to your letter of 30 July 1991, regarding your continuing claims of inadequate funding for your operations.

Attached is a detailed response to the matters you have raised. I provide this as a matter of courtesy, not because I wish to enter into an ongoing debate with you to score points.

Your Office continues to be unique across the range of Budget Sector organisations in not accepting the need to live within its Budget allocations and to improve efficiencies in order to achieve a greater return on the taxpayers' dollar.

Any claims that Treasury would single out your Office for biased treatment are rejected. All organisations are treated equally. In the current difficult financial circumstances, that equality admittedly will be in terms of constraints on the levels of funding for all organisations.

Your correspondence appears to give the impression that if Treasury does not accede to your every request for additional funds, then it will be adversely reported to Parliament. If this impression is one that is intended, I believe that it is an inappropriate use of your powers; if it is not intended, then I would welcome your advice to that effect.

Finally, I feel I must refer specifically to your argument that you are "demand-driven" in your operations. This term is not meant to imply that all organisations

facing increasing workloads can expect an automatic increase in their allocations. It is a term reserved for a very few, very specific instances where expenditures are driven by a formula determined by Government policy. The two most significant examples of this are teachers' salary costs (a direct function of the number of school pupils, given the staffing policies of the Government) and pensioner council and water rates rebates (where the cost is a direct function of the number of pensioners eligible each year under the Government's criteria).

Many Budget sector agencies are facing increasing workloads with fewer staff (including my own). It is indeed a challenge for all of us in the 1990's to seek better ways of meeting those pressures and to achieve value for money in the public sector. I would welcome the opportunity to discuss this with you.

The secretary noted that he had sent copies of this letter to the Premier, the Director General of the Premier's Department, the Auditor-General, the Chairman of the Public Accounts Committee and the Chairman of the Parliamentary Committee on the Office of the Ombudsman.

In reply to this letter the Ombudsman replied on 29 August 1991, in the following terms:

Thank you for your letter of 15 August 1991, the contents of which are noted.

Your response is of interest but clearly there are basic differences of opinion on the issues in dispute. Your response does not lessen our concern on the important issues involved nor attempt to deal with these issues. I agree, however, that it appears that an ongoing debate between the Treasury and the Ombudsman's Office probably has no virtue.

Clearly the issue is not as you say, our success or failure with living within budget allocation or the improvement of the efficiencies of my Office. We have demonstrated that our efficiencies are continually being improved. There are, however, limits, which have now been exceeded and must be addressed. The issue is not simply a Treasury issue but is one of public concern and public interest. I have, as you are aware not merely sought to bring the serious budgetary problems of the Office to the attention of Parliament, but prior to doing this sought and was given an interview with the Premier. The Premier made himself available to me immediately prior to the election no doubt at great inconvenience to himself. At that time I indicated that my concerns were such that the issues now were beyond that of Treasury and Ombudsman but involved decisions that ought clearly to be made by the Government. I pointed out that clearly if the depletion of the Ombudsman's resources continued as forecast, the effects upon the ability of this Office to carry out its service would be considerable.

There has never been any suggestion by me or my staff that Treasury has singled out our Office for biased treatment. I simply believe that Treasury having carried out its function, as it sees it, does not bring the issue to an end so far as this Office is concerned. I have certainly made it clear in correspondence that the issue is one that ought properly be an issue brought before Parliament by way of report. I consider this my duty and it is certainly in no way connected with a threat.

To put my point of view in unequivocal terms, I, of course, accept that governments in power dictate finance and availability of resources. Where, however, the

reduction of resources is capable of threatening the service of this Office in carrying out its function, it is clearly a matter to be drawn to the attention of Parliament and the public.

I have repeatedly made this point in correspondence, a number of public statements, in meetings with the Premier, and with Treasury officials and have done so before a Parliamentary Committee.

The Office of the Ombudsman has achieved a degree of credibility with the public and that is a very compelling reason, I suspect, why the public has voted its confidence to the Office by bringing increased complaints for the oversight and review. That confidence will immediately dissolve and the credibility gained, be lost, when the public becomes aware that its complaints may or may not be dealt with depending on the availability of resources. Even when complaints are able to be dealt with, the depletion of my office's resources has meant that delays in processing matters may occur. With resources being cut across the board in the public sector, complaints again will be generated. If not capable of being dealt with by my Office, where do the complainants go?

In summary therefore, the issue is clearly one that must be brought before the Government, Parliament and the public.

In addition the Ombudsman sent copies of this letter to those recipients of the secretary's letter of 15 August, 1991.

The Ombudsman and the Aboriginal community

Two years ago the Ombudsman set an objective to break down barriers between this office and the Aboriginal community, indicated by the disproportionately low number of inquiries and complaints from the Aboriginal community. An Aboriginal investigation officer was appointed in August 1989 to liaise with the Aboriginal community concerning the role of the Ombudsman and to handle complaints.

There has been a significant increase in the number of inquiries and complaints over the past year.

The office's investigation into Operation Sue conducted by the police in Redfern was particularly helped by the role taken by the office's Aboriginal officer. Numerous interviews with Aboriginal residents were organised and conducted in the familiar surroundings of premises in Eveleigh Street, Redfern.

The Aboriginal officer has found herself particularly welcomed by Aboriginal inmates of gaols and juvenile institutions. Assistance has been provided in response to inquiries from Goulburn, Mulawa, Norma Parker, Mt Penang and Minda institutions.

Liaison work undertaken during the year included visits with the Ombudsman to Moree, Toomelah, Narrabri and Tamworth. The office's Aboriginal officer has participated in conferences and on the executive of the New South Wales Aboriginal Women's

Corporation and chaired a conference between representatives of Aboriginal land councils and local government councils at Dubbo in August 1990.

The amendments to the Aboriginal Land Rights Act in October 1990 will extend the jurisdiction of the Ombudsman to complaints concerning the NSW Aboriginal Land Council and the regional Aboriginal land councils. The Aboriginal officer recently briefed the Ombudsman's staff on the functions of the Aboriginal land councils and the implication of the legislative changes.

Telecommunications Interception Inspection Unit

The functions of the Ombudsman under the Telecommunications (Interception) (New South Wales) Act have not changed and no authorities have been declared eligible since the last annual report, when the Independent Commission Against Corruption was declared an eligible authority. It has not yet commenced intercepting telecommunications and there is some doubt that it will do so.

As required by the legislation, inspections have been carried out and the results reported to the New South Wales Attorney General.

The Commonwealth Telecommunications (Interception) Act 1979 has been amended by the Crimes Legislation Amendment Act 1991 which received Royal Assent on 4 March 1991. The effect of this amendment is that the keeping of records for the purposes of the Act is a permitted purpose of the Act.

Other changes in the amending legislation provided for the extension of the number of people who have the authority to certify copies of warrants and revocations, namely the case of the New South Wales Crime Commission;

- *a member of the staff of the Authority (being a Senior Executive Service officer appointed or employed under the Public Service Act 1922) who is authorised in writing by the Chairman of the Authority;*

and in the case of the New South Wales Police Service;

- *an officer of that Police Force whose rank is equivalent to that of Assistant Commissioner of the Australian Federal Police.*

Other than changing the name of the State Drug Crime Commission to the New South Wales Crime Commission, there were no provisions which related to the functions of this office.

GENERAL AREA

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

Complaints received

During the year 1173 complaints were received about departments and authorities. In addition, 209 complaints already under enquiry or investigation were carried from 1190-91, to create a total of 1382 active cases.

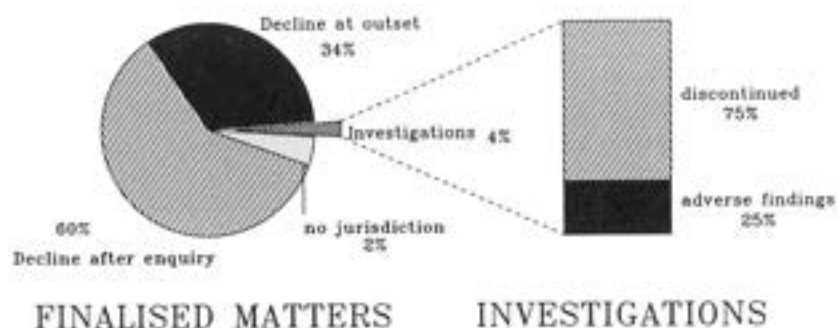
Finalised complaints

A total of 1046 matters were finalised during the year, leaving 336 cases under enquiry or investigation.

The following table gives the category of outcome for cases finalised during the year:

Outcome	Number	% of total
No jurisdiction	45	4%
Declined without any enquiry	349	33%
Declined after preliminary enquiry	510	49%
Resolved after preliminary enquiry	99	10%
No prima facie evidence of conduct described in Section 26	19	2%
Discontinued	18	1%
No adverse finding	-	-%
Adverse finding	6	1%
	1046	100%

DEPARTMENTS *



FINALISED MATTERS

INVESTIGATIONS

* (not Prisons, Local Government or complaints members of the Police Service)

Total complaints finalised 1046

Juvenile justice?

A letter from a detainee of Reiby Detention Centre complaining about an assault on her exposed serious deficiencies in the Department of Family and Community Services, ability to deal with complaints about workers in juvenile institutions.

The girl alleged she had been physically assaulted by two other female residents in the showers, at the instigation of two youth workers and, indeed, in their presence. She alleged she was further assaulted by a male youth worker as she was leaving the showers. She said he pushed her against the wall and threatened to break her legs if she said anything about the incident.

The girl reported her injury later in the evening to the administrative officer on duty. At that time she said she had fallen in the shower and banged her head; this may have been because the two youth workers allegedly involved in the assaults were present in the room. After her return from Campbelltown Hospital, where she was sent for a check up (both for the head injury and for possible drug-affectedness) the girl spoke again to the administrative officer and at this stage told him she had been assaulted. The officer told

the girl that because of the seriousness of her allegations she needed to put them in writing before he would take any action.

The next day the girl wrote a statement and gave it to the acting superintendent. He told her he would deal with the matter. That was in March 1990. In May 1990 the girl complained to this office because she had heard nothing more about any investigation.

When the girl was interviewed it became clear that the conduct of a number of officers of the Department of Family and Community Services warranted investigation, not only in relation to the actual assaults, but also as to how the complaint of assault was dealt with by the department.

In October 1990, it was decided to use the Ombudsman's royal commission powers to take evidence from witnesses on oath. The inquiry was disrupted by Department of Family and Community Services personnel who did not provide statements when required, did not turn up when requested, or did not make other witnesses aware of appointments that had been made. Finally, it was decided to issue summonses to ensure the remaining witnesses did appear when scheduled. In one case, two summonses were issued before the witness appeared.

At the end of the investigation it was not possible to prove that the assaults as alleged by the girl had been committed. It was clear, though, that the opportunity for the assaults had existed and the detainee had sustained injuries to her face consistent with her allegation. Part of the problem in proving the allegations was the length of time which had elapsed; this meant that evidence which was necessary to make such a finding was unavailable. This fact, in itself, showed the serious deficiencies in the department's handling of the matter; the delays, the poor quality of evidence which was gathered and the lack of any real responsibility by any of the senior officers involved.

It seems very likely that the acting superintendent of Reiby at the time disposed of the first statement of complaint the girl gave him. He insisted on her writing a second version because he was concerned that a youth worker may have assisted her, despite denials by the youth worker and the girl.

He told the inquiry he believed his responsibility consisted of reporting the matter to his supervisor, the regional operations manager, and following orders. He said he did not know how to prepare evidence of the kind necessary, despite his substantive position as the manager of a regional young offender support team whose job entails the presentation of breach reports to courts.

The inquiry accepted, however, his admission that he did not know how to conduct enquiries, particularly when he said he had interviewed other detainees about the assault allegations by calling out to them as they walked upstairs beside an office he happened to be in. More seriously, it does not appear that he took statements, even from the youth workers allegedly involved in the days following the assault. He had, at best, informal

interviews in which they simply denied the allegations. At least one of the detainees was not interviewed until weeks later.

By this time the superintendent had returned and he appears to have done nothing for a period of about six weeks, at which point he asked for statements to be taken from the youth workers; a clear indication that such statements had not been obtained before. The request for these statements had been made by the operations manager on the day the superintendent returned, but he himself did not follow up his request despite receiving a memo alleging continuing physical abuse of detainees by the male youth worker. The Ombudsman is concerned that serious allegations of this nature could be given such low priority.

The operations manager said that while the youth worker may well have done what the girl alleged, it would have been difficult to prove, particularly given the girl's drug problems and the fact that she had changed her story. While this may have been true, no serious attempt was ever made to establish any corroboration for her allegations before this conclusion was drawn.

The male youth worker told the inquiry he had offered a very detailed account of the evening when he first heard about the allegations, but was told the detail was unnecessary. Given this, it is perhaps hardly surprising that other valuable evidence was ignored, including entries by youth workers in the daily log book reminding other workers to be aware of threats to the girl and accounts of conversations between detainees about how they had treated the girl.

It appears that at some time in April, the matter was simply lost in a bureaucratic bungle. Responsibility for detention centres was reallocated and a full departmental inquiry was instituted into other allegations about the youth worker. The regional staff assumed the inquiry would cover the girl's allegations; the person conducting the inquiry believed the matter had been referred to him for background information only.

Nothing further was done until this office became involved, despite the fact that the department advised the Ombudsman in August that the girl's allegations were being referred for inclusion in the departmental inquiry. When this conflicting advice was brought to the department's attention, the response was that perhaps the definition of what constituted an enquiry was different. If this office had chosen to finalise its enquiries at that point, nothing more would have been done. The department's response was, therefore, clearly misleading.

By the time the detainee was released from custody in mid-October, she had been given no substantial information by the department. She had been told only that her complaint was being followed up.

Her attempts to get information included an approach to the detention centre's official visitor. He attempted to get information on her behalf and to ensure that a proper

investigation was being conducted, but was unable to do so. Finally after some months he gave up. He had not been given any assistance by departmental officers and when he raised the matter at a meeting of all official visitors, they were horrified at the seriousness of the complaints and at a loss to know what to do. The department's response to this when it came out in the preliminary report from this office, was that they were concerned he had not been more dutiful. The Ombudsman has much less concern about official visitors handling of the matter than he has about the operation of the scheme as a whole.

The department assured this office that since February 1991 the minister has been receiving regular reports from visitors. However, there is still an important and unresolved question about the access to information afforded to a visitor. This office agrees that confidentiality is essential, but not to the point where an official visitor is completely unable to perform his/her duties adequately.

The Director-General also assured this office that the procedures already in place for dealing with allegations of abuse of detainees are being revised. This office strongly recommended much clearer guidance be given on the question of involving the police in the investigation of serious allegations of this nature.

Prosecution of witnesses

An investigation by the Office of the Ombudsman into allegations of assault of a young person in a detention centre included the use of the Ombudsman's royal commission powers under section 19 of the Ombudsman Act. This meant that oral evidence on oath was taken.

Mr Kevin O'Donnell, who was a youth worker at the detention centre, was called as a witness. Before giving evidence he was put on oath. When asked if he knew the whereabouts of one of the people whose conduct was being investigated, he said he did not. Further enquiries by this office revealed that a few days later Mr O'Donnell and the woman in question were married. By the time this office was able to contact the woman, she was unable to assist with the investigation for medical reasons. She was subsequently excused.

Mr O'Donnell's wilful misleading of the enquiry about her whereabouts prevented a full examination of the circumstances of the alleged assaults. Since this was a matter of some significance, this office sought advice from the Director of Public Prosecutions about the possibility of prosecuting Mr O'Donnell.

Proceedings were commenced and on 14 May 1991, at Downing Centre Local Court, Mr O'Donnell pleaded guilty to an offence under section 37(1)(c) of the Ombudsman Act. This offence is:

wilfully make any false statement to or mislead, or attempt to mislead the Ombudsman or an officer of the Ombudsman in the exercise of his powers under this or any other Act.

Mr O'Donnell was convicted and sentence deferred, conditional on his entering a bond under section 558 of the Crimes Act to be of good behaviour for two years.

While it is the Ombudsman's view that it is not generally the business of the Ombudsman to prosecute witnesses, he also believes that where there is clear evidence of any witness, whether a public authority or not, wilfully obstructing, hindering or resisting the Ombudsman; wilfully making any false statement to, or misleading the Ombudsman in the exercise of his powers; or wilfully failing to comply with any requirement of the Ombudsman, consideration will be given to prosecuting that witness under section 37(1) of the Ombudsman Act.

Further, where wilfully false or misleading evidence is given on oath, consideration will be given to prosecutions under either the Royal Commissions Act, for false testimony, or the Crimes Act for perjury.

Meeting with Members of Parliament about juvenile justice matters

Appearance before then Parliamentary Standing Committee on Social Issues

On 4 April 1991, the Ombudsman gave evidence before the committee, which was examining the NSW Juvenile Justice System.

At the hearing, the Ombudsman made it clear that, in practical terms, young people in detention centres have very limited access to the Office of the Ombudsman. Lack of understanding on the part of these young people of the power of the Ombudsman, together with limited resources leading to inadequate contact by Ombudsman staff with these young people, severely restricts the effectiveness of the office regarding juvenile justice matters.

The Ombudsman made it clear that better access to this group by the office could only be provided within increased resources.

Boat licence

Many of the complaints received by the Ombudsman concern allegations that public authorities do not really take any notice when they are provided with information and proceed to act as though that information was not known to them. While such cases are sometimes highly subjective, for those where there is evidence that the public authority's administrative procedures may have failed, the Ombudsman may investigate the complaint.

One such complaint was received from a member of parliament, on behalf of Mr and Mrs M and related to their dealings with the Fisheries Division of the (then) Department of Agriculture and Fisheries.

Mr and Mrs M were buying a boat, complete with licences, from Mr B. However, Mr B sold the boat to a third party, the P brothers, within the period of Mr and Mrs M's contract. Following this action, the Ms contacted the Department of Agriculture and Fisheries to advise of the breach of contract and seeking a freeze on the transfer of the boat licence. The Ms were told to have the matter adjudicated at court and that the department would then transfer the boat licence as per the courts decision.

Subsequent to this advice, Mr and Mrs M commenced the relevant legal action for the breach of contract. However, during the ensuing months, the boat licence in question was transferred to the P brothers by the department.

The breach action reached court over a year later and a subpoena was served on the department for presentation at court of the relevant files. These papers were despatched, however, the fact that the licence had already been transferred was not mentioned. The judge found in favour of Mr and Mrs M and, in his summing up, mentioned he believed the boat licence would now be granted to them and that this appeared to be adequate compensation for damages.

Following the court's decision, Mr M approached the department seeking his fishing boat licence. He was told the minister would have to approve a new licence as it wouldn't be fair to revoke that of the P brothers, as they had bought their vessel in good faith. Mr M was then, a year after the original advice, made aware of the true situation!

This action by the department led Mr and Mrs M to lodge a complaint with their local member and resulted in a flurry of activity within the department as to exactly what the M's were originally told, and how they had "probably misinterpreted it". Most of the file notes written by the department's senior officers clearly refer to the conflict in the versions of events as presented by Mr and Mrs M and the departmental officers with whom they had dealt.

These senior officers eventually recommended to the minister that Mr and Mrs M be granted a fishing boat licence, equivalent to the one they had originally attempted to purchase. Following receipt of this advice the minister held a meeting with Mr and Mrs M, after which he decided not to grant the licence, and advised the M's he was referring the issue to the Ombudsman. The M's then approached a member of parliament to deal with their complaint; that member also approached the Ombudsman for assistance.

The Ombudsman's investigation concluded that the complainants were led to believe, by the department, that the fishing boat licence would be issued to them if the court found their contract to purchase was valid. Further, a letter from the (then) minister to Mr and Mrs M said that "their application may again be considered when the matter has been resolved through the court".

Consequently, it was found the department had acted unreasonably in terms of section 26 of the Ombudsman Act in:

- providing information about its intention to issue Mr and Mrs with licences if the court found in their favour; and
- transferring the licences to a third party in spite of previous advice.

The Ombudsman's report recommended that departmental officers be instructed to make detailed file notes on all dealings with members of the public. It also recommended that the department advise the minister to issue Mr and Mrs M with a new fishing boat licence, including the endorsements equivalent to those associated with the original boat they intended to purchase.

Shortly after the issue of that report, the complainants telephoned this office stating they had tried to collect their new licence and had been offered one exactly the same as the original. Unfortunately, such licences are now not the legal standard! A quick call from this office to the department elicited confirmation that Mr and Mrs M would be provided with a fishing boat licence appropriate to the current legal standard.

Real Estate Services Council

Many complaints are received in the office about the lack of communication between departments or authorities and the general public. In many cases, a quick phone call by this office to the relevant department resolves the problem since it is often an oversight or a misunderstanding.

This was not the case, however, with a complaint received about the Real Estate Services Council (the new incarnation of the Council of Auctioneers and Agents) from a real estate agency.

The problem concerned an initial complaint made to the council about the conduct of the real estate agency in question. The council had been making enquiries and had sought information and explanations about the agency's dealings with a particular client over the release of his rental bond. All this had been dutifully provided by the agency, but months later the council had not informed the agency of the results of the investigation.

The agency finally sought the assistance of this office. They were particularly concerned because they felt that the complaint was completely unfounded, but it had been made to the Minister for Housing on letterhead from another minister for whom the complainant worked and the Minister had forwarded the complaint to the council. The agency wanted to be completely exonerated.

Enquiries made by this office revealed it was not the council's practice to ensure agencies were informed about such matters. The council made a distinction between enquiries and

investigations. Where enquiries were made the licensee-in-charge of an agency was able to present an alternative case. If the council's investigator was satisfied that no further action was to be taken the matter was dropped. If a full investigation was conducted, the licensee-in-charge was again given a chance to respond, but was also provided with written confirmation of the council's decision.

This office did not believe it was reasonable for the council to assume the licensees understood the distinction between enquiries and investigations - particularly when extensive written enquiries had been made.

The Ombudsman believes it is a simple matter of good administrative procedure for complaints to be finalised, not only to the satisfaction of the relevant authority, but also in the eyes of those who were the subject of complaint.

A short report was prepared with a recommendation that the council revise its practice. The council readily complied, agreeing that letters would be sent notifying both the council's decision and the basis for that decision.

The real estate agency which had initially raised the matter was fully exonerated and was also finally advised.

Unflued gas heaters in schools

In last year's annual report the Ombudsman gave a detailed account of his investigation into the use of unflued gas heaters in public schools.

During the investigation, it was ascertained that the department had been aware of health concerns associated with the use of unflued gas heaters since 1988, following the completion of a study of selected schools made by the Australian Gas Light Company (AGL).

In mid March 1989 a meeting attended by the heads of the departments of school education, health, public works, and the State Pollution Control Commission (SPCC), the general manager of AGL and their senior executives was convened to discuss the AGL study. Levels of nitrogen dioxide (NO₂) found in the schools sampled in the AGL study had ranged from acceptable to unusually high. It was pointed out at the meeting that primary school children were particularly vulnerable to the effects of NO₂ because of their age and stage of development and that the problem was compounded because they were located in home base classrooms; that is, not moving from room to room for lessons and being subjected to prolonged periods in heated rooms.

Following the meeting an urgent study was conducted, led by SPCC, during the Easter recess. SPCC sent the report on phase 1 of the study to the department on 28 April 1989. The report recommended, amongst other things, that the department issue a directive to all schools indicating in the strongest terms that the operation of flueless gas heaters in

closed rooms would not be permitted and that the directive include instructions on the use of heaters and minimum ventilation required if the heaters were used.

The recommendations of the report, however, were not acted upon.

At the same time, the department was made aware of the budgetary implications of the problem associated with the use of unflued gas heaters:

- \$2-\$3M to implement a planned maintenance program;
- \$25M if low NO₂ burners were fitted to all heaters;
- \$160M to replace unflued heaters with flued heaters; and
- \$500M to change to electric heaters.

On 7 June 1989, the department was criticised in the media for allegedly withholding information on the use of heaters. On the same day, the department took some action and circulated a memo to school principals on the use of heaters.

The memo, however, did not provide specific information on window ventilation or give instructions on rooms adjacent to corridors. The memo did not convey sufficient information about the results of the tests conducted in the study.

A further report was sent to the department following phases 2 and 3 of the study. The report highlighted the inadequacy of the memo to school principals, adding that the memorandum on its own was not a sufficient method to instruct teachers on such a matter.

On the Ombudsman's recommendation, the department released information on the study to all schools and commenced a program of leak detection and heater maintenance.

The Ombudsman issued his final report on 2 July 1990. He recommended that the department inform schools of the results of the program of leak detection and rectification and that an information and instruction program be established in support of the memos to schools.

In September 1990, the Director General, Dr Fenton Sharpe, informed the Ombudsman that approximately \$4 million had been spent on the program of leak detection and rectification. Every unflued gas heater in State schools had been inspected. Sub-odour leaks had been eliminated and repairs essential to ensure safe operation had been carried out. Those heaters beyond economical repair had been disconnected and replaced with newly designed heaters featuring low NO₂ burners.

Dr Sharpe advised that a maintenance program was being prepared and monitoring of the heaters would continue over at least the next few winters. He said that a random sample of schools would be tested to test the efficacy of the program. Out of 2,900 rooms tested,

2.5 per cent were found to have NO₂ levels of 0.3ppm or above. He said that revised ventilation guidelines were being developed in consultation with SPCC, Department of Health and Public Works Department.

In June 1991, the Director General informed the Ombudsman of further actions he had taken in relation to the recommendation of the report. An information package had been distributed to regional directors on 30 October 1990. The package contained information on flueless gas heaters and instructions for schools.

Dr Sharpe had also circulated the information package and memos to school principals with instructions on ventilation in May 1991. For schools operating with normal flueless gas heaters the ventilation requirements were:

- on calm days, with doors opening onto internal circulation areas such as a corridors or practical activity areas, the **door should be open** with windows open a total of 1,600 sq cm (**two casement windows open 10cm**). If the room has an external door then a window opening of 800 sq cm is required (**one casement window open 10cm with the door open**); and
- on windy days opening of doors and windows could be reduced by a quarter.

Dr Sharpe also advised that new heaters which produce low levels of nitrogen dioxide had been installed in schools in very cold climates, namely:

Adminaby PS	Khancoban PS
Batlow CS	Michelago PS
Berridale PS	Morano HS
Bombala HS	Nimmitabel PS
Bombala PS	Tarago PS
Cooma North PS	Tumbarumba HS
Dalgety PS	Tumbarumba PS
Delegate PS	Tumut HS
Franklin PS	Tumut PS

He informed schools with the low NO₂ burners of the revised ventilation requirements for such heaters.

In classrooms which **can** be cross-ventilated:

- open the top sash of at least **one** window on each side of the room to approximately 50mm. Where other types of windows are in use an equivalent opening can be estimated.

In classrooms which **cannot** be cross-ventilated:

- open the top sash of at least **two** windows on an external wall by at least 50mm.

Classrooms which had been fitted with **ceiling grilles** or other means of fixed ventilation were required to conform to the same general direction or as otherwise advised by Public Works Department at the time of fitting ventilation.

As stated in last year's annual report, the extent of the department's remedial program and the conditions which will need to apply to the use of unflued gas heaters will ultimately depend on the determination by the National Health and Medical Research Council (NHMRC) of a maximum indoor level for NO₂.

The NHMRC has not brought down a standard, but has established that a level of concern in indoor air at which NO₂ may cause clinical effects in some individuals is above 0.3ppm hourly average. The NRMRC will review this level of concern in 1992 in the light of further research.

The Ombudsman is satisfied with the responses of the department following his recommendations and that information regarding the use of unflued gas heaters and possible associated problems has been properly released to all schools in New South Wales.

GIO - denial of liability

The Ombudsman, since 1981, has advocated that people who make claims against public authorities should be given adequate reasons for denial of their claims.

The Ombudsman has previously looked at whether the Government Insurance Office gives adequate reasons to claimants when, as public liability insurer for a local government authority, it denies liability on the authority's behalf. In many cases, a member of the public may have no way of knowing why a council or its insurers has rejected their claim and they may be justified in doubting the rejection was made in good faith. People commonly believe, with some justification, that large organisations routinely deny claims made against them, expecting most individuals will feel their resources are inadequate to mount a legal challenge. Members of the public are then put in the position where they have to trust that council and its insurers will act fairly.

The Ombudsman takes the view that councils have the duty to be open and accountable, they must not only be fair, they must be seen to be fair. In particular, when public liability claims are denied, the claimant should be given sufficient reasons for that denial. The claimant should be given sufficient information to enable them to make an informed decision as to whether they should pursue their claim further, for example, by commencing legal action.

The involvement of the Ombudsman's office in this area goes back as least as far as 1982 when, as a result of some complaints, the issues were raised with the local government and

shire associations. Councils were encouraged by the Ombudsman and the associations to develop procedures for monitoring the processing of such claims. Over a period of several years, investigations were commenced using the Ombudsman's own motion powers to discover whether councils had adopted these recommendations.

By and large, councils were willing to put the procedures in place, but some of them took the view that in disclosing information, or in requiring its disclosure, they may be jeopardising their relationship with their public liability insurer or even, in extreme cases, risking the loss of their rights to insurance cover. The Ombudsman's response was that there were some insurers prepared to give reasons for denying public liability claims. A number of council took the advice that they should change insurers if they were placed in the position of putting the insurer's requirements before their duty to citizens.

The GIO, at the time, had a large share of local government public liability insurance business and it currently covers most, but not all councils. In 1983 the GIO gave the Ombudsman's office undertakings which implied it would, in future, give sufficient reasons for denial of public liability claims against local government authorities which it insured. In 1985, as the result of a complaint, the GIO confirmed the undertaking by reminding all regional managers of the relevant guidelines.

In 1989, a number of cases came to the attention of the Ombudsman which gave the impression that GIO may not be conforming to its previous undertaking. Preliminary enquiries appeared to confirm this view and an investigation was begun. Mr W Jocelyn, Managing Director of the GIO, responded to the initial investigation in a manner which was obstructive and contemptuous. As a result, the Ombudsman was forced to call Mr Jocelyn and other officers to give evidence in hearings convened using his royal commission powers. The GIO submitted that if it were to provide reasons for denial of claims they would suffer significant administrative and cost burden not borne by its competitors. The level playing field concept was being used to justify the practice.

The investigation showed that the GIO did not, at the time of the investigation, have a general procedure for giving sufficient reasons when denying public liability claims against local government authorities. It once had such a procedure, but the practice was abandoned at some stage. The assurances that the Ombudsman received in 1986 that such a guideline was current were probably incorrect, although they were not deliberately misleading. However, some local government authorities appeared to have switched their business to the GIO on the strength of the earlier assurances which this office had made public. Because these assurances turned out to be incorrect, it was important that the investigation set the record straight.

The Ombudsman believes there are compelling reasons why the GIO should have a procedure for giving reasons to the public when claims are denied and, in his report on the investigation, recommended that the GIO adopt one. The GIO said:

When your report is made final, it will be distributed amongst our claims officers and they will be asked to have regard to its findings.

A letter dated 29 May 1991 was received from Mr Jocelyn stating that the report had been distributed as promised. An investigation officer confirmed by telephone that the report had been accompanied by a copy of the letter from Mr Jocelyn indicating that the "findings of the report should be regarded". The Ombudsman notes that this is not a statement that the 'recommendations will be followed'.

Mr Jocelyn told the Ombudsman it "would be very helpful if you found your way clear to suggest to councils that their activities may be made subject to investigation unless they choose to deal only with insurers who are prepared to meet the Ombudsman's requirements". Consideration has not yet been given to this request.

FREEDOM OF INFORMATION

The Ombudsman's view of the first two years

It is now just over two years since the New South Wales Freedom of Information (FOI) Act came into force. From the Ombudsman's perspective, the manner in which New South Wales government departments and agencies deal with and view FOI applications varies considerably. A small number of agencies, such as Byron Shire Council, are both efficient in their processing of FOI applications and liberal in the types of documents they provide to applicants. However, the Ombudsman also believes an unnecessarily large number of agencies are not taking to heart the concept of open government. All too often, determinations of applications are of a poor standard, with agencies showing a closed door response to reasonable requests for information.

According to the provisions of the Act, the Ombudsman has the role of reviewing the determinations of agencies. Such reviews, which are examined as complaints under the Ombudsman Act, allow the Ombudsman to fulfil his role, under Section 52 of the FOI Act, as one of the avenues of external review. The other avenue is the district court. Under the New South Wales FOI legislation, the Ombudsman plays an important role in his external review capacity, as any review of FOI decisions undertaken by him are informal, free and relatively quick when compared with the district court process.

After the experience of the first two years of investigating FOI complaints, the Ombudsman believes major reform of the FOI Act is required. The Act has proved to be unnecessarily complex and there are too many exemption clauses in Schedule 1. This complexity, together with the numerous clauses in Schedule 1, means that the investigation of FOI complaints which the Ombudsman undertakes, become more complex than necessary. This is compounded by the closed door approach of many agencies towards release of their documents. In many cases, agencies are not only reluctant to concede that their original determination may have been unreasonable, but will actively defend the determination.

FOI statistics

As has been detailed elsewhere in this annual report, the Ombudsman's investigatory functions became part of Schedule 2 of the FOI Act on 18 January 1991, thus making such functions exempt from the provisions of the Act. In the period 1 July to 18 January, the Ombudsman received eight FOI applications for documents relating to his investigatory work and one for administrative, statistical information. Of these nine requests, five were applications for personal information and the other four concerned non-personal information. All requests for personal information were granted in full, except one which was withdrawn. Of the non-personal requests, two were granted in full, one was withdrawn and the other was a refusal of access. During this period, the Ombudsman received \$200 in processing fees for these applications, while no requests for an internal review were made. These figures relating to FOI requests are consistent with the nature and number of applications which the Ombudsman received during the previous year.

During the second year of operation of the FOI Act, the Ombudsman received 61 complaints. While the quantitative level of complaints has remained fairly static, the second year saw more complaints received which indicated a growing community awareness of FOI matters, as applicants gained a better understanding of the Act. The number of complaints received where the Ombudsman had no jurisdiction dropped from nine in the first year to only four in the second year. A number of FOI complaints received by the Ombudsman in the twelve months to July, 1991 relate to information and documents which are complex, sensitive and, at times, controversial.

Thirty seven complaints were finalised during the year. The following table shows the outcome of finalised complaints by category:

Outcome	Number
No jurisdiction	4
Declined without any enquiry	5
Declined after preliminary enquiry	20
Resolved after preliminary enquiry	4
Investigation discontinued	2
Finding under s.26(1)	<u>2</u>
	37

The Ombudsman currently is investigating six FOI complaints. This figure, when combined with recently completed and discontinued investigations, indicates that the Ombudsman is being required to undertake a greater number of formal FOI investigations in the second year of FOI as compared with the first twelve months of the Act's operation.

The current figures on release of information under FOI throughout the state may obscure some important issues. Total statistics reveal that approximately 80 per cent of all FOI requests are granted in full, with only seven per cent of requests for documents totally refused. However, approximately 73 per cent of all requests concern the personal affairs

of the applicant. While the Ombudsman applauds the fact that such a high percentage of information is released, from the experience of this office it is clear that a number of agencies are not adhering to the spirit of freedom of information when releasing documents which are not the personal affairs of the applicant and which may be contentious, embarrassing, or indicate errors or poor decisions, but which, nevertheless, are not legitimately exempt according to Schedule 1 of the FOI Act.

Local government authorities and personal affairs

As the Ombudsman reported last year, much confusion has occurred for applicants and agencies because the term "personal affairs" is not defined in the FOI Act. This confusion is most apparent when a person applies for documents from a local government authority. Local government authorities currently are only subject to the FOI Act in relation to applications which concern the applicant's personal affairs.

Although the Premier has promised to bring local government authorities under the full provisions of the FOI Act, this has not happened and, at present, much of the time of the FOI staff is spent determining whether a request for information should have been dealt with under the provisions of section 16(2); that is, whether it concerned the applicant's personal affairs.

Twenty percent of the FOI complaints received by the Ombudsman in the past twelve months have been about determinations made by local government authorities, by far the largest category of complaints, and half these complaints pertained to the question of personal affairs. In two instances formal investigations were commenced and a further matter was the subject of preliminary enquiry. The applicants in these cases were able to demonstrate that the information they sought concerned their personal affairs, as the matters directly affected their lifestyle, property and/or safety.

In two out of the three cases which were taken up, and where the authority's initial view of personal affairs differed from that of the Ombudsman, the authority eventually accepted the application as falling within the category of personal affairs. In the third case the authority has been more recalcitrant and has firmly defended its position.

This resistant attitude to the objects of the FOI Act from some quarters of local government is difficult to understand, particularly in light of the fact that a number of local government authorities have implemented full freedom of information, making available all categories of documents with no adverse effects. Some authorities also have made many categories of documents available over the counter. They have found this saves a great deal of time and expense for both the applicant and the authority.

Notification of determinations

A number of complaints to the Ombudsman include a component about delay in the applicant receiving the notice of determination.

The FOI Act clearly sets out the time limits for which a determination of an application for access and for an internal review. These are 45 days and 14 days respectively. The requirements for the making of a determination are set out in sections 24 and 43 and the requirements for the preparation of notices of determination in sections 28 and 45.

Some agencies appear to have taken the view that there is a distinction between a determination and a notification. While the agency may appear to have made a determination of an application within 45 days, in some cases the notice is not prepared or sent to the applicant until some time later. Taken to extremes, an agency could use such a practice to give its notice of determination to an applicant at any time it chooses.

The Ombudsman is of the view that the division between determinations and notifications was not intended to be interpreted in this way. In pursuit of a principal object of the FOI Act, to encourage the prompt disclosure of information, this office has concluded that a reasonable time for an applicant to be handed written notice, or the notification to be posted, would be as soon as practicable after the determination is made, and in any event no later than 45 days from the date the application is received by the agency. Where an internal review is sought, the applicant should be notified, or the notification be posted as soon as practicable and no later than 14 days after the application for internal review is received by the agency.

If delayed notices continue to be a feature of complaints to this office a recommendation for amendment to the legislation may be the best course of action.

We shall not, we shall not be moved

The Oilseeds Marketing Board for the State of NSW (OSMB) is one of a number of statutory authorities involved in trade, with responsibilities both to the government and to the farming sector. A Freedom of Information (FOI) application to the OSMB by a farmer from the state's north-west, highlighted serious problems to open government in NSW. Some government authorities, in this case a semi-autonomous body, can be extremely stubborn in refusing to allow the FOI Act to change their entrenched, and usually unjustified, attitudes of secrecy.

The applicant applied for certain non-current financial records of the OSMB. An administrator had been appointed to the board eight months prior to the application. Over a period of time, the board released about half the information requested, but refused to release lists of creditors of the board and amounts owing to them as at two dates. These lists were more than a year old by the time the board decided to refuse access. This fact, however, was not seen to be of relevance by the board.

The board, in brief, contended that the lists:

- contained information of commercial value, which would be diminished if released; and
- if disclosed, would cause loss of trust between the board and its suppliers and other parties and, thus, adversely affect the board's trading ability.

The exemption clause in the FOI Act used by the board to refuse access was 7(1)(b)(i), which relates to information which, if disclosed, may itself diminish in value.

The Ombudsman commenced an investigation into the board's refusal to release the creditors' lists after consideration of the quality both of the board's arguments in support of the exemption clause and of the board's written notifications to the applicant, which did not meet all the Act's requirements.

The ensuing investigation saw the board firmly reiterate its view that release of the creditors' lists would be detrimental to the board's trading arrangements. In response to this, the applicant adjusted his application to exclude identifying information about growers and others concerned with the oilseeds trade. He still wished to know, however, the amounts which the board owed to them. The board remained unwilling to release any information, believing it was inappropriate for the board to be subject to a requirement to release information to which their private competitors were not subject.

An examination of the exempt documents identified a major weakness in the board's stance. It became clear that a significant proportion of the creditors' information did not relate to the board's trading arrangements at all. The board's arguments, which only applied to information identifying creditors connected with the oilseeds trade, now had no force at all, as the applicant was no longer interested in those parts of the information.

The board never explained how creditor information **unrelated** to the oilseeds trade, such as the names and addresses of, and amounts owed to, taxi or airline companies, or subscription fees, or out-of-pocket expense details, could harm the board's trading arrangements.

The Ombudsman's preliminary findings and recommendations found the board's decisions to refuse access unreasonable and based on irrelevant considerations and on a mistake of law. Eleven recommendations were made, the thrust of these being that information which did not concern the oilseeds trade should be released subject to the consultation procedures required under the FOI Act.

Two officers the subject of the findings made comment to the Ombudsman, but the comments failed to admit any distinction between the types of creditor information and reiterated previous arguments supporting exemption.

When the final report was issued, the administrator indicated his decision to implement only one of the recommendations. Considering enough time had already been spent on the matter, he wrote:

No doubt your perspective is that of compliance with the Freedom of Information Act and the Ombudsman's Act. However, my perspective is to ensure the efficient financial and management operation of the Board...

The Deputy Ombudsman replied:

All authorities which are agencies for the purpose of the FOI Act are bound by the requirements of the Act. No question of perspective arises.

It adds insult to injury that the administrator, though unwilling to instruct his officers to spend time implementing the recommendations, did not hesitate to incur the costs of legal advice by referring the final report to the board's solicitors. The latter was undoubtedly a more expensive move. Further, much of the time taken by officers of the board was spent creating and maintaining a stand against the release of the information. If the correct decision had been made earlier, time spent would not have been a problem.

The administrator's inflexible stance was reminiscent of the structural attitude of unreasonable secrecy prevalent throughout government organisations in the past and which the FOI Act was designed to dismantle.

It was made quite clear to this office that the board believed its responsibilities under the FOI Act were quite inappropriate. Further, we were told that an association of agricultural boards had made a submission to the minister for agriculture requesting exclusion from the Act for all such boards.

Although these bodies are semi-autonomous, they are nevertheless established by statute and are agencies subject to the FOI Act. In the past few years a number of boards have failed financially and have had to have administrators appointed. Given these facts and the OSMB's antiquated and, in the end, arrogant attitudes to the release of information, and given the Ombudsman's finding that the board's decision to exempt was incorrect, the removal of such boards from the public accountability represented by the Freedom of Information Act would seem retrograde to say the least.

Closure of the Premier's Department FOI Unit

The FOI Unit in Premier's Department was established in the latter half of 1988 to implement the NSW Freedom of Information Act. Agencies were informed in April 1991

of its dissolution, " in view of the successful implementation of FOI and in line with the Government's commitment to let the Managers manage ".¹ The unit ceased to exist on 30 June 1991.

The unit was recognised widely as the major source of advice for both the public and the agencies about the new legislation, providing prompt, unsparing and high quality assistance. The FOI procedure manuals produced by the unit continue to give invaluable aid in interpreting and facilitating the Act. The unit's philosophical approach accurately represented the intentions of an Act drafted with open and accountable government in mind and it actively pursued and espoused those intentions. By their commitment to the ideas inherent in Freedom of Information legislation, the staff of the unit performed a great service for the NSW public.

This office is aware of many who believe the useful life of the unit was far from over and its ending was exceedingly premature. In fact, it would seem, judging by the reaction of FOI practitioners at the final meeting organised by the FOI unit, the only people in favour of the unit's closure were those who decided to close it. If this office had been consulted, the Ombudsman would have certainly recommended against its closure. The consequent loss of FOI expertise is a significant loss for the people of this state.

A number of the unit's responsibilities have now been handed over to individual agencies.

This office believes, however, that the major duties undertaken by the FOI unit in relation to the provision of advice and assistance to the government and the public and the associated duties of interpreting the Act, will to a large degree devolve, not to individual agencies, but to the Ombudsman's office. The Ombudsman is an integral part of the process by which the public are given the right of access to information held by the government. Without the FOI unit, there is little doubt the Ombudsman's FOI workload will increase significantly. His statutory obligations and the published information concerning those obligations point to him as the logical source of help.

In the first 12 months of the unit's operation, it received 4,300 telephone enquiries and in 1990/91, 5,000 telephone and 400 written inquiries. The Ombudsman firmly believes demand for information about the Act will continue at a high level and that, with the demise of the FOI Unit, much of the de-facto responsibility for servicing this demand will fall on this office.

For example, the unit was a very effective arbitrator and educator both for agencies and the public. It is anticipated that, without the unit's conciliation skills and the quality of its oral and written advice, many FOI applications which may otherwise have been successfully dealt with at agency level will become the subject of formal complaint to the Ombudsman under s.52 of the FOI Act. The educative role of the Ombudsman in relation to FOI, at

¹Letter from David Roden, Director of the Unit, 18 April 1991.

present a minor part of FOI activities in this office, inevitably will become significant as a result of the FOI unit closure. The Ombudsman's statutory duties under the Act are at the end of a series of procedures which must be followed step by step by both the applicant and the agency. The unit played a major role in explaining these steps.

No doubt this office will receive a greatly increased number of complaints about local councils' decisions regarding FOI applications. The FOI unit received an average of between one and two telephone calls a day concerning local councils' refusals to deal with FOI applications. The basis of the refusals was invariably councils' view that the information requested did not concern the personal affairs of the applicant, as required by the Act. The FOI unit was highly successful in explaining to the majority of councils their obligations under the Act. Consequently, the applications were dealt with appropriately. In future, the Ombudsman can expect to be called upon to arbitrate informally on this issue in much the same way as the Unit.

Under the FOI Act the Ombudsman's is an independent and objective examiner of determinations and of the conduct related to those determinations. In future, he will not be able to restrict his role, as he has done to a large extent in the past, to that of external examiner. Without the existence of an objective facilitator, arbitrator and educator, as the FOI Unit was, the Ombudsman may well have to adopt these roles in order to impart a reasonable effectiveness to a complex Act.

Need for more staff and the permanent establishment of existing staff

On 22 March 1989, the Secretary of the Treasury approved funding for four FOI positions in this office: two investigation officers, one clerk and one general duties typist, subject to "the staff requirements being reviewed after twelve months".

On 14 May 1990, in response to a request from the Secretary of the Treasury, the Ombudsman forwarded a detailed report covering the work of his FOI officers, analysing complaint statistics and future trends, and requesting approval for the four positions to be retained as permanent positions.

On 26 June 1990, in the absence of any written reply to his earlier letter, the Ombudsman again wrote to the Secretary of the Treasury, detailing discussions with Treasury inspectors and advising it was imperative that continued staffing and funding for FOI be provided.

On 27 June 1990, the Secretary of the Treasury advised:

I wish to advise that approval has been given to your Office retaining the additional staff number of four positions and the funding on a temporary basis pending a management view of your organisation by the Office of Public Management as directed by the Premier and Treasurer.

In his special report of 19 July 1990, the Ombudsman referred to the implications of a review by the Office of Public Management for the independence of his office; where the Premier had directed a review of the Office of the Ombudsman by an organisation which was responsible ultimately to the Premier and yet was a public authority subject to the Ombudsman's jurisdiction.

On 17 July 1990, the Ombudsman met with the general manager of the Office of Public Management and expressed his concern at these matters. The position remained unresolved.

Finally, on 19 April 1991, the Ombudsman again wrote to the Secretary of the Treasury stating:

I am concerned that the issue of FOI staffing levels has still not been resolved. This uncertainty has implications, both for the overall financial and operational aspects of the Office, and as previously reported to Treasury, for FOI staff whose contracts of employment expire at the end of June. These staff are understandably concerned about the question of their continued employment and the stability of the section is jeopardised where staff who are otherwise happy but uncertain of their employment status, are considering alternate employment opportunities.

The Ombudsman also referred to the abolition of the Premier's Department FOI Unit as at 30 June 1991 and pointed out that, in the absence of the unit, responsibility for any educative function in terms of the FOI Act would naturally devolve upon this office.

At the time of writing, the Treasury had not replied to this letter. However, in response to a Special Report to Parliament from the Ombudsman dated 21 June 1991, which mentioned this matter as one of a number of concerns, the Secretary of the Treasury advised the Director-General of the Cabinet Office that:

The Premier and Treasurer has approved of extension of the FOI positions subject to review at the end of 1991/92. If this is an area of great concern, then, as suggested above, the review should be brought forward.

This still did not address the matter of permanency. The same response also failed to support funding for an additional FOI staff member to help with the anticipated increase in enquiries following the closure of the FOI unit.

Given the above and in the face of the FOI unit's demise, it is difficult to avoid the conclusion that the Government is no longer strongly committed to those principles of open government which it initially upheld in introducing the Freedom of Information Act.

LOCAL GOVERNMENT AREA

Complaints about local government

New complaints

During the year 716 new complaints were received. In addition, 177 complaints already under enquiry or investigation were carried forward from 1990-91, giving a total of 893 active cases.

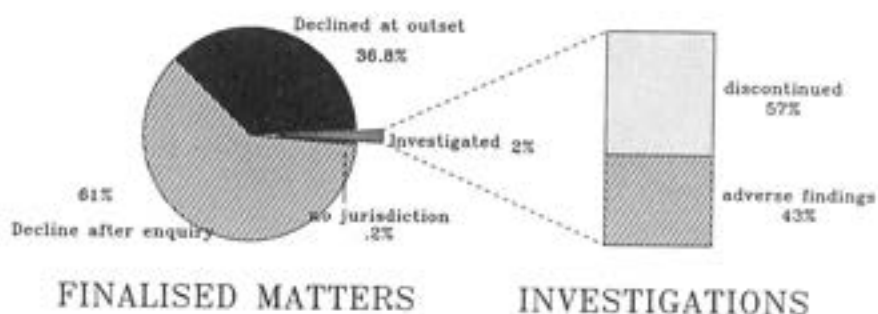
Finalised complaints

A total of 713 matters was finalised during the year, leaving 180 cases still under enquiry or investigation.

The following table gives the category of outcome for cases finalised during the year:

Outcome	Number	% of total
No jurisdiction	2	0.2%
Declined without any enquiry	262	37%
Declined after preliminary enquiry	342	48%
Resolved after preliminary enquiry	52	7%
No prima facie evidence of conduct described in section 26	41	5.8%
Discontinued	8	1%
No adverse finding	-	-
Adverse finding	6	1%
	713	100%

LOCAL GOVERNMENT



Total complaints finalised 713

Lake Macquarie Council - a nice profit!

Toronto Senior Citizens Club complained that Lake Macquarie Council recently had sold the land on which their clubhouse stood. The club had owned this land for nearly 30 years and had transferred it to council in 1984, following a number of assurances and undertakings.

The property in question, at Carey Street, Toronto, had been donated outright to the club in 1956 by a local benefactor. In 1959 a clubhouse was built by the senior citizens with community support. The clubhouse was a community facility for both senior citizens other community groups.

In the mid 1970s, council became interested in extending and improving the clubhouse for community services. In August 1976, council formally resolved:

that further negotiations take place with Toronto Senior Citizens Club for the transfer to Council of the land on which the Toronto Hall is situated to allow Council to apply for a grant.

Council could not apply for funding for such a project on land which it did not own.

The transfer of title followed a long period of negotiation and some hesitation on the part of the club. In July 1979 and in November 1982 council gave a number of written undertakings, including:

- council would meet all outstanding rates and continue to pay rates as they fell due each year;
- council would be responsible for the maintenance of the premises on the same basis that other council owned properties are maintained;
- council would apply for a government grant on completion of the transfer (council thought at the time that funds would be available by 1985-87);
- in the meantime, the club would operate in the existing clubhouse; and
- a care control and a management committee would be established to provide a direct link with council.

With these assurances the property was handed over to council by a formal contract of sale for the nominal purchase price of \$1. A condition in the contract of sale was that a local committee be established under section 527(1) of the Local Government Act. No such committee was ever formed. There was no direct link between the club and council.

Further, the assurances which led the club to transfer the property, did not materialise and, in certain instances, were paid no respect by council.

Government funding

By 1986 there were doubts about the time frame for the clubhouse improvements and uncertainty about the availability of a government grant. The Federal Government was indicating its preference for funding broad based services for both the frail and active aged. Council presented a revised submission along these lines, but when it was reviewed by the Department of Local Government it was given low priority.

No criticism can be levelled at council about the change in government policy on capital grants and the consequent changes to what was possible for the clubhouse.

Following an Ombudsman investigation, however, council's subsequent actions are viewed in a different light.

Continued use

Council advised the club of the lower priority that its submission for funds for Toronto had been given. At the same time, council told the club that until the government indicated when funding would be available, only minimum maintenance would be provided to the

clubhouse. Council disregarded its undertaking to the club. Nevertheless the clubhouse continued to be the centre of operations for the senior citizens and a meeting place for other community organisations in Toronto.

In 1988 the club heard from council's solicitors that council, "had real estate plans for the property". Later in the year, the club was informed by council that tenders were being invited for the purchase of the property. The town clerk said council was considering a number of options for the hall, including relocation.

In 1989 council sold the clubhouse site, together with adjoining blocks, to Henny Penny Foods Ltd for \$705,000.

There was little or no liaison with the club about their future. Council put certain proposals forward without consultation.

Regarding the acquisition of the property from the club in 1984, council said:

the Contract of Sale between the parties is regarded by the Council as the entire agreement between the parties in relation to the transfer of Lot 26...

and on the disposal of the property to the fast food chain, council's view was that:

... council is charged with the responsibility to the whole community and the benefits arising by way of employment opportunity, etc, in the Toronto area far outweigh the potential inconvenience caused to a comparatively small number of people...

and justified its actions with

in any case, council had plans to mitigate this inconvenience by relocating the Senior Citizens Club to another site in the near vicinity...

In January 1990, the club accepted the offer of the council to hold their activities at the Toronto Bowling Club. This venue appeared to be council's preferred option because transfer to the bowling club suited its plans to relocate another community service, the Toronto Community Hall.

The clubhouse was demolished to expedite the sale to Henny Penny. Its replacement value in 1988 was \$30,000.

With regard to the failure of successive councils to establish a local committee under the Local Government Act, the mayor said, firstly, it was not necessary as the club had operated successfully and, secondly, it was not appropriate as the club had exclusive use of the premises.

The first claim ignored the purpose of a local committee, that is, to provide a direct link between council and the club. The second was wrong, as the premises were used by a number of community organisations on a regular basis. Council seemed to have no knowledge of what activity occurred at the clubhouse.

Proceeds

Council's failure to honour its undertakings to the club and its lack of moral obligation was shown by its appropriation of the proceeds of sale of \$705,000. Council initially planned to place the proceeds in council's reserve for reinvestment of assets. The town clerk said the reserve was established to finance land development for resale and to improve caravan parks. During the latter part of the Ombudsman's investigation, however, council altered its decision on its appropriation of the funds.

The mayor advised that an estimated \$100,000 (which, he said, was the value of the land calculated on a pro rata basis) would be provided for a proposed multi purpose community building. The mayor could not say how much of the \$100,000 would go towards facilities for senior citizens. The only change in council's position was that one-sixth of the net proceeds would go to the community building. Council's property manager later advised that the value of the land, pro rata, was approximately \$142,000.

There still was no sense of obligation to the senior citizens club over the failure or inability to honour the assurances given at the transfer of title to council from the club. The club has since been informed by the State Member of Parliament that he had been advised by the Minister for Family and Community Services that the proposal which had been submitted by council for the construction of a home and community care centre may not adequately address the immediate needs of the club for new premises.

The club informed the Ombudsman that they looked forward to the peaceful existence of their club in premises of a permanent nature, plans for which they had not seen nor did they know if any were in existence.

The club expressed the fear that council could continue to sell land with the end result of lack of a suitable site for the proposed multi purpose centre. They welcomed the opportunity for their committee to peruse the plans.

The Ombudsman obtained legal advice from a leading Queens Counsel to assist the investigation. It was Counsel's opinion that the views of the council regarding the contract of sale were not correctly based in law. He said the agreement between the parties must be constructed as going beyond the contract of sale. The Ombudsman agreed with Counsel's advice that the council adopted a fiduciary position by undertaking to act on behalf of the club in the particular enterprise of applying to the Federal Government for funding. As a fiduciary, council was also liable to account for any profit or benefit obtained. Council, however, breached its fiduciary obligations by its subsequent action.

A revised draft report, taking into account the independent legal advice from senior counsel has been forwarded to the Minister for Local Government. It recommends that council place the proceeds of the sale of the land formerly belonging to the Senior Citizen's Club into a special trust account, together with the interest earned on the proceeds since the sale and an amount to cover the value of the clubhouse that was demolished. This trust should then be used to provide facilities for senior citizens in the new centre if and when it is built. The Ombudsman will await the advice of the minister on whether he wishes to consult on the matter, before making the report public.

Lake Macquarie Council - what more could they do - or not do

Part of the Ombudsman's role is to deal with complaints by individuals who, when dealing with large bureaucracies, are relatively powerless. In many cases, the individual citizen does not have access to information and cannot match the resources of public authorities.

Mr B's complaint is one where a member of the community has suffered because the conduct of local government officers was unreasonable, unjust and improperly discriminatory.

Mr B wrote to the Ombudsman in July 1989 about reconstruction work on a neighbouring property that had caused serious water run-off problems.

The neighbour, whose land sloped down towards Mr B's property, had built a retaining wall at the boundary which consisted of rows of concrete cylindrical blocks laid unrestrained, one on top of the other. He had then filled in the back yard to the height of the wall, changing the contour of the area, then concreted and pebblecreted the surface. During heavy storms in the latter part of 1988 there had been extensive damage to the rear of Mr B's property. Terrace gardens had been washed away and there was subsidence.

Mr B, on the advice of professional engineers in November 1988, had sought council's advice about the damage. The engineers had expressed their concern over the legality of the construction work and the consequent uncontrolled and concentrated discharge of stormwater. They recommended to Mr B that he ask council whether the neighbour had obtained approval for the reconstruction work. Mr B wrote to the council in March 1989 seeking assistance.

Council inspected the site on 10 April 1989 and informed Mr B that the wall was under one metre and didn't need council approval and, therefore, it was matter for civil proceedings. No information was conveyed to Mr B whether the wall as an authorised structure or not, whether it was structurally stable or unstable, whether the re-grading and concreting of the backyard was acceptable or whether the concentrated water discharge could be permitted.

On the other hand, on 20 April, ten days after the inspection, council wrote to the neighbour telling him the wall should have been the subject of a building application, that

the wall was surcharged and had bulged and that absorption trenches (under the pebblecrete) appeared to have failed.

The neighbour was advised by council of the appropriate remedial work, including the lowering of the retaining wall and the installation of some form of drainage system to dispose of waste water. He was told to obtain the services of a practising structural engineer and to get a certificate of structural adequacy.

Mr B was not given this information. As a consequence, he was placed at a complete disadvantage in making any decision on what action he should take about the damage to his property and the causes of it. His position was exacerbated when, on asking again about the neighbour's reconstruction works, council told Mr B on two occasions, in letters dated 21 June and 12 July 1989, that it would only produce its records on the service of a subpoena.

In the meantime, council took no action at all to follow up the letter to Mr B's neighbour about the unauthorised work or to monitor what action the neighbour had taken following its advice on remedying the situation.

During the investigation of the complaint it came to light that a senior council officer who had dealt with Mr B's enquiries to council was related to the neighbour who had carried out the unauthorised reconstruction work. The wall, had in fact, been built by relatives of the council officer. As it happened, the neighbour and council officer were also related to one of the elected councillors of the City of Lake Macquarie.

The council officer was called to give evidence at an inquiry before the Assistant Ombudsman.

The officer went to great lengths to convey to the inquiry that he would not handle a matter before council if family members were involved. Despite his protestations, there was clear evidence that the officer had directly involved himself in previous matters before council involving Mr B's neighbour. He had then become directly involved in Mr B's enquiries to council and had made the decision that Mr B could not have information about building approvals unless council was served with a subpoena. It was only after giving out that advice that the officer referred the matter to a more senior council officer.

The Ombudsman considered that the officer's conduct did not present itself as being professional. The Ombudsman recommended that the officer be counselled on his actions, and that council conduct a training program on the Local Government Code of Conduct for Members and Staff, 1990.

There was no evidence indicated the councillor had any direct involvement or influence in the problems experienced by Mr B.

The final report on the investigation was issued on 6 November 1990.

The investigation found that Mr B had been disadvantaged as a result of a number of council's policies and practices and by its inaction. These included:

- the absorption pits on the neighbour's property had failed, yet council couldn't be sure whether they were installed or whether they were just ineffective because a completion inspection on the dwelling extensions had not been carried out;
- council precluded Mr B from knowing that the neighbour's reconstruction works which caused the damage were illegal;
- council gave conflicting advice to Mr B and his neighbour and allowed the inconsistency to stand to the detriment of Mr B and council had no intention of correcting the situation;
- council failed to follow up its letter of advice to the neighbour about the unauthorised work and failed to monitor whether appropriate remedial action had been taken; and
- council had allowed Mr B to believe the only recourse left for him was civil proceedings when it was a situation which council clearly had a responsibility and obligation to address.

It was clear to any officer from council dealing with Mr B that he was an elderly person. Council's rating records also would have disclosed he was a pensioner. It was not a realistic expectation on the part of any council officer that Mr B would pursue litigation. Further, the Ombudsman did not consider that the possibility of civil litigation could properly absolve council of its responsibility to monitor the remedial action it had suggested to the neighbour. Council's letter to the neighbour of 20 April 1989 clearly indicated it considered the structure both unauthorised and defective.

The Mayor, Alderman Welch, informed the Ombudsman that any recommendation from council in respect of unauthorised work could only be by way of demolition. Alderman Welch said that, in the circumstances, the neighbour would have the opportunity to appeal to the Land and Environment Court and that a decision in council's favour was more than remote. There was no evidence produced to the investigation, however, that this was a matter that had been considered and had determined the limited action of council.

Mr Welch had no regard for the remedial suggestions put to the neighbour in its letter of 20 April 1989 to address the situation, nor did his view reflect the range of options council is empowered to pursue under s317B of the Local Government Act. Section 317B provides that council may order an owner to demolish, re-erect or repair building works if the building is in such condition as to be prejudicial to the property or inhabitants of the neighbourhood.

The Ombudsman made a number of recommendations about the unauthorised work and the damage suffered by Mr B:

- that council immediately direct the neighbour to take action in respect of the unauthorised work as set out in its letter to him of 20 April 1989;
- that council monitor the remedial action required on the neighbour's property until its early completion or if such work is not carried out within a reasonable time that council initiate legal proceedings; and
- that council compensate Mr B for its failure to remedy unauthorised work which adversely affected him; for the unfair and disadvantaged position Mr B was placed in because council refused to provide him with information which directly affected him; and for the protracted delay by council in addressing its responsibilities.

The Ombudsman recommended the level of compensation be at least equal to the costs incurred by Mr B for professional engineering advice.

On 10 December 1990, the town clerk informed the Assistant Ombudsman that council had resolved to arrange for a surveyor to determine whether the alleged work was unauthorised.

He also advised that council had also resolved not to pay Mr B compensation in relation to the matter.

The council officer concerned had been counselled regarding his involvement in matters before council involving family members and council had referred the question of a training and information program on the Code of Conduct for Local Government to its human resources manager for implementation in 1991.

On 21 February 1991, council wrote again to the Assistant Ombudsman advising that at its meeting of 11 February 1991, council had considered a report in relation to the recommendations on the investigation and had resolved:

- council take no further action in regard to the matter; and
- that Mr B be advised council has resolved to take no further action in regard to the erection of the retaining wall or the disposal of roof waste water on the premises of Mr B's neighbour.

Council was asked to furnish a copy of the report which had been considered at its ordinary meeting.

The report said the council's surveyor had indicated that in his opinion the retaining wall varied in height from 920mm to 1.050mm above the adjacent ground level. It said a recent inspection of the site by the city health surveyor and deputy revealed that the retaining wall was retaining soil to a height less than one metre. Because of a slight depression in the soil, a section of the wall for approximately one third of the length, exceeded the height

of one metre up to 50mm. It concluded that Mr B had the option of taking legal action against the neighbour.

Alderman G R Hughes declared an interest in the matter and took no part in the deliberation.

Notification of adjoining owners - one step forward two steps back

In last year's annual report, the Ombudsman reported on the decision by the NSW Court of Appeal in *Hornsby Shire Council v Porter* confirming the decision of Mr Justice Cripps of Land & Environment Court. The Court of Appeal decided that the obligation under s.312A of the Local Government Act "to permit a person to inspect plans for a building application on adjoining lands carries with it the implication that the owner will be notified that such plans exist affecting his land or the enjoyment thereof".

This decision by the Court of Appeal was handed down soon after a report to Parliament by this office on the same subject, which was tabled on 28 March 1990. This report was the culmination of ten years of comments in annual reports on the inadequacy of the existing provisions in the Local Government Act.

Over the last ten years this office has on numerous occasions brought to Parliament's attention the following:

- the belief ratepayers are entitled to hold a reasonable expectation that their council will seek their views on development or building applications that may affect their amenity. Such expectations arises out of the provisions of both the Local Government Act and the Environmental Planning and Assessment Act and is in accord with the principles of natural justice;
- that a survey by this office in 1985 showed that the 60 per cent of NSW councils have a policy of notifying affected property owners and that these councils did not consider the policy imposed onerous cost burdens or additional delays in the processing of applications; and
- that the then uncertainty in the law and the divergence of policy adopted by councils across the state gives rise to a totally unnecessary level of ratepayer dissatisfaction with their councils and consequent large number of complaints to this office.

The Court of Appeal's decision vindicated the stand taken by this office and in essence brought about the desired reform of the law. The decision was welcomed by environment groups and ratepayer associations.

The Government's response to this clear statement of the law by the court, was to submit an amendment bill to the parliament prior to the state election. It is understood the bill will be reintroduced in the budget session. The bill will allow councils to reinstitute their policy of not notifying adjoining owners. Currently both councils and their ratepayers know that a council must notify the owners of land adjacent to land the subject of a building

application. There is no discretion. If council fails to notify then any consent can be voided on application to the Land and Environment Court.

The draft bill vests council with the discretion to:

- determine, prior to any community consultation, which of the neighbouring properties would be *detrimentally affected*;
- determine who may inspect plans; and
- prepare a draft policy which may be unique to that shire, city or municipality.

The bill, if enacted, will probably lead to even greater disputation between councils and their ratepayers and, as such, is extraordinarily retrograde. The bill would appear not to recognise that anyone other than neighbouring properties could be affected detrimentally by the proposed building. Nor does the bill provide any assistance to the lay person as to the definitions of *use and enjoyment* and *detrimentally affected*. Further the bill may lead to greatly increased litigation, not the least on the question of whether council has properly assessed who should be notified. Clearly complaints to this office on this subject will increase.

In the view of the National Environmental Law Association;

the proposed legislation runs together two very basic, but essentially different, considerations namely;

- (i) the right of adjoining property owners to be notified of proposed building work on adjoining land;
- (ii) whether or not the proposed building work will detrimentally affect the use and enjoyment of adjoining land.

The answer to the second consideration, namely whether or not the use and enjoyment will be detrimentally affected, should be based on advertising procedures which secure the right of all property owners to be notified of building work on adjoining land.

It is the opinion of the association that the council should only properly come to consider the second question having first given adjoining property owners the right to make a submission.

Central to the question - will proposed building work detrimentally affect adjoining land? - is consideration of the opinion of adjoining land owners about the worth of the application. To deny adjoining land owners the opportunity of making any comment significantly reduces, in the opinion of the association, the ability of the council to determine the ultimate question.

The bill also fails to introduce a uniform policy across the state. It is absurd that ratepayers, resident in different council areas, will again be subject to diverse policies on the

notification of interested parties. The bill reinstates the previous inequitable position of many ratepayers, where some councils will continue to notify all interested parties while others will revert to their habit of limited notification by a very narrow application of the amendment.

The bill also has the potential to produce a climate conducive to corrupt conduct. It will be potentially possible for an employee of a council with delegated power to approve a building application where there has been no community consultation nor has the application be brought before a council meeting for public scrutiny. This defect in the bill was raised with Mr Ian Temby, Commissioner for the Independent Commission Against Corruption, early this year. Mr Temby advised that:

... a legislative requirement that council notify adjacent landowners affords a greater degree of protection to council and staff than a discretionary provision. Where such discretion to notify exists, it is open to abuse. It is possible that applicants will seek to improperly influence council and/or the delegated officer in relation to notification, or that disgruntled adjacent landowners, who were not notified of an application, will allege improper practices on the part of either or both the applicant and the relevant authorising officer.

This office calls on the Government to rethink the amendments and to engage in further consultation with the community on the administrative difficulties of the current position.

Not just a city problem

Over the last couple of years, the Ombudsman has received complaints about sub-division applications where the principle of notification of adjoining owners applies.

The practice of notifying adjoining owners when sub-division applications are received, varies between councils. Most councils provide written notification as a matter of course and courtesy. They often find it useful as a means of pre-empting problems, since adjoining owners can sometimes identify possible impacts of proposals that are not immediately obvious. Other councils write to adjoining owners when major proposals are planned. Others still do not formally notify individual owners in any situation.

It is recognised that councils are not obliged under current planning legislation to specifically notify adjoining owners of sub-division applications received. They do, however, have certain responsibilities regarding the exhibition of proposals, consideration of objections and determination of applications.

In 1987/88 three property owners wrote to the Ombudsman complaining that Wollondilly Shire Council failed, among other things, to consider drainage impacts on their land prior to the approval of two residential sub-division applications. The complainants stated they began experiencing problems with flooding on their properties following heavy rain. All claimed this problem had been exacerbated by the sub-divisions, together with the filling of a natural watercourse.

This office made enquiries with Wollondilly Shire Council concerning the complaint. Council's reply was brief and referred to assisting in the cost of some remedial works on one property. However, council did not feel the other two complainant's problems could be attributed to its conduct. It was noted the adjoining owners were not consulted before granting consent.

This office launched an investigation into the matter and council's design engineer, chief town planner and development engineer were called to give evidence.

Section 90 of the Environmental Planning and Assessment Act, 1979, lists the relevant heads of consideration to be taken into account when determining applications. These include drainage impact on surrounding land. During the course of the investigation, it was revealed council staff not only failed to consider the sub-division applications in terms of section 90 of the Act, but some had no knowledge at all of the provisions of this section.

Council maintained it had assessed the impact on downstream drainage facilities and determined that little change would result. It appeared that the assessment of the drainage impact of the proposal was based on council engineers' experience of such matters and standard engineering practice. The application was dealt with as a routine matter and not as a planning matter subject to the provisions of the Act. Subsequently, the town planning department, although formally processing the application, had very little input into the assessment of the application or in determining conditions of consent.

This office contracted Dr Brian Jenkins from Unisearch Limited, University of NSW, to ascertain the impact on downstream drainage facilities of the concentration and cumulative effect of run-off from the sub-divisions. It was Dr Jenkins view that the sub-division had little effect on the peak flow rate.

There is some doubt as to whether council was fully aware of this at the time the application was approved. Certainly no evidence appears on the files to suggest they were. It is fortunate council's apparently intuitive assessment of the drainage impacts resulted in a conclusion which has been vindicated by a more professional, scientific appraisal.

In addition, it was learnt council had no policy concerning the advertising or notification of neighbours regarding development applications for sub-divisions. It is obvious, therefore, that no consideration was given to notifying owners in this case.

As a result of the investigation, the Assistant Ombudsman recommended, among other things, that:

- council's chief town planner introduce a systematic process to ensure all relevant heads of consideration under section 90 of the Environmental Planning and Assessment Act are taken into account in the processing and determination of all development applications, including subdivision applications;

- procedures be introduced, and, if necessary, training be undertaken to enable all council staff involved in the assessing of subdivision applications to become familiar with the requirements of relevant legislation; and
- Wollondilly Shire Council introduce a policy whereby adjoining owners are notified as a matter of course, and in all circumstances, of proposed developments in their neighbourhood.

In the submission received from the shire clerk of Wollondilly Shire Council dated 20 September 1990 it was stated that, "A systematic process to ensure the heads of consideration under section 90 of the EP and A Act (are taken into account) has been introduced".

The Hon Mr David Hay, MBE, Minister for Local Government and Minister for Planning, considered the draft report in this matter and expressed in his response, his general support for the findings contained therein. However, in relation to the recommendation that "...adjoining owners are notified as a matter of course, and in all circumstances, of proposed developments in their neighbourhood...". The minister wrote:

(This recommendation)...is too sweeping and in practical terms, would result in delays to the determination of many minor development and building applications. Accordingly, I consider that Wollondilly Shire Council should retain the responsibility for deciding when it is reasonable and appropriate to notify adjoining owners of a proposal for development. The Council should be encouraged to fulfil this responsibility with diligence.

The minister went on to request that this recommendation be reviewed in light of these comments.

In these and other matters brought to the notice of the Ombudsman, there has been no conclusive evidence that such notification causes undue delays and it is a practice already widely adopted by many local councils. The Ombudsman firmly believes that notification of adjoining owners is in the public interest and leads to better decision making by local councils. Consequently, the Ombudsman did not agree with the minister's view and the recommendation on notification of adjoining owners made in the Assistant Ombudsman's report remained unchanged.

Donations to councils

Last year's annual report contained a segment on the soliciting of donations by councils and the difficulties arising where such donations are sought from applicants with current projects before the council for determination. The report arose out of an investigation into the conduct of Baulkham Hills Shire Council, which solicited substantial donations from applicant developers towards the cost of the Hills Entertainment Centre.

Despite the findings of the investigation, public comments were made by a number of

persons associated with local government, including the deputy mayor of a neighbouring council, supporting the fund-raising activities of Baulkham Hills Council and criticising, "the lack of practical knowledge displayed in the critical [Ombudsman's] report".

Given the apparent lack of understanding of the propriety of a public body actively soliciting donations from a developer when it has the power to approve or reject that developer's proposal, this area was made the subject of a number of lectures to various groups, including planning experts and local government staff.

In response to addresses to the Local Government Planner's conference and to a metropolitan meeting of the Institute of Municipal Management, this office received a letter from the president of Baulkham Hills Council complaining that the investigation into his council's conduct was used to illustrate the general theme. The letter noted that reference to the council was not conducive to establishing the "climate of genuine trust and cooperation" which the council considered essential to ensure orderly development.

Many questions arise where a public body seeks donations from business groups or persons in circumstances which give rise to an expectation that the functions of that body will be effected by whether or not a donation is made, or the size of that donation. These questions concern the integrity of public administration and have serious implications for the public's confidence in government. It is undoubtedly in the public interest that there is informed debate about the problems which arise, especially among people whose position may bring them into contact with these situations.

It is apparent from the response of Baulkham Hills Council to the inquiry and from subsequent comments by people involved with local government, that there remains a failure to fully appreciate the implications surrounding the soliciting of donations by a public authority from businesses which stand to benefit from decisions of that public authority. As long as this failure to understand the issues persists, this office will continue to promote public understanding in the interests of better public administration.

Mulwaree Shire Council

One of the objects of the Environmental Planning and Assessment Act (EPA Act) is to, "provide increased opportunity for public involvement and participation in environmental planning and assessment". The Act also exists to encourage the proper development and conservation of natural resources for the purposes of promoting the social and economic welfare of the community and for a better environment. To achieve these objects, significant powers and responsibilities are given to local government authorities to assess and approve development applications. It was in relation to Mulwaree Shire's approval of a major rural residential subdivision covering 900 acres that a ratepayer complained to the Ombudsman. The ratepayer claimed council's action had not been consistent with the spirit or intent of the Act.

The investigation examined a number of phases of the development - the initial confidential contact between the developer, council members and staff, the exhibition of the Local Environment Plan (LEP), consultation by council on issues raised in the Local Environmental Study (LES), the determination of the development application and council's involvement in works on this site and its monitoring of compliance with conditions of consent.

Council's confidential but informal consideration of a concept plan of the development, the site inspection by some members (including helicopter flights helicopter around the area), and restriction of mention of these actions in council's business paper was found to be not wrong. It was accepted that it was common practice for councils to agree to a developer's request for confidentiality in the early stages of proposed developments and before any formal applications are made to council or any formal decisions made by council to proceed with proposals. In some circumstances this process may result in the public being excluded from the decision making process and may limit opportunity for public scrutiny. But in cases such as this where the proposal required a draft LEP involving formal procedures of consultation and public participation as a statutory requirement, it could not be said that the public had been unreasonable excluded.

Council only used cadastral facts in the newspaper advertisements announcing the public exhibition of the draft LEP and LES, claiming country people recognise land in those terms. This was not borne out by the evidence. One councillor could not name the parish in which his own property was located. While there are no statutory requirements in the EPA Act or regulations on the form in which land should be described in such advertisements and while Council's actions were consistent with past practice, the advertisements were considered unreasonable because they did not provide adequate information to enable interested persons to exercise their rights to public participation in the planning process. The evidence suggested there was an alternative and commonly known description of the land which would have assisted recognition if it had been used.

Council also followed what was its standard practice regarding the period of exhibition of the LEP and LES. With few exceptions, council had limited public exhibitions to around the minimum period required under EPA Act. The council itself had not considered what exhibition period was appropriate, leaving the decision to the shire planner. In many municipalities and shires such decisions are matters for council, especially where a development is considered to be significant, controversial or unusual. Section 65 of the EPA Act clearly states councils have a discretion in deciding the form and manner of notices and places of exhibition of environmental studies.

While the history of public submission following exhibitions in the Mulwaree Shire generally only supported minimum exhibition times, it was considered that the question should have been deliberated upon by council in this case.

The development was initially described as having "a significant impact" on the area and "a unique concept". This should have signalled to council and the council's officers that more than the minimum requirement in regard to public exhibition should apply.

There was also evidence that the complainant had been misled by council on two occasions. He had been informed by the shire engineer and shire clerk that the LEP and LES had been exhibited at Murulan Post Office, near the development site. This was not true. Council's claim of a misunderstanding involving the complainant's personal enquiry about the development was not credible. Although, no great importance was placed on the incident, it did illustrate how the complainant's initial concerns about secrecy and lack of public participation had been inflamed.

In its consideration of the local environmental study and plan, there was evidence of council's reluctance to consult with the Department of Health and the Soil Conservation Service and to accept their recommendations on technical matters. While council was under no statutory obligation to follow the advice of such agencies, Mulwaree is a small council and obviously does not have the resources and expert knowledge available to such organisations. Council, in such circumstances, needed to be able to clearly demonstrate why it might reject their advice from time to time. In this case, it appeared council adopted the position argued by the developer and was resistant to the advice of expert public authorities without having credible, counter arguments.

By the time the development application for the subdivision came before council, its approval was a mere formality. Council claimed the councillors were well aware of the issues associated with the proposal and what remained was simply to determine conditions to which the approval should be subject. The shire clerk claimed that the necessary considerations under section 90 of the EPA Act had been dealt with through the LES. This view was supported by the shire planner. Contrary to this view, the LES itself suggested there were several important matters to be considered at the approval stage. A development control plan adopted by council some four months prior to the consideration of the development application also contained a reminder that the section 90 heads of consideration applied at the development approval stage.

The Assistant Ombudsman was satisfied on the balance of probabilities that insufficient systematic considerations was given to all the relevant matters listed in section 90(1) of the EPA Act and section 332 and 333 of the Local Government Act.

None of those mandatory considerations were addressed by the developer in his development application nor was any information supplied on the environmental impact of the development as required under the Act. The planner's DA report to council was extremely brief (half a page) and contained no discussion of the mandatory matters for consideration or the issues to which the recommended conditions of consent were presumably directed. None of the councillors interviewed were aware of their statutory obligations under the EPA Act in relation to development approvals.

Whereas the LES stressed that certain issues should be fully considered at the DA stage, the councillors assumed that LES itself adequately addressed them and gave no further consideration to those issues. There also was conflicting evidence regarding which councillors had read the LES itself. Major concerns about the environmental impact, including the need for proper geotechnical and absorption assessment to help assess accumulative impact on the surrounding environment and to determine the most suitable subdivision layout should have been properly determined before approval given.

The inquiry was not presented with any credible planning arguments to support council's view that it was more appropriate to defer such assessments to the building application stage. At that stage it would have been too late to properly assess the effect of the development on the environment and extremely difficult to institute suitable controls if adverse environmental impact had been indicated.

Council also was confused as to whether the roads on the development were going to be private or public roads. That issue had important social implications for the shire residents and economic implications for the council which should have been addressed.

The Assistant Ombudsman found council's attitude towards its statutory obligations under the EPA Act and the Local Government Act to be have been somewhat casual and certainly less than thorough. It was too late, however, to remedy the deficiencies at the time of the investigation.

Another aspect of the investigation concerned council's apparent failure to monitor a particular condition of consent; the requirement for a comprehensive erosion and sediment control plan prepared in consultation with the Soil Conservation Service for each stage of the development. It was to be approved by the service and all works carried out at the developer's expense prior to road construction work. However, road construction works were well under way prior to any plan being prepared and submitted. The issue was further complicated by the fact that the developer had sub-contracted the road construction work to the council.

Neither the council nor the developer was seriously concerned to ensure they complied with the condition, either in its intent which included the requirement to consult the Soil Conservation Service or in its timing which required implementation prior to commencement of road works. The fact that council undertook the road works may in fact have served as an excuse for the failure of both parties to assume appropriate responsibility. Action only was taken on the development of the erosion and sediment control plan following adverse publicity.

Finally, the investigation addressed council's actual involvement in constructing the roads. This was in accordance with council's standard practice to tender for work on private land to assist council in raising funds and ensuring that its plant and workforce were used fully. Further, none of the evidence provided during the enquiry supported any conclusion that

there had been any corrupt dealings between the council and the developer in relation to the development.

A number of recommendations arose from the investigation, these included:

- council develop a policy on the exhibition of draft LEPs, DCPs and DAs that provides for the use of commonly known property names or description in addition to cadastral information wherever possible;
- council determine the length and place of exhibition of plans and applications relating to developments that by their size or particular nature are likely to have environmental impact on adjoining properties or the locality or have social or economic impact on the community or council; and
- the notification of adjoining owners and inviting submissions in respect to development applications.

The first was adopted by council, but council resolved simply to abide with the minimum requirements regarding the length of exhibition in the EPA Act and to exhibit at the shire chambers and the nearest post office to any development. The policy on notification of adjoining owners, apart from dog boarding and breeding establishments, was not adopted.

The shire president was authorised to arrange suitable training courses for members of council and planning staff as recommended.

A recommended review of council's town planning and development control procedures was said to have already been undertaken and was an ongoing process of the planning department. The recommendation for the use of check lists by council's planning staff in respect to mandatory statutory considerations when assessing development applications and preparing reports was rejected. Council simply said its members held appropriate qualifications to deal with such matters.

A recommendation that council review its policy on tendering for works on private land and if necessary determine a reasonable profit margin taking into account such matters as staff on cost and maintenance and depreciation cost for plant and machinery was rejected by the council. The recommendation about council refraining from further road construction works until an erosion and sediment control plan was submitted and adopted was accepted, as was the recommendation for council to ensure its health and building surveyor consult with the soil conservation service over requirements for geotechnical assessment prior to building.

The insularity of the council, evident in its reluctance to consult with other public bodies during its consideration of this development, was matched by its defensiveness in respect to the investigation.

In response to the investigation council:

- spent some \$35,000 of ratepayers money on legal representation (according to press reports);
- made an application under the Freedom of Information Act for documents relating to the investigation including the notes made by an investigation officer at a meeting with the shire clerk and documents provided by the complainant, including his comments on council's response to preliminary enquiries;
- appealed the initial FOI determination which restricted access to some documents or parts which were obtained on the basis of a confidential relationship or that disclosure could prejudice the investigation;
- sought an adjournment of the inquiry until after the application for the FOI review had been determined and resolved to seek an injunction if no extension was given (an adjournment was granted in the circumstances);
- made application to be present during the giving of evidence of all witnesses at the inquiry and to cross-examine;
- when only partial leave was initially granted sought a re-consideration and advised of their intention to take injunctive proceedings should those rights not be granted (they were);
- following the issue of a statement of provisional findings, made a formal complaint to the Premier over the investigation, calling for a review of the inquiries, powers and actions of the Ombudsman and his officers. The complaint was false and misleading in a number of respects; and
- following the release of the final report which was critical of council, (as detailed above) misrepresented the report in press releases by claiming that the, "investigation established beyond doubt that council acted totally within the requirements of the law".

In its complaint to the Premier, council argued that there should not have been a need to argue for the right of appearance, legal representation and cross-examination. It claimed that the principles of justice were based on the adversarial system before tribunals of fact, one feature of which was the right to cross-examine witnesses. Council was at no time denied the right to be legally represented when its members or servants appeared before the inquiry. Their initial application to be present during the giving of evidence of other witnesses and to cross-examine was however denied. In an inquiry under the Ombudsman Act the powers of a royal commissioner apply.

Under the Royal Commission Act 1923 there is no right of appearance, legal representation or right of cross-examination. These are matters at the discretion of the Commissioner and must be argued for. In initially declining the application for party status and cross-examination rights, the Assistant Ombudsman was mindful of the requirement of the Ombudsman Act that investigations be carried out in the absence of the public.

Clearly it was the intention of Parliament to keep Ombudsman investigations as informal as possible. As in Royal Commissions, the rules of evidence do not apply to inquiries held by the Ombudsman and they are by nature inquisitorial, not adversarial. Clearly council did not appreciate that basic point. The initial application was refused for sound reasons and the decision was reversed following a simple request for reconsideration and the amplification of council's submission.

Council also alleged that the investigation officer at the inquiry asked leading and biased questions from a view of preconceived guilt. An investigation officer at such an inquiry has a role akin to counsel assisting a royal commissioner. That duty is to bring into evidence matters that are germane to the conduct the subject of investigation. The officer concerned, in the view of the Assistant Ombudsman who presided at the inquiry, performed her duty in a responsible way. Even so, the council was capably represented at the entire inquiry by a leading firm of solicitors specialising in local government and was able to object to any question put and to make submissions. Needless to say, the findings of the investigation were a matter for the Assistant Ombudsman and not the investigation officer.

Council also complained that the Ombudsman was able to find conduct as being wrong even though it was not illegal. It also alleged, that "throughout the course of the inquiry the Ombudsman indicated that wrong conduct would include conduct that while legal was within the spirit of the law". No such statement was ever made during the inquiry and, indeed, such a statement would have indicated pre-judgement on the matter which was not the case. What was pointed out to council's legal representative in reply to a submission during the inquiry that council's conduct was legal and therefore not wrong, was the provision of section 26(1)(c) of the Ombudsman Act which provides that the Ombudsman may make a report where he finds the conduct the subject of investigation is, "in accordance with any law or established practice, but the law or practice is, or may be, unreasonable, unjust, oppressive, or improperly discriminatory" and that the Assistant Ombudsman had an obligation to consider whether that provision applied on the basis of the evidence.

Such a provision is common to Ombudsman legislation in a number of jurisdictions. It provides a basis for recommending changes to established practices and the to law that will improve a public authority's administration and performance. In the final report it was found that some of the council's actions in relation to the exhibition period of the draft LEP was in accordance with the law and council's established practice, but that the conduct was unreasonable on the facts.

By misreporting such matters to the Premier, the council unjustly cast an aspersion on the integrity of the Assistant Ombudsman and the office in general.

The bunker mentality exhibited by the council over this investigation was indicative of the lack of openness that was the chief concern of the complainant who initiated the investigation.

This reaction contrasts dramatically with that of other local government authorities in response to Ombudsman investigations. For example, in reply to a recent investigation report critical of the Wollongong City Council, the mayor stated:

... basically, council has no argument with the facts in section 1-5 of statement... Council agrees there was an excessive delay between the time the first complaint was lodged and the time legal action was eventually taken...

As a consequence of this case, council had amendments made to the City of Wollongong local environmental plan 1990... to enable action to be taken... The case showed us the weakness in the processes we adopted for handling such matters. In our view, our system was at fault rather than the individual officers. We have subsequently changed the way we process alleged breaches of...

In summary, while council agrees that the complaints of (the complainant) could have been handled much better, the legal, staffing and systems deficiencies in regard to... were at fault and action has been taken to correct them...

On receipt of your final report council will be pleased to consider any further recommendation you make towards improving our performance.

That council, like many other authorities, recognises that an Ombudsman investigation is a means of obtaining constructive criticism to improve performance.

PRISONS AREA

Complaints about the Department of Corrective Services

New complaints

During the year, 520 complaints were received about the Department of Corrective Services. In addition, 61 complaints already under enquiry or investigation were carried forward from 1990-91, to create a total of 581 active cases.

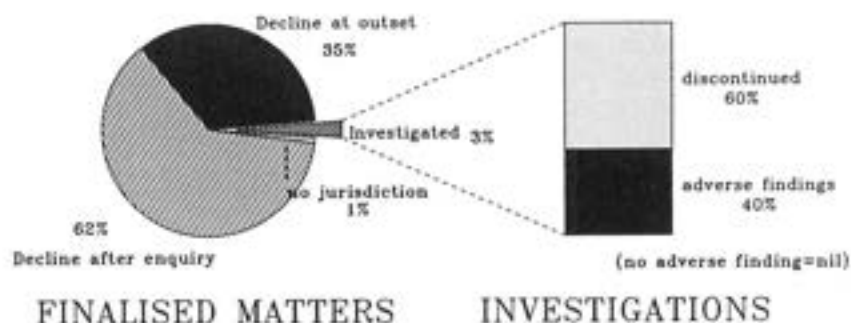
Finalised complaints

A total of 395 matters were finalised during the year, leaving 186 cases under enquiry or investigation.

The following table gives the outcomes for cases finalised during year:

Outcome	Number	% of total
No jurisdiction	3	1%
Declined without any enquiry	137	35%
Declined after preliminary enquiry	205	52%
Resolved after preliminary enquiry	29	7%
No prima facie evidence of conduct described in section 26	11	3%
Discontinued	6	1%
No adverse finding	-	-%
Adverse finding	4	1%
	395	100%

PRISONS



Total complaints finalised 395

Nature of complaints

The majority of complaints made by prisoners or others on their behalf to the Ombudsman concern the Department of Corrective Services. A small number concern the Prison Medical Service of the Department of Health.

In past years prisoners also have complained about the Mental Health Review Tribunal and the former Parole Board and Release on Licence Boards. Complaints against those bodies and the Offenders Review Board and Serious Offenders Review Board (which replaced the latter two Boards) generally are not within the Ombudsman's jurisdiction.

In the past year, however, no written complaints were received about any of those three bodies. The breakdown of the complaints received during the year is as follows:

Nature of complaint	Number	Number
	1/7/89-30/6/90	1/7/90-30/6/91
Department of Corrective Services		
Property	25	74
- private property policy		(11) ¹
- confiscation of /lost		(37)
- delay in transferring		(11)
- failure to compensate for		(15)
Officer misconduct	24	69
- threats/harassment	(14)	(31)
- assaults	(10)	(31)
- other criminal	-	(7)
Record keeping/administration	71	50
- sentence calculation	(30)	(14)
- failure to reply to applications	(11)	(9)
- remissions	(14)	(8)
- private cash accounts	(9)	(8)
- failure to process appeal papers	(7)	(2)
- other	-	(9)

Physical conditions/facilities	8	43
- unhygienic conditions		(23) ²
- lack of basic provisions (eg, bedding, clothing, etc)		(20)
Segregation	6	40
- unreasonable segregation	(6)	(37)
- failure to give reasons		(3)
Daily routine	21	38
- access to amenities/activities		(3) ³
- access to telephone calls		(6)
- general treatment (including time out of cells)		(29)
Transfers	32	37
- unreasonable transfer/refusal to		(21) ⁴
- delay in effecting		(8)
- form of transport		(4)
- interstate		(4)
Classification	21	33
Visits	6	24
- ban on visitor		(7)
- access to		(17)

Work & education	3	20
- access to/removal from		(16)
- other		(4)
Mail	20	19
- delays in delivery		(10)
- interception of/missing		(8)
- interference with Ombudsman's		(1)
Medical	7	17
- access to/denial of	(7)	(14)
- methadone		(3)
Failure to ensure physical safety	22	16
Unfair discipline	1	15
Security measures (including cell & strip searches)	11	8
Day leave	1	6
Probation & parole	0	6
Buy ups	5	2
Food & diet	4	3
Legal	1	-
Other	2	-
Unclassified non-jurisdiction	<u>17</u>	<u>-</u>
Total	<u>310</u>	<u>520</u>

Prison Medical Service

-	standard of care	10	12
-	dental services	-	10
-	other	<u>3</u>	<u>-</u>
	Total	<u>13</u>	<u>22</u>

¹One complaint was a petition 146 signatures from St Heliers Correctional Centre

²Three complaints were petitions from 107 Remand Centre, 75 Remand Centre and 27 Assessment Prison inmates respectively

³Four complaints constituted petitions from 62 Assessment Prison, 47 Bathurst Gaol, 25 Assessment Prison and 6 Goulburn Training Centre prisoners respectively.

⁴One complaint was a petition from 17 prisoners at Bathurst Gaol

While there has been a general increase of 68 per cent in prison complaints made in the past year, there also are evident a number of trends in those complaints. The largest jumps have been in relation to complaints about property and allegations of misconduct by prison officers. The rise in property complaints is not simply attributable to complaints about the introduction of the prisoner's private property policy.

Only 11 complaints were received about the policy per se. The introduction of the policy, however, did involve the confiscation of an enormous amount of prisoners property with its consequent implications for storage and transfer. Most property complaints related to problems encountered with those administrative tasks.

Complaints of officer misconduct jumped from 24 in the 1989-90 year to 69 this year. Over half of those complaints involved allegations of assault or other criminal conduct. Some superintendents have commented to the Assistant Ombudsman that the rise in complaints against prison officers reflects the lack of experienced staff in some gaols. Some maximum security gaols have over 60 per cent of staff with less than 12 months experience as prison officers.

The general gaol overcrowding has been responsible for the increase in complaints about lack of hygienic facilities and amenities. Access to visits and telephone calls also becomes more difficult the more prisoners there are in any one institution. Cut backs in staff also has contributed and in some gaols has resulted in increased delays in transfers, mail delivery, longer hours in cells and restrictions on activities.

The rise in the number of complaints about segregation reflects the increased use of that provision of the Prisons Act and the general cautiousness exercised about security matters since the major round of disturbances in the gaols that began last September.

The prominence of grievances about dental services among the complaints about the Prison Medical Service was caused by the cut back in those services due to budgetary constraints during the year.

Prison visits

The Ombudsman Act gives special recognition to persons in custody and their right of access to the Ombudsman. The Act provides that public authorities who detain or have superintendence over persons in custody must take all necessary steps to facilitate the making of a complaint to the Ombudsman and must send immediately to the Ombudsman, unopened, any written matter addressed to him by persons who inform them that they wish to make a complaint. It is doubtful that most public authorities are aware of this positive duty to facilitate the making of complaints. Most are simply aware that they must not open letters to and from the Ombudsman.

Similarly, the existence of the Ombudsman is not necessarily known to all persons coming into custody. Given that the level of literacy among adult prisoners tends to be lower than among the general population, many prisoners are also disadvantaged by the necessity to make complaints in writing.

Consequently, while the role of the Ombudsman in dealing with complaints from prisoners is limited by the general provisions of the Ombudsman Act, the Ombudsman believes he has a public duty to make sure the resources of his office are known to persons in custody, both adults and children. The history of systematic abuse exposed by the Nagle Royal Commission into New South Prisons also demands that the public interest be served by an independent authority like the Ombudsman keeping a watchful eye on developments in prisons.

For many years, therefore, officers of the Ombudsman have made regular visits to gaols and detention centres to enable inmates to make oral, and where appropriate, formal written complaints. The oral complaints are usually dealt with on the spot and many get resolved through discussions with the relevant superintendents. This year 315 oral complaints were dealt with on visits to adult prisons and 41 verbal complaints dealt with on visits to juvenile facilities.

The visits also enable investigation officers to be informed of conditions and developments throughout the state's prisons and to make personal contact with senior staff at each institution. This enables better assessment of written complaints received about those institutions and provides channels of communication that are necessary to ensure speedy resolution of complaints where possible. Both the Departments of Corrective Services and

Family and Community Services have encouraged the visits by staff of the Ombudsman. They recognise that the Ombudsman provides an important safety valve for tensions and grievances within the system, which if left unresolved, can become major management problems.

There are currently 28 prisons in New South Wales and by the end of the year the new maximum security gaol at Windsor, the John Moroney Centre, and the remand and escapees gaol at Tamworth also will be operational. There are nine juvenile institutions. In past years the Ombudsman's office managed to visit each establishment approximately twice a year. The Ombudsman considered that to be an inadequate service. The metropolitan gaols and detention centres should be visited at least every three months and the country establishments at least three times a year. The financial constraints imposed on the office during the current financial year, however, have meant that it was not even possible to carry out the usual complement of visits. Only 20 visits were made to adult gaols and five visits to juvenile institutions (although that figure is somewhat misleading as Minda Detention Centre was visited three times (twice in one month) because of specific complaints or investigations). Some institutions were not visited at all.

Because of the additional costs of travel and accommodation, the prison visits done have tended to concentrate on metropolitan institutions. This discriminates against inmates of country prisons who are disadvantaged by reason of both their incarceration and geographical position.

In his special report to Parliament on The Effective Functioning of the Office of the Ombudsman², the Ombudsman estimated that he would need additional funding of at least \$46,093 to establish and maintain an adequate service of visits to prisons and juvenile detention centres. A further reduction in the office's budget for 1991-92 means it will be extremely difficult to maintain any sort of reasonable visiting service to gaols and institutions.

Inquiry into the use of force on various prisoners by prison officers

On the nights of 15 and 16 April 1990, members of a section of the Special Response Unit of the Department of Corrective Services conducted a cell search in the Remand Prison at Long Bay. They were attempting to find a set of keys accidentally lost by a prison officer. During the search a handcuffed prisoner was allegedly assaulted by members of that team. Two hundred and eighty-nine remand centre prisoners subsequently signed a petition protesting about the, "highly provocative and unnecessary" conduct of the unit during the search. This was sent to the Ombudsman, as well as various journalists, parliamentarians, individuals and groups interested in prison reform.

On 4 May 1990, the then Minister for Corrective Services, the Hon. Michael Yabsley, MP debated Professor Tony Vinson, a former Chairman of the former Corrective Services

² Tabbed 2 July 1991.

Commission on the topic of "The Prison System - Backwards or Forwards 30 years". During the debate, Professor Vinson made reference to the prisoners' petition about the "provocative aggressive behaviour of the special security staff". Referring to the institutionalised violence revealed by the Nagle Royal Commission into NSW Prisons, he told the audience that there was accumulating evidence that the "bash is back". He called on the minister to investigate the alleged assault in the remand centre.

Subsequently, Professor Vinson asked the Ombudsman to investigate this and other alleged assaults that had been brought to his notice and the minister also requested the Ombudsman to enquire into the allegations made by Professor Vinson.

A major investigation followed, which included an inquiry conducted by the Assistant Ombudsman (Prisons) in which formal evidence was taken from 149 witnesses over 30 hearing days at various gaols. The investigation inquired into alleged allegations of assault upon 24 individual prisoners. Incidents involving 18 of these prisoners occurred during and immediately following two riots at Parramatta Gaol in April 1990. A 350 page report on the inquiry was issued in April 1991 making a series of recommendations.

In relation to the Parramatta riots, the major findings were as follows:

- Prisoners alleged there was no need to use gas in quelling the incident that occurred on 25 April 1990 in front of the square of A, B and C wings. The Assistant Ombudsman found that the use of gas was appropriate and justified as the prisoners were given clear instructions to leave the square, but did not properly obey the instructions and the emergency squad were rushed by some armed agitators.
- The clearing of the main square took place with military precision and the quelling of the riot would have been over in a number of minutes had it not been for the delay in opening the gate providing the critical access route for the prisoners to the gas free zone. This arose from the inadequate preparedness of the Parramatta staff in a riot situation and in, particular, the delay in implementing instructions from the emergency unit officers.

The delay in opening the gate endangered the lives of prisoners and officers alike. The prisoners became trapped in a corner with riot squads on two sides. While the evidence suggests most of the prisoners were at that stage compliant from the use of gas on the square, the potential for a small group of vocal agitators to inspire the mass of prisoners to rush the emergency squads was great. There were two such attempted surges. The one on the vastly outnumbered members of one squad was only repelled by warning shots fired from a tower. This was an appropriate and necessary action in the circumstances. No one was injured as a result. The second surge resulted in the remaining squad being hailed with bricks and other material. Both surges were controlled by the further use of gas. The Assistant Ombudsman was satisfied that the use of gas at that stage was not only necessary and appropriate, but it prevented serious injuries and the probable loss of lives that were the likely consequences had it not been used.

- Once brought to the oval and accounted for, the prisoners were then taken back to their wings. There was no credible evidence to support allegations made by some prisoners that when returning to their wings they were made to walk through a gauntlet of prison officers, who struck them with batons.
- Three prisoners were accidentally struck by ricocheting gas projectiles on the square as a consequence of the nature of the action of the projectiles used and the crowding on the square at the time. There was no evidence found of wilful negligence on the part of the prison officer who fired these projectiles.
- The main allegations of assaults involving 18 individual prisoners arose from incidents:
 - a) in the shower area when that area was cleared during the riot by emergency unit officers;
 - b) when C wing was cleared;
 - c) in B wing when prisoners had been secured after the riot;
 - d) in A wing when prisoners had been secured after the riot; and
 - e) when the segregation yards were cleared after the riot had been quelled.

The allegations of assault in the shower area and in B and C wings were not supported by the evidence.

The inquiry, however, found that five prisoners in A wing and one of the prisoners from the segregation yards were subjected to provocative and unnecessary treatment which was contrary to law in that it constituted an assault upon those prisoners which was not authorised by the Prisons (General) Regulation.

One of those prisoners was struck with a baton above his eye splitting the skin to the bone requiring six stitches. The other prisoners had no major injuries.

- The actual quelling of the riot by the emergency unit squads that went in at half strength on 25 April 1990 was carried out with skill and professionalism.

The misconduct by some emergency unit officers occurred after the riot was quelled, mostly during the escorting of prisoners to their cells at meal time. It was believed by most officers that the riot had been started by Aboriginal prisoners and the Assistant Ombudsman did not believe it was therefore a coincidence that the A wing prisoners who complained of being assaulted were all, but one, Aboriginal.

- That a number of prisoners in B wing on the evening of 22 April 1990 were subjected to provocative and unnecessary treatment during the handing out of meals following the riot on that day and two others were subjected to unwarranted and provocative treatment in the course of being strip searched and escorted from the gaol on that night.

The investigation also examined allegations of assault on six other prisoners. Three were involved in incidents during a cell search operation at Parklea Gaol on 24 April 1990 by members of the Immediate Action Team; one was allegedly assaulted on three different occasions, once at the remand centre and twice in the Supreme Court holding cell area by Transport Unit Officers; another prisoner was allegedly assaulted at Parramatta Gaol in February 1990 by gaol officers in the visiting area change room; and the remaining one involved the alleged assault of the remand centre prisoner in April 1990 that prompted the whole inquiry.

In each of these cases, except one of the incidents at the Supreme Court, the Assistant Ombudsman was satisfied that the force used by the prison officers in the course of their duties was not excessive and was authorised under the Prisons (General) Regulation. In the Supreme Court matter, it was found that the prisoner was subjected to unwarranted and unreasonable force which amounted to an assault and was not authorised by the prison regulations.

Other major findings of the inquiry were:

- That in general the use of force by special response unit officers was likely to be under-reported. The Assistant Ombudsman observed that the denials of the use of force by officers involved in some incidents that should have been reported under the Prisons (General) Regulation came as a result of a kind of occupational blindness of the special response unit officers, who appeared to become used to treating prisoners in a mechanical and authoritarian way and become de-sensitised to what ordinary members of the community might consider to be excessive use of force.
- That the general unpreparedness of gaol officers to deal with emergency situations had contributed to a situation whereby the main mechanisms of control in the prison system appear to reside outside the gaols themselves in the form of specialised response units. While the recent disturbances clearly have shown the absolute necessity for officers with the training and skill that the emergency unit officers have, the Assistant Ombudsman formed the view that discipline and good order in prisons was more likely to be managed and maintained if the majority of security and emergency procedures could be reliably implemented by properly trained resident staff. Consequently, he saw a need to expand the role of the special response unit as a training unit with a view to training all officers in emergency procedures, in order to reduce the reliance currently placed on those specialised response units.

The Assistant Ombudsman made a number of recommendations arising out of the inquiry. These included:

- Further enquiries to support criminal prosecution of certain officers and the consideration of disciplinary action against other officers involved in the less serious assaults. (Preliminary disciplinary enquiries were undertaken in relation to some officers under the provision of the Public Sector Management Act and other matters were sent to the Director of Public Prosecution and the Crown Solicitor for

advice. Two officers have been since summonsed on charges of Assault Occasioning Actual Bodily Harm. Three officers have been departmentally charged with a breach of discipline and suspended pending a preliminary enquiry.)

- That two officers be counselled in regard to actions that were considered to be negligent.
- That across the board numbering of helmets used by prison officers in emergency situations be undertaken and a reliable procedure be developed for recording identification of officers attending prison incidents in riot gear and for the identification of emergency squads in riot situations.
- That the tenure in the emergency units be limited for non-supervisory and non-specialist officers to a two year period and three year periods for supervisory and other specialised positions.
- That the emergency procedures training course be reviewed and that a five year plan be developed to train all prison officers in emergency procedures, including individual gaol riot plans.
- That riot plans for each gaol be reviewed to provide for one or more officers to record the disturbances by mobile video cameras and that adequate equipment and training be provided to implement this.
- That senior officers in each gaol be required to attend a training or refresher course each year on riot plans and associated emergency procedures.

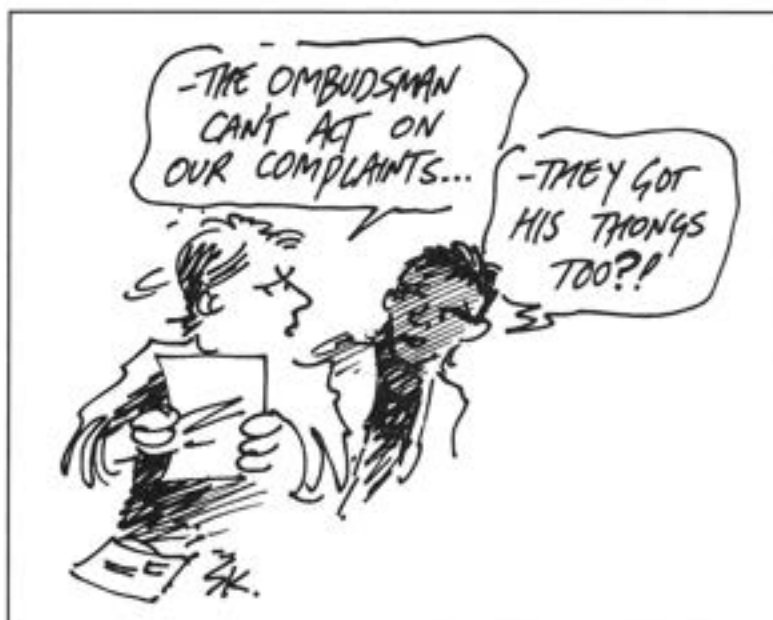
In general, all recommendations were supported by the Director General of the Department and most are in the process of implementation.

Clocks, thongs and wedding rings - the excess property policy

On 9 September 1990 a memo from the Executive Director, Prison Operations, Mr John Horton, was issued to all NSW prisons setting out reductions in the amount and type of private property prisoners could have in their cells.

The consequences of this memo, and the decision making process that preceded it, are still being felt in NSW gaols. The memo set varying property standards for maximum, medium and minimum security institutions. A2 classification prisoners in the reception prison at Long Bay, for instance, were entitled to six personal photographs, two newspapers or books, one pair of shoes or shorts and no sunglasses or cassette player. Prisoners at camps or on work release were entitled to more clothes, photos, electrical appliances and cell decorations.

But it wasn't the property that **was** allowed that contributed to the disturbances that followed in prisons across the state, it was what **was no longer** allowed in most prisoners cells - religious ornaments, posters, electric fans, alarm clocks, thongs and hats. Most of all, perhaps, was the prohibition on jewellery, particularly, wedding rings. On the days set aside to remove this property the tensions in many prisons were pushed to breaking point and beyond.



In response to strong objections from various quarters, the guidelines were later adjusted to allow items like wedding rings, and much later, and only with medical and departmental approval on individual case by case basis, thongs, beanies, doonas, fans and some other items.

The plan to adjust the amount of property available to prisoners, and to reward good behaviour with increased access to particular items, was on the Department of Corrective Services agenda for some time prior to the implementation of the policy. A new policy to that effect had been drawn up by May 1990, but the plan included careful explanation of the policy and gradual introduction from autumn 1991.

In mid August, however, the (then) Minister for Corrective Services, Mr Michael Yabsley, instructed the Director General to confiscate most prisoners private property. Negotiations and consultation then took place within the department and a policy was hastily drawn up for implementation in September. The final policy would appear to have been a compromise between Department of Corrective Services staff and the minister. Mr Horton, in a memo to the Director-General on 7 September 1990, expressed his deep concern about the possible negative consequences for security and prison discipline if the policy was implemented without proper explanation and without proper lead time. By 10 September all superintendents were telling inmates about the new rules. Soon after, the disturbances started.

The Ombudsman's office, not surprisingly, received complaints at a very early stage about the implementation of this policy. The matter also was the subject of a very public debate.

A parliamentarian also lodged a detailed complaint about the legality and the reasonableness of the new policy and the administrative processes associated with its planning and implementation.

The initial complaints could not be acted upon because it appeared that the policy was introduced at the direction of the Minister for Corrective Service.

The complaint from the parliamentarian, however, largely centred on administrative actions of the department which appeared to be within jurisdiction. Preliminary enquiries were conducted principally to determine the jurisdictional issues. They revealed that the planning and implementation of the policy was so interweaved with directions of the minister, that it was not possible to investigate the complaint without investigating, by default, the minister's conduct.

Despite the ramifications of the policy and the unquestioned public interest in the issue, the Ombudsman decided he did not have jurisdiction to investigate the complaint.

Conditions in Cessnock prison

Following the announcement that the new private property policy was to be implemented, serious disruptions broke out in a number of prisons across the state during September 1990. Numerous complaints were received in this office concerning human rights violations during this period. Although the Ombudsman did not have the resources to formally investigate all allegations received, an investigation was conducted into the conditions and amenities at Cessnock Corrective Centre between 10 September 1990 and 25 October 1990.

The disturbance began at Cessnock Corrective Centre on Monday 10 September 1990 following the announcement of the ministerial directive concerning the private property policy. Delegates from the four wings were informed that all inmates would be required to surrender their excess property within one and a half weeks. Following that announcement some inmates in wing A began to smash their property rather than hand it in. The wing delegates told the superintendent that a meeting of all prisoners was being arranged to discuss the policy that afternoon. The superintendent formed the view that such a meeting could lead to a riot. He decided to lock all prisoners in their cells. The lock-in was initially only to be until the next morning, but lasted longer when prisoners began to damage their cells and light fires. The situation was further exacerbated when inmates employed in the kitchen refused to work and all prisoners were placed on dry rations from 11-16 September 1990.

From the time the lock-in commenced many prisoners caused considerable damage to their cells. The tension was fuelled by media reports of riots at Bathurst and Parklea gaols. While most damage was caused during the first week, destruction of property remained an on-going concern. Personal property, furniture, windows, light fittings, heaters and some toilets were destroyed. At times the use of home-made water heaters by some prisoners

tripped the power out in the wing. Clothing, blankets and other flammable materials were set alight and thrown from cells. Overall the superintendent estimated that 50 per cent of the beds, 40 per cent of the lockers, and 10-15 per cent of the tables and chairs were destroyed. Items broken were then used as tools to smash windows and louvres.

The decision to lock prisoners in their cells was taken in response to a perception of imminent disorder, yet many of the prisoners contend they were never given the opportunity to hand in their property. They claimed it was the lock-in that provoked the disturbance.

During the first two weeks of the disturbance, prison officers removed inmates' private property and systematic cell searches were conducted for weapons. The authorities' concerns that there would be a mass disturbance if prisoners were let out were supported by intelligence received from prison informants and interception of prison mail that such a disturbance would happen and that the gaol would be burnt down. The decision to leave prisoners in their cells was in part vindicated by the array of weapons that were found during the cell searches.

The cleaning of debris from the landings and internal yards of each wing also was a priority during the initial weeks of the disturbance. The debris not only created security problems, but constituted an obstacle to free movement around the wings and was beginning to pose a health problem as it was littered with food scraps and, in some cases, human faeces. In all, about 38 trucks of irreparable materials were removed from the prison.

There was no doubt that during the weeks following 10 September 1990 the basic living conditions for most prisoners at Cessnock were appalling, particularly in light of the inclement weather conditions at the time. A significant number of prisoners would have been without blankets and sheets, having used them for fuel to light fires on the landings. Many cells would have been without power in the initial stages and any furniture considered as a potential weapon was removed from cells. Where windows were smashed, prisoners were exposed to cold conditions and rain. Inmates went a number of days without showers, particularly in the initial weeks of the disturbance, and did not receive their minimum exercise entitlement.

During the first two weeks, it was clear that the Cessnock officers had little option other than to leave prisoners secured in cells. Obviously the priorities during this time were securing cells and removing debris, which was labour intensive. The provision of daily showers and minimum exercise entitlements were not possible at that stage. However, following that time the only justification for keeping prisoners locked in their cells was the fear that if they were let out there would be a mass disturbance which would be difficult to control. Notwithstanding this fear, there was no convincing evidence that the provision of opportunities for prisoners to shower and exercise could not have been provided on a more regular basis, at least by the third week of the disturbance.

The gaol did not have in store a sufficient supply of blankets and sheets to replace those destroyed. The power had been restored to all occupied cells within the first three to four weeks of the disturbance. By late October, the superintendent had received further supplies of blankets from government stores and had issued an extra blanket for prisoners to hang over their windows to protect them from rain. Orders had been placed for new windows, although delays of several months were anticipated. Similarly, orders for new beds and lockers were only able to be filled as the gaol's metal workshop returned to normal production. Although not desirable, it seemed that the delays in restoring the cell conditions were unavoidable in the circumstances.

Prior to the disturbance all four wings of Cessnock Correctional Centre were of equal standard and run similarly. Subsequently, D wing was converted into a non-conformist/segregation/reception wing to house the more difficult inmates. Work to upgrade the security of the prison by fitting all cells with metal window grilles and extending the internal security fencing commenced in October 1990. Segregation yards were also constructed in D wing. As a result of the disturbance, the prison was effectively upgraded in its security standards.

The superintendent implemented a system of controlled let out. In A, B and C wings there was a gradual increase in the numbers of inmates permitted to work until full employment was achieved. Eight inmates recommenced employment in the kitchen on 19 September 1990, however, the return to the workshops did not commence until the week beginning 15 October 1990 and then inmates were gradually selected to return to work over the following six weeks. Similarly other entitlements were gradually increased and restored.

D wing, however, was used as a *de facto* segregation facility even though most of the inmates were not under segregation orders, but had been placed there on the basis of oral reports from officers about disruptive behaviour. Given the tension in the gaol it appears that decisions to transfer prisoners into D wing were made with little regard to due process and were often based on hearsay and suspicion. While such precautions are understandable in a period of disturbance, it was a system open to abuse and, in some cases, could have been unfair and unjustified.

When the gaol was inspected in late October the only distinctions between the segregation prisoners and other inmates in D wing was that the latter were receiving an extra hour's exercise. This in effect meant that segregated prisoners were locked in their cells up to 23 hours a day and non segregated prisoners were in their cells up to 22 hours per day. All inmates were classified as non-workers and not entitled to work. On this basis they were denied the unemployed wage, even if they were prepared to work. Phone call and visiting entitlements were more restricted for D wing inmates than other wings. Non segregated prisoners also were confined to segregation yards during exercise periods. Given the number of prisoners, these yards gave minimally more space than a prisoner's cell and were unsatisfactory for such a purpose.

The Assistant Ombudsman found that the treatment of inmates in D wing was clearly discriminatory when compared with the other wings. Among other things, the Assistant Ombudsman recommended that a series of procedures be implemented to ensure that the rights of D wing inmates were safeguarded. These included:

- developing clear guidelines concerning the transfer of inmates to D wing; formulating a program and providing information to all D wing inmates concerning the daily routine, rules and stages of progression; and
- non segregation prisoners be entitled to the same privileges and rights as prisoners in other wings.

All recommendations were implemented by the department.

The initial complaints that led to this investigation also contained allegations that collective punishment was being imposed on prisoners by them being hosed if there was any disturbance. Clearly cells would have been hosed in attempts to extinguish fires on the landings and in the eaves. While there was little evidence to support the claim that collective punishment was imposed, given the number and consistency of the inmates' stories, it was likely that while extinguishing fires some officers did deliberately hose nearby cells.

A number of allegations were also received concerning bashings. It appeared that most of these allegations related to incidents that occurred on the day that emergency unit officers came into D wing to search for a weapon. While a number of prisoners who were not directly involved had graphic accounts of what happened, the prisoners involved generally had more conservative descriptions which amounted to rough handling rather than systematic assaults. None of the prisoners who alleged they were assaulted claimed to have received any injuries. Furthermore, no substantiated reports were made to the medical staff, the psychologists or the chaplains who would normally be told of such occurrences by prisoners. It was not possible to thoroughly investigate those claims. Given the resources of the office, the fact that the Ombudsman's Office was then concluding a major inquiry into the use of force by special response unit staff, the lack of reported injuries and the general discrepancies in the accounts given by the prisoners, it was decided that a separate investigation of these allegations was not warranted.

Because it was a ministerial directive, prison staff at Cessnock had no discretion about whether they would implement the new private property policy. The announcement of that policy, however, resulted in a situation where prison authorities and inmates were polarised in an atmosphere of fear and tension. The decision to lock prisoners in their cells was taken in response to a perception of imminent disorder, yet it was clear that a catch 22 situation developed. The continued lock-in led to the tension that in turn created the fear amongst the officers of letting the prisoners out. Clearly Cessnock Corrective Centre will never be the same. The excess personal property was removed from

prisoners' cells, but the costs were exorbitant. The economic costs involved in replacing damaged property and upgrading the prison security are no doubt considerable, as was the human cost in terms of stress on both prison staff and inmates.

Forensic patients

A simple complaint about the delay in transferring a forensic patient from a prison to a hospital after the Governor signed an order under section 119 of the Mental Health Act, has led to major reforms in the treatment of forensic patients held in prisons.

Following preliminary enquiries, the Ombudsman reformulated the complaint using his own motion powers to examine the classification process applied to forensic patients by the Department of Corrective Services (DCS) and the failure of the Department of Health to prepare suitable accommodation plans for Mr X, both prior to the Mental Health Review Tribunal (MHRT) dealing with his case and Governor's Order-in-Council being made for his transfer.

Under the Mental Health Act 1983, the MHRT is required to review each forensic patient's case at least every six months. It is empowered to make recommendations to the Minister for Health as to a patient's continued detention care or treatment in a hospital prison or other place, the fitness of certain patients to be tried for an offence and the patient's release.

Those forensic patients detained in the custody of DCS are also subject to the internal classification system run by the department.

Mr X's case was similar to a number of other complaints received by the Ombudsman in the past few years from prisoners who were aggrieved that recommendations made by the tribunal were ignored by DCS.

In 1986 a MHRT recommendation that Mr X be transferred from a prison to a hospital was not implemented. In March 1987, it made a similar recommendation and said Mr X should be classified at the lowest security rating C3 by DCS while awaiting transfer and be considered for the minimum security Metropolitan Training Centre.

The Minister for Health approved the MHRT's recommendation and the Governor made an Order-in-Council that Mr X be transferred to a hospital in April that year. It took until October 1987 for the transfer to be effected.

In the meantime, the Program Review Committee of DCS and its Director of Classification rejected this recommendation and Mr X was kept in maximum security until he was eventually transferred.

The investigation revealed a number of deficiencies in the system:

- the Department of Health admitted there was no formal administrative procedure to ensure prompt implementation of MHRT recommendations approved by the Minister for Health;
- the DCS had no formulated policy on liaising with the tribunal and handling their recommendations;
- the quality of the information provided to the MHRT by both departments was found to be poor;
- there was a demarcation problem between the MHRT and the DCS, with the classification assessments undertaken by DCS staff taking precedence over those made by the MHRT; and
- the cautious approach adopted by DCS placed a question mark over the suitability and capacity of the then current classification system to provide adequately for the care and treatment of forensic patients.

The delay in transferring Mr X from a prison to a hospital was a consequence of failures in administration of both departments and findings of unreasonable conduct were made against both the Department of Health and the Department of Corrective Services.

By the time the Ombudsman made his report, the administrative foul ups which characterised Mr X's case were no longer systemic. However, it was obvious that a more coordinated system of reviewing forensic patients' cases was needed to reduce administrative inefficiency and to improve the care and treatment of these mentally ill persons.

The Ombudsman recommended the establishment of a standing liaison committee of officers of the Department of Health and Corrective Services, the MHRT and the Mental Health Advocacy Service. The Ombudsman recommended that the committee develop a mutually agreed set of principles to guide administrators and decision makers when dealing with forensic patients, to develop principles and policy guidelines for the development of programs for forensic patients and to develop criteria for assessing progress in such programs.

These and other recommendations were supported by both departments and their respective ministers. The committee was subsequently established and its inaugural meeting took place in December 1990. The committee considered the report of the Ombudsman and endorsed a number of the principles suggested in his report for dealing with forensic patients, as well as adopting his major recommendations for defining the role of the committee.

A special Program Review Committee has now been established in A Ward at the Long Bay Prison Hospital which will deal initially with all forensic patients coming into the custody of DCS. This committee is to have input from the Prison Medical Service and make recommendations as to classification, placement and program options for each particular case prior to the patient's case being reviewed by the tribunal.

The establishment of the committee and the administrative changes that have flowed from its deliberations should lead to a far more coordinated approach in the treatment of forensic patients held in prisons.

Conditions in assessment prison

The Ombudsman received an anonymous complaint alleging that prisoners had been assaulted during a disturbance at the assessment prison on 25 September 1990. The same complaint was received by members of the media and some politicians. One MP later asked the Ombudsman to investigate the claim. Preliminary enquiries were already on the way when that request was received.

The most serious allegations were that:

- prisoners were made to run a gauntlet of some 60 officers during which at least one in every five prisoners was batoned to the ground leaving many with serious injury, "not the worst being one man's head repeatedly smashed into the brick walls breaking his nose";
- after prisoners were locked in their cells, members of the emergency units came and handcuffed those seeking medical attention and smashed their heads into walls and belted them with batons before saying, "now you do need medical attention"; and
- a particular inmate who had been returned from court was taken by the emergency unit officers from a holding cell to the centre of a wing handcuffed and there bashed until he was unconscious. It was alleged that the officers told the inmates in the wing that they were using him as an example to others to comply with authority.

The Director General of the Department of Corrective Services provided a report prepared by a seconded police officer from the department's Special Investigation Unit. He had gathered incident reports, running sheets of the operation and other documents. He also interviewed some medical staff and the Deputy Superintendent of the Special Response Unit before deciding there was no evidence to support the anonymous allegations.

Gas had been used to control the disturbance that erupted on 25 September 1990. The prisoners were contained in holding yards and later were returned to their cells between two lines of officers. Official reports said this occurred without use of force and after

medical checks were done, several prisoners were taken to a medical station but there were no serious injuries and no complaints made. A number of officers were treated for gas inhalation and other injuries.

The Deputy Medical Director of the Prison Medical Service advised that no inmate suffered any serious injuries as a result of the riot and that none had injuries to the face consistent with the first allegation. Thirteen prisoners had received medical treatment and according to the medical director only two had injuries which may have been caused by physical confrontation. One inmate suffered a bruise to the back and the other a small laceration to the left leg. All the others were treated for ailments relating to the use of tear gas. The nurse who administered medication in the prison that evening indicated she did not witness any assault.

Court and prison documents revealed that the individual who had allegedly been bashed as an example had returned from court two days later and had been transferred from the holding yard at the assessment prison to Goulburn Gaol immediately after reception and had not been returned to the wing at any time. The prisoner had been examined by a nurse on reception at Goulburn and reported that he was in good health and did not receive any medical treatment as a result of having been assaulted. Investigation officers from the Ombudsman's office were dispatched to interview this prisoner about the matter, but he refused to speak with the officers.

Having considered the results of the various preliminary enquiries made by the department and our own investigators, it was decided there was insufficient prima facie evidence of misconduct to warrant resources being allocated to any further investigation. In forming that view, particular regard was made to the following:

- the lack of medical evidence of serious injuries reported to the Prison Medical Service;
- the lack of any other direct complaints to this office concerning the allegations; and
- the refusal of the inmate to discuss the allegations about him with members of our staff and documentation on his transfer which suggested that he could not have been in the wing at the time the alleged assault took place on him.

Maitland Prison

A member of parliament contacted the Ombudsman asking for an urgent investigation following representations from a sister of a prisoner who alleged he had been gassed and beaten by a group of officers at Maitland Gaol. Subsequently, he had been moved to two other gaols before being sent to the high security unit at Goulburn. The Ombudsman was informed that the prisoner still had burn marks on his face and other injuries.

Contact was immediately made with Goulburn Gaol and a request was made for the prisoner to be photographed. This was done and the prisoner was examined by the Director of the Prison Medical Service who happened to be at the gaol at the time. An

initial interview was carried out with the prisoner a few days later and a decision taken to carry out detailed preliminary enquiries. Investigation officers assigned to the case then interviewed the inmate and a fellow prisoner who had been involved in the incident. They later went to Maitland Gaol to locate and interview any inmates who had witnessed the incident. Over a two day period they conducted formal interviews with thirteen witnesses. Four other potential witnesses refused to discuss the matter. The records and reports relating to the incident made by the gaol staff were obtained, as were the medical records of the inmates and three officers who had been treated as a result of the incident.

The inmates had been given access to the showers from the B wing yard at Maitland. An argument developed between prisoner A and the prison officer on duty at the post resulting in an altercation. Prisoner B came to his assistance and another prison officer then became involved. Other prisoners not directly involved in the altercation called encouragement to the inmates involved. A warning shot then was fired by a tower officer, resulting in a number of other prison officers coming to the scene, including members of the northern emergency unit. Tear gas was used by the emergency unit officers to subdue the prisoners and they were both handcuffed and taken to the segregation section of the gaol.

The prisoners claimed that the prison officer had provoked an argument while they were waiting in the yard for the showers. On entering the shower block it was claimed that the officer pushed prisoner A in the back and he retaliated by pushing the prison officer. The prison officer assisted by another officer then took hold of him and a struggle ensued.

It was alleged that unreasonable force was used on the inmates, including that they were sprayed in the face with mace gas after they had been subdued and handcuffed. It was alleged they later were assaulted on a number of occasions after they had been taken to the segregation wing.

Both prisoners were seen by the nurse at Maitland shortly after the incident. It was reported that prisoner A suffered distress from tear gas and a red mark to the left lower rib area. He was medically examined on his arrival at the Long Bay complex the following day, where a small swelling to the ankle, tenderness to the left ribs, a red mark on the wrist and bruising to the left upper arm were noted. When examined by the Director of the Prison Medical Service at Goulburn Gaol two days later no injury to his scalp or ribs was detected although the prisoner complained of tenderness to those areas. A linear bruise on the upper arm that was consistent with the prisoner's claim of being struck with a baton was noted. No other evidence which was consistent with the use of excessive force was noted by the doctor. The bruise to the prisoner's arm was clearly evident in the photograph taken at Goulburn Gaol.

The medical examination of prisoner B shortly after the incident revealed he reaction with wincing and sharp breath intake to palpation of the region around both left and right kidneys, however, no evidence of pain was detected in his sitting or moving from left to right. There was no evidence of blood in the urine and no deformity, swelling or

immobility was detected. The prisoner refused any analgesic as he claimed the pain was not sufficient to warrant such treatment.

The prisoners gave graphic accounts of the assault by the prison officers during the incident at the showers and later in the segregation wing. There was conflict in their evidence, however, as to how the initial fight started.

Prisoner B claimed that prisoner A was punched in the head, whereas prisoner A and other witnesses state he was pushed by an officer. The other witnesses gave conflicting evidence as to what occurred. One inmate in the immediate vicinity stated that a prison officer pushed prisoner A in the chest and he retaliated by punching that officer in the head with a closed fist. The witness stated that the prisoner was sprayed with tear gas during the handcuffing and that prisoner B was not handcuffed at all. The witnesses stated the prison officer who had been hit by prisoner A, later hit him in the face and kicked him while he was being restrained on the ground by emergency unit officers. Other inmates gave variations on that account.

There was conflict among a lot of the witnesses as to how the incident arose and whether or not handcuffs were used, at what stage tear gas was used and whether or not there was any assault on the prisoners. Some prisoners in the segregation section gave evidence that they heard the sounds of persons being assaulted. However, other evidence from inmate witnesses was that nothing unusual occurred in that section at the relevant time.

There was clear conflict in the evidence of witnesses as to what actually took place. However, more prisoners stated that prisoner A and prisoner B were sprayed with tear gas before being handcuffed. Further, the witnesses' estimates of the time in which the struggle in the showers lasted ranged from 30 seconds to 10 minutes. The departmental documents stated the incident lasted for one minute. There was no clear evidence given by a witness to the alleged assaults in the segregation unit.

The injuries suffered by both inmates as set out in the medical records were not consistent with their allegations. They would have had far more visible injuries if their accounts of the incidents were to be accepted. On their own evidence, both inmates engaged in a fight with prison officers and some of their injuries obviously resulted from that, as did the injuries to the officers concerned.

The prisoners were charged with assault offences on the prison officers concerned, which had not been heard at the time the preliminary enquiries were made. In the circumstances the court hearing of those matters was the appropriate place to determine the issues as to who initiated the fight between the inmates and prison officers and the assault allegation. The interest of the Ombudsman's office was in the question of the reasonableness of the use of force to restrain the prisoners. As set out in section 157 of the Prisons (General) Regulation of 1989 a prison officer, "must use no more force than is reasonably necessary in the circumstances".

Although substantial force was used on both prisoners there was clear conflict in the accounts given by the numerous witnesses and there were no eye witnesses to the alleged assaults that occurred in the segregation unit. The evidence of prisoners in that unit was also conflicting. There was also a clear disparity between the extent of force alleged and the visible injuries present on both inmates. These conflicts, considered against the consistency of the reports of the prison officers involved, provided obvious difficulties in establishing that excessive force was used. Those difficulties were of such a magnitude, it was considered there was no utility in carrying out a formal investigation at the time.

Work release at Silverwater

Last year's annual report contained an account of the Ombudsman's own-motion investigation into the administrative procedures involved in supervising work release prisoners.

The investigation confirmed that the program is held in very high regard. However, it also disclosed that the department had not allocated sufficient resources to the program nor had put into place adequate administrative procedures.

At the time of the investigation there were approximately 100 prisoners leaving Silverwater each week to work. There was a regular turnover of prisoners, with an average of fourteen new prisoners entering the program each month.

There were only two field liaison officers to supervise the placement of the 100 prisoners (one in the morning shift and one in the afternoon shift) and to find positions in the workforce for the prisoners coming into the scheme. As a result, prisoners were not supervised sufficiently because of the limited time available from the field liaison officers. Priority had to be given to placing prisoners in employment and to the paperwork that went with it. Security checks on work releases could only be done when everything else was completed.

Further there was no record of supervisory checks, if and when they were done, kept on prisoner's files. There were no procedures in place to record the number of checks made on a prisoner.

Inadequate procedures were identified during the investigation in the system used at Silverwater for handling and banking of prisoners' wages. Many of the prisoners were

being paid in cash and pay packets containing wages varying from \$200 to \$1,500 in notes had to be checked by rostered prison officers on pay day. Pay advice slips were not being checked by the work release administration. In a case study of one of the prisoners on work release, there were insufficient details given regarding the amount of wages calculated and tax had not been deducted.

A draft report on the investigation was forwarded to the Minister for Corrective Services in June 1990 and a consultation between the Minister, Hon M Yabsley, the Ombudsman and Assistant Ombudsman followed.

On 5 November 1990, the final report on the investigation was issued. The Ombudsman made a number of recommendations, including:

- that the Department of Corrective Services allocate sufficient funds to the Work Release Program to enable the full employment of two additional field liaison officers to make possible the adequate supervision of the (then) 100 prisoners currently on work release;
- that the department establish standard procedures for the supervision of work releasees including:
 - random checks of the prisoner's employment and that this be recorded as having been done on the prisoner's file, with commentary;
 - while the number of random checks may vary with the nature of employment and difficulty of placement, a minimum of 26 visits over a period of 52 weeks apply;
 - examination of pay slips be carried out by field liaison officers to ensure proper procedures are being adhered to by the employer and prisoner; and
 - the department require that wages be paid in the form of bank deposit or cheque and that wages in cash be accepted only in exceptional cases, such as where it is a condition of an industrial award covering the position.

In May 1991, the Director General informed the Ombudsman of the actions taken by the department in respect of the recommendations of the report.

With regard to the recommendation that funds be allocated to employ two additional field liaison officers to enable adequate supervision of the approximate 100 prisoners, Mr Angus Graham advised that funds had been allocated for the employment of one full time officer to enable additional supervision.

On face value, this advice, appeared to go half way in complying with the recommendation on adequate supervision. In reality however, it did not do even that.

At the time of writing, the number of prisoners on work release had been increased from 100 to 140. The increase in field officer from two to three, therefore, is relative to the increase in the work release program. It in no way reflected the thrust of the recommendation to increase the capacity of the supervisory field staff to be able to carry out the minimum amount of supervision, (one would expect of prisoners released from the gaol to participate in the general work force).

With regard to the recommendation that a minimum of 26 supervisory checks be made of a prisoner over a period of 52 weeks, Mr Graham said that an initial objective of 12 visits over 12 months had been set because of the level of staffing of field officers.

Regarding the recommendation that pay advice slips be examined by field officers on the work release administrative staff, Mr Graham advised that this would not occur and that uniformed prison officers would continue to examine pay advice slips.

Regarding the method of payment of wages, the Director General raised objections to prisoners being paid by cheque or direct bank deposits, although Mr Graham said he was aware of the dangers of payroll hold-ups by armed robbers with the present system of wages in cash. He said there were worries about the cheques not being honoured.

The Assistant Ombudsman wrote to the Director General informing him of his dissatisfaction with the action taken by the department and sought urgent clarification on the lack of supervision of the prisoners and lack of proper scrutiny and security of wages received and handed in at Silverwater.

Parklea Prison

Following the introduction of the new prisoner's private property policy in September 1990, unrest swept the state's gaols. At Parklea, prisoners protested by destroying gaol and private property over a number of weeks culminating in a full scale riot on 23 September in which over half the gaol's accommodation was rendered unusable. For weeks most of the remaining two bunk cells were shared by at least four prisoners who were locked in 24 hours a day while the clean up got under way.

Over the following weeks there were media reports of alleged assaults at the gaol during the riot. It was not until late November/early December that the Ombudsman received any written complaints from prisoners. During preliminary enquiries, the Ombudsman was presented with statutory declarations and other reports from over twenty prisoners making similar claims.

Given the number of allegations and the media coverage, the Ombudsman decided it was in the public interest that the allegations be formally investigated. Over a quarter of the prisoners who were present during the riot were interviewed over the following months.

Reports were then required from all officers on duty. An inquiry was subsequently held where oral evidence was taken from some 60 custodial and emergency unit officers whose duties during the riot made them subjects of investigation in relation to specific assault allegations and from a number of medical staff and other witnesses.

A report on the investigation is being prepared.

Private prisons

In the last annual report, the Ombudsman outlined his concern that any introduction of privately managed prisons into New South Wales should ensure that the grievance handling procedures be not less than those currently available to prisoners in the state run gaols. This meant unfettered access to the Ombudsman and official visitors.

The Prisons (Contract Management) Amendment Act 1990 received assent on 13 December 1990 and was proclaimed on 25 February 1991. In accordance with the provisions of that Act, prisoners in any prison managed by a corporation will have access to an official visitor who will be appointed by that prison and they may also direct complaints to the Office of the Ombudsman.

The provisions of the Ombudsman Act will apply to the management company and the governor of the prison, including every director or other officer of the management company and any employee of the management company authorised by the Director General to perform custodial duties or in any other capacity prescribed by the regulations. The Freedom of Information Act and Independent Commission Against Corruption Act also will apply to any privately managed gaol.

The government already has announced a preferred tenderer for a new prison to be built at Juncie to house 500 medium security and 100 maximum security prisoners. It is planned to become operational in early 1993.

The Ombudsman is pleased that the rights of prisoners to have access to independent grievance handling bodies will be preserved for those prisoners ultimately transferred into the privately managed gaol. The precise means of effecting access to the Ombudsman will be a matter for future negotiation between the Ombudsman, the Director General and the managing corporation.

The Ombudsman notes with some regret that the accountability of the privately managed gaol will be less than the state run gaols in terms of the coverage of the Freedom of Information Act. The amending act gave the management company the status of a local authority under the Freedom of Information Act, which restricts access to only those documents relating to the personal affairs of a person.

POLICE AREA

Police complaint statistics

The combined total of complaints against police and the Police Service this year was 3232, an increase of 34 per cent. The following table is a comparison of complaint totals, this year with last year.

	1989/90	1990/91
• Complaints under the Police Regulation (Allegations of Misconduct) Act	2329	3129
• Complaints against police dealt with under the Ombudsman Act	51	80
• Complaints dealt with under both Acts	1	-
• Complaints outside jurisdiction	22	23
	2403	3232

The following sections give an overview of police complaint numbers and outcomes for complaints in each area of jurisdiction ie. complaints which involve the conduct of members of the Police Service under the Police Regulation (Allegations of Misconduct) Act and complaints under the Ombudsman Act involving conduct relating to matters of administration.

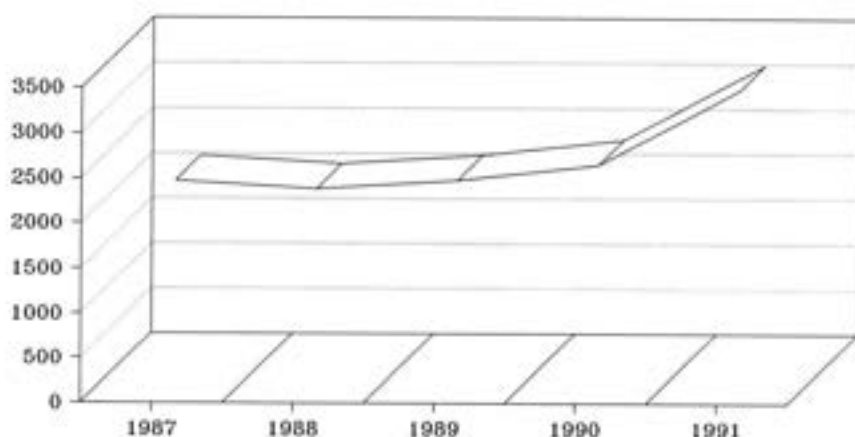
Complaints against police officers (Police Regulation [Allegations of Misconduct] Act, 1978)

Complaints against members of the Police Service totalled 3129 during the year - the highest level of complaints seen.

In terms of volume increase from the previous years total, 1990/91 was the largest increase since 1981/82 when public awareness of police complaints system was greatly increased.

The following chart illustrates the continuing trend for an increase in complaints:

POLICE COMPLAINTS 1987-1991 SHOWING VOLUME INCREASE



2225 complaints in 1987

3232 complaints in 1991

The increase in police complaints has not been particular to any type of misconduct. Complaints have increased across the range of categories with marginally stronger increases in serious matters such as assault and corruption. Anecdotal evidence and statements in letters of complaint suggest that publicity about police conduct has a marked effect on the level of complaints received. Incidents which complainants might otherwise accept, become heightened when there is constant public focus on police misconduct. The past two years have seen spectacular and widely publicised episodes where the NSW Police have come under searching public scrutiny. The inquiries into the death of David Gundy and the Royal Commission into Black Deaths in custody generally; the Harry Blackburn saga; the shooting of Darren Brennan; the raid on Redfern by 135 police including TRG; and the ongoing inquiries by the Independent Commission against Corruption concerning police misconduct including harassment of Eddie Azzopardi by Mt Druitt police, are the more widely known matters. The fact that such matters are opened up for public debate generally encourages confidence in the mechanisms to deal with complaints and appears to have an influence on the increasing numbers.

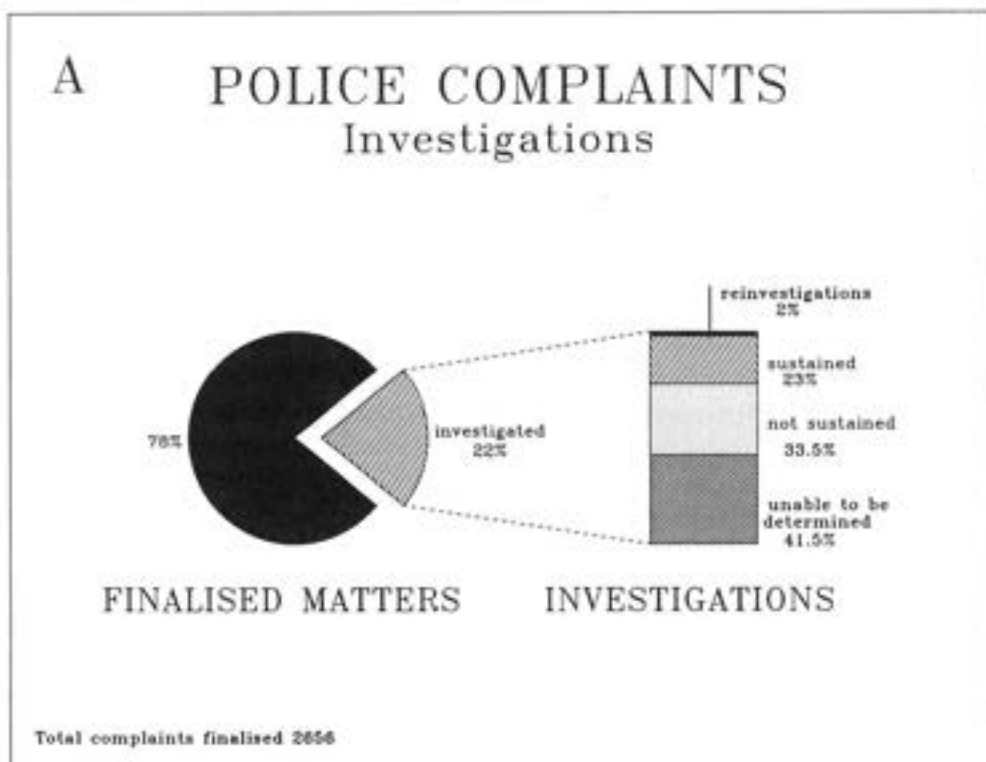
Whatever the reasons, the great increase in complaints against police has not been matched by an increase in the resources available to the Ombudsman. The number of officers available to deal with these complaints has remained static. The minor increases

in the Ombudsman's budget in real terms has not been sufficient to cover inflation on fixed costs.

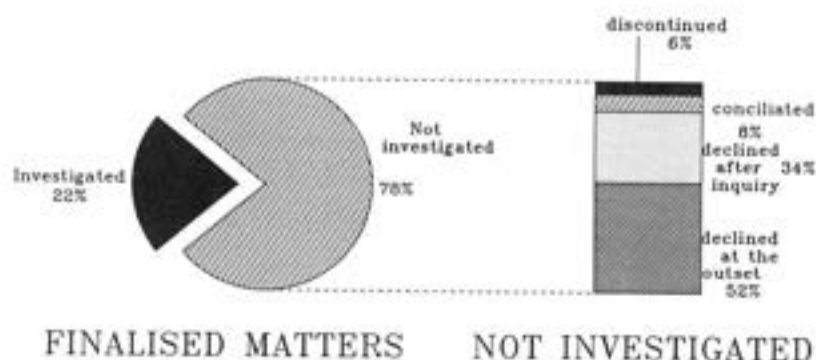
The increase in complaints has been apparent for some time and the Ombudsman has been developing various administrative measures to improve efficiencies across the range of his activities. Although police complaints comprise the largest single area of complaint, the extensive delay by the Government in the process of appointing the Assistant Ombudsman (Police) left the area without the detailed administrative and policy attention that it constantly requires. The position was eventually filled in May 1991 and this has provided a crucial focus for improving procedures and consistent decision making within the office. Although procedural changes are not a complete answer to the growing workload, the Ombudsman is constantly developing and streamlining administrative practices.

The following charts show:

- A. Investigations and outcomes.
- B. Complaints not investigated and cases finalised by means other than investigation.



B POLICE COMPLAINTS Not Investigated



Total complaints finalised 2056

Complaints finalised

The number of complaints investigated this year was 22 per cent of all complaints finalised. The office has continued to apply a close screening policy to new complaints to ensure that investigations of trivial issues do not occur.

Of those complaints not investigated, cases declined at the outset represent 40 per cent of all cases finalised and 32 per cent of cases were finalised through pre-investigation enquiry or successful conciliation. A further 5 per cent of cases were begun as investigations, but discontinued prior to completion. A total of 77 per cent of all cases were finalised by means other than investigation.

Complaints about the Police Service (Ombudsman Act 1974)

New complaints

During the year, 80 complaints against the Police Service involved matters of administration rather than allegations of misconduct against individual members of the Police Service. Such allegations are dealt with under the Ombudsman Act and the relevant statistics are reported below.

Finalised complaints

A total of 77 matters were finalised during the year, leaving three cases under enquiry or investigation.

The following table gives the outcome of cases finalised during the year:

Outcome	Number	% of total
No jurisdiction	23	30%
Declined without any enquiry	13	17%
Declined after preliminary enquiry	30	39%
Resolved after preliminary enquiry	11	14%
No prima facie evidence of conduct described in section 26	-	-
Discontinued	-	-
No adverse finding	-	-
Adverse finding	-	-
	<hr/>	<hr/>
	77	100%

Raid on Redfern

In May this year the Ombudsman published his report on an investigation into Operation Sue, where 135 police, including the Tactical Response Group, raided ten premises in Eveleigh Street, Redfern.

The report found that the intelligence on which the raid was based was pathetically inadequate and, while Redfern's intelligence officer was grossly inexperienced, the senior officers responsible for the raid not only failed to supervise him, but failed to notice that intelligence he provided as a basis for some targets was completely different from information they had given to him as a basis for search.

This was probably the most disturbing factor in the investigation, that such force, potentially deadly, could be implemented without any sound intelligence basis. Inaccurate information was supplied to the justice issuing the warrants, at least one premises was entered without a warrant and serious questions were raised about the legality of the method of executing the warrants by the TRG.

An historical perspective produced by the report showed a series of violent disturbances in the area dating roughly from the death of David Gundy to the time of the raid. Some of these incidents involved injury to police and feeling expressed to the inquiry among local police was that the area was getting out of control. The raid on Eveleigh Street appeared to be a general response to these problems rather than a specifically targeted police operation soundly aimed at particular offenders. While the police response was understandable in human terms, it's professionalism left a lot to be desired.

The Ombudsman's role with police is a monitoring one, he is not in a position to directly supervise operative police on a day to day basis. Where the policing situation involves the tense and difficult area of race relations what is required is a constantly firm and sensitive approach at every level of police contact with the community. The investigation was consequently conducted with a view to getting the police in charge of the operation to recognise what had gone wrong and to ensure it did not happen again.

The report, therefore, concentrated on the conduct of the commanding officers and, although there were strong grounds, did not recommend penalties against junior officers. Unfortunately, the commanding officer refused throughout the investigation to recognise any errors and left the inquiry with the impression that, given the same circumstances, he would do the same thing again. Certainly, this was the primary fear of the Aboriginal complainants.

The response from the Commissioner, Mr Lauer, was much more encouraging. He agreed to adopt all of the Ombudsman's recommendations, including compensation for some of the residents most severely traumatised and counselling of the senior officer involved. He also announced a plan for a Redfern summit, involving major government agencies together with police and community groups which he would put to the Minister of Police and Premier. The Premier has advised that he does not support a summit given the cost involved, but favours the setting up of a task force to address the issues of policing Redfern.

Search warrants

One of the most disturbing features of the investigation into Operation Sue, and it applies to other cases such as the Darren Brennan incident and another report by this office concerning a raid on Glebe House, is that search warrants were obtained based on inadequate and unverified intelligence information supplied by junior and relatively inexperienced police officers. The TRG were then used to execute the warrants using their standard forced entry procedures. Dead-of-night raids employing maximum force occurred when attempting to enter premises when the permission of residents during daylight hours could have been an appropriate response. The Ombudsman considered that a serious situation had emerged given the potentially fatal consequences and trauma to residents arising from forced entries.

The Search Warrants Act 1985 allows a police officer to apply to an authorised justice for a search warrant if the police officer has reasonable grounds for believing there is in or on any premises a thing connected with a particular indictable, firearm or narcotics offence or a thing stolen or unlawfully obtained. An authorised justice is a magistrate or a justice of the peace employed in Local Courts Administration, usually a clerk of a local court.

The Search Warrants Act also states that a police officer may use such force as is necessary for the purpose of entering premises and executing a search warrant. Police decide how they will execute a search warrant including whether the TRG would be utilised. Therefore, a warrant is issued there is no independent control over the method of its execution. The TRG itself makes little assessment of the intelligence and is used more as an operational tool.

The TRG Standard Operating Procedures Manual did not contain any rule or guideline stating which officer was responsible for authorising forcible entry by the group. The police, however, stated in 1989, in response to enquiries by the Ombudsman arising from a forced entry Glebe House, that the referral officer, usually a sergeant at the TRG base, decided whether the TRG would assist in the execution of a search warrant. The Field Commander assisted by the referral officer then decided how many members would be needed. The manual also specified that the referral officer authorised the use of shotguns in an operation.

A police circular that amended Instruction 136, Regional Tactical Response Groups, seemed to modify this regime (no. 90/147, 31 December 1990). Instruction 136.07 provided that it was the responsibility of the team leader to obtain authorisation for proposed operations from the patrol commander. Instruction 136.08 provided that the team leader was also responsible for obtaining authorisation for the use of shotguns in proposed operations from the region commander.

The amendment, implemented after the shooting of Darren Brennan, seemed to represent a shift in procedures requiring more senior members of the police to authorise the use of the TRG and the use of shotguns. There was, however, no corresponding change in the TRG procedures manual. There, was therefore, a period prior to the abolition of the TRG where the procedures contained in the Standard Operating Procedures Manual were inconsistent with Instruction 136. While the instruction circularised no doubt overruled previous procedures, the method of notice leaves cause for concern.

Given the complaints arising from forced entries and after careful consideration of the issues, the Ombudsman, in the Operation Sue report, concluded that a special type of warrant was required to embrace situations where police believed that a forced entry by the TRG was necessary to execute a search warrant. The benefit of such a procedure would be that an independent person would assess the intelligence information and the police officer's reasons for seeking a forced entry and balance these against the trauma

that a resident may suffer. Such a system would also benefit the special response police by ensuring they are not engaged unnecessarily.

Justice Wootten in his report on the death of David Gundy stated:

The incident does fortify my view that police seeking warrants to justify forcible armed entries into the homes of citizens should have to justify their applications to persons of much greater independence and standing than a justice of the peace.

The Ombudsman is of a similar view. Given the serious nature of the decision, it should be made by a judge.

The Ombudsman also expressed some reservations about the legality of the TRG's practice of entering and securing a premises without the search warrant which is in the possession of a back up team. The Search Warrants Act requires a police officer executing a search warrant to produce the warrant if required to do so by an occupier.

In Operation Sue one back up team was late. If an occupier had requested to see the search warrant the TRG would have been unable to comply with the provisions of the Act thus leaving the occupier in doubt as to their authority to enter and search. Furthermore, the Act requires an authorised justice to prepare an occupier's notice and the police officer executing the warrant to serve an occupier with the notice upon entry or "as soon as practicable thereafter". What would constitute "as soon as practicable" in the circumstances of a forced entry is not known. The legality of standard forced entries by special response police is doubtful and the Search Warrants Act does not specifically address the situation. A special warrant for forced entries would remedy these problems.

There have been two recent developments which may have some bearing on this matter. First, the TRG and SWOS have been abolished and replaced by the State Protection Group. The new group is said to operate in a reactive capacity rather than a proactive one and under new procedures which have yet to be formally set down. What reactive and proactive will mean in the context of forced entries and what procedures will be adopted is not known. Presumably, authorisation for the use of the group will come from the police. The Ombudsman's conclusion that a special warrant should be required for forced entries is significant, notwithstanding that the TRG and SWOS have been abolished. There is clearly a need for an independent person, preferably a judge, to decide when special response police should be mobilised for forced entries in the execution of search warrants.

The Ombudsman recommended in the Operation Sue report that the Police Service provide a copy of the report to the Attorney General for consideration regarding the use of search warrants in forced entries by the TRG and whether an amendment to the Search Warrants Act was required. The Ombudsman also recommended compliance with the recommendation within one month of the report being made final (8 May 1991). The Assistant Commissioner (Professional Responsibility), Col Cole, forwarded a letter dated

25 June 1991 informing the Ombudsman that arrangements were in hand for the Legal Services Branch to refer a copy of the report to the Attorney General. He also stated:

Already, a senior member of the Police Service has been part of a committee formed by the Attorney General's Department to examine the issues surrounding search warrants.

The committee Mr Cole refers to, however, was formed well before the report on Operation Sue was made final, as part of the Attorney General's own initiatives to review the Search Warrants Act. The report was forwarded to the Attorney-General by police on 24 July, 1991.

As a result of the Attorney-General's committee, a bill is currently being prepared which will amend the Search Warrants Act. Work on the draft bill took place before the Attorney General's Department received a copy of the Operation Sue report, and the then Attorney General, Mr Dowd, gave assurances on commercial radio station 2GB that the proposed amendments would cure the problems raised in the report. Unfortunately this does not appear to be the case.

The Ombudsman will be watching with interest any amendments to the Search Warrants Act and, specifically, whether they address forced entries by special response police.

Investigation into the events leading to the death of Mr David Gundy

This matter was the subject of comment in last year's annual report (at pp 165 - 167).

Mr David Gundy was shot during an operation by the Special Weapons Operations Squad. He later died of his injuries.

On 2 May 1989, the Ombudsman directed that a complaint by a member of the public about the circumstances leading to the fatal shooting of Mr Gundy should be investigated by the Police Service under the Police Regulation (Allegations of Misconduct) Act.

The history of the investigation of the complaint is outlined in the 1989 Annual Report at pp. 274 - 278 and the 1990 Annual Report at pp. 165 - 167.

The position as at August 1990 was that, although the Ombudsman had received a report by the Commissioner of Police on the Police Service investigation into the complaint, the Ombudsman had decided it would be inappropriate for him to investigate or report on the complaint until the Royal Commission on Aboriginal Deaths in Custody inquired into and reported on Mr Gundy's death.

A further complication was the fact that, on 25 June 1990, the Minister for Police had requested the Police Tribunal under section 45 of the Police Regulation (Allegations of Misconduct) Act to inquire into the functions and management of the Police Service's

Tactical Response Group (TRG) and Special Weapons Operations Squad (SWOS). The tribunal's inquiry had the potential to overlap with any investigation which the Ombudsman might undertake into the circumstances surrounding the shooting of Mr Gundy. (The nature of the tribunal's inquiry is discussed elsewhere in connection with the investigation into the shooting of Mr Darren Brennan by a member of the TRG.)

The Royal Commission's term was extended by the Federal Government to permit the commission to inquire into and report upon Mr Gundy's death. The Royal Commission subsequently conducted an inquiry into Mr Gundy's death. Its report on the matter was made publicly available in April 1991.

The Royal Commission's recommendations were as follows:

- I recommend that compensation be paid to Mrs Doreen Eatts [Mr Gundy's widow] and Bradley Eatts [Mr Gundy's son] for damage to them arising out of the unlawful police raid on the premises at 193 Sydenham Road, Marrickville on 27 April 1989, including the death of David John Gundy. I recommend that appropriate arrangements be made to have this compensation determined and paid without resort to litigation.
- I recommend that appropriate compensation be paid to Marc Valentine and Richard McDonald for the infringement of their rights and any damage they may have suffered as a result of the unlawful police raid on the premises at 193 Sydenham Road, Marrickville on 27 April 1989.
- I recommend that consideration be given to the question whether any criminal or disciplinary proceedings should be taken against any person arising out of the matters dealt with in this report.
- I recommend that this report be forwarded to the Police Tribunal for consideration in the course of its inquiry into SWOS operations.

As regards the Royal Commission's first and second recommendations concerning the payment of compensation, the Ombudsman understands that claims for compensation have been made.

As regards the Royal Commission's third recommendation concerning the possibility of criminal or departmental charges against police officers, the Director of Public Prosecutions announced on 6 May 1991 that, "the facts as found by the Royal Commission do not support the laying of any criminal charges". The State Crown Solicitor's office is still considering the question of departmental charges.

In accordance with the Royal Commission's fourth recommendation in its report, the report was sent to the Police Tribunal's inquiry into the functions and management of the TRG and SWOS. However, on 17 June 1991, the Minister for Police withdrew the tribunal's terms of reference concerning TRG and SWOS.

The Office of the Ombudsman will be reporting on the matter in the near future.

The circumstances surrounding the shooting of Mr Gundy were matters of considerable concern to the Aboriginal community, the general public and the Police Service. It is most unfortunate that, from the outset, the Police Service took an unnecessarily defensive attitude to public criticism about the incident and to the prospect of external review of the matter. In particular, the then Deputy Commissioner, Mr Lauer, adopted and persisted with an extremely narrow interpretation of the nature of the complaint which this office required the Police Service to investigate.

Furthermore, there were serious inadequacies in the conduct of the Police Service's investigation. Superintendent Harding, the police officer who was responsible for investigating the complaint, was given responsibility on the express understanding that the Internal Affairs Branch would supervise his investigation. Yet, when Superintendent Harding failed to prepare the type of report on the investigation which is required by the relevant legislation and police instructions, the Police Service did not take steps to remedy this failure. Mr Lauer simply concluded in his report to this office that the complaint was not sustained. Accordingly, the Police Service failed to provide a report on the investigation which summarises the relevant facts, identifies the crucial issues and reaches appropriate conclusions. The last word can be left to Commissioner J H Wootten who conducted a thorough investigation into the shooting of Mr Gundy:

The absence of a proper written consideration of the matter meant that it was very difficult for this Commission, or the Ombudsman to know what, if anything was considered. As this Commission found, in the absence of a written report, those who are supposed to have held other police accountable can retreat behind a wall of waffle, inability to remember, and unspecified reference to thousands of pages of coronial transcript when they themselves are called to account.

Investigation into the shooting of Mr Darren Brennan

This matter was the subject of comment in last year's annual report (at pp. 167 - 169).

On 17 June 1990, Mr Darren Brennan was shot during an operation by the Tactical Response Group. The Police Service commenced its own investigation into the incident as required by departmental procedure.

Subsequently, the Ombudsman received from the Commissioner of Police a notification of a complaint from a member of the public about the shooting of Mr Brennan. On 22 June 1990, the Ombudsman directed the Commissioner of Police to investigate this complaint under the Police Regulation (Allegations of Misconduct) Act. The Ombudsman agreed that the Police Service's own investigation could also be treated as the investigation for the purposes of the Police Regulation (Allegations of Misconduct) Act provided that it was oversighted by the most senior officer of the Internal Affairs Branch available.

On 25 June 1990, the Minister for Police requested the Police Tribunal to conduct an

inquiry under section 45 of the Act. Broadly speaking, the terms of reference for this inquiry covered two matters:

- matters connected with the sustaining of injury by Mr Brennan; and
- the functions and management of the Tactical Response Group (TRG) and the Special Weapons Operations Squad (SWOS) of the Police Service.

(The full terms of reference for the inquiry are set out in last year's annual report at pp. 168 - 169.)

The Police Service made available to the Police Tribunal, for the purposes of the tribunal's inquiry, copies of all of the material produced during the police investigation into the shooting of Mr Brennan. Accordingly, there was no need for the Ombudsman to provide copies of this same material to the tribunal. However, at the request of the tribunal, the Ombudsman did make available to the tribunal copies of various files in the Office of the Ombudsman which might be of assistance to the tribunal in reporting on its terms of reference concerning the functions and management of the TRG and SWOS. Among these files was that on the investigation into the fatal shooting of Mr David Gundy by a member of SWOS and others concerning complaints of unreasonable use of force by the TRG.

On 22 January 1991, the Commissioner applied to the Ombudsman for consent to a deferral of further investigation of the complaint under the Police Regulation (Allegations of Misconduct) Act until the completion of the Police Tribunal's inquiry. On 11 February 1991, the Ombudsman advised the Commissioner that such an application was misconceived. The Ombudsman's consent to an application for a deferral can only be given pending the conclusion of criminal proceedings which have been instituted and in which the subject of the complaint is, or may be, in issue. In the present matter, there were no such criminal proceedings and, in particular, the Police Tribunal's inquiry did not constitute such proceedings. Accordingly, the Ombudsman could not consent to the Commissioner's application. However, the Ombudsman did advise the Commissioner:

Nevertheless, having regard to the unusual nature of the inquiry by the Police Tribunal and the fact that the inquiry is to canvass issues which are of obvious significance to the investigation of the present complaint, I am prepared to await the supply of your report on the complaint under s.24 of the Act until after the Police Tribunal reports on its first terms of reference concerning the circumstances surrounding the shooting of Mr Brennan.

On 17 April 1991, the Police Tribunal's report on its first terms of reference was released by the government. (On 17 June 1991, the Minister for Police withdrew the tribunal's second terms of reference at the request of the tribunal, presumably in light of the imminent introduction on 23 June 1991 of the Police Service's State Protection Group. The establishment of this group saw the abolition of the TRG and SWOS).

As at the date of writing, the Commissioner had not yet provided his report on the investigation of the complaint.

Use of the power of arrest

For some time the Ombudsman has been concerned with the inappropriate use of the power of arrest. It is not only his view, but is clear in current police instructions, that arrest should only be used where the issue of a summons would be ineffective in the circumstances. Arrest is seen as an additional penalty; and depriving a person of his or her liberty can only be justified by weighty considerations of public order and safety.



For these reasons the Ombudsman recommended, in 1984, that the police rules be amended, firstly, to reflect the criteria recommended by the Australian Law Reform Commission for the exercise of that power and, secondly, that an offence may be regarded as minor notwithstanding that it carries as a maximum penalty a sentence of imprisonment. Despite agreement from the Minister for Police that the issue was important, the Commissioner of Police refused to support this recommendation until 1987, when the preferential treatment of a high profile offender came under public scrutiny. The Commissioner of Police conceded that in matters of stealing from retail stores, the Ombudsman's argument had some merit. He informed the Ombudsman that in such matters, specific instructions would be given to police officers to obtain particulars at the scene and to proceed by way of summons, except where the police officer concerned had

reasonable grounds for believing that a summons would be inadequate to ensure that the alleged offender appeared before the Court.

Whilst this was a step forward, the action taken was still inadequate. This year, once again, the Ombudsman produced a report which demonstrated the continuing unreasonable use of the arrest power.

In November 1987 Mr B's two sons were assaulted by Mr A, a neighbour. The boys had been throwing things at each other and Mr A feared damage to property. The boys aged 12 and 14 went home crying and told their father, Mr B. Mr B went to Mr A's house and questioned him about the assault and punched him. Mr A called the police and said that he feared Mr B would strike again. Two police officers found Mr B talking to his neighbour near his house. He readily admitted the offence and the circumstances. Constable W decided that Mr B should be arrested and charged with assault because of the seriousness of the offence. They also arrested Mr A and charged him with assault. The offence against Mr A was found proved, but dismissed. Mr B applied unsuccessfully to have the charge withdrawn. He eventually pleaded guilty and was fined \$200.

Constable W argued that the seriousness of the offence was sufficient to justify the use of the arrest power. The Ombudsman believes that where there is a chance of an offence being repeated if the offender is not taken into custody, it would be reasonable to arrest the offender but, in the absence of such circumstances seriousness alone ought not to be determinative otherwise the decision to arrest amounts to an additional penalty. The imposition of penalties is the exclusive jurisdiction of the courts.

In 1975 the Australian Law Reform Commission suggested four criteria for considering whether proceeding by means of arrest might be justified:

1. The need to ensure the appearance of the offender before the Court. The balance between the defendants' temptation to avoid court against his or her community ties or other reasons for appearing, would all be relevant here.
2. The need to prevent the continuation or repetition of the offence.
3. To preserve evidence of or relating to the offence which would or might be lost if a summons was issued.
4. For the protection of the offender.

In response to a discussion paper issued by the NSW Law Reform Commission in May 1987 the Police Service went on record as saying:

Arrest should only be resorted to where other processes will not or cannot reasonably be expected to ensure attendance of a suspected offender at court or appropriately deal with the matter other than by court attendance.

The department suggested court attendance notices and self enforcing infringement notices as alternatives to arrest, except where:

1. a suspect refuses to give his or her name and place of abode;
2. the name and address cannot be satisfactorily verified;
3. there is a continuing offence or danger of a continuing offence;
4. there are grounds to believe that use of citation or summons will not achieve attendance of the suspect; or
5. there are reasonable grounds for believing that arrest is necessary to prevent the suspect:
 - interfering with the course of justice
 - causing physical harm to himself or some other person
 - causing loss or damage to property
 - causing obstruction to persons or traffic
 - committing an offence against public decency.

The evidence in Mr B's case demonstrated that it is police practice to arrest offenders much more readily than would be justified. The Ombudsman found that Mr B's arrest was unreasonable, but that Constable W had acted in accordance with police instructions. It was on the basis that the police practice was wrong that the complaint was sustained.

The Ombudsman recommended, amongst other things, that:

- there be amendments to the law to allow the issue by police of on-the-spot summonses;
- the cumbersome procedures relating to the issue of summonses in cases like this be revoked;
- the criterion of seriousness be removed from circular 87/133 and the remaining criteria be incorporated in the police instructions; and
- police training and on-the-job lectures be amended to include reference to the appropriate criteria.

The Ombudsman presently is investigating three other matters where there appears to have been an inappropriate use of the arrest power.

One matter concerned a breach of a minor traffic regulation. A senior sergeant arrested the complainant for not having his headlights illuminated at night. The complainant claims his vehicle developed a defect while driving. He was taken to Dee Why Police Station and charged. The charge was dealt with at Manly Local Court and found proved but dismissed.

In another matter during the issue of a traffic infringement notice a complainant was arrested for an offensive manner. He was also charged with assaulting police and resist arrest. A passerby who tried to help him was also arrested for hindering police in the execution of their duty. The initial offence was minor and it may be that the decision to arrest brought about the further charges. The District Court dismissed the charges against the complainant.

In 1990 the Police Service set up a committee to review the use of the arrest power.

On 17 September 1990, Assistant Commissioner (Professional Responsibility) Cole informed the Deputy Ombudsman that a working party was looking at alternatives to arrest and that a white paper was due later that month. He also said one of the options being considered was a system involving the issue of infringement notices.

On 26 November 1990 Mr Cole informed the Deputy Ombudsman that a paper dealing with the expansion of the infringement notice system was ready to be presented to the state executive group for discussion, but added that it did not canvass the use of the Court Attendance Notice. Mr Cole said this issue would be investigated by a special research officer appointed for that purpose. At the most recent meeting held on 23 July 1990 the Assistant Ombudsman (Police) was informed that the white paper was not yet available.

Clearly it is no simple task to instigate changes to the way police carry out their work. The Ombudsman continues to view this issue with the utmost concern and is keen to see his recommendations adopted and implemented.

Strip searches by police

The question of the legality and reasonableness of strip searches by police was the subject of the following comment in the Ombudsman's 1989 annual report:

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 complaints about strip-searches by police were discussed in the 1989 annual report in order to demonstrate the difficulties referred to above. As mentioned in the 1989 annual report, one of these complaints resulted in a report by the Ombudsman in January 1989 which contained the following recommendations:

- that the Police Service devise guidelines for its officers on the conduct of searches. Particular regard should be paid to the sex and age of the suspect in determining the manner and location of such searches; and
- that the Police Service obtain legal advice on the extent of the power to search.

The other complaint discussed in the 1989 annual report had not been the subject of a report by the Ombudsman at that time. The Ombudsman made a report on the complaint in February 1990. He found that the two police officers who had strip searched the complainant, although acting legally, had acted unreasonably in conducting the strip-search in a public place. The Ombudsman recommended:

- the Commissioner of Police seek independent legal advice on the meaning of the word search in s.37 of the Drug (Misuse and Trafficking) Act to determine whether police have power to conduct strip searches in public places, pursuant to that provision;
- the Police Commissioner approach the Minister for Police to seek amendments to the Drug (Misuse and Trafficking) Act, the Poisons Act, the Crimes Act and any other legislation which contains provisions empowering police, without arrest, to stop and search persons, which will define and clarify the circumstances in which persons may be strip searched by police; and
- that the Commissioner issue an interim instruction to police that strip searches of any persons stopped and searched are to take place in police stations or, where this is impracticable, preferably a van, out of the sight of the public.

The Police Service had created a departmental working group to draft police instructions on the general subject of care, control and safety of persons in police custody. It was this working group which considered the Ombudsman's recommendations of January 1989 with respect to strip searches.

In August 1989, the Police Service advised the Ombudsman that, "the matter is taking longer than anticipated". In December 1989, the Ombudsman requested advice from the Commissioner as to the progress of the working party.

In February 1990, as noted above, the Ombudsman made further recommendations on the subject of strip searches. At this time, the Police Service advised the Ombudsman that the working party would finalise the police instructions within a few months.

By May 1990, the Ombudsman had received no further advice from the Police Service about the matter. He wrote to the Commissioner to say that he was most concerned at the lack of instructions and clear guidelines to police in this area.

In July 1990, the Police Service advised the Ombudsman as follows:

I wish to advise that a departmental working committee ... has completed Police Instruction No 32 - Care, Control and Safety of Persons in Police Custody. The Police Instruction has been approved to issue ... The Police Instruction is supported by a Police Custody Manual and Education Package.

Police Instruction No 32.05 and No 32.06 specifically deal with the personal search and strip search of prisoners, respectively. Unfortunately, due to the mammoth task involved, the departmental working committee has not completed instructions to police concerning the searching of an accused person before arrest, taking into account the complaints mentioned above [i.e. including the complaints which had resulted in the Ombudsman's recommendations of January 1989 and February 1990]. However, in accordance with your recommendation ... independent legal advice on the meaning of the word 'search' in Section 37 of the Drug (Misuse and Trafficking) Act has been referred to the Attorney General for advice from the Crown Solicitor.

On receipt of advice from the Crown Solicitor, the departmental working party will be reconvened to urgently consider the position relating to the preparation of instructions to police concerning the searching of suspects prior to arrest, or whether such action should be deferred pending the introduction of legislation which would clearly define the powers of police to stop and search persons in a public place on reasonable suspicion. As you are aware, this may impact upon the existing provisions of the Drug (Misuse and Trafficking) Act, the Crimes Act, the Poisons Act and any other legislation which currently empowers police to stop and search persons on reasonable suspicion.

I will contact you again as soon as I have received advice from the Crown Solicitor.

Instruction 32.06, as the Police Service noted, is, strictly speaking, concerned with the strip searching of people who have been arrested rather than those stopped under stop, search and detain provisions. The instruction included the following:

There will be occasions in policing when all the circumstances of a particular case will demand a search of the physical person, including the surface of the body of a prisoner (strip search). This may involve the removal of any or all clothing at the point of arrest, subsequent to arrest.

It is considered that these occasions will be rare and will only occur after reasonable grounds establish the need for such search. A prisoner shall not be strip-searched unless the seriousness and urgency of the circumstances require and justify a more intrusive search of the surface of the body. A prisoner shall not be strip-searched, unless that person knows in substance the reason why it is being imposed. ... AN IMMEDIATE STRIP SEARCH AT THE POINT OF ARREST WILL ONLY OCCUR AFTER REASONABLE GROUNDS ESTABLISH THE NEED FOR SUCH URGENCY.

The shedding of clothes involves an invasion of the modesty or dignity of the prisoner concerned. Police shall evaluate all the individual circumstances of the case and consider the apparent or known disposition of the prisoner ... The actual

strip search is to be away from the public view and where the circumstances permit, inside an enclosed area and in such a manner as not to subject the person to any unnecessary embarrassment or degrading treatment and in a place where such search can be carried out under close security. ... STRIP SEARCHES BY PERSONS OF THE OPPOSITE SEX WILL ONLY BE CONDUCTED IN EXTREME AND URGENT CIRCUMSTANCES.

It is emphasised that police must display a professional approach at all times and be thoroughly conversant with the law of searching, and in particular strip-searching, before they take such action which may be subject to criticism or complaint at a later date.

Accordingly, it was well over a year after the Ombudsman's recommendations of 1989 that the Police Service produced instructions to its officers on the subject of strip searches, and, even then, only in relation to strip searches of persons arrested and not specifically in relation to persons stopped and searched under stop, search and detain provisions. While the instructions may have given some guidance to police officers on the question of strip searching people stopped under stop, search and detain provisions, those instructions did not and could not deal comprehensively with the problem.

In September 1990, at one of his monthly meetings with the Police Service, the Ombudsman raised the question of the possibility of an interim instruction to police of the type referred to in the Ombudsman's recommendation of February 1990. The Assistant Commissioner (Professional Responsibility) noted that there was a question as to whether stop, search and detain provisions authorised a police officer to take a person to a police station for the purposes of a strip search and that there was a problem in issuing an instruction which was based upon an assumption that there was such authority. The Ombudsman agreed to defer the matter in the light of those issues and wait for the receipt of the legal advice sought by the Police Service from the Crown Solicitor's office.

In February 1991, the Police Service sent the Ombudsman copies of two advisings from the Crown Solicitor's Office. These advisings had been obtained by the Attorney General at the request of the Minister for Police.

The first advising, dated 20 September 1990, included the following:

You seek my advice as to the meaning of the word search contained in section 37 of the [Drug (Misuse and Trafficking)] Act and in particular, as to whether police have the power to conduct strip-searches in public places.

The Act contains no definition of search and no express limitations on the nature and extent of the search allowed or the place such a search may be carried out. ... I have found no direct authority which clarifies the meaning of search in s.37(4)(a).

... [S]earch in its ordinary meaning includes the removal of garments.

While that meaning would seem appropriate in the context of a power to locate prohibited drugs and plants and the common law seems to imply a power to remove

clothes in order for a police officer to conduct a body search of a person lawfully in custody ... a number of considerations suggest there may be limitations in the case of the power in s.37(4)(a).

Firstly, s.37(4)(a) indicates that the power to search arise in connection with the stopping of a person, ie, the person is not in lawful custody and may be in a public place and not in, say, a police station. That may suggest perhaps that only the removal of garments necessary to confirm possession or control of the specified items is intended.

Secondly, it is not clear that s.37(4)(a) would permit a search of body cavities and, if that is the case, it suggests the circumstances in which it would be necessary to remove garments would be limited.

Thirdly, a court would be anxious to construe s.37(4)(a) in a way which is consistent with civil liberties and considerations of privacy.

It is likely that a police officer's right to search pursuant to s.37(4)(a) must be exercised with due regard to the dignity and rights to privacy and in proportion to the necessities of each individual set of circumstances with which those officers are confronted. ... It is hard to imagine a situation where it would be necessary after stopping a person in a public place to remove all of that person's clothing in order to conduct a search for possession or control of a prohibited plant or prohibited drug. Where garments need to be removed, presumably they can be removed systematically and replaced one at a time behind some screen from public view. I have some reluctance to suggest that where garments need to be removed a person should be taken any significant distance from the location where the person was stopped as the power to detain may not extend that far. It is not quite clear what purpose that power serves. ... It may only be exercisable after search, but that is not necessarily so. It would be unwise to assume other than that it may only be exercised for a brief period and is connected with the stopping of a person.

I have already contemplated that a search pursuant to s.37(4)(a) may take place in a public place. The provision itself contemplates a search upon stopping a person and a person would obviously have to be stopped in a public place. The manner of conducting that search would, however, have to have regard to the considerations discussed above.

The second advising, dated 23 October 1990, included the following:

You now seek my further advice as to the following:

- (a) whether an argument can be mounted that had Parliament intended the power to search ... to include strip searches, it would have used the word examination (as used in s.353A of the Crimes Act 1900) instead of, or as well as, the word search; and
- (b) whether an argument can be mounted that there is little connection between the common law power to search persons in custody and the power to search conferred by s.37 of the ... Act and, if there is a difference, the powers under s.37 should be more restricted.

As to (a):

... the power to examine in s.353A(2) is likely to extend to a search of body cavities and to an examination of the body in order to determine whether a person's physical characteristics and state can provide evidence of a crime or an offence. The power to search conferred by sub-section (1) of s.353A presumably does not include the power to do those things which may only be done pursuant to the power to examine under sub-section (2). ... [I]t could be argued that the power to search contained in s.37 ... may not also include the power to conduct body cavity searches or other physical examinations... If that is so, ... it may, in turn, indicate some limit on the extent to which clothes may be removed in order to conduct a search pursuant to s.37. I do not think, however, that the failure to use the word examine in s.37 necessarily means that the word search in s.37 does not include the power to remove garments. The word examine as used in s.353A appears to be more concerned to denote the type of investigation which may be carried out rather than the extent to which clothes may be removed to enable that to occur...

As to (b):

... It does not follow that, because the power conferred by s.37 of the Act may be different in some respects to the common law power which permits removal of garments, such removal of garments is not permitted pursuant to s.37 of the Act...

Having received these advisings, the Police Service stated:

Consideration will now be given to the question of appropriate amendment of the relevant legislation and/or police instructions.

In May 1990, the Police Service advised the Ombudsman:

I refer to the advisings provided by the Crown Solicitor.

... The Crown Solicitor has confirmed the powers available to police and, accordingly, it is not considered necessary to seek amendments to [the Drug (Misuse and Trafficking) Act] or other similar legislation.

At the same time, the Crown Solicitor had suggested that certain considerations should be taken into account in relation to the manner in which police may conduct a search. While these aspects were already mentioned in Police Instruction 32, the opportunity has been taken to revise the relevant points of the instruction.

As mentioned in earlier correspondence, the preparation of instructions concerning the searching of suspects had not been completed when Instruction 32 was issued last year. This aspect has now been addressed in the light of the Crown Solicitor's advice, together with the inclusion of definitions of search based on the Customs (Detention and Search) Act 1990.

A draft circular has been submitted for consideration but, given the sensitive nature of the various issues, it will need to be examined by the Programme Co-ordinator, Judicious Use of Police Force, Authority and Power. This will be a priority task.

I will forward a copy of the circular as soon as possible.

In June 1991, the Police Service sent the Ombudsman a copy of the circular about strip searches. The circular includes reference to the following revised police instructions:

32.01 PERSONS IN POLICE CUSTODY

The term suspect, when used in this Instruction, will refer to any person detained for the purpose of search in terms of the Crimes Act, the Drug Misuse and Trafficking Act and the Search Warrants Act.

32.05 SEARCHING SUSPECTS OR PRISONERS

The following terms and definitions have been adopted for the purpose of clarifying the nature and extent of searches by police:-

- (a) Frisk search means a quick search of a person by the rapid and methodical running of hands over the person's outer garments; and an examination of anything worn by the person that can be conveniently removed and is voluntarily removed by the person.
- (b) Strip search means a search of the body of, and anything worn by, a person but does not include an internal examination of the person's body.
- (c) Internal search means an examination (including an internal examination) of the person's body. The requirements in relation to a search of the cavities of the body is contained in Instruction 10.

32.06 STRIP SEARCHES - OFFICER SAFETY/LOSS OF EVIDENCE

(b) SUSPECTS

Police should appreciate that the power to search and seize has great destructive potential in relation to the right to privacy and civil liberties generally. No person is to be strip searched in the absence of an arrest, unless there are clear grounds for reasonable suspicion in terms of the relevant legislation.

There will be rare occasions when the circumstances of a situation demand immediate action, but the exercise of the relevant statutory power must be capable of justification. Police will be expected to account for their actions regarding the execution of a strip search of a person who has not been arrested. A record of the incident must be made in the officer's official notebook.

Within the limitations of the existing legislation, the actual strip search should be conducted away from public view, preferably in an enclosed area. Where a search is required in a public place, police should consider the removal only of such garments as may be necessary to confirm possession or control of the specified evidence or thing. The conduct of the strip search should not subject the person to any unnecessary embarrassment or degrading treatment. During the search, the

individual should not be exposed to any other person, especially of the opposite sex. Police can seize only what is 'upon' the body. Police will not conduct a search of the cavities of the body....

Special regard shall be given to the disposition of the person in relation to age, ethnic background, knowledge of English, intellectual capacity, and physical and mental disabilities. ... The search should not be carried out unless the person knows in substance the reason why it is being imposed.

Strip searches of suspects should be conducted by a police officer of the same sex and, where possible, in the presence of another police officer or independent person of the same sex. **A POLICE OFFICER WILL NOT CONDUCT A STRIP SEARCH OF A SUSPECT OF THE OPPOSITE SEX, EXCEPT IN THE MOST EXTREME CIRCUMSTANCES.** In this case, the incident must be recorded on the occurrence pad as well as in the officer's official notebook.

Sexual harassment

On 10 June 1991 the Commissioner of Police issued a circular, which stated, in part:

Due to the increase in the number and seriousness of complaints of sex based harassment coming to my notice, a review of the procedures for the handling of such complaints was directed. That review is now complete and I have approved a Sex Based Harassment Policy and Procedures document.

Sex based harassment represents an unacceptable standard of conduct for members of the NSW Police Service. Such behaviour is in breach of the Statement of Values as it raises serious concerns as to the integrity of the perpetrator.

The Commissioner's concern may be particularly intense in view of the fact that the March 1990 EEO survey of the NSW Public Service revealed that 41 per cent of policewomen surveyed had experienced sexual harassment during the survey period and 16.4 per cent of civilians within the (then) Police Department had been harassed. (This compares with a figure of 10 per cent across the public service). Of course, such a figure does not include those female members of the public who encounter sexual comments, innuendo or overtures from police supposedly in the course of their professional policing duties.

The deleterious effects of allowing such harassment to continue in terms of lost productivity, low morale and detriment to the image of the Police Service, cannot be underestimated.

It is readily acknowledged by this office that such matters can be extremely difficult to investigate. The victim of such harassment, whether in a suburban police station, a police van or on the streets, may be reluctant to report harassment and may fear reprisals from colleagues where such behaviour comes from a male superior or colleague. Often, they will have put up with many instances of harassing behaviour before the ultimate incident occurs, which causes them to make a report. Pressure from colleagues in the form of jokes or threats also may make complainants reluctant to pursue complaints.

The difficulties inherent in investigating such complaints are compounded if undue delay occurs between the time of the report and any action being taken.

A survey of complaints from female police and members of the public about sexual harassment by police was notified to the Ombudsman. It revealed an inconsistent approach by the Police Service in investigating such complaints. Some complaints, particularly over the past year and particularly in some regions, have been dealt with swiftly. Investigative resources have been applied intensively and, within days of the incident, all witnesses have been interviewed and a clear result obtained. Such an outcome is clearly in the interests of all concerned and promotes the good management of the service. In other cases surveyed, however, months elapse between the report and the first interview. Other witnesses are interviewed over further months. Identification parades are conducted later still. Not surprisingly, the matter grinds to a halt in a morass of half remembered events, contradictory statements and witnesses who cannot recall the elementary facts.

While other issues of internal police discipline, particularly those involving missing property or money, appear to be investigated with thoroughness and alacrity, unless the appropriate managerial will is present sexual harassment issues can all too easily disappear into a dark forest of ambiguities and delays, emerging blinking into the harsh light of day when the possibility of a positive outcome has disappeared.

The concerns outlined above may be illustrated by a profile of complaints against one particular officer which have been received by this office. It should be noted at the outset that not all the complaints which are to be discussed have been sustained against this officer; the purpose of this discussion is to address broader issues about the manner in which different sorts of complaints about the same officer were investigated and, thereby, illustrate some of the inconsistencies which can occur.

The first sexual harassment complaint received about Constable X was notified to this office in April 1989. A female officer complained that while on duty during March, a police officer had approached her, made suggestive comments and run his hands up her inner thigh.

Over the next few weeks, other witnesses were interviewed in this matter and other female officers reported suggestive comments from a policeman of broadly similar appearance on the same day. Constable X was interviewed over two months after the alleged events and, it was not until some four months after the complaint, that an identification parade was conducted.

The police investigator provided some reasons for the delay in arranging the identification parade, some of which the Ombudsman accepted as cogent; there was a difficulty in locating the requisite number of police for the parade who shared some of the physical peculiarities of Constable X. However, the matter was also delayed for less convincing

reasons; delays in allocating the investigation and the absence on leave of a witness whose evidence was, at best, tangential to the case at hand.

The female officer concerned made various comments about the intimidating nature of the identification parade process itself. On television police dramas, such parades are conducted in privacy and security in separate rooms via one way mirrors; in the real world, the complainant (as is apparently standard procedure) was required to enter a room full of men broadly similar in appearance to her assailant, to pass before them almost at arm's length and to make an identification to the sergeant conducting the parade while in the room.



She stated she was too intimidated to identify her assailant in the circumstances, but said that she had "informally" identified Constable X as her assailant after the parade. Some witnesses support the fact that she made this informal identification, but it has been accepted by this office that this late identification was of no use for evidentiary purposes.

For whatever reason, the complainant failed to make a formal identification. All the circumstances surrounding the identification parade are contentious and will now never be resolved.

Ultimately the Ombudsman determined that the conflict of evidence was such that he was unable to be satisfied where the truth lay, particularly in view of the confusion in the complainant's evidence and the passage of time. Under the provisions of the Act, this matter was therefore deemed to be not sustained.

The next complaint concerning Constable X was received in February 1990.

Ms F, a social worker, attended an inner city men's home in early November 1989 with a colleague to assist in taking a disturbed client to a psychiatric hospital. Two police were also in attendance, Constable X and a more junior officer.

The evidence of Ms F and her colleague in a complaint lodged a few days later was that from the first meeting, Constable X appeared excited and agitated, making inappropriate jokes and flirtatious comments. His behaviour deteriorated, as he invited Ms F to climb into the back of the van with him (in lieu of the patient), pulled her up against him and invited her out to lunch.

According to Ms F and her colleague, Constable X continued with sexually suggestive remarks as the police van (containing the psychiatric patient) and the car containing the two social workers drove through traffic to the hospital. He would stop next to the car at traffic lights and mouth suggestive comments, jocular proposals of marriage and the like. This continued, says Ms F, at the hospital.

Constable X was not questioned about this matter until more than four months after the complaint was lodged. Even more remarkably, the complainant herself was never questioned again, the investigator relying alone upon her initial statement.

When Constable X was eventually questioned, he denied the physical overtures, but basically admitted at least to the remarks complained of, saying that he had been trying to "alleviate a potentially volatile situation". He said that there was nothing "sexual" in his remarks and that they should have been interpreted as "apparently poorly chosen humour", adding:

when we were at the academy... we were told that we would need to maintain our sense of humour or go mad.

An independent witness at the original encounter mentioned that Ms F seemed to be nervous and apprehensive on this occasion. Constable X attributed this to her inexperience. The Ombudsman, in his report on this issue stated,

it seems at least as likely that any tension was caused by the inappropriate and eccentric behaviour of [Constable X]. While it may be to [Constable X's] credit that he freely admitted making many of the remarks complained of, I find his apparent lack of comprehension as to the effect of those remarks and their inappropriateness to be a matter of concern.

In finding the complaint sustained, the Ombudsman recommended that Constable X should be paraded, reprimanded and placed under strict supervision for twelve months

with a view to determining his suitability for positions involving stressful situations or unsupervised dealings with the public.

The Commissioner advised that he had complied with these recommendations.

However the last had not been heard from Constable X. On 3 August 1990, the Ombudsman received a late notification of a complaint about a faulty investigation by Constable X of a motor vehicle accident on 19 February 1989 involving a police car and two police officers, a male officer who was driving and a female probationary constable. The allegation was that Constable X had failed to record relevant material, had not explored inconsistencies in the account of the driver and had failed to get the evidence of the female officer before submitting his report.

Internal inquiries were initiated in this matter with incredible speed; Constable X was required to submit a report about this matter three days after the incident occurred.

At the time of writing, legal advice had been received that evidence was insufficient to establish departmental proceedings but advice had been received that he was to be "paraded... and reminded of his responsibilities when investigating motor vehicle accidents".

The importance accorded to matters connected with the internal combustion engine was brought home with still greater force when the next complaint about Constable X was received on 12 November 1990.

The allegation this time was that on 4 November 1990 the Constable had appropriated petrol from a departmental bowser into his private car. The complaint, by a fellow officer, was made on 5 November. Statements were taken from three other witnesses that very day; photographs were taken of the bowser in question, with its possibly incriminating meter reading, and a detective from the physical evidence section also examined the bowser that same day. Three days later, Constable X was questioned and made certain admissions. By 7 February 1991, the report of the investigator was with this office and by May 1991 two departmental charges had been laid against Constable X, to which he pleaded guilty. The question of penalty is still under consideration.

While investigators swarmed over the violated petrol bowser outside the police station, a much more cautious, frugal and considered investigation was being undertaken of events within the same police station; another accusation of sexual harassment against Constable X. This time the matter involved allegations by clerical staff and allegedly the harassment of two police women.

The notification of harassment was made on 16 August 1990 and, apart from routine advice of progress, little was heard of the matter by this office until the receipt of the investigation report on 20 February 1991. This report revealed that the original complainant in the matter was interviewed comparatively swiftly; that is, only a month after the complaint was made. She alleged that, among other actions, Constable X, when

an attractive female came into the police station, "turned around from the counter and faced us all and grabbed his groin, in the vicinity of his penis". The complainant also alleged she had had a conversation with Constable X;

about the complaint against him of sexual harassment ..He showed me the letter from the Ombudsman which outlined, in full detail, the allegation .. which was of a sexual nature.

She said that he stated during a conversation;

I was thinking about joining the ambulance but I might resign in another twelve months and open a massage parlour and when I get 126 female clients and when I've had no complaints I'm going to write to Mr Landa and tell him that I've had no sexual complaints.

Other witnesses were interviewed in late October, early November, January 1991 and Constable X himself was interviewed on 8 January 1991. He denied the allegations, although he admitted that the "groin grabbing" allegation was true and, in fact, he had been paraded for his behaviour on that occasion, and,

after that parade I made special point not to touch any female member of the Police Service or their support units.

The matter was "under consideration" by the Assistant Commissioner (Professional Responsibility) regarding departmental charges for six months, but at the time of writing advice had just been received that two charges of misconduct were to be laid in respect of two issues raised in the complaint.

The most recent complaint about Constable X to this office again involves a car and has been dealt with swiftly and efficiently by police investigators.

Dr M complained in October 1990 that Constable X had rudely and wrongly accused him of throwing a can from his car.

By 30 December 1990, the department had conciliated the complaint with Dr M on the basis that Constable X was counselled about the need to improve his politeness when dealing with members of the public. By mid January this had been done, and the matter was concluded.

As the Commissioner of Police said in the circular cited above, the current policy on sexual harassment is

designed to maintain a high standard of integrity, work performance and productivity and to maintain the privacy and rights of individual persons who are employed within the NSW Police Service.

The Ombudsman entirely endorses these aims and acknowledges the major managerial complexities involved in addressing them. Other complaints, in other regions, have been dealt with by the Police Service with speed and efficiency which may augur well for the future. However, while delays and inconsistencies of the kind chronicled above continue to occur, progress will not be assured, and it will continue to be difficult to convince complainants of the integrity of the complaint making process.

The corruption of silence - the second phase

Two cases dealt with during the year involved two relatively inexperienced police officers reporting the actions of their supervising sergeant in respect to the assault of persons in custody. Both matters eventually resulted in the issue of summonses against the sergeant for assault.

In the first case, a constable of four years experience was on station duty when he saw a prisoner being carried into the police station by his supervising sergeant and another officer. Each had hold of the prisoners arms which were cuffed behind his back. The constable alleged that the prisoner was thrown face down onto the ground near the entrance to the cells. The constable then removed the handcuffs from the prisoner and asked him to get up but the prisoner said that he could not because of his bad back.

The constable then left the prisoner and spoke with a friend of the prisoners who was waiting in the reception area. This person confirmed to the constable that his friend had a back injury. When he returned to the charge room he saw the sergeant standing at the charge dock with the prisoner. He alleged that the sergeant then threw the prisoner against the cement wall. Shortly afterwards, he alleges, the sergeant again threw the prisoner against the wall and the side of the charge dock. The constable said the sergeant bent the prisoner's head to an "unnatural angle" causing him to scream out in pain and struck him across the face with the back of his hand.

During this alleged assault upon the prisoner, a number of other officers were present and each of them later gave statements. Each officer's version of the events varied to some degree and, although they were basically more corroborative of the evidence of the constable than the sergeant, the officers did not believe that the sergeant's actions amounted to an assault. Only one of the other constables thought that the actions of the sergeant amounted to an assault upon the prisoner. He stated that he saw the sergeant strike the prisoner in the body with his knee and then slam his head into the railing of the charge dock.

The constable said he was disgusted by the behaviour of the sergeant and discussed the injuries sustained by the prisoner with other officers. He was concerned that if something was not done a similar incident may occur. Three days after the incident the constable reported the matter to his senior officers and made a statement the following day.

The constable claimed that initially he received considerable support from his senior officers when reporting the matter and they re-assured him; "you're doing the right thing" and "we will stick by you". However with the commencement of the official investigation he thought that he was getting the cold shoulder treatment from those same senior officers as well as from a group of officers at the station who sided with the sergeant.

His general impressions were that the majority of his colleagues agreed with his action but "were reluctant to stand up and be counted" and support turned out to be little more than lip service. The constable felt that after the commencement of the investigation the voices of support faded and that he had, "stuck his neck on the line".

The internal police investigation found the complaint sustained and the sergeant was eventually summonsed for assault.

Approximately two months later, the same sergeant was involved in the arrest of another offender who allegedly tried to escape from the police when he had been taken from the back of the truck. He was subdued by the sergeant and another officer and, as he was in an agitated state and uncooperative, he was placed in a holding cell. The sergeant returned to the cell a short time later with a probationary constable to remove the prisoner for processing.

The probationary constable alleged that the sergeant pulled the prisoner to his feet by the handcuffs, after which he kned and kicked him in the stomach and then flung him into the front wall of the cell. The probationary constable alleged that the prisoner said, "I don't deserve this", at which point he was struck in the face by the sergeant with a closed fist.

The probationary constable walked away from the cell in disgust and the sergeant emerged with the prisoner about five minutes later, after which he was processed and bailed.

The probationary constable claims that the incident resulted in some considerable soul searching as to his suitability for police duties if it entailed such behaviour. He thought about the matter over the weekend and reported it to his senior officers upon resuming duty and again, as in the previous case, they were supportive of his actions.

That same evening the probationary constable received a call at his home from the sergeant whom he had reported. The sergeant, unaware of who had reported him, told the probationary constable that he had been relieved of his supervisory duties and then allegedly said, "we have to get our stories straight," referring to the incident in the police cell. He is also alleged to have said, "we have to look after ourselves because I.A. (Internal Affairs) won't". The probationary constable reported this phone call to a senior officer.

A week later the probationary constable received another call at his home from the sergeant who is alleged to have said "I've just been told that you shelved me. Have you said anything at all?". The sergeant wanted to discuss the matter with the probationary constable, but he refused, saying he had been told not to discuss it. The sergeant also is alleged to have said "have you said anything at all, have you signed anything? and "just as long as you didn't shelve me. This phone call never took place". The probationary constable reported the second call when he next resumed duty.

Again the police found the complaint sustained and a further summons alleging an assault upon a prisoner was served on the sergeant.

The sergeant denied the allegations during the police investigation and at the subsequent hearings at the Local Court. In both matters the respective magistrates found a prima facie case of assault against the sergeant had been established, but because of conflict in the evidence the cases were dismissed. The sergeant was later charged departmentally with one count of misconduct. The Police Tribunal found the charge proven and recommended the sergeant's dismissal.

Both constables who had reported the actions of the sergeant have resigned from the Police Service.

The constable involved in the first case was quite clear in subsequent correspondence with this office that his decision to resign was largely influenced by the lack of support he had received during the course of the investigation and court proceedings.

He also was of the opinion that his senior officers wanted to keep the matter quiet and that there was some sort of allegiance between the sergeant and other senior members of the Police Service. As a result of rumours which he had heard, as well as the police conduct of the investigation and court hearing, the constable formed the opinion that, "the sergeant was never meant to be found guilty".

The former constable has since re-considered his decision to resign from the Police Service and applied for re-instatement. He was told that the Police Service needed officers such as himself, "who were prepared to stand up for themselves" and he would be accepted but in his own interests he would not be assigned to his former station, which was outside of the Sydney metropolitan area, but to either Kings Cross, Central or Mt Druitt patrols. The former constable said that his impressions from the interview was that he would not be assigned to his original region because of the likelihood of conflict and that he would have to take the postings, "that no-one else wanted". He declined the offer.

The probationary constable involved in the second case has declined to comment on the police investigation report or his reasons for resigning from the Police Service.

Anonymity of police complainants

An anonymous complaint was received during the year alleging that a particular sergeant and "some other senior officers" attached to Mt Druitt Police Station spent the duration of their shift drinking at a number of licensed premises and that they were unable to be located when needed. The letter indicated that the author was a probationary constable. A police investigation was conducted and, while the Ombudsman determined that there was insufficient evidence to substantiate the allegations, a disturbing aspect arose concerning the manner in which certain interviews were conducted during the investigation. In an endeavour to establish the identity of the complainant, the investigating officer had directed each of the five probationary constables interviewed to indicate whether they were the author of a letter of complaint or if they were aware of the identity of the complainant.



The direction placed the probationary constables in an extremely difficult position. To answer in the affirmative would either reveal their identity or that of a fellow officer. Conversely, if they answered in the negative to preserve their anonymity and, it was later determined that they had made a false statement, they could have been subject to departmental proceedings for untruthfulness. In either case, the direction contravened the complainant's desire to remain anonymous, which was clearly expressed in the original letter:

I can't disclose my identity for obvious reasons.....I feel I can't approach my superior officers about this problem and be sure my identity would be kept secret which is vital.

The Ombudsman brought the matter to the attention of the Commander of the North West Region of the Police Service, who in turn, requested comment from the district commander responsible for the Mr Druitt Patrol. The district commander agreed that the approach adopted was incorrect and advised the investigating officer, "that any member of the service is entitled to anonymity in a complaint and in future investigations such a course should not be adopted".

Further, the District Commander indicated that as part of the district's anti-corruption plan, all staff were advised of the policy regarding support of anonymity of police complainants in matters of corruption and that this had been reinforced by patrol commanders.

The region commander subsequently told the Ombudsman, "as a result of this particular incident it has become evident to me that there is no specific procedure in place for investigating anonymous complaints. In this regard I have now taken the opportunity to refer a copy of your letter to the Assistant Commissioner (Professional Responsibility) and at the same time I have asked that he consider the appropriateness or otherwise of introducing specific procedures. I have also asked that he communicate his decision direct to your office".

To date a response has not been received from the Assistant Commissioner (Professional Responsibility), however, it is hoped that appropriate action is taken to ensure that police are able to continue to bring incidents of misconduct to notice without having their desire to remain anonymous threatened.

The buck stops where?

Historically, the public service's operational focus has been administration rather than management. Autonomy was rare; heeding instructions mattered more than outcome. Going by the book was seen as commendable.

Very specific instructions have a value, but can also be a problem. If the rule-book gets too big, some may argue that no precise instruction means no specific responsibility. Adding to the rule-book may, therefore, not be the best answer.

The former Police Department reflected this. It had a host of very specific rules and instructions beyond those applying to other public servants and its operational orientation was administration rather than management.

The Police Department is now the Police Service. The change is more than just cosmetic. A managed operation became the goal. But major change takes time.

The Ombudsman's 1990 annual report had a case-note, *Passing the buck*, about a constable, with only eighteen months' service, left in charge of a busy suburban police station. His lack of training and experience led to a person arrested on a relatively minor

matter being held in custody longer than he should have been. In fact, he was detained unlawfully. Not surprisingly, he complained.

The police investigator blamed the constable. When the Ombudsman studied the report closely, it was clear that while this was true in the most immediate sense, responsibility really lay more heavily on the constable's superiors, whose role and conduct had not been examined, let alone questioned in the investigation, nor, it must be said, by the investigator's superiors, who agreed with his finding.

The constable was left in charge when more senior officers were elsewhere. The patrol commander absented himself without arranging for proper supervision of the station or of the constable. Although two sergeants were on duty, neither had been directed (or felt the need) to supervise or even check on the constable during the day. In short, the constable was left in circumstances where it was not only possible but likely that he would make a mistake, because the patrol commander had failed to arrange proper supervision. The Ombudsman felt that managerial responsibility was being ignored.

In reporting his findings, the Ombudsman recommended disciplinary action, varied procedures, new instructions and amended statements of duties. These dealt with the particular incident and the possibility of recurrence, but the Ombudsman felt this was not enough and that the underlying issue of managerial responsibility had to be addressed. He therefore, also recommended that future investigations consider whether management deficiencies led to the conduct being investigated.

The recommendation has resulted in changes to the structure and reporting of police investigations, which must now examine and report on the role and responsibility of the supervisor of any officer the subject of complaint. The Ombudsman commends this as a commitment to a managed Police Service, likely to have far-reaching consequences.

Accountability - is it carried through?

A recent investigation has sharpened the focus on the failure of senior police management to insist and ensure that there is proper accountability of officers in the service.

In May 1990 the Assistant Commissioner (Professional Responsibility) notified the Ombudsman of an internal police complaint which followed an adverse report on the conduct of a sergeant who headed a special crime squad. The head of this squad reported directly to his district commander. This line of accountability was explicitly set out in the statement of duties for the squad leader.

In brief, the complaint was forwarded to the Ombudsman by police following a surveillance operation on the sergeant. The observations from the exercise were compared with the duties recorded in the sergeant's official duty book; the actions of the sergeant did not correspond with what had been recorded.

An investigation by the Internal Police Security Unit established that the sergeant had meetings with well known criminals, never recorded them, attended and remained at a registered club with a constable under his supervision, drinking and playing poker machines, but had recorded being on duty at the station; and had taken a friend (who was remanded on bail at the time and later convicted on an indictable offence) together with the junior officer, in the police car to view a brothel. This had not been recorded. The IPSU investigation also noted that the sergeant on another occasion, had driven to a bus terminal where it was alleged gays gathered and in the presence of the junior officer under his training, had arrested an Aboriginal person who was holding an empty beer glass (valued at 30 cents by the hotel) and had charged him with theft.

IPSU obtained a statement in relation to the complaint from the district commander, who was the supervising officer of the sergeant in the hierarchy of accountability.

The district commander said that the sergeant, as head of the squad, was autonomous in the performance of his duty. He said this, "autonomous responsibility is in accord with current departmental policy". He said that he would not expect the sergeant to advise him of normal day to day activities of the group, but any activities of an unusual nature or likely to attract media attention should be brought to the attention of the district office.

In the late notification of the complaint to the Ombudsman, the Assistant Commissioner furnished papers on the IPSU investigation and advised that he was satisfied that there had been no impropriety by the sergeant and considered that the matter could be dealt with by the department as a management issue.

It was the Ombudsman's view, however, that the matter clearly was a serious one which should be investigated under Part 4 of the Police Regulation (Allegations of Misconduct) Act. The lack of apparent supervision was of special concern. The report on the investigation under section 24 of the Act will be reviewed by the Ombudsman when finally completed by the police.

In the meantime, however, the Assistant Commissioner (Professional Responsibility) advised that he had arranged for the transfer of the sergeant to an area which did not involve the training or supervision of staff, which also allowed for close supervision of the sergeant by a more senior officer.

When asked for advice on the details of the transfer, the Assistant Commissioner advised that he had been located in the district office under the direct supervision of the district commander carrying out general district duties as directed. The sergeant is now under the supervision of the district commander who reported that the sergeant had, "autonomous responsibility".

The matter will be examined in detail when all documentation is forwarded by the Assistant Commissioner.

Questioning of Aboriginal people

The Aboriginal Legal Service (ALS) complained to the Ombudsman about the conduct of police when arresting two Aboriginal brothers and the behaviour of the police inspector who carried out the investigation into the incident.

The brothers were arrested at a country hotel and placed in the police van while the police attended to other duties. One brother escaped from the van, but was rearrested nearby. Both men were charged with a number of criminal offences.

The ALS complained about the conduct of the arresting police and Inspector M, who was assigned to investigate the complaint.

The Principal Legal Officer of the ALS later lodged a lengthy letter of complaint about Inspector M; claiming that the inspector had conducted the investigation in an unethical manner.

Inspector M interviewed both brothers together without a solicitor or an independent person being present. At the end of the interview, both men signed statements of retraction, withdrawing their original complaints.

Inspector M in his report accompanying the retraction made adverse comments about the solicitor from the Aboriginal Legal Service, accusing him of a standard practice of entering not guilty pleas while making "allegations of assault or some other impropriety by police".

An inspector from the Police Internal Affairs Branch was assigned to conduct an investigation into the allegation by the ALS. The investigation found that the two men should have been interviewed in the presence of their legal adviser, pointing out that this was a firm request of the original complaint. Interviewing both brothers together indicated, "a measure of incompetence on the part of the former inspector".

The allegation that the brothers' statements of withdrawal used language that the signatories did not have the fluency or capacity to speak was not sustained by the second investigator on the basis that "paraphrasing takes place to some extent in many statements taken from witnesses".

The disparaging remarks about the solicitor made in Inspector M's report were found to be, "without foundation and quite improper".

Inspector M was discharged on medical grounds before the conclusion of the second investigation, so no further action was taken. A letter of apology was sent to the solicitor.

This office, over a lengthy period of time, corresponded with the Police Service and the ALS regarding the issues raised in this complaint.

In his report the Ombudsman made the following recommendations:

- departmental lectures and instructions be revised for the guidance of all police and should address appropriate methods of dealing with Aboriginal witnesses and suspects; generally and specifically on the desirability that interviews with Aboriginal suspects be conducted in the presence of witnesses (preferably from the Aboriginal Legal Service) and at locations other than police stations;
- the lectures be prepared in consultation with the Aboriginal Liaison Unit of the Police Service;
- the Commissioner provide the Ombudsman with the documented lectures and instructions given to police when dealing with members of the Aboriginal community; and
- these recommendations be complied with within three months of the date of the report's finalisation.

On the 5 March 1991, the Deputy Commissioner replied to the recommendations concerning the interviewing of Aboriginals. At that stage advice was still being sought from various branches within the Police Service. On the 16 May 1991 the state commander said the police training methods were under revision and consideration.

The Ombudsman's recommendations are being taken into consideration with the recently released report of the Royal Commission into Deaths in Custody. A task force has been established in the Police Service to review the relevant recommendations.

It is evident from this investigation and the findings of the Royal Commission on Aboriginal Deaths in Custody that the NSW Police Service must establish better training and guidelines for dealing with Aboriginal people.

Failure of police to attend court

Over a period of time, this office has had some concerns about the number of police who do not turn up for court when they are required. Set out in the police instructions is a clear direction that all police have sole responsibility for following each and every one of their cases through the court system to finality. This, however, does not always happen and consequently charges are dismissed, usually through lack of evidence. Occasionally costs are awarded against the informant police officer who doesn't attend court, generally resulting in the taxpayer meeting those costs, as well as the usual costs associated in bringing the prosecution as far as court. Members of the public who, as victims of crime, rely on the police to prosecute the perpetrators, are understandably unhappy when their cases are dismissed because the police officer did not attend court and they, consequently, raise their complaint with this office.

When a police officer fails to attend court, the police prosecutor is required to submit a written report on all events surrounding the hearing of the case. A prosecutor's report may

include attempts to contact the police officer concerned and any reasons for the officer's failure to attend court. This report is then deemed to be an internal police complaint, in terms of the Police Regulation (Allegations of Misconduct) Act, 1978, and is notifiable to the Ombudsman.

In early 1990, it was noted that a number of these cases were being sent to this office. After considering the volume and impact of these complaints, a team of investigation officers was formed to look into the issue. Initial enquiries made of the Police Service provided the investigation officers with all the directions and instructions to police officers concerning their attendance at court, along with some data about the number of cases prosecuted each year and attendance rates. As a result of these enquiries, a notice appeared in the Police Service Weekly reminding police of their court responsibilities and advising them that this office had raised its concerns with the Commissioner.

Following the receipt of material from the Police Service it was decided that an investigation into the subject of the failure of police to attend court should be commenced using the Ombudsman's own motion powers under the Ombudsman Act, 1974. During the course of this investigation, officers attended a meeting with the Commanders of the Police Legal Services Branch, monitored and surveyed individual cases as they were notified to the office and discussed the need for the relevant police instructions to be clarified.

The survey covered records for cases notified to the Ombudsman since January 1990 until May 1991. There were 109 files concerning 116 instances when 134 police did not attend court. There were only two cases which involved the same officer. Both of these cases are still being under the consideration of the Assistant Commissioner (Professional Responsibility) to decide on disciplinary action.

Instances of police failing to attend court can be broken down region by region as follows: North 21, North West 28, South 40, South West 27. As can be seen, generally there is no evidence of trends in any particular region - south region does appear slightly higher but it is realised that many cases from that area are heard at the busy Downing Centre.

A record also was kept of the costs awarded due to the non-attendance of the police informant at court. Fourteen cases were noted in this survey, with the amount awarded within the period under consideration totalling \$10,862 which was made up of sums ranging from \$52 to \$1450. While \$10,826 is a significant amount in its own right, an analysis will show that it is minute in terms of the overall budget for policing New South Wales. Ultimately, it may cost more to make the system more efficient.

In approximately two-thirds of the cases surveyed, reasons for non-attendance can be readily identified and grouped together. Such reasons include:

no notification 21;
wrong date 17;
on leave (including rest days) 22;
forgot 10.

For the other 38 cases, the reasons were varied or unknown.

The survey allowed the Ombudsman to reach a number of conclusions:

- from approximately 12,000 police officers in NSW, 134 failed to attend 116 of the estimated 11,500 cases which are prosecuted over a 12 month period. (NB: this survey looked at a 16 month period);
- a great deal of money in costs against police is not involved, even though there is considerable waste of other resources when police do not attend court;
- Police officers are generally aware of their responsibility under police instructions, which is to follow each of their cases through the court system to finality. However, for some time now there has been in use a form which is used by courts/prosecutors to notify police officers of dates they are required to attend court. Police officers have come to rely on the receipt of such a form to keep them up-to-date with their court matters. These forms are not always reliable and their reliability hinges on other officers fulfilling their obligations. It appears, however, to be as close to a 'good' system as is likely to be found; and
- there is no evidence on the cases surveyed of corrupt or illegal reasons for police not attending court. As discussed above, the most common reason is that concerning notification. The other main reasons are all attributable to human error and will never be entirely eradicated, no matter which system is installed.

As a result of these findings and actions, it was decided to discontinue the investigation. The investigation had shown that while the numbers were not low, they were also not substantial; that there is little prospect of developing a totally fail-safe system of ensuring police attend court; and the police service is undertaking a review of the instructions to police in an effort to make them clearer.

The decision to discontinue the investigation, and the findings of our survey, does not mean that this office views lightly the incidence of police not attending court as required. On the contrary, individual cases remain notifiable and will continue to be monitored and dealt with on a case by case basis.

Police cells

Last year's annual report referred to an investigation into complaints about conditions in police cells.

The report revealed that a large number of remand prisoners were held at Sydney Police Centre for long periods awaiting transfer to Corrective Services' institutions, during which

time they had very limited access to exercise or to fresh air, and even less to visitors and phone calls.

Preliminary enquiries into a complaint about the cells at Campsie Police Station did not satisfy the Ombudsman, so an investigation was commenced and the Commissioner was asked to answer various questions. On 24 August 1990, a report was received in this office. That report, which was two pages long, noted:

All Police Stations with prisoner accommodation have been inspected by members of District Physical Evidence Units, Police Properties Branch and the Deaths in Police Custody Task Force. These inspections identified areas where alterations, additions or improvements are required. This work has now commenced on a priority basis and a list (in priority order) of establishments where work is being undertaken is attached. There also was some information of a general nature about the supply of mail, medical services and the arrangements for the transfer of prisoners to gaols. In addition, a copy of Police Instruction No. 32 -Care, Control and Safety of Persons in Police Custody, was attached. That instruction introduced new screening procedures to eliminate deaths in police custody and took into account several recommendations made by the State Coroner arising from a number of inquests and the findings of the Blackburn Royal Commission.

A series of inspections by officers of the Ombudsman was carried out in the following months. These revealed that police cells were originally constructed as holding cells only, for prisoners to be kept on the days they made their court appearances or after arrest until they were either given bail or transferred to prison and should be used only as such. Even for short holding operations, they are barely adequate. Furthermore, the instructions to custodial officers were not drawn up with the possibility that prisoners would be kept for more than a day or two at most and, therefore, make no provision for that eventuality.

Conditions range from lamentable at the Sydney Police Centre to utterly disgraceful at the Newtown and Campsie Police stations.

On 5 June 1991, the Sydney Morning Herald reported that more than 80 prisoners were being held in cells under the Sydney Police Centre with little chance of transfers to, "proper gaols as the city's main reception prisons remain at bursting point. Some prisoners have been held in the police cells designed only for overnight custody for a number of weeks, according to police".

This situation is not likely to improve in the near future and, short of a change in remission and sentencing policies and a huge increase in expenditure on expanding the number of cells, police cells will continue to be crowded with long-term prisoners.

Prisoners, some of whom have been in custody for periods of several weeks, are kept in conditions that do not meet the minimum standards set in the Prison Act, 1952 and Prisons (General) Regulation 1989 and are far below minimum standards set in the Geneva Convention governing prisoners of war. In most cells, there is no access to daylight or fresh

air of any kind and it is not possible to give prisoners exercise in the fresh air. Prisoners sleep in their clothes on vinyl covered mattresses, covered with blankets which are infrequently cleaned and without pillows. They are able to have one shower per day where numbers are low enough for that to be possible.

At Newtown there is one shower available for a possible prisoner population of twenty. Most police stations have little or no visiting facilities available and prisoners' clothes can be changed only if friends or relatives bring a clean change of clothing and take away the worn set.

The cells themselves are usually no more than concrete boxes in which there is a toilet, and, perhaps, a concrete hob to sit on. There is almost never any outlook except through a narrow barred gate facing a corridor. Prisoners are allowed cigarettes only under supervision and are not allowed radios, writing materials or any personal possessions. Even their watches are confiscated.

On 30 April 1991, the acting state commander advised this office, in response to the Ombudsman's provisional statement in this matter, that:

The findings contained in the statement have been noted and, in the light of the preceding conclusions, the recommendations were submitted for consideration by the State Command Action Team. The recommendations have been supported and action is being taken to appoint the new Director, Operations Support, as the officer responsible for monitoring, raising and maintaining conditions applying to prisoners in police custody.

While considerable improvements had flowed from the Task Force 'Prevention of Deaths in Custody', it is considered that the on-going responsibility should be vested in an operational area. The Director, Operations Support will also be required to establish immediate liaison with the Department of Corrective Services and report on the position within six months.

In the meantime, the four Regional Commanders have been requested to initiate action for the extension of visiting rights to all police stations throughout the State; and the Police Academy will be asked to address the proposal for special instructions in prisoner care, with particular reference to Sydney Police Centre.

The action being taken on these findings and recommendations demonstrates the importance which the Police Service places on the issue of prisoner management.

The Ombudsman looks forward with interest to the report of the Director, Operations Support, because in May 1991 a further complaint was received about the Lismore police cells.

The complaint mentioned poor ventilation, wet and filthy bedding, an inability to have a change to clothes and the poor attitude of the police.

In response to another complaint about bedding in the cells at Wagga Wagga, the police stated:

The matter of mattresses for the cells at Wagga Wagga has been raised on a number of occasions in the past. In fact there were mattresses in the cells some four years ago. However, due to the mattresses being set on fire by prisoners, they were removed. They were all found to be in poor condition and were thrown out.

An order has now been placed with Dunlop to supply 16 mattresses.

In contrast to the above complaints, an inspection of the Sydney Police Cells revealed that some measures had been taken to alleviate the conditions previously described. In particular, it was noted that an officer from the Department of Corrective Services was now attached to the unit. Negotiations had taken place with the Department of Corrective Services to supply prisoners' food and since April 1991, the Prison Medical Service has supplied a nursing sister for four hours a day for seven days per week. She sees prisoners and sets out medication which is supplied to prisoners by police and also administers doses of methadone as prescribed.

It has not been possible to do anything about the lack of heating and it was extremely cold on the day of the Ombudsman's visit. Prisoners were sitting about with blankets round their shoulders. The cleanliness of the cells is still not satisfactory and cell floors, walls and toilets needed to be scrubbed.

Records are now kept which allow the patrol commander to determine quickly, and with certainty, how long a prisoner has been in police custody. The cell notes have also been redesigned so they show how long prisoners have been in custody in other police stations from which they have been transferred. This is particularly important as prisoners from the inner western police area are brought to the Sydney Police Centre after 8 pm as well as prisoners due to go to gaol from other parts of the State. The reason is, although conditions at the Sydney Police Centre are hardly ideal, conditions there are better than in any other police cells in the state.

The will and the capacity, or waiting for ICAC

Investigations by police under the Police Regulation (Allegations of Misconduct) Act provide evidence which the Ombudsman considers in determining complaints about the conduct of police. One of the Ombudsman's responsibilities is to assess the quality of those investigations. If they are deficient, the Ombudsman can direct further investigation by police under Section 25(1) of the Act, to remedy any deficiency. If an investigation is thorough and effective, there may be no need for the Ombudsman to carry out a re-investigation. The quality of the police investigations is clearly very important. They should be thorough, effective, fearless and impartial. Promptness often matters, because a trail can go cold. In short, the Ombudsman is concerned to see that police have the will and the capacity to investigate properly.

In 1985, police began investigating bribery allegations reported to them. In 1986 they sent the Ombudsman a hotel manager's statement that since 1984, \$250 was, "taken out of the business every week and handed over to a member of the....licensing police". Hotel books described the payments misleadingly. The manager believed they were "to allow the bistro to hold more customers than the law permitted".

Internal Affairs began investigating under the Police Regulation (Allegations of Misconduct) Act. Among issues identified in a report nine months later were that money was paid to Senior Constable X to induce him to neglect his duty in regard to the hotel and that he had an unauthorised second job.

It took another sixteen weeks for this report to reach the Ombudsman. The police accepted the officer's explanation that the payments were wages from the hotel for work "in an undercover supervision capacity", a second job which he admitted was unauthorised. The police found this issue of complaint sustained and said they had asked the solicitor for public prosecutions to advise as to criminal charges.

Meanwhile to save time, the Ombudsman told the police in June 1987 that the investigation was unsatisfactory and that the financial affairs of Senior Constable X and his immediate family should be examined. In September, that year the police advised that an experienced senior officer would further investigate the matter. The Ombudsman asked the police for the advice due from the solicitor for public prosecutions, whether they agreed the investigation was deficient and if they intended to provide the information sought in June.

In October, the police replied that the solicitor for public prosecutions felt the evidence did not justify criminal proceedings, but that the papers should go to the Police Legal Services Branch for its advice on departmental charges. Legal Services Branch subsequently proposed a departmental charge of misconduct against Senior Constable X. There also was a change of view about further investigation; an experienced officer from the Internal Police Security Unit was to review the investigation to see whether any further inquiries can or should be conducted.

The Ombudsman still wanted the information sought in June and asked if this had been drawn to the attention of the officer reviewing the original investigation.

On 24 November 1987, the Assistant Commissioner (Review), sending results of his own further inquiries, conceded police had "not taken the matter any further". He proposed accepting the advice of the solicitor for public prosecutions not to lay criminal charges but contemplated a departmental charge after further advice from the Ombudsman. The further inquiries requested in June were thought, "potentially privacy-invasive", likely to be objected to, and not very relevant as Senior Constable X had admitted receiving the \$250 a week. Nevertheless, he said the Senior Constable had been shifted from licensing work to general duties.

The Ombudsman, nevertheless, required the deficiencies identified in June 1987 to be remedied. On 24 May 1988, this office was told Senior Constable X had been re-interviewed and details would be sent shortly. In June 1988, the police said "additional investigative action...has not provided evidence to support proceedings..." and no departmental charge was now proposed. In fact, X had been allowed to resign, precluding departmental charges.

Police had sent three investigation reports. By invoking Section 26(1) of the Act, they stopped the Ombudsman sending almost all the financial material to the complainant for his comments, as is customary. He did not bother responding to the rest.

The police found that Senior Constable X did not receive any other payments of an untoward or unusual nature or that he was not employed as he said. They found that he had not been induced to neglect his duty over the hotel by the payments he did receive.

After three investigations and material from police which often provoked more questions than it answered, the only thing that seemed clear was that Senior Constable X had an unauthorised second job. The police knew this because he admitted it.

The complaint raised serious issues. It was felt every effort should be made to resolve them. Apart from the public interest and that of Senior Constable X, the allegations related generally to licensing police in the area and brought into question the conduct of other officers.

Under Section 11 of the Independent Commission Against Corruption Act, the Ombudsman had to notify matters which he believed may involve corruption to the newly-formed Independent Commission Against Corruption. The Ombudsman saw this matter as significant and sent a report on 31 March 1989, disclosing the allegations and the material held by him. This led to an investigation by the commission of this and other matters involving licensed premises in the area.

The ICAC made public a report of its inquiry in February 1991. Evidence it gathered made possible a finding by the Ombudsman that Senior Constable X's explanation for the payments was false and a recommendation that independent legal advice be obtained regarding preferment of criminal charges.

It is fortunate this was a complaint where no specific redress was sought by the complainant. It took over five years for his complaint to be finalised. Its basis was conduct going back to 1984 and the subject of complaint to police in 1985. One way or another, it was under investigation by the police until June 1988. Neither the first investigation nor the second got to the bottom of the matter. Nor did the third, which is why this office expended many resources and roughly nine months collating, aggregating, analysing and evaluating all the material provided and considering what should or might be done with it. Time also was lost seeking comments from the complainant who, finally, gave up responding.

At this point, the police had spent roughly two and a half years investigating this matter. A number of experienced, senior police officers had been involved, yet, at the end, it was not possible to be confident as to where the truth lay. The prospects for constructive reinvestigation by this office seemed slight.

In the event, it was just as well that the ICAC agreed to take it up, and was able to get to the bottom of the matter. It is a matter of concern, however, that some such outcome was not achieved by the police at a much earlier stage.

The question must be asked, why did the ICAC succeed where the police failed? Did the department lack the will or the capacity to get to the bottom of what might have been institutionalised corruption?

The Ombudsman has, and freely expresses, some confidence that the speed and quality of police investigations has risen in recent times. Indeed, he hopes so, because he would not wish to be faced with a similar situation again.

Stress management program

In last year's annual report the Ombudsman commented on the need for a stress management program for police. He believed there should be monitoring and counselling available before crisis point is reached and that police not only need to know of the existence of a departmental stress management program, but need to see it as important to them in coping with their daily tasks and not a sign of weakness.

It was the Ombudsman's intention to conduct a formal investigation into the levels of police stress and the department's response to it, but this became unnecessary when former Commissioner Avery suggested the establishment of an ongoing panel between the Ombudsman and the Police Service in order to provide an open forum in which issues of concern in the employee support services area could be identified and acted upon in a constructive manner.

That panel met for the first time on 25 March 1991 at Police Headquarters. The meeting was attended by the Ombudsman and members of his staff, representatives of the Police Association and Commissioned Police Officers Association, the Commander of the Welfare Branch and the Chief Psychologist and was chaired by the Acting Executive Director, Human Resources. Agreement was reached on the broad aims of the panel. These included the recognition of the Police Service's greater need to consider the welfare and psychological problems of its members.

At the panel's next meeting in May 1991 David Gill, the newly appointed Executive Director of Human Resources, took the chair. He informed the meeting that since his appointment to that position it had become clear that the employee support programs of the service needed reform. As a first step, he convened a half-day seminar of all the

support groups' branch heads as well as directors within the human resources command to clearly identify what the priorities of the support groups should be.

As a result of the seminar, three working parties were formed to develop firm strategies in the key areas of confidentiality, early identification and intervention as well as management information systems. Further, approval had been given by the Commissioner for a senior sergeant (who is a qualified psychologist) attached to the psychology section to undertake a comprehensive project to identify at-risk groups within the Police Service. In addition, Mr Gill was to address a meeting of the internal affairs branch team leaders and the welfare branch had also been invited to participate in an internal affairs branch workshop to be held later in the year.

This action is part of a process whereby every individual under investigation would be informed of the assistance available to them by the employee support services group. The chief psychologist reported on the peer support officer scheme which had completed a trial period in five police districts. A proposal to introduce the scheme on a statewide basis is to go before the Service's State Executive Group.

Given the significant progress being made in the area of stress management for police and the need for intense specialised attention, the Ombudsman decided to retire from the panel and to continue monitoring the provision of stress management for police in the course of investigations.

Amazing Grace

Following investigations into police conduct which has caused physical or economic damage, the Ombudsman occasionally recommends that the Police Service make an *ex gratia* payment to complainants.

By definition, such payments should be made out of grace - the sums recommended do not reflect a detailed assessment of damages or compensation and serve more as a recognition by the Police Service of misconduct and as a tangible apology to complainants.

When agreeing to make such payments, however, there appears to be very little grace exhibited by the police.

During the year one complainant contacted the Ombudsman concerned that police had approached him to sign a deed of release as a condition to receiving an *ex gratia* payment. Essentially, the complainant was asked to renounce any claims or rights against the police at law which might be exercised in future.

The Ombudsman wrote to the police expressing the view that the practice was neither necessary nor appropriate in the circumstances and received advice from the police legal services branch.

The advice began with the defence that the, "signing of a deed of release does not for all time exclude the signatory from pursuing legal action", because the Supreme Court was empowered to grant relief to people against, "harsh, oppressive, unconscionable or unjust contracts", under the Contracts Review Act.

It continued by pointing out that, "there is no legislative prohibition or restrictions in general law that would militate against the continued use of deeds of release as the department is currently employing them".

Further, "the inequality of bargaining power between the signatory and the Department appears to be a further concern in the issues raised by the Ombudsman. However, in all contractual negotiations one party is in a superior bargaining position".

Complainants against police usually have either no satisfactory or affordable means of legal redress. Further, by the conclusion of the lengthy investigation process, any complainant with the stomach for legal action would have pursued it earlier. The prospect against which the deed of release guards is extremely remote. Any later assessment of damages by a court would no doubt consider any ex gratia payment.

In practice, the signing of a deed of release as a condition for an ex gratia payment is one more unnecessary aggravation for complainants, whose association with police began in the same manner.

Traffic and parking complaints

For the period July 1 1990 to June 30 1991, this office received 371 complaints alleging the illegal issue of traffic and parking infringement notices and the associated misconduct of police. The number of infringements disputed in these complaints represents only a small percentage of the 1.7 million infringement notices issued by police and other authorities in the same period.

Complaints about the issue of infringement notices generally are not investigated by this office. Complainants who wish to dispute these matters can refer their complaints to the Manager, Traffic Infringement Processing Bureau. If, after considering all the facts, the manager determines that the penalty should stand, the complainant may elect to defend the matter in the Local Court.

The alleged police misconduct referred to in these complaints usually involves rudeness or the adoption of improper practices by police in the execution of their duties. Some of the more commonly recurring complaints include the use of abusive and threatening language, failure to provide any form of identification and refusal to show the speed reading on radar equipment when requested by the motorist. Given the usual lack of independent witnesses and heated circumstances, such complaints are not amendable to investigation.

These complaints are generally declined in accordance with section 18(1) of the Police Regulation (Allegations of Misconduct) Act, but are referred to the regional commander for any action deemed appropriate from a managerial or supervisory point of view. In some cases, the Ombudsman may request advice as to what supervisory action is taken.

CONSTRUCTIVE ACTION BY PUBLIC AUTHORITIES

The Anti-Discrimination Board

A man complained that he had received no response from the Anti-Discrimination Board about the progress of his case, despite a series of letters and an eight months wait.

Inquiries by this office found that the delay occurred because the board had experienced difficulties in arranging a mutually convenient time to interview the complainant's employer. The board agreed to send a letter of apology to the complainant for the delay and also advise him of the meeting time and date arranged.

The man later sent his thanks for the prompt action taken by this office. His complaint was now in progress and he was satisfied with the actions of the Anti-Discrimination Board.

The Department of Housing

A man complained that the Department of Housing raised the valuation of his housing commission property after he indicated his interest in purchasing it under the HomeOwner '89 HomeBuy scheme.

The man was advised in September 1989 that his house had been valued at \$56,500. He was offered the opportunity to purchase. The man then went through all the necessary steps to get a loan approved. His solicitor then made numerous calls to the Housing Co-operative for a progress report on the sale, with no success. Then in February the next year, the man received a letter saying the price for the house was now \$63,000.

This office made inquiries which found that the original valuation was incorrect. However, the department did not discover this until after the letter of offer had been sent to the man. Two independent valuers later verified that an error had been made in the initial valuation of the property.

The department expressed their willingness to proceed with the sale at the corrected valuation. This office considered this to be quite reasonable given that this corrected valuation was done over a year ago and it would seem reasonable to expect that the current valuation figure would be considerably higher than the corrected valuation figure. The department also agreed to deduct \$250 from the purchase price for work done on the property which the complainant had paid for himself.

The State Rail Authority

A solicitor complained that the State Rail Authority was uncooperative in supplying a certificate of earnings for his client who sustained injuries in a motor accident, unrelated to his employment. The certificate was needed to comply with the current Workcover legislation in regards to claims.

The solicitor had written to the SRA three times over a period of four months with no success. Inquiries by this office were made with the SRA about the matter. They subsequently apologised to the solicitor and said the request would be processed as soon as possible.

However, the solicitor was then advised that he would have to make a Freedom of Information application for the certificate. He was asked to supply a release from his client and pay a \$30 application fee before the information could be released.

After this office's involvement, the SRA conceded that, "this is an isolated instance which arose through an erroneous understanding of an authority officer.... I have taken steps to ensure that as far as possible, such a situation will not re-occur".

A letter of apology, together with the requested information was then forwarded to the solicitor.

The Water Board

A member of parliament wrote in on behalf of his constituent who had been battling with the Water Board to adjust her overcharged account. The Water Board had incorrectly designated and valued the constituent's house as two flats rather than a single dwelling. The constituent claimed she was overcharged for water rates from 1964 to 1975 because of this incorrect valuation. On the advice of her solicitor, she then stopped paying her water account.

Initial inquiries with the Water Board discovered that the board's file contained no documentation of the dispute prior to 1990. This presented certain difficulties for both the board and this office, in that neither body was in possession of the complete history of the dispute between the woman and the board.

After reconsidering the case, and taking into account the lack of sufficient records to determine absolutely whether the board or the woman was right, the board decided to waive outstanding charges up to 30 June 1990.

The woman expressed her appreciation for the work done by this office and said she was more than satisfied that the dispute had, "finally been settled by the Water Board after 26 years!".

Hornsby Shire Council

Mr C complained that a condition attaching to his building permit operated unfairly against him. Mr C worked Monday to Friday and went to church on Saturdays and could only work on his home on Sundays, but the condition, implementing council policy, did not allow work on Sundays. Mr C sought council's permission to work on Sundays, which was granted, but he was not permitted to use any power tools. Consequently, each Sunday a ranger would arrive at Mr C's property requesting him to stop work as a neighbour had complained about the noise of his power tools. Mr C simply wanted to continue building his home.

The Ombudsman conducted preliminary enquiries with council into this condition, which was attached to all building permits. The shire clerk subsequently advised the Ombudsman that it was not council's intention to hinder Mr C in completing his home through the use of inappropriate conditions. Council subsequently gave permission for Mr C to work on Sundays using his power tools, but warned that action would be taken against Mr C if he contravened the appropriate noise levels under the Noise Control Act 1975. Mr C subsequently resumed work on his house and council agreed it would review its standard conditions for hours of work.

Strathfield Municipal Council

Mrs P complained that council had not complied with its assurances to restore her property as close as possible to its former condition following drainage works undertaken by council. She alleged that the garage, rebuilt by council, was so badly built that the door had fallen off and that her verandah and driveway had not been repaired and the trees, plants and garden bed had not been replaced. Mrs P wanted council to rectify these matters.

The Ombudsman forwarded the complaint to council and requested a response to each of her complaints. The town clerk informed the Ombudsman that the damage to her verandah was in dispute. Council was of the view that the cracking existed prior to council's work and had photographic evidence to that effect. Council was, however, prepared to admit that the cracking may have been jarred out of line with the work. Council offered, without prejudice, to repair the brickwork and balustrade, paint the balustrade and supply enough matching paint for Mrs P to paint the rest of the verandah. Council also repaired the garage door and agreed to supply bricks to form a garden bed and trees, plants and shrubs. The driveway, however, remained in issue.

Tumbarumba Shire Council

Mr and Mrs M complained that council's roadworks at the front gate of their property were affecting the water flow to their bore. The pressure in the bore had dropped and the water had become dirty. Mr M approached the council, but was informed that the road was council property to do with what they liked.

The Ombudsman found that the council was more than willing to rectify the problem.

The council engineer proposed to put rock into the culvert to minimise water flow from the hill and thereby redirect the water to the bore. Mrs M subsequently wrote to the Ombudsman advising him that the water flow to the bore was restored and thanking him for his assistance.

Warringah Shire Council

Mrs P complained that she was suffering from stress as a result of the continuous noise from her neighbours budgerigars and that council had not responded to her complaint.

The Ombudsman found council had implemented a policy of restricting the number of birds kept by a person to a maximum of 100 in the ordinary season and 250 during the breeding season. A health and building surveyor had inspected the neighbour's property and found the limit maintained and the birds kept in a satisfactory manner.

Mrs P was not satisfied with council's response to her complaint and the Ombudsman made further enquiries.

Council, in an attempt to appease Mrs P, paid for an acoustic engineer to advise Mr D, the neighbour, on ways of reducing the noise caused by his birds. In response to this advice, Mr D turned his aviary to face away from Mrs P's property and also reduced the number of birds. Council paid the engineer to continue monitoring the noise levels.

The Ombudsman was of the view that council had done everything possible to minimise the budgerigar noise problem and Mrs P's stress.

Young Shire Council

Mr H objected to being required by council to connect to the council's water main and pay \$7,000 for the privilege. Mr H had paid an additional amount in the purchase price of his property for the fact that town water was connected. He did not want to pay \$7,000 for something that he already had.

The council, in response to preliminary enquiries by the Ombudsman, outlined the problems it had with private water lines and the need for a council water main. The fee for connection was \$3,500 and Mr H's property was regarded as two lots.

The council, however, began negotiations with Mr H and they reached an agreement to the effect that the land would revert to its original subdivision (three lots) and that fees for the connection of the water main would be a nominal fee of \$300 (maximum) for the house and the standard connection of \$3,500 for the remaining vacant lots.

Mr H was satisfied with this result.

Department of Corrective Services

- An aboriginal prisoner complained of being discriminated against and denied employment opportunities within Mulawa Gaol.

General inquiries were conducted by this office on the issue of Aboriginal employment in the prison system. Since these inquiries this office has been advised that there has been an upsurge in job opportunities for Aboriginal women.

Further inquiries revealed that the complainant had now found a job in the gaol.

- A complaint was received about the Department of Corrective Services and their delay in handling a claim for entitlements. A solicitor, acting on behalf of the daughter of a former employee of the department, was frustrated by the department's delay in informing his client on whether she was eligible for any entitlements due to the death of the former employee.

The department finally replied, asking that appropriate documentation be supplied. The documents were forwarded to the department, but once again no response was forthcoming. The solicitor wrote again forwarding more information. He waited for a response and then complained to this office.

A phone call to the coordinator of staff and salaries at the department found that the file was with the minister and that payment would be made within the week. Their explanation for the delay was that they did not handle many deceased estates and the junior clerks who got responsibility for processing them were not confident and did not act on them quickly. In addition, there was a high staff turnover recently. She said that in future such matters would be the responsibility of more senior officers.

Five weeks later, this office received another letter from the solicitor advising that they were still waiting for advice from the department in regards to the matter which should have been resolved four weeks ago. Once again, this office contacted the department. The coordinator apologise profusely for the delay and said that a cheque would be drawn up in the next 24 hours. This office was later advised that the solicitor had now received the funds from the department.

However, it did not end there. The solicitor wrote to this office again seeking our assistance in obtaining a response from the department after another nine months wait regarding a request that the department pay interest on the entitlement due to their initial delay. Another phone call by this office found that the legal section of the department had assessed the question of interest and recommended no payment. Unfortunately, the file was then misfiled and no action was taken to inform the solicitor of the decision.

The department agreed to write to the solicitor explaining the situation, together with an apology for the delay.

- A letter was received from a prisoner who complained that he had been given different information regarding his sentence. After his escape and recapture, the department refused to supply him with the details of how they calculated his sentence and failed to reply to subsequent correspondence.

Inquiries were made with the Prisoner Index Unit and an officer acknowledged that an oversight had been made in not replying to the prisoner's letters. He said that a reply would be issued to the prisoner straight away.

The officer explained that previously, when a prisoner was recaptured, his/her non parole period was adversely affected. However, in a court of appeal decision on 5 December 1990, the court ruled that in the event of an escape, the escape would not be considered when deciding on a prisoner's non parole period.

This change in interpretation of section 447A of the Crimes Act was what created the confusion in the information supplied to the prisoner. The officer confirmed that he had written to the court asking for the judge to review his sentencing decision for the prisoner. He would then reply to the prisoner.

This new interpretation of the law effectively meant that the prisoner's release date was sooner than originally expected.

- In late 1989, prisoner M was sentenced to 17 years imprisonment for armed robbery. While held at Maitland Prison, he lodged an application for leave to appeal against the sentence, with the chief clerk of Maitland prison. Soon after, he was transferred to Long Bay Gaol.

Two months on, prisoner M wrote to the Department of Corrective Services to inquire about the progress on his application. He was surprised to find out that his original application had not been received by the Registry of the Court of Criminal Appeal. The department further advised him that they therefore lodged another application on his behalf.

Inquiries were made with the department and a response was received from the chief clerk at Maitland. He said he had no recollection of this particular appeal, although he was able to confirm an application form had been completed in December 1989 by the prisoner. The chief clerk said that the normal practice whenever legal documents were processed for a prisoner was that the original was forwarded by the State Mail Service as soon as possible and a copy was placed on the prisoner's file.

Prisoner M was not satisfied with this response. He stated that despite the delay

he encountered with his application, his motivation for pursuing this complaint was to ensure that it did not happen to other prisoners.

This office made further inquiries and it was resolved that, in future, the system at Maitland Gaol regarding the despatch of legal documents would be improved. A date of despatch would be recorded on all legal documents sent from that institution.

- A prisoner complained that while he was in the protection yard at Long Bay Gaol, several other inmates forced entry into his cell and took a number of personal items and damaged his television set. He alleged that a prison officer had left the gate open leading to the protection cells. He wrote a number of applications to the department regarding his missing property, but had not heard anything from them.

Inquiries with the department were made by this office, as well as by the official visitor for the prison. The department was unable to find any written reports concerning the incident. The prison officer on duty at the time of the incident did not make any report regarding the matter. He also had resigned from the department.

After talks between the prisoner and the superintendent, the prisoner agreed to a proposal that the department fix his television at their cost. He then agreed not to pursue the loss of his other property.

Police Service

- Mr R complained to the Commissioner of Police over a decision to withdraw approval to Mr R's company to conduct security industry training courses made by a sergeant of the security industry unit. The sergeant had delegated authority from the Commissioner to grant approval for courses. Mr R believed that the sergeant withdrew his approval because he conducted similar training courses and didn't want any competition. Mr R sought a review of the sergeant's decision.

Preliminary enquiries conducted by the police revealed that the sergeant's decision was based on a complaint received by him from a person who attended Mr R's course and his own view after having attended the same course under an assumed name. The sergeant considered that the lecturer, a Ms K, provided inaccurate information and did not provide the necessary training for a career in the security industry. He wrote a report setting out the deficiencies in the course.

The Ombudsman forwarded the police report to Mr R, which incorporated the sergeant's report. Mr R, in response to the sergeant's report, submitted to the security industries unit his recommendations for improving his course. On the basis of this submission and his own recommendations, the sergeant granted the necessary approval.

- Mr W complained to the inspector-in-charge of his local police station about a telephone call he received from a constable, who was the wife of his former son-in-law. The constable abused Mr W over a call he was alleged to have made to her daughter. Mr W denied ever making such a call.

On receiving Mr W's complaint, the police attempted to conciliate the matter. Mr W was willing to withdraw the complaint if he received an apology from the constable. This was not accepted by the constable who had been falsely advised that Mr W's letter did not constitute a complaint under the Police Regulation (Allegations of Misconduct) Act, 1978.

The Ombudsman took the view that a further attempt to conciliate should be made.

Mr W, in setting out his terms of conciliation, stated that it was not his wish to "tear arms and legs off", the constable, but for her own benefit she should be counselled by the district commander. Counselling occurred and the constable subsequently expressed her regret over the incident.

- Mr M complained to the Traffic Infringement Bureau and his local member that a constable had given him an infringement notice for not being licensed to drive a semi-trailer when he was in fact licensed. Mr M also complained that the constable was unwilling to radio through to the police station, take his particulars or drive to the nearest town to check his licence.

The Minister for Police, on receiving the complaint from the local member, waived the prescribed penalty on the notice. The Ombudsman, however, considered that the matter of the constable's conduct could be dealt with by conciliation.

Mr M agreed to conciliate the matter on the basis that the constable be spoken to and advised of his concerns and of being more helpful to motorists. The constable was duly counselled and in addition advised of the district commander's view that he should have verified Mr M's licence to drive a semi-trailer.

- A prisoner complained to the Ombudsman that the police had not returned a cassette player seized on 11 July 1983. The cassette player was the subject of a goods in custody charge which had not proceeded to court.

The Ombudsman requested preliminary enquiries from the police which revealed that the cassette player had been auctioned on 5 December 1987. The Ombudsman invited the Commissioner of Police to consider the payment of compensation to the prisoner for the value of the cassette player. An *ex gratia* payment was subsequently made to the prisoner's wife to the amount of \$160 on 10 October 1990.

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 establishment was 74. During the year a number of positions were created or deleted. As at 30 June 1991, the approved staff establishment was 74.

During the year the Public Employment Industrial Relations Authority (PEIRA) or the Ombudsman under delegation from PEIRA, approved the following changes in the establishment.

Positions Created	Positions Deleted
Investigation Officer (Aboriginal Complaints) Clerk Grade 7/8	Assistant Investigation Officer (Aboriginal Complaints) Clerk Grade 4/5
Human Resource Manager Clerk Grade 7/8	Personnel Officer Clerk Grade 5/6
Financial Accountant Clerk Grade 7/8	Accounts Officer Clerk Grade 5/6
Executive Officer Clerk Grade 11/12	Executive Officer Clerk Grade 9/10
Manager Information Systems Clerk Grade 9/10	Senior Administrative Officer (Police) Clerk Grade 9/10
Investigation Officer (Police) Clerk Grade 7/8 (two positions)	Seconded Police Officer (two positions)

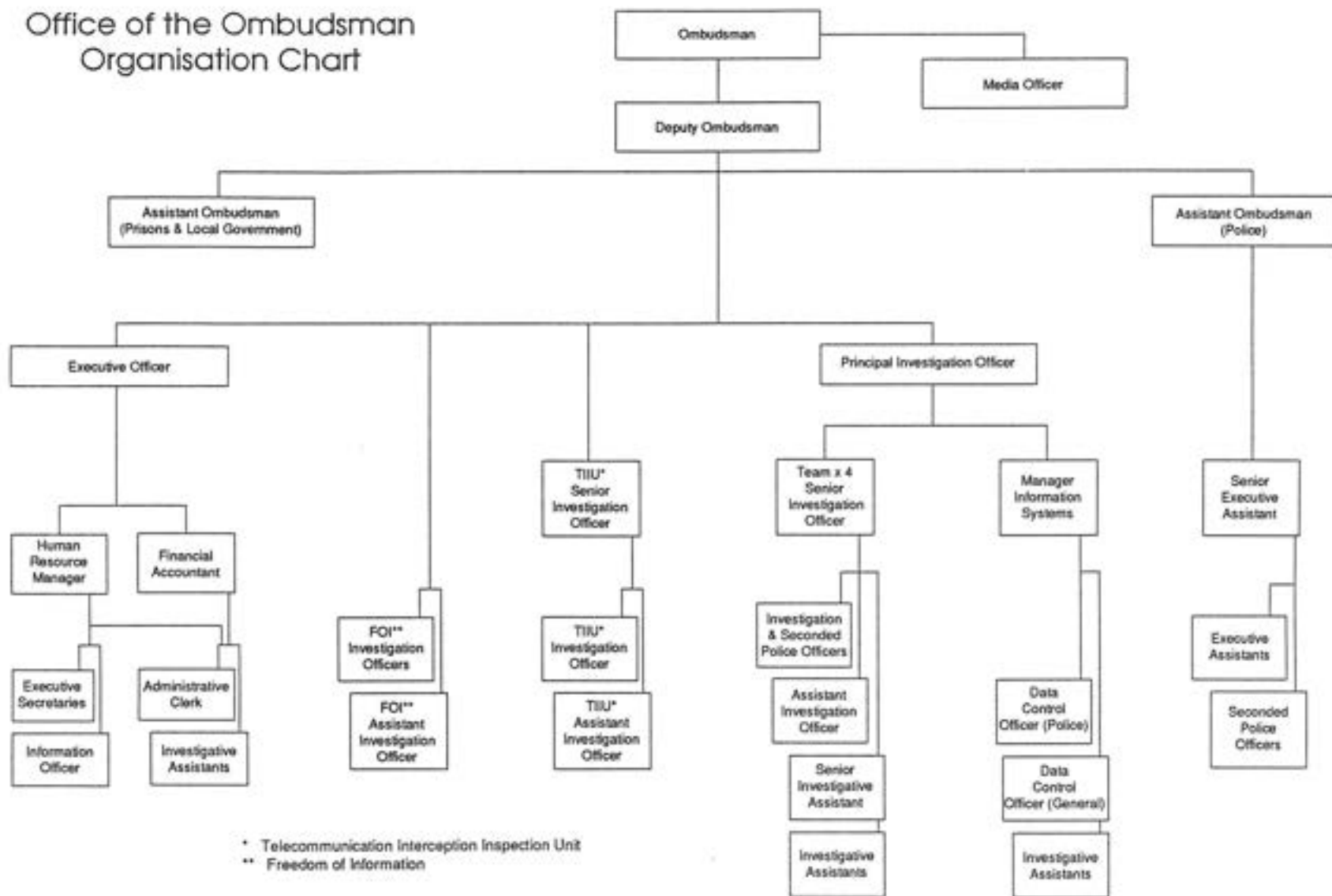
Categories officers and employees are shown in the following table:

	At 30/6/91	At 30/6/90	At 30/6/89	At 30/6/88
<hr/>				
Statutory Appointees				
Ombudsman	1	1	1	1
Deputy Ombudsman	1	1	1	1
Assistant Ombudsman	2	2	2	2

	At 30/6/91	At 30/6/90	At 30/6/89	At 30/6/88
Officers				
Principal Investigation Officer	1	1	1	1
Executive Officer Grade 9/10	-	1	1	1
Executive Officer Grade 11/12	1	-	-	-
Senior Investigation Officer Grade 9/10	4	4	-	-
Senior Administrative Officer (Police)	-	1	-	-
Senior Investigation Officer Grade 9	1	1	4	4
Investigation Officer	16	16	17	15
Investigation Officer (Police)	4	2	-	-
Investigation Officer (Aboriginal Complaints)	1	-	-	-
Special Officer of the Ombudsman (Seconded Police Officer)	4	6	9	9
Executive Assistant (Police)	3	3	3	3
Manager Information Systems	1	-	-	-
Public Relations Officer	1	1	1	-
Data Control Officer	1	1	1	-
Human Resource Manager	1	-	-	-
Financial Accountant	1	-	-	-
Accounts Officer	-	1	1	1
Personnel Officer	-	1	1	1

	At 30/6/91	At 30/6/90	At 30/6/89	At 30/6/88
Administrative Assistant	1	1	1	-
Interviewing Officer	-	-	6	5
Administrative Clerk	1	1	2	1
Officer in Charge Records	-	-	1	1
Information Officer	-	-	1	1
Keyboard Staff and Stenographers	-	-	16	16
Executive Assistant (Ombudsman Secretary)	1	1	-	-
Assistant Investigation Officer	5	6	-	-
Investigative Assistant (Teams)	10	10	-	-
Investigative Assistant (Records)	3	3	-	-
Investigative Assistant (Administration)	2	2	-	-
Senior Investigative Assistant (Records)	1	1	-	-
Senior Investigative Assistant (Teams)	4	4	-	-
Senior Investigative Assistant (Executive Area)	1	1	-	-
Senior Investigative Assistant (Information)	1	1	-	-
	<u>74</u>	<u>74</u>	<u>74</u>	<u>67</u>

Office of the Ombudsman Organisation Chart



Wage movements

The second 3 per cent Structural Efficiency Principle (SEP) instalment was paid to all staff, excluding statutory officers and seconded police officers effective 20 July, 1990.

Police officers were awarded salary increases of between 10 - 15 per cent under a special case provision of the SEP. A number of police allowances also increased.

On 1 October 1990, the Statutory and Other Offices Remuneration Tribunal increased the salary paid to statutory officers by 6 per cent.

As at the 30 June 1991, the NSW Industrial Commission was hearing submissions concerning the application of the State wage case to public service awards.

Personnel policies and procedures

During the reporting year, policies on higher duties, training and rehabilitation were reviewed to ensure sound management and EEO principles were being implemented. As a result, the Ombudsman issued policy statements on:

- availability of and access to higher duties;
- commitment to training and the role of the training committee; and
- occupational health and safety plan.

The higher duties policy ensures all staff in all areas of the office have equal access to opportunities to act in higher graded positions.

The training policy outlined the Ombudsman's commitment to provide training to all staff and the role of the training committee in the coordination of training requirements.

The occupational health and safety plan outlines the responsibilities of the Ombudsman as employer, supervisors and individual staff members under the Occupational Health and Safety Act. The plan also summaries other occupational health and safety matters including workers compensation.

The Ombudsman has entered negotiations with the Public Service Association concerning the rehabilitation policy.

Senior Executive Service

As previously mentioned in this report, the Ombudsman Act was amended to enable the Ombudsman to appoint his own statutory officers as part of the senior executive service (SES). The SES establishes contract based employment and flexible remuneration arrangements which are linked to performance reviews.

Prior to the inclusion of the statutory positions of Deputy Ombudsman and Assistant Ombudsmen in the SES, discussions commenced with the Office of Public Management's SES Unit. In particular Ms Pam Rutledge and Mr Steve McIntosh were most helpful in providing guidance in the establishment of the SES in this office.

The SES unit undertook a review of the SES positions to determine what remuneration level should be assigned to each position. Once that determination was made, SES staff were required to choose a remuneration package that consisted of salary and other benefits such as superannuation, motor vehicle, housing and mortgage payments.

The introduction of the SES into the Office of the Ombudsman is quite complex and requires a great deal of work. Initially the priorities are:

- assessing and deciding the most appropriate SES remuneration packages;
- preparing a detailed contract of employment that identifies duties, code of conduct and performance criteria; and
- developing preliminary performance criteria and performance agreements. In this regard, the performance management system developed for the SES must be accredited by an independent committee. It is envisaged that the performance management system developed for the SES will be implemented throughout the office.

Recruitment

During the 1990/91 reporting year, 30 established positions were filled. Two of these positions were filled by police seconded from the Police Service, 26 were by promotion and recruitment from outside the public service and two base grade positions were filled through the Government Recruitment Agency as required by the Public Sector Management Act, 1988.

In addition, temporary staff were employed in times of high workload or to replace permanent staff while absent on leave. At the close of the financial year, two positions were vacant. Advertising action had commenced on one of those vacancies.

It is office policy to advertise vacant promotional positions as widely as possible in order to attract the most competitive range of applicants. Investigative and senior administrative positions are advertised in the public sector notices, the press and also are distributed to various organisations, such as law faculties and community based agencies. Other administrative positions are advertised in the public sector notices only.

Industrial relations

The implementation of the Structural Efficiency Principle (SEP) required the formation of a Joint Consultative Committee (JCC) comprising equal numbers of union and management representatives. Since its formation the JCC has undertaken a number of

tasks required under the SEP agreement. Details of the activities of the SEP Committee are discussed elsewhere in this report.

There were no industrial disputes involving the office during the year, however the Public Service Association wrote to the Ombudsman about their concern over the use of statistics in performance appraisal. A working party has been established to consider this issue.

A representative of the workplace group continued to participate in weekly management meetings.

Staff training

On 1 July 1990, the Commonwealth Government Training Guarantee Act (1990) and the Training Guarantee (Administration) Act (1990) came into effect. They aim to increase and improve the skills of the workforce and, thereby, to improve the productivity and effectiveness of Australian industry.

Under this legislation, employers with an annual payroll of \$200,000 or more, are required to expend a minimum of 1 per cent of their total salary bill on structured training or pay a penalty to the Australian Taxation Office. The Office of the Ombudsman met its obligations under this Act.

The training committee continued to meet and discuss the training activities for the office. The Ombudsman, on the recommendation of the training committee, issued a training policy that reinforces the Ombudsman's commitment to provide effective training to all staff as well as outlining the role of the committee and its duties.

During the year the training committee approved and/or organised a number of internal training courses, including:

- letter and report writing,
- team development,
- introduction to word processing,
- Word Perfect training,
- induction course,
- selection techniques workshop,
- prison issues and
- training on complaint handling for investigative assistants.

Regular informal training/information sessions were held for investigation officers.

The office introduced a new computerised information system during the 1989/90 reporting year (refer to the annual report for 1990). As a result, all staff had access to word processing facilities. The training committee approved of Ms Heather Brough, administrative assistant to the Deputy Ombudsman, designing and conducting two

associated courses - word processing and Word Perfect training - for all staff. These courses were designed to provide staff with the necessary skills and knowledge to effectively use the word processing system. Training of all staff took three months. These courses were highly successful and the training committee is considering the possibility of advanced courses.

Staff also participated in courses conducted by external agencies. In most cases the office met the cost of attendance. Those courses included:

- executive program for women,
- accrual accounting,
- training needs analysis,
- occupational health and safety,
- first aid,
- performance indicators for government and
- Word Perfect.

Other training opportunities were available to all staff through either job rotation and/or the opportunity to act in higher graded positions.

The training committee is organising a number of courses for the next reporting year including a train the trainer course to assist in the design and delivery of internal courses. The office has asked TAFE to assess the literacy/communication skills of all base grade staff with the view to developing training courses.

Restructure

In last year's annual report details were provided on the restructure of the office. This new structure promoted the structural efficiency principle as well as enabling closer supervision of the work and workload of staff. The new structure involved the creation of teams as a basic management unit for investigations and creating broad salary and grading bands for support staff enabling multiskilling, job rotation and promotional opportunities.

The new structure is working well. Staff have been given the opportunity to develop and increase their skills in a team environment. The increase in skills has resulted in a number of staff members successfully being promoted to positions both within the office and in other public sector organisations during the reporting year.

Further training of staff in investigative procedures is required and the training committee is focusing on this issue. Training of base grade staff has continued with the implementation of a three month rotational program whereby investigative assistants are assigned to different work areas one day a week.

Computerised Human Resource System

The Ombudsman approved the installation of a computerised human resource system. A project team including the human resource manager and the manager information systems, was established to review and evaluate available systems and to make a recommendation to the Ombudsman on an appropriate system for the office. The project team recommended the installation of a system known as CHRIS (Complete Human Resource Information System). The Ombudsman approved the recommendation.

Initially, leave administration and establishment control will be computerised. Payroll and other personnel activities, such as training and recruitment, will follow.

It is anticipated that the computerised leave and establishment system will replace manual records by December, 1991.

Ethnic affairs policy statement

In August 1990, the Office of the Ombudsman submitted its EAPS Annual Report to the Chairman of the Ethnic Affairs Commission (EAC). The office has been advised that the commission recognised the office's commitment and achievements in relation to the implementation, review and improvement of our ethnic affairs policy statement. During the reporting year, the committee has met with a representative of the Ethnic Affairs Commission to discuss the implementation of EAPS, revised strategies and to share information in relation to the operations and priorities of the commission. This liaison has been particularly useful and, hopefully will continue.

One of the office's concerns in relation to the implementation of our EAPS strategies is the withdrawal of the educational/training services previously provided by the Ethnic Affairs Commission. The staff of this office, and indirectly the public of New South Wales, have benefited from the expert training provided by the EAC on many matters including use of interpreters, the needs of people from non-English speaking backgrounds and working effectively with people from non-English speaking backgrounds. Funding cuts, it is understood, have made it impossible for the EAC to continue this service. Similarly, this office, because of budgetary constraints, has been unable to buy in any expertise to continue such training sessions.

The EAPS committee has continued, however, to report monthly at the office staff meeting about the work of the committee and the Ethnic Affairs Commission. In addition, all new staff attended one of two formal induction courses, which included a detailed presentation on our EAPS.

Work commenced in the reporting year on an internal training course in conjunction with TAFE for the office's investigative assistants who are from non-English speaking

backgrounds. The course aimed to improve staff communication and literacy skills and to build on the training delivered through two adult migrant education courses conducted during 1989.

The office decided to reinstate a goal in the EAPS about measuring the level of use of the office by various ethnic communities. As a result we will be able to monitor the adequacy and appropriateness of our service. This goal had been deleted because successive EAPS committees had found it impossible to determine how best to collect the necessary data. This same difficulty has been experienced by similar complaint handling organisations, such as the Human Rights Commission, where people whose complaints may be declined, are asked to provide survey information. The principle concern is that people from non-English speaking backgrounds whose complaints had been declined and who had also provided information about their ethnicity, may have concluded their matter had been declined on the basis of their ethnicity and, hence, could have concluded they were being discriminated against. Following discussions between the EAC, TAFE and the Human Rights Commission, a decision was made by the Ombudsman, on the recommendation of the EAPS committee, that a survey of ethnicity form be sent to all complainants when letters were sent acknowledging receipt of a complaint. The survey form has been approved by the commission and the survey will commence as soon as funds are available. Appropriate computer software has been purchased to assist in the analysis of the data.

Equal Employment Opportunity

In December 1990, the EEO committee completely reviewed the EEO management plan and amended it to ensure a tighter reporting and evaluation method. This revised plan, in conjunction with material reported in the 1990 EEO Annual Report, resulted in the office being congratulated by the Director of the Office of the Director of Equal Opportunity in Public Employment (ODEOPE) for implementation of EEO strategies and goals within the office.

In October 1990, the evaluation of the EEO Resurvey was completed and a detailed report submitted to ODEOPE. The EEO survey was actually conducted sector wide during March 1990, with the aim of providing information about employment patterns and opportunities. The survey gathered specific information about employees' sex, Aboriginality, ethnicity, disability, status, living arrangements, harassment experiences, age, promotion patterns, work location, salary, occupation, qualifications and conditions of employment. Participation was completely anonymous and voluntary. A response rate of 94 per cent was achieved in the office.

The survey revealed there are more women than men employed in the office with a concentration of women in lower paid positions, particularly women from non-English speaking backgrounds. Since the last EEO survey in 1985, there has been an increase in the number of women achieving promotional positions. In general terms there have been a number of significant improvements since 1985 as a result of the implementation of EEO objectives and affirmative action plans.

The EEO committee meets on a monthly basis and continues its routine work in relation to the implementation of EEO. There have been a number of notable achievements within the reporting year.

Promotion of women

A number of women investigative assistants and senior investigative assistants, clerical officers Grade 1/2 and 3/4 have been promoted internally. This is a major achievement for the office's multiskilling and training strategies. Staff have been competitively selected for these positions and as a result of committed training for investigative staff, there have been a number of staff promoted to positions outside the organisation.

Selection techniques workshops

The aim of having all members of staff trained in selection techniques has been almost achieved following the provision of two selection techniques workshops during the reporting year. The workshops were conducted by three members of the EEO committee over two full days. Course evaluation has been positive and, in fact, other public sector organisations have asked for details of our program. New staff and a few long standing staff will be trained in the new year.

Induction course

Two formal induction courses have been held during the reporting year. All new staff undertake an individual induction program and approximately two to three months after employment, a formal one day induction course is held, with presentations by various representatives of the administrative and investigative staff on operational, administrative and staffing matters, in addition to presentations by members of the EEO, OH & S, EAPS, SEP and training committees. Feedback from the participants in relation to content and use has been positive and informative.

Higher duties policy

With greater opportunities made available for staff to act in higher duty positions because of multiskilling and broadbanding strategies, the EEO committee recommended the formulation of a higher duties policy which recognised short and long term acting up possibilities, in addition to ensuring all staff, had equal higher duty possibilities. The policy was endorsed by the Ombudsman and his management committee and has been operational for six months.

Advanced literacy/communications course

In May 1991, negotiations commenced with TAFE to develop an advanced literacy/communication course for investigative assistants from non-English speaking backgrounds. This course follows on from the achievements of the course conducted in the office last year by the adult migrant education service. Each investigative assistant has been individually assessed and a programme is currently being designed by a TAFE teacher.

Grievance handlers

The results of the EEO survey showed that a number of staff, both male and female, believed they had been harassed. As a result of this disclosure, the grievance handling procedures were reviewed and grievance handlers undertook work to increase their profile in the office and understanding of their role and function. It is pleasing to note there have been no new complaints or grievances of harassment.

Rotation of investigative assistants through the office

In April 1991, a scheme commenced to allow investigative assistants to be trained while working in a different functional area to their own substantive position. Hence, investigative assistants now work a set day each week in human resource management, information systems and in inquiries with the assistant investigation officers. The scheme at this stage is quite small. There are plans to extend the training into accounts and possibly, public relations.

Strategies for current reporting year

The current reporting year presents a challenge for the office in trying to maintain its current level of staff without reduction of services. Already, in order to honour the Ombudsman's commitment to maintain current staffing levels, a number of plans and priorities have been deferred or cancelled. There is no doubt that with increased workloads as a result of a significant increase in complaints and new administrative and legislative functions, staff will be under considerable pressure. Those staff working on committees such as the EEO committee, will be under additional strain. During the reporting year, the EEO committee will oversee the implementation of a computerised human resource management system, CHRIS. A number of the EEO committee members are on the CHRIS implementation project team.

The initial rotational training scheme for investigative assistants will be evaluated and a more extensive second scheme is planned. Given the opportunity, the EEO committee would like the office to employ at least another person representing the EEO target groups. The ability to achieve this objective is uncertain given the current budgetary situation.

In the current reporting year, a number of staff on the training committee will participate in Train the Trainer courses. This is consistent with and fundamental to the office providing relevant training for staff. The EEO committee members have had input into this decision, given the training objectives of our EEO management plan.

A course will be conducted during the current reporting year for investigative assistants to increase their oral and written communication skills.

TABLE 1

**Representation & Recruitment of Aboriginal Employees and
Employees with a Physical Disability**

	1990/91			1989/90		
	TOTAL STAFF	ABORIGINAL PEOPLE	PWPD*	TOTAL STAFF	ABORIGINAL PEOPLE	PWPD*
Total Employees	74	2/2.7%	3/4.1%	71	2/2.8%	3/4.2%
Recruited in the Year	30	Nil/0.0%	Nil/0.0%	49	2/4.1%	Nil/0.0%

* People with a physical disability

TABLE 2

Representation of EEO Target Groups within Levels

	1990/91			1989/90		
	TOTAL STAFF	WOMEN	NESB ¹	TOTAL STAFF	WOMEN	NESB ¹
Below C.O.2 ²	2	2/100.0%	Nil/0.0%	1	1/100.0%	Nil/0.0%
C.O.1 - Gd1 ³	14	12/85.7%	12/85.7%	17	14/82.4%	12/70.6%
A&C Gds1-2	7	7/100.0%	5/71.4%	8	8/100.0%	4/50.0%
A&C Gds3-5	9	7/77.8%	3/33.3%	8	7/87.5%	2/25.0%
A&C Gds6-9	33	22/66.7%	5/15.1%	30	16/53.3%	3/10.0%
A&C Gds10-12	4	1/25.0%	Nil/0.0%	2	Nil/0.0%	Nil/0.0%
Above A&C Gd 12	5	Nil/0.0%	1/20.0%	5	Nil/0.0%	Nil/0.0%
TOTAL	74	51 68.9%	26/35.1%	71	46/64.8%	21/29.6%

1 Non-English speaking background

2 Employees on salaries below clerical officer scale grade 1, 21 year old rate of salary

3 Employees on salaries from clerical officer scale grade 1, 21 year old rate to below minimum administrative and clerical scale grade 1

NB: This table includes staff on leave without pay and staff employed under training program.

Occupational Health and Safety (OH & S)

The Occupational Health and Safety Committee, elected in March 1990, continues to meet on a monthly basis. The committee comprises seven members representing various sections of the office, namely, management, administration, investigative assistants, investigation officers and seconded police officers.

During the reporting year, the following issues and significant achievements should be noted.

Training of OH & S committee members

As previously reported, under the Occupational Health and Safety Act 1983, all members of the OH & S Committee are required to undergo training. All but two of the members have received accredited training. Funds have been allocated from this year's budget to cover the cost of training the two remaining members.

Fire and emergency evacuation procedures

The office currently has six fire wardens. During the reporting year, a new chief fire warden was appointed and he and other fire wardens attended a fire and emergency evacuation course in October 1990. In June 1990, another fire warden was appointed to take the place of a staff member who had been relocated elsewhere in the office. In the current year, the committee plans to hold a simulated emergency evacuation and to arrange for fire wardens to attend refresher courses.

Occupational health and safety workplace inspection

During June 1991, a workplace inspection was undertaken of the entire office and basement car park by three members of the committee. On the whole, the office's work environment was found to be sound from an occupational health and safety viewpoint. The task force identified issues which needed immediate attention by management, by the landlord and by individual officers.

Given the high profile of the Ombudsman's office, it was considered that the office may have been at risk in terms of terrorist attack or threat. Accordingly, a member of the Police Special Branch addressed all staff on security procedures and precautions.

Computer terminal and keyboard equipment

Ms Erica Pumpa of Sydney Hospital Occupational Health and Safety Service revisited the office in July 1990 to hold a seminar and workplace inspection in relation to the investigation officers use of computers, work arrangements and practices. As has been previously reported, Ms Pumpa has inspected and advised the office for some time on the use/misuse of computers, keyboards and correct work practices, work station arrangements and furniture. Ms Pumpa spoke to staff individually and collectively and provided a detailed report on her findings and recommendations.

The OH & S committee reissued the report in June 1991 to remind staff of the correct procedures in relation to the use of computers and keyboards.

One of the matters requiring further attention by the office is to provide additional ergonomic chairs for use at computer terminals. All staff have approved ergonomic chairs but there is a need to provide additional chairs at terminals, instead of staff having to move their chairs to the terminal on each occasion they wish to use it.

First aid training

Due to the resignation of staff from the office, two new first aid officers were appointed. Both officers have received accredited training through St John's Ambulance of Australia and were awarded first aid certificates which are valid for three years. The office currently has three first aid officers.

Rehabilitation policy

During the year a rehabilitation policy was formulated by the OH & S Committee and approved by the Ombudsman. The Rehabilitation Policy has now been sent to the Labor Council for approval.

Occupational health and safety plan

In December 1990 the OH & S committee drafted the office's occupational health and safety plan and this was approved by the Ombudsman.

Eye tests for staff

During the reporting year, all staff were sent, at the office's expense, to the government medical officer to have their eyes tested. Staff will have eye tests upon appointment and every two years. In requiring staff to have these tests, the committee aims to prevent/detect eye problems or strain which might occur as a result of work, particularly computer based work.

Structural Efficiency Principle (SEP)

The Structural Efficiency Principle Joint Consultative Committee (SEP JCC) has continued to work towards the implementation of SEP in the Office of the Ombudsman.

As was detailed in last year's annual report, the implementation of SEP requires the completion of six specific processes, namely communication and education, review of functions, review of work arrangements in present form, skills analysis and training, job evaluation, and finally, application to the industrial authority.

As has previously been reported, following a period of considerable review and rapid change in the office during 1989/90, three of the six processes were completed. The fourth process, the skills analysis and training, will be completed by November 1991. A sub-committee of the SEP JCC is currently working on the skills analysis. It might be noted that this office's work on the skills analysis has been recognised by other public sector

organisations and many have sought advice and assistance in relation to the implementation of this process.

At this stage, no progress has been made in relation to the job evaluation process. At the time of reporting, no agreement had been reached between the Industrial Authority and the Labor Council in relation to the methodology for the implementation of job evaluation. However, in anticipation of an agreed job evaluation methodology, members of the SEP JCC attended a number of relevant briefing sessions held by the Industrial Authority and the Office of the Director of Equal Opportunity in Public Employment.

During the reporting year, the benefits of multiskilling and broadbanding strategies have been apparent. Staff have had increased training in-house which has developed their skills and knowledge across a broad range of the office's operation. Many staff, because of their broader range of skills, have been able to act in higher duty positions and some staff, having increased their knowledge/skills through training strategies, have achieved promotional positions outside the organisation. With investigation officers having gained keyboard skills, and the investigative assistants having been trained in preliminary investigative techniques and able to take on the more routine matters, investigation officers have more time to investigate complex or time consuming matters. The office is thus using its human resources more efficiently, while at the same time providing its staff with interesting work and developmental opportunities.

Regular meetings with staff

Staff participate in a number of regular meetings.

Staff meeting

A monthly staff meeting is held, chaired by the Ombudsman. It is compulsory for all staff to attend. Office policies, procedures and administrative matters are discussed and information provided on current investigative issues and current challenges/problems facing the office. There are a number of permanent agenda items such as EEO, EAPS, public relations report and reports on the progress of the structural efficiency principle.

Senior investigation officers - principal investigation officer meetings

Senior investigative staff meet on a weekly basis to discuss issues relating to investigative processes, current complaint level, mix of complaints, administrative matters and investigative strategies.

Meeting of investigative assistants with human resource manager and executive officer

These meetings occur monthly and occasionally are attended by the principal investigation officer. The meetings are held to ensure staff are informed of developments in the office, such as new policies and administrative arrangements, and to provide an avenue for investigative assistants to provide feedback on the functioning of the investigative teams. Staff are encouraged to express their views and discuss areas of concern.

Callover meetings

These meetings are held on a monthly basis. The meeting is chaired by the Ombudsman. It is compulsory for the Deputy Ombudsman, Assistant Ombudsmen, all investigation officers, seconded police officers and executive assistants to attend. During the meeting all general, police and prison matters which are at the stage of issue of section 16 Notices, issue of Statement of Provisional Findings and Recommendations, draft and final reports and compliance with recommendations are discussed.

Administration meetings

Staff of the administration section meet on a monthly basis. A report is provided by a representative of each of the sections that is human resources, accounts and management, on work carried out in each area, new procedures, policy decisions, and interesting and complex matters. The meeting also provides an opportunity for feedback in relation to issues, challenges, and problems in the sections.

Freedom of Information (FOI) meetings

The Deputy Ombudsman meets weekly with the FOI staff to discuss current matters held by the section, discuss interesting and complex matters and any administrative or operational issues.

Telecommunication Interception Inspection Unit (TIU)

The Deputy Ombudsman meets with the staff of this unit on a monthly basis to discuss current investigations and any complex or interesting matters. The meeting provides the opportunity for feedback on other administrative or operational matters.

Working party on police complaints involving domestic violence and/or sexual harassment

A representative of each investigative team comprises this working party which meets monthly to discuss, analyse, review and coordinate work on police complaints involving elements of domestic violence and/or sexual harassment.

Consultants

During the year, the Ombudsman used a number of consultants to provide expert advice and assistance in the following areas:

Legal advice

- Mr W Heylen provided legal advice to the Ombudsman in relation to his submission to the Statutory and Other Offices Remuneration Tribunal.
- The following barristers provided advice to the Ombudsman on a number of litigation matters throughout the year:

J C Campbell
P R Garling
R J Ellicott
J V Nicholas
T Simos

- The firm of solicitors, Allen Allen & Hemsley, is retained by the office to act on behalf of the Ombudsman, in addition to providing legal advice.

Litigation costs during the year exceeded the office's budgeted expenditure on this item by \$80,000, however, NSW Treasury provided supplementation late in the year and this covered the additional unexpected costs.

Investigations

- Associate Professor V S Ramsden of the School of Electrical Engineering of the University of Technology, Sydney, provided scientific advice concerning a complaint.
- Computer Reporters Pty Ltd provided transcription services for a lengthy inquiry into NSW Prisons.
- Chris Anderson was engaged in 1990/91 to assist with the identification of handwriting in relation to a complaint.
- Mr A Jones of the Department of English at the University of Sydney provided his services to assist in the identification of a voice on a cassette tape.

1989/90 annual report

- Ecco Personnel provided specialist word processing assistance as part of the production of the 1989/90 annual report.

Computer Consultancies

- Computa Biz was engaged in September 1990 to dismantle the old Unisys word processing system which had been replaced by the office computer network in 1989/90.
- Tangent Computer Services was engaged by the Ombudsman from August to October 1990 to develop and implement the office information systems software. Tangent's services also were used to provide expert advice about forward planning capital works requirements for the office.
- Tachyonics continued their work for the Ombudsman in 1990/91, as part of the design and implementation of the information processing strategic plan.
- Dialog provided assistance with the implementation of the file tracking system in the general complaints database and setting up formats for statistical reports.

Freedom of Information (FOI)

- Ms Helen Mueller continued her association with the office in 1990/91. Early in the year, Ms Mueller participated in the recruitment of new Freedom of Information officers.

EEO Resurvey

- G & M Krasovitsky provided helpful assistance with statistical analysis for the EEO Resurvey which took place in September and October 1990.

Accrual Accounting

- The Accounting Equation provided consultancy services in the months leading up to 30 June 1990. As part of the Government's economic reforms, most inner Budget agencies are required to implement accrual accounting. From 1 July 1991, the Office of the Ombudsman was required to have in place its accrual accounting system. To achieve this, a working party was established, comprising key staff of the Office of the Ombudsman, Treasury officials and Mr P Onus from the Accounting Equation. Mr Onus provided information about available software and arranged the purchase of the software. Information also was provided about staff training courses. The office was ready to fully implement the new accrual accounting system at the close of the financial year.

Summary of consultancy costs 1990/91**Consultancies costing at or in excess of \$30,000**

Allen Allen and Hemsley - provision of legal services and advice

Total cost: \$97,724

NB: Costs include fees payable to the following individual barristers who were instructed by Allen Allen and Hemsley:

Mr J C Campbell
Mr R J Ellicott
Mr J V Nicholas
Mr T Simos

Consultancies costing less than \$30,000

Mr W Heylen
Mr P R Garling
Associate Professor V S Ramsden
Computer Reporters Pty Ltd
Mr C Anderson
Mr A Jones
Ecco Personnel
Computa Biz
Tangent Computer Services
Tachyonics
Dialog
Ms H Mueller
G & M Krasovitsky
The Accounting Equation

Total cost of consultancies costing less than \$30,000 - \$71,369:

Accounts payable policy

The Office of the Ombudsman continues to implement an accounts payable policy. The policy states that all accounts shall be paid within the agreed payment terms or within 30 days of receipt of invoice if terms are not specified. Suppliers are notified of the policy in writing when orders for goods and services are placed with them. Where there is an unjustified delay in the payment of an account, the supplier can bring the matter to the attention of our minister, who may award a penalty interest rate. Details of any penalty interest imposed must be included in the annual report. To date no penalty interest payments have been imposed upon this office.

Accrual accounting

It has been previously reported that the Office of the Ombudsman was to move to an accrual accounting system in 1991. This is in line with the Premier's direction that all inner budget departments move to accrual accounting within a three to five year period. Accrual accounting is a method by which revenue and expenditure are recognised when incurred, not when cash is received or paid.

An accrual accounting project plan was devised in December 1990 by the information systems manager and the executive officer. Following approval by the Treasury on 15 January 1991, of an accrual accounting funding submission for \$30,000, a project team was established and had its first meeting on 23 January 1991. The team consisted of:

John Pinnock	-	Deputy Ombudsman
Sue Bullock	-	Executive Officer
Geoff Pearce	-	Manager, Information Systems
Sandra Bitsakos	-	Financial Accountant
Mr Mark Pellowe	-	Treasury Consultant
Mr Peter Marks	-	Treasury Budget Inspector
Mr Peter Onus	-	Computer consultant to the Office of the Ombudsman

Despite delays being experienced as a result of both hardware and software problems, the office did change over to the accrual accounting system on 1 July 1991.

There are still some outstanding accounting matters to be resolved by Treasury, such as Treasury transfers and cash budgeting, but generally speaking the changeover to the new accrual accounting system has been relatively smooth. With this new system of accounting, the financial information available will be more accurate and of greater assistance in ascertaining the organisation's current financial position and also provide greater predictive abilities. In a time of great financial strain, this information is crucial.

Witnesses expenses

Section 19(3) of the Ombudsman Act provides, in part that:

a witness appearing before the Ombudsman shall be paid such an amount as the Ombudsman determines but not exceeding the amount that would be payable to such a witness if he or she were a Crown witness subpoenaed by the Crown to give evidence.

Witness expenses are paid to witnesses to cover meals, loss of earnings, public transport and accommodation costs. However, a person called as a witness will not be reimbursed for costs incurred if he or she is employed by the public authority which is subject to the enquiry concerned.

During 1990-91, five witnesses appearing at hearings conducted by the Ombudsman were reimbursed expenses by the office. Total expenditure was \$524.27.

Financial summary

The recurrent allocation of funds to the Office of the Ombudsman, for the year ended 30 June 1991, was \$4,178,000. In addition, a specific amount of \$21,000 was provided to this office for expenditure on capital works.

The above amounts were supplemented by additional approved funding for the following items:

1. Capital fund allocation of \$30,000 was provided for costs associated with the implementation of accrual accounting in the financial year 1991-92.
2. Consolidated fund allocation of \$80,000 was provided as a reimbursement of litigation costs that this office incurred throughout the course of the year for a matter that could not be classified recurrent.
3. Consolidated fund allocation of \$63,000 was provided as a reimbursement of costs incurred while undertaking a prisons inquiry at the request of the then Minister for Corrective Services, the Hon Michael Yabsley.

It should be noted that this office advised the Treasury that supplementation for items two and three would be necessary early in July 1990 and that supplementation was not granted until 31 May 1991. The formal advice of this decision was not received by this office until 5 June 1991. This made it extremely difficult to properly manage the resources of this office.

Therefore, in total, the Treasury allocated to the office a recurrent expenditure budget of \$4,321,000 of which the office spent \$4,277,362, and a capital expenditure budget of \$51,000 of which the office spent \$51,134.

The significant expenditure items were as follows:

Item	Expenditure \$	Percentage of Total Expenditure
Salaries and other employee related payments	3,078,674	71.13
Rent	513,692	11.87
Rates & charges	118,656	2.75
Legal expenses	117,228	2.71
Postage and telephone	99,413	2.30
Fees	82,716	1.91
Stores	76,102	1.76
Capital works	51,134	1.19
Motor vehicles	50,627	1.17
Travel	32,798	0.76

Total expenditure for the year was \$43,504 less than the total budget allocation. This amount was set aside in the current budget to transfer to the 1191/92 financial year to cover costs associated with a rent review that was due to be determined on 1 March 1991. The review has not yet been finalised, as there is a dispute between this office and the lessor as to the level of rental increase. The rent review will go for determination to an independent valuer appointed by the Australian Institute of Valuers (NSW Division).

Value of recreation and extended leave

The monetary value of recreation leave and long service leave owed in respect of persons employed within the Office of the Ombudsman, for the 1989/90 and 1990/91 financial years is as follows:

	Year ended 30 June 1990	Year ended 30 June 1991
Recreation leave	\$159,575	\$184,171
Long service leave	\$325,627	\$373,174

Major assets on hand as at 30 June 1991

Description	Quantity on hand	
	1989/90	1990/91
Computers and Related Equipment		
Office System Network:		
Minicomputer	1	1
Terminal servers	2	2
Laser printers	3	3
Terminals	30	35
Word Processing, office automation and database software	3	3
General Office System:		
Personal computers	19	19
Laser printers	2	2
Daisy wheel printers	12	12
Word processing database and graphics software	14	14
Cash Based Accounting System:		
Minicomputer	1	1
Dot matrix printer	2	2
Terminals	1	1

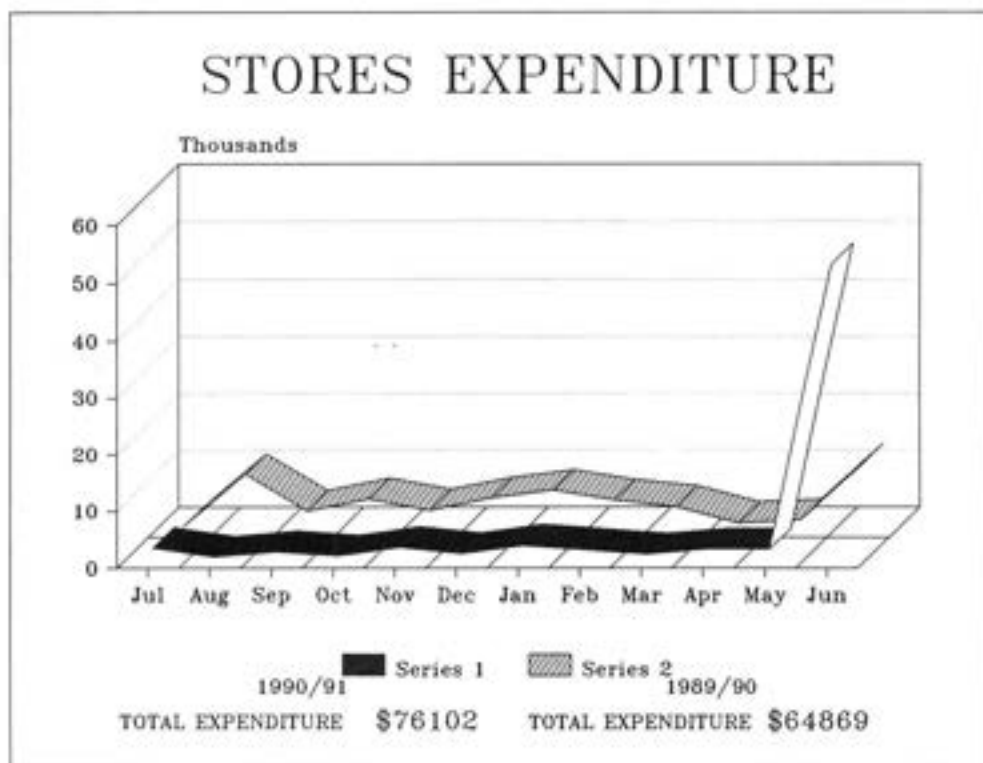
Description	Quantity on hand	
	1989/90	1990/91
Accounting, word processing and spreadsheet software	3	3
Accounts/Human Resources Network:		
Personal computers	0	2
Terminals	0	1
Laser printer	0	1
Dot matrix printer	0	1
Human Resources, payroll accrual accounting, windowing, word processing and spreadsheet software	0	6
Photocopiers	5	7 ^a
Television & video equipment	7	7

^aTwo of the photocopiers included in this total are non-operable and are being disposed of imminently.

Expenditure of stores

The following graph indicates the expenditure trend of stores, for both the 1989/90 and 1990/91 financial years. It can be seen from this graph that the total expenditure for both financial years did not vary greatly, only the monthly pattern was different.

The graph indicates a relatively stable expenditure pattern for the financial year ended 30 June 1991, for the period July 1990 - May 1991. This is due to this item being primarily used for the purchase of replacement stationery and stock items for that period. The office had been exercising extreme financial restraint for the entire period due to the uncertainty relating to the supplementation request for funds in relation to litigation expenses and costs associated with the prisons inquiry. As this issue was not decided until 31 May 1991, by Treasury, this office did not know whether it had to fund non-recurrent expenditure out of its original budget allocation. Therefore, replacement items were not purchased when the need arose. When we received the formal advise on 5 June 1991, that our budget was being supplemented, we then proceed to purchase items of office machinery that had been needed throughout the year. As a result, most of this office's stores expenditure took place in June 1991.



1 JULY 1990 - 30 JUNE 1991

FINANCIAL STATEMENTS



BOX 12, G.P.O.
SYDNEY, N.S.W. 2001

AUDITOR-GENERAL'S OPINION

OFFICE OF THE OMBUDSMAN

I have audited the accounts of the Office of the Ombudsman for the year ended 30 June 1991. The preparation and presentation of the financial statements comprising the accompanying summarised receipts and payments statements and statement of special deposits account balances, together with the notes thereto, and the information contained therein is the responsibility of the Department Head. My responsibility is to express an opinion on these statements based on my audit as required by Sections 34 and 45F(1) of the Public Finance and Audit Act 1983.

I conducted my audit in accordance with the provisions of the Act and the Australian Auditing Standards to provide reasonable assurance as to whether the financial statements are free of material misstatements. My procedures included examination, on a test basis, of evidence supporting the amounts and other disclosures in the financial statements and the evaluation of accounting policies and significant accounting estimates. These procedures have been undertaken to form an opinion as to whether, in all material respects, the financial statements are in accordance with the requirements of the Public Finance and Audit Act 1983, and Australian accounting concepts and standards, where applicable, so as to present a view of the Office of the Ombudsman which is consistent with my understanding of its operations.

In my opinion, the financial statements, within the confines of the cash basis of accounting described in Note 1, comply with Section 45E of the Act and are in accordance with the accounts and records of the Office of the Ombudsman for the year ended 30 June 1991, and the Statements of Accounting Concepts and Accounting Standards, where applicable.



J.R. MITCHELL, FCPA
ASSISTANT AUDITOR-GENERAL

SYDNEY
8 October 1991

TABLE A

OFFICE OF THE OMBUDSMAN

SUMMARISED RECEIPTS AND PAYMENTS OF THE CONSOLIDATED FUND
AND THE SPECIAL DEPOSITS ACCOUNT BY ITEM
FOR THE YEAR ENDED 30 JUNE 1991

DETAILS	NOTE	1989/90 ACTUAL	1990 /91	
			ESTIMATE	ACTUAL
		'000s	'000s	'000s
<u>RECEIPTS:(a)</u>				
Repayments to Previous Years Vote		7	-	7
Commission on Deductions		1	-	1
Salary Deductions		9	-	55
Balance of Salaries Adjustment		7	-	28
Advances to be Recovered		-	-	3
<u>Total Receipts</u>		24	-	94
<u>PAYMENTS:(a)</u>				
Salaries and other employee related payments	10	2736	3092	3079
Maintenance and Working expenses		1150	1086	1198
Capital Works and Services Office of the Ombudsman		232	21	51
Advances to be Recovered		3	-	-
Provision for Outstanding commitments		128	-	22
<u>Total Payments</u>		4249	4199	4350
<u>Excess of Payments Over Receipts</u>		4225	4199	4256

(a) Inter-fund transfers have been offset in the preparation of this table

TABLE B

OFFICE OF THE OMBUDSMAN

SUMMARISED RECEIPTS AND PAYMENTS OF THE CONSOLIDATED FUND AND THE SPECIAL DEPOSITS ACCOUNT BY PROGRAM
FOR THE YEAR ENDED 30 JUNE 1991

DETAILS	NOTE	RECEIPTS			NOTE	PAYMENTS		
		1989/90	1990 /91			1989/90	1990 /91	
		ACTUAL	EST.	ACTUAL		ACTUAL	EST.	ACTUAL
<u>PROGRAM 5.1 DESCRIPTION</u>		\$000s	\$000s	\$000s		\$000s	\$000s	\$000s
Investigation of Citizen's Complaints & Monitoring & Reporting on Telecommunication Interception Activities								
Consolidated Fund		-	-	-	4118	4199	4328	
Special Deposits		-	-	-	-	-	-	
Gross Total Program 5.1		-	-	-	4118	4199	4328	
less: Inter-Fund Transfer		-	-	-	-	-	-	
<u>Net Total Program 5.1</u>		-	-	-	4118	4199	4328	
<u>NON PROGRAM</u>								
Consolidated Fund		8	-	8	-	-	-	
Special Deposits		78	-	88	990	-	931	
Gross Total Non-Program		86	-	96	990	-	931	
less: Inter-Fund Transfer		-	-	-	797	-	907	
<u>Net Total Non-Program</u>		86	-	96	193	-	24	
<u>TOTAL</u>								
Consolidated Fund		8	-	8	4118	4199	4328	
Special Deposits		78	-	88	990	-	931	
GRAND TOTAL		86	-	96	5108	4199	5259	
less: Inter-Fund Transfer		-	-	-	797	-	907	
GRAND TOTAL	11	86	-	96	4311	4199	4352	

(a) Amounts transferred from Consolidated Fund to Special Deposits are included in the Consolidated Fund payments section of this table. This has been done to make the Consolidated Fund figure 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 30 JUNE 1991

CASH \$000s	PREVIOUS YEAR		ACCOUNT	CURRENT YEAR		
	SECURITIES \$000s	TOTAL \$000s		CASH \$000s	SECURITIES \$000s	TOTAL \$000s
-3	-	-3	1121 Advances to be recovered	-	-	-
56	-	56	1140 Balance of Salary Adjustment	85	-	85
76	-	76	1196 Salary Deductions	55	-	55
22	-	22	1820 Provision for Outstanding Commitments	-	-	-
151	-	151	TOTAL - All Special Deposits Accounts	140	-	140

**OFFICE OF THE OMBUDSMAN
NOTES TO AND FORMING PART OF THE FINANCIAL
STATEMENTS
FOR THE YEAR ENDED 30 JUNE 1991**

Note 1 Statement of Accounting Policies

(a) The attached financial statements have been prepared in accordance with the Public Finance and Audit Act 1983, the Public Finance and Audit (Departments) Regulation 1986, and the Treasurer's Directions.

(b) 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 and items covered by the Provision for Outstanding Commitments which are reported on an accrual basis. (Note 10 also refers).

(c) The financial details provided in Tables A and B relate to transactions on Consolidated Fund and Special Deposits account and are in agreement with the relevant sections of the Treasurer's Public Accounts.

(d) A reference in the receipts and payments statement to an "estimate" figure means the amount provided in the estimates to be appropriated by the relevant Appropriation Act as advised by the Treasury.

(e) A reference in the receipts and payments statement to an "actual" figure means payments actually made by the Office in respect of the item to which it refers with the exception of payment for salaries and items covered by the Provision for Outstanding Commitments which are reported on an accrual basis as per (b) above.

(f) All totals have been rounded to the nearest one thousand dollars (\$1,000).

(g) 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

Note 2 Schedule of uncollected amounts

There are no uncollected amounts as at 30th June, 1991, 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 1991, and comparative amounts as at 30th June 1990, for the following items are as follows:

1989/90		1990/91
\$		\$
2,764	Advertising	-
220	Books	970
276	Fees	437
30	FOI Refunds	-
174	Motor Vehicles	133
-	Stores	1,266
-	Travel	<u>322</u>
<u>3,464</u>		3,128

Note 4 Contingent Liabilities

The Office of the Ombudsman does not have any contingent liabilities.

Note 5 Amounts repayable and outstanding loans and advances

The Office of the Ombudsman has no form of Public Borrowings, all funds being provided from the Consolidated Fund.

Note 6 Debts written off

The Premier and Treasurer delegated authority to write-off debts deemed irrecoverable, and discrepancies following stocktakes within the office on 7 April 1989, to the Ombudsman.

Total debts written off in the financial year ended 30 June 1991, totalled \$813.11.

The irrecoverable debts are summarised below:

1. Salary overpayments, discovered during an internal salary audit, were deemed irrecoverable as the employees had resigned at the time of the discovery, and all attempts to recover the moneys were unsuccessful.

The total amount of salary overpayment written-off was \$711.06

2. A discrepancy in the Petty Cash account of \$102.05 existed for approximately five years. It was an irrecoverable amount and as such the decision was made to write-off the amount.

Note 7 Commitments

Commitments on hand as at 30th June 1991, and comparative amounts as at 30th June 1990, are as follows:

1989/90	1990/91
\$	\$
21,700	-
	Capital Works

Note 8 Material assistance provided to the Department

No material assistance was provided to the Office during the financial year ending 30th June 1991.

Note 9 Sums of money held for two years or more

There were no monies held by this Office as at 30 June 1991 that should have been sent to Treasury.

Note 10 Full years costs for Salaries and Wages expenditure

The expenditure for salaries and other employee payments for consolidated fund was \$3,078,674 which includes an amount of \$84,589 for the final six 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 \$000s	Program Description	Balance of Salaries \$000s	Advances to be Recovered \$000s	Other \$000s	Total Receipts \$000s
	Program 5.1 Investigation of Citizens Complaints and Monitoring and Reporting on Telecommunication Interception Activities				
86	Non-Program	85	3	8	96
86	TOTAL	85	3	8	96

Note 11 Dissection of Program

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 Payments \$000s	Program Description	Salaries & Other Employee Payments \$000s	Maintenance & Working Expenses \$000s	Other \$000s	Total Payments \$000s
4118	Program 5.1 Investigation of Citizens Complaints and Monitoring and Reporting on Telecommunication Interception Activities	3079	1198	51	4328
193	Non-Program	2	-	22	24
4311	TOTAL	3081	1198	73	4352

END OF AUDITED FINANCIAL STATEMENTS

Office of the Ombudsman
Year Ended 30 June 1991

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 statements to be misleading or inaccurate.



D.E. Landa
OMBUDSMAN



S. Bitsakos
S. Bitsakos
FINANCIAL ACCOUNTANT

- 2 AUG 1991

PERFORMANCE INDICATORS

AND

STATISTICAL TABLES

Performance indicators

Performance indicators for the year are set out below. Tables in the following format have been published in the Ombudsman's annual report since 1985.

A review is under way to assess whether these indicators present a true picture of the level of efficiency and effectiveness of office activity.

The Ombudsman considers these indicators to be an important window into the operation of his office as well as a key aid to the effective management of a valuable public resource.

Telephone enquiries and interviews

	Assistant Investigation Officers	Receptionist	Total	% change from 1989/1990
Telephone enquiries	6139	2571	8710	+ 33%
Interviews with prospective complainants	558	-	558	+ 6%

Complaints received - comparative table

Ombudsman Act:

	1990/91	1989/90	1988/89
Departments and authorities (other than Corrective Services)	1093	1097	969
Local councils	716	716	633
Department of Corrective Services	520	310	321
Outside jurisdiction	<u>274</u>	<u>302</u>	<u>345</u>
	<u>2603</u>	<u>2427</u>	<u>2268</u>

Police Regulation (Allegations of Misconduct) Act:

Complaints against police	3232	2352	2231
Total:	5835	4777	4499

Police

Sustained complaints -

No recommendation made; action by police accepted

Nature of Action Taken -
Accepted by Ombudsman

Total Number of Cases Involved: *81

Change in procedure	-
Change in action	-
Change in policy	-
Change in law	-
Disciplinary action	65
Ex gratia or other payment	4
Issue direction or instruction to staff	3
Other	10

*More than one action may have been taken on an individual case.

Visits

The following table shows the number of hours spent in various activities during visits by Ombudsman officers to institutions and in community awareness programmes.

	Oral Complaints Received	No. of visits	Travel	Interviewing and follow- up	Totals
Prisons	315	20	114	263	712
Juvenile Institutions	41	5	48	57.5	151.5
Community Awareness Programs	199	11	98.5	164	472.5
Totals	555	36	260.5	484.5	1336

Action following visits

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	99	22	3	= 124
Other general enquiries made and advice given to complainant	44	7	1	= 52
Advised to make written complaint	46	-	40	= 86
Written complaint taken	24	1	31	= 56
Referred to other service	14	4	10	= 28
Declined	26	-	29	= 55
No jurisdiction	19	-	34	= 53
Enquiry re existing complaint; advice given/arranged	103	8	15	= 126
Totals	375*	42	163	580

* In some instances more than one action has been taken on an oral complaint.

Hearings under Section 19 of the Ombudsman Act

	No. of hearings	No. of days	No. of witnesses
Departments and authorities	-	-	-
Local government councils	1	3	12
Prisons	2	42	221
Police	5	25.5	66
Totals	8	70.5	299

Hearings were conducted in the Office of the Ombudsman, in other Sydney locations and in NSW country centres nearest to the incidents under inquiry including a number of NSW Prisons.

Numbers of formal reports

Ombudsman Act

	S 26(1) Conduct (Final)	No Adverse Finding
Departments and authorities	6	-
Local government councils	6	-
Prisons	4	-
Totals	16	-

POLICE Regulation (Allegations of Misconduct) Act

	Sustained		Not sustained	
	Reinvestigated	Not reinvestigated	Reinvestigated	Not reinvestigated
Police	3	136	5	-

These are reports made final. Reports sent to ministers for advice on consultation are set out in the topic "Reports to Ministers and to Parliament".

COMPLIANCE WITH RECOMMENDATIONS

1 JULY 1990 - 30 JUNE 1991

	Departments and Authorities (excluding prisons)		Prisons		Local Government - Councils		Police		Totals	
	Accepted	Not accepted	Accepted	Not accepted	Accepted	Not accepted	Accepted	Not accepted	Accepted	Not accepted
Number of cases involved	13		4		10		22		49	
Nature of recommendations										
Change in action:					2	2	1		3	2
Change in legislation:					2				2	
Change in policy:					3				3	
Change in procedure	2		1		6		7		16	
Disciplinary action:							26		26	
Ex gratia or other payment:							4		4	
Review/investigation:	2		1		1	3	3		7	3
Issue direction or instruction to staff:	1				2		7	1	10	1
Provide information to public:	1				1				2	
Other:							2	1	2	1
TOTALS	6		2		15	7	50	2	73	9

In some instances more than one action may have been taken on an individual case.

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 conduct under s.26 of the Act (NPFE) | - | Complaint is concluded after preliminary enquiries because there is no prima facie evidence of conduct described under s.26 of the Act. 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 Adverse Findings (NAF) | - | After investigation, no conduct as described under s.26 of the Act is found. |
| Adverse Findings (AF) | - | After investigation, conduct as described under s.26 of the Act is found. |

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPFE)	(DIS)	(NAP)	(AP)	(CURR)	TOTAL
Aboriginal Land Councils			2						2	4
Agriculture and Fisheries	1	4	5						4	14
Albury-Wodonga (NSW) Corporation			1							1
Anti-Discrimination Board			3	2					2	7
Attorney-General's Department	2	2	11							15
Australian Gas Light Company		2	4						1	7
Board of Senior School Studies				1						1
Building Services Corporation		8	7	1		1			9	26
Business and Consumer Affairs	2	4	13	3					11	33
Chief Secretary		1	2		1					4
Coal and Oil Shale Mine Workers Super. Tribunal		1							1	2
Commissioner of Inquiry for Environment and Planning		1								1
Consumer Claims Tribunal			1						1	2
Corrective Services Department	3	137	205	29	11	6		4	75	470
Council of Auctioneers and Agents								1		1
Crown Solicitors Office									1	1
Diary Corporation of NSW										-
Dental Board of NSW			1	1					1	3

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DISCO)	(DMCE)	(RES)	(NPPF)	(DES)	(NAP)	(AP)	(CURR)	TOTAL
Dust Diseases Board										-
Electricity Commission of NSW		2	2	2						6
Fair Rents and Strata Titles Board		1							1	2
Family and Community Services	3	15	48	4	1	1			22	94
Fire Commissioners Board		1							3	4
Fish Marketing Authority			1							1
Forestry Commission		3	6						3	12
Geographical Names Board										-
Government Insurance Office	1	8	26	3				2	3	43
Government Supply Office	1									1
Guardianship Board										-
Harness Racing Authority of NSW									1	1
Health Department	1	22	15	2	1			1	7	49
(Health Department) Prison Medical Service		5	15						11	31
Heritage Council of NSW			1		1				1	3
Home Care Services		1	2							3
Housing		17	44	6	3	2		1	39	112
Hunter Ports Authority			1							1

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DECO)	(DECI)	(RES)	(NPRE)	(DBS)	(NAP)	(AP)	(CURR)	TOTAL
Hunter District Water Board		1	2	1						4
LCAC	1									1
Industrial Relations and Employment		2	7						2	11
Joint Coal Board			1							1
Lands Department		3	9	1		1			7	21
Land Tax Division (Office of State Revenue)			1							1
Land Titles		1								1
Legal Aid Commission		10	27	3	3				4	47
Liquor Administration Board		3							1	4
Local Government		1							2	3
Local Government Exam Committees			1							1
Local Government Grants Commission									1	1
Macquarie University		1	1		1					3
Maritime Services Board		6	5	4		1			1	17
Meat Industry		1	1							2
Medical Board		1	2							3
Mental Health Review Tribunal			1							1
Mine Subsidence Board				1						1

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DISCO)	(DICE)	(RES)	(NPPE)	(DIS)	(NAF)	(AP)	(CURR)	TOTAL
Mineral Resources and Energy		2	4	1	1					8
Ministry of Transport		1							1	2
Motor Vehicle Repair Industry Council										-
Museum of Applied Arts and Science										-
National Parks and Wildlife Service		5	3	2	1				4	15
Office of Aboriginal Affairs			1						1	2
Office of the Director of Public Prosecutions	3	1							2	6
Office of Minister for Education & Youth Affairs										-
Office of State Revenue (Treasury)		8	6	6					5	25
Parole Board			1							1
Pastures Protection Board		1	1	1					1	4
Police Service	23	13	30	11					17	94
Premier's Department			1							1
Property Services Group		1								1
Planning Department		2				1			3	6
Protective Office			1							1
Public Trust Office		3	8	1					4	16
Public Works Department		1	6			1			1	9
Real Estate Valuers Registration Board			3	1		1				5

PUBLIC AUTHORITIES

AUTHORITY	(NF)	(DECO)	(DECI)	(RES)	(NPIB)	(DIS)	(NAF)	(AF)	(CURR)	TOTAL
Registry of Births Deaths and Marriages		3	8	6						17
Rental Bond Board			2							2
Residential Tenancies Tribunal			1							1
Roads and Traffic Authority	2	34	41	8	1	1			28	115
Royal Botanic Garden & Domain Trust			2							2
Rural Lands Protection Board		1								1
School Education Department	1	13	11	2				1	16	44
Sporting Injuries Committee									1	1
Sport and Recreation Department		1								1
Stamp Duties Office (Office of State Revenue)					1					1
State Authorities Superannuation Board		1	7	1	1				1	11
State Bank		42	14	2		1			9	68
State Contracts Control Board										-
State Electoral Office	1								1	2
State Library		1								1
State Lotteries Office		3							1	4
State Pollution Control Commission			5			1			3	9
State Rail Authority	1	17	15	6		1			12	52

PUBLIC AUTHORITIES

AUTHORITY	(NJ)	(DECO)	(DECE)	(RES)	(NPPG)	(DIS)	(NAP)	(AP)	(CURR)	TOTAL
State Transit Authority		6	2	1					5	14
Strata Titles Office		2	3	1					1	7
Technical and Further Education		1	5	1					1	8
Transport Department		2	11	3					2	18
Totalizer Agency Board		2							1	3
University of Newcastle		1							1	2
University of New England			1							1
University of New South Wales		2	4							6
University of Sydney		1	1							2
University of Technology		1	1						1	3
University of Western Sydney			2							2
University of Wollongong									1	1
Urban Transit Authority			2						2	4
Valuer Generals Department		22	4		1				3	30
Waste Management Authority		2								2
Water Board	1	22	29	10	2	5			14	63
Workcover Authority	1	1	5						2	9
Workers Compensation Commission		2								2
	48	486	715	128	30	24	-	10	362	1803

Less Current as at 30/6/90

270

Total received

1533

COUNCILS

COUNCIL	(NF)	(DBCO)	(DBCE)	(RES)	(NPPE)	(DS)	(NAF)	(AP)	(CURR)	TOTAL
Albury City Council		1								1
Armidale City Council		1								1
Ashfield Municipal Council		2	3							5
Auburn Municipal Council		4	3							7
Ballina Shire Council		3								3
Bankstown City Council		3	2	1					2	8
Barhurst City Council		2	1		1					4
Baulkham Hills Shire Council		11	9	2						22
Bega Valley Shire Council		1	3						1	5
Bellingen Shire Council		2	1			1			3	7
Blacktown City Council		7	3						1	11
Bland Shire Council			1							1
Blue Mountains City Council		13	2		1				3	19
Bombala Shire Council		2								2
Botany Municipal Council		1								1
Broken Hill City Council			1							1
Burwood Municipal Council		1	1							2
Byron Shire Council		3	3							6

COUNCILS

COUNCIL	(NJ)	(DISCO)	(DECE)	(RES)	(NPPE)	(DIS)	(NAF)	(AP)	(CURR)	TOTAL
Carbone Shire Council		2	1							3
Campbelltown City Council		3	3						1	7
Camden Municipal Council										-
Canterbury Municipal Council		1	2		2				1	6
Casino Municipal Council			1							1
Cessnock Municipal Council		3	4			1				8
Cobar Shire Council			1							1
Coffs Harbour City Council		5	3							8
Concord Municipal Council			4							4
Coolah Shire Council			3	1						4
Cooma Monaro Shire Council		2	3							5
Coonabarabran Shire Council		1	1							2
Coonamble Shire Council			1							1
Cootamundra Shire Council		1								1
Copmanhurst Shire Council			1		1			1		3
Cookwell Shire Council									1	1
Culcairn Shire Council				1						1
Cowra Shire Council		2	3							5

COUNCILS

COUNCIL	(NJ)	(DBCO)	(DBCI)	(RES)	(NPPE)	(DIS)	(NAI)	(AP)	(CURR)	TOTAL
Drummoyle Municipal Council			2		2				1	5
Dubbo City Council			2						1	3
Damansque Shire Council						1				1
Dungog Shire Council			2							2
Eurobodalla Shire Council		2	2						1	5
Evans Shire Council			2		1				1	4
Fairfield City Council			3							3
Forbes Shire Council									1	1
Gilgandra Shire Council										-
Glen Innes Municipal Council										-
Gloucester Shire Council			1						2	3
Goulford City Council	1	6	18	2	1				3	31
Goulburn City Council			1						1	2
Grafton City Council		2	2					1	1	6
Great Lakes Shire Council		4	4	1	1				1	11
Greater Lithgow City Council			2		1				1	4
Greater Taree City Council		1		2	1					4
Griffith Shire Council		2								2

COUNCILS

COUNCIL	(NJ)	(DECO)	(DECI)	(RES)	(NPP)	(DIS)	(NAP)	(AP)	(CURR)	TOTAL
Gundagai Shire Council										-
Gunnedah Shire Council		3			1					4
Harden Shire Council		1								1
Hastings Municipal Council	1	4	4					1		10
Hawkesbury Shire Council			5							5
Holbrook Shire Council			1							1
Hoboyd Municipal Council		2			1					3
Hume Shire Council			1						1	2
Hornsby Shire Council		5	11	4	9				1	30
Hunters Hill Municipal Council			1							1
Hurstville Municipal Council		3	1	2						6
Ilwarrara County Council			2						1	3
Inverell Shire Council		1								1
Jerrilderie Shire Council			1							1
Kempsey Shire Council		3	2						1	6
Kiama Municipal Council		1	1						2	4
Kogarah Municipal Council		2	3	1					2	8
Ku-ring-gai Municipal Council		7	5	1					2	15

COUNCILS

COUNCIL	(NJ)	(DICO)	(DICE)	(RES)	(NPPE)	(DIS)	(NAP)	(AP)	(CURR)	TOTAL
Kyogle Shire Council			1							1
Lake Macquarie City Council		17	15	3	1	1			4	41
Lane Cove Municipal Council		1	1	1						3
Leeton Shire Council				1						1
Leichhardt Municipal Council		2	2	1	1				1	7
Lismore City Council		2	2	1						5
Liverpool City Council		2	1							3
Lower Clarence County Council		1								1
Maclean Shire Council		2	1		1				1	5
Macquarie County Council		1							1	2
Maitland City Council		1	2		1				1	5
Manilla Shire Council										-
Manly Municipal Council			1							1
Marrickville Municipal Council		5	4	1				1	1	12
Monaro Electricity Council		1		1					1	3
Moree Plains Shire Council		1							1	2
Mosman Municipal Council			1		1	1				3
Mudgee Shire Council		3	3							6

COUNCILS

COUNCIL	(NU)	(DECO)	(DECE)	(RES)	(NPPE)	(DES)	(NAP)	(AP)	(CURR)	TOTAL
Mulwaree Shire Council			1					1		2
Murray Shire Council			2						1	3
Murrumbidgee Shire Council										-
Muswellbrook Shire Council		2	1							3
Nambucca Shire Council		2	2							4
Namoi Valley County Council			1							1
Narrabri Shire Council										-
Newcastle City Council		4	7						1	12
Northern Riverina Council		2	2							4
Northern Rivers County Council		3	2	2	1					8
North Sydney Municipal Council		1	1							2
Nundle Shire Council										-
Nymboida Shire Council			1		1					2
Orange City Council			1							1
Oxley County Council			1							1
Parkes Shire Council			1							1
Parramatta City Council		5	5		2	1				13
Parrish Shire Council		1	2							3

COUNCILS

COUNCIL	(NF)	(DECO)	(DECE)	(RES)	(NPPE)	(DIS)	(NAP)	(AP)	(CURR)	TOTAL
Parrith City Council		3	1						1	5
Port Stephens Council		3	4	1	1				3	12
Prospect Electricity		3	7							10
Queanbeyan City Council		2	1							3
Quirindi Shire Council		1								1
Randwick Municipal Council		3	6						1	10
Richmond River Shire		1	3							4
Rockdale Municipal Council		1	2	1					1	5
Ryde Municipal Council		2	10							12
Rylstone Shire Council			1							1
Scone Shire Council		2	3							5
Severn Shire Council		1	1							2
Shellharbour Municipal Council		1								1
Shoalhaven City Council		3	6						4	13
Shortland Electricity		1	1							2
Singleton Shire Council			1							1
South Sydney City Council		4	7	1						12
Southern Riverina County Council			1							1

COUNCILS

COUNCIL	(NF)	(DECO)	(DECE)	(RIS)	(NPPE)	(DIS)	(NAP)	(AP)	(CURE)	TOTAL
Southern Tablelands County Council			2							2
Strathfield Municipal Council				1					1	2
Sutherland Shire Council		7	10			2			3	22
Sydney City Council		1	4							5
Sydney County Council		4	9	2	1					16
Tamworth City Council			4							4
Temora Shire Council			1							1
Tenterfield Shire Council										-
Tumbarumba Shire Council				1						1
Tunburri Shire Council			1							1
Tweed Shire Council		3	9		2				1	15
Ulan County Council									1	1
Ulmara Shire Council			1							1
Upper Macquarie County Council			1							1
Uralla Shire Council			1							1
Wagga Wagga City Council		1								1
Walcha Shire Council		1								1
Walgett Shire Council									1	1

COUNCILS

COUNCIL	(NJ)	(DECO)	(DICE)	(RES)	(NPPE)	(DIS)	(NAP)	(AP)	(CURR)	TOTAL
Warren Shire Council		1								1
Warrigah Shire Council		7	5	7	1				2	22
Waverley Municipal Council		2	2	1					1	6
Wellington Shire Council									1	1
Wentworth Shire Council			1		1					2
Willoughby Municipal Council		1	4	2						7
Wingcarabee Shire Council		3	3	1	1				2	10
Woolondilly Shire Council		1	2	1	1			1	2	8
Wollongong City Council		5	9	2	1				6	23
Woolahra Municipal Council		1	4						1	6
Wyang Shire Council		4	7	1					2	14
Yarrowlamla Shire Council										-
Yass Shire Council		1							1	2
Young Shire Council		3		1						4
	2	262	342	52	41	8	-	6	85	796

Less Current as at 30/6/90

177

Total Received

621

POLICE COMPLAINTS

NOT OR NOT FULLY INVESTIGATED	Declined	1765
	Conciliated	169
	Discontinued before Ombudsman reinvestigation	135
	Discontinued during Ombudsman reinvestigation	2
NOT SUSTAINED	Not sustained finding without reinvestigation	197
	Deemed not sustained - no request for reinvestigation (Section 25A (2))	212
	Deemed not sustained by Ombudsman - Ombudsman decided reinvestigation not warranted despite request	32
	Not sustained finding following reinvestigation	5
SUSTAINED	Sustained finding without reinvestigation	136
	Sustained finding following reinvestigation by Ombudsman	3
TOTAL		2656

THE OMBUDSMAN OF NEW SOUTH WALES

SIXTEENTH ANNUAL REPORT

CASE NOTES

CASE NOTES

TABLE OF CONTENTS

COMPLAINTS ABOUT DEPARTMENTS AND AUTHORITIES

Department of Housing	
A breed apart	222
Roads and Traffic Authority	
Pick a car...any car...	223
Sorry we asked you to pay for our mistake!	224
Gone but not forgotten	225
Staff freezes froze fan mail	227
Double trouble; it wasn't me!	227
Maritime Services Board	
Missing mooring	228
Let's bring the fee down!	230
The Maritime Services Board and State Transit Authority	
Washed out	230
Water Board	
Major works contributions	232
Government Insurance Office	
A change of policy	234
Department of Transport	
What they don't know won't hurt them	235
State Authorities Superannuation Board	
Do not fret, vicious computer	235
Registry of Births, Deaths and Marriages	
How is my name spelt?	237
Technical and Further Education Commission	
All stitched up	238
State Rail Authority	
Good PR for SRA	238

COMPLAINTS ABOUT COUNCILS

Bankstown City Council	
Abandoned vehicles	239
Baulkham Hills Shire Council	
When council needs a push	240
Broken Hill City Council	
A matter for grave concern	241
Gosford City Council	
When is a quarry not a quarry?	242
A council duped by a developer	243
Kiama Municipal Council	
Life on the farm	244
Marrickville Municipal Council	
Wish you were here... ..	246
Wingecarribee Shire Council	
Unreasonable delays	247
Wollongong City Council	
Too much noise	247
Upper Macquarie County Council	
Excessive noxious weeds	249

COMPLAINTS ABOUT FOI

Department of Corrective Services	250
Martime Services Board	251

COMPLAINTS ABOUT THE DEPARTMENT OF CORRECTIVE SERVICES

Winter weather	252
Creative action	252
Room service lacking	252
Smile...or lose your licence	253
Semantic lessons for prison visitors	254

COMPLAINTS ABOUT POLICE

Stay under .05 or ... rest for awhile	255
An informal chat	256
James Bond or Arnold Schwarzenegger?	258
"Well...the door was open..."	260
Sticky fingers	260
Who's the odd one out?	261
In hot water	262
Radio days	264
Just drop me anywhere	265
Helping a mate	266
Who do we tell?	267
First offence	267
Whistleblowers	267
Blow in here sir	268
Misuse of information	269
Serious assault	269

COMPLAINTS ABOUT DEPARTMENTS AND AUTHORITIES

Department of Housing

A breed apart

A tenant of the Housing Department, Mrs B, was moved to write to the Ombudsman when her complaint about one of her neighbours seemed to be getting no response from her local tenancy manager.

The units in which Mrs B lives are not very large and the laundry facilities, including washing machines, are communal. Mrs B's indignation was easily understood when it was learnt the neighbour in question had been breeding pigeons in her unit for approximately six months and, consequently, was washing her household linen in the washing machine she shared with Mrs B!



The local council inspected the pigeon fancier's unit and agreed the conditions were highly unhealthy, not least of all for the twenty or so pigeons cooped up inside. Mrs B and the council inspector contacted the tenancy manager; however, before anything could be done, the manager transferred from the area.

When Mrs B's complaint was received in this office, a phone call to the department's office resulted in a conversation with the newly appointed tenancy manager. He advised our investigation officer he had visited the breeding unit and had arranged for the pigeons

to be removed and dealt with by local council officers. Assistance was to be given also to the budding breeder to adjust to the niceties of unit living and the responsibilities inherent in communal washing facilities.

Roads and Traffic Authority

Pick a car...any car...

In March 1990, Ms K, a pensioner, received a registration renewal notice from the RTA for a Nissan Urvan which she had never owned.

She went to Port Kembla Motor Registry to inform them of the error and told them she owned a Datsun sedan. She was informed she had five vehicles registered in her name; one caravan and four cars.

She asked the RTA to amend their records as she had never owned these vehicles. The RTA informed Ms K they would investigate the matter.

In the meantime, Shellharbour Council had issued several traffic infringement notices to Ms K on cars she didn't own. Ms K advised the council of the RTA's error and the authority was in the process of amending their records.



Several weeks passed and no action had been taken by the RTA. Ms K was told by council officers that as far as they were concerned she was the registered owner of the vehicles in question and therefore was liable for the fines incurred. She was further informed if she

failed to pay the penalties, vehicles registered in her name would become unregistered and court action would be taken against her.

Meanwhile, two of the cars wrongfully registered in Ms K's name had been stolen and then recovered by police. Ms K was not notified of this action by police.

Up to this point, the RTA had failed to take any action on Ms K's complaint.

Preliminary enquiries were made by this office with the RTA. The problem started with the transfer and subsequent renewal of the Datsun sedan's registration by Ms K which the RTA failed to record.

Renewal of Ms K's car registration was received for recording, but since transfer to Ms K was still not recorded, a change of name and address transaction was raised to change records prior to recording the renewal payment.

This action was contrary to standing procedures by the RTA and as a result the change of name and address recording generated identical changes through the alphabetical file to all vehicles owned by Mr S, the previous owner of Ms K's Datsun.

RTA's records were amended and a written apology was sent to Ms K. Additionally, Shellharbour City Council were notified of the RTA's error and the infringement notices against Ms K were waived.

Officers in the RTA handling these types of transactions have been reminded of the correct procedures.

Sorry we asked you to pay for our mistake!

In December 1990, a car dealer bought a motor vehicle which he intended to offer for sale. The dealer paid an appropriate registration fee to the RTA by cheque on 24 December 1990 and, subsequently, sold the vehicle to Mr X on 3 January 1991. Mr X transferred the registration into his name the same day and later sold the vehicle to the complainant, Mr A, on 14 January 1991.

In the meantime, the car dealer's cheque for registration was dishonoured and the RTA was advised on 7 January 1991. An appropriate notation was made against the vehicle registration and this notation appeared on computer.

Mr A attended Bankstown Motor Registry on 17 January 1991 and was able to successfully transfer the vehicle registration into his name. The clerk handling the transaction was aware the registration was technically invalid at that time, as the dealer's cheque had bounced, but did not inform Mr A.

Mr A received an undated form letter from the RTA in late February 1991, advising him the vehicle registration would be cancelled unless he accepted either of the following options:

- surrender the number plates...and get new registration for a period of twelve months.
- retain the registration of the vehicle by paying a pro-rata amount of \$253 which represented 5/12ths on the total amount outstanding on the registration. This amount was calculated from the time Mr A acquired the vehicle to the expiry date of the registration.

The RTA's form letter indicated the vehicle registration would be cancelled within ten days of the date of the undated letter, unless one of the above options was taken by Mr A.

The complaint, received in late February 1991, was investigated by this office. The RTA, in its swift response to the investigation, acknowledged:

...(it)...was clearly wrong in allowing the transfer to proceed...accordingly...no further action will be taken to pursue the payment of the debt with (Mr A). The cost of the outstanding registration will be borne by the Authority.

Mr A's particular complaint was resolved, however, this office is presently considering further investigation into the legal basis for the RTA to make demands for payment of debts from persons who did not incur the debt.

Gone but not forgotten

Ms D received a parking fine which she promptly paid by credit card on the day of her court case. For some reason, the court accounting system reversed the payment. Officially, the payment was not received by the court. Because the Ombudsman has no jurisdiction over courts, or persons attached to a court, the reason for this accounting dilemma could not be investigated by this office.

A default notice was forwarded by the court to the RTA for action to be taken to cancel Ms D's licence for non-payment of the fine. Ms D received the RTA cancellation notice in September 1990 and immediately took steps to prove to the RTA she had paid the fine.

The RTA accepted Ms D's proof and provided her with a computer print out, with an RTA City South Motor Registry stamp, stating "default deleted on 280990".

Ms D then went on her merry way believing the matter to be resolved.

In November 1990, she received a second cancellation notice from the RTA, relating to the same parking fine which she had already paid and which the RTA had supposedly deleted from its system.

Ms D attempted to resolve the matter at her local motor registry, but was not satisfied with the manner in which her enquiries were handled by RTA staff. A complaint was made to the Ombudsman and preliminary enquiries were conducted.

The RTA admitted to the Ombudsman that the RTA City South registry, when attempting to delete the first cancellation notice,

...inadvertently used an incorrect deletion format. A latter attempt by the Penalty Default Unit at Rosebery to correct the mistake was not successful, principally because of computing difficulties involving penalty defaults generally.

However, the RTA did not take any action to advise Ms D of these difficulties or to stop the computer system from taking any further action against Ms D.

Ms D then received a second cancellation notice in November 1990. The RTA admitted to the Ombudsman that "...steps should have been taken to ensure a correct result was achieved in respect of the transaction relating to Ms D's licence".

The RTA, in its response to the Ombudsman's preliminary enquiries, contradicted itself concerning the success of the deletion attempt by the City South registry, by stating:

... the fact that a default deleted notice was issued is indicative the Authority accepted the penalty had been paid...

However, the system used by the RTA had not accepted the penalty had been paid, since it allowed a second cancellation notice to be issued to Ms D.

After receiving the second notice, Ms D made enquiries with her local motor registry, producing evidence of her payment of the fine. The RTA then successfully deleted the notice from its system the day after.

Ms D could well have taken the view that the November cancellation notice was a simple computer error and ignored it, since she had a document from the RTA which stated the fine default had been deleted from the system.

However, in accepting the inconvenience and taking the time to find out why she had been issued with a second cancellation notice, Ms D was able to avoid driving on a licence which would have been officially cancelled.

The RTA advised the Ombudsman that "clerical procedures have since been modified to avoid similar problems in the future".

Because Ms D's licence status was completely clarified, and because the RTA acknowledged its compounded errors, a decision was made not to proceed to formal investigation.

Staff freezes froze fan mail

Ms K complained to this office she had mailed a priority paid letter on 8 January 1991 to the Infringement Processing Bureau, Parramatta, to pay a fine which was due on 10 January 1991. She also enclosed a statutory declaration in this letter.

On 11 February, she received a Notice of Cancellation from the Roads and Traffic Authority Fine Default Unit saying the payment had not been received.

After this office contacted the Infringement Processing Bureau, the bureau admitted there had been administrative errors in the processing of Ms K's payment and statutory declaration.

This delay was as a result of staff freezes and the inherent difficulties in recruiting staff quickly, which resulted in a backlog in the 2500 statutory declarations received weekly.

Ms K was refunded \$72.00 by the Roads and Traffic Authority.

Double trouble; it wasn't me!

In March 1991, Ms Penny Jane C received a Camera Infringement Notice from the NSW Police Service, alleging she was the owner of a vehicle which a red light camera had detected committing a traffic offence. Ms C was most surprised, since she was not the owner of the offending vehicle, nor had she ever been the registered owner of a motor vehicle! She telephoned and later wrote to the Police Service requesting its records be checked. Ms C then went to the motor registry at Cammeray and completed a statutory declaration indicating she had no connection with the offending vehicle.

In April 1991, Ms C received a courtesy letter from the Police Service indicating the fine remained unpaid and threatening possible licence/registration cancellation if she did not take certain described action, or pay the fine.

Ms C was provided with computer information which lead her to believe that another Penny Jane C was the true owner of the vehicle and that an administrative error had been made by the RTA when linking her with that vehicle.

Ms C wrote to the Internal Audit Branch of the RTA and indicated she was aware another Penny Jane C was a licensed driver in NSW and suggested this person may be the

registered owner of the offending vehicle. It appears the other Ms Penny Jane C used the name Penelope Jane C on her registration, but the shortened first name Penny on her licence. Ms C indicated her belief that the RTA should have been able to differentiate between herself and the other Penny Jane C by checking dates of birth. A copy of that letter was forwarded to the Ombudsman.

In May 1991, preliminary enquiries were made by this office with both the RTA and the Police Service Infringement Processing Bureau. Within seventeen days, the Ombudsman was informed by telephone and in writing that the RTA had made a mistake.

The RTA advised that a courtesy letter had been sent to the correct Penny Jane C, the registered owner of the offending vehicle, at her last known address, but the document was returned unclaimed in February 1991.

The RTA stated:

Unfortunately, the officer handling the matter incorrectly assumed (Ms C, the complainant) was the owner of the vehicle. She failed to take the fundamental step of cross matching the birth dates and addresses shown on the licence details of the two (Ms Cs) notwithstanding the slight difference in names.

This error led to the offending vehicle being noted on RTA records as belonging to the complainant, resulting in the fresh Infringement Notice being sent to her.

After investigation by the RTA's Internal Audit Branch, all records held by the Police Service Infringement Processing Bureau and the RTA were amended and the infringement notice against Ms C was withdrawn. The RTA asked this office to pass on to Ms C its "...sincere apologies for (the) error and for the inconvenience caused...".

With the matter resolved, the Ombudsman decided to take no further action.

Maritime Services Board

Missing mooring

In May 1989 the Waterways Authority of the Maritime Services Board wrote to Mr M, after his Sydney Harbour mooring had been found unoccupied, asking him to show cause why his licence should not be cancelled. Mr M wrote back explaining that his vessel had been absent for four weeks, but was now back on the mooring.

In October, the authority sent Mr M a renewal notice for the mooring and he paid the fee of \$150 the same month. However, two months later, the mooring, which was new and had cost about \$400, disappeared. Mr M's neighbour reported a mooring barge had removed it.

After numerous telephone calls and letters to the authority, Mr M was finally told that the reason for the cancellation, which occurred at the beginning of November, was that the mooring had not been occupied from March to December. Mr M could not understand this, since he knew it had been occupied for most of this time. He wrote to the authority to try and resolve the problem, but without success. He finally appealed to this office for help and commented:

I have found this section of the MSB totally impossible to deal with. They take weeks to answer letters, will not reply to telephone calls and, as you can see by the enclosed correspondence, they do not answer written questions.

Preliminary enquiries were made of Maritime Services Board's chief executive, specifically about:

- what observations were made and what records kept as evidence that the mooring was unoccupied during the period in question;
- whether the board intended returning to Mr M the mooring apparatus or whether compensation would be paid; and
- whether the board intended to refund to Mr M the mooring fee in view of the cancellation of his licence two weeks after he had renewed it.

The chief executive replied in detail about what had gone wrong in Mr M's case. Firstly, Mr M's letter of May apparently had not been attached to his file until late December. The chief executive added:

All staff involved with this matter have been interviewed but none can explain the inaction on this letter.

Unfortunately, when the mooring was inspected in late November the vessel was again not attached and because of the build-up of marine growth on the mooring, it was assumed it had been unused since May. In December, as part of a clean-up campaign, 150 abandoned moorings were removed from Sydney Harbour, including Mr M's which was disposed of by the mooring contractor.

The chief executive noted that Mr M then wrote to the authority's regional office, but could not get his case reviewed. He continued:

He did not take the matter further with the authority but, understandably in my view, took the case to you.

It cannot be disputed that Mr M's case was mishandled by the Waterways Authority. ... This conduct is not satisfactory and corrective action is being taken both in respect of procedures and staff conduct. Accordingly, the authority has refunded his licence fee for the period since the mooring was removed and has sent him a letter of apology.

Should Mr M still require a mooring in his area the authority will allocate space and lay a mooring on his behalf. If he no longer requires a mooring, the authority will pay him the cost of the apparatus which was removed and discarded late last year.

Let's bring the fee down!

Mr L paid \$120.00 to the Maritime Services Board for a year's mooring for his boat. When, three months later, he decided to sell his boat, he applied to the MSB for a part refund of the mooring fee. He was told, in the circumstances, no refund would be granted. He brought this matter to the attention of the Office of the Ombudsman.

Preliminary enquiries revealed the MSB's practice, in cases like this, was to provide a refund on a pro rata monthly basis; in Mr L's case, \$10.00 for every month he would not be using the wharf. However, a \$50.00 administration fee was subtracted from the refund. On top of that, if the amount of refund left after the \$50.00 administration fee had been taken away totalled less than \$50.00, it was the practice of the MSB not to send a refund.

In other words, Mr L would have had to have cancelled his mooring licence almost immediately after he had obtained it to become eligible for a refund. Furthermore, boat owners were not normally informed about refund policies when applying for a refund.

In response to enquiries by the Ombudsman, the Maritime Services Board admitted the practice of not paying refunds of less than \$50.00 was not reasonable commercial behaviour. This practice was stopped.

Additionally, the Maritime Services Board agreed the procedures involved in preparing a refund did not justify a \$50.00 fee and the administrative fee was reduced to \$20.00.

Mr L therefore received a cheque for \$70.00. Statistics had not been kept on the number of cases where refunds below \$50.00 had not been forwarded, but the Maritime Services Board revealed early cancellations of mooring licences which might have been eligible for refunds occurred at the rate of about 150 per year.

The Ombudsman received a letter from the complainant thanking him for his prompt and efficient service in this matter.

The Maritime Services Board and State Transit Authority

Washed out

Mr D had moored his yacht at the Sydney Amateur Sailing club one Saturday evening along with two other yachts. At about 8.15 pm, a twin hulled ferry left Musgrave Street Wharf at great speed generating a substantial wash. The wash was so massive the forward line from Mr D's yacht stretched markedly and its stern hit the wharf causing damage to the deck at the deck/transom joint overhang.

The owner of one of the other yachts contacted the harbourmaster of the Sydney Ports Authority about this incident. However, nothing further was heard from the authority.

As Mr D felt the damage to his yacht was directly attributable to the actions of the ferry, he made a claim for damages against the STA. The STA later wrote to Mr D advising him Sydney Ferries did not accept liability and rejected the claim. It gave no reasons for their decision.

Mr D then complained to this office about the failure of the STA to admit liability for the damage. Mr D alleged STA ferries often travelled at excessive speeds in Mosman Bay. He also complained about the failure of the STA to adequately discipline their ferry masters and the failure of the MSB to prosecute STA ferry drivers when they contravened the maritime regulations.

This office made preliminary inquiries with both the STA and MSB. The MSB replied with the assurance that:

STA ferry drivers or any other persons who are found by the board's officers to be in contravention of any of the relevant regulations will be proceeded against with firmness and fairness.

The MSB also issued an instruction to harbourmasters reminding them of the need to:

Ensure that all reports of incidents involving marine safety regulations are referred immediately to the Marine Safety Branch for evaluation and investigation where necessary.

The MSB also undertook to commence an investigation into Mr D's incident.

The Ombudsman considered these actions to be reasonable and advised both the MSB and Mr D that since the complaint about the MSB was addressed the office would take no further action.

However, the STA failed to reply to the Ombudsman's inquiries and, after several telephone conversations, a meeting was arranged between the STA and the Ombudsman's office.

The STA said it had investigated Mr D's complaint. However, the master of the vessel allegedly involved in the incident had denied he was speeding. The STA accepted the word of the master and did not proceed any further with the matter. Mr D was not interviewed, nor was his yacht inspected for damage. No record was kept of the interview.

The STA also acknowledged there had been wash problems in Mosman Bay, especially with the twin hulled ferries. They said the twin hulled ferries were designed for a speed of 15 knots, although they had been electronically engineered down to 12 knots. However, the maximum speed limit set for enclosed waters was 10.5 knots. The STA said the twin hulled ferries currently are being re-engined to a lower horsepower to further address the problem of some drivers travelling at excessive speed.

The Ombudsman raised the issue of the STA's failure to give reasons for denying liability and the STA agreed in future reasons should be given. The STA then agreed to the following:

- ensure in future, where there is a denial of liability, reasons are given for doing so, subject only to preservation of the authority's rights;
- ensure that a record is kept of all interviews of employees which flow out of a complaint or representation by a member of the public;
- ferry schedules will be examined with a view to substituting single hull ferries for twin hulled ferries wherever possible for services in enclosed waters;
- twin hulled ferries to be re-engined to reduce horsepower and therefore wash problems; and
- ferry masters to be reminded the first Fleet Class vessels are to operate at a main engine speed no greater than 10.5 knots when navigating.

In light of the STA's constructive actions in relation to the complaint and, considering that Mr D had an alternative means of redress through the legal system in relation to the damage allegedly caused to his yacht, the Office of the Ombudsman decided to take no further action on this matter and advised the STA and Mr D accordingly.

Mr D later sent a letter in appreciation for the efforts taken by this office to address his concerns.

Water Board

Major works contributions

Mr C wrote to this office on behalf of his father who had purchased five residential allotments in the Blue Mountains in 1981 as an investment for his retirement and to build a retirement home for him and his wife. The existing lots were relatively deep, but narrow, which would have restricted the type of house which could be built.

In 1989, Mr C and his father decided a rearrangement of allotment boundaries would improve the amenities of all allotments. The rearrangement of the allotments required an adjustment of boundaries with the neighbouring lots to comply with council's minimum

depth and area requirements, but the total area of the lots was to remain approximately the same. Prior to commencing the realignment of the boundaries, Mr C's father checked with council and the Water Board about the charges which would be applicable. He was advised by the Water Board a major works contribution would not be applicable.

Mr C's father proceeded with a preliminary boundary rearrangement which involved the purchase of some land from neighbours and the provision of access rights to the rear of a neighbour's block. In January 1990, he lodged an application with council to adjust the boundaries of the five residential lots. In May 1990, council approved the application subject to, among other things, obtaining a compliance certificate from the Water Board.

When lodging the application for the compliance certificate, Mr C claimed he again checked there would be no major works contribution payable and this was confirmed by Water Board counter staff. However, in June 1990, Mr C received a terms of agreement notice from the Water Board. Contrary to the earlier advice received, the board required a payment of \$8630 for major works to satisfy increased demand within the area. In addition, a further \$14365 was required for new reticulation mains or, alternatively, Mr C was to engage a private contractor to perform the work.

Mr C's father agreed to pay the costs for the new reticulation mains, but objected to the board's decision to require him to pay a major works contribution prior to issuing a compliance certificate. He argued such a contribution is based on the premise the subdivision of land will result in additional allotments and an increased demand for the board's services. However, in his case, he had merely rearranged the boundaries of five existing allotments which were already considered suitable for single residential development. He argued the realignment had not led to any change in the number of allotments or the potential demand on services. Further, he claimed his decision to rearrange the boundaries was made after receiving advice from the Water Board he would not be required to pay a major works contribution.

Mr C and his father met with Water Board staff on several occasions to discuss their complaint. The Water Board offered them various compromises, the final offer being a reduction in the major works contribution to \$4861.

This office made preliminary inquiries regarding Mr C's complaint and met with an a representative from the Water Board to discuss the matter. The representative stated there are considerable major works being constructed in the Blue Mountains, resulting in a need to upgrade the existing systems.

With the move in recent years to the users pay principle, the Water Board has been expected to be more commercial in its operations. He considered the relevant issue in this case to be whether the Water Board/ratepayers should subsidise those who are subdividing land they will sell at a profit. In his view, Mr C's case was not a rearrangement of boundaries, but a subdivision and stated the total area of the five allotments had been increased. He agreed that at least on one occasion Mr C had been advised there would be no major works charge and, primarily on that basis, the Water Board had been prepared to offer a compromise by reducing the fee.

He said as a result of this experience with Mr C, the Water Board has changed its procedures concerning the advice it provides. Clients now are told a detailed investigation must be carried out before advice can be given on the requirements for the provision of services.

This office did not concur with the view of the Water Board that the rearrangement of the boundaries constituted a new subdivision, with an increased demand for services. After this meeting, the Water Board agreed to only levy the major works charge on the additional land area, which was not part of the original sub-division of five allotments. The other major works charges were waived.

Government Insurance Office

A change of policy

A complaint was received from Mr V that the Government Insurance Office apparently failed to repay his excess, even after he was able to identify the party responsible for the motor vehicle accident.

Inquiries made with the GIO found, unfortunately, Mr V's claim was made one month prior to the introduction of their new procedure; that is, as long as a party is identified as being responsible for the accident, the claimant is automatically repaid their excess.

Prior to January 1990, all claims with the GIO which were able to identify the party responsible for the accident did not automatically receive back their excess. In order for the excess to be repaid, the GIO had to first recover all repair costs, including the excess from the party responsible. If this was not possible, the claimant lost out too!

The fact one is not responsible for the accident and one is also able to identify the party responsible compounded the frustration many claimants felt when they were denied the refund of their excess. As a result of numerous complaints about this system, the GIO finally changed its procedures. Unfortunately the change came too late for Mr V.

Department of Transport

What they don't know won't hurt them

Mr and Mrs K had for some years run a school bus route in a country area, on a subsidised contract paid by the Department of Transport.

In all previous years, automatic indexed increases had been made to the payments.

However, in 1989, the system was altered so only those operators who lodged formal submissions substantiating cost increases were given increased payments and these increases dated only from the date a submission was lodged.

Mr and Mrs K complained to the Ombudsman, who made telephone inquiries.

A Department of Transport official agreed, cheerfully, the system had been changed without notice. When asked why operators had not been advised they must now lodge applications for increases, he replied, with faultless logic, then all operators would lodge applications for increase and this would be expensive.

In the meantime, ministerial intervention meant the department reverted to the old system of automatic increases for the forthcoming year (1990). This left in contention only those operators who had missed out on their 1989 increase due to the unannounced change in the system.

At length, after many phone calls and letters, Mr and Mrs K received their back payment, recompense for a cost cutting method that was tried and failed.

State Authorities Superannuation Board

Do not fret, vicious computer

Mrs X was a teacher's aide at a NSW country high school. In April 1988, due to family commitments, she resigned from her position one month before turning 55 years of age. Up until that stage, Mrs X had been contributing to the State Authorities Superannuation Scheme (SASS). Upon her resignation, Mrs X elected to preserve her benefit until reaching the prescribed early retirement age.

Over the next two years, the State Authorities Superannuation Board sent Mrs X several letters confirming her entitlement and notifying the early retirement age as 58 years. Mrs X and her family continued to plan their budget around the payment of her benefit in May 1991.

In January 1991, Mrs X received a distressing letter from the board. The board claimed she had been misinformed regarding her benefits under the Public Authorities Superannuation Scheme (PASS). The board went on to say:

Annual Statements issued to you since 1988 stated the "early retirement age" was 58 years...regret this advice was incorrect...sincerely apologise for any inconvenience which may have been caused to you as a result of the earlier incorrect advice.

Mrs X rang the board and was told the letter was correct and she would not be eligible for her benefit until May 1992, when she turned 59. Needless to say this threw Mrs X's financial plans into turmoil and prompted her complaint to this office.

On the face of it, the board's conduct seemed unreasonable and so this office conducted preliminary enquiries into the matter.

Apparently, at the time of writing to this office, Mrs X made a last ditch plea to the board for mercy. Upon receiving her letter the board was quick to act. A few days later, an officer from the board rang Mrs X and told her not to fret. The January letter was a hoax played on unsuspecting SASS contributors by a vicious computer. Mrs X was reassured her benefits would be paid out at age 58. This advice was followed up in writing.

Mrs X did not notice the scheme referred to in the board's letter was PASS not SASS. It was later revealed the computer had failed to distinguish between the two schemes and so sent PASS letters to all contributors.

The board has assured both Mrs X and this office the computer has been suitably chastised and no more incorrect letters of doom will be despatched to undeserving SASS members. Incidentally, both PASS and SASS now have the same prescribed early retirement age (58), another reason why the problem should not occur again.

As this office was satisfied the matter had been satisfactorily resolved and the computer program error rectified, the board and Mrs X were advised no further action would be taken. Mrs X did not seem to be completely reassured. In a letter formally withdrawing her complaint to this office, Mrs X wrote:

I wish to advise you that I have been informed...that a mistake had been made...in January 1991 and I will be eligible for payment of my superannuation at 58.

I would appreciate you keeping my file open for the moment as who knows, they [the board] seem very competent in making mistakes, maybe they will make more...before I am paid.

At the time of writing, Mrs X has not reapproached this office. Since May 1991 has passed, we assume all has gone according to plan.

Registry of Births, Deaths and Marriages

How is my name spelt?

Mr Z complained to the Ombudsman that the Registry of Births, Deaths and Marriages had made a spelling error on three occasions when providing extracts of his birth certificate and were now requiring him to pay a fee to have the situation remedied, even though the error was largely a result of the incompetence of the registry.

It was an unusual situation. Mr Z's given name on the original birth certificate was Darrel, yet when Mr Z went to the Registry at Maitland in 1962, at age sixteen years to enter the Navy and, again in 1967 and 1975 to obtain extracts, his name was spelled Darrell. He assumed in 1962 this was the correct spelling of his name and continued to use it. His school certificate, driver's licence, marriage certificate, Australian passport, will and so on all used the spelling given on the extracts provided by the Registrar of Births, Deaths and Marriages, because Mr Z regarded them as being a true and accurate record of his original birth certificate.

Later, Mr Z obtained a copy of his full birth certificate and noticed the spelling was different. He returned the certificate and asked for the spelling to be corrected. To Mr Z's surprise, he was told the spelling on the full certificate was correct and he had been using the wrong spelling since birth. Mr Z showed the registry the extracts provided by their office on three separate occasions, but was told to change the spelling on his birth certificate in line with the extracts would cost him \$45. Mr Z objected to this fee and maintained if the extracts provided by the registrar had been correct in the first place, there would be no need for him to change the spelling because all the legal documents obtained since that time would have been correct.

A reply from the registrar to a letter from this office pointed out it was not a legal requirement that Mr Z's birth certificate be changed to match the acquired spelling of his name and the registrar did not have the authority to dispense with the fees. The registrar was asked how such an error could have occurred given the original document clearly showed Darrel as the name. Further questions were asked about the procedures used to ensure extracts are at all times correct, given such extracts provided by the registrar are used to obtain important documents.

The registrar informed this office the service fee normally payable for amending a registration had been dispensed with and Mr Z could obtain a corrected birth certificate by sending \$17 and returning all the incorrect certificates in his possession. Mr Z was quite satisfied with this compromise.

Technical and Further Education Commission

All stitched up

Two sisters enrolled with TAFE to do a Fashion Apparel Diploma Course full time at a cost of \$800. During the first day of the course they were told about the costs they would incur for the materials to be used in the course. They decided these costs were exorbitant and they could not afford to continue.

The sisters had enrolled late on being offered positions which had become available after the normal enrolment day. At no time were they given any literature about administration fees or told about the costs which would be involved in doing the course. They withdrew as soon as they realised it would be too expensive for them to continue and requested either a full or partial refund of their enrolment fees. Letters and phone calls elicited no clear response from the department, apart from a standard letter saying consideration was being given to their requests.

This office made telephone enquiries of the TAFE head office and four days later the department wrote to the sisters offering a full refund explaining the nature of the situation made it a special case. The sisters were overjoyed with the result and no doubt will make detailed enquiries before enrolling in such a course again.

State Rail Authority

Good PR for SRA

In February 1991, Ms H lost her red yearly rail travel pass, which was valid until August 1991. The loss was swiftly reported to the SRA and an interim ticket was issued for a fee of \$5.00.

Ms H was advised a replacement ticket would not be issued until she paid a fee of 10 per cent of the unexpired value of the lost ticket, which amounted to \$32.80. Ms H complained in writing to the SRA stating she was not made aware of this replacement condition at the time of purchase of the original ticket. A copy of that letter was forwarded to the Ombudsman.

The Ombudsman declined to investigate, as Ms H had not given the SRA the opportunity to respond to her written complaint.

In March 1991, the complainant received a reply from the SRA, apologising for the inconvenience caused by failing to advise her of the replacement conditions at the time of purchase.

As an act of good will, the SRA provided Ms H with a complimentary ticket, allowing one day unlimited travel on the City Rail System.

COMPLAINTS ABOUT COUNCILS

Bankstown City Council

Abandoned vehicles

Mr and Mrs Z complained to the Ombudsman that they purchased a Ford Laser from Bankstown City Council at auction for \$3,880, but when they latter tried to sell the car they found there was an encumbrance of \$10,000 on it. Notification of the encumbrance had been placed on the Register of Encumbered Vehicles (REVS) by a finance company and was not discovered until an intending purchaser had made a REVS enquiry.

The complainants were in a position where they could not sell the vehicle until the debt was cleared and, while they may have been the legal owners of the car, the finance company still had an interest in it. Naturally, they found this situation quite worrying and contacted the council.

The finance company said if Mr and Mrs Z gave them the same amount of money as they had paid council for the car, then the debt would be cleared from REVS. Mr and Mrs Z refused to pay again and both sides then threatened to take legal action against each other.

Mr and Mrs Z complained to the Ombudsman saying they felt it was wrong for a council to advertise for sale a vehicle which was encumbered with a debt.

Councils are empowered by section 267B of the Local Government Act to dispose of abandoned vehicles. The council must make enquiries of the Police Service to find the last registered owner and to ensure the vehicle is not on the stolen vehicle index. Money from the sale is kept by the council and the residue, after provision is made to cover expenses, must be paid to the owner if one turns up within 12 months. If an owner does not approach the council within 12 months, the money, less expenses, goes to consolidated revenue.

In this particular case, the last registered owner was contacted by council and denied all knowledge of the car, claiming he had never owned it. He was told it would be disposed of as an abandoned vehicle if he did not claim it. After correspondence from the Office of the Ombudsman, the council decided it would in future be sensible to make enquiries with REVS as well as the police to ensure no encumbrance was registered on vehicles offered for sale.

The finance company agreed to lift the encumbrance registration if they received a cheque from council for the sale price of the vehicle and council then agreed to absorb its own costs in this instance.

Baulkham Hills Shire Council

When council needs a push

Mr X complained the Baulkham Hills Shire Council had approved a totally ineffective storm water drainage system for a school site next to his property. Mr X had many discussions with the council engineer, who advised him to wait until the method of drainage being tried on the site was given a chance to work. When there was no improvement after some months, Mr X wrote to this office.

It seemed council had allowed the developers (in this case a private school) to dispose of stormwater from stage one of the development via contour drains, pending the acquisition of suitable easements to drain water over downstream properties. The downstream neighbour concerned spent about \$4000 having surveys and drainage reports done. However, the school would not compensate him for even the \$1000 paid out for the consultant fee. He then refused to allow the easement.

After negotiation, council allowed the school to change the stormwater proposals in the next stage of development. The new method involved the use of retention ponds at the rear of the site which would collect the run-off and theoretically allow it to disperse within the site. The council said this was an "...innovative approach to overcome concentration of surface flows onto downstream properties. The principles involved have been successfully utilised for dispersal of stormwater in a bushland area at West Pennant Hills". In ordinary language, this means they were trying out the system and did not know if it would work or not! It appeared the possible impact of the change of direction of the water flow, from the original plans requiring downstream easements to the retention pond method adjacent to Mr X's property, was not fully assessed. Council informed this office that the engineering department was monitoring the situation.

The problem was made worse by the failure of the school to follow the recommendations of the Soil Conservation Service to increase groundcover and vegetation to bind the underlying soil, slow the velocity of run-off and, hence, decrease the amount of sediment washed away. Council's engineer agreed the ponds were too small and were not working as intended. Sediment was flowing into the ponds and silting up the outlet pipes, allowing the water to flow over the bank in one spot. This concentration of the water flow was affecting Mr X's property seriously. The engineer said the bush area would normally absorb 60 per cent of the water landing on it and allow 40 per cent to flow over the surface. Bulldozing had changed the situation, so that only 20 per cent was being absorbed and the rest was being piped onto Mr X's property.

After two on-site meetings and various correspondence between this office and the council, an agreement was reached that no further development of the site would be permitted until the drainage problem had been rectified, either by the use of greatly enlarged

retention ponds or by the purchase of easements downstream as provided for in the original development consent. The council refused development consent for the next stage of the school's proposal and Mr X was then approached regarding a drainage easement. Mr X was satisfied the council would not have resisted the pressures being exerted by the school without assistance from this office.

Broken Hill City Council

A matter for grave concern

Broken Hill City Council had the misfortune to administer Broken Hill Cemetery.

The Ombudsman received a complaint from members of the X family that other members of that family had, against their wishes, caused to be interred in the family plot the ashes of a family member estranged from those already buried in the plot. They further alleged the marble accoutrements of the plot had been damaged in this process.

The complaint was council had failed to oversee the cemetery adequately and, in particular, council had failed to consult sufficiently before consenting to the burial of the subject ashes.

Council's letter in reply stated, in part:

Approval to the interment by Mr (X) was not sought because he was not known to council as a party to the matter in the first instance.

It is acknowledged that consensus before granting of permission to inter would possibly have eliminated some dispute.

It is respectfully suggested however, that in such matters, family consensus should be reached before any approach to council.

Obviously on occasions what appears to be simple and straightforward may be complicated by matters beyond council's obligation or capacity to research.

Preliminary inquiries revealed the involvement of solicitors, representations to mortuary masons and an extremely complex family history. Ultimately, the matter seemed likely to turn on the question of the mental competency of one elderly family member to give consent.

The Ombudsman determined, on the face of the matter, council's administration had been adequate in all the circumstances and it was not fair to expect council to arbitrate on all the sensitive social, historical and medical issues involved.

Formal investigation was declined.

Gosford City Council

When is a quarry not a quarry?

In February 1990, a member of Parliament complained on behalf of an organisation about the illegal operation over many years of a quarry in South Woy Woy and the Gosford City Council inaction. The main claims were:

- council had been aware for the past eight years of the illegal operation of a quarry behind the Woy Woy Abattoirs;
- in 1984, Council had granted permission for restoration works associated with the abattoir site works. However, although six half-yearly progress reports were required over 1985-1987, only one had been submitted, in April 1985;
- in 1986, Council had authorised its engineering department to purchase gravel from the quarry and purchases took place over the next twelve months;
- council had further stipulated the quarry operation cease in December 1988, but had not enforced this; and
- council's actions and inactions in relation to the quarry had resulted in increased siltation of Correa and Horsfield Bays and the Woy Woy inlet.

This office made detailed enquiries of Gosford City Council and council's response included a six-page history of the excavations at the site since 1972. The current position was that a development application to undertake a quarry had been lodged by the quarry owners in November 1989 and was being still assessed.

The Ombudsman concluded although there was prima facie evidence to support the issuing of a notice of investigation under the Ombudsman Act, this action would not serve any useful purpose at this stage for several reasons. Firstly, it is rarely feasible to investigate events which occurred as long as ten years ago. Secondly, such an exercise would probably not represent the most efficient and productive use of this office's resources. Thirdly, the conduct at issue, that is, council's failure over several years to terminate the illegal operation of the quarry, had already ceased. Finally, the Ombudsman doubted whether recommendations which could be made would negate the effect of council's inaction over the years.

Despite his decision not to formally investigate this matter, the Ombudsman expressed his grave concern about it. In his letter to council he wrote:

It appears from 1972 to mid-1984 council approved several development applications ostensibly relating to the abattoir only. However, towards the end of this period it is clear extraction of material began, since in July 1984 a council inspection revealed the existence of an extractive industry. Council states excavation began between 1980 and 1982. Council directed in July 1984 that the quarry operation cease and required advice on restorative measures. The operators

took four months to reply to this initial approach by council. The next three and a half years were characterised by communication delays on both sides, the operator's failure to provide progress reports as required and council's apparent failure both to follow up these requirements and to verify whether work in progress was restoration or continued quarrying. Within this time, after allowing a two-year period for restoration work, council then agreed to a years's extension, but does not appear to have followed up a request for a statement from the operators after six months. It also let a further six months elapse after the expiry of the extension period before taking any action.

Following legal advice in May 1988, a stop work notice was issued and, subsequently, a plan of management approved extending over eighteen months. Since then, council's overall management of the issue seems to have been somewhat more decisive, although it did not decide until January 1990 that the restoration work had not conformed to the plan of management. I believe council is still considering a development application in connection with the quarry, lodged in November 1989, and there has been no excavation since January 1990.

It appears over the whole period in question council allowed excessive time to elapse within and between stages in this matter. Furthermore, it appears council did not adequately enforce stop work orders or reporting conditions attached to approved work, nor adequately supervise that work, including taking reasonable steps to ensure restoration work, not quarrying, was carried out.

The Ombudsman asked for details about the current status of the quarry site and a proposal for future action within a specified time frame.

Council wrote speedily to say no quarrying was taking place and siltation and sedimentation controls were being maintained to the satisfaction of council and the State Pollution Control Commission. Five months later, council informed the Ombudsman the development application had been refused. The Ombudsman is now seeking advice about restoration measures on the quarry site.

A council duped by a developer

A developer managed to get a canal development through Gosford City Council without the matter being considered at any stage by council as a canal development. Normally proposals which involve canals or waterways have to be considered as designated development and require a different procedure for approval by council which is much more stringent than other proposals.

Documents on council files gave no indication the development was a canal development, even though the submitted plans clearly showed canals on three sides. The problem began when the developer took the liberty of enhancing an existing open shallow drainage ditch of five metres width into a channel 11.5 metres wide with a water depth of 1.7 metres and a major two metre high rock retaining wall with boat recess access!

The problem was compounded because the developer was in fact complying with the conditions of consent applied to the development by the engineering department to provide adequate drainage for a low lying site. Council had approved the application for a cluster housing development subject to several conditions, one of which included a flood hazard study. This study was undertaken by the developer's own consultants who recommended the adjoining drainage channels be widened and deepened. The development was approved without a full realisation of the consequences.

The planning department of council thought because the huge drains were already in existence a condition requiring them to be widened and deepened would be okay. The main concern appears to have been to ensure the capacity of the canals was increased to compensate for the extra fill placed on the site to improve the soggy conditions and low lying nature of the site. The planning department never realised this requirement would turn the drains into canals, so the study and its recommendations were approved by council without any person in council looking at the overall impact the proposal would have on the downstream wetlands.

One of council's internal memoranda said:

From an environmental perspective, the establishment of a canal development without due consideration is an ecological time bomb. Insufficient tidal flushing within the current channel will result in the canal becoming ecologically dead, resulting in offensive odours and possible health risks.

A complaint was made to the Ombudsman, but by this time there was little that could be done to rectify the problem. One of the problems with developments such as this is each separate council department looks at issues which concern them only and no one particular officer was empowered to look at the overall effect of the proposals.

Council told the Ombudsman it would be very cautious in its consideration of any future development of a similar nature and council had accepted in principal a study of the downstream wetlands area would be required before further work was done.

Kiama Municipal Council

Life on the farm

Mr and Mrs Q complained Kiama Municipal Council had failed to inform them of their entitlement to apply for farmland rating for their property at Jamberoo. They claimed there was no mention of the availability of differential rate charges in council's annual report or on the actual rate notices. They also claimed they were not advised there was a farmland rate when they queried their rates with council. As a consequence, they were charged general rates for their property during the 1990 rating period.

Mr and Mrs Q purchased their property at Jamberoo in August 1989. Applications for farmland rating must be made before 30 September in the year preceding the rating year or, if council so determines, no later than 31 December of the preceding year. When an application for farmland rating is granted, the approval remains in force until the land ceases to be farmland or the ownership of the land changes.

Under the Local Government Act, council is required to advertise its rate charges and estimates of income and expenditure before making any rate. Council fulfilled this requirement by advertising its differential rate charges in the *Kiama Independent* on 13 December 1989 and publishing an amended notice on 31 January 1990.

The notices were published after the 30 September deadline and the first of the notices was published only a few weeks prior to the final date for receiving applications for farmland rates, while the amended notice was not published until after that date. The notices themselves did not provide any information concerning the statutory requirements relating to the lodging of applications, the criteria on which such applications are determined or the process by which to apply. Council acknowledged other than responding to verbal inquiries, no further information was supplied to ratepayers concerning their entitlement to apply for differential rating.

Although there is no statutory requirement on council to publish further details, council acknowledged its responsibility to ensure adequate information was provided. The town clerk stated:

Council is totally committed to its public participation and consultation processes and is keen to ensure ratepayers are well informed of the affairs of the council. Unfortunately, in this particular instance, it appears to have fallen short of the standard council has set itself.

Council determined Mr and Mrs Q would be reimbursed the difference between 1990 general and farmland rates on their property. They also advised this office of the procedural changes they intended to make to ensure ratepayers are notified of their entitlement to apply for farmland rating. Those changes included:

- publishing a notice in the local newspaper prior to September 1991 advising ratepayers of the farmland rating provisions and the manner in which an application may be made;
- sending letters to new ratepayers following the receipt of a Notice of Transfer advising them of the differential rating system; and
- issuing section 160 certificates in respect of land in receipt of the farmland differential rate which will include a notation that the rate notice in the ensuing year will be issued on the general rate, unless an application is made prior to the 31 December.

Marrickville Municipal Council

Wish you were here...

Ms B owns a property in the Marrickville Council area and while she was overseas a notice was issued to her concerning a building application (BA) in connection with the adjoining property. Following the arrival of this notice, Mr Y wrote to council advising them he held Power of Attorney for Ms B in this matter and requested all future correspondence be forwarded to him. At a council meeting it was decided to inspect the premises prior to making a decision on the BA. Notice of this inspection was sent to Ms B at her address and a copy was faxed to Mr Y.

Following the inspection, council deferred approval of the BA pending certain amendments to the plans. A few weeks after council's decision to defer, the owner of the adjoining property issued the council with a Notice of Appeal to the Land and Environment Court and a complaint concerning dampness on the common wall of the property. The dampness issue was raised with Ms B by letter to her residential address and advised an inspection was required. Mr Y was not informed of the complaint or the inspection. The inspection was able to take place as, fortunately for council, Ms B's youngest son was at the premises on the day in question. He reminded council officers his mother was still overseas.

A short time after the inspection, a letter was sent to Ms B's residence advising her revised plans had been submitted for her neighbour's house and the plans could be inspected and comments made within seven days of the date of the letter. Mr Y was not sent a copy of this letter. Approximately one week after the expiry of the seven days allowed for comments, Ms B's son contacted council. He was informed of the revised plans and told a submission could still be made for the council meeting to be held in a week's time. Ms B's son viewed the plans and provided advice to Mr Y who then faxed a submission to council the day before the council meeting. That facsimile was, however, wrongly directed upon its receipt at the council, to the town planning section and was not taken into consideration by the council when it approved the revised plans.

After investigation, this office concluded the council was aware a power of attorney for Ms B existed and it had failed on three occasions to provide Mr Y with relevant notifications concerning Ms B's property. This failure prevented Mr Y from fulfilling the obligations Ms B had placed on him when she gave him the power of attorney. Further, council had failed to adequately deal with the facsimile submitted by Mr Y, prior to the council meeting.

Following the Ombudsman's recommendations, council advised changes of address and power of attorney notices now will be notified to all relevant staff, held on the appropriate files, noted on computer records and stamped on file covers. As well, council has

improved its administrative procedures for dealing with incoming facsimiles, particularly those relating to matters under consideration at upcoming council meetings.

Wingecarribee Shire Council

Unreasonable delays

The complainant's solicitor wrote to this office contending Wingecarribee Shire Council had failed to reply to correspondence about his client's claim that certain water rates had been unlawfully levied.

There was no evidence about the question of legality of rates, just the lack of correspondence from council was causing hardship.

This office telephoned council who said they would reply to the correspondence. Nearly five months later, council had still not responded.

The solicitor then recontacted this office and this time a written inquiry was made to council asking how council answers correspondence and how long it takes.

Council then responded to both this office and the complainant's solicitor. Council apologised to the solicitor for its delay in finalising the matter which they stated had been caused by problems associated with examining the broader issue of council levying water supply and sewerage rates on similarly affected properties throughout the shire.

Wollongong City Council

Too much noise

The complainants live in a house opposite a function centre. That centre is owned by Wollongong Council which hires it out for weddings and other parties. Since 1987, the complainants had been in contact with council about noise, which they believed to be excessive, coming from the centre. Consequently, conditions were incorporated in the terms of the hire of the centre to minimise the noise.

As a result of a further complaint in early 1989, council undertook a noise level assessment and, although it was not established that the noise was offensive as defined under the Noise Control Act 1975, council tried to arrange for the installation of more noise monitoring equipment from the State Pollution Control Commission. That, however, did not occur as agreement could not be reached with the complainants.

After a further complaint, later that year, council advised the complainants they should contact council's caretaker whenever they believed the noise to be excessive. This was done on a number of occasions, but the complainant said frequently the caretaker would

refuse to speak to him and he was then forced to call police. On the other hand, the caretaker took the view the noise did not constitute a nuisance.



The following year arrangements were made to undertake a further series of noise level assessments in the presence of the complainants. Consequently, acceptable levels were set for all equipment, such as the public address system and amplified music system operated at the centre. The noise levels, however, would be monitored by the manager. As a result of further complaints in December 1990, council carried out a survey of all residents within the immediate area, including those located on either side of the complainants' house. One resident indicated noise was occasionally excessive, but had not considered complaining to council. No other people within the vicinity had complained to council.

Finally, in March 1991, because they were still not satisfied, the complainant wrote to the Ombudsman. This office was provided with information about council's previous actions and their further offer to construct a suitable fence within council's property to screen the premises. Council also provided an officer to investigate and to take any action necessary as a result of any further complaints.

A copy of this information was forwarded to the complainants together with a request for any comments they might have. In their response they said:

Regrettably, since receiving your letter, we have been subjected to further intrusive noise and took the action recommended by council and contacted council's representative, whom we invited inside the house. At his request, we closed the

front and passage doors and turned up the television. Despite the noise still penetrating, he was not willing to say it was excessive or intrusive.

The Ombudsman decided, in view of council's offer to install monitoring equipment and to construct a suitable fence on its property, there was no point taking the complaint any further.

Upper Macquarie County Council

Excessive noxious weeds

Mr X and his neighbours complained to the Ombudsman that a county council and a local council had taken no action against a landholder who had excessive noxious weed growth on his property.



Enquiries made by this office found the county council was responsible for eradication of noxious weeds in the district and was in fact aware of the problem. However, the county council did not believe it could do anything about the problem at this stage; although it had the authority to enter and eradicate weeds on a property, it had no power to recover the costs involved. A fault in the Local Government Act does not allow the costs to become a charge on the land, as say, with outstanding council rates. Any future purchaser of the land would not be obliged to pay any outstanding charges for weed eradication.

The county council said it was prepared to eradicate the weeds if it could eventually recover its costs. It had previously prosecuted the company who owned the property and had costs awarded in its favour by the court, but had not received any money because the company is in receivership.

The Ombudsman decided there would be no merit in investigating the matter as there were already proposed changes to the Local Government Act which would cover any recommendations this office could make.

COMPLAINTS ABOUT FOI

Department of Corrective Services

The first FOI complaint formally investigated and taken to final report stage was a complaint against the Department of Corrective Services, made by a former employee of that department. Ms Z had applied to the department for a copy of a research paper titled "Role Problems, Attitudes and Training Needs of Junior Prison Officers". The report was produced in 1983 by the Research and Statistics Division of the Department of Corrective Services.

In the determination of Ms Z's initial FOI application, access to this document was refused for the following reasons:

- the document came into existence more than five years before the commencement of the FOI Act (this is a ground upon which access may be denied); and
- the contents of the report are very much out of date and to release it provides no opportunity to place the findings in the context of changes that have occurred in prison officer training since 1983.

The internal review upheld the original determination, but included the Schedule 1 exemption clause relating to documents affecting the conduct of research, as another basis to refuse access. However, no facts, reasons or references to the sources of information were provided to support the use of this exemption clause.

Ms Z then asked for an external investigation by this office.

The Director General's response to the notice of investigation included the following arguments to support the earlier decisions to deny access to the document:

- as there have been significant changes in prison officer training in the past two years, release of the report could adversely effect the recruitment of prison officers;
- without knowing Ms Z's reasons for requesting the report, it is difficult to compare positive and negative aspects of release; and
- it would be justified to refuse access to the report, if it is to be used in any way that would see its contents become public or used against the department.

In his report the Ombudsman accepted this document was created more than five years prior to the commencement of the FOI Act and, therefore, the department had the discretion to decide whether or not this document should be released. However, he pointed out the objects of the Act stipulate the discretions conferred by the Act must be exercised to facilitate and encourage the disclosure of information. Guided by this principle, each of the reasons put forward by the department to justify its use of the discretion to refuse access was examined. The Ombudsman found none of the arguments could justify suppressing the release of the document. The department conceded and the document was released to the complainant.

Martime Services Board

Mr G lodged an FOI application with the Maritime Services Board for certain documents held by the board. He received a receipt for his \$30 application fee and a letter from the board stating he would be advised of the result of his application within 45 days; that being the period of time in which authorities must respond to applications under the FOI Act.

When Mr G did not receive a reply from the MSB within this period, he sought an internal review, in line with the provisions of the Act, enclosing a further \$30 fee. Again Mr G did not receive a reply from the MSB and, more importantly, had not been given access to the documents he wanted.

Mr G subsequently complained to the Ombudsman. The MSB told this office Mr G's FOI application had been filed and marked as a refusal to grant access to the documents sought. The gross error of the MSB's procedure in this instance was pointed out by this office. The MSB said Mr G's FOI application would be re-examined immediately.

As a result of the examination of his FOI request, Mr G was subsequently granted all the documents he wanted and also received a refund of his \$30 internal review fee. Needless to say, Mr G was happy both with the outcome and the role of the Ombudsman.

It is hoped in future MSB will significantly improve its processing of FOI applications.

COMPLAINTS ABOUT THE DEPARTMENT OF CORRECTIVE SERVICES

Winter weather

The winter of 1991 has been remarkably mild. Inmates at Goulburn Gaol would say that was fortunate because they are no longer allowed certain items of cold weather clothing.

Under the much discussed property policy, woollen scarves and beanies are not allowed in NSW prisons. An inmate can have a broad brimmed cloth hat, a jacket and can buy electric blankets and doonas, but those things that might make a cold evening in the yards bearable are not available.

The Ombudsman has examined the property policy and determined it constitutes a decision by the then minister, Mr Yabsley, and as such is outside the jurisdiction of this office.

Creative action

A group of koories at Goulburn gaol decided the colourful but tasteless statue of an Aboriginal with a spear at the gates of the prison did not accurately represent their aspirations and complained about it to prison officials.

The initial response of the gaol was to paint the statue white!

When the Ombudsman made enquiries it was found the statue had been removed.

Room service lacking

An Asian prisoner complained about the practice of some prison officers who used their feet to kick the prisoner's food into his cell. He said this habit was totally objectionable behaviour in his culture and asked if the Ombudsman could do something.

The complaint was originally discussed with the superintendent who also found the practice objectionable. He undertook to raise the matter in the staff bulletin and to reinforce the

issue by mentioning it at a staff meeting. The matter was considered resolved at that stage.

Some months later, the Ombudsman received a petition from 47 prisoners from the gaol complaining certain officers continued to kick food into their cells.

The superintendent was asked what action he had taken and what other action he proposed in light of the new complaint. He responded by saying the previous action

appeared not to have produced the desired results. The matter also had been recently raised with him by the official visitor.



The superintendent said the prisoners alleged the officers were using their feet to kick food into the cells while the officers alleged they only placed it in the cells with their feet. The superintendent said neither action was acceptable behaviour.

He counselled two officers whose names had been reported to him by the official visitor and also issued a new procedure to prevent a repetition. The problem appeared to be an issue at breakfast time, so the new procedure required prisoners to get out of bed and collect their breakfast from outside their cells in the morning. The direction to staff also indicated the kicking or placing of food for inmates inside cells by the use of feet was an unacceptable practice.

Smile...or lose your licence

A prisoner complained the RTA's new guidelines for photo drivers, licences discriminated against prisoners and meant they had to let their licences lapse. Under the old system, prisoners could renew their licences each year by simply sending in the renewal fee.

The introduction of photo licences brought with it a new set of guidelines for identification that prisoners cannot meet. If their licences have not been renewed within two years, prisoners must undertake a driving test to regain their licence.

The prisoner argued the RTA should relax its identification guidelines so prisoners could send a photo, with a statutory declaration signed by prison officials to verify the identity of the prisoner, and they should be allowed to renew their licences without penalty.

While the Ombudsman was sympathetic to the plight of long term prisoners who would be inconvenienced on release by the new procedures, he agreed with the RTA the system was not discriminatory since any other driver whose licence had lapsed for more than two years had to undergo the same process as ex-prisoners, that is, a driving, knowledge and eye test. The Ombudsman formed the view the purpose of these restrictions was to improve public safety on the roads and the public good outweighed the inconvenience for individual drivers.

Semantic lessons for prison visitors

Ms H wrote to this office complaining about an order, made by the Executive Director of Prison Operations, restricting her to box visits. The restriction was imposed on the basis that she had supplied false information to the visiting section and because she was under the age of eighteen.

Ms H, who was seventeen years of age, stated she had been living in a de facto relationship with Mr T, at his parent's home, up until the time Mr T was imprisoned. According to Ms H, the false information she provided was she described her relationship with Mr T as spouse, rather than de facto.

Being a minor, Ms T would only have been permitted to visit Mr T in the company of another adult, unless she was able to establish that Mr T was her de facto. Our inquiries revealed Ms H had visited Mr T on numerous occasions, visiting either alone or with Mr T's mother. She used her driver's license to obtain her visits and this, of course, had her date of birth on it. It appears Ms H made no attempt to mislead prison staff in regard to her age and any oversight in that area was attributable to prison staff.

According to the information provided by the department, the alleged false information was that Ms H stated on the visitor's form that her relationship to the prisoner was spouse whereas, when later interviewed by IJU officers, she described herself as his girlfriend. To add to what already amounts to a heinous misdemeanour, on previous visits Ms H described herself as Mr T's wife and de facto, as well as describing Mr T's mother as her mother-in-law.

According to the Corrective Services Procedures Manual a prisoner's immediate family for the purpose of contact visits is to be regarded as "a prisoner's spouse (including an established de facto relationship) parents, children and siblings...". Clearly it is the intention that the definition of spouse includes de facto relationships.

Upon review of this matter and advice from the department's Legal Services Division, the department decided to revoke the order restricting Ms H to regulation or box visits

and to permit her to visit Mr T, unaccompanied by an adult, if she produced a statutory declaration affirming her de facto relationship with Mr T. Mr T, however, had been released from prison prior to this decision being made.

COMPLAINTS ABOUT POLICE

Stay under .05 or ... rest for awhile

An NRMA patrolman observed a vehicle which he believed to be a police car driving erratically on the F5 Freeway near Campbelltown and in the surrounding area. He reported the matter immediately at the local police station, as he believed the persons in the car were skylarking and driving in a dangerous manner.



Several hours later the same vehicle was noticed by the crew of a Campbelltown police vehicle in the Airs area. The local police approached the vehicle and identified the two police officers in the car, a detective sergeant and a detective senior constable from the Sydney area. According to the detectives, they had driven out to Campbelltown Bowling Club to meet an informant. They had just dropped the informant off at Airs when they came to the attention of the local police. The detectives explained they were unfamiliar with the area, so the local police offered to show them the way.

The local police then noticed the detectives' vehicle falling back and veering from side to side. They again stopped and approached the vehicle. At this stage the driver showed signs of being heavily intoxicated and admitted he had been drinking. Both detectives

were then driven back to Campbelltown Police Station where they were left to sleep in their vehicle. They were not breath tested.

Four to five hours later, in the early hours of the following morning, the vehicle driven by the same detectives was checked on the radar exceeding the speed limit while travelling along the F5 Freeway and Hume Highway towards Casula. The highway patrol officers also formed the opinion the driver had been drinking. Again, he was advised to park the vehicle and rest for a few hours, which he did.

Court proceedings were instituted by the department against the driver of the vehicle. He was convicted for driving under the influence, fined \$300 and disqualified for driving for six months. He also was convicted of exceeding the speed limit and fined a further \$120.00. Both detectives were paraded and severely reprimanded by the department in relation to this matter.

Although the other police involved in this matter took appropriate action to prevent the detectives from driving their vehicle while inebriated and reported the incident to their supervisors, on neither occasion was the driver subjected to a breath test. These officers were also counselled in relation to the matter.

An informal chat

Mr A's trial was to be heard in court in February. The trial proceeded and, in due course, the jury retired to consider its verdict. The day after the jury retired, a successful application for the discharge of the jury was made by counsel for Mr A.

Mr A, through his solicitors, complained to the Ombudsman that:

- a juror had discussed the case with a police officer one week into the trial; and
- the charge being defended by Mr A had no basis other than as vengeful conduct by the police against Mr A for previous problems.

The latter allegation was not investigated by the Ombudsman as the matter was raised in the court dealing with the trial. The Police Service investigated the first allegation and during that investigation Mr A's solicitors alleged that Detective Sergeant W knew about the conversation in question for some time and withheld this knowledge from the Crown Prosecutor. Sergeant W was the police officer nominally in charge of the investigation against Mr A and Mr A's solicitors alleged Sergeant W only raised the matter when it appeared the Crown was losing the case against Mr A. This further allegation was included in the police investigation. If established, this further allegation could have amounted to a conspiracy on the part of the police involved to pervert the course of justice.

In the police investigation Constable A stated he went to the local hotel while off duty. At the hotel he met a Mr B whom he had known for some time. Mr B told Constable A he was on jury duty and said:

Its a bloody waste of time, I could be earning heaps more laying bricks. I could be there for a long time and the bloke's guilty. The big fellow, the policeman made a few mistakes in his statement.

Constable A realised he should not be talking to Mr B and then said to him:

[Mr B] you shouldn't be talking to me like this.

Constable A then left the hotel. He spoke to Detective Sergeant D and Sergeant W and related his conversation with Mr B. Later Sergeant W casually mentioned the conversation to the Crown Prosecutor. He stated he did not do this earlier as he thought the comments made by Constable A were casual and not official. Sergeant D stated that he did not report the matter to the Crown Prosecutor as he did not think it was necessary.

The Ombudsman considered the materials provided through the police investigation and Police Instruction 79.23 which provided at that time:

Police should refrain from speaking to jurors either before, during or after trials, especially in country centres where jurors may be well known personally to police.

The Ombudsman noted, in the event such a conversation did take place, there was no requirement that the officer inform the Crown Prosecutor appearing in the trial. As contact of any sort between a juror and a police officer will almost certainly lead to a trial being aborted, the absence of such a requirement is of great importance.

Having considered the matter, the Ombudsman found the conversation was in breach of instruction 79.23. However, given Constable A terminated the conversation in question as soon as he realised Mr B was a juror, the Ombudsman determined it would be unreasonable to find the complaint sustained against him.

The Ombudsman could not determine whether Sergeant D and Sergeant W had deliberately withheld from the Crown Prosecutor their knowledge of the conversation, until they believed they would lose the case. The Ombudsman decided not to investigate this issue because he believed it would not produce any new evidence. Therefore, that aspect of the complaint was deemed to be not sustained.

In his final report, the Ombudsman recommended instruction 79.23 be reviewed immediately. The Ombudsman recommended the Commissioner consider, firstly, requiring the officers to report any conversations they may have with jurors and, secondly, advising those officers as to whom such conversations should be reported.

On 15 April 1991, the Ombudsman received from the Police Service a copy of circular no 91/25, dated 11 February 1991, notifying officers of additional paragraphs of instruction 79.23, being amendments to that instruction. In the circular, Mr Avery, the Commissioner at time, acknowledged that the instruction did not adequately cover the situation in question. Where such conversations did take place Mr Avery stated:

It is incumbent upon the police officer concerned to report the incident as a matter of urgency through the normal channels for the information of the appropriate instructing officer.

The amendments to the instruction, appearing in the circular, provide:

When Police discover that they have had a conversation, with a juror, regardless of its subject or whether before or during a trial, the officer concerned is to immediately make a written report of the circumstances and text of the conversation to the commander of the patrol where the court is sitting. Such a report should include the identity of the juror and the nature of the trial where known.

It will be the responsibility of the patrol commander, or the person acting in that position, to ensure the report of the incident is brought to the immediate attention of the appropriate instructing officer.

Mr Avery directed officers to comply with these amendments and also advised that an amended instruction was being printed. As the amendments clearly direct officers to report conversations they may have with a juror and direct officers to whom they are to report such conversations, the Ombudsman regards this action as complying with his recommendation on the matter.

James Bond or Arnold Schwarzenegger?

For fans of tough police action films, the scene is easy to visualise.

A car screeches along the streets of Coolangatta at high speed, making illegal turns and forcing other drivers to swerve and brake. The car lurches onto the highway in the face of several lanes of oncoming traffic. It brakes, mounts the median strip and roars off into the night at tremendous speed. A shaking fellow driver reports the incident to Gold Coast police, who broadcast a general alert.

Seventy minutes later and some 115 kilometres away Senior Constable R, of the Queensland police, was performing routine and uneventful radar duty. He and his fellow officers observed a car approaching at high speed. He signalled it to stop, which it did, engine noticeably smoking. The driver climbed out; Constable F, of the NSW police. He claimed to be on an urgent undercover mission for the NSW police. He showed appropriate identification and was allowed to proceed unmolested once his identification had been noted.

In the fullness of time the Gold Coast report (which referred to a car with the same license plate as the one stopped by Senior Constable R) was collated with that of Senior Constable R, and both were sent to the NSW police, who in their turn referred the matter to this office, with the offhand suggestion that the matter should be dealt with as an internal managerial issue by police. This would have had the effect of excluding the Ombudsman from any role in the subsequent investigation. This suggestion was refused; the Ombudsman took the view that the complaint raised at least the possibility of a serious misuse of office.

When Constable F was questioned about the life or death mission which had caused him to hurtle through Queensland residential areas at such speeds, his story began to unravel. He denied he had told Constable R he was on duty. He claimed to have permission to drive to Brisbane to see friends. He claimed this permission had been given by a Sergeant H. No sergeant of that name was connected with any operation in which Constable F was involved. When this was pointed out, he said it may have been Sergeant S. Again, no such sergeant was connected with his operation. It was pointed out that none of the car diaries and other documentation which he had filled out concerning his trip accurately reflected his purported movements or those reported by Queensland police. His explanations, though fluent, were no more convincing.

This information having been obtained by police investigation, the matter was referred by police for legal advice to the internal Legal Services Branch of the (then) Police Department. That Branch had arrived at the view that Constable F should be charged with misconduct for minor administrative offences to do with the use of the vehicle, but allegations that Constable F had falsely pretended to be on duty and had driven dangerously were too expensive and too tenuous to proceed with.

The Ombudsman took exception to this advice and urged that additional, independent legal advice should be obtained. The Ombudsman also identified deficiencies in the police investigation of the complaint and required that these should be remedied.

In a letter to the Commissioner of Police dated 11 May 1990 the Ombudsman said:

I am most concerned that the department has chosen again to lay trivial charges and not pursue the more serious ones, particularly when the evidence supports serious misconduct. The argument has been proposed that the costs involved militate against bringing Queensland police to Sydney. In my opinion this is a specious argument, because to lay trivial charges is more of a waste of resources than to deal with the matter properly.

In the event, additional charges were laid and the Police Tribunal found the constable guilty of five charges of misconduct. The Commissioner advised the Ombudsman that Constable F was to be the subject of disciplinary action and to be fined.

The case once more highlighted the inadequacy of internal legal advice provided to the Police Service, as well as weaknesses in the investigative process. It appears that if not for the intervention of this office, the Queensland police crucial to the inquiry would not have been interviewed.

"Well...the door was open..."

On the afternoon of the 29 August 1990 four prisoners including prisoner E, a female, were escorted from a country police station to the Sydney Police Centre. They arrived there about 6.10pm.

The prisoners were escorted to the cell complex where they were searched and processed. Sergeant F was on duty in this area, as supervisor, with a number of other very junior police under his command. While the new prisoners were in the reception area another female prisoner was escorted to the toilet. When the female police officer H returned with this prisoner she asked where prisoner E was.

Prisoner E had escaped by simply walking out of the complex through a door with a faulty mechanism. This fault was known previously to Sergeant F. The sergeant had a duty as a supervisor to ensure the safe custody of all prisoners and the responsibility of supervising the duties performed by the junior police under his control.

The sergeant was paraded before his district commander and reminded of his duties as a supervisor. The junior police under his control on that evening were not penalised in any way. It was clearly the sergeant's responsibility to monitor the situation in this critical area of a large holding station and to identify and to rectify any weaknesses in the security.

Sticky fingers

A report was referred to this office concerned a drug squad officer from a country area who was required to convey a large quantity of drugs to Sydney for analysis. Arriving in Sydney after the closure of the Government Analysts offices he felt secure in leaving the drugs securely locked away at the Sydney Police Centre.

Alas on arriving the next morning to retrieve the drugs he found they had been interfered with and an amount was missing. His check revealed a large jar of hashish oil had been opened and it still bore the sticky fingermarks of someone on the outside of the jar. An investigation followed his report which failed to identify the officer responsible for the theft of the drug, but it did disclose serious deficiencies in the police department's procedures regarding the security of drugs.

At about the same time the theft of a quantity of marijuana from Marrickville Police Station demonstrated further the problem and the deficiencies in security regarding drugs.

This obvious lack of security resulted in the Ombudsman making recommendations that would significantly enhance drug security procedures. These included the introduction of a selection criteria as to which police stations would hold drugs, that a safe be installed in a secure area to hold drugs and, importantly, the use of two individual locking systems which would mean that no officer on his own could have access to the drug area.

The Minister for Police and Emergency Services regarded this as an important issue and consulted with the Ombudsman regarding his report. The result is that the Police Service has now reviewed arrangements and greatly enhanced security by changes to procedures and the provision in police stations of purpose built safes designed for the retention of drugs.

Who's the odd one out?

After the completion of a trial of two persons accused of assault and robbery, the trial judge directed a copy of the transcript of the trial be forwarded to the Commissioner of Police for investigation. The judge was critical of the method the police involved used to identify the two accused and commented "...the police made a terrible botch of what should have been powerful evidence."



It was disclosed by the subsequent investigation that two aboriginal persons had been detained by police following an assault and robbery. The detective sergeant in charge of the case did not hold an identification parade for these persons because of the difficulty of finding sufficient persons of similar description at that time of night. The sergeant then

left the station to make further enquiries about the matter leaving these two persons in the charge of Constable P.

The constable then decided to have the witnesses view the two persons "to confirm their two earlier sightings" of these persons.

The persons in custody were asked if the witnesses could view them and the constable says they agreed to this. The witnesses were then shown to the room where two aboriginal persons were seated and they were duly identified.

This identification of the accused persons concerned both the judge and this office. Police instructions are specific regarding identification parades, being based on previous court decisions and require not less than five other persons of similar age, height and appearance be present. This is meant to ensure a fair identification.

The constable reasoned that the persons had to be identified because he didn't want to be liable for false imprisonment. The judge concluded that sighting two Aboriginal persons amongst police at a police station could not be deemed a fair or unbiased identification. The identification was rejected by the court and the judge directed the jury to acquit the two accused.

In hot water

The Ombudsman received a report of an investigation carried out by the Internal Police Security Unit (IPSU). The investigation related to the following allegations:

- Senior Constable P, of the Pillage Unit, was in possession of a Suzuki outboard motor bearing no identification;
- Senior Constable P wrongfully disposed of miscellaneous property from the Sydney Water Police; and
- Senior Constable P failed to properly record property taken into police possession.

The background of the allegations was that a council employee found various property in a locker at a marina in Yacht Bay, Sydney. This property included a 15 horsepower Suzuki outboard motor bearing a serial number 406794. Senior Constable E, also of the Pillage Unit, and Senior Constable P collected this property, returned it to the Pillage Unit and entered details of these items into a Miscellaneous Property and Receipt Book kept by that unit.

The Miscellaneous Property and Receipt Book revealed that a Mr Eric Rodgers of Greenwich, signed his name in the book claiming as his motor 406794. This was witnessed by Senior Constable P.

IPSU interviewed Senior Constable P and found he had a 15 horsepower Suzuki outboard motor in his possession. Senior Constable P advised IPSU that he bought this motor at a market in Rockdale. He admitted the motor did not bear any serial numbers and therefore could not be readily identified.

IPSU interviewed a Mr Z who stated he had built a house on vacant land at the address in Greenwich and had lived there for the past 13 years. He stated he did not know of an Eric Rodgers.

The Ombudsman decided to conduct a reinvestigation and required, in the first instance, that Senior Constable P hand over the motor in his possession to the Ombudsman.

After a long investigation that included tracking down the only four motors of this type in Australia, the Ombudsman concluded that the motor in Senior Constable P's possession was serial no 406794. The Ombudsman recommended that the Police Service obtain independent legal advice as to whether there is sufficient evidence for criminal charges to be brought against Senior Constable P in relation to this matter.

During the reinvestigation the Ombudsman engaged the services of Mr C Anderson, forensic document examiner, to examine the entry in the Miscellaneous Property and Receipt Book, which contained the signature of Eric Rodgers and the writing of Senior Constable P. Mr Anderson concluded it was more likely than not that Senior Constable P wrote the entire entry including the signature of Eric Rodgers.

The Ombudsman also recommended a review be carried out of the practice of the Pillage Unit in handing over property to persons claiming ownership of it and failing to record the proof of identification produced by such persons when property is handed over.

This latter recommendation arose from evidence given during the investigation and the revelation that proof of identification provided by persons claiming ownership of property was not recorded by the unit. Furthermore, the Ombudsman was told that occasionally property was handed over even when no proof of identification was provided. These practices concerned the Ombudsman.

The Ombudsman has been notified by the Police Service that the Director of Public Prosecutions intended to prosecute Senior Constable P for stealing the outboard motor, an eight foot Brooker aluminium dinghy and a Driclad life jacket.

A review of the property handling procedures also was undertaken. The acting state commander considered that, provided police instructions were followed carefully, the problems should not arise. Obviously police instructions were not followed in this case. No amendments to the procedures were considered necessary.

Radio days

Three tow truck operators complained that Senior Constable D transmitted a hoax road traffic accident message over the police radio.

The tow truck operators complained that while performing their duties they all intercepted a police radio message over their hand held scanners. The message relayed over the air was that a four car accident had occurred at a particular location, with one car down an embankment. The source of the transmission was a highway patrol vehicle, but the drivers could not identify the vehicle or the police officer responsible. Each driver recalls that words similar to standby for rostered tow were used during the transmission.

Each driver then proceeded to the scene of the collision and at one point the drivers travelled together, behind each other. Each vehicle was then stopped by police who had set up a radar area, but another private vehicle was allowed to proceed. Each driver was issued with a radar infringement notice for exceeding the speed limit of 60kph. After requesting to see their recorded speeds on the radar unit they were told that the unit was "not locked on". Each tow truck driver denied exceeding the speed limit, but the Ombudsman determined the court was the appropriate forum to determine this issue.

Senior Constable D stated that while out on patrol he asked his driver to locate a phone box. Constable D then rang VKG and informed the radio operator he "...was going to broadcast over the police radio, as an exercise, that there was a motor vehicle collision. The purpose of this exercise was to see if tow trucks were exceeding the speed limits". He informed the radio operator not to take any action in relation to his broadcast. He then returned to his vehicle and told his driver that he was going to "...put over the air a fake accident...".

Constable D then set up stationary radar, broadcast the fake accident, waited for tow trucks to approach, checked their speed, pulled them over and issued them with infringements.

The VKG operator, Constable O, could not recall the precise information given by Constable D, but states the only instructions he received was "...the accident was a furphy (sic) and that I was aware of the situation".

Constable D readily admitted the transmission was false and the purpose was to catch speeding tow truck drivers. In mitigation, he stated his actions were sanctioned by his superiors at a highway patrol meeting, when he suggested he would perform such an exercise. "There was never anything ever put on paper" but, he said, the members present verbally "...in one form or another approved the idea".

The members at the meeting said they were not aware that Constable D would perform such an exercise and Inspector B said "...no covert operation in respect of tow truck enforcement was sanctioned by myself".

Section 65(10)(b) of the Radiocommunications Act states that "...a person who, in a transmission made by a radiocommunications transmitter operated by him ... conveys information, with the intention of inducing a false belief that property is being, or has been destroyed or damaged is guilty of an offence punishable on conviction by a fine not exceeding \$10,000.00 or imprisonment for a period not exceeding five years or both".

The Legal Services Branch found that Constable D committed a technical and minor breach of the section and stated that "the costs involved in prosecuting this matter would far outweigh the nominal penalty likely to be imposed". Counselling was considered a more appropriate penalty.

The police department found this issue sustained and a comment was made that Constable D's "...actions arose from his over zealous initiative and specifically an intention to identify speeding tow truck drivers rather than out of any conscious intent to breach the relevant legislation". It was thought the appropriate penalty would be to parade and reprimand the constable for his actions. Needless to say, the complainants were not satisfied with this view and stated that "...the police are proposing to ignore the more serious offence while electing to proceed with the minor speeding offences".

The Ombudsman, in sustaining this issue, recommended independent legal advice be sought from the DPP as to whether criminal or departmental proceedings should be instituted against Constable D for the apparent breach of Section 65(10)(b) of the Radiocommunications Act, 1983. That advice is yet to arrive. The constable was paraded before his district commander.

Just drop me anywhere

A was drinking late one evening with a group of young friends by the side of the road. Sergeant S and Constable Z, who were driving by, stopped and apparently some words were exchanged. The end result is that A and his friend R were bundled into the police vehicle A under arrest for offensive language and R detained as an intoxicated person.

The police vehicle drove to R's home, where he was released. A, who lived next door, was not released, the police van proceeding on its way. Some twenty to thirty minutes later, Sergeant S responded to a call over the radio for assistance at an accident and released A from the back of the truck, saying he had more important things to concern himself with. A later received a summons.

The Ombudsman said in his report on this matter:

...the power to arrest and detain a person is not to be used lightly. Section 352 of the Crimes Act, common law and subsequent judicial interpretation requires a police officer to take a person arrested before a justice to be dealt with according to law and to do so without unreasonable delay and by the most reasonably direct route. Any detention which is reasonably necessary until a magistrate can be obtained is, of course, lawful. Detention which extends beyond this, however, cannot be justified...

X police station was only a short distance away at various times while [A] was in custody of Sergeant [S]. ...[whose] conduct in not taking [A] to the police station, or releasing him at his home, but driving him to [another street and suburb] and releasing him there was unreasonable.

The Ombudsman found the conduct of both police officers involved had been unreasonable in this respect and recommended both should be paraded.

The Assistant Commissioner (Professional Responsibility) advised this office in a letter dated 12 November 1990 that he saw no difficulty in complying with this recommendation in regard to Sergeant S, but in regard to the actions of Constable Z these "were merely as those of a subordinate obeying the directions of his supervisor".

The Ombudsman was concerned at this apparent revival of the Nuremburg defence in late twentieth century New South Wales.

The policy issue involved was addressed at a senior level and eventually the Assistant Commissioner (Professional Responsibility) advised in the following terms:

in the final analysis the constable's duty to obey directions from a senior officer does not excuse or extend to the breaching of the law or police rules and instructions.

Helping a mate

Mr W complained to the Ombudsman that a friend of his, who is a police officer, had provided him with information concerning the whereabouts of Mr W's ex-defacto. The complaint was investigated by police and the officer in question admitted orally providing confidential information to Mr W, but denied providing him with a printout from the police computer.

While both the Police Service and this office view the provision of such material by any means, very seriously, the officer's reason for doing so in this case was borne in mind when deciding on disciplinary action.

The police officer stated he had taken this action out of "compassion for a friend". It was decided counselling by his district commander would provide a suitable form of discipline and hopefully redirect the officer's misguided sense of loyalty.

Who do we tell?

A complaint was made to this office by Mr S that his relatives were not informed by police of his hospitalisation following a motor vehicle accident. The matter was investigated and it was found that Mr S was involved in a collision following a short pursuit by police. This is where the problem occurred.

Police instructions require officers to inform next of kin where a person is injured in an accident and subsequently hospitalised. However, where police are involved in the accident, they are referred to another set of instructions which do not cover informing relatives. The various instructions are not clear as to how they interact with each other. This confusion meant that on this occasion the police didn't inform Mr S's relatives of his hospitalisation.

As a result of this, and other similar complaints, the Police Service is currently undertaking a major overhaul of the Police Rules and Instructions, with a view to clarifying them.

First offence

Mr K received a parking fine from the Police Service, which he paid within 24 hours. When paying the fine, Mr K also requested from the police a receipt for the fine and an explanation as to why the fine was the unusual amount of \$97.

When he did not receive a receipt or a reply, Mr K complained to the Ombudsman. As a result of contact made by this office with the Traffic Infringement Branch of the Police Service, Mr K was subsequently issued with his receipt, which he proceeded to place in his photo album, since it was his first traffic fine in 51 years of driving. Mr K was delighted with the outcome.

This office also explained to Mr K why the fine was \$97; fines are indexed to the Consumer Price Index and increase proportionately to the CPI.

Whistleblowers

Things are slowly changing in the Police Service and some officers are willing to report other officers for assault.

Two constables on duty picked up an invalid pensioner from a park, as an intoxicated person.

Mr F was obstreperous at the time he was detained. Once back at the police station, he objected to being searched by the police officer who was rostered for duty as the charge

room controller. While being searched, Mr F became abusive towards the charge room controller. The charge room controller became violent towards Mr F and punched him a number of times in the face and the side of the head causing him to fall to the ground. The charge room controller continued to punch Mr F in the head and face.

The two constables who brought in Mr F reported this to the station commander at the time who contacted his supervisor, who contacted the Police Internal Affairs Branch.

Internal Affairs Branch interviewed Mr F who, although he showed signs of being assaulted, denied that it happened. He refused to make a statement or to accept medical attention.

One of the original constables who brought in Mr F gave evidence that the charge room controller punched Mr F in the side of the face and he collapsed to the ground. The second constable saw blood on the charge room controller's hands while Mr F had blood all over his head and there was blood on the floor. Another witness to the incident supported the evidence of the two constables.

The investigation by the Internal Affairs Branch resulted in the police commissioner directing the charge room controller be charged with assault. On the charge of assault the officer was dealt with under S.556A of the Crimes Act, 1900, and placed on recognisance with a \$500 good behaviour bond for three years and to continue to receive psychiatric counselling. The charge room controller was then permitted to resign from the service.

Blow in here sir

Mr H wrote to express his dissatisfaction regarding random breathtesting after his arrest for refuse breathe. The subsequent police investigation disclosed Mr H had been stopped by Constable D for the purpose of random breathtesting. When the instrument was produced, Mr H declined to blow into it until the constable placed a fresh mouthpiece on it. Mr H expressed concern that he had not seen the mouthpiece fitted and it may be unhygienic.

The constable told the investigator that Mr H had indeed seen him place the original mouthpiece of the instrument after opening the sterile packaging. He further explained he did not have further mouthpieces with him and had shown Mr H the used sterile wrappers. He expressed concern that to get a new mouthpiece meant walking back to his vehicle and this may have been a ploy so Mr H could drive off.

Mr H was concerned at the constable's recalcitrant attitude to his request, but the police investigation found the complaint "that the sterile pack containing the disposable mouthpiece was not removed in view of the complainant" had not been sustained on the evidence. What was not disclosed by the police investigation was the police instruction

specifically pertaining to breathtesting, which states: "If there is any dispute whatsoever another mouthpiece must be used...Courtesy is most important here".

Police instructions recognise the concerns of the public regarding the hygiene issue of breathtesting, as well as the intrusive aspect of breathtesting. The constable, however, decided not to replace the mouthpiece and eventually arrested Mr H for refusing to undertake the breathtest, even though Mr H stated his willingness to undertake the test with a new mouthpiece.

Community relations was obviously not the constable's long suit and this office recommended he be counselled regarding both his failure to comply with the police instruction and his failure to adopt a reasonable or conciliatory approach.

Misuse of information

Mr X complained to the Ombudsman that a police officer had used the department's computer system to obtain, through registration details, the name and address of the new owner of a vehicle recently sold by him. These details were given to Mr X's estranged wife, who was in a de facto relationship with the police officer.

Mr X and Mrs X were involved in a property dispute and Mrs X wanted to know the sale price of the vehicle to assist her case in the property settlement. When she was unable to contact the new owner, the police officer contacted the owner on her behalf and gained the necessary information.

The police officer admitted his part in the matter and has been departmentally charged with misconduct.

Serious assault

In November 1989, two persons complained they were severely assaulted by a plain clothes constable while in custody. One said a gun was held to his head, he was threatened with death and the officer was extremely affected by alcohol. There was also a complaint that, despite highly visible injuries, the sergeant on duty refused to provide medical attention.

An investigation was immediately conducted by the Internal Affairs Branch of the Police Service which resulted in charges of assault being laid against the officer.

The officer was convicted of an assault on one of the complainants, but the other matter was dismissed because the other complainant failed to give evidence.

While the investigation was proceeding this office received an anonymous complaint that the complainant who had failed to give evidence had been persuaded not to do so by a detective sergeant from the same police station. The complainant could not be contacted

and there was insufficient evidence to take the matter further. The Internal Affairs investigator also said in his report:

I believe there are reasons behind [the complainant's] reluctance which I can only suspect, but have no proof.

The complaints of assault and of failing to afford the complainants medical attention were found sustained. The police officer convicted of assault has appealed the decision.