NSW

Ombudsman's Annual Report

1991-1992

THE OMBUDSMAN OF NEW SOUTH WALES

SEVENTEENTH ANNUAL REPORT

1 July 1991 - 30 June 1992

OFFICE OF THE OMBUDSMAN
3RD FLOOR 580 GEORGE STREET, SYDNEY 2000
TELEPHONE: 286 1000

Our reference:

Your reference:

30 October 1992

The Hon John Fahey,M.P.,
Premier of New South Wales,
Level 8,
State Office Block,
Macquarie Street,
SYDNEY NSW 2000

Dear Premier,

I am pleased to present you with my Annual Report for the 1991/92 financial year.

Yours sincerely,

David Landa
OMBUDSMAN

Contents

CHAPTER ONE

MANAGEMENT & STRUCTURE

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 seventeenth 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 1992. 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 (September 1992) 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.

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 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

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
- Sue Bullock, B Soc Stud (Syd) - Executive Officer
- Jennifer Mason, BA (Hons), B. Soc Work (Hons) - Principal Investigation Officer

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

OVERVIEW

The political and media furore over the tragedy of Victorian teenager Angus Rigg which occurred at Milton Police Station, NSW, focused considerable attention on this Office and the police complaints system.

Although this occurred in September and is, therefore, outside the reporting year, the incident is an explicit example of the continual problems experienced with complaints about police: inadequate investigations, the double handling of evidence and delay, delay, delay.

As well, a series of major public incidents during the year focused attention on the police and their relationship with minority groups. These issues are covered in Chapter Two.

These issues were examined extensively by the Joint Parliamentary Committee on the Office of the Ombudsman during its inquiry into the police complaints system. The committee essentially endorsed the need to change and improve the system and it is hoped Parliament will shortly pass the required legislation.

The major recommendations of the committee included:

- Ombudsman to have first investigation rights for complaints of major public interest;
- Internal investigations by police being observed by Ombudsman investigation officers; and
- Modifications to police regulations to enhance opportunities for conciliation of police complaints.

If the committee's recommendations are implemented, NSW would become one of the few jurisdictions in the world to accept police accountability as the cornerstone of community policing.

The increased use of conciliation in the police service is an exciting prospect and one which will pave the way for its use in other public sector organisations. It is essential for this Office, and indeed society in general, to explore alternatives to our current legalistic approach to settling disputes.

Funding the Ombudsman

The Parliamentary Committee's inquiry into police complaints was its first overview of this Office's operations. Its second and current inquiry is an examination of the Office's resources. As police complaints make up over half of the complaints to this Office, a positive outcome from both inquiries is fundamental to an effective Ombudsman. During the resources inquiry, we will address and, hopefully, remedy the many grievances this Office has with Treasury and which have been subject to reports to Parliament.

If the new powers on police complaints are to be effective, they, and the other functions of the Office, must be adequately resourced.

Communications

I believe the Parliamentary Committee is essential to bridge the gap between this Office and Members of Parliament. While I hope the committee will disseminate issues to other parliamentarians, I recognise the need for my Office to provide accessable information in a digestible format, particularly concerning the often complicated reports to Parliament. We are currently re-evaluating our reporting formats, including a proposal to issue summaries of reports to all members of Parliament.

The results of the Commonwealth Ombudsman's survey of public awareness also highlighted the vital need to maintain a regular flow of information to the general community, with particular emphasis on certain groups. For instance, at 31 percent Aboriginals and Torres Straight Islanders have the lowest level of awareness of the Ombudsman than any other group.

The awareness of a state Ombudsman among young people (aged 16 - 24) is only 35 per cent and for recent immigrants it is 32 per cent. Both demand redress.

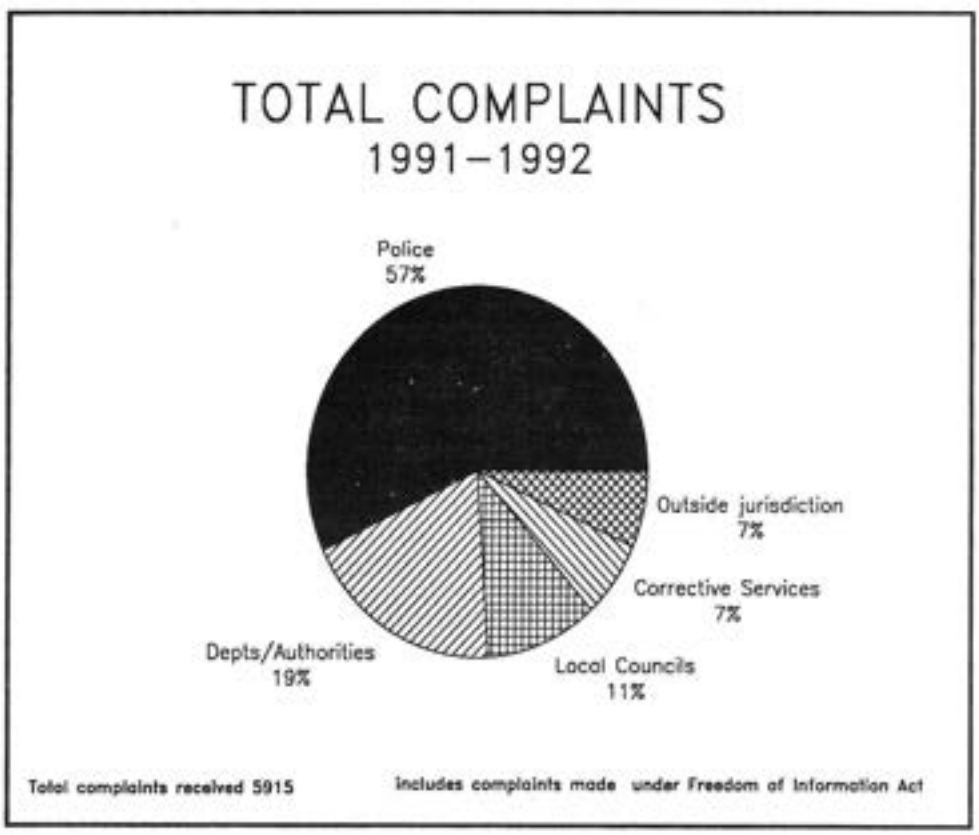
Secrecy

The secrecy provisions of the Ombudsman Act still remain despite many attempts over the years to open up the Office as a public source of information on issues of major importance. There is no indication that Parliament has the issue on its agenda. Indeed, one suspects there is a preference for a silent watchdog. It is certainly an issue that should be taken up by the Joint Parliamentary Committee.

Total Complaints

The Office received 5915 written complaints during the year, a small increase over last year's figure of 5896. While police complaints increased seven percent, all other areas experienced a small decrease.

One can only assume that the news of our rigorous decline policy is being whispered throughout the community. Given that there have been no public awareness visits to country regions and that visits to prisons and juvenile centres have been too far and few between, this drop in complaint numbers is not unexpected.



FOI and Local Government

Other major issues covered in detail in this report include Freedom of Information (FOI) and local government. The FOI section discusses the inadequate State monitoring of the FOI Act and the number of escape clauses available to maintain secrecy when it is unwarranted. The Office's influence in the local government area continues to be hampered by a lack of any requirement for councils to table Ombudsman reports and make them public.

New Jurisdictions

Notwithstanding the financial difficulties confronting this Office, we are clearly perceived as a potential watchdog in emerging jurisdictions. Various Parliamentary committees and government agencies have canvassed extending the Ombudsman's powers to a number of areas, including disability and community services, children and government advertising. Indeed, the potential for expansion is considerable when considered in light of the alternatives, which would involve establishing special tribunals with costly infrastructures. In comparison, widening the Ombudsman's jurisdiction emerges as a credible, cost effective vehicle to deliver government accountability to the community.

Challenges

The challenge in the next year will be in the allocation of scarce resources to achieve the most equitable processing of grievances, while optimising effective solutions. The CHIPS (Complaint Handling in the Public Sector) project discussed in detail elsewhere in this chapter will be critical to the process.

I am conscious that the credibility of the Office to achieve fair and just decisions from government agencies is critical if the Office is to remain relevant. It is more than unfortunate that the juggling of resources raises another dimension to the application of equity. While I recognise that not all complaints can (or even should) be handled, there is a limit which, if too restrictive, damages public confidence in the accountability of government.

NOTABLE ACHIEVEMENTS

For most people, the immediate value of the Ombudsman's Office is its ability to resolve an apparently intractable problem with a government authority which looms large in an individual's life. Such resolutions require the cooperation of the government authority wise enough to recognise that if unresolved, the problem may lead to expensive litigation, political embarrassment or some other unwelcome outcome.

Often a problem arises from a systemic fault in a government authority's procedures. The intervention of an experienced, independent investigator can often fix faults which are persistently immune to internal review. In these cases the actual or potential savings to the government authority can be substantial.

All too often in disputes between a government authority and a citizen, the two parties tend to adopt extreme adversarial positions. To that impasse the Ombudsman brings his independence (he is the representative of neither side) and his statutory obligation to detect conduct which is in some way unjust or unreasonable. He is frequently able to modify the initial positions of one or both sides and effect a compromise which satisfies the complainant, and (more often than is realised) benefits the government authority.

Some examples of positive action by government authorities, following intervention by the Ombudsman's Office, are set out below.

Case Study 1

Inside Information was Unreliable - Corrective Services Commission

Although the Sentencing Act 1989 abolished remissions, up until August 1991 prisoners at the then Parklea Prison were being given a handout about remission entitlements. The document also misinformed prisoners about prison discipline for major and minor offences based on a regulation which had been superseded by the Prison (General) Regulation 1989.

When the Ombudsman's Office contacted the superintendent about this potentially highly distressing misinformation, he immediately withdrew the document and arranged for the issue of a new information sheet.

The Director-General of the Department of Corrective Services then advised this Office three other institutions in the former metropolitan region also had been issuing defective information sheets. These sheets also were withdrawn and instructions given to issue updated sheets.

Case Study 2

Alarm Prompts Unwanted Excursions - NSW Police Service

In March 1991 Fairfield police were called by a neighbour to silence an external burglar alarm on a nearby house which had been ringing for two hours. An unknown bystander suggested an old person may be inside and in trouble. The police then broke a window to enter the house. On finding no-one inside, but all doors deadlocked, they exited by the broken window, damaging blinds in the process.

The police then left the insecure house in the care of the neighbour who located the house owner in Queensland. The owner broke off her holiday to fly back to her damaged home incurring travel costs of $340 and repair costs of $310. She then sought reimbursement of these costs from the police.

Despite instructions covering this type of occurrence, police involved were unsure of how to proceed and a paper war commenced with the homeowner. Her complaint to the Ombudsman's Office and its intervention prompted payment of $360 which was not accompanied by any explanation.

The homeowner remained dissatisfied and was preparing for legal action. This Office recognised that the final part of the claim could be negotiated and urged the complainant to do so, informing the police similarly.

Shortly afterwards (and 11 months after the alarm went off) the complainant received another cheque for $292 which was accepted as final settlement. The complainant is grateful to this Office but remains critical of the Police Service for its delays.

Case Study 3

Renewed Life of Lease - Department of Lands

Mrs S's family had a Department of Lands' lease on a caravan park. A year before the termination they applied for renewal of the lease, but heard nothing.

In 1991 Mrs S paid three years rent by cheque which the department accepted, but without issue of either a receipt or confirmation of renewal of the lease. The department subsequently advised Mrs S the park lease was to be put to public tender.

Following a complaint from Mrs S, this Office contacted the department. As a result of those enquiries, the department apologised to Mrs S for the delay in finalising her application and extended her lease to its maximum term of 40 years.

Case Study 4

Dust-Up Over Dust is Settled - Lithgow City Council/Electricity Commission

A resident complained about Lithgow City Council's failure to act on dust raised by excessive use of unsealed Range Road by heavy trucks servicing the Thompson Creek Dam site.

Enquiries from this Office elicited advice from the council that it lacked funds to seal the road. However, the enquiries prompted the council to contact the Electricity Commission which is responsible for the dam as part of the Mt Piper Power Station project. After some discussion the Electricity Commission agreed to commence dust suppression measures along Range Road adjacent to residences.

Case Study 5

Steamed Up Over Selective Courtesy - Water Board

The Water Board notified Mr B that he must engage a licensed plumber to replace a defective jumper valve in his water meter. Mr B's plumber charged $168 for this service.

Mr B later was advised the Water Board had a free service to replace such valves, but the service was not publicised. Mr B complained that such lack of publicity

"unfairly discriminates between persons who Water Board employees choose to notify of the existence of the free service and those who are unaware of its existence through no fault of their own".

Even Mr B's solicitors failed to move the board towards considering compensation for Mr B's valve expense.

In response to enquiries from this Office prompted by Mr B's complaint, the board advised such valves had in the past been replaced by board staff as a courtesy service when resources permitted. However, in Mr B's case the board agreed to make an ex gratia payment to cover his expenses and to review and rationalise its policy on such cases.

Case Study 6

Garbage Bin: Sin of Omission - Manly Municipal Council

Mr H's retail premises at Manly are occupied by a lessee. The lessee was asked by a council employee whether he would like to change from the four 55 litre garbage bin service to the 240 litre mobile garbage bin (Sulo) service. The lessee accepted the offer.

Manly Council's garbage fee (charged to property owners) is $1.36 per litre. However, the council while supplying the Sulo service to Mr H's lessee did not inform Mr H of the new arrangement or that his garbage account would increase.

The lessee moved premises and took the Sulo bin with him, but council continued to charge Mr H for the use of the departed Sulo bin.

Following Mr H's complaint to this Office, Manly Council advised the Ombudsman garbage service arrangements were often made with tenants without negotiation with or advice to property owners as "a matter of convenience". As the Local Government Act gave council the power to charge property owners for any garbage services provided, council saw no need to advise property owners of changes agreed with tenants. Council believed any problems arising should be settled between landlord and tenant.

The Ombudsman disagreed with this attitude and as a result Manly Council now has produced three standard forms for changes to standard garbage services:

- Where the tenant initiates a change and accepts responsibility for the additional charges. The owner is advised of the change and the tenant's acceptance of responsibility.
- Where the tenant wants a change and the change is to be reflected in charges to the landlord. This form requires the landlord's consent.
- Where an owner-occupier wants a change. This form provides for a consent to pay the additional charges.

Council finally amended the disputed garbage account in favour of Mr H and agreed future changes to garbage services would not be made without notification to or agreement from the relevant landlord.

Case Study 7

Solo Cash Counters Face Motza Trouble - Totalizator Agency Board

During a morning audit of a small Sydney TAB Agency, the auditor's cash count discovered an unexplained deficiency of $3,000. The TAB agent had her agency terminated. She complained to the Ombudsman the auditor had encouraged her to go about her normal pre-opening duties while he counted the cash alone and that the TAB had acted unjustly in terminating her agency.

Since court action for wrongful termination was in prospect, the Ombudsman declined to investigate that aspect of the complaint. However an investigation of cash counting practices by TAB auditors and regional managers was undertaken.

During the investigation TAB management readily conceded that due to agency operating practicalities (the need to ensure setting up duties were complete before advertised opening times, or to ensure continuity of service to the public where an agency was already open) an informal procedure had developed where auditors and regional managers frequently counted cash in the absence of the agent or their delegate. This informal procedure was contrary to instructions in TAB manuals but was sanctioned by management.

The Ombudsman's report noted:

"Prudent cash counting procedures comprise wisdom accumulated since the dawn of coinage. At their heart is a recognition that it is most unwise for those counting cash to do so alone." It also concluded the informal procedure was conducive to twin evils: the cash-counter may be tempted to pocket some of the cash or the agent - confronted with a cash shortage - may be tempted to falsely accuse the cash-counter of theft.

The report recommended the TAB review its cash counting procedures in order to devise those which would "ensure that only in exceptional circumstances, and then only with the prior consent of the agent or their delegate, will auditors and regional managers be permitted to conduct any part of an agency cash count alone".

With commendable promptness the TAB undertook the review and issued new instructions which fully implemented the Ombudsman's recommendation.

Case Study 8

Late Lump Lacked Interest -

Coal and Oil Shale Mine Workers Superannuation Tribunal

Mr H, a Wollongong mineworker, expected prompt payment of his six figure lump sum superannuation entitlement on his retirement at age 60 in October 1990. He had completed the relevant application form and there were no complications about his retirement.

In fact, Mr H suffered a delay of eight weeks in getting his money, and sought compensation from the Coal and Oil Shale Mine Workers Superannuation Tribunal for loss of interest. His request was denied on the basis that the Tribunal did not have the power to make such a payment.

In response to Mr H's complaint the Ombudsman commenced an investigation in April 1991. As a result the payout system was reviewed and the relevant Act amended to permit payments of the kind sought by Mr H and in April 1992 he at last received an interest compensation payment of $1308.

Mr H then wrote to the Ombudsman's Office as follows:

Not only do I owe you a thank you but so do all the future retiring mineworkers who now have a more efficient pay out system and payment of interest for delays.

PROGRAM EVALUATION

The major program evaluation undertaken this year examined the basic functions and procedures followed by the Ombudsman investigating complaints against members of the NSW Police Service. Complaints against police officers make up more than half of the total complaints made to the Ombudsman.

The evaluation was conducted for the purposes of the Inquiry into the Role of the Office of the Ombudsman in the Investigation of Complaints Against the Police conducted by the Joint Parliamentary Committee on the Office of the Ombudsman. Details of that evaluation formed the basis of written submissions made by the Ombudsman to the inquiry which are now part of the public record. Evidence was given before the committee by the Ombudsman and one of the Assistant Ombudsmen. Further details of this inquiry are set out in the police section of this report.

Two other evaluations were conducted, the first into the assessment and complaint management procedures of the Office, and the second was a management review conducted by a consultant.

Complaint Assessment and Management

Following a significant increase in complaint numbers in the 1990-91 financial year and faced with reduced resources, there was a need to limit the number of complaints proceeding to preliminary enquiries and formal investigation. The CHIPS initiative (reported on elsewhere in this report) was partly aimed at reducing in the long term the number of complaints made to the Office by encouraging more effective in-house complaint resolution within public sector agencies. The immediate problem of managing the increased workload was addressed by reviewing the procedures by which complaints were assessed and managed and by developing stricter guidelines for declining complaints.

In past years, the majority of complaints received were allocated to the four investigation teams which, through a collaborative process, assessed the merits of each complaint and determined the course of action prior to assigning one of their individual members to action the matter. The principal guidelines for the exercise of the Ombudsman's discretion to investigate were the considerations laid down in section 13 of the Ombudsman Act, as well as the essential question of jurisdiction.

While this process in the past had allowed for detailed consideration and appropriate action on each complaint, in a period of escalating complaints it had two principal defects. Teams were taking on more work than they had the resources to effectively deal with, leading to delayed enquiries. Furthermore, there was increasing potential for inconsistent assessments made across the teams.

As a result of the evaluation, new procedures were introduced whereby every new complaint is personally assessed by the statutory officer responsible for the specialised area of complaint, be it police, local government, corrective services or other public sector agencies. Those officers now determine subsequent action on each complaint prior to its allocation. Ongoing supervision is given by the senior investigation officer in each team or the principal investigation officer. In complex or important cases, the statutory officers directly conduct investigations themselves or closely supervise investigations carried out by others.

More detailed guidelines for the monitoring of enquiries and investigations in progress were introduced so that unproductive enquiries can be terminated quickly to free resources for use on more complex enquiries. Senior investigation officers now conduct three monthly file reviews of all non police files more than three months old. The Deputy Ombudsman and Assistant Ombudsman responsible for local government and corrective services complaints review all such files unresolved after six months on a tri-annual basis.

The Ombudsman also introduced strict guidelines for the exercise of the discretion to decline complaints in an effort to limit the number of complaints that are made the subject of preliminary enquiries or investigations. The principles guiding this policy are:

- priority is to be given to complaints that identify systemic and procedural deficiencies in public administration and individual cases of serious abuse of powers
- preference is to be given to complaints which, if investigated, are likely to lead to practical and measurable changes through recommendations
- complainants are expected to, and are to be encouraged, to take up individual grievances initially with the public authority concerned so that the Ombudsman is used as an avenue of last resort
- alternative and satisfactory (in the Ombudsman's opinion) means of redress are to be used
- the lack of resources, both human and financial, is an essential consideration in the exercise of the discretion not to investigate.

The type of complaints declined now include:

- complaints relating to the discharge of a substantially commercial or trading function
- complaints relating to conduct more than six months old
- all complaints where there is an available appeal mechanism
- all premature complaints
- complaints involving minor misconduct which have no widespread implications
- complaints in which the complainant has no direct interest or insufficient interest.

Management Review

A private consultant was engaged during the year to conduct a management overview to identify any opportunities for downsizing and for enhancing overall efficiency of the Office in response to a projected financial deficit for the 1992-93 financial year and following years. The review was conducted using extensive staff interviews, perusal and analysis of office documentation and observation of processes.

The review made recommendations in the following areas: management strategies, public confidence and the role of the Ombudsman, strategic direction and operational planning, executive decision making and management, structure, polarisation of ideas and attitudes within the office, pursuit of excellence, performance appraisal and temporary and permanent employment specialisation and generalisation, and staff development and training.

Many of the measures recommended by the consultant are being implemented, including voluntary redundancies and the identification of staff as excess to meet budget projections.

Programs Proposed for Future Evaluation

Unlike many agencies, the Office of the Ombudsman has only one essential program - the investigation of complaints. Future evaluations therefore will tend to be evaluations of sub-processes of that main program.

During the coming year the Office will be attempting to carry out an evaluation of client expectations of the services provided by the Ombudsman and levels of satisfaction with those services.

A further evaluation of the organisational structure of the Office will also need to be undertaken in response to proposed fundamental changes to the Ombudsman's role in the investigation and overview of complaints made against police officers arising from the report on the Inquiry into the Role of the Office of the Ombudsman in the Investigation of Complaints Against Police.

CHIPS - COMPLAINTS AND CONSUMER SATISFACTION

Background

All organisations get complaints. In 1991, however, with complaints about public authorities increasing sharply, the Ombudsman began examining the ways in which government agencies handle public complaints. He believed comparing techniques and successes would help agencies cut costs, increase effectiveness and, thus, improve their ability to meet community expectations.

Introduction

Some complainants raise their problems and dissatisfactions directly with the agency in question and seek the Ombudsman's assistance only if still dissatisfied. Others bring their complaint straight to the Ombudsman. In such cases, the Office will not usually begin an investigation until the agency in question has an opportunity to resolve the matter. Exceptions are usually only with the more serious complaints. Complaints about the Police Service usually come within the Police Regulation (Allegations of Misconduct) Act and are not covered here unless specifically noted.

Some authorities are more effective than others in handling complaints made direct to them. If handled well, such complaints may never have to be considered for investigation by the Ombudsman. About a third of the complaints brought to us involve service delivery. If they are handled effectively within the agencies, we can concentrate the investigative expertise of the Office on the more significant matters. When resources are tight and complaints which warrant attention have to be declined, this assumes increasing importance.

This Office is uniquely placed for an overview of complaint-handling policies and procedures of public authorities and to make constructive comparisons. The Office has the capacity to move information, ideas, experience and skills between authorities, promoting a higher general standard of in-house complaint-handling by the authorities themselves, to their benefit and that of the community generally.

A Survey of Public Authorities

Our initial research suggested 85 per cent of agencies did not have a complaint-handling manual, 80 per cent did not have a unit set up specifically for complaint-handling and 80 per cent did not have useful records or reporting systems. Even fewer were using complaints as a management tool of any kind or published their performance, to allow comparison.

Agencies with a private-sector orientation or significant contact with the public generally had better-developed complaint-handling systems and were using them to improve the operation of the organisation.

Preliminary Conclusions

Where complaint-handling was involved, corporate memory and learning was often fragile, spasmodic or non-existent. Agencies vary; in some, everything proceeds from the top down and often also out from the centre. Others have very flat organisation structures or are significantly de-centralised. Some have problems achieving consistency. Some can't integrate flexibility with consistency. Some agencies' promises do not match up with what they deliver. The Ombudsman saw significant potential for his office to contribute to low-cost, practical improvements.

What is a Complaint?

This is often a problem. One test is to see if the authority is a third party in a dispute between a complainant and, say, a law, policy or practice. It may be that a public authority properly administers a law or policy but that people object to the law or policy. Such objections will not constitute complaints about the authority's conduct, although such situations may develop into complaints if not handled well.

A Common Pattern

An enquiry becomes a dissatisfaction; a dissatisfaction turns into a complaint and a complaint results in an investigation and regardless of outcome, someone loses.

An Answer to the Problem

If this process never starts, or can be stopped early, everyone benefits. This is one way an effective in-house complaint-handling system pays its way.

A Means to an End

A system which starts with enquiries, continues through complaint-handling to resolution, providing feedback which drives improvement, reduces complaints.

What System?

Organisations differ. But there are universal elements. The ideal is to develop a structure which each can adapt to its particular circumstances.

Essentials

Any in-house system must set out or address some fundamental elements:

- The agency's policy regarding complaints and complainants
- Consistency and procedural fairness
- Recording and reporting
- Responding:
  - to the complainant (in terms of resolution)
  - to the system (in terms of necessary changes)

The survey showed widespread failure to use complaint-handling as a management tool. Agencies need to know what their customers think. Orthodox market research is expensive. Good in-house complaint-handling systems provide feedback otherwise had only at high cost. Most complaints are very specific, tightly-focused and well-rooted in reality (which is not to say that complaints should always be sustained; in the Ombudsman's experience, this is not necessarily so). The survey showed, however, very few agencies were tapping the rich vein of customer opinion obtainable from complainants. Without this, significant improvement in service is very difficult.

The Government's Guarantee of Service

Our project began in 1991. In March 1992, the Government offered the public a "guarantee of service" in its statement, NSW - Facing the World. The Ombudsman supported the concept but said that if the Office of Public Management were to implement the proposal, duplicated effort and waste of scarce resources must be avoided. The Director-General, Premier's Department, agreed the two projects must be integrated.

The Ombudsman's Policy Statement

The Ombudsman stated a policy which, though primarily for his office, had implications for other public authorities. The first part said:

> **The Ombudsman will not normally investigate complaints which he considers can and should be resolved by an appropriate complaint-handling system within the public authority in question**

The second part of the policy was:

> **The Ombudsman will always consider for investigation complaints which cannot be so resolved, as well as a failure by a public authority to deal satisfactorily with a complaint received by it**

In giving his reasons for the policy, the Ombudsman stated the following aims:

- To conserve the Ombudsman's investigative resources for such complaints ascannot be dealt with appropriately in-house
- To encourage an enhanced response to complaints by public authorities
- To involve complainants, wherever possible, as fully as possible in the resolution of their own complaints
- To locate the cost of complaint-handling and the operational practices which create complaints where those costs originate
- To reduce, ultimately, the incidence of complaints made
- To achieve better resolution of such complaints as are made.

This restated a belief that anyone complaining about a public authority should first raise the matter with that authority. The Ombudsman was not sure, however, if this was understood by the agencies themselves. Although the survey centred on complaint-handling, that was essentially a strategy for achieving other changes and long-term objectives. The Ombudsman saw benefits for his office and the agencies if that policy operated successfully, but knew it needed complaint-handling systems capable of meeting the proper demands of a complainant, future users of the agency's services, the public in general, the Government and the organisation itself.

The Ombudsman saw a need for common reporting standards, and circulated a draft of these and of guidelines for effective complaint management which are available to public sector organisations involved in setting up or modifying existing arrangements for handling complaints.

Ways in Which Complaints May be Resolved

We have also been examining **how** complaints may be resolved. Recent years have seen significant changes and alternative and additional dispute resolution systems may well have a place in the repertoire of strategies available.

Conciliation

The Ombudsman's first step was a drive to increase substantially both the level and the success rate of conciliation of complaints about the police. A joint working-party between this Office and the NSW Police Service stopped at a certain point to await the report of the Joint Parliamentary Committee on the Office of the Ombudsman in regard to the handling of complaints about the conduct of police.

The Committee's report has now been tabled. It deals at length with the conciliation of complaints. The Committee adopted virtually all the points made in that regard by the Ombudsman, who believes that lessons learned from this initiative may be capable of productive application elsewhere.

Mediation

Conciliation is closely linked to mediation and we have examined the use of mediation to resolve complaints in certain circumstances. The process is likely to be useful in situations where the complaint has the character of a dispute or contains within it a significant element which can be characterised as a dispute which can, if necessary, be separated out from the rest of the complaint.

The Ombudsman and another officer have undergone training for accreditation as mediators. To take it further and to focus attention on the possibilities, it is proposed to recommend mediation be considered in a range of particular instances.

What has been Achieved to Date

Some authorities already had sophisticated complaint-handling procedures. Since the Ombudsman began this project, other authorities have introduced systems or have upgraded existing schemes. In some cases, little was needed to bring existing systems into close alignment with the concepts in the Guarantee of Service. In other cases, rather more remains to be done. Some agencies of course may never need elaborate systems. Nevertheless, there are basics which will apply to all of us in the public sector. It is those basics which must form the core of what is done.

The Ombudsman fed back to public authorities results and preliminary conclusions from his initial survey, asking them for further co-operation if needed, mainly in terms of expanded answers, actual inspection of systems, etc. With virtually no exception, the responses were and continue to be very positive.

Comment has been sought at all stages. It was clear from an early point that the particular circumstances and needs of individual agencies must be ascertained and met. Organisational differences in the public sector are considerable - what works for one agency will not necessarily do for another. What we were seeking, therefore, was a core of agreed common standards and perhaps an agreed common structure, able to be modified to meet individual circumstances.

Material from here and overseas, from the public and private sectors, was examined. Consideration had to be given to how prescriptive and proscriptive a model manual or guidelines should be. The decision, finally, was to concentrate on the philosophy of the process, to be specific about core elements and leave it to each agency to perhaps provide an example or so, or a case study, something in the nature of a "hypothetical", and, of course, to settle its own actual paperwork and handling of complaint material, including, if necessary flow charts and the like.

Agencies were generous in allowing their approaches and their forms to be made available for use by others who might wish to borrow good ideas. The Ombudsman is appreciative of the open approach adopted by agencies in this regard.

Seminars were conducted jointly by the Ombudsman's Office and the Office of Public Management in August-September 1992 for senior officers responsible for implementing the Guarantee of Service and, as an integral part of that, for providing effective complaint-handling systems in their organisations. Segments presented by both offices were augmented by speakers from private-sector organisations who focused first on a tiered approach to complaint-handling, culminating in referral to external resolution where necessary, and the possibilities of mediation as an appropriate strategy in some cases.

How Things Stand at Present

The importance of complaint-handling has been recognised in the Government's Guarantee of Service, and the Ombudsman's Office and the Office of Public Management have agreed on integration of their respective roles in this regard, to avoid duplication of effort and waste of scarce resources.

Much remains to be done, however, and the office will continue to pursue this initiative.

SIGNIFICANT OFFICE COMMITTEES

No significant committees were established or abolished during the reporting year.

Management Committee

Membership:

David Landa, Ombudsman

John Pinnock, Deputy Ombudsman

Gregory Andrews, Assistant Ombudsman

Kieran Pehm, Assistant Ombudsman

Purpose: management of the Office. Consider matters relating to the functions of the office, policies, budget, priorities and overall administration.

Corporate Planning Committee

Membership:

David Landa, Ombudsman

John Pinnock, Deputy Ombudsman

Gregory Andrews, Assistant Ombudsman

Kieran Pehm, Assistant Ombudsman

Jennifer Mason, Principal Investigation Officer

Sue Bullock, Executive Officer

Geoff Pearce, Manager Information Systems

Anita Whittaker, Human Resource Manager

Sandra Bitsakos, Financial Accountant

Jennifer Knox, Investigation Officer

Purpose: development of a corporate plan.

Training Committee

Membership:
Gregory Andrews, Assistant Ombudsman
Jennifer Mason, Principal Investigation Officer
Sue Bullock, Executive Officer
Geoff Pearce, Manager Information Systems
Anita Whittaker, Human Resource Manager
Margaret Lyons, Senior Investigation Officer
Sandra Butler, Assistant Investigation Officer
Sue Sullivan, Senior Investigative Assistant
Purpose: co-ordinate training program.

Joint Consultative Committee

Membership:
John Pinnock, Deputy Ombudsman
Sue Bullock, Executive Officer
Anita Whittaker, Human Resource Manager
Jan Weller, Workplace Group
Robert Bellamy, Workplace Group
Jacqui Trad, Workplace Group
Anne Milson, Public Service Association
Purpose: implementation of Structural Efficiency Principle.

In addition to the above committees, the following committees met on a regular basis.

- Equal Employment Opportunity Committee
- Ethnic Affairs Policy Statement Committee
- Occupational Health and Safety Committee

PROMOTION AND PUBLICITY

Community Awareness

There were no public awareness visits conducted during the year due to budgetary cutbacks.

Speaking Engagements

During the year the Ombudsman and his officers welcomed the chance to address numerous community groups. These included:

- Police Academy, Goulburn
- Police Academy, Sydney
- Police College, Manly
- Corrective Services Academy, Sydney
- Numerous Sydney Technical Colleges
- Numerous Community Groups, ie, Lions andRotary

Papers presented during the year included:

- Freedom of Information - The First Two Years
- The Role of the Ombudsman (College of Law Chatswood, Chamber of Commerce, Clerks of Local Courts and IIR Company Secretaries)
- User Pays (IIR)
- Calling Australia Home - How to Face the Challenge
- Freedom of Information - The First Three Years (RIPAA)
- Accountability, Customer Service and Satisfaction in the Public Arena (RIPPA)
- Community Expectations and Police Accountability
- Complaint Handling as Market Research (IIR)
- Consumer Complaints and the Determination of Customer Satisfaction (RIPPA)
- The Citizen as Client (IIR)
- Perceptions of Local Government (Local Government Conference)
- Customer Complaints and Client Satisfaction (National Parks and Wildlife Service)
- Complaints as a Means of Determining Customer Satisfaction (Public Sector Management Course).

Publications

With the exception of the 1991 Annual Report, the office was unable to produce other publications due to budget constraints.

Printing of the 1992 Annual Report cost $12,000 (approximately).

SPECIAL REPORTS TO PARLIAMENT

Under section 31 of the Ombudsman Act, 1974, the following reports were tabled:

18 July 1991: Report on the role of the Ombudsman in the management of complaints about police.

2 December 1991: Report on the failure by officers of the then Department of Family and Community Services to respond to allegations of assault of a detainee in a detention centre.

2 December 1992: Report on the failure of the former Department of Family and Community Services to issue instructions to superintendents and staff on the requirement of the Children (Detention Centres) Act and its regulations, in terms of minor and serious misbehaviour and, in particular, instructions on dealing with assaults on detainees by detainees.

4 May 1992: Report concerning the Prisons (Segregation) Amendment Bill 1992.

HEARINGS UNDER SECTION 19 OF THE OMBUDSMAN ACT

Hearings under Section 19 of the Ombudsman Act			
	Number of hearings	**Number of days**	**Number of witnesses**
Departments and authorities	3	8	17
Local government/councils	2	4	17
Prisons	4	16	88
Police	8	24	34
Total	17	52	156

Hearings were conducted in the Office of the Ombudsman, in other Sydney locations and in NSW country centres neareast to the incidents under inquiry, including a number of NSW Prisons.

TELECOMMUNICATIONS INTERCEPTION INSPECTION UNIT

The functions of the Ombudsman under the Telecommunications (Interception) (New South Wales) Act were detailed in the 1987-88 Annual Report. That Act commenced on 20 January 1989 and shortly afterwards the New South Wales Police Service and the New South Wales Crime Commission were declared eligible authorities under section 35 of the Commonwealth Telecommunications (Interception) Act. Since then, amendments to the New South Wales legislation enabled the Independent Commission Against Corruption (ICAC) to be declared an eligible authority, effective from 16 February 1990. To date, ICAC has not advised this office that it had commenced intercepting telecommunications.

The Ombudsman's Telecommunications Interception Unit began operating shortly after the enactment of the New South Wales legislation. This high security unit is not open to the public and is located on a separate floor from the main office. The unit has four staff: a senior investigation officer, an investigation officer, an assistant investigation officer, and an investigative assistant.

As required by the New South Wales legislation, inspections are made of the records of intercepts made by the New South Wales Police Service and the New South Wales Crime Commission. Results of those inspections are reported to the New South Wales Attorney General as soon as practicable after 30 June each year, and in any case, within three months of that date. This year's reports have been delivered to the New South Wales Attorney General.

During late 1992 the officer responsible for carrying out the inspection functions for the Ombudsman of South Australia visited the office. He was supplied with a description of our inspection system and copies of checklists and running sheets. As an inspection was being conducted at the time of his visit, and at the generous invitation of both the agencies, he was able to observe our working procedures.

VISITS

The Ombudsman recognises the special needs of people in rural areas and people in custody to have access to the Ombudsman's Office and has traditionally carried out an outreach service. As the following table reveals, this service has been severly curtailed in the past two years due to resource constraints.

Ombudsman Visits

	Number of Visits			Oral Complaints Dealt with		
	1989 to 1990	1990 to 1991	1991 to 1992	1989 to 1990	1990 to 1991	1991 to 1992
Public awareness	33	11	0	494	199	0
Prisons	36	20	27*	420	315	349
Juvenile Institutions	12	5	3	146	41	23

*Eighteen of the 29 main correctional centres were in fact visited, some on more than one occasion.

CONSUMER SATISFACTION

Recently, the Ombudsman began collecting statistics on requests for review of decisions, and actual complaints about the Office. A breakdown will be provided in next year's annual report.

As a high percentage of complaints currently are declined by the office, the majority of return correspondence from the public is letters or telephone calls requesting a review of the decline decision. Snapshot samples of files over the year indicate requests for review are received on over 18 per cent of files in the general area and around 11 per cent in the police area. Most letters contain no actual complaint about the conduct of the original officer handling the file; although many complain about the stringency of the tests applied as to which case shall be investigated.

Requests for review are handled by the next most senior officer who has had no previous dealings with the file. The file is read afresh and a decision made whether to reopen the matter or to affirm the decline decision. In general, a matter is likely to be reopened only if the complainant, when writing, has provided information which casts a new and unexpected light on the matter.

Very occasionally, a member of the public will make a specific complaint about the judgement or conduct of a member of staff. Such matters are referred direct to the Ombudsman for appropriate inquiries or conciliation of the complaint.

Similarly, specific complaints from public authorities under investigation about the conduct of officers are referred direct to the Ombudsman. It is more common for public authorities to complain about the Office than for members of the public to do so. While each case is treated seriously and investigated accordingly, such cases frequently appear to be a case of shooting the messenger. In past annual reports, cases of *"denigration of the Ombudsman"* have been featured, and it is regrettably still the case that authorities will resort to personal attack rather than addressing the issues subject of complaint.

Response Times

The office aims to acknowledge initial correspondence within seven days, and sampling indicates this goal is achieved in 85 per cent of cases. Matters subject of formal investigation, however, may take many months to complete, due both to the burgeoning complaint load and to the lengthy processes of seeking consultation and comment from interested parties.

However, as the Achievements section of this chapter indicates, many matters within the office are resolved informally and expeditiously, often producing much more heartfelt satisfaction from the public than vindication at the end of a six or nine month investigation.

One such complainant expressed his satisfaction vividly:

...may you continue to be adequately funded and thrive: in the new jungle, where the bureaucracy looks increasingly predatorial (at best self-interested, at worst rapacious), you are Tarzan, the hope of the citizen victim.

Joint Committee on the Office of the Ombudsman

Following its Inquiry into the role of the Office of the Ombudsman in Investigating Complaints against Police (Report April 1992), the Parliamentary Joint Committee on the Office of the Ombudsman announced, on 25 June 1992, that it had resolved to enquire into the adequacy of funds and resources available to the Office of the Ombudsman, to examine the Ombudsman's request for an increase in funding and to recommend any changes to funding levels necessary for the Office to perform its functions.

At the time of writing, the Committee has already obtained submissions from interested parties including the Office of the Ombudsman, engaged a consultant to assist the inquiry and has commenced taking evidence.

The Ombudsman welcomes the review which is the first comprehensive inquiry into the funding of the Office since its establishment in 1975.

Chapter Two

Complaints About The Police Service

OVERVIEW

New South Wales police are in a process of transition. The Police Force has become the Police Service; officers subscribe to a statement of values detailing standards of ethics and behaviour; and responsibility is being devolved from a centralised hierarchical structure to the regional and local level. The concept of community policing, initiated by former Commissioner John Avery, has become the basis of police management.

The mid-1980s were a period of crisis for police. The public image of NSW police was lower than in any other state, including (pre-Fitzgerald inquiry) Queensland. The appointment of Commissioner Avery saw a period of internal purging in which some of the more notorious perpetrators of misconduct were investigated, charged and convicted. Many others resigned or retired while under inquiry. In some cases, zealous internal investigations and uncritical use of informants resulted in lengthy and, finally, failed prosecutions against innocent police officers.

From the outside, the extent of the clean up is difficult to gauge. There is no objective measure which can be relied upon and, since the extent of misconduct was largely hidden, no starting point from which to make comparisons.

It is clear there now is a strong public commitment to ethical, professional policing by the present Commissioner, Mr Lauer, and the top levels of his senior management. To the limited extent that the Ombudsman can provide insight, considerable effort is being made to instil these values throughout the Police Service. It would be premature to pronounce the process an unqualified success.

If police officers are to be regarded as professional, they must develop work standards which have, as their basis, high levels of education and practical knowledge, a high level of autonomy and responsibility in the exercise of discretion and a commitment to the conscientious use of the law and procedures which govern the occupation.

Culture

Short cuts to reduce effort and the idea justice is served by convictions whether or not a person is guilty of a particular offence (where "the end justifies the means") constitute unprofessional (and sometimes criminal) behaviour. These ways of thinking have dominated the Police Service in the past and have undermined its credibility and public confidence. In varying degrees, these attitudes are a part of police culture. Culture is transmitted in complex and subtle ways, primarily through personal contact with those already in the job. The effect of high-flown statements of principle is negligible unless adopted and promulgated in the everyday workplace.

The transformation of the Police Service into a professional body is no overnight process. In effect, the practices and ethos which defined the NSW police culture have been attacked and discouraged. For good or bad, it was these practices which gave police their strong sense of internal loyalty and identity. That identity is now under redefinition - and redefinition of a cultural identity is the most difficult of processes. Almost inevitably, transformation is not absolute but adaptive. Predictably, aspects of the existing culture will survive and independent oversight and accountability remains essential.

The Ombudsman attends seminars and training sessions for police and is constantly asked why the Office emphasises police misconduct at the expense of all the good police work.

The perspective of this Office will be uniquely informed by the material before it - complaints of police misconduct. Consequently, the viewpoint will tend to be critical.

There are many dedicated police who never come to the Ombudsman's notice and the media carry news of sometimes heroic responses by police to tragic and difficult situations. At times, media attention also is turned to cases of criminal and other misconduct by police.

The public credibility of police will be judged in the context of all the information available. The Ombudsman's report is but one source from a particular perspective. Any police perceptions of unfairness have to be balanced against advertising campaigns promoting community policing and other positive police media. Ultimately, the experience of how members of the public are treated when they come into contact with the police will determine the public image of the Police Service and, finally, the fate of community policing.

DEALING WITH THE LOAD

Last financial year, complaints against police rose by 35 per cent; this year they rose by a further seven per cent. The Office of the Ombudsman has received no increase in funding to deal with the greater volume. Inevitably, people with complaints against police will suffer. A system with an increased demand on static resources has little option but to restrict the extent of its investigations.

During the year, the Joint Parliamentary Committee on the Office of the Ombudsman conducted a public inquiry into the police complaints system. The committee heard considerable evidence detailing the implications of increased complaints and the reduced ability of the Ombudsman to deal with them.

It was clearly demonstrated by a number of submissions that the greatest impact of declining resources falls on people who are least able to articulate and support their complaint. Typically, the system becomes less responsive to Aboriginals, complainants of non-English speaking background and juveniles. The irony of this situation, following the recommendations of the Royal Commission into Aboriginal Deaths In Custody to increase independent investigation of police complaints, was apparent. The Parliamentary Committee's inquiry and recommendations are examined in more detail below.

Declining Complaints

The only alternative to drowning under the increasing piles of paper generated by police internal investigations, with the consequent lessening of attention to individual complaints, is to limit deliberately the number of complaints referred to the police for formal investigation. The ultimate aim is that officers of the Ombudsman will be able to devote adequate resources to thorough and effective investigation of complaints where there are strong grounds for concern about police conduct and some prospect of improving police practices.

At the outset, stricter tests are being applied to complaints before it is decided to commence inquiries. It may no longer be enough to claim you have been assaulted by police; your complaint will be assessed for the quality of evidence available to substantiate the allegation. The Ombudsman will need to be satisfied there is supporting medical evidence, perhaps independent witnesses, and the hearing of charges, if any, arising out of the incident (usually assault police, and resist arrest) is not an adequate forum in which to raise the substance of the complaint. Assaults in custody are still a major source of complaint and it is difficult to refuse inquiries in this area. Generally, however, the threshold level of evidence necessary to support a decision to investigate is increasing.

Last year, 1069 complaints were declined without any inquiry; this year the figure is 1529: an increase of 43 per cent.

Similarly, through training sessions with police investigators, the Ombudsman has been encouraging police who are investigating complaints to apply for consent to discontinue their investigations where, even though inquiries are incomplete, there does not appear to be any prospect of a definitive outcome. Applications from police for the Ombudsman's consent to discontinue are, of course, carefully scrutinised to ensure proper inquiry is not avoided. Consents to discontinue investigations were granted in 229 cases this year compared to 135 last year: an increase of 70 per cent.

Informal Resolution

Since the commencement of his term in 1988, the Ombudsman has been encouraging greater use of informal complaint resolution by the Police Service. Overseas experience shows a far greater degree of satisfaction by the public with informal resolution procedures, even when not entirely favourable to complainants, compared to the protracted process of formal investigation where the outcome is often just as unclear.

Only relatively recently, particularly as the result of a circular issued in August 1991, have the Police Service taken up the challenge and made greater use of the conciliation provisions in the legislation. Despite the concerns of some police officers that the process is unfair to them, successful conciliations have risen from 169 to 424, an increase of 150 per cent. The effective use of conciliation, and its increased use, is discussed in greater detail below.

With increasingly stringent tests of complaints before inquiry and greater efforts to resolve complaints outside the formal process of investigation, the actual numbers of complaints sent for investigation has decreased. Last year it was 829; this year only 583: a drop of almost 30 per cent.

The present investigation process was set in place in 1983. The climate was one of increasing public concern about police corruption and great resistance by police to any questioning of their authority. In effect, the system entrenched internal investigation by police of complaints against themselves with civilian oversight kept at a respectable distance. Direct inquiry by the Ombudsman only occurred after internal police investigation and necessarily involved double handling of the same evidentiary material and considerable duplication of effort. The problems inherent in the present system and the essential causes of the serious delays are examined later.

In handling the complaint volume, the staff of the Ombudsman, particularly those working in the police area, have made extraordinary efforts during the year to keep the load manageable, often with considerable out-of-hours, unpaid work. In the year 1990 - 1991, 2656 cases were finalised. This year, the cases finalised rose to 3624, an increase in output of 36 per cent. The dedication and professionalism of the Ombudsman's staff in achieving this result deserve special thanks.

Priorities

In dealing with complaints against police, there is limited scope for the Ombudsman to choose where to concentrate resources. Complaints of assault, for example, are so serious they demand attention wherever there is any reasonable prospect of acceptable evidence becoming available. There are numerous other categories of complaints where it would be unacceptable not to make inquiries in the public interest. There is, however, a large body of complaints to which the Ombudsman's attention is inevitably drawn. Namely, complaints for which there is no other means of redress.

The Independent Commission Against Corruption (ICAC) has established a high profile in the area of police corruption. The ICAC has extensive and wide-ranging powers, which go far beyond those of the Ombudsman, to deal with complaints in this area.

The performance of the Police Service in investigating complaints has improved. Police generally do not take complaints of criminal misconduct lightly, investigations are reasonably thorough and sustained findings, often with consequent charges, have increased. Police understand criminal misconduct and the processes for dealing with it. The Ombudsman maintains oversight of the investigation of such matters.

What is often overlooked by police investigations are areas of habitual police practice which may not amount to criminal misconduct but are, nevertheless, oppressive or unfair.

Police are given extraordinary powers to interfere with the rights of the public. The level of complaints in the area of unreasonable treatment suggests police powers are not exercised with the forbearance and discretion required. It is clear from complaints and investigations that many police see any questioning of their authority as a challenge and, consequently, use their power to reinforce their position. This mentality is entirely unprofessional and contrary to the spirit of community policing.

Of course, the Ombudsman is not on the street to observe the reasonableness of any particular exercise of authority and this distance from the event is relied on by some police to deflect criticism. It is clear both from complaints and the police investigations, however, there are routine police practices which needlessly infringe on individual rights and which police, often including those charged with investigating the complaints, consider, if not entirely proper, then not warranting inquiry. The most obvious and persistent example in this area is arrest for minor offences when the issue of a summons would be appropriate. This, and related areas, are dealt with below.

Although many of the matters for complaint in these areas can seem relatively petty, they perpetuate a police attitude of dominance at all costs. Often, more serious incidents arise out of street confrontations where police decide their authority is being undermined and over-exercise their power.

CONCILIATION

Since its inception, the Police Regulation (Allegations of Misconduct) Act has made provision for the informal resolution of complaints by conciliation. In previous years conciliation was rarely used - the percentage of complaints conciliated was static at about six per cent.

Overseas experience has shown informal complaint resolution can be used in a far higher proportion of complaints and with greater degrees of complaint satisfaction than formal investigation. A research project carried out at the Centre for Criminological Research at Oxford University in 1989 found the bulk of dissatisfied complainants were those whose complaints were fully investigated. They complained about the length of time, the absence of any apology and the inadequacy or lack of explanation for the final decision.

> *"The general feeling was that the police made all the decisions and that these were biased in favour of their own officers."*

On the other hand, a much more positive response came from complainants who had experienced the then new system of informal complaint resolution. Over half declared themselves broadly satisfied with the outcome. The researchers concluded:

> *"...that what complainants are seeking in most cases is not something akin to trial or punishment of the officer concerned, but a full explanation, an apology, some pointed remarks to the officer from someone in a senior position and/or a clear assurance that steps will be taken to see that it does not happen again."*

The present Ombudsman has put considerable effort into encouraging a greater use of conciliation since the beginning of his term. As the police are largely in control of complaint handling, however, there was little success in increasing the use of conciliation until the Police Service decided, after lengthy negotiation with the Ombudsman, to officially increase its use. In August 1991 the Assistant Commissioner (Professional Responsibility), Mr Col Cole, issued a circular to police saying:

> In future, all written complaints of a minor nature which are received by the Internal Affairs Branch will be firstly forwarded to the local area for attempted conciliation; and
>
> I expect all officers or supervisors who receive complaints of a minor nature, whether orally or in writing to attempt conciliation.... (Assistant Commissioner's emphasis)

Survey of Complainant Satisfaction

As the number of complaints conciliated began to rise, the Ombudsman surveyed complainants whose matters had been resolved through conciliation to test their satisfaction with the process. A questionnaire was devised and sent to complainants with a reply paid envelope for their response.

The first surveys were sent out in March 1992. Of the 164 cases where complainants had agreed to conciliate their complaints, 72 returned the surveys - a response rate of 44 per cent. Some responses were incomplete - one complainant sent the survey back shredded with the ominous response: *"You may not assume that this matter has been resolved. It has only begun".*

The following, however, can be drawn from an analysis of the returns:

- sixty respondents (83 per cent) declared themselves *"satisfied"* or *"very satisfied"* with the way their complaint was handled. Ten complainants (14 per cent) said they were either *"unsatisfied"* or *"very unsatisfied"*.
- Thirty six respondents (50 per cent) thought that the Police Service would improve *"slightly"* or *"very much"* as a result of the process. The largest majority in a single category, 30 (42 per cent), thought there would be no change to the Police Service flowing from the conciliation.
- In response to a question about the manner of the police officer sent to conciliate, 61 complainants (82 per cent) were either *"satisfied"* or *"very satisfied"* that they were taken seriously and the officer responded properly. Only 11 (15 per cent) were dissatisfied with the way they were treated by the conciliator.

The remainder of the survey dealt with the factors which played a part in the complainant's decision to conciliate. A series of possible factors were given and respondents asked to indicate whether the factor played no part, some part or a large part in their decision to conciliate.

The possibilities ranged from the positive (eg, apology by the Police Service; a senior officer *"speaking to"* the police under complaint about their behaviour; an explanation that the police concerned were in fact acting properly) to the negative (eg, concern about damaging a police career, involvement in a long drawn out investigation or court case; intimidation by the police officer conciliating or fear of future harassment by the police under complaint).

On the whole, the response was positive:

- an apology played some or a large part in a little over half (54 per cent) the complainants agreeing to conciliate;
- for 58 respondents (81 per cent), the assurance a senior officer would speak to the police involved in the complaint played some or a large part;
- only one respondent said intimidation by the police officer conducting the conciliation was an influencing factor.

There were also, inevitably, some adverse indications:

- 30 respondents (42 per cent) said concern about damaging the career of the police if the complaint was investigated played some or a large part in their decision to conciliate;
- 20 (28 per cent) said concern over getting involved in a long court case or disciplinary hearing if the matter was investigated played a part; and
- 26 (36 per cent) said that fear of future harassment played a part in conciliating.

The negative factors in the survey arose from the Ombudsman's past experience with conciliation and were matters complainants had raised as problems. The first two of the negative factors above is more likely to be raised by the police officer conducting the conciliation while the third could arise from the complainant's own fears without any reinforcement from the conciliating police. The surveys are treated anonymously to assist complainants in responding freely.

Police Resistance to Conciliation

Operating under a disciplinary system of control, NSW police have tended to see any apology as an admission of fault. Similarly, being *"spoken to"* has been equated with the traditional disciplinary measure of *"counselling"* and can be resisted because it is perceived as affecting career prospects. In the past, police under complaint have insisted on full investigations rather than conciliation. They wanted their *"name cleared"* rather than leave any inference that they may have been in error. When the complaint involves a minor matter, this approach is untenable.

The basis of such objections is unclear. There is no record or adverse entry contained on the *"record sheet"* of police involved in conciliation - (under the Police Service Regulations, there is no provision to record anything other than proven or admitted criminal or departmental charges.)

The Police Regulation (Allegations of Misconduct) Act (section 35A) does require a report of complaints about an officer and the result to be submitted with the promotion report where the officer is applying for a position above the rank of senior sergeant. Although this does not affect lower ranks, much of the fear about prejudice to career prospects comes from this area.

Whether misconceived or accurate, the resistance remains real. At present, conciliation largely proceeds on the basis of agreement between the Police Service and the complainant. Some officers are willing to conciliate individually, but this is exceptional.

Following submissions, the Joint Parliamentary Committee inquiry into police complaints (covered generally later in this report) recommended that the existing requirement to include all complaints on promotion reports be amended so that only complaints found sustained within the three years prior to the report be included (ie, complaints conciliated would not be included). If there was ever any rational basis for police resistance to conciliation, this step removes it completely.

Prospects for the Future

The current volume of complaints demands new approaches. The expense involved in formal investigation simply is not justifiable for many of the less serious matters. Despite the change in orientation from Police Service management, conciliation requires further development both through training of police conducting conciliation and encouraging the willingness of individual police to drop their defensive stance and enter the process with an open mind.

As noted in the Overview of this report, the number of complaints finalised by conciliation has risen 150 per cent (from 169 last year to 424 in the current year).

INVESTIGATIONS

The present system of investigation was broadly set in place by the Police Regulation (Allegations of Misconduct) Act (PRAM) in 1983. Much to the surprise of many complainants, there is no provision for direct investigation by the Ombudsman; complaints are referred to the Police Service for investigation.

There was no time limit on police investigation until 1987, when a limit of six months was imposed.

In practice, the responsibility for investigations is largely in the hands of the police and the Ombudsman exercises oversight from a considerable distance. It is not until the police finish their investigation and any deficiencies in that investigation have been returned to the police for rectification that the Ombudsman is in a position to undertake any inquiry himself. By that stage, the complaint has aged, the evidence has been well traversed and there often is little interest in pursuing the matter. Where a case is re-investigated by the Ombudsman, the delay usually works against definite findings. Even when a definite finding is reached, it seems the delay has just begun. In practice, investigations are rarely taken over by the Ombudsman because the work already done by police would be displaced and would have to be repeated, and because of the lack of resources available for this purpose.

Justice Delayed...

Delay is the most common complaint about the investigation system, it covers everyone - complainants (many of whom give up the ghost or move away from the area), police under investigation (who may suffer under the stress of an uncertain future) and, occasionally, (when complaints end up in charges before a court or tribunal) judges.

Two complaints subject to investigation resulted in charges against police heard by the Police Tribunal this year. Both alleged assault and both exemplify the delays which can occur. Apart from imposition of penalty by the Commissioner or further appeal by police, the tribunal or court is usually the endpoint of the complaint process.

Case Study 1

Four Years and Six Months

The first complaint concerned an alleged assault by police on 23 January 1988. In July that year, the Police Department concluded its investigation and found the assault was not sustained. There were 19 witnesses interviewed and significant documentary evidence obtained. The Ombudsman was not satisfied with the police determination and a re-investigation began in January 1989. Eight civilians and six police were called to give evidence and further documentary evidence was obtained. The departmental legal representatives for the police argued their clients needed a month to consider their copies of the original police investigation rather than the week given.

In June 1989, the Ombudsman issued a provisional statement finding the complainant had been assaulted by police. This document, as required by the legislation, was to allow the police concerned the chance to respond before any report was published. The police response was received in October 1989. The draft report was sent to the Minister in December 1989 and finalised in January 1990, two years after the incident.

The Police Service referred the matter to the **Crown Solicitor in January 1990** and advice recommending departmental charges was returned to the police in **January 1991**. In April 1991 the Assistant Commissioner advised he was referring the papers to the Police Legal Services Branch for formulation of the relevant charges. In August of 1991 he advised he had directed the laying of the charges. In August 1992 the Police Tribunal delivered its judgement - over four and a half years after the incident.

The Judge found the four police involved had used *"unreasonable restraint"* against the complainant. No penalty was recommended for the most junior officer and a reprimand was recommended for the next above him. The sergeant was found to have done little to exercise control and *"was involved physically"*. The senior constable, found to be primarily responsible, *"had made up his mind to get [the complainant]"* following an earlier encounter because as he said,*"It would have undermined (his) respect in the area if [the complainant's conduct] had gone unpunished."* The Judge recommended both the sergeant and senior constable be fined $300.

Case Study 2

Four Years and Still Going...?

Rather than a lengthy recital of the length of time taken at the various stages (11 months with Internal Affairs to find the complaint *"not sustained"*; 15 months with the Ombudsman to reverse that finding; 18 months with the Crown Solicitor for legal advice, etc), a summary can be left to the Police Tribunal which heard some of the charges arising out of the complaint. The judgement reads:

> *On 25 May 1992 I commenced the hearing of the Departmental charge against [one of the police concerned]. To date, departmental charges have not been laid against the dog-handlers...It could be many more months before any proceedings can be heard by the Police Tribunal if departmental charges are laid.*
>
> *Four years and three months elapsed from the time of receipt of the complaint against [the constable concerned] until the time the matters were heard by me. The complaint...contained allegations of a most serious nature, and it is inexcusable that a delay of this magnitude occurred. In cases where identification evidence is relied upon it is imperative that steps be taken to bring those cases on before the Police Tribunal expeditiously.*

In this case, the Tribunal was unable to accept the complainant's identification of the police officer who assaulted him, although it was satisfied the assault occurred.

Although the Ombudsman is often the target of criticism by police for the time taken by the process, the above two cases show the Ombudsman's function is not the sole cause of delay. On the other hand, had the Ombudsman accepted the initial "not sustained" finding of the police investigations then the complaints would have gone no further.

Streamlining the Ombudsman's Functions

As detailed in the Overview section above, a concerted effort has been made to cut down the number of complaints referred for formal investigation and to provide resources to deal expeditiously with those investigated. Consequently, the resources expended on reviewing police investigations should be reduced and re-investigations handled more expeditiously.

The present system, however, has a propensity for delay as part of its structure. This is particularly evident when a police internal investigation fails to thoroughly examine the complaint and the Ombudsman is obliged to conduct a re-investigation. This double handling of the same material has obvious problems.

The section below on the Joint Parliamentary Committee's inquiry into police complaints sets out recommendations which, if implemented, should provide the Ombudsman with a broader range of investigative powers to help eliminate the present inefficiencies.

Improving the Police Performance

The bulk of investigations into complaints against police are, and will continue to be, investigated internally by the Police Service. It must be acknowledged the quality of Internal Affairs branch investigations has improved and the level of sustained findings by these investigations has increased.

The regionalisation of the Police Service, and consequent devolution of formerly centralised responsibility, has necessitated changes in administrative procedures in handling complaints which, during the current year, have been cause for concern. In his evidence to the Joint Parliamentary Committee, the Ombudsman cited a number of examples of significant delays in the investigation process which were purely administrative. Examples included:

- A delay of four months between a police investigator submitting a completed report and its receipt by the Ombudsman caused by its administrative progress through superior ranks.
- A complaint referred for investigation taking two and a half months to be sent to the region where it was to be investigated.
- A letter from the Ombudsman requesting clarification of investigative action taking three months to reach the responsible officer.

Delay is compounded when an officer continues along a track or completes an inquiry which does not address the issues required by the Ombudsman. If the issues are of sufficient weight, the papers have to be returned for further attention through the same administrative system.

Some effort is being made by the Police Service to deal with this problem and the situation improved towards the end of the reporting year. The eventual outcome will probably be more direct communication with the Ombudsman from police at the regional level rather than through the centralised structure.

Devolving Investigations to the Local Level

One of the obvious reasons for delay is simply the volume of complaints. From the outset of the present legislative scheme, it was apparent the Internal Affairs Branch of the Police Service had difficulty in keeping up with the number of investigations.

The Act originally contemplated the bulk of complaints would be investigated by Internal Affairs, although there was provision for investigation by other members of the Police Service (Section 19). The Ombudsman's annual reports since 1983 have consistently raised delay as a problem.

In 1985 the Ombudsman agreed with the Police Commissioner, under section 19 of the Act, that Internal Affairs would only investigate complaints falling within the category of serious assault, corruption, dishonesty or other criminal behaviour. The remainder were to be investigated by non-Internal Affairs police *"outside the same hierarchy as the officer(s) the subject of complaint"*. The idea behind this structure was to ensure some limited degree of independence and objectivity by the investigating police.

The new arrangements seemed to do little to reduce the backlog. During a Parliamentary Select Committee Inquiry in 1988, the then Commissioner, Mr Avery, strongly argued it was contrary to the principles of community policing for complaints to be investigated outside the line of command. This system, he believed, destroyed the morale and responsibility of supervisors. They could sit back and ignore misconduct because police outside the immediate command line were investigating and taking responsibility. The time had come, he argued, for senior police to be trusted to discipline their subordinates.

Although concerned that investigations be, and be seem to be, as impartial and independent as possible, the Ombudsman reluctantly agreed to a greater shift to investigations at the local command level.

During the inquiry this year by the Joint Parliamentary Committee on the Ombudsman, the Commissioner proposed a further shift to investigations by police at the local level. Under the proposal, Internal Affairs would investigate *"the most serious matters only"*, the rest would be conducted within the command line and *"reviewed"* by a police officer from Internal Affairs. The Committee recommended the Ombudsman and Commissioner should continue to agree on the types of complaints which are appropriate or not for Internal Affairs investigation and the current agreement is still in place. It seems inevitable, however, the shift to the local level will continue and the degree of association of the police investigator with the police under investigation will become stronger.

This devolution of investigatory responsibility has been occurring for some time and is still taking place. Training sessions are being conducted to prepare local police to handle more investigations and these are attended by the Assistant Ombudsman (Police).

Given the potential for police at this level to be well associated with the police whom they are investigating, the Ombudsman's focus in this training is on conflict of interest, how to identify it and what steps to take. This issue, even in more general terms, has not traditionally been properly appreciated by police.

Apart from the necessity of handling the volume of complaints speedily, the Police Service's theory is local supervisors and commanders managing investigations into police under them will instil a greater sense of professional responsibility and promote integrity at the grass roots. The intention is admirable, but the potential, and temptation, for police to look after their mates is obvious. The Ombudsman's experience of local investigations to date allows no unequivocal conclusions to be drawn - they range from the very conscientious to the obviously biased and poorly conducted. Unfortunately, the majority of local level investigations do not exhibit a high degree of professionalism.

The goal of professional, dispassionate investigations by police at the local level, if it is a success, will be a major achievement. The road towards that goal will be difficult and the role of independent civilian oversight crucial if wrong turns are to be avoided.

PARLIAMENTARY INQUIRY INTO POLICE COMPLAINTS

As its first inquiry, and on the basis of a 35 per cent rise in complaints against police the previous year, the recently established Joint Committee chose to examine the Ombudsman's police jurisdiction. Initial submissions, apart from the Ombudsman's, were overwhelmingly from the police perspective and considerable effort, both by the committee and the Ombudsman, was spent in obtaining the views of other interested parties.

It was agreed by almost all interested parties that the present system was, to use the Ombudsman's phrase, cumbersome and time consuming and it was generally accepted there was need for reform. Many of the problems arising from the operation of the present system, raised earlier in this report, were put to the committee.

Conciliation

With the exception of the Aboriginal Legal Service, which submitted that conciliation was not appropriate for Aboriginal complainants given their history with police, there was general agreement that greater use of conciliation was desirable.

While expressing some concern about the Police Service position that police officers, because of the nature of their work, were well equipped to act as conciliators, the committee agreed conciliation of complaints should be extended, the present mechanisms governing the Ombudsman's involvement be streamlined and the Ombudsman's powers to monitor police attempts to conciliate be increased by the development of random audits of the conciliation process. The committee also recommended that there be provision for conciliation using conciliators independent of the Police Service at the Ombudsman's discretion.

To help allay the suspicion with which any complaint handling process is viewed by rank and file police, the committee recommended that any evidence gained during an attempted conciliation would not be admissible in any later disciplinary proceedings which may arise from the complaint. It also recommended that records of complaints which were conciliated would not be included on the promotion reports of police.

Investigations

Given the inherently bureaucratic and cumbersome nature of the present investigation process (set out above in the Investigations section), the Ombudsman proposed a number of measures designed to streamline the current process. Although the initial Police Service submission proposed keeping investigations essentially in police hands, it later agreed some of the suggested reforms were appropriate. The major police concern remained, however, that the Ombudsman could encroach on the exclusive police control of formal investigations.

Reforms to the Ombudsman's power to acquire further information from the Police Service, complainants and witnesses prior to deciding whether a formal investigation should be conducted were recommended by the committee without substantial disagreement. The Commissioner of Police also agreed to the Ombudsman obtaining a power to directly investigate complaints in the public interest without initial investigation by police. This agreement came despite his concern that the public interest be defined in any redraft of the legislation and his reservations about the Ombudsman investigating complaints of criminal misconduct.

The greatest contention arose over the Ombudsman's proposal that his investigators have some supervisory or participatory role in the conduct of internal police investigations. This is a particularly important area given that the funds available to the Ombudsman will severely limit the number of possible direct investigations.

Despite resistance from the Police Service it was finally agreed and recommended by the committee, that:

> the Ombudsman should be able, on a discretionary basis, to monitor the progress of police internal investigations by being empowered to:
>
> (i) be present as an observer during selected internal investigations; and
>
> (ii) consult with police investigators during the course of an investigation.

The reforms recommended to complaint handling are long overdue and the committee, particularly the Chairman, Mr Tink, is to be congratulated on achieving substantial consensus in what have traditionally been areas of conflict and antagonism between the Police Service and the Ombudsman. Although it can be anticipated there will be some difficulties in the practical implementation of the reforms, they are in the best long term interests of both the Police Service and the public of New South Wales.

The committee's report was published in April 1992. Either because of the complexity of the system, or because there was no major dispute between the Ombudsman and the Police Service, the report received little media attention. If the report's recommendations are to be implemented, the existing law will be substantially amended. When the draft of any amendment is placed before Parliament, interested parties should carefully consider the proposals.

TRUTH IN SENTENCING

In contrast to the rigorous (even over-zealous) investigation and prosecution of complaints against police in the late 1980s, the service's present disciplinary approach has swung towards leniency in dealing with police misconduct.

While it is difficult to be precise about the reasons for this change, there is little doubt police command is seeking to re-establish confidence in the ranks. Internal purging called into question the unwavering support the police hierarchy had traditionally shown in defending the actions of its officers.

The Assistant Commissioner (Professional Responsibility) articulated the new regime in the Police Service Weekly on 4 November 1991. There is now a *"three level"* approach to police infractions. At the first level, serious criminal or other misconduct will result in dismissal or reduction in rank. The second level involves less serious transgressions and the emphasis is on rehabilitation. The type of penalty employed in such matters is a deferral of penalty during a probationary period, usually of twelve months but longer in some cases. If the officer's performance is satisfactory during that period then a disciplinary penalty is usually waved. At the third level, honest mistakes or errors of judgement are dealt with by counselling and education.

An integral aspect of this approach is the encouragement of officers under inquiry not to avoid or mislead the investigation, not to cover up their misconduct for fear of being unreasonably penalised; in short, to have confidence that the complaints system will treat them fairly. Obviously, the greatest obstacle to the detection of police misconduct is that well documented aspect of police culture, the *"wall of silence"* and even the giving of false evidence when one of their own is under investigation.

The new disciplinary approach of the Police Service has been applied with consistency, although there are many occasions where the Ombudsman has disagreed with the penalty, or lack of it, in particular cases. The fairness or adequacy of penalty, however, is largely a subjective matter and the law gives the relevant discretion to the Commissioner of Police.

Case Study 3

Double Dishonesty

There is a particular type of case, however, which does provide grounds for concern: the case where the police officer involved actively avoids scrutiny, misleads the investigation and denies any misconduct until the evidence adduced by the investigation is finally presented and proves the conduct overwhelming. Such conduct suborns the investigation process and brings the rehabilitative nature of the disciplinary system into disrepute.

In one case, an inspector with substantial command responsibility suggested, to help boost the morale in his command, that the squad take over the duties of a relief cleaner, use a fictitious name to collect the cleaner's wages and use the money for entertainment. During the internal investigation many of the police admitted their respective roles in the matter, but the inspector denied any knowledge of the arrangement. Indeed, he earnestly proclaimed his innocence and impressed upon the investigation that he would never condone the use of a fictitious name to gain funds. In the course of a second interview, he was shown a cheque made out to the fictitious cleaner with his signature authorising cash. Still he said he had no knowledge of the matter. Following legal advice, he was charged with permitting the use of a fictitious name and with untruthfulness. Initially, he denied the charges until, having viewed the evidence against him, they were admitted. The penalty imposed was a twelve month deferral pending reviews of his performance.

The Ombudsman objected to the proposed penalty, particularly in view of the officer's command position, and recommended legal advice be sought as to the existence of any criminal charges on the evidence. It also was recommended the inspector's suitability for his position be reviewed.

Legal advice from the DPP suggested the offence of *"conspiracy to obtain a benefit by deception"* was disclosed, but advised that further investigation was necessary if the matter was prosecuted. Among other things, all statements in the investigation were obtained without cautions and would not be admissible in criminal proceedings. Given the lapse of time in the whole process, the Ombudsman did not press the issue.

The twelve months probationary period recently lapsed, the inspector's performance was satisfactory in the eyes of his superiors so no penalty was imposed.

Discipline is in the hands of the Commissioner and recommendations by the Ombudsman or Police Tribunal are not binding. It must also be recognised that there is significant sympathy for police, given the difficulties of their work, in courts and tribunals and that unsuccessful prosecutions are time-consuming and expensive. While rehabilitation is the most preferable method of dealing with offenders, such method must be finely tuned to the individual and the offence. The danger with a generally lenient approach is that it fails to adequately distinguish between particular cases and lowers respect for the disciplinary system itself.

POLICING COMMUNITIES

Community policing faces its biggest test when police deal with communities which are not readily identified as mainstream or are perceived, at least to some extent, as being in conflict with it. The Ombudsman's perception of the treatment of such communities by police appears related to the extent to which they are marginalised from the community in general.

GAY RELATIONS

Gays and lesbians are entitled to fair and equal treatment by members of the Police Service and gay and lesbian police officers are entitled to perform their duty free from harassment, threats or criticism relating to their sexuality.

The Police Service has put considerable effort into improving its performance in this area. Meetings between gay representatives and senior police, gay liaison contact officers, increased police visibility and patrols in gay and lesbian frequented areas have all helped to build these better relations. While the public aspect of relations in this area has undoubtedly improved, the street relationship remains relatively fragile. Although complaints are not high in this area, largely due to the gay community's capacity to organise and engage in its own dialogue with the police, the complaints received disclose some resistance in the ranks to Police Service policy.

A number of complaints were received following an article in a Sydney newspaper purporting to quote a local police officer:

> *Unfortunately, the bushland is riddled with little tracks and has become infested with homosexuals...you see their little heads bob up and down in the bushes - its like going hunting.*

The matter was quickly addressed by the Police Service who strongly counselled the officer and arranged for a seminar to be given to supervising officers in the area on the principles of non-discrimination.

The question of police attitudes to beats (public places where gay men meet other gay men) is constantly discussed in the gay media and some complaints are received which raise the issue. The complaints are essentially that police try to close down beats through prosecutions for offensive behaviour, but do not act properly against anti-gay violence perpetrated at beats. Generally, given the positive policy approach by the Police Service, complaints are conciliated, although sometimes reluctantly.

Case Study 4

Just Walking the Dog

One complainant felt aggrieved when, on walking his dog in a park, he was detained by police, identification demanded, radio checks made and allegations levelled at him that he was using the park to make homosexual contact with another man. The initial attempt at conciliation failed because the police concerned denied the complaint, saying that they spoke to the complainant for his own safety and, further, that complaints had been received about homosexual activity in that area late at night.

The file was returned to the Police Service with a recommendation that the complaint be conciliated and the officers reminded of their duties to exercise civility and forbearance when dealing with members of the public. The Assistant Commissioner for the Region responded, with a legal advising attached, that the recommendation was unacceptable and no action would be taken.

The Ombudsman took the matter up with the Commissioner and the Assistant Commissioner later responded that he agreed with the recommendation and further arranged for the Police Service Gay Liaison Unit to attend the area. He suggested that good liaison may prevent future complaints and would assist in the gathering of information of interest to police.

Case Study 5

Immoral Beat

Another complaint related to this area came to the Ombudsman through the Police Service with a decision that it would be investigated. The complaint was expressed in terms of a police officer acting *"for immoral purposes [and thereby] did bring discredit upon the NSW Police Service"*. The Ombudsman invited the police to apply for consent to discontinue the investigation but the invitation was not taken up. The Police Service continued with the investigation and found the issue to be sustained. Among other things, the officer was asked during the investigation whether he *"had homosexual tendencies"* which was denied.

The Ombudsman took issue with the way in which the complaint was characterised and in the manner in which the investigation was conducted. The complaint was "not sustained" and the Commissioner advised of the Ombudsman's finding.

People of Non-English Speaking Background

It is difficult to gain an accurate picture of the state of police relations with non-English speaking communities. There are many different language groups with many different perceptions of authority and police. Within particular groups there will also be differences between the older, more conservative members of the community and young people who will have more street contact with police. Further, non-English speakers may not be readily identifiable if they have the same racial characteristics as Anglo-Celts. Skin colour identifies a person and may affect how they are treated from the start.

The biggest problem in this area, of course, is lack of awareness of the facility to complain and, consequently, lack of access. A survey conducted by the Commonwealth Ombudsman in June 1992, found that 43 per cent of those surveyed who came from a non-English speaking country had heard of a State Ombudsman compared to over 60 per cent of those from Australia or other English speaking country. Further, only 33 per cent of those who had arrived in Australia in the last five years had heard of a State Ombudsman compared to 61 per cent of those who had been here longer than five years.

Even when non-English speakers do become aware of the Ombudsman - their understanding of the process and capacity to provide relevant information is generally poor. It appears from a subjective reading of complaints that those with the lowest capacity to articulate their grievance are complaining about the most serious misconduct. It is often the case with complaints in this area that complainants only become aware of the Ombudsman and complain when the incident giving rise to complaint appears in the media.

Case Study 6

Effective Harassment

After what was obviously a long period of concern about police interaction with Asian juveniles in the Cabramatta area, a youth worker went to the media and later complained to the Ombudsman about alleged police misconduct. His complaint contained brief details of allegations from a number of boys ranging from harassment to serious assault. The worker was contacted and the system of complaining against police explained to him in detail. It was clear that a number of the individual complainants would have to be interviewed by police.

Two of the complaints have failed - the boy concerned failed to keep appointments with the police who were to interview him. Two others are unlikely to be taken further given conflicts in the evidence and lack of independent witnesses. One is still being investigated by the police.

The patrol commander was quoted in the Sydney Morning Herald when the complaints first received public attention as saying:

> *There have been a number of issues raised with me personally, objections to police being a little hard on some members of the community. But what they call harassment, I would call effective policing.*

Case Study 7

Kids and Cops

Another incident of alleged discrimination, involving police response to a brawl among white and Asian schoolchildren on the North Shore, was also first raised in the media. A police investigation found no issues of complaint sustained and the Ombudsman is making further inquiries. There was only one Asian witness interviewed during the police investigation. Some were contacted and refused to cooperate. Despite this it was clear from community meetings that a great deal of resentment was still harboured towards police over the incident. The Ombudsman is having more success interviewing relevant witnesses.

Aboriginals and Police Relations

Aborigines suffer widespread discrimination and racist violence. The Royal Commission into Aboriginal Deaths in Custody produced figures showing that 14.6 per cent of the prison population in 1987 were Aboriginal and that Aborigines, in August 1988, constituted 29 per cent of all people held in police custody. At the time of the survey, Aborigines were 1.5 per cent of the total population.

The Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence in 1991 concluded that Aborigines had a widespread perception of institutionalised racism against them and that *"... a major problem brought to the attention of the Inquiry is the problem of racist violence by police officers"*. During the reporting year, ABC television showed NSW Police on patrol in Redfern in the program *"Cop it Sweet"* and in a video tape of police mocking Aboriginal deaths by hanging in custody at a fund raising fancy dress party.

Low Recognition

The Ombudsman's Office is not equipped to effectively monitor police conduct towards Aborigines. The Commonwealth Ombudsman's survey referred to above, with a note of caution about the size of its sample, found only 30 per cent of Aboriginals and Torres Strait Islanders had heard of the Ombudsman, the lowest proportion of any surveyed group.

This lack of awareness is reflected in the number of complaints to the Ombudsman. Only complaints which make it clear that they are from Aborigines are recorded as such (or where the representative is an Aboriginal Legal Service) and there may be a larger, hidden proportion. The number identified, however, was only 71 complaints or two per cent of the total. This is an extraordinarily low figure when the degree of adverse contact between police and Aborigines is considered.

The Ombudsman has a position designated and filled by an Aboriginal Investigation Officer. Her experience is largely one of frustration. There is little funding presently available for awareness campaigns in country areas and, apart from letters of complaint, much of her time is spent visiting Aboriginals in prisons and juvenile detention centres. There have been no specific community awareness programs or materials printed to effectively introduce and explain to Aboriginal people how the Ombudsman can assist them.

No Confidence

The lack of complaints may also reflect, where complainants are aware of the Ombudsman, the perception that the system is structured against them. Complaints have to be in writing and provide enough detail on which to pursue inquiries. Where literacy is not an insurmountable problem, letters often relate a litany of grievances against many authorities and the police role is bound up with more general matters. The scope of the Ombudsman's jurisdiction is often difficult to explain. Aboriginal Legal Services tend to advise against complaining because they have little confidence in the system and they fear the possibility of a complaint compromising their position in any related criminal charges.

Under the current legislation, investigations are conducted by police and, unless the subject matter is serious, by police who are well associated with the police under complaint. Police define the issues of complaint, ask the questions and reach their conclusions. There is no oversight of the investigating police during this process. Especially in country areas, complainants tend to drop off during this process. There is fear of future harassment and an almost universal lack of faith that the complaints process will be of any assistance. Submissions by representatives of the Aboriginal Legal Service to the Parliamentary Committee's inquiry into the police complaints system made the position clear.

Old Habits

While the Police Service hierarchy recognises the extent of the problems which lead to high Aboriginal contact with police, there is little being done to address habitual police attitudes towards Aborigines. Following the Ombudsman's report in 1991 into a police operation *("Operation Sue")* in Redfern, where 10 premises in Eveleigh Street, Redfern, were raided without justification, the Police Service set up a task force, with Ombudsman representation, to examine the problems of police/Aboriginal relations. The task force has a working staff of one and has met intermittently. Its concentration has been on problems within Aboriginal communities and how these might be addressed so that police intervention is less frequent. Schemes for self-policing operating in other states are being examined to consider their applicability in NSW.

Lack of land and the many social problems endured by Aborigines no doubt contribute to the high incidence of contact with police but little attention is given by the Police Service to the training and education of police officers on the job in areas with high Aboriginal populations and specifically on how they interact with Aborigines.

The Police Service relies largely on its training academy to address the training needs of police. The real training ground, however, is existing police practice - what is learnt from colleagues and superiors in the everyday discharge of duties. It is in this area that traditional police culture perpetuates itself. One of the police on *"Cop it Sweet"* made it very clear that everything learned at the Academy was *"bullshit"* compared to what was picked up on the streets.

Training

The investigation into Operation Sue showed there was no structured training for police on the job in Redfern. Years later, there has been no attempt to introduce it. The Police Service response to *"Cop it Sweet"* was to the effect that the officers in the program were not representative of police. The *"Cop it Sweet"* video would become a training package for police recruits. The response to the Ombudsman's report into Operation Sue was, essentially, that police were on the receiving end of a whole series of societal problems which were not their fault.

What this approach fails to consider, however, is that NSW police have a traditional and quite specific relationship with Aborigines. Historically, police had the function of enforcing official policies of segregation and the degree of intrusion, surveillance and control went so far, in some circumstances, as to amount to absolute power. In the time frame of culturally transmitted values, the 1960s is not far away, especially in the absence of positive programs to influence the situation. As matters stand, the style of policing in areas with significant Aboriginal populations is largely a matter of the patrol commander's attitude. There is little organisational direction or strategy in training in Aboriginal cultural values on the job or in identifying or correcting racist values and behaviour in police officers. If nothing else such training might prevent police claiming that *"coon"* is not a racist term but a neutral form of identification.

If the Parliamentary Committee's recommendations are implemented and the Ombudsman is able to have more control over complaints by Aborigines, the complaints system may develop more credibility. As matters stand, however, Aborigines, justifiably, see little point in making a complaint against police.

JUVENILES

The Legislative Council's Standing Committee on Social Issues tabled its report on Juvenile Justice in New South Wales in May 1992. In the section on police (page 163) it noted that in submissions received young people saw police as *"representatives of authority system hostile to their class or race"*, that they were harassed, threatened and subjected to violence and that cautions were used inadequately. From the summary of submissions it appears the most significant grievance came from being juvenile and Aboriginal. The committee recommended increased training for police.

The present complaint system makes no provision for the special problems encountered by juveniles in making complaints. Assuming there is knowledge of the system and literacy enough to compile a written account with sufficient evidence to investigate, the lengthy investigation period can suggest to juveniles that nothing is happening and that their complaint is being ignored.

Attendance by Ombudsman staff at meetings of YOST (Young Offenders Support Team) workers has disclosed frustration about the difficulties of getting kids to complain when the results appear meaningless, inadequate, negligible and too remote in time.

Complaints from juveniles are rarely made without the support of an adult or youth worker from the institutions responsible for their care. Youth workers in country areas are reluctant to complain because they work closely with police and have to rely on their cooperation in assisting with young people. Even where complaints are made, they later lapse when the juvenile is released or moves on and cannot be contacted.

The Ombudsman takes a special interest in complaints from juveniles and has recommended the review of police instructions with respect to the treatment of juveniles in custody. The law at present provides that any evidence obtained during an interview by police with a juvenile is not admissible in criminal proceedings unless an adult is present during the interview.

Situations arise, however, where police will arrest and charge a juvenile without any need to question or interview them. In such circumstances, there is no obligation on police to notify the parents/guardians of the child's detention or charging. The Ombudsman has recommended that police instructions be amended to provide for parents or guardians to be notified whenever a child is taken into custody. The Police Service is considering redrafting its instructions.

Sexual Harassment and Sexual Discrimination

Last year's annual report canvassed in some detail the problems encountered by the police service, and by this Office, in investigating complaints of sexual harassment within the service.

A particularly vexing problem is the issue of ongoing or renewed harassment when a complaint has been made by an officer against her/his fellow officers, and the officers must then continue to work together in the same station or workplace.

Case Study 8

Double Trauma

One example finalised last year involved highly offensive remarks to a female constable who was travelling in a car with a number of male officers. The constable was also assaulted by one of the male police.

Following investigation, departmental charges were laid against each of the male officers involved. The Police Tribunal recommended that one constable be dismissed from the Police Service and another be fined $500, and these penalties were subsequently implemented by the commissioner.

During the course of the investigation and subsequent tribunal/appeal proceedings, the constable continued to work at the same police station as the officers who had harassed her and was subjected to ongoing generalised harassment. She reported one instance where the officer ultimately dismissed, had picked up a typewriter either pretending or intending to throw it at her, accompanied by obscene gestures. The Commissioner of Police found enough evidence available to prefer a departmental charge. With his dismissal from the Police Service in the sexual harassment complaint, there was subsequently no need for this action.

This matter highlighted the need for the Police Service to examine potential action to protect complainant police where they remain working at the same station or duty area as officer/s subject of their complaint. The female constable's traumatic situation could not be resolved by transferring the male police, as the matter had not been determined and such action could be viewed as an unfair and premature penalty against those police. Similarly, it would not have been fair for the complainant constable to transfer to another station, as she had done nothing wrong. The Commissioner and the Ombudsman have this very difficult problem under review at present, and hope to produce some useful proposals in the near future.

Case Study 9

Under Supervision

Another female officer who had been the victim of a campaign of harassment by her supervisor, put the position as follows:

> *"...the stress of this matter, and the constant demands being forced upon myself to return to work whilst [the alleged harasser] remained, caused me to submit my resignation from the NSW Police Service. This resignation was withdrawn, when the officer involved was transferred...The matter took some ten months from the first complaint, to when I returned to work, and I was given no support in any way...I would advise any other female that if she had a complaint to seek a transfer away from the situation, because I feel that the suffering caused by making a complaint and the non-interest of the Police Service in relation to these types of complaints, in the long run, a person would be better off to remove themselves from the situation...I still do not feel comfortable at work, due to my making a complaint."*

Obviously, it is in the interests of the Police Service to ensure that the investment of resources to train these officers, and their combined expertise gained on the job, is not lost through resignations as a last resort to end the persecution generally suffered after making a complaint.

Case Study 10

Hands On

Not all of the complaints dealt with this year revealed disheartening results. One case in point involved a sergeant reaching down and lifting the bottom edge of female constable's uniform culottes, saying words similar to *"What have you got there?"* The constable told the sergeant to *"piss off"*, and a formal complaint was later made. In conversation with the Ombudsman's investigation officer the constable said she made the complaint to protect other junior police who had been too scared to complain about the sergeant's *"hands on"* approach to work.

The sergeant admitted rubbing the constable's leg, but said:

> *"... it was most definitely below the knee, and at no time did I lift her dress or culottes."*

The Ombudsman issued a report sustaining the complaint. A submission was later received from the sergeant praising the constable as a police officer. He was forthright and open in his comments, and said:

> *"...from as long ago as I can remember, I was a patter, by this I mean...I patted people on the shoulder or backside, as a form of greeting or simply as a way of saying `Hello', that includes males and females and ages (sic) was never a problem...I am finding it very hard to change my ways, to adapt to the confines of EEO policy..."*

The Ombudsman recommended that the Sergeant be reprimanded, and that his work attitude and behaviour be monitored for twelve months. Even after this incident, both parties were able to maintain an appropriate working relationship.

Case Study 11

Police Academy I

If the destructive and demoralising effect of sexual harassment in the service is to be effectively countered, then education is obviously crucial. However, the nerve centre of police education in the state - the academy - has given rise to complaints which suggest that some recruits receive on the job training in harassment.

In one complaint, three drunken police officers staying on at the academy following completion of a residential Weapons Training Course, barged through the sleeping quarters of female student police on their first night of residence, calling comments such as *"Where are the fucking sluts"*, forcing their way into women's rooms and grabbing at several women. Although reported to senior police the next day, the Internal Affairs Branch investigator assigned to handle the case did not commence interviews until almost six weeks later. At that time, the suspect police were dispersed across the state and the recollections of the victims had presumably begun to fade. No identification parade was conducted until almost a year after the event. The investigation was characterised by delay at every turn, and this fact was unfavourably remarked upon by both senior police and the Ombudsman.

When the identification parade was finally conducted, only one officer was positively identified. He admitted to a subsequent charge of misconduct, and his work performance was monitored for twelve months.

Case Study 12

Police Academy II

In another case, a group of police who were participating in a residential Initial Response Officers Course incorporating awareness of sexual assault issues, were having a social function in the academy tea room. A constable had her shorts pulled down around her ankles by another constable who was a course participant. This matter, in contrast to that above, was investigated rapidly and efficiently. The offending constable admitted his actions, but said he meant it as a *"joke"*. Clearly, none of the issues confronting victims of sexual assault as portrayed during the course, had sunk in with the perpetrator of the *"joke"*. A departmental charge of misconduct was laid against the offending constable, and was admitted. The constable was severely reprimanded and his work performance monitored for twelve months as penalty. The Ombudsman further recommended that the constable not be given accreditation for the course from which he had learnt so little.

Case Study 13

Party Tricks

In looking at the wider implications of excessive alcohol consumption by police in attendance at the academy, the Ombudsman also recommended this issue be reviewed. The Assistant Commissioner, Education and Training, has since advised that numerous measures have been put in place and reinforced to students and police officers concerning their professional conduct, including the consumption of alcohol, while attending the academy.

The citizens of Goulburn also had the opportunity to observe police officers at play. Officers from the then SWOS were at the academy for a residential course, and attended a social function in a Goulburn pizza restaurant. Gross behaviour was given a new definition, when one officer allegedly performed a *'party trick'* by passing a condom up his nose and pulling it out of his mouth. A waitress faced with this distressing sight dropped a tray of food and was threatened with dismissal by the restaurant owner. A female police officer made a subsequent statement alleging that a SWOS officer passed the officer she was sitting next to a serviette with the words *"fuck her up the arse"*. She said that female student police at nearby tables were subjected to similar comments.

The Ombudsman found this behaviour could be adequately dealt with at a managerial level, however, he recommended that a commissioned officer be required to be present at *"all functions occurring outside the academy attended by student police officers and police officers from the academy."*

The Ombudsman stated:

> *"Such a measure is in my view extreme but necessary given the impression that may be created in the minds of members of the public when they witness or hear of such behaviour. Such negative impressions can only undermine the image of the Police Service and bring discredit upon it."*

The Ombudsman is still awaiting the Commissioner's response.

Case Study 14

Police Academy III

There was, however, a bright spot in complaints from the academy this year; a solid example of decisive action to quickly deal with a sexual harassment complaint.

Two female student police officers complained to a senior sergeant at the academy that another sergeant, a participant in a supervisors course, had conducted conversations which left no doubt as to their sexual intent; had attempted to make social arrangements with one of them and complained when she did not keep these 'appointments'; had made departmental inquiries to find out which police station she had been assigned to during phase II of her course; and that his attempts to gain the attention of both students was a *"power play"*, targeted at the most vulnerable and less experienced female student police.

It transpired that the sergeant was attached to the Internal Affairs Branch as a training officer. His uninspiring conduct came to prompt notice and was dealt with rapidly. Without proceeding to a time consuming formal investigation, the complaint was successfully conciliated by having the sergeant removed from the supervisors course, and removing him from Internal Affairs Branch training duties.

Considerable resources are expended in training police for active duty. No consideration appears to have been given to quantifying the cost in time and other resources when (mostly) female police faced with untenable workplace situations arising from sexual harassment feel their only avenue of escape from such behaviour is resignation. It may well prove more cost effective in the long term for the Commissioner to commit resources towards more thorough, professional, and expeditious investigation of such complaints; to enhance morale; and to neutralise the loss of valuable human resources.

DOMESTIC VIOLENCE

Research has shown there is a significant proportion of the community who see spousal and family violence as less criminal than violence between strangers, or, more disturbingly, not criminal at all. The police naturally will reflect the spectrum of community attitudes and any belief widely held in society at large will be shared by many police. This is reflected in a number of complaints received by this Office where Police Circular 88/75 is ignored.

Police circular 88/75 states, in part:

> Police are obliged to give the victims the full protection, afforded to them under the law, from violent parties whom they have been in contact with...Police are required to actually bring offenders to justice and not to rely on the victims.

and further:

> If satisfied an offence has been committed (no matter how minor) you are encouraged to arrest and charge the offending party. Do not ask the victim what they want you to do. They are a compellable witness.

The pattern that emerges from examining various cases is that police repeatedly ask the victim what she wants done even when they have independent evidence of the alleged assault. Instead of charging, they tell her to issue a summons herself, something which places on her the whole burden and expense of prosecuting the matter. On the occasions when they tell the victim about apprehended violence orders, they advise her to see the chamber magistrate to commence proceedings, instead of initiating such proceedings themselves.

The Crimes Act specifically provides that police may do this. Some police are so unfamiliar with the relevant provisions of the Crimes Act that in one complaint, the legislation was repeatedly referred to in police statements as the Domestic Violence Act.

Undeniably, the tendency of many victims to withdraw prosecutions and complaints is frustrating and it is understandable that police are reluctant to bring charges which are dismissed through the failure of the victim to give evidence. However, the pressures on the victim to withdraw proceedings need to be understood.

Many women feel responsible for the violence, either as a product of low self esteem or as a result of the brain washing that accompanies emotional and physical abuse. There is a widespread attitude that women are responsible for the emotional well being of the family; any breakdown can then be seen as the woman's fault.

There is a common pattern in abusive relationships which has been identified as a cycle which moves through stages, from the build up of tension to its explosion, followed by either denial by the perpetrator that anything happened, or a "honeymoon" stage, characterised by displays of remorse. Women who still want the relationship, if not the violence or abuse, find themselves wanting to believe the perpetrator's promises that it will never happen again and succumb to pressure to withdraw the complaint.

In recognition of these pressures, amendments to the Crimes Act take the onus of pursuing legal remedies away from the victims. When a police officer is the informant, obviously the victim cannot withdraw and is compellable as a witness.

Case Study 15

Mistreating Victims

Another area of concern is the treatment women receive from police when they report domestic assaults. This ranges from polite but dismissive to downright rude and insulting. When women complain about rudeness, it is often put to them in conciliation sessions that the careers of police involved will be adversely affected and as a result one complainant wrote to police saying that she regretted that her complaint may have adversely affected the officers involved.

One woman who had been repeatedly punched and choked was asked to take a seat in the public area of the station and was then questioned by an officer who hung over the counter. He first asked her whether she had been sexually assaulted. When she said no, some police officers behind the counter started laughing. Then, when she said that it was her father who had attacked her, the police officer castigated her for wanting to charge her own father. Eventually she broke down and began to cry as a result of this treatment, at which point the officer said that he would go and find a female officer to complete the interview.

Case Study 16

No Action

In another matter, a woman complained to police that there had been a break enter and steal at her home. When she told the constable that she suspected that her ex-de facto was responsible, he advised that civil action was the appropriate course and took no further action. He was counselled by his patrol commander concerning his responsibilities when conducting criminal investigations.

In another, a woman who was allegedly punched in the ribs, kicked in the hip and had a telephone cord wrapped around her neck by her police officer husband, was advised by the police officer who attended that she should seek legal advice or consult the chamber magistrate as he felt that no police action was necessary. She subsequently attended the doctor and obtained medical evidence of bruising which was consistent with her account of the assault. Some months later, another incident occurred when a witness was present. The constable was paraded by his patrol commander and counselled. His conduct is to be monitored over an 18 month period.

Police stations need to have provision for spaces where complainants can be interviewed in private. Complainants should be treated with respect and not in a way that is a continuation of the assault they have experienced. The police role in a domestic violence situation is not a mediation or counselling one. The provisions in the Crimes Act were drafted on the basis that domestic violence is a crime, not a personal problem requiring a welfare oriented response. This is emphasised in Circular 88/75, which makes it clear that police should actively bring offenders to justice. Police need to be aware that, whatever their personal attitudes or prejudices, their duty is to obey police instructions and the relevant legislation.

An Arresting Situation

The frequency with which police exercise their power of arrest continues to be an area of concern to the Ombudsman. Although Police Service regulations encourage police to exercise forbearance and discretion and to proceed by summons when dealing with minor offences, the Police Commissioner's Instructions provide minimal guidance for police in exercising their power of arrest. Police continue to routinely arrest people for street offences, such as offensive language and traffic offences.

Case Study 17

Summons

One complainant (Mr V) was approached by two officers, a sergeant and a constable, while sitting on a verandah with friends and family members. The sergeant advised Mr V he was under arrest for swearing at him three weeks earlier.

The complainant disputes he was given any reason for his arrest. He refused to accompany police and family members and friends intervened. The constable phoned an *"officer in trouble"* message to the station and police swarmed to the area. A violent brawl erupted between police and residents involving batons, garden hoses and other items.

Six persons were arrested, resulting in numerous charges against four of them. Half of the charges were dismissed at court, including all charges of assault police, while the remainder resulted in minor fines. A considerable amount of court time and expense was consumed in pursuing the charges arising out of this incident.

There seems little doubt if the complainant had not been arrested, the violent confrontation between police and residents would have been avoided and court time saved. An investigation was conducted by police but the arrest of the complainant was not examined. The Ombudsman requested further enquiries aimed at determining why arrest was used rather than summons.

The sergeant when questioned defended his decision to arrest the complainant stating that according to police records he had resided at a number of addresses making the issue of a summons inappropriate. The sergeant had decided to arrest him on their next meeting. The complainant, however, states that he has lived with his mother at the same address for eleven years and occasionally stays at his uncle's house. The Ombudsman is still pursuing the reasonableness of the arrest. It is worth noting that a summons could have been served at Mr V's last known place of residence or directly on him.

Case Study 18

Swear by Me

In another case, a complainant arrived at a crowded inn at Broken Hill and approached the bar to buy a drink. He opened his wallet and exclaimed *"Oh fucken hell"* as he realised he was short of money having loaned $20 to a friend earlier that evening. A sergeant judiciously performing his duty immediately advised him that he was under arrest for offensive language. The complainant objected to his arrest on the basis that there were numerous other people swearing in the bar.

The sergeant stated during the course of preliminary enquiries that:

> *The offender was arrested for this offence because it is standard procedure in Broken Hill to arrest offenders for street offences and not proceed by summons. . . . To leave an offensive intoxicated person in that environment may be inviting the offensive conduct to continue and possibly escalate. To deal with [him] by way of summons would have been a departure from consistency and normal procedure.*

The Ombudsman disagreed with the sergeant's reasoning and considered a summons would have been a more appropriate method of instituting proceedings.

Case Study 19

Arresting Kids

The arrest of juveniles has been an especially problematic area. The Children (Criminal Proceedings) Act 1987 specifically prohibits the arrest of a child, except where for example the offence is violent or a serious indictable offence or the child's behaviour is violent.

A complainant, an Aboriginal youth, committed the following offence:

> *I saw this kid coming (sic) so I asked him for a dollar. He said why. I said I was hungry. And I told him we were street kids so he gave it to me.*

Notwithstanding the amount was $1, he was charged with robbery, an offence carrying a maximum penalty of 14 years penal servitude.

He complained that he was assaulted at the station following his arrest. An investigation was conducted by police but it failed to address why a summons was not issued as required by the legislation.

The police investigator responded contemptuously to the Ombudsman's request for further enquiries:

> *Suffice to say that the offence alleged was one involving a threat of violence. The fact that the property stolen was only of the value of one dollar is a matter for little consideration. Offences under section 94 of the Crimes Act are considered generally to be serious indictable offences for which arrest and charging is the appropriate course of police action.*

The investigator further asserted that the complainant's alleged violent threat of *"just give me the dollar or I'll hit you"* warranted his arrest. The Ombudsman disagreed with the investigator's assertions.

Case Study 20

Handcuffs

Arrest is often followed by handcuffing, fingerprinting, photographing and detention of the arrested person. The Ombudsman is concerned by the routine manner in which these procedures are performed by police.

A 17 year old complainant, was stopped by police after driving on the wrong side of the road and making a wide left hand turn. Police advised that he was under arrest for *"driving in a manner dangerous to the public"*. He was then frisk searched, handcuffed with his hands behind his back and conveyed to the station. There he was fingerprinted, photographed and charged. He was detained for over two hours before being allowed to leave.

Case law suggests that handcuffing should only occur where a reasonable necessity exists for doing so. Where an arrested person has attempted to escape or where police hold a reasonable apprehension that an arrested person would attempt to escape or his or her conduct would pose a real risk of injury to himself or other people, handcuffing may be justified. Handcuffing for longer periods of time presumably would only be justified where the above conditions continue. The Commissioner's Instructions, however, fail to articulate these concepts stating only *"whether or not you handcuff a prisoner is your decision, however, you are responsible for the safe custody of your prisoner"*.

In this case, police argued that the 17 year old had been tense and had his teeth clenched while speaking to them and it was, therefore, necessary to handcuff him for their own protection. The Ombudsman found that, in the circumstances, his behaviour did not provide the basis for a reasonable apprehension by police that the complainant would injure them or attempt to escape.

Establishing Identity

Photographs, fingerprints and palmprints can be taken for the purposes of identifying an arrested person. Police, however, routinely fingerprint arrested persons without considering whether identification is necessary, even on occasions where a person has provided their drivers licence as proof of identity.

Arrested persons also are frequently detained for significant periods of time depending on whether officers are available to process arrested persons and whether an investigation into the alleged offence has been completed or sufficient evidence exists to charge the person with an offence. The large number of complaints received involving persons allegedly assaulted by police in custody has been noted elsewhere.

While the Ombudsman acknowledges that police perform a difficult and often dangerous job and would not wish to prescribe when arrest is appropriate, the extent to which police currently use their arrest power must be curtailed. The law recognises that a person's liberty should remain undisturbed where the issue of a summons would ensure a person's attendance at court. Arrest can be considered an additional penalty. Police culture contradicts this by instilling in officers the notion that arrest is the most appropriate means by which to institute proceedings.

The distinction between minor and serious offences contained in the regulations and instructions also contributes to the high number of arrests. Police tend to regard every infraction of the law as serious and will routinely arrest persons for street offences and traffic offences.

Ultimately, what is required is a clear set of guidelines to assist police in determining whether an arrest is necessary. Such guidelines should be cast in terms related to the circumstances of the offence and would avoid the distinction between minor and serious offences. For example, whether the arrested person would appear before the court, whether there is likely to be a continuation or repetition of the offence or whether arrest is necessary to preserve evidence could be relevant factors in deciding whether to arrest a person or proceed by summons. Arrest would, therefore, only ensue when it is necessary as a means of enforcement.

The Police Service set up a working party in September 1990 to examine the alternatives to arrest, such as infringement notices. A draft white paper was provided to the Ombudsman a year later. To date there has been no final report and no new procedures implemented. Reform in this area is now at a standstill. The Ombudsman will, however, continue to monitor the extent to which police use arrest and continue to push for reform in this area.

Misuse of Office

One of the hallmarks of professionalism is the capacity to identify private interest and to prevent it influencing the way in which public duty is discharged.

The Ombudsman constantly receives complaints which draw attention to the problem of police officers using their powers in private matters, either for direct personal gain, or for the benefit of family members or friends.

In some cases, the misuse is blatant; in other cases the line separating professional responsibilities and private interest is blurred.

The following are some examples of how officers have become involved in private matters. The conduct can only be described as exploitative and in some cases intimidatory.

Case Study 21

On the Job

At a time when a constable was off duty and in fact on sick leave, he had cause to go downtown. He parked his vehicle with a box trailer in tow, illegally, and the offence was noted by a parking patrol officer. The constable became aware of his predicament and, according to the parking officer, attempted to influence her not to issue a Parking Infringement Notice, saying he was a police officer and was *"on the job"*. The police officer, she said, then became very aggressive and intimidating to the extent that the parking patrol officer believed her future employment was in jeopardy. The complaint which ensued from the parking officer was found to be sustained. The constable was paraded before his district commander and reprimanded.

Case Study 22

Don't Trespass on My Land

Another constable took exception to a young man and woman taking a short cut through his property one evening. When off duty, he confronted the couple and after a heated discussion a fight developed between the officer and the man. The couple returned to their home and the constable commenced his shift at the local police station. He told his supervising sergeant about the *"trespass"* and said he wanted to lay charges. The sergeant told the constable to find out the names of the two people and he would accompany him to speak to the couple.

The constable, however, took his offsider on the shift, another constable, to visit the two people sometime after 11 pm. After a verbal exchange at the front door, both were arrested. Also arrested was the occupant's sister who had come to the door to object. She was eight months pregnant. The three were handcuffed and pushed into the back of a paddy wagon.

On arriving at the station, the accompanying officer informed the sergeant of what had occurred. The sergeant telephoned the patrol commander who directed the three be released immediately and for police to proceed by way of breach report.

The pregnant woman lodged a complaint about the officer, attaching a medical report indicating she suffered bruising to her legs, buttocks and back, with tender ribs, wrists and toes.

The investigation has yet to be finalised.

Case Study 23

Don't Tell My Daughter What To Do

A complaint was lodged about a sergeant who involved himself in an investigation into an alleged assault on his daughter, and then failed to properly investigate the assault.

The sergeant's daughter and her friends went to a disco and in the early hours of the morning were asked to leave the premises by the security guard for not wearing shoes. A disturbance erupted between the disco-goers and the security officers.

The daughter rang her father who arrived at the disco at about 2 am in casual clothes and talked things over. The sergeant then requested the constables from the local police station to attend the club. It was the sergeant, however, who interviewed the security officers and club personnel involved and then insisted they attend the police station. The sergeant informed one of the security officers that a summons would issue shortly in relation to a charge of assault.

The security officer was a captain in the Australian Armed Forces and the sergeant happened to be a member of the Army Reserve. The sergeant informed the commanding officer of the charge and the security officer was removed from a respected position in the army to normal duties.

The charge was dropped and the sergeant has been paraded and severely reprimanded.

Case Study 24

Outright Harassment

A constable went on a holiday cruise with one of his friends and on their return stored some of his belongings at his friend's house. Around this time the friend and his fiancee broke their relationship and the fiancee moved her possessions out of the house.

In the meantime the constable lost his passport and thought it was among his belongings left at his friend's house. He suspected the fiancee of having taken it.

The constable, when he was on duty and in uniform and accompanied by his offsider, visited the local leagues club where she was attending a disco. He required the manager of the club to bring her downstairs from the disco to be questioned by him.

The constable used his authority as a police officer to have the young woman brought downstairs and questioned, and succeeded in intimidating her. To add to this, the officer also had acted wrongly in not seeking permission from his supervisor to leave his patrol area to go to the leagues club in pursuit of his own interests.

After the young woman lodged her complaint, the officer, though not in uniform this time, harassed her a second time at the disco, using offensive and foul language and stand-over tactics.

Departmental charges resulted from the Ombudsman's determination.

Case Study 25

Protection of Family

A complaint was received about a sergeant intervening in an investigation involving his son's possession of stolen property.

The complainant had suffered the theft of a valuable bicycle and had located part of the bicycle at the culprit's family home. He informed the police of the whereabouts of his property and returned to the home where he spoke to the boy's mother. He then discovered other bicycle parts in the attached garage. The mother telephoned her husband who was the local police sergeant.

The sergeant arrived at his home with two constables accompanying him. The sergeant, however, informed his two constables that he would take over the matter, and as a consequence no details were recorded by the constables.

The sergeant denied the allegation that he had intervened and claimed he had made an agreement with the complainant about compensation. However, the complainant said that he wanted something done about the youth, who as it turned out eventually received a police caution.

The sergeant's interests as a parent conflicted with his responsibilities as an officer. His misuse of office in taking over the investigation of his son's offences was seen as intentional as the sergeant had been off duty when he arrived at his home and furthermore he had used his seniority over the constables to relieve them of any investigation. The sergeant also failed to act on the complainant's report of additional bicycle parts stored in the garage.

The Police Legal Services Branch considered there was insufficient evidence to justify the laying of departmental charges against the sergeant, but the Assistant Commissioner (Professional Responsibility) directed that the sergeant be counselled by his commanding officer regarding the dangers of becoming involved in matters in which he has a personal interest.

Case Study 26

Misuse of Powers to Access the Police Data Base

Apart from police accessing privileged information for financial gain, as shown by a recent ICAC investigation, there have been several cases of male police officers accessing the police data base to satisfy their curiosity about young women in whom they have a personal or sexual interest, and further, indiscreetly disclosing information about the women.

One police officer had become infatuated with an attractive friend of his sister. Someone in their group of friends had heard that the young woman had worked at a strip club. The officer accessed the police computer to search for information about her.

Following an investigation, the complaint about the officer's conduct was found to be sustained. A further complaint that he had disclosed information about the woman to other people was unable to be determined as there was a conflict of evidence in the information available.

Similarly another young officer accessed the police computer to obtain particulars about the receptionist at his dentist's surgery. He also obtained information about her from the data base of the Roads and Traffic Authority.

This constable said he had liked the look of the secretary - he had seen her before at the hotel - he wanted to know her age.

This officer went further and passed on information to his male friends. He has been counselled about his misuse of power.

Case Study 27

On the Political Hustings

There are a number of cases where police have exploited not only their powers but their position of power.

A local detective agreed to address a gathering at a gala day for the local branch of a political party. He delivered his address while rostered for duty, although he did not record his visit in his duty diary or his motor vehicle diary. The detective's response was that he hadn't left his patrol and that he had given his speech during his lunch break period.

The detective had not been given permission nor had he sought it, to present himself on such an occasion for the purpose of furthering his political interests and advancing the standing of a political party. He saw no conflict in providing visible police support to a political movement or linking the police service with political party fundraising. The detective has been counselled appropriately.

Case Study 28

The Beer was Cheap - and so was Their Behaviour

Last year the Police Service referred a complaint to the Ombudsman regarding the misuse of police identification to get the desired liquor service at a major leagues club. The officer concerned had been drinking at the club; a dispute arose between the one of his friends and the bar attendants about a round of beers, which resulted in an accusation from one of his mates of being shortchanged. The officer handed over to his friend his wallet which contained his police ID, to get another round of drinks and to fix up the argument about the change.

The disorderly behaviour of the group including the police officer was sufficient for the club to call the police.

The officer has since resigned.

General Comment

Formal recommendations have been made to the Commissioner of Police that he issue a circular advising police on the undesirability of involving themselves in matters in which they have a personal interest, where a possible conflict of interest may arise; and where investigations are concerned, that the officer disqualify his/her self from the investigation.

The Ombudsman also has made the point in his final reporting that such an instruction is not especially onerous given that most professional groups are bound by a rule of ethic that does not permit individuals to involve themselves in matters where they have a personal interest or where a conflict of interest may arise.

The standing Commissioner's Instruction regarding such matters, headed Neighbourhood Disputes is inadequate. It is even less instructive than the rule which issued in 1988 in the previous set of Police Instructions, namely:

Disputes/matters involving neighbours/friends/relatives

When at home, Police should avoid intervention in incidents such as disputes between neighbours and trivial street offences. Unless immediate action is required they should, whenever practicable, also avoid becoming involved in matters concerning friends or relatives or in which they have a direct personal interest. Such cases should be referred to other members of the Service for appropriate attention.

These instructions equally apply to traffic incidents and adjudication action arising therefrom where Police or their immediate family have a direct personal involvement.

The new instruction, valid as at April, 1992, reveals:

Neighbourhood Disputes

Avoid involvement in neighbourhood disputes, trivial street offences, and matters concerning family or friends when off duty, unless immediate action is required.

It can be interpreted as permitting involvement in private matters when on-duty.

It is timely that this requirement of police be given more detailed attention, and the instruction removed from the present heading. The instruction should be rewritten to avoid misuse of office, and entitled *"Involvement in Private Affairs"* or other proper reference.

ABUSE OF PROCESS

The Ombudsman receives a number of complaints alleging police have fabricated evidence, colluded in the preparation of their evidence or failed to comply with the correct procedures for obtaining and executing search warrants.

Case Study 29

Police Evidence

A recent case concerned two police officers involved in the arrest of a young woman on several drug related charges. Both officers tendered statements to the court which had identical layout and common spelling errors. Under cross examination both gave evidence that their statements were prepared independently. One of the officers was then asked to spell a word misspelt in his statement and on that occasion spelt the word correctly. The magistrate dismissed the matter before the court and, in doing so, indicated he was of the opinion both constables were untruthful in the witness box and their evidence could not be relied upon.

Both officers later admitted to the police prosecutor that they had given incorrect evidence in court, but denied they had wilfully intended to mislead the court. From the information given to the police prosecutor and, later when the matter was under investigation, it appears the probationary constable had approached his partner for assistance as this was his first court matter.

That officer then went over the questions and answers in the probationary constable's notebook, helping him to put his statement in chronological order and then typed the statement for him. Both claim to have made a mistake in their evidence as a result of a range of factors, including nerves, tiredness, inexperience and lack of adequate training.

The magistrate considered referring the transcript to the Attorney General with view to perjury charges, but retreated from this course of action when advised that senior officers of the district would investigate the matter at a local level and educate the police concerning their duties in this area. In his report concerning the matter, the police prosecutor stated, in his opinion, if there was dishonesty displayed by the constables in the giving of their evidence, it was not aimed at strengthening the case against the defendant. He informed both officers that they could not be criticised for one officer typing up both statements as long as the other officer read that statement and adopted it as being a true and correct version of what he recalled happening. He also advised them that they could not be criticised for discussing the matter prior to compiling statements to ensure the facts were correctly presented to the court.

While there was no evidence to suggest these officers fabricated evidence relating to the actual charges before the court, the Ombudsman did not accept their explanations regarding their mistakes in evidence concerning the compilation of statements. He concluded both officers did attempt to mislead the court on this matter. Both were counselled and their future conduct in this area will be monitored.

One of the more concerning matters arising from this investigation was the attitudes of various senior officers to this investigation. The acting patrol commander stated:

> *"It is regrettable that the incident was reported in the way it was as the matter could have been dealt with through the normal processes of management and training at a local level".*

Further to this, the police prosecutor reported:

> *"... it is not uncommon to see in court officers of a far more senior nature than Constable X giving similar versions as to statement compilation".*

In effect, they appear to be implying the officers' conduct was common and, if not acceptable, a relatively trivial matter to be dealt with as an internal matter only. It also indicates such conduct is accepted as part of police culture.

Another case involving the compilation of statements has resulted in a senior constable being charged with attempting to pervert the course of justice. This matter came to attention when the DPP was advised by a police officer she had no knowledge of a statement that was said to be hers. Examination of the statement revealed that her christian name was misspelt and that the signature was not hers. The senior constable who had previously been that officer's partner subsequently admitted he had typed the statement from her notebook, but denied he had forged her signature on the statement. This matter has not yet been heard at court.

SECONDARY EMPLOYMENT

Employment by police in second jobs has always generated complaints. During the year, the Ombudsman reinvestigated a complaint where a police officer, in responding to bomb threats against a large city building during the Gulf War, handed the business card of his private security firm to the building manager. He later followed up this initial contact in an attempt to gain the security contract for the building. His evidence to the inquiry exemplifies the problems involved where police officers also have private interests in security firms:

> *"My go is to become known to them as a police officer, as a competent human being, and then that will naturally flow onto my other duties. So when [my company] presents their tender, they say "Yeah, I know the bloke that runs it. He's a good bloke, a smart bloke, lets look at them more seriously." I was trying to make a good impression with the opportunity of getting some business."*

The inquiry revealed that the officer actively pursued numerous other private security contracts for his company following initial contact as a police officer. Given the sensitivity of his police work, including advice on security needs, his position gave him a distinct advantage in the security market. Further, he recruited a number of staff to his company both from his own unit and other areas of the Police Service and carried his private company pager and business cards while on police duty. Evidence to the inquiry in this and in other matters, showed that many police have little understanding of the concept of conflict between their private interest and public duty. Whether or not a conflict exists it seems, is determined by the officer's perception when in the position of conflict.

The officer resigned from the Police Service during the investigation to pursue his interests in the security industry.

The security industry provides the most fertile area of complaint. Arising from 11 complaints in this area, 47 police have had sustained findings against them for failing to obtain departmental approval or the required security licence. Other complaints included:

- a police officer, also a licensed firearms dealer, privately obtaining firearms which had been handed into police. (Unlicensed owners of firearms may dispose of weapons either by handing them in to police or to a licensed dealer);
- police having liquor licensing duties involved in secondary employment with a consultant firm preparing licensing applications;
- a police officer introducing the principals of a security firm to a neighbourhood watch group; and
- a police officer in the Security Industry Unit, with responsibility for approval of security industry training courses and of applications for security licences following the completion of such courses, privately employed as an instructor in some courses.

The policy of the Police Service itself towards secondary employment in sensitive areas has been variable. In May 1987, police officers were given the right to apply to the commissioner for secondary employment. In 1989, following concern about employment in the security and liquor industries, approvals in these areas were tightened. Following further incidents of concern, the commissioner issued a circular banning employment in the security and liquor industries from 30 June 1991. There was obviously a very strong reaction from the Police Association and the blanket ban was lifted. Individual attention would now be given to each application to assess the potential for conflict of interest before deciding whether an application should be approved.

In a draft report on the first matter mentioned above, the Ombudsman recommended that the Police Service revert to a complete ban on secondary employment in the security and liquor industries. Prior to the finalisation of that report, the Independent Commission against Corruption, in August 1992, published the results of its corruption prevention project into the general issue. While recognising the potential for corruption in particular areas of police secondary employment, the report stops short of recommending a blanket ban. Instead, it proposes far more detailed application requirements, including wide-ranging disclosures of interests where an application is made.

The Police Service has set up a working party to examine the ICAC's report and the relevant Ombudsman's reports are being referred to the working party for consideration. Hopefully, the working party will arrive at a Police Service policy which recognises the legitimate secondary employment of police while carefully regulating areas of employment where there is potential for corruption and conflict of interest.

THE COST OF JUSTICE

A common complaint to the Ombudsman involves complainants who are charged and prosecuted, but claim they are innocent.

Complainants frequently allege that if the police had conducted an adequate investigation, they would have recognised the complainant was innocent and should not have proceeded with the prosecution. Some complaints raise allegations, not merely of carelessness on the part of police, but of bad faith in the pursuit of the prosecution.

The Ombudsman usually declines to investigate on the ground that the complainant has the opportunity to defend the matter at court. In declining an investigation, the Ombudsman normally invites the complainant to make a further complaint about the propriety of the prosecution if the complainant is acquitted of the charge and the evidence presented at court - or lack of it - demonstrates some impropriety in the conduct of the prosecution.

Critical Judgement

Nevertheless, the Ombudsman is only inclined to investigate such later complaints if the court was critical of the prosecution or if there is clear evidence that the prosecution was unreasonable. The Ombudsman recognises that the lack of success in obtaining a conviction does not in itself reflect adversely on the adequacy of the investigation or the decision to pursue the prosecution.

Furthermore, given the high standard of proof required to obtain a conviction, the fact that a charge has been dismissed does not necessarily suggest that the police investigation was inadequate or that the pursuit of a prosecution was unreasonable.

Cost Decisions

While the Ombudsman considers this is the only sensible approach to complaints about unsatisfactory prosecutions, the financial cost incurred by a complainant in defending the matter at court will generally be quite substantial. The difficulty is aggravated if a complainant who is found not guilty of a criminal charge is not entitled to recover the legal costs incurred in defending the charge. It is cold comfort to successfully defend a charge, but not to recover costs from the prosecution. There is less comfort where, in addition, the prosecution failed because of inadequate investigation or unreasonable decision-making on the part of the police. To make matters worse, even if the Ombudsman investigates a complaint about the propriety of the prosecution and determines the complaint is sustained, the Ombudsman generally considers himself precluded from recommending reimbursement of the complainant's costs because a court already has made a decision on costs.

These issues were highlighted by recent developments on the question of whether a defendant who has been acquitted of a charge in summary proceedings should be entitled to an order for costs.

Until recently, section 81 of the Justices Act 1902 (NSW) permitted a magistrate who dismissed a charge against a criminal defendant to make an order for costs against the complainant or prosecutor. In practice, this discretion was seldom exercised in favour of successful defendants.

In 1990, in the case of Latoudis v Casey, the High Court of Australia considered the discretion to award costs in summary criminal prosecutions. The case involved the question of whether a magistrate, exercising the discretion conferred by Victorian legislation in similar terms to the New South Wales legislation referred to above, had properly declined to make an order for costs in favour of a successful defendant. The High Court, by majority, decided the magistrate had erred in the exercise of his discretion and ordered the defendant's costs should be paid by the prosecution.

The reasoning behind this decision is noteworthy. The Chief Justice, Sir Anthony Mason, made the following observations:

> *In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs. ...*

... in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that ... costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings ... Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings.

The argument that police and other public officers charged with the enforcement of the criminal laws will be discouraged by the apprehension of adverse orders for costs from prosecuting cases which should be brought is without substance and is no longer accepted by the courts ... The courts have rightly recognised that the Executive's practice of indemnifying police officers against payment of costs ordered against them undermines [that] argument ...

The Chief Justice acknowledged that:

"... there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs".

Such cases included:

- The defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself.
- The defendant had been given an opportunity of explaining his or her version of events and declined to take up that opportunity.
- The defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably.

Justices Toohey and McHugh effectively agreed with the Chief Justice. Justice Dawson delivered a dissenting judgment, with which Justice Brennan agreed.

The High Court's judgment was delivered in December 1990. It appears that, in New South Wales, the decision prompted a multitude of successful applications for awards of costs by defendants who had been acquitted of the charge or charges against them in summary proceedings.

In early 1991, the New South Wales government introduced the Justices (Costs) Amendment Bill. The Bill was designed to alter the circumstances specified by the majority of the High Court in which a defendant acquitted of a criminal charge would be entitled to an award of costs.

In effect, the proposed amendment of the existing law was that a magistrate should not make an award of costs to a successful defendant unless satisfied of one of the following:

- The investigation into the alleged offence was conducted in an unreasonable or improper manner.
- The proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecution in an improper manner.
- The prosecution unreasonably failed to investigate, or investigate properly, any relevant matter of which it was aware and which suggested either that the defendant might not be guilty, or the proceedings should not have been brought for any other reason.
- It would be just and reasonable to award costs because of other exceptional circumstances relating to the conduct of the proceedings by the prosecution.

The merits of the Bill were the subject of considerable debate in Parliament. The Bar Association submitted that the government should not change the existing law in a precipitate manner and without the benefit of considering alternative schemes. However, the Justices (Costs) Amendment Act came into effect on 13 January 1992.

While there is now a strictly limited discretion conferred upon magistrates in New South Wales to award costs to successful defendants in summary matters, the basis upon which magistrates are entitled to make such awards appears to address the sorts of concerns raised by complainants to this Office about unreasonable or improper prosecutions. However, the legislation puts the onus on the defendant to satisfy the magistrate that there was some impropriety in the prosecution. In practice, this may well pose serious obstacles to defendants in obtaining orders for costs. Defendants denied an award of costs may not be able to expect any alternative form of redress from the Ombudsman. Complainants to this Office continue to claim that this situation is unfair.

Traffic Infringement Notices

During the year, over 520 complaints were made about the issuing of traffic infringement notices, as well as 30 complaints about the conduct of the Infringement Processing Bureau.

Where the complaint is about the issuing of those notices, complainants are advised that it is not the function of this office to determine whether or not the traffic or road laws have been breached.

Generally, we suggest they write to the Infringement Processing Bureau and put their case for consideration. Payment normally is deferred until those representations have been reviewed by the bureau and a decision reached in the matter. It is further pointed out to complainants that if the bureau advises that the penalty set out in the notice will not be altered, it is possible to not pay but apply to defend the matter in court. At the court they will then be able to plead not guilty to the charge or explain to the Magistrate any circumstances relevant to the alleged offence.

The Office takes this action because the review by the Infringement Processing Bureau and Court is considered to be an alternative means of redress and is, therefore, more suitable as a forum for these issues than this Office. Further, the resources involved in investigating such matters, where it is usually the word of a motorist against that of the police, would be a major drain on the Office. Generally there is little prospect of a definite outcome.

Minor Misconduct

Frequently, complaints in this area also involve allegations of rudeness, aggression and malice by police. The Police Service has instituted a system where, given the relatively minor nature of the complaint, the matter of associated misconduct is referred to relevant police supervisors for management attention. Records of the number of complaints against particular officers are maintained so that a pattern of alleged misconduct can be detected and appropriate action taken.

Given the nature of complaints against the Infringement Processing Bureau and the persistent claim that representations by motorists were not being properly considered, an investigation in terms of Section 16 of the Ombudsman Act was commenced in February 1992. The conduct that was made the subject of investigation was:

> *"the alleged failure of the Infringement Processing Bureau to properly consider the submissions made to it and to provide adequate answers to those submissions". The bureau provided the Ombudsman with a full report and an inspection of the bureau was conducted.*

The main functions of the bureau are the processing of traffic, parking and camera-detected notices, enforcement action and some summonses in accordance with legislative requirements. As well, the Bureau is responsible for the collection and banking of monies received from the issue of on the spot fines and for reports on the bureau's commercial activities to the Treasury, the Minister and other interested parties.

The bureau receives over 100,000 representations annually, and an equal number of statutory declarations denying control of the vehicle at the time the infringement notice was issued, as well as over 800 telephone calls and counter enquiries per week. These statistics relate to the 1.9 million infringement notices issued throughout the State each year.

This Office was advised that in the past year the following measures have been taken by the bureau to improve the quality of service.

- Quality control strategies were initiated
- Statistics are collected and used, in part, as performance indicators
- A comprehensive procedures manual has been introduced
- Clearly documented job instructions have been written, setting out the functions of the bureau, as well as the responsibilities attached to each position
- Staff training has been improved
- All aspects of letters to the bureau are fully answered and, if necessary, comments from reporting officers are sought.

The Ombudsman concluded that the bureau had taken adequate steps to minimise the possibility of errors in its response to representations. Given that an error-free output by the bureau is impossible, the investigation was discontinued.

Ongoing assessment of complaints as they are received can disclose a pattern of conduct or administrative procedure which demands inquiry. During the current year, two such areas were examined.

Radar Detector Detectors

Radar detectors and radar jammers are prohibited by law. Police have in operation a device called a "VG-2 interceptor" which is used to detect the presence of equipment designed to frustrate police radar.

A number of complaints have been received from motorists who have been stopped following a reading from the VG-2 interceptor. Although, on searching the vehicles, no radar evasion devices have been found, the complainants claim police have treated them as guilty, even going so far as issuing notices for failing to surrender the illegal device.

There is some evidence that the VG-2 interceptor is not infallible - in one case a Telecom technician claimed his mobile phone triggered the alarm.

Currently, we are making inquiries to ensure the accuracy of the VG-2 interceptor is clearly understood by its operators, clear instructions are in force and innocent motorists are dealt with correctly.

Showing Speed Readings to Motorists

A reasonably frequent complaint associated with speeding tickets is that the motorist asked to see the radar detector's reading but was refused by the operating police. In many cases the refusal has led to an altercation which gives ground for further cause for complaint.

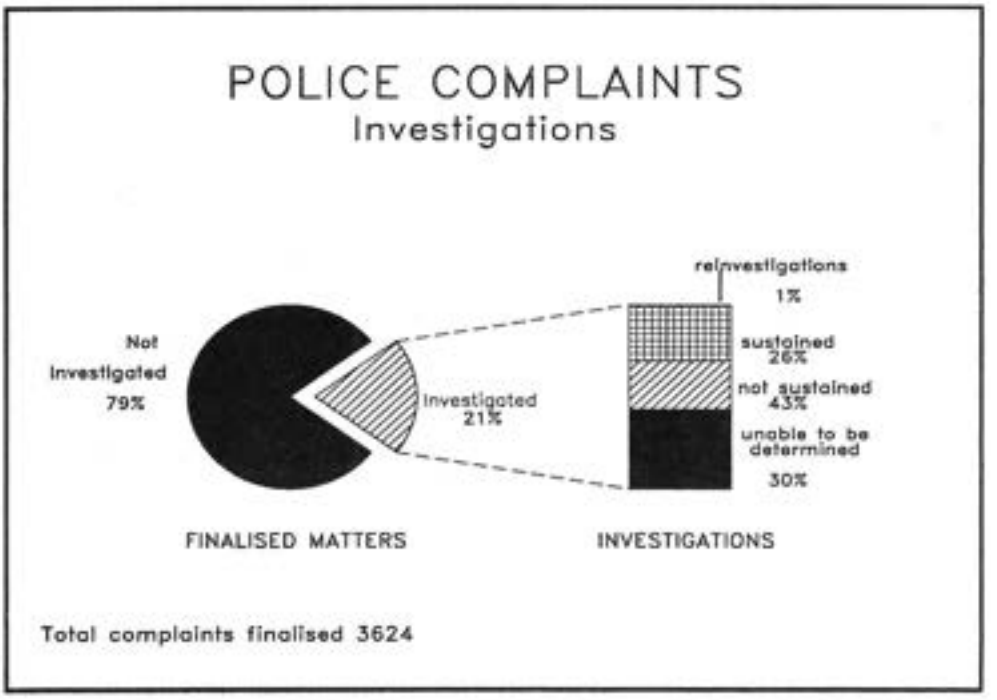
A Victorian motorist booked in NSW complained about this issue and a check with Victorian police confirmed that, as a matter of courtesy and general procedure, offending motorists are shown the speed reading.

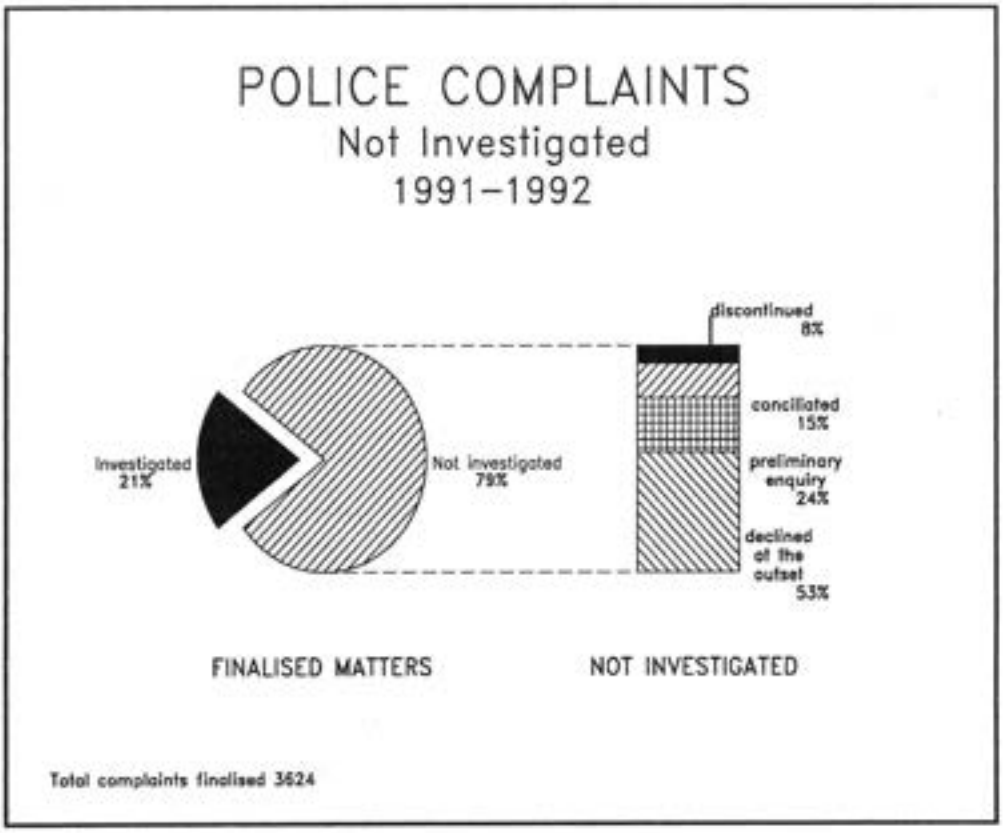
At this stage, inquiries of the NSW Police Service have led to objections that operational procedures make the showing of readings to motorists impractical. An inspection and demonstration of the equipment has been arranged and inquiries are continuing.

POLICE COMPLAINT STATISTICS

The total number of complaints received against police during 1991 - 1992 was **3375**. The following table illustrates the determination categories for these complaints.

Police Complaints Determined in 1991-1992		
Not or not fully investigated	Declined	2225
	Conciliated	424
	Discontinued before Ombudsman investigation	229
	Discontinued during Ombudman investigation	1
Not sustained	Not sustained finding without reinvestigation	318
	Deemed not sustained - no request for reinvestigation [section 25A (2)]	193
	Deemed not sustained by Ombudsman - Ombudsman decided reinvestigation not warranted despite request	29
	Not sustained finding following reinvestigation	3
Sustained	Sustained finding without reinvestigation	198
	Sustained finding following reinvestigation by Ombudsman	4
	Total	3624





POLICE COMPLAINTS PROFILE

Complaints to the Ombudsman are managed by the creation of a file for each complaint. However, each complaint file may contain a number of allegations which arise out of a single complaint. For example, a motorist stopped for speeding may be subsequently arrested for offensive language. The arrest might be resisted and, further, the complainant may allege assault during the arrest. Consequently, one complaint may contain three allegations - unjust prosecution (for the speeding offence), unreasonable arrest and assault.

In the 3456 complaints registered this year, 6238 allegations were determined. The following tables list all of the allegations made in complaints finalised this year with information about the outcome achieved for each.

Ombudsman Determination - Breach of Police Rules/Procedure						
Category	Not Fully Investigated	Sustained	Not Sustained	Unable to Determine	Conciliation/ Resolved	**Total**
Fail to provide or delay legal rights	25	3	20	29	4	81
Inappropriate disclosure	57	13	11	13	2	96
Fail to provide information/ notify	50	10	20	10	12	102
Provide false information	37	19	6	16	4	82
Failure to return property	59	3	13	13	10	98
Unreasonable treatment	309	8	36	53	142	548
Drinking on duty	16	4	14	7	3	44
Fail to identify/wear number	15	7	13	13	5	53
Fail to take action	133	24	29	32	70	288
Other traffic/ parking offences	113	10	14	14	26	177
Faulty policing	15		1		1	17
Misuse of office	31	7	12	4	3	57
Accidental property damage	4	1	1	1	2	9
Other	436	17	64	31	13	621
	1300	186	254	236	297	2273

Ombudsman Determination - Assault/Harassment						
Category	Not Fully Investigated	Sustained	Not Sustained	Unable to Determine	Conciliation/ Resolved	Total
Physical/ Mental Injury - outside police premise	88	17	75	133		313
Physical/ Mental Injury - inside police premises	67	13	55	112		247
Minor Physical Mental Injury - outside police premises	43	9	10	20	9	91
Minor Physical Mental Injury - inside police premises	37		4	8	1	50
Threats/ Harassment	203	7	42	64	50	366
Sexual Harassment	8	2	2	12	1	25
	446	48	188	349	61	1092

Ombudsman Determination - Management Issues						
Category	Not Fully Investigated	Sustained	Not Sustained	Unable to Determine	Conciliation/ Resolved	Total
Condition of cells/premises	6		1	1	1	9
Delay in answering correspondence	10		3		9	22
Inappropriate permit/ licence action	10				3	13
Other	35	3	1		6	45
	61	3	5	1	19	89

Ombudsman Determination - Investigation/Prosecution						
Category	Not Fully Investigated	Sustained	Not Sustained	Unable to Determine	Conciliation/ Resolved	**Total**
Forced Confession	12		10	8		30
Suppression of Evidence	3	1				4
Supression of Evidence (Traffic)			2			2
Fabrication	45	3	14	12	1	75
Fabrication (Traffic)	9		2	6		17
Unjust Prosecution	120	3	26	11	9	169
Unjust Prosecution (Traffic)	498	4	4	2	12	520
Faulty Investigation/ Prosecution	84	17	27	15	12	155
Faulty Investigation/ Prosecution (Traffic)	31	9	13	3	7	63
Failure to Prosecute	57	6	12	1	10	86
Failure to Prosecute (Traffic)	9	1	4		4	18
	868	44	114	58	55	1139

Ombudsman Determination - Arrest/Detention/Warrant						
Category	Not Fully Investigated	Sustained	Not Sustained	Unable to Determine	Conciliation/ Resolved	**Total**
Improper Detention - Intoxicated person			1			1
Unreasonable Use of Arrest/ Detention powers	86	6	38	33	9	172
Faulty Search Warrant Procedure	32	1	11	15	4	63
Unjustified Search/Entry	33	2	17	13	15	80
Unnecessary use of Force/ Damage/ Resources	81	9	36	51	5	182
Improper use of Summons/ Enforcement Order/ Warrant	69		1		1	71
Fail to Withdraw Warrant/ Accept Fine Payment	5				3	8
	306	18	104	112	37	577

Ombudsman Determination - Criminal Conduct						
Category	Not Fully Investigated	Sustained	Not Sustained	Unable to Determine	Conciliation/ Resolved	**Total**
Murder/ Manslaughter	4		3	2		9
Sexual Assault	15	1	7	7		30
Bribery/ Extortion	46	5	45	11		107
Theft	59	11	42	24		136
Drug Offences	74		24	8		106
Dangerous/ Culpable driving	3			2		5
Telephone Tapping	2		1			3
Conspiracy/ Coverup	24		9	16	1	50
Other eg, perjury	33	2	20	18		73
	260	19	151	88	1	519

Ombudsman Determination - Abusive Remarks/Demeanor						
Category	Not Fully Investigated	Sustained	Not Sustained	Unable to Determine	Conciliation/ Resolved	**Total**
Race Related	35	1	2	4	3	45
Social Prejudice	2		1	2	1	6
Traffic Related	260	2	2	12	34	310
Other	72	11	27	50	28	188
	369	14	32	68	66	549

SOME RESULTS

Many investigations result in recommendations for systemic change, such as amendments to police instructions or training procedures. Such changes, for example, an amendment secured this year to police instructions concerning missing juveniles and appropriate procedures for advising parents when juveniles are located, may seem rather intangible and undramatic to the original complaint, although important in the long run. However, below is a selection of some of the more tangible results secured this year as a result of investigations finalised in the police area.

- An ex gratia payment of $600 to a man who was arrested on traffic offences and improperly detained for 24 hours
- An ex gratia payment of $2500 to a man who was wrongfully arrested for stealing his own car; (procedures in regard to amending records when stolen vehicles have been recovered also were reviewed as a result of this case).
- Review of police instructions in regard to use of informants, registering informants and ensuring that the police/informant relationship is conducted in a fit and proper manner.
- Ex gratia payment of $1000 for valuable old coins taken from a dead man's house for "safe-keeping" which were later found to be missing from the police station.
- Ex gratia payment of $1000 to a motorist whose stolen car was stripped due to excessive police delay in advising him it had been relocated.
- New guidelines drafted for the Reward Evaluation Committee
- Seven hundred dollars ex gratia payment for money which was found to be missing after police attendance at the home of a complainant's dead mother.
- A central review of police procedures for the security of drug exhibits at police stations.
- New procedures to record when a police officer has accessed RTA records to prevent unauthorised or private use of such searches.
- Payment of $1000 to a woman whose stolen car had been located but police had failed to advise her of this (before she was told of the car's recovery, it had been stolen again).
- New procedures for recording and transporting property of prisoners to avoid "misplacement" or theft of the same.
- Review of personnel procedures to deal with possible harassment or intimidation of a police officer who has made a complaint about one or more other police officers in the same station or workplace.
- A new property docket system designed to reduce complaints about loss or theft of prisoners' property while in police custody.
- The preparation and distribution to all police stations, at the Ombudsman's request, by the State Commander of a contact list of police gay/lesbian liaison officers.
- Amended instructions to improve police advice to courts when accused persons fail to comply with bail conditions.

CHAPTER THREE

COMPLAINTS ABOUT LOCAL GOVERNMENT

OVERVIEW

Jurisdiction

Since 1 December 1976, this Office has had jurisdiction to investigate the administrative conduct of local government authorities. In December 1986 Parliament clarified this jurisdiction to ensure it also included the conduct of local government employees and members.

The Ombudsman is able to investigate complaints relating to matters of administration (except specific excluded conduct as defined in the Act). The meaning of *a matter of administration* generally is interpreted as drawing a distinction between decisions of the legislative and judicial arms of government from the executive or administrative arm. This distinction can create interesting questions about local government decisions. It can be argued the council, consisting of elected representatives, should be compared to Parliament and, thereby, only is answerable to the people via the ballot box. Alternatively, all its decisions, except enacting council bylaws, are administrative and can be reviewed by this Office.

Political v Administrative Decisions

Since 1976, all Ombudsmen have taken a pragmatic view of this issue and have determined certain local government decision making will not be reviewed, except in specific circumstances. In the 1977 Annual Report, the first NSW Ombudsman, Mr K Smithers, said he did *not regard resolutions as to the fixing of rates* [except special rates] *as being matter sto be looked at.*

Mr G G Masterman QC, the Ombudsman from 1981 to 1987, said *complaints about policy decisions for want of a better word* were merely extensions of the council debate and should have been concluded with council's decision. Such complaints would not be investigated unless there was clear evidence the conduct of council or its officers was *wrong*, that is, the decision was beyond council's power to make, was made in bad faith or was made with some impropriety.

Currently, the Ombudsman regards decisions about rates and charges as political, as the individual views of councillors on this question often partly forms the basis of their election. Although the setting of rates and charges is an administrative decision, council's assessment of the merit of competing rating options is in essence political. This assessment would not be reviewed by this Office unless there was clear evidence of unreasonable or improperly motivated administrative conduct. The fact that a ratepayer is dissatisfied with a decision of council is not, in itself, sufficient to warrant an investigation.

Differential Rates

During the year several ratepayers have complained about the failure of their council to adopt the new locality based differential general rating system. Recent amendments to the Local Government Act give councils the power to establish a general rate for a particular area at a lower (or higher) general rate than that levied on the residential areas in general. This allows a council to alter the rating on their prestige suburbs by reducing the cent in the dollar rate these ratepayers must pay on the Valuer-General's valuation of their property.

Obviously any reduction in the rates income from these suburbs must be compensated by increased income from the remaining areas. The merit of such a decision by council would attract much debate in the community and clearly there are strong political arguments for and against such differential rating. It is not the role of the Office to determine the merit of such arguments.

Discretion to Investigate

While the Ombudsman Act establishes the jurisdiction for the Office and therefore the types of complaints that can be investigated, the Act also provides a discretion to decline to investigate complaints. Section 13(4) of the Ombudsman Act provides a legislative framework for the exercise of the discretion in deciding whether a complaint should be investigation. Section 13(4) states:

> 13(4) Where any person has complained to the Ombudsman under section 12 about the conduct of a public authority, the Ombudsman, in deciding whether to make that conduct the subject of an investigation under this Act or whether to discontinue an investigation commenced by him under this Act
>
> (a) may have regard to such matters as he thinks fit; and
>
> (b) without limiting paragraph (a), may have re gard to whether, in his opinion -
>
> (i) the complaint is frivolous, vexatious and not in good faith;
>
> (ii) the subject-matter of the complaint is trivial;
>
> (iii) the subject-matter of the complaint re lates to the discharge by a public author ity of a function which is substantially a trading or commercial function;
>
> (iv) the conduct complained of occurred at too remote a time to justify investigation;
>
> (v) in relation to the conduct complained of there is or was available to the complain ant an alternative and satisfactory means of redress; or
>
> (vi) the complainant has no interest or an insufficient interest in the conduct com plained of.

Declining Complaints

This discretion to investigate complaints about local government is constrained by the provision of s.13(5). This provision is an extension or amplification of a preceding provision, 13(4)(v) set out above. Section 13(5) states:

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

Both the Local Government Act and the Environmental Planning and Assessment Act in conjunction with the Land and Environment Court Act, provide an appeal mechanism to the Land and Environment Court for the applicant on the actual merit (as opposed to a point of law) of a council's decision about building and development applications. The Court can also entertain a merit based appeal against the Valuer-General's valuation of land for rating purposes.

Consequently, this Office rarely investigates complaints about council's assessment of building or development applications or the Valuer-General's valuation of land. The Court, standing in the shoes of the council, hears all the evidence and can issue a consent or make an order binding on all the parties, unlike the purely persuasive power of the Ombudsman's recommendations.

The Supreme Court and the Land and Environment Court both provide appeal mechanisms where there has been a **breach of the law** by the council in making its decision. Any citizen with enough money can bring an action in the Court to remedy what they perceive to be a breach of the Act by another person or by a council.

A Right of Appeal

It is debatable whether an appeal only on a point of law constitutes *a right of appeal* for the purposes of s.13(5). The interpretation of this provision has been discussed in previous reports. In his 1978 Annual Report the Ombudsman said he did *not regard the possibility of an application being made to the Supreme Court for a declaratory order or other similar remedy as being a right of appeal or review*. The Ombudsman considered the *special circumstances* exception to apply *where the cost involved would be quite out of proportion or where the complainant has been unaware of the right of appeal and the time for appeal has passed.*

While the availability of an appeal on a point of law to either Court may not constitute *a right of appeal* as such, this does not automatically mean the complaint will be investigated by this Office.

Given the limited financial resources of the Office, the value of such an investigation must be considered. Where the complaint centres around a building or development consent, in the vast majority of cases there is little point in an Ombudsman investigation, as such consents are legally binding. Once issued, only the Land and Environment Court can vary or declare them void. No recommendation by this Office, even with the agreement of the council, can alter the legal validity of such a consent. Therefore, unless *special circumstances* exist, this Office will generally not investigate complaints relating to the granting or refusal of building or development consents.

Special Circumstances

In the 1989 Annual Report, two areas of conduct were identified as potential *special circumstances*. Firstly, local governments may misuse or even abuse their powers in rating, development or building matters. It may be a one off situation where the aggrieved citizen's legal remedy is appropriate or it may be indicative of a systemic problem in the council's administration. While individuals may appeal, this avenue would be unlikely to examine the systemic problem. Over the years this Office has taken up several such systemic matters, for example, the unreasonable failure of councils to notify adjoining owners of building applications.

The second area identified as likely to generate *special circumstances* is conduct by a public authority that attracts significant public interest and where a complainant's interest maybe indirect or where the complainant is one of many aggrieved citizens. In these circumstances, the investigation may be the only independent scrutiny.

One such matter was the investigation in 1983-84 of the Sydney City Council's decision to grant development consent for a building that would overshadow Hyde Park without adequate consideration of the effects of such an approval. Another example was the investigation in 1989 into the decision by Grafton City Council to grant approval for a building in a designated flood plain thus potentially increasing the flood hazard to nearby dwellings. In both these matters the cost of conducting an appeal into the lawfulness of the council's decision was beyond the means of the complainants and there was significant public interest.

Drains and Floods

Another local government area in which this Office can provide only limited assistance concerns complaints about drainage and flash flooding. Generally, it is difficult to establish that a council is directly responsible for a drainage problem. Mostly these problems originate in initial planning and are often the result of decisions to compromise the adequacy of a drainage system to provide cheaper land. Often such decisions were taken long in the past.

A council decision to provide drainage at a level where some properties may be subject to regular flooding so land in these areas is cheaper is not necessarily an unreasonable exercise of a council's powers under the Local Government Act.

Another difficulty for this Office is the cost of technical assessments to determine the cause of the drainage problem. As well, unless the council has adequate funds (and the political will) to remedy the problem it can be a futile exercise.

Section 149(2) of the Environmental Planning and Assessment Act requires council to issue a certificate advising, among other matters, that development of the land has been restricted because it is flood liable land. This requirement only applies where council has decided to restrict development. There is no obligation on council to advise, via the certificate, of flood liable land per se. Some councils who have compiled flood affected land maps do provide this information. The Ombudsman believes councils should disclose this information if it is available. Nevertheless, the obligation rests with the purchaser to make their own enquires about potential flooding.

Consultation but with who?

In the 1978 Annual Report, the Ombudsman questioned the effectiveness of the Ministerial consultation provision (s.25 of the Ombudsman Act) in the investigation of complaints about the conduct of local governments. He said:

Councils are in a somewhat different position to government departments and statutory authorities in so far as ministerial responsibility is concerned. All departments and authorities have a minister who has direct responsibility over them but in respect of local government authorities, the control of the Minister for Local Government is somewhat remote. Consequently when a report is made under the Act to the Minister for Local Government as required, he has not the same measure of control over the activities of the council unless it might be a matter which would involve consideration of the appointment of an administrator or relate to other financial aspects. Consequently the council can decide of its own volition to ignore a report. After a report has been tabled in Parliament, apart from the publicity thus engendered, Parliament generally can do little more than express a view and the matter is then left to the council to decide whether or not it carries out the recommendation. If it will not do so, the matter can only be left to local feeling to convince the council that it should take such action.

This issue was taken up by in Annual Reports for 1983, 1984 and 1985. Since 1982 numerous reports under s.26 of the Ombudsman Act had been sent to the Minister for Local Government, but consultations have been rare.

If the Minister for Local Government declines to consult and to exercise any of his/her limited powers under the Local Government Act, then the only recourse, under the current secrecy provisions of the Act, is to report to Parliament. Given the sanction of Parliament would have only limited effect on a council, the merit of this recourse is dubious except insofar as it brings the matter into the public domain.

The 1986 Annual Report suggested that *it would be more useful if consultations, when required, were held with mayors and shire presidents, and if council were required to table reports from this Office.*

As a consequence of the reduced financial resources available, this Office has sought to maximise its effectiveness by concentrating its investigative resources on complaints indicating potential systemic problems in particular councils or on issues affecting more than one local government area. Such issues have included the failure to notify adjoining owners and the collection of a fee to lodge an objection to a building application. Where investigation has revealed systemic problems requiring legislative review of the Local Government Act, it is totally appropriate to consult with the Minister for Local Government.

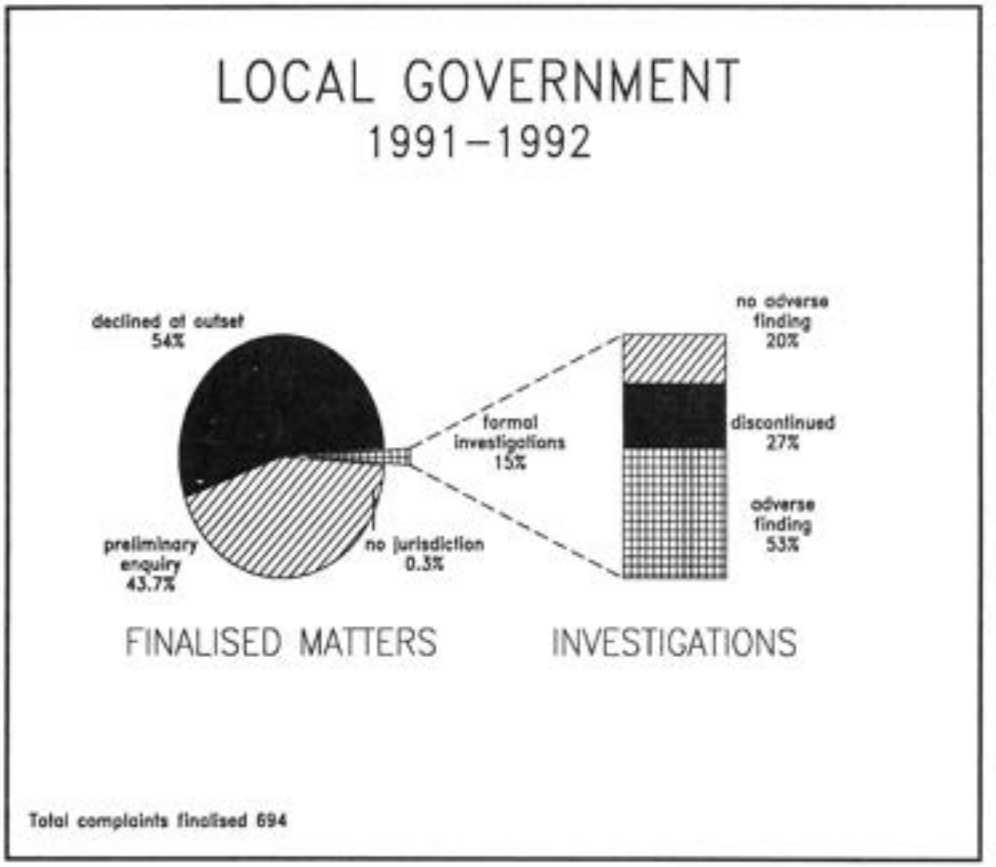
Under section 26(5) of the Ombudsman Act, the Ombudsman is able to make a report to Parliament where he considers the public authority has not taken sufficient steps in consequence with one of his reports.

In November 1991, the then Premier, the Honourable N F Greiner, MP, issued a memorandum (No 91-29) recommending to the responsible Minister that, in the interests of open and accountable Government, they respond to an Ombudsman's report to Parliament within twelve days of the report being tabled. This should greatly assist the public debate on recommendations by this Office arising out of investigations into complaints about councils and local government in general.

New Local Government Act - Watching Brief

The proposed new Local Government Act, which is a complete revision and clarification of current local government powers and responsibilities, appears to give councils greater automony and scope for decision making. This Office will monitor the effect of the new Act and any attempts by councils to abuse wider powers under the Act.

LOCAL GOVERNMENT COMPLAINTS



ACHIEVEMENTS

This year 629 complaints were recieved about local councils and 65 were carried over from the previous year and finalised. Below is a small selection of results achieved following intervention from the Office of the Ombudsman.

- Lake Macquarie City Council sets aside $142,000 plus accruing interest in separate reserve fund for future development of senior citizens centre at Toronto
- Port Stephens Shire pays $ 33,000 to fix land slip problem
- Forbes Shire Council pays legal fees and $1000 ex gratia payment as nominal compensation for withdrawn tender acceptance
- Corowa Shire Council carries out remedial drainage works to fix an 18 month old problem
- Penrith City Council issues direction to comply with conditions of development consent for Learning Centre and undertakes to take follow-up action
- Tweed Shire Council introduces new procedures to: cross-reference building and development files, coordinate Development Control and Building Services sections in assessment of files, involve developers in consultations with objectors over new or amended development applications and demonstrate commitment to community consultation and mediation approaches in the processing of development applications
- Blue Mountains City Council resolves to engage consultant to review lighting at Warrimoo Oval to reduce impact on surrounding properties
- Auburn Municipal Council carries out drainage works to alleviate flooding of complainant's property
- Gosford City Council agrees to process sub-division application after previously refusing on legal grounds
- Sydney City Council makes ex-gratia payment of $9645 for delay in issuing enforceable fire safety order under Local Government Act
- Holroyd City Council requires compliance with conditions of development consent for swimming school

NATURE OF COMPLAINTS

The following table analyses the nature of the new complaints received during the past twelve months. Details of the number of complaints dealt with against individual councils are contained in the statistical tables in Chapter Seven.

New Complaints 1991-1992	
Nature of Complaint	**Number**
Development	**79**
- objection to DA	33
- failure to properly consider DA	14
- failure to notify	3
- delay in processing/refusal of DA	15
- objection to DA conditions	4
- failure to enforce DA conditions	10
Rates	**62**
- objection to rate increase	7
- calculation of (including complaints about excess water/electricity accounts)	17
- rate notice	3
- instalments/interest charges	9
- rate recovery	12
- differential rates	3
- rural/farmland rates	5
- rebates/refunds	6

New Complaints 1991-1992 (continued B)	
Nature of Complaint	**Number**
Building	**57**
- objection to BA	19
- failure to properly consider BA	10
- failure to notify	5
- delay in processing/refusal of BA	6
- objection to BA conditions	6
- failure to enforce BA conditions	11
Misconduct	**38**
- alderman/councillors	7
- council staff	16
- pecuniary interest	7
- conflict of interest	8
Services and charges	**33**
Drainage and flooding	**33**
Roads	**29**
- road closure/access	11
- failure to maintain	11
- traffic and other	7
Unauthorised developments/ building work	**29**
Noise-failure to act	**27**
- dogs	11
- other	16

New Complaints 1991-1992 (continued C)	
Nature of Complaint	**Number**
Objection to orders/notices	**26**
- parking	12
- works	6
- dogs	4
- demolition	2
- other	2
Denial of liability	**23**
Failure to reply to correspondence	**15**
Resumption	**14**
Kerb and guttering	**12**
Failure to act on noxious weeds/pollution	**12**
Information - failure to provide/inaccurate	**12**
Rezonings	**11**
- objections to	8
- failure to	3
Garbage collection/charges	**9**
Tenders	**8**
Unfair treatment	**9**
Trees	**8**
- preservation orders	1
- failure to act	7

New Complaints 1991-1992 (continued D)	
Nature of Complaint	**Number**
LEP procedures	**5**
Inadequate inspection	**5**
Fail to act on neighbour nuisance	**5**
Council elections	**5**
Easements/right of ways	**4**
Council entrepeneurial activity	**4**
Failure to issue license	**4**
Unsatisfactory handling of complaints	**4**
Bonds/interest on deposits/refunds	**3**
Cemetries	**3**
Fences	**3**
Libraries	**2**
Council works	**2**
Parks/reserves	**2**
Uncategorised	**15**
Total	612

OMBUDSMAN ASSISTANCE IN LOCAL GOVERNMENT

As can be seen from the preceding tables, complaints received in the local government area are diverse. Many are resolved during preliminary enquiries by investigative officers which prompt the council to take action on the complaint. Then there are matters brought to the Ombudsman's attention which involve conduct by a council which is unacceptable because it is:

- contrary to law;
- unreasonable, unjust, oppressive or improperly discriminatory;
- based on improper motives, irrelevant grounds or considerations;
- based on a mistake of law or fact;
- or conduct for which reasons should be given but are not given.

In such cases the Ombudsman will usually make a formal investigation. Some of the investigations undertaken this year in the local government area follow.

Illegal Uses, Non-compliance with Development and Building Conditions

People affected by the illegal use, unauthorised work, or non-compliance with development/building conditions have a right under section 123 of the Environmental Planning and Assessment Act to instigate legal proceedings in the Land and Environment Court to achieve compliance. Most people are reluctant or can not afford the cost of legal advice to instigate proceedings in the Court. Many believe that councils have an obligation to ensure developments comply with regulations and legislation, especially when the failure to comply is brought to their attention. If councils do not take steps in this direction, the Ombudsman believes they are side stepping their responsibilities.

Some complaints in this category can be resolved quickly when this Office contacts the council and a council officer inspects the property and takes some action. This may include issuing a notice to conduct/remove works or comply with conditions to the offending owner/developer.

Case Study 1

Do Not Swim Here

A complaint about Warringah Shire Council's handling of an illegal swimming school operating in a residential area prompted preliminary enquiries from this Office to council. These revealed a development application had been lodged and council was to determine the application in the near future. Since the matter appeared to be in hand, no investigation was contemplated.

Two months later Mr and Mrs H made their complaint to this Office alleging that council had failed to take any action. The development application for the swimming school had been refused consent. Notice to comply was to be issued, and the premises monitored to ensure compliance with council's decision. Since council was taking appropriate steps, this Office did not launch an investigation.

Three months later a further complaint was received from Mr and Mrs H. Officers inspected the site and met with appropriate council officers. An investigation was then commenced into this complaint.

Council had a policy of reconsidering decisions on development applications if requested by the applicant. In this case, after the application was refused and a second notice issued directing the use to cease and threatening legal proceedings, council received a reconsideration request. The owner was reminded, of the need to cease the unauthorised use by letter in the following terms:

> *"...I must immediately point out that submission of a request for reconsideration of Council's refusal to grant consent to the subject development application does not remove your obligation to discontinue the unauthorised use..."*

Despite this the use did not stop. Before the request was formally determined, councillors inspected the site.

At that time the use had ceased for a short recess but the applicant indicated an intention to recommence the use before council made a formal decision on the request for a reconsideration of the development application. At the site meeting the councillors decided to allow the use to recommence pending formal reconsideration at the next council meeting. The councillors had no authority to make this decision and their actions served to encourage the operator of the swimming school to contravene the provisions of the legislation.

The council subsequently resolved to allow the use subject to some stringent conditions. Further delays in these conditions being formulated and re-submitted to council and further action of the owner to try and regularise some associated unauthorised building works prompted Mr and Mrs H to eventually initiate proceedings in the Land and Environment Court. These were not finalised until May 1991, some two years after the complainants had first approached council with their complaint.

The Ombudsman's final report on this investigation was critical of the actions of council members and staff involved in this matter. He recommended, among other things, that the council meet the complainant's legal costs for the action that morally should have been brought by council.

Case Study 2

Notification of Adjoining Owners

The issue of notification of adjoining owners is still alive and a report was recently completed by the Ombudsman on this and related matters. A development application was submitted to Tweed Shire Council to erect two dwellings on a block of land adjoining Mr and Mrs P's property. Council's Local Environmental Plan (LEP) distinguished between cluster development and duplex. The former describes the location of more than one dwelling-house on a single allotment of land, whereas the latter was defined as a residential flat building containing not more than two dwellings. The LEP stipulated that cluster development must be advertised so that residents may view the proposals and make submissions. On the other hand duplex developments did not have to be advertised.

The development proposed was categorised by council officers as a duplex and therefore not advertised. The development application and associated building application were both approved. When building began Mr and Mrs P discovered their water view would be blocked by the development. Examination of the Statement of Environmental Effects submitted with the plans revealed the information contained in that document was not accurate. It stated the proposed building would be lower than the P's dwelling. This was false. The plans did not include cross sections to show the relationship of the proposal with adjoining development. Council would therefore have been unable to fully assess the effect of the proposal on the adjoining property at the time of determination.

It was considered that the development could not reasonably have been considered a duplex, as there was no physical link shown on the plans between the two proposed dwellings. The development should have been defined as a cluster, in which case the proposal should have been advertised and Mr and Mrs P given an opportunity to view the plans and lodge any submissions.

The investigation found that council's failure to notify the P's of the development application and to document assessment of the application was unreasonable. The failure to notify the P's of the building application was contrary to law, unreasonable, and unjust. It was also unreasonable that council had failed to address the ambiguity in the definitions of cluster and duplex developments until late 1990.

Tweed Shire Council accepted the findings and recommendations made by the Ombudsman. Community consultation on development applications has been increased. The practice of organising site meetings and/or mediation/consultation approaches to applications where there are objections is now used more frequently.

Many councils have had policies of notifying adjoining owners of building applications for years, but a recent court case, *Porter v Hornsby Shire Council*, vindicated the view expressed in many reports by the Ombudsman that this was a requirement to properly fulfil the assessment duties under the Local Government Act. A number of councils have had to include such notifications in the assessment process as a result of this case and have sought ways to recoup the cost.

Case Study 3

Fee for Service

Orange City Council resolved to charge a $30 fee for processing objections to building applications. This was brought to the Ombudsman's attention by Mr D who claimed that the charge was unreasonable.

An investigation was conducted which addressed the issues of equal access to residents to lodge objections to proposals that affected them, in addition to council responsibility to ensure that resident views are available to council so that it can fulfil its obligations under the Local Government Act. This matter has not yet been finalised.

Case Study 4

Land Slip Hazard

Mrs J and other residents found themselves in a life threatening situation when Port Stephens Council would not carry out remedial works necessary to alleviate the threat of further land slips in the area. Geotechnical reports confirmed that development in the area approved by council may have contributed to the land slips that had occurred since 1976. Legal opinion was that although there may be no statutory obligation for council to carry out the work required to stabilise the situation, it may be liable to claims for damages and injury to persons as a result of approving development. After many delays council finally resolved to share the costs with residents for remedial works.

The Ombudsman recommended that council pay the full costs of remedial works because the excessive delay in council accepting responsibility and agreeing to contribute had resulted in increases in the cost of the required works. Council chose not to comply with this recommendation, but paid a major share of the costs.

Case Study 5

Tree Preservation

Environmental issues are receiving widespread community attention. Councils have in place Tree Preservation Orders to ensure trees are protected from unnecessary destruction. For these regulations to be effective, councils must ensure they are implemented and offenders are properly prosecuted.

Mr H had informed Wollongong Council that trees had been removed without council permission from a property in his area. Council officers began but did not complete an investigation and failed to refer the matter for court action within the six month statutory period. Consequently, the offender could not be prosecuted.

The Ombudsman reviewed council's handling of the matter and found Wollongong council had acted unreasonably. Following the investigation, council amended its policy by requiring all complaints about trees to be forwarded to one point of reference from which the complaint would be properly administered.

Case Study 6

Rates

Rates are an area of frequent complaint to this Office. Many of the grievances do not reveal any improper action on the part of councils. They result from a lack of awareness of the obligations the Local Government Act places upon councils to collect rates and the methods authorised.

One matter that proceeded to an investigation during the year concerned Kiama Council failing to inform Mr and Mrs Q of their entitlement to apply for farmland rating for their property. This resulted in them being charged the higher general rate for their property during the 1990 rating period. Council had not provided adequate information regarding the ratepayers' entitlement to apply for differential rating. As a result of the report by this Office, council reimbursed Mr and Mrs Q for the difference between 1990 general and farmland rates on their property. Additionally, the council changed its procedures to ensure ratepayers are notified of their entitlement to apply for farmland rating.

Case Study 7

Drainage

Mr and Mrs S complained that Newcastle City Council failed to adequately maintain a storm water creek near their home. Consequently, during peak rain events from 1988 to 1991, the accumulation of vegetation and refuse made it difficult for storm water to flow. As a result, the S's property was flooded several times. Preliminary enquiries were conducted. The finalisation of these enquiries was delayed waiting for a report from consultant engineers engaged by council to examine flood problems over an extended area including the S's home.

Council has advised it intends to upgrade drainage systems in the area. However, work cannot commence until Newcastle Council and the local water supply authority agree on who is responsible for drainage in the whole area. The issue of responsibility for the drainage is presently being investigated by the Ombudsman.

Case Study 8

From Woe to Go

Due to statutory requirements concerned with reporting and the need to observe certain principles of natural justice, investigations conducted by this Office can be expensive and often time consuming. Investigations can often take over twelve months from receipt of complaint to the issue of a final report. Many matters referred to the Ombudsman, however, are resolved speedily and without the need for formal investigation. Some cases that have been dealt with in this manner during the year follow.

Mrs M said that despite complaining for 19 months, she had been unable to get Corowa Shire Council to perform remedial works to solve a drainage problem caused by run-off from a recently built block of units. An investigation officer telephoned council's shire engineer, who admitted that council had been a "bit slack" in not attending to Mrs M's complaint. The case was resolved over the phone with the shire engineer promising to arrange for a drainage ditch to be put along Mrs M's back fence, to alleviate run-off effects. Mrs M wrote to thank this Office saying *"...you achieved in less than a month what I had spent 19 months trying to achieve."*

A widowed pensioner Mrs O complained that Auburn Municipal Council had done nothing to assist with the constant flooding of her home. The house had poor underfloor ventilation which contributed to a rising damp problem. The backyard sloped downwards from rear to front, and the topography of the land virtually allowed for excess stormwater to run straight into the back door of the house. These problems were not for council to solve, but a matter for the owner.

However, water accumulated at the front of Mrs O's property when stormwater surcharged from council's street drains. Council acknowledged that these problems were caused by old and inadequate street drainage. Council staff offered to carry out drainage works on Mrs O's land at council's expense to assist with the rear drainage problems. This Office was notified council had resolved to conduct $40 000 worth of remedial drainage works near Mrs O's residence.

Case Study 9

Conditions of Building Approval and Development Consent

Mr M complained a nearby resident had been permitted by Woollahra Municipal Council to construct a tennis court with inadequate drainage. As a result, surface water from the tennis court seeping into the subsoil traversed underneath the complainant's large brick dwelling, undermined the foundations of the complainant's home and threatened to cause extensive building damage.

Mr M believed council had:

- failed to enforce conditions of building approval;
- delayed in taking follow up action after becoming aware of non-compliance with conditions of approval by the tennis court owner; and
- failed to reply to numerous letters from the complainant and his solicitors, requesting council to provide information and follow up enforcement of the approval.

Investigation officers conducted a site inspection and noted considerable damage to the interior and foundations of the dwelling. Examination of relevant council documents revealed the failure of council officers to conduct a final inspection of the tennis court drainage; evidence of unacceptable delays in compliance with conditions by the tennis court owner; and evidence that council had unreasonably failed to reply to numerous detailed letters from the complainant.

With the damage to the complainant's home (and possible collapse), the Assistant Ombudsman advised him to take immediate legal action rather than commence a lengthy investigation that may not have led to the resolution of the problem before further damage occurred.

The Assistant Ombudsman told the council there was sufficient prima facie evidence of maladministration on the part of council to warrant an investigation in terms of Section 13 of the Ombudsman Act, but said that he had exercised his discretion not to proceed and set out his reasons. Council was put on notice that it faced a potentially expensive claim if it did not act to enforce its conditions of consent as quickly as possible. Mr M expressed his gratitude for the intervention of this Office, and its assistance in securing long overdue remedial action by council.

Case Study 10

Subdivision

Mr R wrote to this Office in desperation after attempting to register his plan of subdivision from late 1990. Having presented the plan to the Land Titles Office for registration, he was informed that council's approval would be required before the plan could be registered. So, Mr R approached Gosford City Council with the proposal. Council returned his application and the fees he had paid, advising that development consent was not required.

With this information Mr R again submitted the plan to the Land Titles Office for registration. However, the Land Titles Office held firm to the view that council approval was required. Their view was based on *Peters v The Council of the Shire of Hornsby Anon.* In that case, although a road had been placed through the land in question thus physically dividing it, the parcels had been linked with vinculum on the plan, meaning that the land remained one complete parcel. Consequently, it was ordered that council approval was required before the land could be subdivided so that it may be sold separately. The complainant's case was considered similar to the *Peters* case.

Council, on the other hand, maintained that consent was not required and based its opinion on *Lee and Another v Registrar-General*. In that case, again the land was divided by a road that had been resumed across the land. The difference being that there were no vinculum links shown on the plan and, therefore, the land was considered to have been subdivided by the construction of the road.

Each authority was unwilling to reconsider its position. In fact council told Mr R that it would only review his application if he obtained his own independent legal advice. The complainant found himself caught between two authorities, and he was at their mercy if he wanted to proceed with the subdivision of his land. Following an approach by this Office, council sought further legal advice and, based on that advice, decided to accept Mr R's subdivision application for consideration. Cheap and speedy redress was obtained for Mr R, ending a battle of competing views which had reached an impasse.

Conclusion

These are just some of the local government issues that the Ombudsman has pursued in the past year. In coming years, the Ombudsman is likely to focus his resources on the following areas in dealing with local government:

- abuse by council of the determination and review process
- local councils' handling of development and building applications where there is extremely unreasonable, or discriminatory conduct
- council not complying with the tendering procedures, and/or showing favourable treatment to particular companies
- failure to take action to remedy drainage problems where council is responsible
- failure to act on unauthorised work and illegal uses that have detrimental consequences
- practices that are contrary to law
- improper or unreasonable application of ordinances or other legislation
- unreasonable or inadequate policies or procedures
- misappropriation of funds
- conflict of interest by members of staff or council
- discriminatory, inconsistent, or favourable treatment to particular parties which disadvantages others
- failure to reply to correspondence and other basic service issues.

COUNCILS AND LEGAL COSTS

In May 1991 the Public Accounts Committee issued its *Report on Legal Services Provided to Local Government*. Throughout its inquiry, the committee received evidence of a massive growth in legal costs funded by local councils, a trend by some councils to shelve their planning responsibilities by encouraging any issue involving possible controversy to be settled in the Land and Environment Court, and decisions by council members without reference or concern to the costs incurred by their council, the applicant and the ratepayer.

The committee made numerous detailed recommendations, but few have been adequately acted upon.

In the past year, almost one quarter of all complaints about local government involved development or building applications or related issues. Many concerned unreasonable refusals or conditions, delays and the enormous costs associated with such outcomes. In many instances, the complainants already had initiated proceedings. Accordingly, these complaints could not be investigated under the Ombudsman Act. One complaint, involving a controversial eastern suburbs waterfront property, included a claim that the costs of two successful appeals over development applications, which were supported by council staff but refused by council members, cost $275,000 excluding holding charges and incidentals.

The Ombudsman also is concerned by the delay tactic used by some councils to avoid decisions on controversial development and building applications, thereby provoking the applicant to appeal to the Land and Environment Court over the deemed refusal. Alternatively, council may reject an application which meets all relevant planning criteria simply because it is unpopular with some residents, knowing the applicant will appeal. Effectively, the council diverts the decision to the Court, washing its hands of decisions which invariably put some sections of the local community offside.

Like the Parliamentary Accounts Committee, the Ombudsman believes councils are abrogating their responsibilities by such acts.

Another tactic is the use of unreasonable conditions of consent on applications which generally meet all planning requirements, simply to appease local objectors or council members. There are times when councils reject applications or place conditions on approvals without giving reasons and, then, when the matter is appealed council staff are forced to come up with arguments to back up the council's decisions.

These examples of defective decision making bring discredit on local government and cause unnecessary expense for applicants, the council and the citizens who bear the costs of the Land and Environment Court.

Avoiding Appeals

There are, of course, legitimate decisions councils should defend or litigate in the Court. Councils have a duty to uphold the planning laws and properly made decisions should withstand scrutiny. Even so, costs can and should be minimised. Court actions should be reserved for priority cases and alternative dispute resolution procedures used wherever possible.

The Ombudsman is encouraged by initiatives in some councils which are designed to avoid costly appeals over development and building applications such as the following:

- advisory panels to deal with pre-lodgement enquires which provide access to information about relevant planning controls and council policies and insight into council's preferred options for particular developments.
- mediation sessions after preliminary assessments are made which provide an opportunity for objections and modification to be discussed prior to formal determinations.
- invitations to applicants following the issue of consents or refusals, to contact planning staff to discuss conditions or modifications of the development.
- procedures for applicants to request re-consideration by the full council of consents or refusals issued under delegated authority.

These initiatives not only reduce the potential for costly appeal proceedings, but may also play an important function in streamlining the assessment process.

Court Mediation

Since May 1991, the Land and Environment Court has offered optional mediation conferences in most Class 1, 2 and 3 matters, including appeals for development and building applications, as well as compulsory conferences in Class 4 matters after the filing of affidavits to explore the possibility of settlement. These are important initiatives with the potential to save councils considerable funds. Councils must, however, make a positive commitment to use these alternative dispute resolution processes and to ensure officers have proper delegations and instructions to negotiate real agreements.

While strategies to minimise the number and cost of disputes should be on the management agenda of all councils, they must be backed by sound decision making in the first instance. Well formulated and clear planning strategies to assist the determination of development and building applications are essential. Councils with comprehensive planning policies that are consistently applied and updated will face fewer appeals and incur less legal costs.

Appropriate training of staff and members also is important. In a number of Ombudsman investigations over the past years, it has been obvious that members and staff do not always have a clear understanding and appreciation of their responsibilities under section 90 of the Environmental Planning and Assessment Act in respect of assessment of development applications.

The Ombudsman currently is considering using his own motion powers to investigate the adequacy with which councils are addressing these issues.

COUNCILS AND THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act, operating since 1 July 1989, gives the public a legally enforceable right to access government documents. Although the Act applies to local authorities, it has specific limitations. Section 16(2) limits access to information which concerns the applicant's personal affairs.

As mentioned in last year's annual report, there is a problem in defining *personal affairs* and this issue continues to cause conflict.

Of the complaints received where section 16(2) was used by councils to refuse access to information, in most cases its application was, to say the least, doubtful. Where councils see release of information as placing them in an invidious position, eg, as the meat in the sandwich in a neighbourhood dispute or where the information could increase the likelihood of action against council, section 16(2) is invoked, even when any reasonable analysis of the information would define it as relating to the applicant's personal affairs.

In one matter, the applicant requested access to documents specifically concerning his house and land. The application was prompted by a legal dispute between the applicant and his neighbour. Although Section 16(2) was claimed, a preliminary examination of the documents revealed its use was inappropriate.

Councils such as North Sydney and Liverpool have open access policies, providing many categories of documents over the counter. No doubt this significantly reduces the number of formal applications made to them under the Freedom of Information Act and does not hamper their operations. This Office believes such policies should be widely introduced, **provided they result in processes which are quicker than under the FOI Act and which provide all information requested without exception.** It is only under the FOI Act that refusal of access to information should be considered.

Refusals to release information have not been solely based on section 16(2) of the FOI Act. Other exemption provisions of the Act have been employed in councils' determinations, resulting in complaints to this Office. As well, information has been refused which was never the subject of an FOI application. The information councils have refused to release under FOI is varied, but includes tapes of council meetings (open and closed sessions); third party complaints about applicants; reports of council committees; job selection documents; documents relating to council personnel and an assessment report of a contaminated land located opposite the applicant's land.

Under the proposed Local Government Bill 1992 citizens will be guaranteed access to an extensive range of council documents, as well as to correspondence and reports tabled or submitted to open council meetings unless the council resolves otherwise. The Local Government (Consequential Provisions) Bill 1992 also provides for the deletion of section 16(2) of the Freedom of Information Act, thus placing local authorities completely under the ambit of the Act.

Other Acts

Councils also provide a variety of information to the public which is not processed through the FOI Act. The Local Government Act and the Environmental Planning and Assessment Act (EP&A Act) provide access to certain information and the Ombudsman receives complaints about the conduct of councils under these Acts as well.

One case currently under investigation involves information contained in section 149 certificates obtained under the EP&A Act. These certificates should contain accurate information about the prospective block of land or home, which is usually required by financial institutions before money will be lent.

To assist people with this information, policies and statutory instruments, such as local environmental plans and planning schemes, are available over the counter at council chambers. A fee can be charged for providing this service.

Section 149 certificates are essential for selling land, as they must be attached to a contract for sale. As well, these certificates provide relevant information about the controls relating to the land, including the statutory instruments that apply, zoning, the development control plans that apply, whether the land is affected by road widening or alignment, whether or not council adopted a policy to restrict development due to land slip, bushfire, flooding, tidal inundation, subsidence or any other risk. This information must be provided under section 149(2).

Section 149(5) specifies councils may include advice on other relevant matters affecting the land of which it may be aware. This subsection gives councils discretion to make available even more information on the relevant land to assist interested parties.

However, there are sometimes problems attached to these certificates as the discretionary wording of section 149(5) can be used by council to avoid providing information that may be significant to the buyer.

Case Study 11

Flood Plans

Mr T claimed he obtained a section 149(2) and (3) certificate from Auburn Council indicating the land he wanted to buy was not subjected to flooding. He then checked council's flood plan and saw this block of land was not affected. He then obtained another certificate under section 149(2), (3) and (5), issued five months later which also showed this block was not flood affected. He acted on this information and bought the land.

After his development application was rejected by council, he was informed the block was in a flood plain. He checked council's flood plan again which still did not show the block was in the flood plain. He then spoke to the chief town planner who told him the reason was based on a new flood report. He was refused access to the new flood report.

Consequently, Mr T was required to redesign the foundation of his planned home and incurred substantial additional expense. The Ombudsman currently is investigating whether the council has any liability in the matter. (For further information in relation to Freedom of Information please refer to the separate section on FOI in this report.)

POLLUTION AND THE COLD TRAIL OF RESPONSIBILITY

Noise - barking dogs, motor bikes, air conditioners - all incite complaints to this Office. In one complaint, barking dogs, motor bikes and amplified music were all featured. Noise from large public buildings like community halls or railway depots also generate aggravation, as do odours, fumes and other air pollution.

Responsibility for noise and other pollution problems is shared between a number of government agencies. This in itself creates another problem - inadequate or confused response. Of the neighbour complaints received, local councils are often mentioned as the first agency approached. Some complainants also had contacted the police and a few contacted the State Pollution Control Commission (SPCC) to complain or obtain advice.

The Neighbours

With neighbourhood noise problems, most complainants are advised to seek a noise abatement order (under the Noise Control Act), as it provides the quickest binding solution. If mediation seems an option, complainants are encouraged to contact a Community Justice Centre.

In some cases the noisy neighbour is a government authority. If so, the remedial options are different and individuals are more reliant on the Environment Protection Authority (EPA), the replacement body for the SPCC. For example, an individual can not obtain a noise abatement order against a government authority. In these cases, an order to abate noise or measure noise levels must be issued by the EPA.

Possible solutions also depend on whether premises are scheduled under the relevant anti-pollution statue. For example, the Noise Control Act contains a schedule of premises which are considered most likely to create a large volume of noise. Responsibility for these scheduled premises rests with the EPA. Other premises, being non-scheduled, are the major responsibility of local councils (though the EPA may still play a role). Similarly, the Clean Air Act divides premises into scheduled and non-scheduled. Scheduled premises are the responsibility of the EPA and the non-scheduled premises are mainly the responsibility of local councils, though here too the EPA retains a role.

All too often, this sharing of powers can be confusing for complainants and agencies alike.

Case Study 12

Scheduled Premises

Take Ms A's case: Ms A wrote to this office after months of complaining to Bankstown Council and the then SPCC about offensive odours from a nearby factory. Ms A claimed there was a blatant abuse of the Clean Air Act which neither agency had addressed. Following our enquires, it was apparent both agencies had done something, though it became clear the agencies had disagreed about who was responsible.

The council had referred the complaints to the SPCC:

As the abovenamed property is classified as a Scheduled Premises under the State Pollution Control Act, I refer this matter to your attention.

In response, the SPCC wrote:

As you will be aware primary responsibility for the control of air pollution from non-scheduled premises (x company is not scheduled under the Clean Air Act 1961) rests with ... Council.

As Council were subsequently of the opinion that the matter was not their responsibility, the Commission was obliged to issue a Section 20 Notice (for non-scheduled premises) under the Clean Air Act, 1961, directing x company to implement pollution control measures.

SPCC'S action was good news for the complainant. The SPCC issued a notice under the Clean Air Act requiring the company to install pollution control equipment and followed up with an inspection to ensure compliance.

With an assurance from the SPCC that further problems would be addressed, this Office declined to take further action.

Case Study 13

A Slow Burn

In another case, Sutherland Council and the SPCC were involved in attempting to curb air pollution from a service station burning trade waste. The council was (and should have been) the main agency involved, but the way the council dealt with the complaint raised questions about whether the SPCC should have had greater involvement.

In this case, Mr B wanted the neighbouring service station to stop burning trade waste which produced unpleasant fumes. He claimed Sutherland Council failed to deal with the problem despite his constant complaints.

Mr B originally complained to this office in 1986 and wrote again in March 1990. After assurances from council that the manager had been interviewed and had agreed to stop the burning, this office advised Mr B the problem was resolved and no further action would be taken. In response Mr B wrote:

Whilst it is true Council has now written to me about interviewing the Manager of the adjoining property concerning my complaints, ... the dangerous activity continued.

The subsequent investigation revealed the service station had been the subject of council attention over three issues: noxious plants, disused motor vehicles and the burning of trade waste. Council records showed the issue of burning trade waste came to the council's attention in 1978 when the council issued a notice under the Clean Air Act, which stated:

You are hereby required to take all practicable means to prevent the emission of air impurities from the said premises by ceasing to use and removing the incinerator drums from the said premises within twenty-eight (28) days from the date of this notice.

Penalty: Any person offending against this section of the Act is liable to a penalty not exceeding $500 and, in the case of a continuing offence, a further penalty not exceeding $100 for each day the offence continues.

After issuing the 1978 notice, the council issued another notice on 4 December 1980 and followed up with an inspection of the premises on 5 January 1981. When this inspection revealed the notices had not been complied with, council wrote to the proprietor and advised him of council's dissatisfaction with his lack of compliance and its intention to take legal action:

> *You are hereby required within fourteen (14) days from the date herein to show cause, in writing why Council should not institute legal proceedings against you for failure to comply with the said notice.*

This threat was not carried out, although council records show the problem was recurrent. A sample of file notes paints the picture:

> 1981: The proprietor of the garage ...is burning at random times rubbish from the operation of the premises in 44 gallon drums.
>
> 1986: A recent inspection by a Council Health Surveyor revealed that the burning of waste material is being carried out on the site.
>
> 1988: (The proprietor) said that he would not burn off in future.

Notes and notices continued to be written. The complainant became increasingly frustrated:

> *...on none of the occasions which I reported fires in progress to the Council did the Council attend nor was the fire extinguished as a result of my having made that report to Council. Furthermore, Council's officers have been advised of my willingness to give evidence of these offences. However, Council has at no stage in the past years of continuing offences acted on evidence which was readily available and more than sufficient to be acted upon.*

Over 11 years the council inspected the premises, interviewed staff, issued notices and threaten legal action. While council's records indicate officers were convinced there were breaches of the Clean Air Act and grounds for legal action existed, no penalty was imposed and no legal action was taken. The garage's failure to comply lead to threats of legal action which never eventuated. All the threats proved to be hollow.

The SPCC, after independently receiving three complaints about the garage, did an inspection. There was evidence trade waste had been burnt (though burning was not in progress at the time) and in these circumstances, the SPCC settled for giving the proprietor a warning that burning trade waste was in contravention of the Clean Air Act.

Subsequently, an officer of the SPCC phoned council to ask it to "keep the premises under surveillance".

In June 1991, prior to issuing a provisional report on the complaint, this office recontacted the SPCC and an officer admitted neither Sutherland Council nor the SPCC had advised the other of further developments.

The case illustrates a sad history of indecision. Council's endeavours were ineffective because it did not reassess its strategies. While breaches may have been recorded, there was no review and no decisive action to stop the pollution. Although council had a range of powers: fining the proprietor, taking legal action and/or seeking the intervention of the SPCC, none of these steps were taken and the offender was confident the burning off could continue with impunity.

While council was the principal agency dealing with the complaint, the SPCC also had a role to play. While it may not have known the history of the problem, it was pointless having the situation monitored if no one followed up. Without feedback, the SPCC did not know if the problem was solved or whether council was effectively using its powers under the anti-pollution legislation.

In response to our provisional report, Sutherland Council stated it actively pursued breaches of the clean air legislation. Even so, council agreed to strengthen its inspection and regulatory procedures and to advise staff of their responsibilities under the relevant legislation. In his reply, Mr B said:

> *...the Ombudsman's powers should be greatly expanded to enable the Ombudsman to make more significant recommendations in order that more appreciable and effective changes may be realised.*

Case Study 14

Planning by Stealth

Mr C's complaint raises similar issues about the involvement of two agencies and whether dual involvement helps or hinders the complainant.

Mr C complained to this Office about an adjoining property used as a depot for concrete, sand and soil and which also had a concrete batching plant. This business was established in a rural area next to a row of houses and a short commercial strip.

Baulkham Hills Council said although there was a history of complaints from Mr C about the dust and noise problems associated with the works, the site was being monitored by the successor agency to the SPCC, the Environment Protection Authority (EPA). Council said the stock pile bins that Mr C was complaining about were recommended by the EPA.

Mr C's main complaint concerned the large number of heaps of gravel, sand, aggregate, soil, fly ash and dirt on the site, and in particular, its proximity to his boundary. Generally, council permission had not been sought by the owner to form new heaps of soil, sand or gravel. However, on sighting these piles, EPA officers required them to be surrounded by a wind shield or 'bin' to a height of two metres above the pile, with sprinklers installed to wet material in windy conditions. Council approval is required for the construction of the bins.

No EPA approval is required to store sand or to extend the storage facilities and the existing EPA license was for the concrete batching process enclosed within a shed. EPA approval is required for any changes to the method in operation or for an increase in output.

The council's conditions of consent for the concrete batching works advised the applicant to comply with any requirements of the EPA and the Noise Control Act and included the condition:

> The development is to be conducted in such a way that it does not interfere with the amenity of the area by reason of noise, vibration, smell, fumes, smoke, dust, waste products or likewise.

Mr C said after the sprinkler ordered by the EPA was turned on, the dust was converted to watery mud sprayed all over his yard. He said:

> A tin wall was constructed ostensibly to contain cement dust and reduce the risk of cementosis. The wall diverts dust on to our home, acts as a backing for soil heaps, and is a giant sounding board amplifying the noise of front end loaders.

The EPA officer responsible for the area said he had visited the site on numerous occasions and he considered the company was operating within its licence. The EPA had asked for some work to be done and although the owner was very slow in completing the work, the EPA did not prosecute because he was allowed extra time to apply for the necessary council permission.

The EPA recently issued a notice under the Clean Air Act, but felt constrained not to enforce the notice because council approval is required for the construction of the bins and on that occasion this approval had not been given. The EPA did not believe it had a reasonable case for prosecution in these circumstances.

Mr C's contention was the owner first deposited the heaps of gravel, sand and soil and then applied to the council for permission to construct bins to stop the dust.

This puts pressure on council to give approval for the construction of the bins. Mr C said this allowed the business to grow by stealth. On the most recent occasion council said it approved the construction of three bins because the heaps may have been in the particular locality for some years. Mr C says they were recent arrivals and are moved about from time to time.

The development itself was unauthorised, but purportedly had existing use rights. An investigation by the Ombudsman found council had wrongly recognised existing use rights in the early 1980's and was now saddled with the problem. A report has been issued recommending a number of steps council can take to solve the problem.

These three cases highlight the need for greater constructive effort by government authorities. The average citizen can not be expected to know of the overlapping and sharing of legislative powers by government authorities and should not be disadvantaged by it. A greater responsibility then falls on government authorities to exercise their powers cooperatively. Laws may be confusing and, ultimately, law reform may be desirable, but in the short term greater communication and cooperation between government authorities would alleviate some problems, if not prevent complaints to this office.

TENDERS AND PURCHASING

In the last year, two complaints about councils' tendering practices (or failure to go to tender) have been investigated. Both investigations revealed a lack of knowledge within councils of the provisions and intent of the Local Government Act and its ordinances.

Under the Local Government Act, councils as body corporates may enter into contracts for any purpose under the Act. The Act stipulates councils can not delegate to staff the power to accept tenders. As well, councils can enter contracts only in accordance with the ordinances accompanying the Act. Ordinance 23 provides the statutory regime regulating council's power to enter contracts.

Case Study 15

Tenders v Quotes

The first investigation concerned Mr G, who had lodged his quote for cleaning various council buildings, which was accepted in writing by the clerk of Forbes Shire Council. Prior to signing the contract, the previous contractor, having been advised his quote was not accepted, successfully lobbied several council members to reverse the clerk's decision.

The investigation disclosed the shire clerk was acting on the basis he had lawfully delegated power to accept quotes for cleaning contracts. The clerk's delegations were unclear and, as the accepted quote exceeded $50,000, the clerk did not have power under the Local Government Act to enter into the contract without the formal acceptance of the quote by council.

However, the clerk's lack of power was unknown to Mr G who immediately had ordered equipment to perform the contract based on the written advice of the clerk. Mr G reasonably considered the signing of the contract only a (necessary) formality. The process of calling for quotes by the clerk had ensured council was in a position to get the best bargain.

In response to the investigation, council argued as the clerk had no legal power to enter the contract, council was entitled to revise the decision, enter a contract with another person and not compensate Mr G for his reliance on the clerk's letter. The investigation revealed council was reasonably concerned about the cost of Mr G's quote, given the rural recession, while the clerk was concerned about the quality of the previous contractor's work and considered Mr G's quote reasonable in the circumstances.

The report of the investigation concluded council only had two reasonable options. One option was to endorse the clerk's assessment of the quotes and formally resolve to enter the contract with Mr G. As council was dissatisfied with the cost of the contract, the other option was to redraft the specifications for the work and call for fresh tenders. It was not reasonably open to council to enter the contract with another party without consultating Mr G and offering him the contract at the lower price.

The council accepted the recommendation for Mr G to be paid a nominal sum of $1000 for his loss of profit and for council to pay his legal costs.

Case Study 16

Delegating the tender process

In another investigation, Mr W complained about irregularities in the construction of a new grandstand at the town oval by a country council. The council had engaged a local architect to design and oversee the construction. Under the Local Government Act, councils do not have to tender for professional services if they are performed by a professionally qualified person; the services require specific talents, abilities, qualifications or expertise; and there exists in respect of the services generally provided by the profession a scale of charges fixed by law or determined, adopted, recommended or suggested by a recognised body formed to regulate the conduct of the profession. All three conditions must be met.

Nevertheless, council's can still call tenders for such services and it is certainly prudent to call for expressions of interest from a number of professionals.

In this case, the council sought one other expression of interest, but gave preference to a local firm with a good track record.

The architect also had responsibility for the calling of tenders for the construction of the grandstand, apparently without specific instructions from the council. In calling for tenders some of the steps required by ordinance 23 were not followed. The tender was advertised only locally and only seven days notice of the close of tenders was given instead of the required 21. The size of the advertisement also was small in comparison with adjoining advertisements. Seven tenderers were then given only nine days from receipt of plans and specifications to submit their final tenders for the job. The original tender did not include the demolition of the original grandstand and only a few verbal enquiries were made before this also was awarded to the same company.

The requirements of the ordinance are designed to ensure councils get the best deal. By failing to follow the correct procedures, council cannot be sure it did.

This matter is still under investigation.

Case Study 17

Conflict of Interest

A recent investigation into the purchasing practices of Narrabri Shire Council is the third Ombudsman report to find adversely against the council and its staff. As in previous reports, the investigation found inadequate policies and inadequate supervision of staff. More importantly, the investigation raised issues for all local councils and shires.

The complaint arose after council became aware employees were approaching council suppliers requesting donations of cash and goods for a council staff club. These same employees, knowing which companies had donated, were also making decisions on where council supplies were purchased. The conflict of interest between their private fund raising activities and their public duties should have been apparent.

The inquiry looked at the issue of whether knowledge of donations influenced decisions about purchases and whether suppliers had benefited from donating. On both issues, the allegations and innuendo could not be supported by positive evidence although strong views were clearly held about some suppliers and in some dealings there was an appearance of partiality which brought discredit on the council.

The investigation revealed the Narrabri Shire Staff Social Club sent regular written requests to suppliers:

> *As valued customers of your firm, an invitation is now extended to make a contribution to the Narrabri Shire Social Club of either cash or goods that may be used to enhance functions that are held and this in turn should promote greater participation of staff in these functions.*

Recently, the letters were signed by the shire clerk or the club president, both well known figures in the shire. The attempt to link the requests with the council was enhanced by the shire clerk signing some letters using his official title. Some companies also were approached personally or via their representatives.

The wording of the letters clearly suggested suppliers were approached because of their business link with the council and it could easily be assumed their business would be improved by donating.

In making approaches to suppliers, employees used information obtained from working for the council. Computer records were checked and acquired knowledge used to identify which suppliers to approach. Other resources, such as the council's postal address, were used. At an earlier time, letters were sent on council letterhead.

Suppliers did respond to the letters, donating over $1,000 a year in cash or in goods that earned the club another $1,000 to $2,000 a year. With the exception of two donations to charities, the donated cash and goods were used to support the club's picnics and dinners.

The practice of making such approaches had a long history at Narrabri (at least since the council was formed in 1981). Evidence also revealed it was not confined to this council, but was a common practice in local government.

While the donations were not disputed, suppliers had different views on whether the approaches of the club were appropriate. The full spectrum of views were recorded: some were happy to donate, others thought it made good business sense and yet others who were annoyed, refused to donate and subsequently felt disadvantaged in their business dealings with the council.

While the business community was well aware of the requests, the council as a whole did not become aware employees were making requests until February 1992. A complaint was notified to the Ombudsman and an investigation commenced.

In questioning council employees about the practice, the issue of appropriate conduct was raised. The bench mark was the local government code of conduct, adopted in 1990 as a guide to the standard of conduct required of council members and staff. All councils were asked to adopt the code and make it relevant to their members and staff. While Narrabri council had in fact adopted this code (with some extra provisions) staff awareness of the code was low.

The investigation found there was a conflict of interest in the public and private activities pursued by the shire clerk and the storekeeper. Criticism also was levelled at the council for its lack of guidance to staff in discretionary purchases and its failure to supervise staff.

After the investigation recommendations were made, principally to eradicate the practice of targeting suppliers for donations. The Department of Local Government was asked to liaise with the Independent Commission Against Corruption to produce a circular on appropriate standards of behaviour to be distributed to all councils and shires. To stop the practice in Narrabri, it was recommended the council advise staff that the practice of targeting suppliers must cease and also advise suppliers. The council also has been asked to liaise with the social club to ensure a strict separation of function.

To deal with the management deficiencies, it was recommended council review its purchasing practices to ensure adequate policies exist to guide staff in discretionary purchases and to ensure suitable audit procedures are established. Consideration also was given to proposing the Department of Local Government undertake a full management audit of the council, however, the Department of Local Government commenced such an audit prior to the final report.

No recommendation was made in relation to the shire clerk's or storekeeper's conduct, as the council had dismissed the employees prior to advising of the complaint. However, it was considered the council pre-empted the outcome of the inquiry and imposed a harsher penalty than would have been recommended.

Council has subsequently advised that the recommendations have been adopted in full.

Case Study 18

Seins for the memories...

Mr G complained Parramatta City Council had increased the cost of a parking fine incurred by his friend Mr D, from $40 to $133. Mr G considered this to be:

> *"...a gargantuan racket which is totally unacceptable in a society which holds itself out as at least having some semblance of justice remaining."*

The fine incurred by Mr D was originally $40, but as it was not paid within the time allowed, council referred the matter to their solicitors for Court enforcement action.

When parking infringements are issued, either by council or the Police Service, the identity of the owner of the offending vehicle is generally not known. A search of the Roads and Traffic Authority's computer records is required, based on vehicle registration particulars, to ascertain this information.

A fee of $15 is paid by council to the RTA for this service. Parramatta City Council's solicitors then applied to the Parramatta Local Court for the issue of a summons, at a cost of $45. The solicitors charge professional costs of $33 for their services on behalf of council. These additional fees are, of course, passed on to the registered owner of the offending vehicle.

In this manner, the fine escalates from $40 to $133.

At the same time as council's solicitors forward the summons to attend court, a letter is attached advising the relevant vehicle owner that if the amount of $133 is paid at least two weeks prior to the date of Court, the summons will be withdrawn.

If the owner of the offending vehicle chooses not to pay and not to attend Court, the Court has the power to increase the fine and associated costs.

Mr G complained council's solicitors had sent the summons and notice of demand for payment to Mr D by ordinary pre-paid post. This is considered to be an acceptable mode of service under the Justices Act for parking and certain other traffic offences.

Mr G also complained Parramatta City Council did not have a reminder letter system which would afford the owner of an offending vehicle the opportunity to pay the original fine (ie, $40) before other costs are added.

Parramatta City Council, as at 1 February 1992, has adopted an entirely new process for enforcing its parking infringements. This council, together with a number of other local councils throughout New South Wales, has accepted a commercial offer by the NSW Police Service Infringement Processing Bureau to use its Self Enforcing Infringement Notices System (SEINS).

Parramatta Council's parking infringements will now be handled in the same manner as traffic and parking infringements issued by the Police Service. If the fine is not paid within 21 days after issue of the first notice, a courtesy letter is forwarded, allowing a further 21 days to pay. If a fine is not paid within this time, enforcement action is taken through the RTA, which can result in license and/or registration cancellation.

Consequently, this Office declined to investigate Mr G's complaint, as council had taken appropriate action to ensure reminder notices are sent before additional costs are incurred.

This may well be a timely reminder to pay fines or make representations within the time allowed, otherwise further costs and the inconvenience of loss of license or registration may result.

Case Study 19

Lake Macquarie Council - Squares the Account

Last year's annual report discussed the complaint by the Toronto Senior Citizen's Club about Lake Macquarie Council selling the land on which their clubhouse stood.

The property in Carey Street, Toronto, was donated outright to the senior citizens club in 1956 by a local benefactor and in 1959 the clubhouse was built by the club members with community support. In the mid 1970s council became interested in extending the clubhouse for community services and in August 1976 formally resolved to negotiate with the club for the transfer of the property to enable council to apply for a grant.

In 1979 and 1982 council gave a number of written undertakings, including that it would apply for a government grant on completion of the transfer and, in the meantime, the club would operate in the existing clubhouse. Council believed at the time funds would be available by 1985-1987. However, there was a change in government policy on capital grants and the Toronto project did not rank a high priority.

In 1988 the club heard from council's solicitors that the council had real estate plans for the property, and later, tenders were being invited for the purchase of the property. In 1989 council sold the clubhouse site, together with adjoining blocks to Henny Penny Foods Ltd for $705,000, and the club was required to vacate the premises by December. The clubhouse, given a replacement value of $30,000 on council's books, was demolished to expedite the sale. The club accepted an offer from council to hold their future activities at the Toronto Bowling Club.

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 its reserve for reinvestment of assets, established to finance land development for resale and to improve caravan parks.

Later, the (then) mayor, Alderman Welsh, advised that an estimated $100,000, which was the value calculated on a pro rata basis, would be provided for a proposed multi purpose community building. He could not say how much of the $100,000 would go towards facilities for senior citizens.

The Ombudsman obtained legal advice from a Queens Counsel who said the agreement between the club and council must be construed as going beyond the contract of sale. Council had adopted a fiduciary (ie, a trustee) position by undertaking to act on behalf of the club in applying to the Federal Government for funding. As a fiduciary, council also was liable to account for any profit or benefit obtained. Council had breached its fiduciary obligations by its subsequent action.

At the time of last year's annual report, a draft report had been issued to the Minister for Local Government recommending council place the proceeds of the sale of the land formerly belonging to the senior citizens club into a special trust account, together with the interest earned on the proceeds and an amount to cover the value of the demolished clubhouse. This trust should then be used to provide facilities for senior citizens in the new centre if it is built.

The Minister agreed with the Ombudsman's recommendations and the report was made final on 24 October 1991.

On 9 June 1992, the Mayor, Alderman Carley, advised the sum of $142,000 plus interest of $33,550 had been set aside in a separate reserve for future development of a senior citizens centre at Toronto. He said no decision had been made yet by council as to how the proceeds of the sale will be used to provide a facility for the senior citizens. However, he said the council had resolved that the proceeds be used for that specific purpose.

The Mayor did not respond to the Ombudsman's question as to his intention regarding the allocation of $30,000 replacement value of the former club house to the separate identified account.

Besides this last outstanding matter, Lake Macquarie Council has come a long way in squaring the account with the Toronto Senior Citizens Club.

Case Study 20

Collecting Rates on No Man's Land

Under section 26(5) of the Ombudsman Act, after a final report on an investigation is issued, the head of the public authority whose conduct has been investigated and reported on, will notify the Ombudsman of any action taken or proposed as a consequence of the report. If the Ombudsman is not satisfied sufficient steps have been taken, under section 27 of the Act he may make a report to the minister for presentation to Parliament.

Although Maclean Shire Council has not complied with the Ombudsman's recommendations within reasonable time, council furnished sufficient reason. Consequently, the Ombudsman decided to monitor the progress.

The matter dates to September 1986 when owners of land at Palmers Island complained about the refusal of council to allow them to build on their land, because of a report released by the Public Works Department (PWD) entitled, Palmers Island Bank Erosion Study.

This PWD study was conducted in 1983 and concluded that small scale rock tipping could continue to slow the rate of erosion but would not provide a long term solution; works such as rock tipping could lead to a false sense of security and increase the risk of sudden collapse of the bank and thus endanger lives and property; it could also encourage further development.

In 1985 council made submissions to PWD on two alternative bank protection proposals, but both were rejected. PWD recommended council implement a voluntary purchase scheme.

Council embargoed building approvals on the affected land and, as a result, the owners were obliged to pay rates on property they could neither sell or develop. (Council introduced a differential general rate in 1987 for the vacant lands affected by the development freeze. The amount levied is 50 per cent of the general rate).

An investigation into the conduct of the council commenced in September 1986 and was finalised in September 1987. The report recommended Maclean Shire Council to take all steps necessary within its power to establish a voluntary purchase scheme in relation to the "de facto non development area" on Palmers Island.

In November 1987 the shire clerk advised that council had sought a deputation with the Department of Local Government and his senior officers were meeting with PWD about the procedures for a voluntary purchase scheme. Later, in February 1988, the shire clerk advised PWD had informed him eligibility for assistance from the Commonwealth and State Governments, under the Flood Mitigation Scheme, depended on statewide priorities and the availability of funds. He said council and PWD decided to develop a flood plan management strategy and the project was at its final stage.

In April 1988 the Clarence River experienced major flooding. The river bank within Palmers Island village was not damaged and council believed riverbank protection works should be reconsidered. By August 1988 council had ascertained funds were not available for protection works. Council and PWD engineers agreed to obtain an independent study on the riverbank and Professor C Appelt from Queensland University was commissioned to undertake the research.

The Ombudsman agreed to defer his review of council's conduct pending the issue of Professor Appelt's report. Subsequently, the Ombudsman was advised his report would not be issued until April 1989.

In July 1989 the shire clerk forwarded a copy of Professor Appelt's report. In brief, the study concluded the bank protection works proposed by Maclean Shire Council were insufficient to provide an acceptably low level of risk; Professor Appelt agreed with the PWD 1983 report in general.

Council's engineer, however, prepared a report on a number of options and proposed another study by consultants to estimate the various costs. Council agreed, but said the study would have to be finalised by June 1990.

In March 1991, the shire clerk advised that the draft final report from the consultants was expected to be completed by May 1991. The draft was not completed until the following September and still had to be reviewed by officers of the council and the PWD. Some of the options which came under consideration were a voluntary purchase scheme, zoning controls, variable zoning and structural projects. All the shire clerk could say was that the Office of the Ombudsman would be further advised when the consultant's report had been considered by council.

The latest response to the Ombudsman's enquiries was that the investigations by the consultant had concluded and his final report had been delivered. The shire clerk said, however, council's engineer had been digesting the report and would be discussing it with the Flood Plain Management Committee. He said he could not give a time frame for the resolution of the matter.

The five year delay by Maclean Shire Council and its indecisions regarding the management of Palmer Island have passed the point of being reasonable.

The Ombudsman, of course, does not have the power to direct a public authority to take any particular course of action. The Ombudsman can, however, draw public attention to the failure of Maclean Shire Council to manage this section of waterfront land, and to its lack of consideration towards its current and prospective constituents at Palmers Island, who nonetheless continue to contribute to council's rate revenue.

CHAPTER FOUR

COMPLAINTS ABOUT PRISONS

OVERVIEW

The majority of written complaints made by prisoners or others on their behalf to the Ombudsman concern the Department of Corrective Services. During the year 391 written complaints were received about the conduct of the Department of Corrective Services. Some of the complaints were in the form of petitions.

In all 908 prisoners were involved in lodging these complaints. A further 349 prisoners made oral complaints to investigation officers during visits to correctional institutions. These complaints generally were resolved by enquiries made at the institution at the time. A small number of written complaints concern the Prison Medical Service of the Department of Health. The nature of these written complaints is set out in the following table, together with comparable figures for the two previous years.

Complaints about Corrective Services

Nature of Complaint	Number	Number	Number
	July 1989 to June 1990	July 1990 to June 1991	July 1991 to June 1992
Officer Misconduct	**24**	**69**	**50**
- threats/harrassment	14	31	17
- assaults	10	31	18
- other criminal	-	7	15
Property	**25**	**74**	**47**
- private property policy		11	2*
- confiscation of/lost		37	30
- delay in transferring		11	4
- failure to compensate for		15	11

**One complaint was a petition from 40 inmates at the Reception Centre complaining about the procedures for recording property on reception.*

Complaints about Corrective Services (continued B)			
Nature of Complaint	**Number**	**Number**	**Number**
	July 1989 to June 1990	**July 1990 to June 1991**	**July 1991 to June 1992**
Record Keeping/Administration	**71**	**50**	**40**
- sentence calculation	30	14	8
- failure to reply to applications	11	9	4
- remissions	14	8	9
- private cash accounts	9	8	8
- failure to process appeal papers	7	2	3
- other	-	9	8
Classification	**21**	**33**	**41**
Transfers	**32**	**37**	**33**
- unreasonable transfer/refusal to	-	21	23
- delay in effecting	-	8	1
- form of transport	-	4	6
- interstate	-	4	3
Segregation	**6**	**40**	**32**
- unreasonable segregation	6	37	31
- failure to give reasons	-	3	1
Mail	**20**	**19**	**24**
- delays in delivery	-	10	8
- interception of/missing	-	8	15
- interference with Ombudsman's	-	1	1
Visits	**6**	**24**	**21**
- ban on visitor	-	7	9
- access to	-	17	12*

**One complaint was a petition from 10 inmates at Mulawa Correctional Centre complaining about the prohibition on all day children visits for protection prisoners.*

Complaints about Corrective Services (continued C)			
Nature of Complaint	**Number**	**Number**	**Number**
	July 1989 to June 1990	**July 1990 to June 1991**	**July 1991 to June 1992**
Daily Routine	**21**	**38**	**18**
- access to amenities/activities	-	3	4*
- access to telephone calls	-	6	5
- general treatment (including time out of cells)	-	29	9**
**One complaint was a petition from 119 inmates of St Heliers Correctional Centre about the failure of the activities officer to carry out his duties.* ***One complaint was a petition from 17 inmates of the Long Bay Prison Hospital about being locked in cells for excessive hours due to officer shortages.*			
Unfair discipline	**1**	**15**	**16**
Medical	**7**	**17**	**13**
- access to/denial of	7	14	12
- methadone	-	3	1*
**One complaint was a petition from 10 inmates of Grafton Correctional Centre about proposed changes to the distribution of methadone.*			
Failure to ensure physical safety	**22**	**16**	**12**
Physical conditions/facilities	**8**	**43**	**10**
- unhygienic conditions		23	3*
- lack of basic provisions (eg, bedding, clothing, etc)		20	7**
**One complaint was a petition from 107 inmates at Goulburn Correctional Centre about unhygienic conditions and access to basic amenities.* ***One complaint was a petition from 169 inmates of Lithgow Correctional Centre complaining about the removal of kitchens from accommodation units.*			
Work and education	**3**	**20**	**10**
- access to/removal from		16	10
- other		4	-

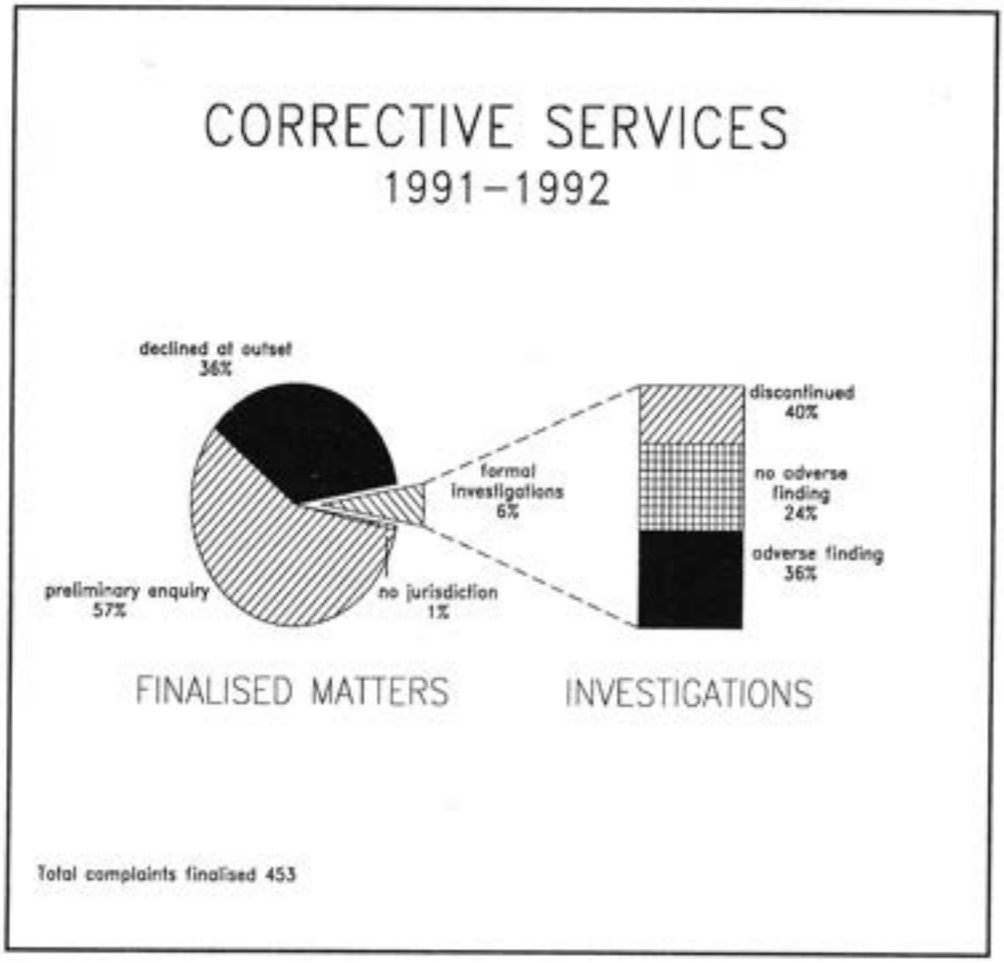
Complaints about Corrective Services (continued D)			
Nature of Complaint	**Number**	**Number**	**Number**
	July 1989 to June 1990	**July 1990 to June 1991**	**July 1991 to June 1992**
Food and diet	**4**	**3**	**7***
One complaint was a petition from 53 inmates at Parklea Centre about inadequate food rations.			
Security measures (including cell and strip searches)	**11**	**8**	**4**
Probation and parole	**0**	**6**	**3**
Legal	**1**	**-**	**3**
Periodic detention		**-**	**3**
Buy ups	**5**	**2**	**1**
Day leave	**1**	**6**	**-**
Other	**19**	**-**	**3**
Total	308	520*	391
Eight complaints were petitions signed by a total of 431 prisoners.			

Complaints about Prison Medical Service			
Nature of Complaint	**Number**	**Number**	**Number**
	July 1989 to June 1990	**July 1990 to June 1991**	**July 1991 to June 1992**
- standard of care	10	12	25
- dental service		10	2
- other	3	-	-
Total	13	22	27

Overall there has been a 25 per cent reduction in the number of written complaints received this year about the conduct of the Department of Corrective Services compared to 1990/91. However, due to the number of petitions, almost the same total number of prisoners were involved in making these written and oral complaints to the Ombudsman as in the previous year. The fall was less than one per cent. The fall in the number of written complaints is most likely the product of reduced tensions in NSW gaols compared to the turmoil that characterised the 1990-1991 period. It also is likely to be a product of the reduced visibility of the Ombudsman in correctional centres due to restricted visiting and the greater visibility of official visitors. During the year, this Office has engaged in a number of activities to promote official visitors as an effective internal grievance mechanism.

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, only one written complaint was received about any of those bodies which was outside jurisdiction.



ACHIEVEMENTS

Some significant achievements gained by the Ombudsman's intervention and recommendations following investigation of complaints about prisons.

- new facilities and extra staff at Assessment Centre
- closure of the Goulburn High Security Unit pending a review of operational procedures
- new policy and procedures on the segregation of inmates
- review of Prisons (Segregation) Amendment Bill 1992
- new policy on classification and placement of interstate transfer prisoners
- proposed amendment of Prisons (Administration) Regulation to include anti-corruption provisions
- new day leave policy
- approximately 50 inmates refunded over fraud committed by prison officer at Maitland Correctional Centre
- monetry and other compensation paid to various prisoners over loss of property by the department
- written apologies provided by Commissioner to two prisoners for wrong administrative conduct
- allocation of $200,000 to project to find alternative forms of transportation for inmates on long distance escorts
- new policy on prisoner's access to legal papers during court escorts
- introduction of prisoner's complaint form in correctional centres
- maintenance program implemented at Reception Centre and other prisons to fix emergency call buttons in cells

ACCESS TO THE OMBUDSMAN

Prisoners have a right to make complaints to the Ombudsman under the provisions of the Ombudsman Act and the Prisons (General) Regulation provides for privileged correspondence between prisoners and the Ombudsman. Prisoners also are free to phone the Ombudsman, although those calls are countered as part of their normal entitlements.

Due to the high degree of illiteracy among the prison population, officers of the Ombudsman also attempt to make regular visits to correctional centres and juvenile institutions to hear complaints and to give general advice. These visits also enable investigation officers to be informed of conditions and developments throughout the state's correctional centres and to make personal contact with senior staff at each institution. This improves assessment of complaints about institutions and provides contacts necessary for speedy resolution of complaints wherever possible.

Given the particular history of systematic abuse of prisoners uncovered by the Nagle Royal Commission into New South Wales Prisons and the propensity for such practices to resurface (see section on the Parklea Riot), it is in the public interest for the Ombudsman to regularly inspect the conditions and practices in NSW prisons.

Prison Visits

There are 35 separate correctional centre or annexes in NSW and nine juvenile institutions. Approximately half of these facilities are in the country. When the present Ombudsman took office, it was the practice to visit each institution approximately twice a year for general outreach purposes. The Ombudsman considered that to be an inadequate service. Since then budgetary constraints have further limited the Ombudsman's ability to conduct this outreach service.

In the past year only 27 visits were made to adult prisons and three visits to juvenile detention centres. As some adult gaols were visited on more than one occasion, only 18 of the 29 main correctional centres received visits. Centres such as Broken Hill and Mannus, which are the most distant and therefore the most costly to service, have not received visits for more than two years. The lack of visibility of the Ombudsman in gaols is one cause of the decline in the number of written complaints this year.

Official Visitors

Given these restraints, other strategies have been emphasised to ensure prisoners have access to an adequate grievance mechanism. The Office has supported moves by the Minister for Justice to invigorate the Official Visitor Scheme. The Assistant Ombudsman spoke at the annual seminar for official visitors and regional meetings of visitors have been addressed by the Assistant Ombudsman or experienced investigation officers. A number of official visitors regularly seek advice from this Office on particular complaints or methods of inquiry. The responsibilities of official visitors also have been extended to cater for concerns of the Ombudsman on the issue of segregation.

Complaint Form

The Department of Corrective Services, with the support of official visitors, also recently agreed to distribute an Ombudsman complaint form in correctional centres. The form was designed to stem the flow of complaints to this Office by directing prisoners to take their grievances in the first instance to gaol governors and official visitors. The implementation of the prisoner's complaint form will be the subject of an evaluation during 1992/93.

The Department of Corrective Services also has published a number of articles in its fortnightly staff bulletin to help educate and inform its staff about the Ombudsman's jurisdiction and procedures. Each class of trainee prison officers are addressed by the Assistant Ombudsman or an experienced investigation officer at the Corrective Services Academy. Making front line staff more aware of the Ombudsman as an accountability mechanism hopefully will lead to more professional and consistent service.

Misconduct by Prison Officers

Complaints about prison officers fall into three categories. The first are complaints of harassment or threats. Not all involve prisoners, some are claims of harassment of prisoners' visitors. Generally, there are no witnesses or they are complaints of systematic harassment where each individual event is somewhat trivial but collectively form a deliberate campaign.

It is difficult to investigate such claims because they involve interactions which rarely leave any evidence trail.

Where appropriate such complaints are raised with the superintendent for action at a management and staff training level. In cases where consistent complaints are made about individual officers investigation may be warranted. There have been no such cases in the past year.

The second category involves allegations of physical assault by prison officers. Prisoners making such complaints expect the Ombudsman to investigate and prosecute the officers concerned. While the Ombudsman has wide powers of investigation, he can only make recommendations and has no power to initiate proceedings. The evidence gathered during an investigation by the Ombudsman cannot be used in other proceedings. Under section 35(1) of the Ombudsman Act, civilian investigators in the Ombudsman's Office are designated as being not competent or compellable to give evidence or produce any document in any legal proceeding.

Where cases of criminal assault can be established a further investigation by some other authority is needed before any proceedings can be initiated.

In the past years, the practice of this Office has been to ensure that the department properly carried out its own policy on the reporting and investigation of assault allegations; to request the Commissioner to have some cases investigated by the seconded police officers in the department's Special Investigation Unit; and to provide advice to prisoners about other legal remedies available to them.

In cases where there are allegations of assaults on more than one prisoner, and certainly in cases where there are allegations of systematic bashings of prisoners, this Office has considered it in the public interest to formally investigate.

One such investigation completed during the year examined serious allegations of systematic assaults on prisoners during the riot at Parklea Prison on 23 September 1990.

The final category of complaints against prison officers concerns other criminal behaviour. In the past year complaints covered alleged frauds, conspiracies, illegal telephone interception and the use of listening devices and larceny. These complaints also are affected by the restrictions relating to admissibility of evidence and for that reason the Ombudsman may consider referring such cases to another investigation agency where appropriate. One case that was investigated by the Ombudsman in the past year involved a fraud committed at Maitland Correctional Centre.

Case Study 1

Parklea Riot

The prisoners private property policy was implemented at Parklea Correctional Centre on 10 September 1990. In the following two weeks there were a series of incidents of disobedience in protest at the policy. Many prisoners destroyed the personal property they were being forced to give up and cell furniture and fittings were destroyed. By 21 and 22 September, however, the gaol appeared to have returned to normal.

On 23 September 1990, staff received information that there would be a disturbance later in the day. That disturbance resulted in the most significant damage to a NSW gaol experienced since Bathurst Gaol was burnt down in the late 1970's.

The riot appeared well organised, erupting at a pre-determined time throughout the gaol. The main disturbance lasted less than 15 minutes in 1 and 2 wings before they were cleared of inmates. It took less than 30 minutes before 3 wing was cleared and less than 45 minutes before 4 wing was cleared of rioting prisoners. Yet in that time, almost every window in the wings was smashed, as were light fittings, fans, sinks and toilets. Kitchens were destroyed and cell doors made inoperable. A number of power boxes and wing offices were burnt. In evidence to the Ombudsman's inquiry, Superintendent de Silva said over $1.5 million subsequently was spent to make the gaol operational again.

At the time there was extreme threat to life of both prisoners and officers, initially from the toxic fumes and smoke from the various fires, and later when a small band of prisoners took refuge on the roof of 4 wing, actively resisting the prison officers. Apart from the extensive damage caused to public property, there was the threat of the potential breach of the total security of what was then a maximum security gaol.

Given the amount of physical damage, the presence of serious fires and the use of gas to control prisoners, it was remarkable there were so few injuries among the prisoners and officers. The containment of the riot and the isolation of the majority of prisoners in a holding yard took less that 30 minutes. This was accomplished by gaol based officers with the initial assistance of only eleven special response unit officers.

Unfortunately some prison officers later metered out retribution on some prisoners.

Inquiry

In the following months complaints were made to the Ombudsman about assaults and destruction of prisoners television sets. After interviewing 30 prisoners who gave consistent stories of being assaulted during one or more movements of prisoners during the riot, the Ombudsman decided to conduct a formal investigation.

Written reports were gathered from the 114 officers who attended the disturbance and later oral evidence was taken from 61 officers, nine members of the Prison Medical Service and four Public Works staff during an inquiry held over 16 days at various institutions. Sixty five prisoners (22 per cent of the gaol population) were interviewed. They included prisoners who reported or were identified by others as victims of assaults, prisoners identified from medical records and a random sample.

The allegations of assault involved different stages of the riot and its containment; the clearing of the wings, the escort of the majority of prisoners to and from the holding yard, the removal of the resisting prisoners from the roof, then to 1 wing, and the placement of prisoners in cells in 1 wing.

In the majority of cases, the evidence was insufficient to support any finding of misconduct or unreasonable force given the context of the urgent need to clear wings and restore order and secure the safety of both prisoners and officers, and the statutory authority given to prison officers to use force in such circumstances under the Prisons (General) Regulation. In other cases the conflicts in evidence and the lack of corroboration meant it was not possible to reach a finding that the alleged assaults took place.

This was not the case, however, in relation to three events. In two individual cases, prisoners who were not resisting were assaulted while being put into cells in 1 wing. One prisoner received broken ribs and had bruises on his back consistent with the baton blows he claimed caused the injuries. All officers denied witnessing the event although he was a well known prisoner and one of the first prisoners to be put away that night. Another prisoner was struck on the head in similar circumstances and received a laceration requiring suturing.

In both cases there was no explanation for the assaults. There was simply total denial which was contradicted by the forensic evidence.

Running the Gauntlet

The most serious assault occurred when 48 prisoners who had resisted officers on the roof of 4 wing were put into cells later that night. The weight of evidence indicated that an extended line of somewhere between 20 and 25 Parklea officers dressed in riot gear formed in two rows inside the wing. As the prisoners were escorted into and through the wing by emergency unit officers, the unidentified Parklea officers in this gauntlet batoned, kicked and punched the prisoners. The gauntlet was concentrated in the far south common room. The prisoners gave convincing accounts of this event which received substantial corroboration from four special response unit officers. One gave evidence of the officers in the line intimidating prisoners by yelling, name calling and threatening gestures. Another corroborated this and observed a prisoner hit across the back of the legs with a baton after he struggled with his escorting officers. A further officer confirmed claims that prisoners were kicked, punched and batoned. He was hit in the process and received bruising to his body as a result.

According to this officer the majority of the prisoners he escorted into the wing were treated in this way. His partner gave clear evidence of one inmate being forcefully struck in the stomach with a baton. Both said the assaults were unprovoked. They were certain that the officers responsible were Parklea officers although, like the prisoner victims, they were unable to identify them because they were in riot gear.

Only a handful of Parklea officers admitted to being in this line and all totally denied anything untoward. There were obviously many more involved it was impossible to conclude whether all present participated in the assaults. Certainly a significant number of the officers participated in a conspiracy of silence over the episode as did a number of the special response unit officers who escorted the prisoners along the line.

Apart from these prisoners who had resisted officers on the roof of 4 wing, it was common evidence from both officers and prisoners that the majority of inmates did not mean any harm to the officers. This was illustrated by stories told by officers of how prisoners gave the wing officers time to escape before they attacked the wing offices and of prisoners carefully removing an officer's jacket and bag from an office before setting the office on fire. The riot was perceived by all as an elaborate protest against the implementation of the ministerial policy on prisoner's private property.

Batoned Televisons

While physical damage to the gaol was the target of the riot, there was certainly damage to prisoners' own property during the mayhem. Many cells were turned upside down although the substantive damage was mainly to fixtures and fittings. However, there were an unprecedented number of prisoners' television sets destroyed during or immediately after the riot. The Assistant Ombudsman was satisfied that the number was somewhere between 100-150.

There was no direct evidence of how this occurred. The prison officers suggested the prisoners did this, but the prisoners believed the officers caused the damage. Most of the damaged televisions had small round holes knocked through the screens which prisoners said were baton holes. There were no witnesses either among prisoners or officers of the damage being done. Some officers claimed seeing some sets destroyed by prisoners but they turned out to be gaol property sets. One prisoner was said to have reported seeing other prisoners destroy his television during the riot but he denied this when interviewed by the Ombudsman.

Some officers said they remembered the TV's being intact when they cleared the wings while others were adamant they were destroyed at that stage. The most valuable evidence came from one officer who went into a specific cell in 4 wing when he was checking the wing for useable cells after all the prisoners had been contained in holding yards. He recalled the TV in the cell was intact but a video recording of the cell damage taken two days later showed the television in that cell was damaged. The evidence shows that particular television set could not have been damaged by prisoners.

While the evidence of that officer added weight to the prisoner's claims, and while the Assistant Ombudsman was generally of the view that the it was not credible that the prisoners destroyed their own or each others' sets (TV's being the most prized possession of a prisoner), there was insufficient evidence available to determine the truth of the matter.

Denials

The most damaging result of the investigation in terms of the long term health of the prison system, was the culture of silence among prison officers. The inquiry was faced with a barrage of stereotyped denials of misconduct or observations of misconduct. The majority of officers gave accounts of orderly clearing of wings and prisoner escorts which were hardly credible given the emotionally charged and dangerous events they were describing.

At the moment there appears to be no positive duty placed on prison officers to report any misconduct of fellow officers that comes to their attention. Consequently, the report of the Assistant Ombudsman recommended that the Prisons (Administration) Regulation be amended to include rules similar to those governing police that require the reporting of misconduct that comes to officers' attention either directly or indirectly and a rule outlawing any discrimination against officers for reporting such conduct.

The investigation also recognised some individual acts of valour on the part of some officers during the riot and recommended that the commissioner commend the officers in some appropriate way. Both recommendations have been agreed to by the commissioner.

Case Study 2

Maitland Fraud Case

In May 1991 an inmate at Cessnock gaol complained he had been overcharged for electrical items when he was in Maitland Gaol.

Inmates can buy basic items like extra food and toiletries through canteen buy-ups from a list of products put together by a contractor. However, other items to make life in prison a little more bearable, like televisions and radios, can also be bought through activities buy-ups. These items are ordered by prisoners and then purchased at the cheapest price (theoretically) by the activities officer.

Preliminary inquiries by this office were met with assurances that everything was alright from the activities officer responsible for the purchase of such items.

The prisoner persisted and with the support of a prison officer from Cessnock spelt out his concerns. An unannounced inspection of Maitland's account books by this Office revealed major discrepancies between the price paid for goods and the price charged to inmates.

A major investigation revealed the activities officer was inflating the cost price to the inmates and keeping the difference. In some cases this was as low as a few cents but amounted, overall, to a considerable sum. The Department of Corrective Services speculated the total cost to prisoners could have been as high as $10,000. It was impossible to tell exactly how many prisoners had been defrauded, or how much had been taken because the accounting records were incomplete. The records that did exist identified 96 inmates who had been defrauded.

What was instantly clear was that the existing procedures did not insist on matching invoices to the forms signed by prisoners when the goods were delivered. It was easy for the activities officer, no one ever checked whether he charged inmates the right price.

At the instigation of the Ombudsman the department drafted new guidelines setting out how records should be maintained and refunded money to most of the inmates who could be located. Unfortunately the persistent complainant was not one of those who got his money back; the documentation concerning the purchase of his TV was *"lost"* and no fraud could be proven.

The officer was charged and convicted of the crime and no longer works for the department.

CONDITIONS IN GAOLS

Case Study 3

The High Security Unit

Since the closure of Katingal Gaol following the Nagle Royal Commission, the High Security Unit (HSU) at Goulburn Correctional Centre has provided specialist segregation for prisoners considered to pose difficult management problems, either overt or covert. Prisoners who assault prison officers, for example, have almost invariably been sent there. In the 18 months up to July 1991, 67 inmates had been held in the unit, seven on more than one occasion. The average stay was three months but five prisoners spent 12 months or more there, and two of them as long as sixteen and seventeen months.

At night the inmates are housed in spartan cells in D wing, part of the oldest section of the gaol. During the day, they are put in the building known as the HSU. It comprises two rows of cells opening onto a shared corridor. There are five larger cells measuring 9.75m by 4m. Another cell this size functions as the exercise yard. Part of its roof is open to the air through steel bars. There are seven smaller cells measuring 5.18 by 1.38m. There is also a storeroom which has a steel cage inside where inmates are placed for interviews with professional staff.

Each cell has an open toilet bowl, a small plastic table and a chair, a 7.5 foam mattress and whatever personal property an inmate is allowed. High on the wall is a shower outlet which is controlled externally by prison officers. There is a chalk board set into the wall. There is no window apart from the hatch or peep hole in the metal door which is kept locked except when officers deliver meals. On the roof there are glass louvre windows. They have always appeared not to work during inspections by the Ombudsman. The top of one wall is a type of plexiglass that opens onto a catwalk that is patrolled by an officer all the time. The prisoners have no privacy in these cells.

Showers are operated once daily for 5 to 10 minutes and inmates can request cleaning materials.

Reduced Amenities

Until February 1991 prisoners held in the unit had almost identical entitlements and privileges to other prisoners on segregation in other gaols except they did not have contact visits and were allowed only half the weekly buy up amount. In that month, however, a new program was introduced which substantially reduced the amenities of the prisoners held in the HSU and which formed stage one of a three stage program.

The amenities were reduced under section 22(3) of the Prison Act. That section says prisoners on segregation shall not suffer reduction in diet or amenities except by order of the commissioner.

The order relating to the HSU allowed inmates one box visit every 14 days, the right to buy some pre-paid envelopes to write letters and to have a small radio. Banned were contact visits, telephone calls except in extenuating circumstances, newspapers, magazines, journals, electrical items and tobacco. The inmates were not allowed any payments and inmates held in the unit for assault or intended assault on officers were not permitted any private clothing or property.

The prisoners spend from 8am to 3.30pm in HSU cells and the rest of the day and night in their single cells in D wing. The two hours of exercise in the open air guaranteed prisoners under the Prison Act and Regulations is taken in the exercise yard in the HSU, although access to the yard is not allowed during the first ten days in the unit. Given the number of hours spent in the HSU it is impossible for inmates to receive the two hours a day in the yard if the unit has more than three inmates.

Protest

The conditions and amenities constituted a significant deprivation of the entitlements and privileges normally available in maximum security gaols. One prisoner who complained to the Ombudsman described the HSU as 10 times worse than Katingal. During the investigation some prisoners were so frustrated with the poor conditions they staged a protest by ripping up the gaol issue overalls and damaging other property. They also refused to use the toilets in the yards and spread faeces, urine and toilet paper over the walls and floors. During the protest, which lasted for over ten days, the staff withdrew some of the remaining amenities such as the issue of towels and hot water for tea until the prisoners protest collapsed.

Behaviour Modification

The conditions and reduced amenities in the HSU were part of a three stage program purportedly aimed at changing the inmates behaviour. This office was told its purpose was *"to foster positive interaction between prison officers and prisoners"* and it was based on principles of behaviour modification where appropriate positive and negative reinforcement was provided in relation to desirable and undesirable behaviour. It was also said to be *"designed to make effective use of the prisoners time in the unit"*.

A number of prisoners complained to the Ombudsman shortly after the introduction of this program. An investigation was commenced into the conditions of the HSU and the monitoring and review of the segregation of certain prisoners housed there during the year. This investigation led to a detailed examination of the department's policy and procedures relating to segregation (see section on segregation). That policy makes it clear that segregation (even in the HSU) is to be used as a temporary, short term measure, in situations of emergency for the purpose of reducing threats and restoring order in a gaol. As such it is a management tool and is not meant to be used as punishment.

The HSU is the end of the road for prisoners in the NSW prison system. It provides the most secure environment of any gaol and its conditions are the harshest. While the cells prisoners sleep in are no different from ones found in other older gaols, they are bereft of the items that make the 16 hour lock in bearable for most inmates such as books, magazines, writing material and TVs. During the day they are housed alone in sterile yards under constant observation with nothing to do . They have no windows and the windows in their night cells only look out onto the bare brick wall of the HSU. The investigation by the Assistant Ombudsman concluded the HSU prisoners were the most sensory deprived prisoners in the NSW system.

Breach of UN Rules

As a result of the investigation it was found that the ability to restrict rights and privileges under s22(3) of the Prison Act should be for a purpose constituting a legitimate part of the purpose of segregation and the restrictions at the HSU did not fulfil this. There was no legitimate purpose served in denying the inmates newspapers and books, for example. It did not help overcome the threat to safety, security and good order. It also was concluded that such restrictions could not properly be regarded as a legitimate part of a behaviour modification program and were, therefore, outside the purpose underlying the segregation provisions of the Prison Act.

Certain rights guaranteed under the Act, such as exercise, were not even covered by the purported s22(3) order and the Act was being regularly breached by the failure to give the inmates the opportunity to exercise in an open air space for two hours each day. The order governing the conditions at the HSU also was inconsistent. Inmates were allowed to have a radio, for example, but if they did not already have one, they could not buy one because buy-ups were banned. The further ban on all private property of prisoners held for assaulting officers could only be seen as a means of punishment.

Given the sensory deprivation that the inmates in the HSU were forced to endure, it was concluded that no reasonable person could consider placement in the unit to be anything but a form of punishment. This constituted a breach of the department's own policy on segregation and was inconsistent with the stated purpose for which Parliament approved the power to segregate. The conditions and lack of amenities were considered to aggravate the suffering inherent in imprisonment and were in breach of Rule 57 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

Unreasonable Program

The program that was said to justify these deprivations also was highly criticised. The Assistant Ombudsman said it had little or no reasonable connection with a sensible scheme of behaviour modification. At the broad level the program did not have any articulated purpose nor did it set broad goals or anticipated outcomes, let alone have strategies to achieve such outcomes. There was no clear identification of what behaviours were sought to be reinforced in individual prisoners or what behaviours were sought to be eliminated. The only reward was being able to get out of the unit but inmates were in a catch 22 situation as many of them were not told what they had to do to get out. Good behaviour, for instance, did not necessarily lead to an early graduation from the HSU into the second stage.

The program also was defective in terms of the capability of the staff to implement it. Until late in the investigation none of the staff had any training in unit management let alone the principles of behaviour modification. They often did not know why a prisoner had been placed in the unit and therefore had no way of telling what the issues were that the prisoner had to confront while in the unit. There was no evidence that the prisoner/prison officer interaction that is part of case management applied in the unit.

It was clear the purported HSU stage one program was ineffective. The additional but still severely restricted privileges available in the second and third stage (which were housed in the more modern purpose built segregation facilities in the Multi-Purpose Unit of Goulburn Correctional Centre) did not constitute any effective incentive for the prisoners to conform. This was conceded by senior officers and was born out by the prisoner's protest.

The system for reviewing and monitoring the behaviour of the inmates held in the HSU was totally deficient. These were detailed as were the other findings and a series of recommendations in a ninety page report by the Assistant Ombudsman.

Following the issue of the provisional report on this investigation, the HSU was cleared of prisoners and closed down. It has since been remodelled for use in another program. It is hoped the department will be able to effectively manage the prisoners in its care without having to resort to the regime of the old HSU again.

Case Study 4

Third World Conditions at Long Bay

During the day non-working prisoners were held in security yards adjacent to the wing in which they were housed. These yards measured approximately 24 x 7 metres at the widest point, and up to 80 or 90 prisoners were held in each yard for up to six hours at a stretch. The yards were bare concrete with a couple of low benches. One yard had a single tap and two unscreened toilets. The toilets often overflowed into the yards because they were blocked; the cleaning done during the lunch-time lock up was obviously cursory since the toilets were filthy. There was very little shade and no occupation except pacing up and down. Morning tea was provided by way of a bucket of tea into which prisoners dipped their mugs.

Is this a description of a third world prison? No ... it is what investigation officers found when they visited the Assessment Prison (now the Industrial Centre) at Long Bay in February 1991.

The inspection came after this office received a petition complaining about conditions at the centre. An article in the Sydney Morning Herald on conditions at the Assessment Prison stated the Department of Corrective Services:

> *"...had mounted an investigation into jail conditions and overcrowding after suggestions that NSW jails could be breaching international human rights treaties".*

The article referred to investigations by the Ombudsman and the Human Rights Commission.

As it turned out, only the Ombudsman pursued the matter. The commission was interested but did not have the resources to undertake an active investigation. The Director-General of the Department of Corrective Services' response was:

> *"...it is hardly likely that the department would need to mount an investigation into prison overcrowding as the Herald suggests it has, because prison occupancy levels have been closely monitored for many years and can be ascertained at any time... this is not an investigation that the department has mounted itself."*

Yet, no one disputed the facility was overcrowded. It was designed early in the century to house 216 prisoners. The daily average number of prisoners held in January to April 1991 was somewhere between 350 and 326. In February 1991 this figure included 129 unsentenced prisoners.

The main complaint, in fact, was about the practice of holding a large number of inmates in very small yards with appalling facilities for long periods of time. This resulted in the conditions described above. Other complaints included the poor ventilation in cells, particularly for non-smokers who were housed with smokers, inadequate access to showers and washing facilities, to medical, vocational, educational and recreational facilities and to telephone calls and visits. The protection and segregation areas were criticised as zoo-like.

Limited Resources

While the superintendent at the time agreed with most of the criticisms, he believed resource difficulties prevented any major changes. He was undertaking minor renovations, such as painting the wings, but it seemed little would be done because of the expense and time involved in renovation or construction of new facilities. The Ombudsman believed departmental policies were contributing to the horrific conditions which were so bad that a limited resources argument was not good enough. A formal investigation began in March 1991.

Investigation officers inspected the Industrial Centre and interviewed prisoners and officers, including each of the three superintendents, Messers Hassan, Dries and Dudley, on a number of occasions during the investigation.

The investigation focused on a number of issues:

- Access to employment, education and activities
- Conditions in the security yards
- Conditions in the protection and strict protection areas
- Multiple occupancy of cells and the housing of non-smokers with smokers
- Access to visits and telephone calls
- Conditions and facilities available to non-sentenced prisoners.

While the department was making some effort to improve conditions and facilities identified during the investigation, it was not until Mr Dudley was appointed the new superintendent in June 1991 that significant gains were made. Mr Dudley's mission statement for the centre is *"To provide meaningful work, support and educational programs to those prisoners who are required to be incarcerated in a maximum security environment"*. The investigation and his aim to turn the old Assessment Prison into the new Industrial Centre fortuitously coincided.

Unsentenced Prisoners

Specific complaints were made by remand prisoners who claimed their conditions were less favourable than those in the Remand Centre and that the practice of housing unconvicted and sentenced prisoners together was jeopardising their safety.

Investigation revealed remand prisoners were unlikely to be receiving their full entitlement to phone calls and visits, due both to the pressure on facilities from overcrowding and because not all staff seemed aware unsentenced prisoners are entitled to extra phone calls and visits. Prisoners in the Remand Centre also spent less time locked in their cells, being able to move within the wings until about 10 pm.

When inquiries were made about the entitlements of unsentenced prisoners, it was clear the department was in breach of Section 15 of the Prisons Act 1952. This section provides that:

> *"...to the fullest extent reasonably practicable, convicted prisoners should be separated from other prisoners."*

This was not happening at the Industrial Centre in 1991, with unconvicted and convicted prisoners even sharing cells. The superintendent at the time said this was at the request of the prisoners and limited resources did not allow for special arrangements to be made. Following inquiries from the Ombudsman, the department referred the matter to its Legal Services Division who advised that:

> *"...the legislation requires that this separation of prisoners be given top priority by the department",*

and that requests for shared accommodation should be denied.

By August 1991 Mr Dudley had reorganised the centre so that sentenced and unsentenced prisoners were housed in separate wings and in a separate yard. Mr Dudley said he had chosen the wing closest to the Remand Centre for remand prisoners because he though the Ombudsman would approve - the humour was appreciated. Mixing only occurred in the clinic, in the education unit and in the segregation unit because facilities did not allow for the complete separation. Mr Dudley was keen for all unsentenced prisoners to be transferred so the classification of the centre could be reduced, thereby allowing more access to employment opportunities. Where possible unsentenced prisoners on segregation were transferred to the Remand Centre.

By the middle of 1992 no remand prisoners were held in the Industrial Centre.

Overcrowding

The obvious result of the overcrowding was that the majority of cells were occupied by at least two inmates. Most strict protection cells housed three prisoners. There is only one toilet and basin in each cell and no privacy screen. Cells with three beds had minimal standing room, particularly those where washing was hanging from lines attached to the beds. The cells are ventilated by high slit windows and the ventilation was poor. Prisoners complained rain came in through the unenclosed windows and in winter it was very cold. Prisoners eat in their cells and spend up to 18 hours a day in these cramped and stifling conditions.

Inquiries were made as to whether the multiple occupancy of cells was in contravention of public health regulations. While the cells in the centre were undoubtedly sub-standard, particularly in terms of size, the department was not contravening any regulations because they related only to the construction of new prisons.

In late 1991 the superintendent advised that the cells were to be fitted with new beds which would take up less space, and almost all cells had only two inmates. Mr Dudley's budget did not allow for any other improvements.

Investigation officers also had strongly recommended smokers and non-smokers be accommodated separately if they wished. All superintendents said this was being done, but prisoners said that in practice little attention was paid to the issue. Mr Dudley issued an instruction that as much consideration as possible was to be given to this question when allocating cells.

Investigation officers were also concerned about the limited access to visitors and telephone calls and about the limited access to education and the library because of staffing limitations. Visits during the week had been restricted to one hour, and on weekends sometimes to 30 minutes because of the pressure of numbers. Mr Dudley advised he had insufficient resources to improve the visiting areas, although the legal visiting area was renovated. But by the end of the investigation, the department advised tenders had been let for demountables to increase the visiting area. This was expected to alleviate the problem and perhaps lead to increased flexibility in visiting hours.

Protection, Strict Protection and Segregation Yards

The areas where those prisoners requesting protection from other inmates spend their days were particularly appalling. Both were very small with one toilet and basin apiece, limited chairs and one table. Neither area was clean, one had only a beaten earth floor. Neither were protected from the weather.

Mr Dudley closed the areas. This means there is no protection facility at the Industrial Centre. Inmates wishing to go on protection are transferred.

The segregation yards also were cramped and unpleasant. Mr Dries' comment was that:

> *"...the segregation yards provide adequate area for daily accommodation. In many cases segregation prisoners prefer to have other prisoners in the same yard rather than be one out".*

Security Yards

The use of small security yards to hold non-working inmates during their out of cell time began in about August 1990. The department believed it a better method of control and containment than allowing inmates to move around the centre. It was of some concern to the Ombudsman that the department was unable to provide details of who developed the policy and the alternatives which were considered.

Mr Dries claimed the numbers of assaults on officers and prisoners, abusive language, stand over tactics and prisoners applying for protection had drastically decreased as a result. This claim was not supported by subsequent superintendents or inmates. Mr Dudley stated the number of assaults had not necessarily decreased, but at least offenders were readily identified.

Yet a prisoner was badly injured during an assault in one of the yards in June 1991, apparently without being observed by any officer. Prisoners believed aggressive behaviour had increased because of the sheer boredom and frustration suffered by those locked in the yards. There were less assaults on prison officers simply because they were now outside the yards.

When asked about the conditions in the yards, Mr Dries commented that an awning provided adequate shade but that:

"...most inmates are content to lie in the sun".

Prisoners responded to this with outrage. They pointed out there was little alternative but to lie in the sun, despite risks of sun cancer, and in the winter the yards were in fact cold and damp.

The level of frustration and hostility provoked by the overcrowding and filthy conditions in the yards was illustrated by an incident described in one Sydney newspaper as the *"Great Pear Mutiny"*. Following Mr Dries' decision to make prisoners stay in the yards to eat lunch instead of returning to their cells, he was pelted with pears by protesting inmates. Lunchtime fruit was immediately withdrawn.

Mr Dudley agreed with the rationale for the use of yards, but said he could not defend the state of them. He obtained approval and money to upgrade the conditions - extending the roofing, installing new toilets with modesty screens and installing galvanised tables and benches. Renovations included access directly from the yards to adjacent shower blocks, with surveillance cameras to monitor these passageways. These improvements were finished in February 1992.

Over and above the physical improvements to the yards, improved access to work and other activities means less prisoners are held in the yards at any one time.

Employment, Education and Activities

In February 1991 employment was only available to about 125 of the 350 inmates. There also were only 19 full time students and a restricted number of part time educational opportunities. These limited opportunities for useful activity exacerbated the poor conditions for inmates, primarily because of the large numbers held in the yards each day.

By March 1992, 184 inmates were employed in the new industries block. One hundred and fifty nine of the 194 sentenced prisoners were employed with only 20 waiting for jobs. The other sentenced prisoners were either medically unfit or unsuitable for employment. The employment opportunities in the centre now include a t-shirt factory, an electronics factory, a textile shop and a bakery.

The physical space available to the Education Unit has doubled. This enables more programs to be run simultaneously as well as providing areas for group work and private study. By July 1992 approval had been given for the employment of a further activities/education officer to enable inmates to have access to activities on weekends. Additional funds were made available for increased numbers of part-time teachers and improved library facilities. The department was considering training a prisoner to be the librarian. It was recommended all of the 30 full-time students be paid $12.00 a week.

Mr Dudley has reorganised access to activities and unsentenced inmates now have access to activities every morning. Working inmates have access in the afternoons.

It is clearly difficult to work on legal matters in the yards. Recognising this, Mr Dudley has instituted a system where inmates can apply for permission to remain in their cells during the day to prepare for court appearances. However,

> *"...any prisoner found to be abusing this privilege by either not returning to his cell ... or being found asleep, etc, will be immediately placed in the yard."*

The department's 1990/91 Annual Report has the following note on the role of the department.

> *"Through the provision of both education and work, the department offers encouragement for offenders to improve their ability to live law-abiding and responsible lives."*

This was not true of the Assessment Prison in February 1991. It is much closer to the truth for the Industrial Centre in 1992 since at least opportunities for work and education are available to the majority of inmates and the conditions in which these people are living are more suited to human beings.

SEGREGATION AS PUNISHMENT

Section 22 of the Prisons Act enables prison authorities to take a prisoner out of the general population of prisoners and keep them separate from other prisoners. There are two types of segregation. Some prisoners request to be segregated for reasons of personal safety. At other times prison authorities believe the continued association of a prisoner with others constitutes a threat to the personal safety of that prisoner or to other prisoners or to prison officers, or to the security or preservation of good order and discipline within the prison. This is known as administrative segregation.

Segregation of prisoners against their wishes is controversial because they are often kept in conditions indistinguishable from those given as punishment.

Prisoners on administrative segregation usually are housed in special yards with reduced access to the normal amenities and privileges. The Department of Corrective Services currently has five special segregation units to house up to 106 prisoners at any time in administrative segregation. During 1991 a total of 344 male prisoners were placed on administrative segregation. The conditions can be harsh.

The power for prison authorities to segregate is found in section 22 of the Prison Act. It bestows an extremely wide discretion. Only an opinion of a threat to good order needs to be formed to sanction the segregation of a prisoner. No charges have to be made; there does not need to be proof of any allegation.

At the same time this wide discretion is tempered in section 22 by the inclusion of certain safeguards. The power of superintendents to segregate is limited to fourteen day periods. Additional periods of segregation require the approval of the commissioner or his delegate, and ultimately the minister, if the period of segregation exceeds six months. Subsection (3) provides that prisoners on segregation shall not suffer reduction of diet or be deprived of any rights or privileges other than those that may be determined by the commissioner.

When the existing provisions were introduced by the Prisons (Amendment) Bill 1966, it was made clear to the parliament by the then minister in his second reading speech that segregation was not meant to be a means of punishment but merely a management device. The Department of Corrective Service's policy on segregation (Policy 89.89/1) recognised this and stated:

> ... prisoners are to be segregated chiefly in situations of urgency, as a temporary short-term measure...
>
> *It is essential to note that segregation under section 22 of the Prisons Act is not intended to constitute any form of punishment or retaliation. The provisions under this section are intended to operate as a protective rather than a punitive measure.*

Previous Recommendations

Over the years the Ombudsman has received many complaints about the unreasonable use of segregation. The Ombudsman previously has reported on a specific investigation involving two prisoners who were held on segregation at Parklea Prison in contravention of the spirit and intention of section 22 and contrary to the departments own policy[1] (see *Justice at Last*, p140). A number of recommendations were made as a result of that investigation, the most important being to amend section 22 of the Prisons Act to insert a subsection (5) to the effect that:

> The Minister or Director General may approve an extension of segregation beyond an initial period pursuant to subsection (4) only if there are reasonable grounds for considering that the association of a prisoner with other prisoners continues to constitute a threat to the personal safety of that or any other prisoner or of a prison officer or to the security of the prison or to the preservation of the good order and discipline within the prison.

The purpose of the amendment was to require the person authorising the continued segregation of a prisoner for periods in excess of the initial period to be satisfied that there was a real threat to persons or to the security or good order of an institution and that no other reasonable alternative existed.

Prisons Bill

The recommendation was accepted by the then minister and commissioner and since that time the Ombudsman has been informed that it would be made. When the Prisons (Segregation) Amendment Bill 1992 was introduced into Parliament by the then Minister for Justice, the Hon T A Griffiths MP on 29 April 1992, he said the bill was *"designed to provide more effective and accountable use of segregation"* and was intended in part to address concerns raised by the Ombudsman. The bill, however, failed to address the most important recommendation previously made by the Ombudsman and furthermore, in the Ombudsman's opinion, decreased accountability.

A special report was made to Parliament[2] addressing the Ombudsman's concerns that additional safeguards must be incorporated into the Act to protect against abuses of the segregation power. As a result of that report, further consideration has been given to the Bill by the minister before the debate proceeds.

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1 Fourteenth Annual Report of the Ombudsman of NSW Year ended 30 June 1989, page 215

2 Report Concerning the Prisons (Segregation) Amendment Bill 1992, dated 4 May 1992

Case Study 5

Goulburn HSU

A recent investigation concerned two prisoners who were segregated for over nine months against their wishes in the Goulburn High Security Unit on the suspicion they may have been associated in planned escape attempts.

In both cases there was little, if any, reliable evidence linking the prisoners to the possible events and their segregation was essentially related to their reputations. Their good conduct while held in the restricted and harsh conditions of the High Security Unit had little effect on the decisions to extend their periods of segregation. There was no demonstrable evidence that the security of any institutions would be threatened by their return to normal discipline. One of the prisoners did not know why he was segregated and even the officers in the High Security Unit did not know why he was there. The system of internal review and monitoring of segregation was unsatisfactory, failing to justify the segregation on reasonable grounds. The department's mechanisms for the monitoring and review of long term segregation cases was found to lack the rigour and detailed evaluation that should be mandatory in cases involving the severe deprivation of rights and privileges.

A provisional report of these cases was presented to the department around the same time as the special report to parliament. It was highly critical of the monitoring of the segregation of inmates held at the HSU. The monthly reports made on the prisoners were defective. They contained behavioural assessment categories that lacked meaning and which staff did not understand. Staff had no clear understanding of the purpose of the reports. The absence of criteria for proceeding through the specific program at the HSU meant that the person reviewing the placement of the prisoner did not have sufficient information to make proper assessments of the need to further segregate the prisoners.

Specific observations made about one of the prisoners were treated in contradictory ways; one month justifying his continued placement in the unit, the next month being used as a reason to recommend his removal.

When it came time to issue new orders, the review process seriously broke down. Orders for a second three month order for one prisoner appeared to be made without the benefit of any written reports detailing the grounds that required the further segregation. In such circumstances it was concluded there was doubt about whether the discretion was properly exercised. When the same prisoner was subject of an application to the minister to extend his segregation beyond six months, the submission contained inaccurate and misleading information which could invalidate the authorisation.

The other prisoner was segregated for over nine months pending the results of an investigation of his suspected involvement in an escape attempt and *"in order to influence him to adopt a more suitable and positive attitude to his imprisonment and rehabilitation"* according to the then commissioner. Segregation for this period was unreasonable on such grounds. In South Australia for instance, it is not possible to segregate someone pending an investigation of their involvement in some criminal or disciplinary office for more than 30 days.

The second reason was unreasonable because senior administrators in the department, including the officer who was responsible for reviewing and authorising the segregation, had no confidence that the HSU program could in fact influence the prisoner who displayed model behaviour all the time he was in segregation.

The monitoring and review of this prisoner's segregation also revealed two practices that warranted criticisms. The first was that decisions on his continued segregation were sometimes made wholly or partly on irrelevant considerations that did not relate to his personal behaviour. The second was the de facto adoption of tariffs governing the length of time prisoners spend in segregation. In these and other cases examined by the Ombudsman there appears to be an acceptance in the department of arbitrary periods for segregation which undermines the constant and individual review that the departmental policy requires. Rather than constantly monitoring the prisoners conduct to determine when the appropriate time to release a prisoner from segregation has come the general practice to only seriously do this at the expiration of an order thereby requiring prisoners to serve de facto segregation sentences.

The failure to involve non custodial staff in evaluating the continued segregation of prisoners in the HSU was also found to be deficient.

Case Study 6

Which Six Months?

Another investigation by this office revealed that a prisoner had been segregated illegally for more than six months because of what the then Director-General called a clerical error.

The prisoner had already been segregated for six months when orders for further periods of segregation were approved, first by the Executive Director Prison Operations and then by the Deputy Director General. The legislation is quite explicit that any period of segregation beyond six months must be approved by the minister. In this case, no order was put up to the minister for his approval until the prisoner had already been segregated for a year. Further, the submission to the minister referred to the prisoner having only been in segregation for six months at that point. The clerical error was that the first six months went uncounted.

Two problems were identified. The wording of the segregation orders themselves were found to be confusing and not even two experienced superintendents were clear about how to complete one specific section properly. The second problem was that orders for long term segregation did not appear to receive any particular special attention in terms of review; the then Executive Director of Prison Operations gave evidence that it was not uncommon for up to 50 orders to arrive on his desk in a batch and that he basically relied on clerical controls at lower levels of the service to ensure their correctness.

A number of provisional recommendations were made by the Assistant Ombudsman to address the deficiencies in the department's policy and procedures highlighted by these investigations. The segregation policy and procedures have since been reviewed and now incorporate more explicit instructions to overcome some of the defects identified. A written apology also was made by the commissioner to the prisoner in the latter case.

Justice at Last

In the 1989 case mentioned previously where two prisoners were invalidly segregated at Parklea Prison, special remission was recommended as compensation for their illegal segregation and for the harsh and punitive conditions they were held in. The then Director-General of the department refused to implement the recommendation on the basis that the Sentencing Bill 1989 provided for the abolition of special remissions.

The Ombudsman later reported to Parliament that the reason given for the refusal was unsatisfactory and failed to address the issues on which the recommendation had been based.

Recently, however, the Commonwealth Minister for Justice gave effect to the Ombudsman's recommendations by approving that these Commonwealth prisoners be considered for possible release on licence 134 days and 46 days respectively before their parole periods expired, subject to them obtaining satisfactory parole and prison reports.

Decision Making

Section 26(1) of the Ombudsman Act sets out the type of conduct on which the Ombudsman may make a report. Throughout the year many complaints alleged the conduct of the Department of Corrective Services was:

> contrary to law ... unreasonable, unjust, oppressive or improperly discriminatory ... based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations ... conduct for which reasons should be given but are not given

In some instances, the Ombudsman finds this is in fact the case. In many of these cases the Department of Corrective Services acts to remedy the problems. More rarely, initial inquiries by Ombudsman officers simply suggest that a practice or procedure is inappropriate and the department takes action. In other cases compliance with the Ombudsman's findings, no matter how clear cut, are incomplete.

The following cases are examples of some of the inquiries and investigations during the year which resulted in new policies and procedures for the department.

Irrelevant Considerations and Unreasonable Conduct

Temporary leave programs for prisoners are designed to:

> ... assist prisoners to prepare for return to the community on release.

In broader terms day leave and related programs are seen as both rewards for consistently good behaviour and as powerful rehabilitative tools. To be granted day leave a prisoner must first be granted a C2 classification by the Program Review Committee (PRC).

There are strict guidelines governing which prisoners are eligible. Put simply, those with excellent behaviour and work records who have been classified C2 for three months, are in the last 12 months of their sentence and have less than 50 per cent of their sentence remaining are eligible.

Case Study 7

Dayleave

At one correctional centre in 1991 the superintendent had set out other requirements in a day leave process document which had been issued on 5 February. The document stipulated that no one convicted of internal drug charges could be considered for 12 months from the date of the offence and that:

> Prisoners generally serving short fixed sentences of several months will not be considered to meet [the Day Leave] criteria.

Mr W applied for day leave in the normal way on 25 March 1991. He was serving a fixed two year term with his earliest release date after 12 months. Though he had served prison terms before, Mr W's application satisfied all the criteria and explained that he wanted to spend time with his family. Initially Mr W's application was not sent to the PRC for consideration and Mr W was told that his sentence was too short to allow him to apply. The superintendent later explained that for some time he had been applying an unwritten policy that interpreted a short prison term as less than 18 months. Those with minimum sentences less than 12 months were ruled out, those with terms between 12 and 18 months were considered at the superintendent's discretion.

Mr W's application ultimately went to the PRC who recommended that the (C2) classification be granted, but the decision was overruled by the superintendent who believed the prison term was too short to justify the time away from the prison.

> *I am far from convinced that anyone serving a sentence with a minimum release date of 12 months fits (under normal circumstance) into this criteria.*

In reply to this office's inquiries about the decision the superintendent suggested another reason for his view of Mr W's application.

> *... I do seriously question [W]'s motivation.*
>
> *[W] is a long term recidivist prisoner ...[details of Mr W's extensive prison record follow] ... In view of the above, I believe a reasonable person would suspect that [W] (demonstrably) does not have a paternal, caring attitude towards his children, and in this instance he is simply using them to gain a day out of gaol.*

This reason was never put to Mr W and never supported by any information about Mr W's relationship with his children. It would have been almost impossible for the superintendent to have formed a view about W's circumstances as there was nothing adverse on his file and the only meeting between the two men was brief and involved the superintendent telling Mr W that his application was not accepted.

This office did not necessarily disagree with the superintendent's view that inmates with short sentences should not get day leave. The concern was with the fact that the existing guidelines had been overridden in favour of the superintendent's opinion. An opinion which seemed to have been formed on the irrelevant and unsupported grounds that Mr W was *"demonstrably"* not a good father because he was a recidivist. Mr W had every right to suppose he would be treated fairly and reasonably based on the procedures in place at the time.

Mr W continued with his attempts to be granted day leave and the Ombudsman investigated the matter. On two occasions the department failed to process Mr W's applications for leave because the Ombudsman's office was involved.

In January 1992 the Ombudsman found that the superintendent and the department had acted unreasonably and had taken into account irrelevant considerations in denying Mr W day leave. By this time Mr W had been released without the benefit of the temporary leave program.

Since then the department has rewritten the guidelines for all prisons concerning temporary leave programs. DCS has also been asked to counsel the superintendent about the need to *"...assess each application for leave on its merits alone within the parameters of existing written guidelines"*. A letter of apology to Mr W has been requested.

Case Study 8

Carriage and Retention of Legal Papers by Prisoners

Mr S, a prisoner in a metropolitan institution, complained to the Ombudsman that he had not been permitted to carry an envelope containing his legal case notes in a prison van on the way from the gaol to a court hearing. The envelope had been taken from him at the gaol by a prison officer and returned to him in the court.

The Office of the Ombudsman was told by the Department of Corrective Services there were no written regulations relating to the retention by prisoners of legal documents while they are in prison vans on the way to court. The department advised, however, that it was unwritten policy not to allow prisoners any objects or papers in the vans for security reasons. Papers and other items were carried in the front of the van and given to the prisoner at the court.

A second complaint about this issue was received from another prisoner, Mr A. Mr A also complained that he was not allowed to keep any legal documents or pens in court holding cells that were under the control of the Department of Corrective Services. Further inquiries were made with the department and the view was again expressed to the Ombudsman that prisoners should not be allowed to retain any implements or papers while in vans or holding cells.

As a result of Mr A's complaint, the Ombudsman asked the Police Service about their policy. The Police Service allows prisoners to retain legal papers in police vans and in police cells at courts. The regulations do not allow prisoners to keep pens, boxes, folders or any other hard objects which may be used for undesirable purposes.

There was clearly an inconsistency between the procedures followed by the police and those adopted by the department. The Ombudsman asked the Director General of the department whether departmental policy could be altered to bring it into line with procedures followed by the police.

The Director General changed the policy to allow prisoners on escort to court or in holding cells to retain some of their legal documents relevant to their imminent court proceedings. For reasons of security, the new policy does not allow prisoners to retain pens, paper clips, metal binders or any other hard objects. The new policy allows only the retention of loose leaf papers.

This office welcomes this policy change.

Case Study 9

Private Cash Printouts

In early 1991 a number of complaints were received from prisoners about the introduction of a $2.00 charge by the Department of Corrective Services for providing inmates with a print-out of their private cash account.

It is into this account that a prisoner's wages are paid and out of which money is deducted for any expenditure by a prisoner. Any other money a prisoner receives, as a gift for example, also is credited to this account.

The department was asked to explain how the $2.00 charge had been arrived at, and to establish if other systems existed where prisoners could verify their account balance.

The then Director General of the department, Mr Graham, said the charge was based on the Attorney General's Department statement of fees for court service.

Mr Graham added that:

> *"... the charge of $2.00 can be justified from the point of view that the service does cause work for the office staff at the gaol. In addition, the charge discourages prisoners from making frequent and frivolous requests for transaction printouts. If monthly statements were forwarded, the high number of prisoner movements could lead to statements going astray or being delivered to the wrong prisoner."*

It was noted that the charge was only made for full transaction print-outs. A prisoner was able to obtain the account balance by requesting that information.

Concurrent inquiries were being made into the charges made for photocopies of other documents requested by prisoners and for incoming facsimile messages. The department's response, relating to the work involved, the need to contain administrative costs and the fact that prisoners are generally able to obtain this information by alternative means, was not considered unreasonable. This line of inquiry was therefore not pursued.

The office did a survey to establish how prisoners kept track of their money without requesting and paying for the transaction printouts. It became clear that no single system existed and prisoners did not have access to regular, verifiable information about their accounts.

This office did not believe the Attorney General's Department schedule of fees to be paid by a member of the public was a reasonable basis for the charging of equivalent fees to prisoners. For example, under this system, unemployed prisoners would pay almost 50 per cent of their allowance in order to check transactions on their accounts.

The Ombudsman began a formal investigation. Mr Graham told the Ombudsman his department had done its own survey of the administration of prisoners' private cash accounts and a number of inconsistencies had been revealed. He said that the Executive Director of Finance and Administration had been asked to review the existing system, including the level of charges and procedures for keeping prisoners informed about their accounts.

Mr Graham told the Ombudsman that as a consequence of the review a circular had been forwarded to all superintendents advising of new procedures.

The circular dated 31 December 1991, noted that a statewide Prisoner Cash System was being developed. In view of this, and of the need for uniform procedures in all institutions, the following procedures were to be observed:

- a print-out of the prisoners' private cash balances was to be issued each week. This print-out would not indicate a balance in excess of forty dollars in order to protect the prisoner concerned;
- at the end of each calendar month every prisoner would receive a complete record of that month's transactions;
- genuine grounds for believing that an error had been made could be raised with accounts section;
- additional or back copies of monthly transaction statements would be provided for a maximum fee of 50c. If the department was found to have made an error, the fee would be reimbursed.

The introduction of the Prisoner Cash System should ensure that statements of prisoners' private cash accounts are produced regularly.

In light of revision of procedures and fees involved in the administration of prisoners' private accounts, this office did not continue its investigation.

Case Study 10

Interstate Transfer on Welfare Grounds

A prisoner made an application to be transferred from a Queensland Correctional Centre to a New South Wales institution on welfare grounds. He wanted the transfer in order to receive visits from his wife and children. The application for the prisoner's transfer under the Prisoners' Interstate Transfer Act was granted after an assessment was made by both the Queensland and New South Wales authorities and approved by the two ministers.

At the time of making this application the prisoner was aware of the differences in the remission system between the two states. He agreed that if he was transferred to New South Wales and parole was not granted, he would serve an additional 10 months imprisonment.

When the prisoner arrived in New South Wales, the department placed him at Cessnock Correctional Centre. The prisoner complained that since his wife was a pensioner, lived in an inner city suburb and did not own a car she was unable to visit him. The prisoner stated that his placement at Cessnock defeated the purpose of his transfer.

During the investigation the department stated that:

- at the time of the inmate's initial placement at Cessnock there was no medium security institution in the metropolitan area to place him;
- Cessnock was the closest appropriate gaol to the inmate's family;
- the majority of prisoners in NSW could not be accommodated close to their family home and
- welfare was comparatively a low priority reason for classification and placement in present overcrowded circumstances.

All these reasons were found to be unsatisfactory. Parklea Gaol, for example, already had been made a medium security gaol and prisoners with the same security classification moved there. In fact, no conscious decision had been made to place this inmate at Cessnock. It was simply the gaol where the first place became available.

The investigation concluded that the legislative intent of the whole program was to allow the welfare needs of selected interstate prisoners to be met in order for rehabilitation to be improved. The department's classification and placement policy, however, failed to adequately make provision for appropriate placements and therefore made a mockery of the whole program. It also constituted an abuse of the public purse since the department takes on the cost of incarceration of prisoners from other states on the basis that the minister believes their welfare and rehabilitation will be improved by the move to NSW and then does nothing practical to ensure the reasons for their transfer are taken into consideration once they arrive.

During the investigation the prisoner was relocated to a more appropriate prison and has since been paroled. This office found the department's placement of the prisoner following his transfer to New South Wales under the Prisoner's Interstate Transfer Act was unreasonable. The report recommended:

> The Commissioner develop a specific policy on the classification and placement of prisoners received under the provision of the Prisoners Interstate Transfer Act on welfare grounds. As far as practicable, transferred prisoners should be placed at an institution where the welfare needs, as defined in the application for transfer, can be catered for more easily.

Also it was recommended that the commissioner develop and distribute an information sheet for the use of correctional staff and prospective applicants under the Prisoners Interstate Transfer Act. It should include relevant information to assist decision making in terms of applying for transfers to New South Wales, such as information on the classification and placement policy, the prisoners private property policy, and relevant provisions of the Sentencing Act 1989.

The department complied with both recommendations.

THE PRISON MEDICAL SERVICE

In 1991 the then head of the Prison Medical Service (PMS) addressed the investigation staff of the Ombudsman's Office. He made plain that the standard of medical care he aimed to ensure within NSW prisons was the same standard applied to the community at large. There was, he said, barring funding, no reason for it to be otherwise. This office has found little evidence to suggest that medical care in NSW correctional institutions customarily falls below the standard of care available to those not in prison. However there are a number of particular problems.

Wherever statutory authorities share responsibilities, the level and quality of the communication between departments is of vital importance. It is not just important for the coordination of activities but for the safety of workers, and in the case of Corrective Services, PMS and other departments, prisoners as well.

The Ombudsman has investigated a number of cases where the communication process has broken down to the detriment of both prisoners and prison staff.

Case Study 11

Psychiatric Care and Communication

Mr K suffered from a schizo-affective illness for many years and had been receiving medication. He was considered to be a difficult but not uncontrollable patient. However during a period when he was unmedicated he attacked and killed someone and was sentenced to prison for manslaughter. The sentence was comparatively light since he was considered not to have been fully in control of his actions.

During his relatively short period in prison Mr K was treated by psychiatrists. He also received continuous medication, barring a period when he was taken off drugs for a short time as an experimental treatment. During that period he briefly escaped from prison.

On release Mr K went on to lead a normal life while receiving treatment and taking drugs to control his condition. He studied and moved in with his girlfriend. Mr K breached the conditions of his parole by forging a prescription form to obtain amphetamines. Some time later probation and parole acted on the breach. They apparently acted, at least partly, in the belief Mr K was no longer taking his medication as required.

When Mr K was arrested for breach of parole, the Police Service was aware of his history, as well as the belief that he was not properly medicated. The police computer records at that time noted Mr K could be dangerous. Local police arrived at Mr K's home with the Tactical Response Group and representatives of the Dog Squad as a precaution. Mr K went to the police station without objection.

It appears that while in the local police cells awaiting transfer to Long Bay, Mr K received his medication as well as visits from the local psychiatric crisis team, but his admission form stated that he was not taking his medication.

At the Reception Prison (now Reception Centre) Mr K noted on his reception form that he was receiving the drug Largactil (used almost solely to treat those with a psychiatric condition) and that until recently he had been treated by a psychiatrist.

The dosage of Largactil was confirmed by prison nursing staff. A domiciliary nurse recognised Mr K, remembered some of his prior history, spoke to him, and the following day completed a referral form to the consulting psychiatrist. The nurse noted on the form that Mr K would need *"ongoing psych care in gaol"* and he was *"quite hostile at present"*.

Mr K was concerned for his safety but continued to take the medication for the first three days in prison. Days four and five passed without Mr K receiving the Largactil and he received only a partial dose the next day. On day seven Mr K was interviewed by the visiting psychiatrist who commented on Mr K's aggression and spoke to him about the possibility of injected medication rather than the normal oral dosage. Mr K's previous medical history in the prison system was not available for this consultation.

An appointment was made with the psychiatrist for the following week but Mr K completed an application form the next day saying he didn't want enforced or injected medication and he wouldn't see any more psychiatrists or doctors. Two days later the psychiatrist wrote on the application form, *"I am aware of the details leading to the revocation of parole"*. There were no other comments.

Between days 8 and 15 Mr K took no medication. On day 15 Mr K did not keep his appointment with the psychiatrist. Nursing staff were worried about Mr K's condition and the next morning the nurse unit manager appropriately told prison officers not to let him out of his cell. However, on that same morning, apparently suffering from delusions that he was to be forcibly injected with drugs, Mr K attacked and severely beat a prison officer.

This complaint illustrates the need for formal and informal communication links within PMS, and between DCS, PMS, the police and probation and parole. This office is aware of the privacy concerns regarding the release of confidential medical information. However, there is a point at which an assessment must be made about the need to pass on vital information that affects the health and well being of prisoners, not to mention the safety of custodial officers.

Clearly this is a complex and difficult issue involving several bodies with, in some cases, competing agendas. Notwithstanding these problems there is no excuse for allowing the standard of care to fall below an acceptable level. Procedures and practices must be examined and, if necessary, changed to guarantee the health and safety of all concerned.

Case Study 12

Medical Care in a Crisis

The above case raises the issue of lack of communication. The following case raises the question of exactly who has responsibility for the care of a prisoner.

In August 1991 there was an attempted escape from the (then) Assessment Prison. During the escape two prison officers were badly bashed and the gaol was immediately *"locked down"*.

All inmates were confined to their cells and all activities were cancelled. Emergency unit staff and extra officers staffed the prison while all non-custodial staff were taken outside the prison until the situation was under control.

Mr L is a diabetic and receives two insulin dosages daily, normally at 9-00am and 3-30pm. When he tried to leave the wing to get his afternoon dose he was stopped because of the *"lockdown"*. He then started to make the first of many complaints to prison officers about not getting his medication. Inmates in adjacent cells say they heard Mr L calling for the insulin and say he was asking to see the nurse. Mr L got progressively sicker and he says despite his cries for help over a long period, he was ignored by prison officers.

After what Mr L describes as a horrifying night in which he suffered some of the symptoms of diabetic coma he was taken to the clinic and given the insulin.

In their statements all prison officers denied any request for assistance had been made by any inmate. None remembered Mr L at all. Many remembered the day only in terms of the attacks on their fellow officers. Mr L claims he told a prison officer that he wouldn't make it. He says that the reply was, *"neither might my mates."*

PMS, in response to inquiries from this office, said in an emergency medical staff leave the prison but are available to treat life-threatening conditions on request. However PMS also said nursing staff would arrange to have an inmate on regular insulin brought to the clinic or deliver the insulin to the cell. That did not happen in this case.

Prison officers recognised no threat to Mr L's health and didn't call the medical staff; medical staff did not follow up the failure of someone on regular medication to take the required dose.

There is a clear and undeniable responsibility to care for the health of those in custody. Someone has to accept it.

CHAPTER FIVE

COMPLAINTS ABOUT OTHER PUBLIC AUTHORITIES

OVERVIEW

This section covers complaints about government departments and statutory authorities other than police, prisons and local government.

Two public interest issues stand out in this year's consideration of complaints concerning government departments or authorities and instrumentalities.

The first relates to the adequacy of mechanisms for juveniles in custody to make complaints about conditions of their custody. Allied to this problem is evidence that juveniles have either no knowledge or insufficient knowledge of the existence of the Office of the Ombudsman and its role in investigating complaints. The Ombudsman's concern to redress the unique grievances of juveniles in custody has been reinforced by the recent report of the Standing Committee on Social Issues, following its inquiry into the juvenile justice system.

All the evidence suggests that there is a real unmet need of juveniles in custody for greater involvement by this Office in reviewing complaints and redressing grievances. Only when greater attention and investigative resources are devoted to this area will the true depth of the problem become apparent and a proper assessment made of the likely trend of complaints. However, the Ombudsman faces the dilemma, at a time of declining real resources, of finding the time, money and staff to apply to the area of juvenile justice in general and juvenile institutions in particular.

A second significant and increasing trend in complaints, although the numbers are relatively small at present, concerns the actions of a growing number of public authorities to contract out the provision of public services across a range of areas, including construction of public works, use of consultants to handle tendering procedures and even the provision of basic social welfare services. Many commentators see this trend as a result, directly or indirectly, of deliberate government policy.

The Ombudsman does not wish to involve his Office in a debate about the relative merits of alternative policy prescriptions. The Ombudsman, however, is concerned and rightly so, about the way in which services are delivered by public authorities and the quality of those services.

The trend of contracting out will no doubt continue and the central issue for the Ombudsman is how to investigate complaints about the provision of public services where the actual provider may not be a public authority but, rather, a private body engaged by the relevant public authority to carry out those services - whether by way of a direct contractual relationship or some form of delegation of authority. The Ombudsman Act contains a wide definition of public authority, but it is the Ombudsman's strongly held view that, whatever the true meaning of that definition, it was never the legislature's intention to give the Ombudsman jurisdiction to investigate a private body.

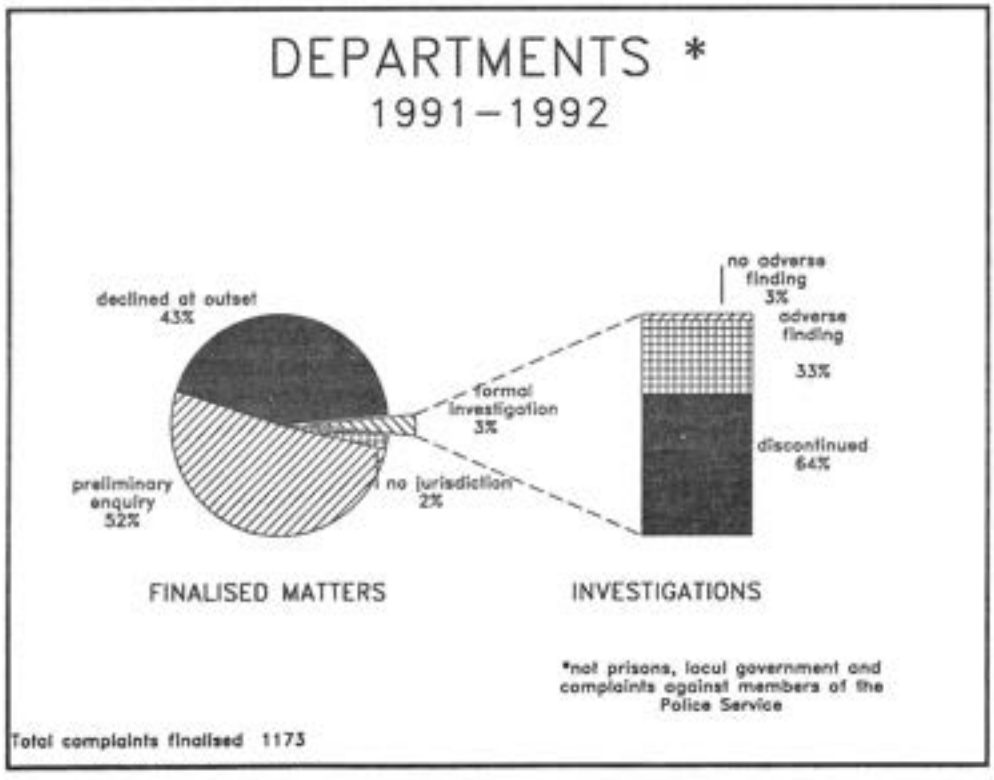
Accordingly, the Office of the Ombudsman has adopted a two-pronged method for dealing with these complaints. Firstly, as a general matter, the CHIPS project emphasises not only the duty of, but also the merits of public authorities having appropriate internal mechanisms to deal with customer grievances. Secondly, where complaints concerning the provision of services which have been contracted out cannot appropriately be dealt with internally by the public authority, the Ombudsman will investigate not the actual delivery of services by the private body but rather whether the public authority concerned has established mechanisms or guidelines to regulate the provision of public services by those private bodies on its behalf.

ACHIEVEMENTS

The general area covers complaints about public authorities, other than police, local government and prisons. This year 1125 written complaints were received and 58 complaints were carried over from the previous year. In total, 1173 general area complaints were finalised. Below is a selection of results achieved from Ombudsman recommendations.

- RTA makes a $5000 ex-gratia payment after inspecting and registering a 'cut and shut' vehicle comprising a stolen chassis and altered compliance plates that was subsequently seized by police.
- Amendment of Stamp Duties Act to make provision for refunds for duty paid on transfer of vehicles that are later seized by police as stolen.
- Department of Health makes $4,292 ex-gratia payment to manufacturer of domestic aerated septic systems who was given incorrect advice about testing requirements.
- TAB reviews financial control procedures and issues new direction to staff.
- RTA issues technical and procedural instruction and information booklet relating to refunds/stolen vehicles.
- Office of Juvenile Justice issues new staff instructions regarding responsibilities under the Children (Detention Centres) Act and regulations.
- State Lotteries changes procedures for renewal of Lotto registration players and mounts major education campaign for agents and customers.
- Housing Department changes Homefund guidelines to pay interest to borrowers on monies held by housing societies until approved repairs are completed and provision for full disclosure to the borrower of arrangements at time of loan approval.
- Office of State Revenue refunds $15,000 late fee on property transaction stamp duty.
- Housing Department makes $600 ex-gratia payment after destroying complainant's file before assessing claim for capital improvements and issues new staff instruction.
- Housing Department virtually rebuilds a home affected by termites after two years of tenant complaining and department claiming the damage was merely "unsightly". Department agrees to inspect neighbouring homes for similar problems in order to protect its assets.
- Structure of the Department of Health's public health division overhauled and review of approval process for design of aerated septic tanks.

General Complaints 1991 - 1992 (excluding Councils and Corrective Services)		
Analysis by type of conduct		
Quality of service (No reply, delays, rudeness, inaction)	390	38.7%
Procedural objections	217	21.5%
Wrong decisions (Includes excercise of discretions)	176	17.5%
Action or failure of regulatory acitivity	115	11.4%
Contracts/prices/tenders	50	5.0%
Policy/legislation (Objections to government policy/law)	21	2.1%
Management (Broad issues associated with operation of authority)	15	1.5%
Other	23	2.3%
Total	1007	



COMING THE RAW PRAWN AND OTHER BUREAUCRATIC TRICKS

A business seeking to invest in NSW or an entrepreneur wishing to promote an innovative business must contend with a proliferation of rules, regulations and by-laws, administered by state and local governments.

Even when such regulations are administered fairly and efficiently by individual officers, the cumulative tendency is for rules to multiply, to persist beyond their useful life and to conflict with the multiplying systems of other departments and levels of government.

The Ombudsman is acutely aware of his role in ensuring complaints about over regulation or frustration of commercial operations are taken up wherever possible. Section 26 (1) of the Ombudsman Act specifically provides the Ombudsman may make a finding that the conduct of a public authority is in accordance with the law or within established practice, but that such law or established practice is unreasonable, unjust, oppressive or improperly discriminatory.

While many public authorities find it difficult to comprehend they can be criticised for lawful conduct, the focus of the Ombudsman on **reasonableness** rather than (necessarily) lawfulness enables a commonsense approach to the question of regulation.

The Department of Health

Many regulations and monitoring structures are designed to protect the public interest when commercial enterprises may present a risk to human health. This is obviously an unexceptionable, even highly desirable, function of government.

Many hundreds of such rules, codes and guidelines are administered by the Public Health Division of the Department of Health, pursuant to such legislation as the Public Health Act, Sydney Abattoir and Nuisances Prevention Act, Food Preservation by Sulphur Dioxide Enabling Act, and the like.

In recent years, the Ombudsman has received complaints from business people about the Public Health Division, alleging the area is short on technical expertise in some fields, but long on old style bureaucrats whose chief expertise is creating inconsistent and unproductive regulations.

The following is a summary of two investigations undertaken on the work of the Public Health Division this year.

Case Study 1

Septic Insanity

Mr J had a new design for an aerated septic tank, a type of unit increasingly installed in unsewered areas where terrain or soil type make the more traditional styles of septic tank inefficient.

In order to be allowed to market his unit, Mr J had to submit design specifications to the Public Health Division for assessment and approval. Public Health, rightly, needs to assure itself that methods for disposal of human waste are safe and efficient, given the very serious potential health risks of a defective system.

Mr J paid a test fee and, with the consent of the local council, a test unit was installed for six months trial and assessment.

This, however, was where Mr J's problems began.

In theory, in exchange for the test fee Mr J had paid, officers from the Department of Health were to carry out tests of his unit, with Mr J to bear the costs of analysis of the samples. The respective duties and obligations of Mr J and of the department were set out in a comprehensive document entitled *Guidelines for Testing of Aerated Septic Tank Installations.*

However, Mr J was never given a copy of this document and was never advised either in writing or verbally of the services provided by the department in exchange for his fee. He contracted, at a cost of some thousands of dollars, a private firm to conduct the tests the department should have been doing for no charge.

Monthly testing then commenced, with an officer of the department attending the monthly sessions as an observer.

However, the officer was a very unobservant observer, who was unfamiliar with his department's guidelines. Some months into the testing, the Department of Health advised Mr J the tests were supposed to be conducted weekly. Mr J was at this late stage provided with a two page document entitled *Test Criteria* which purported to set out the department's requirements. It transpired this two page document was a composite and unofficial summary of the department's official guidelines and was wrong and/or inaccurate in several respects.

In any event, weekly tests then were commenced on the unit (with the meter still ticking on the expensive private consultants). Some of the samples of Mr J's unit fell short of the standards set by the department. Although it transpired under departmental guidelines testing should have been discontinued after **one** unsatisfactory test, testing went on, with the continued presence of the department's observer and the private consultant.

In addition, the occupancy of the premises where the test unit was located fell below the five person minimum necessary to test the unit satisfactorily. Various remedial measures were taken, with the knowledge and apparent consent of **regional** health staff. It later transpired these remedial measures totally invalidated the testing in the eyes of **central** health staff.

Finally, in March 1989, documentation was sent from the regional office to the central office of the Department of Health recommending approval of the unit.

The unit was refused on the basis that:

i) the remedial measures designed to counter the low occupancy level of the test site were invalid; and

ii) inadequate details about the test unit had been provided at the outset.

Mr J, outraged, took the view that as (i) had been known to regional staff he should have been advised earlier if this was a problem. He further took the view if inadequate documentation had been provided about his test unit, he should have been asked to provide more details at an early stage.

There then ensued a very frustrating period for Mr J, whose slender stock of investment capital was rapidly dwindling, as he tried to negotiate with the Department of Health. He made repeated written and telephone representations to both the regional and central offices and encountered delay, confusion and a consistent tendency for various officials to *pass the buck*, blame each other and do nothing.

Eventually, Mr J complained to this Office and an investigation was commenced. In dealing with the office of the Chief Health Surveyor, the Ombudsman investigator encountered many of the same problems Mr J had encountered - delay, confusion, and a tendency to *pass the buck*. This of course added credence to Mr J's claims.

Fortunately, senior management of the department showed a great deal more responsiveness and concern than operational public health staff. In response to recommendations by this Office, the director general undertook disciplinary measures in relation to the conduct of some officers; the structure of the Public Health division was overhauled; and a review was commenced of the entire approval process. Finally, a recommendation was made for an ex gratia payment of some thousands of dollars to Mr J and this was approved by the Minister.

Case Study 2

Service - No Thanks

It would be pleasant to end on this optimistic note. However, subsequently, a complaint has been received from another businessman in the same industry, this time the head of a company which wants permission to service aerated septic tanks across the state. Aerated septic tanks require frequent servicing to function optimally and can present a significant health risk if left unserviced. One would think, therefore, the Department of Health would have a keen interest in accrediting skilled operators to service these units.

However, on the basis of preliminary inquiries, it appears the department has left the question of accreditation in the hands of local councils. This means the present complainant, Mr A, must apply separately to every municipal and shire council in the state if he wishes to service units statewide. Each will have its own, idiosyncratic conditions and approval process, some will have fees, some will set onerous conditions and with some it will be purely a formality. Such a procedure is obviously inimical to commercial operations and will result in a mound of useless paperwork for Mr A.

Inquiries are continuing.

Case Study 3

The Seaweed Swindle

Meanwhile, in another section of the same division of the Department of Health, food inspectors were working tirelessly to protect the public from the dangers of arsenic in edible seaweed.

Mr L was the proprietor of a health food store, which for many years had been importing and selling edible seaweed. Edible seaweed, and indeed many other marine lifeforms, contain arsenic, although scientific opinion differs as to whether this arsenic is in a form harmful, or potentially harmful, to humans who ingest it. In the early 1980s, when Mr L's problems began, different regulations applied in different states about permissible arsenic levels in such foodstuffs.

No Norwegian Seaweed

Mr L was the subject of legal action by the Department of Health's Food Inspectors, preventing him from selling the seaweed in question. Mr L protested about the real threat to safety presented by the seaweed, but to no avail.

Mr L then began to question why he had been prevented from selling one type of seaweed (Norwegian kelp powder), when other stores were allowed to sell traditional Japanese edible seaweed, which he alleged could have similar levels of arsenic. Neither, in his submission, was harmful, but if the Norwegian type of weed was to be banned, so, too, should the Japanese.

A long and at times acrimonious correspondence then ensued between Mr L and the food inspectorate. Mr L's contention was their method of testing for arsenic levels in edible seaweed was wrong. He claimed analytical tests conducted by independent agencies had shown arsenic levels to be consistently different to the department's test results, using similar samples. Furthermore, Mr L alleged this incorrect testing had allowed companies to import edible seaweed for sale in New South Wales which did not meet the Australian standard, without fear of prosecution.

Test Results

Failing to receive the information he wanted by normal correspondence, Mr L applied under Freedom of Information for documents concerning the department's testing procedures and sample test results. Following the determination of that request, Mr L received certain papers, but did not receive test results. However, some months later he was supplied with a table of results, which the department later stated had been specially prepared for Mr L and did not form part of the FOI determination.

Blank Results

The table received by Mr L had two columns setting out the results of tests conducted on a variety of edible seaweed. These two columns were headed *As Received* and *Rehydrated*. *As Received* is a method of testing the seaweed where it is tested dry, whereas *Rehydrated* refers to tests conducted after the sample has been mixed with a liquid. The column for testing on an *As Received* basis was blank and the figures contained in the *Rehydrated* column indicated each variety of seaweed tested had met the standard, ie, less than 1 part per million. Following further correspondence and discussions with the department, Mr L was supplied with a second copy of the table, this time including figures in both columns. The results in the second table showed the majority of samples did not meet the standard when tested *As Received*.

After further examining the two tables supplied to him by the department, Mr L formed the view the first table appeared to have had the *As Received* column covered up when it was copied before being issued to him. At this time Mr L complained to the Ombudsman the department had deliberately concealed the test results and they were failing to prosecute importers of edible seaweed which did not meet the Australian standard because of their refusal to acknowledge the correct testing method.

During the course of the subsequent enquiries and investigation by this Office, it became apparent there was a basic disagreement between Mr L and the department as to the correct interpretation of Regulation 5 of the Pure Food Act which dealt with the testing of arsenic levels. Mr L's opinion was the seaweed was to be tested on the basis of its manner of consumption, ie, if it was eaten *As Received* (for example, as it is in sushi) then it should be tested in that way; if it was eaten in a *Rehydrated* form then that should be the method of testing; or, if the seaweed could be consumed in either way then it should be tested dried, or in other words in the manner in which it is purchased.

The department, however, seemed to have been operating on the basis that the seaweed samples should be tested in both forms and if it passed either one then it was considered to have met the standard. This is borne out in their provision of the original table to Mr L in that they believed those seaweeds met the standard because they passed one of the methods of testing.

Mr L's opinion was based on a court case reported as the *Tokyo Mart Case*, which resulted from a prosecution by the department a couple of years earlier. However, during discussions with a departmental officer, this office was firstly told the matter needed to be determined by a court, when such a determination had clearly already been made. Subsequent to that discussion another officer informed us that while there had been a court decision, it had taken them a while to really understand and implement it! In fact, despite the court decision having been reported in 1988, the department had not taken any steps to seek legal advice on the interpretation of the regulation or of the court's decision. The court decision does seem to give more support to Mr L than to the department in its determination that the overriding criteria is that the *As Received* method should have precedence over the *Rehydrated* method because the seaweed is not sold in a *Rehydrated* form.

Enquiries with department officers failed to elicit a reason as to why they had originally given Mr L only one set of test results, other than to say Mr L had asked for test results where the seaweed met the standard. Accordingly they had provided him with results of tests which had **in their opinion** met the standard.

Based on the evidence gathered during the investigation, this Office found information was purposely withheld from Mr L when the original table of results was provided to him. Given Mr L's history of correspondence and negotiation with the department on this issue, such action was considered unreasonable.

A further finding was made that the department, by failing to act to implement the court ruling on the appropriate method of testing edible seaweed for arsenic levels, had applied the Pure Food Act in an improper and discriminatory manner in New South Wales.

A recommendation was made that the department write to Mr L and apologise for providing him with misleading information. Further recommendations were that the department:

- prepare guidelines for the staff of the Food Inspection Branch to ensure up-to-date methods of testing are implemented as soon as possible after approval and/or decision and when they are approved by the relevant bodies, and
- develop directions to Food Inspection Branch staff which clearly outline the department's policy with regard to prosecution.

Following the issue of this Office's Statement of Provisional Findings and Recommendations, the department took action to comply with each of these recommendations.

Case Study 4

The Raw Prawn

Although the Public Health Division acted in an unimpressive and inefficient way in the cases cited, it can at least be said to have been attempting to fulfil a genuinely beneficial function, ie, ensuring commercial interests do not endanger public health. The same cannot be said for other departments and regulatory bodies, whose involvement in certain aspects of commercial life appear to serve no purpose whatsoever, other than to frustrate and impede businesses.

A case in point is Mr Q, who sought the approval of the New South Wales Government to establish a prawn farm on a NSW waterway system.

As far as the complainant was concerned, the inlet was ideally suited to his purpose, as the inlet had been closed to commercial fishing for many years and was not used for recreational fishing or other recreational pursuits. Importantly, the inlet was close to a cheap source of warm water (produced as a byproduct of another industry) which would enhance prawn production.

The economic benefits of the proposal were described by the complainant as significant. From the proposed size of the project, which the complainant says was accepted by the Department of Agriculture and Fisheries, more than three million dollars could be generated and local employment created.

However, before the project could proceed, various approvals where required. Mr Q believed he had gained all of the necessary approvals and approached the Department of Lands and the Department of Agriculture and Fisheries to have the necessary lease granted. However, the complainant says the departments failed to promptly deal with his applications, resulting in his development application (DA) lapsing after two years and a 12 month extension to the DA also then lapsing.

Delay and Opposition

From papers provided to Mr Q under FOI, Mr Q says it seems apparent there were misunderstandings between departments in the early stages about the responsibilities of each department in dealing with the application for a fisheries lease. Mr Q also complained the Department of Lands from the outset, took a dim view of the project for a number of reasons, including the fact it was of the mistaken belief an Environmental Impact Statement (EIS) was required for the development and it was opposed to the legislation that could give rise to the granting of fishery leases over large tracts of water.

Mr Q also complained the department delayed and opposed the application because it felt it was being relegated by the Department of Agriculture and Fisheries to being a mere formality. Despite there being an unchallenged and therefore valid development consent given by council to Mr Q over the land (which required s77 consent by the Department of Lands for the DA to be lodged), the Department of Lands believed the development should not have been approved. In this respect, Mr Q complains the department apparently mistook its role as being one of a planning authority. Further delays were caused.

By the time Mr Q had convinced the Department of Agriculture and Fisheries to approach the Department of Lands and convinced the Department of Lands to come to the party, Mr Q's DA had lapsed for want of substantial commencement. The local council refused to grant an extension and Mr Q appealed to the Land and Environment Court. He sought to have the lease finalised while the matter was in court, but the Department of Lands adopted a *let's wait and see* position.

While the Land and Environment Court granted an extension of one year to the DA, this lapsed three days after the judgement was handed down (it dated from the application to council).

Our inquiries into the matter are continuing.

Conclusion

The Office has a number of other such matters under investigation, which will be reported as they are finalised. The world of commercial operations is a delicate one and there is always a tendency to develop complex nests of procedures and rules in *easy* areas, leaving difficult or contentious areas untouched. Faced with the very urgent demands of big or small business, administrators who are untrained in the technicalities of the particular proposed industry or business find it easier to play it safe and say *no*. They will accrue more personal blame if they approve a project that goes sour, than if they *bury* a speculative project in a mire of red tape. Reform of administrative lethargy and regulatory overkill is a very slow process; but this Office will continue to promote such reform wherever possible.

JUVENILE JUSTICE AND THE OMBUDSMAN

The treatment of juveniles within the justice system continues to be a matter of public interest and of concern within the Office of the Ombudsman.

A CHILDREN'S OMBUDSMAN?

This year saw the release of the report of the Standing Committee on Social Issues on its inquiry into the juvenile justice system. The report, in a cluster of recommendations concerning the promotion of alternatives to detention and improvement of conditions within detention centres, recommended the creation of an additional senior position within the Office of the Ombudsman:

> that would be responsible for the coordination of complaints made by children, including those in the Juvenile Justice System, and for the establishment of a system of education and information for children about the role of the Ombudsman. Adequate resources should be made available to assist in the creation of this position.

Clearly, as identified above, juveniles often lack knowledge of the Ombudsman's role. They also will often lack basic literacy skills to formulate a complaint. Although every effort is made to make communications from this office informal and easy to understand, with a minimum of legalism, juveniles will often find the formal and prolonged nature of the investigative process extremely alienating.

For these reasons the Ombudsman has had a policy that juvenile institutions should be visited regularly, allowing officers of the Ombudsman the opportunity to speak to residents and to observe for themselves conditions in the institutions. In the past, smaller scale complaints have often been resolved through discussions with superintendents on the day of the visit. Such swift and informal resolution is obviously in the interests of all concerned.

Over the past year resource constraints have forced a severe reduction in the number of visits. Only two regular visits were conducted in the reporting period, with two other special visits in response to particularly significant individual complaints. The report of these two visits is outlined below.

KARIONG

One of the juvenile justice centres visited by investigation officers is the newly established facility at Kariong, near Gosford.

It was established at a cost of $12 million to accommodate detainees who prove difficult to manage in the other centres, ie, absconders and detainees who continually misbehave. In recent times, those who have committed serious indictable offences have been placed at Kariong to be assessed for long term placement.

Kariong Juvenile Justice Centre had its first intake of detainees in August 1991. It had been aptly named at the time the Kariong Secure Unit. Although it commands a magnificent view of Brisbane Waters, its appearance is quite awesome. The centre facility is surrounded by two massive security mesh walls, and one enters through a labyrinth with electronically controlled doors.

It has accommodation for 48, mainly in single cabins; it usually does not reach half that capacity and 20 seems the average number held at any one time. Ages range around the 16 to 18 years, although one detainee was 14.

Inmates

In its first year of operation, the superintendent estimated 73 youths have been placed with him. Sixteen of those 73 were Aboriginal (22 per cent). The average stay was three months, after which most were transferred back to one of the other centres. Some were placed back in the community under Community Youth Centre (CYC) supervision.

There have been nine youths who have been returned to Kariong after their initial three month training. Two of those nine were Aboriginal. Three of those who returned were over the age of 18 and had committed offences during their committal period, such as malicious damage or assault, and sentenced by the magistrate to serve a sentence in the adult gaol system. Two were transferred to Long Bay gaol to be admitted to the prison hospital for a short period following self-mutilation. The remainder were sent back from the other establishments because of their unacceptable behaviour.

If detainees are returned to Kariong because they have committed an assault or other serious offence, or if they commit serious misbehaviour during their period at Kariong, they are placed in Keiran North wing on the restricted program. This special program involves one to one supervision at all times, ie at mealtimes, workparty, passive and active recreation; there is no contact with other detainees. The aim is to encourage disciplined behaviour.

Ombudsman Visits

Investigation officers made two general visits to Kariong during which a number of detainees requested interviews. Some of the complaints raised were able to be resolved in later discussions with the superintendent. The facilities also were inspected.

The cabins or cells have been designed to ensure a safe and secure environment, bearing in mind the recommendations of the Royal Commission into Black Deaths in Custody. Nonetheless, there were some features identified during the inspections which presented a danger to persons at risk, including protrusions and sharp edges on some of the metal fittings. Adjustments were ordered by OJJ to address these concerns.

The superintendent also pointed out some deficiencies in the overall design. The complex is a high tech, high security establishment but failed to incorporate a functional kitchen. All meals have to be brought down from the kitchen at the Mt Penang Juvenile Justice Centre and, consequently, there are continual complaints from detainees about the food going cold and spoiling. A new kitchen at a cost of nearly $1m has been given priority funding.

In addition, the large auditorium which is used for program activities and indoor sport does not have toilet facilities or drinking taps. This has resulted in security and management problems.

Case Study 5

Inspection Following Riotous Behaviour

On 22 January 1992, investigation officers visited Kariong following phone requests from detainees. Three detainees had gone berserk and destroyed areas of the Keiran North wing on 14 January. They claimed they had then been locked up for a week.

The incident started when detainee A said he wanted another cigarette and before staff could respond he picked up a guitar and began to smash the windows. He dislodged aluminium strips from the window frames and began to make threats. Detainee B joined in and then detainee C joined the affray. One of the staff in the control room notified the police and called for staff assistance. Tables and kitchen equipment were destroyed and later A B and C demolished all the glassed areas, dining tables and recreational equipment including the TV and snooker table. Their behaviour was not controlled until reinforcement staff arrived. A B and C were later charged at Gosford Police Station with related offences.

The youths were placed in cabins in Drummond South wing and the next day A and B and two other detainees began destroying their cabins, smashing toilet bowls, windows and other fittings. The police with police dogs were called to apprehend all youths. They were charged with various offences at the Gosford Police Station.

All staff involved in these incidents received support and counselling.

The detainees primarily involved in the incidents were placed on the restricted program, with one to one supervision, and one-out activities for a number of days.

All but one of the detainees who took part in the riotous behaviour, completed their special programs at Kariong and were returned to other juvenile centres; they subsequently either earned a place on the CYC program or were discharged.

Case Study 6

Yasmar

In August 1991, a coronial inquiry was held into the death of a juvenile at Yasmar Detention Centre on 25 December 1990. Although the deputy coroner found that the boy had hanged himself, and no one else had been involved in the death, he expressed doubt as to whether he had intended to commit suicide.

The coroner considered that the hanging may have been an attention seeking ploy which went sadly wrong because it was dependent on staff doing regular checks. There was considerable dispute in the evidence concerning the actual time of death, but it was apparent that there was at least a 50 minute delay between the prior check and the time he was found.

Checks on Children

Evidence revealed inconsistency in departmental policy about checks on children in custody at night. According to the superintendent, there was a policy of checks on all residents every 30 minutes. The only youth worker in the wing at that time believed there were no set times and that it was up to each individual worker to decide. However, he stated to the inquiry that he usually made rounds every 30 to 40 minutes. No records were kept of the checks.

While the Royal Commission on Aboriginal Deaths in Custody recommended that checks of people in custody should be undertaken at least every hour, it is quite clear that checks of children should be more frequent. The deputy coroner also raised issues concerning the adequacy of the emergency response and basic first aid training provided to staff and recommended that bars be removed or covered with mesh.

In response to inquiries, Mr Graham, Director of the Office of Juvenile Justice, advised this office that a memorandum was issued to all superintendents of Juvenile Justice Centres on 7 January 1991 concerning nightly checks. The current policy is that regular 20 minute checks are conducted each night in every centre. Night log books are kept and details of every check are entered in the log. The frequency of checks made can be no longer than each twenty minutes, however for a resident who is either known to be suicidal or at risk in some way, more frequent checks each two or five minutes are made. For a resident who is assessed as being at extreme risk, constant supervision is given.

Mr Graham said each centre was inspected by a task force, consisting of the assistant director and other superintendents, following the release of the Aboriginal Deaths in Custody Report. He said steps had been taken to remove bars and other potentially dangerous furniture and fittings. This had been achieved in all centres, save for some cells at Reiby, which are in an area which is subject to constant supervision.

Suicide Awareness

Further, suicide awareness training has been implemented for youth workers, and training of staff and residents in basic first aid is now undertaken at all centres. This training is provided by the centres' nursing staff, visiting doctors, ambulance paramedics, Royal Lifesaving Society and the Prison Medical Service. According to the statistics provided, 50 - 100 per cent of staff at each centre are trained in basic first aid.

Investigation officers inspected the conditions at Yasmar in April 1992. Checks were made of the nightly logs, and as might be expected, entries varied in their thoroughness and detail, though all were in accordance with minimum requirements. According to the log books, checks were being conducted at least every 20 minutes or more frequently for children considered to be at risk. The superintendent advised those officers that the centre's psychologist was running a regular suicide awareness training package for new staff and providing them with a manual and training materials. Although the nursing staff were running regular first aid sessions with staff and the chief youth workers also were receiving training through the St John's Ambulance Course, records were not available to indicate how systematically this training was conducted for new staff.

The bars in all cells and cabins have been covered with mesh, as recommended, but the quality of the mesh appeared to vary; in some areas it was quite sturdy but in other places it appeared more flimsy. Generally, the investigation officers had concerns about some safety aspects of the cabins, for example the shower taps. However, they acknowledged that it is difficult to remove all potentially dangerous items without creating a totally dehumanised environment. These concerns were mitigated to some extent by the frequency of the checks. Frequent checks and training in managing potentially suicidal residents seem to be the most effective strategies for dealing with this problem.

Clearly, the Office of Juvenile Justice has taken considerable action to address the shortcomings in procedures, training and the safety aspects of cabins which were highlighted in the coronial inquiry. Nevertheless, given the seriousness of this issue, this office will check on safety aspects of centres and the implementation of the procedures and training as part of our program of routine visits to juvenile justice centres.

INVESTIGATIONS

While resources have not permitted a truly adequate visiting schedule, the Ombudsman has recognised the major public interest in this issue and has made complaints about conditions in juvenile institutions the subject of two major investigations this year

Case Study 7

Minda

In November 1990, investigation officers inspected Minda Detention Centre and Paterson House, interviewed detainees and talked to the superintendents. The specific purpose was to enquire about the discipline and punishment of detainees because information had been provided to the office that the disciplinary procedures were harsh and, possibly, illegal. Soon after, the Public Interest Advocacy Centre (PIAC) wrote to the Ombudsman complaining about the same issues.

PIAC's specific complaints were:

1) alleged non-compliance with legislative procedures for dealing with complaints of misbehaviour;
2) concern about the reasonableness and proportionality of punishments given;
3) the conditions in segregation/isolation cells;
4) the use of other sorts of punishments, including restrictions on property;
5) restrictions on property and possessions generally;
6) the increased frequency of body searches.

As a result of the visit and the complaint, extensive written enquiries were made. The department did not provide a reply until the end of February. When the material provided by the department was examined, it seemed that the legislation was being breached, and in some instances, although legal, procedures were not in the spirit of the legislation.

A formal investigation began in June 1991. Once again, there was a long delay before the response to this office's enquiries was received. By the time the investigation was complete the Office of Juvenile Justice had been established.

LEGISLATION

The legislation governing the punishment of detainees is the Children (Detention Centres) Act and Regulation. Because the department clearly did not understand the legislation, and had issued no operational guidelines, it was considered that the failure of the individual superintendents to implement the legislation properly was not in itself unreasonable.

One of the functions of the legislation is to provide a mechanism whereby bad behaviour in a detention centre can be punished without the detainee being subject to further criminal proceedings. Detention centre offences are called *"misbehaviour"* and are clearly distinct from *"offences"* which are criminal acts, escaping for example. Misbehaviour is categorised as either minor or serious and is loosely defined in the legislation.

A number of problems with the legislation itself were identified. Some of these were obviously drafting problems, numbering of clauses for instance, but others were more serious. For example, there is no explicit provision for a detainee's right of appeal against decisions on misbehaviour charges, and detainees were required to indicate to the superintendent whether they would plead guilty or not guilty before they had access to legal advice.

Misbehaviour

Complaints of minor misbehaviour, which includes lying, abusive or threatening language and fighting, are heard and determined by the superintendent who is also responsible for determining punishment. Punishment is also prescribed in the act and includes a caution, restricted participation in sport or leisure activities, additional duties *"of a constructive nature designed to promote the welfare of detainees"*, and, the most severe penalty, periods in isolated detention. The periods are clearly defined: up to three hours for detainees younger than 16 years, and up to 12 hours for older detainees.

Complaints of serious misbehaviour, on the other hand, must be heard by a Children's Court. An additional penalty of up to seven days detention on top of the sentence being served is available as punishment. Serious misbehaviour includes assault, insubordination, possession, procurement or supply of unauthorised medications or substances.

One of the most obvious problems was that superintendents were assuming a discretion, which did not exist, to decide whether misbehaviour of certain types was serious or minor. The only discretion available to a superintendent was to treat offences as misbehaviour if circumstances warranted. It is not evident from the legislation whether an offence should be dealt with as minor or serious misbehaviour.

When the department was asked why misbehaviour recorded in the centres' registers as serious were not referred to a magistrate, the reply was that they were regarded as minor incidents and that serious matters were referred to the police. This is a clear contravention of the legislation. The department also referred to other clauses which provide that inquiries into complaints of misbehaviour are informal and quick, and that a superintendent has the discretion to treat an offence as a misbehaviour. Neither of these clauses work in this way.

Magistrate Referral

Mr Blackmore, Senior Children's Magistrate, told investigation officers that no cases of serious misbehaviour in detention centres had ever been referred to the courts. He jokingly suggested that maybe no serious misbehaviour occurred. He believed, however, that superintendents avoided the need to refer detainees to the Children's Court because a fair bit of work was involved in such a referral, and that superintendents might not believe it was warranted when the maximum penalty was an additional seven days detention. He believed one solution would be to increase the maximum penalty to 28 days.

It is not clear how additional periods of detention could be applied to remandees who are not serving a term of detention.

Some types of misbehaviour are obviously described in such a way as to allow a superintendent some discretion in his/her assessment of the seriousness of the incident. For example disobeying rules or instructions is minor, but insubordination is serious; fighting is minor, but assault is serious. What is not clear is the basis for the use of discretion. It could be assumed that this would be addressed through departmental instructions, but in fact this was not the case.

The information provided to detainees was not explicit in advising that periods of detention could be increased. The report recommended that this be remedied and the Office of Juvenile Justice advised that information sheets for all centres were being examined for uniformity, and that this advice would be included.

Internal Enquiries and Records

Further difficulties were identified in the conduct and recording of inquiries into misbehaviour.

Section 20(8) of the act is an explicit instruction that "a copy of the record shall be given to the person to whom the complaint relates within 24 hours after the determination of the complaint". It is difficult to see how there could be any confusion about this, but the department advised that it had mistakenly believed that only detainees denying guilt automatically received copies of records. This error was corrected in February 1991.

Of further concern was that the evidentiary section of the punishment records does not accurately reflect the detainee's position. Many detainees complained that they were punished for incidents provoked by youth workers; these statements must of course be treated with caution, but the superintendents agreed that this sometimes happens. When it does, it is treated as a mitigating factor; the records do not show this.

The department's response to enquiries about this issue again referred to the need for speed and informality. This office does not believe that getting the detainee's version of events necessarily slows down or formalises the procedures. What it does do is allow an objective review of punishment records.

The department revised its punishment records, but only two lines are available for evidence. When the records were examined, no mitigating circumstances were recorded, and on over half the sheets, the detainee's plea was not even recorded.

Review of Punishment Records

A superintendent should forward copies of all punishment records to the director each month. Presumably, this enables implementation of procedures and reasonableness of punishments to be checked. This has not always happened. For example, in a comprehensive (the department's word) review of Minda in December 1990, the author refers to the completion of procedures and documentation on the use of segregation/confinement as *"as per Act and Regulations"*. This was patently not true, not least because the records show that serious misbehaviour was being punished by the superintendent.

The level of information on punishment sheets certainly did not allow investigation officers to assess the reasonableness of punishments. Insufficient evidence was recorded to determine why one detainee would receive four hours confinement for abusive language when another would receive 12 hours.

The Incentive System

Section 21 of the act provides specific categories of punishment for misbehaviour; it does not include a general power to remove property and privileges as a punishment. In practice, however, a regime was developed at Minda which resulted in detainees having property and privileges removed.

The department argued the regime was not imposed as a specific punishment *"but takes into account general behaviour over a period of time"*. The routine was developed as an incentive to good behaviour following the removal of remissions and is based on a system of levels of privilege. In full recognition of the management problems which could result from the complete lack of any incentive, it must be recognised the system is equivalent to the classification of adult prisoners in the effect it has on detainees' lives. For example, the lowest level of privilege means a detainee has a bare room with a water jug only, wears detention centre clothing and has to go to bed at 7pm. A television is not available until level 5, a watch at level 7. Further, the only appeal against loss of privilege is directly to the superintendent or in writing to the director.

This system makes privileges out of items, such as televisions, which are readily available to adult prisoners. It also raises a question on how this system fits into the United Nations Rules relating to detainees' property:

Rule 31: The possession of personal effects is a basic element of the right to privacy and essential to the psychological well-being of the juvenile. The right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognised and respected.

Rule 32: Juveniles should have the right to use their own clothing.

The primary concern of this office is that unless there is a clear definition of the minimum rights and living conditions in a detention centre, it is not possible to assess the reasonableness of a system of privilege. Without this definition, it is possible for drastic sanctions to be imposed on young people in detention without such sanctions being technically regarded as punishments.

Conditions in Segregation/Isolation Cells

The conditions under which a detainee may be confined as punishment are stipulated by section 21(2) of the act. It includes the provision of useful occupation in a physical environment which is no less favourable than the rest of the detention centre, unless otherwise appropriate. The detainee must also be visible to an officer at all times and able to communicate readily.

The department's own guidelines stipulated that a bed, a pillow and a soft-furnished chair should be in the room, and that a hand-held radio could be provided.

All the units at Minda are old, and Paterson House had been closed for renovations by September 1991. The department acknowledged that the isolation cells in another unit, Talbot, were in need of renovation as well, but they were still used and were quite clearly in breach of the Act. There was fire retardant carpet on the concrete base which serves as a bed in one cell, the other had only a bare concrete slab. There was no possibility of a view to the outside world and the toilets were inaccessible unless the detainee is let out of a cell by a youth worker. Given that the cells also are not in constant view of staff, this in itself undoubtedly causes occasional problems. Checks are made every 20 minutes in an attempt to deal with the problem of immediate communication and notes are made after each check. Radios are not provided, despite the department's own guidelines.

In June 1992, the director advised that the floors of all cells in existing juvenile justice centres, both normal and confinement, were being sprayed with a resin-based covering which was more comfortable underfoot and more practical than carpet. He also advised that while reading material would continue to be provided, radios would not be *"given the potential for some detainees to use the radio for self-destructive behaviour"*.

Stopping the Clock

The department's practice of "stopping the clock" was identified by PIAC as a further contravention of the legislation. The practice was that if a period of isolated detention was interrupted by the hours during which a detainee would normally be locked in his or her room, overnight for example, then this period of being locked up was not counted and the balance of the isolated detention would be served in the morning.

As a result, detainees were isolated for periods much longer than the maximum 12 hours prescribed by the legislation. When the practice was queried by investigation officers, the department got advice from the Crown Solicitor who agreed that the practice was outside the intention of the legislation. When the department received this advice in March 1991, the practice was stopped immediately.

Body Searches

A body search in a detention centre is in fact a frisk while the detainee is clothed, not a cavity search; a strip search is when a detainee is required to remove all clothing.

PIAC's complaint questioned the apparent frequency with which body searches were being done on detainees who had visits, even from lawyers.

The department advised that searching was carried out after visits, on suspicion of contraband or when a dangerous item goes missing, and as part of established routine. In Paterson House, established routine was that random searches of at least two or three cabins, and a full strip search of the detainee were conducted every evening. The chances of a detainee being strip searched a couple of times a week was high.

Investigation officers were concerned that there were no guidelines about when one method of search rather than the other should be used. They also were concerned that records of strip searches were not kept as the procedure is clearly very intrusive.

As a result of the investigation, the Office of Juvenile Justice developed a policy on searching. This policy included guidelines on when searching may take place, procedures to be followed and the need to keep a record of strip searches.

Recommendations

The overall recommendation made by this Office was for a complete review of the legislation given the extent of the difficulties in its application. Serious consideration should be given to the establishment of a system of Visiting Justices and a minimum standard of rights and living conditions for detainees should be defined and applied in all NSW juvenile justice centres. The Office of Juvenile Justice advised that a full review of the legislation and operational procedures was to be conducted.

Discussions between the Office of Juvenile Justice and the Senior Children's Magistrate indicated a Visiting Justice Scheme would not be quicker or more effective in dealing with complaints. He believed that bringing the detainees before the nearest Children's Court would ensure proper legal representation was available and would be more cost effective. Further discussions are being held with the Young Lawyers Section of the Law Society about extending the existing legal service for juveniles.

Amendments to the Act proposed by the review committee included an extension of the seven day additional detention as a punishment for serious misbehaviour to 21 days and a clarification of the rights of appeal. Proposed amendments to the regulation resolve small problems about inconsistencies and numbering, and most importantly delete the provision that detainees must indicate a plea to the superintendent prior to a court appearance.

The Report of the Legislative Council Standing Committee included a recommendation that a system of remissions be re-introduced. By the time that the Office of Juvenile Justice responded to the report from this office, possible policy and legislative changes had yet to be considered and developed. If such a system were to be developed there would be extensive implications for the management of juvenile justice centres, not least for the existing incentive program.

Case Study 8

Conditions in Centres

This Office currently is investigating a complaint by the Public Interest Advocacy Centre about entitlements of detainees in juvenile justice centres to telephone calls and visits.

PIAC complained that the rules and practices in relation to visits and phone calls are unduly restrictive of the rights of juvenile detainees and prejudicial to their welfare and interests. The current minimum entitlements are two visits per week for each resident with usually no more than four visitors permitted at a time. Each resident is entitled to one phone call per week as a right; a second, depending on response to programs; and a third at the discretion of the superintendent. The superintendent has further discretion to approve any number of additional phone calls and visits.

Though this Office appreciates superintendents are able to use their discretion to grant visits at times other than those scheduled, this is not a substitute for adequate basic entitlements. These can be increased without limiting the use of the discretion. After investigating the complaint, this Office is of the preliminary view that minimum visiting entitlements should be increased to four scheduled times per week, in line with the current practice at Keelong and weekly entitlements to telephone calls should also be increased.

An important issue is visits of non-family members. In juvenile centres, any intending visitor who is not a family member must seek prior approval for the visit from both the detainee's parents and the superintendent. PIAC submits that this serves to discourage peer visits and thus make rehabilitation and re-integration into society on release more difficult. The Office of Juvenile Justice, in contrast, believes that rehabilitation of detainees is most likely to be achieved when they are isolated from peers who may be negative influences. However, it could be argued that this is a temporary solution at best and it would be more useful to integrate peer visits into the program.

Though Regulation 17(2)(a) of the Children (Detention Centres) Regulation 1988 requires parental approval be obtained for non family visits for detainees under 16, the department makes this requirement of those over 16 as well. The department's commitment to restricting peer visits in comparison with those of family is shown in their proposal to amend Regulation 17(2)(b) which states the superintendent *"shall, at all times, seek to encourage and facilitate visits to detainees by their relatives and friends"* so that the word *"friends"* is deleted and replaced with the words *"immediate family and other visitors approved by the superintendent."*

The investigation also has examined ways of encouraging both family and peers to visit by providing more scheduled visiting times and by ensuring the rules of the institution are rewritten to positively encourage people to ask for discretionary visits, where needed.

Assaults in Detention

Allegations of assaults on juveniles in detention are of course viewed with the greatest concern by this office. This year, investigations into such allegations have been made the subject of two reports to parliament.

Case Study 9

Departmental Whitewash

In December 1991 the Ombudsman made a special report to Parliament on the failure of departmental officers to respond appropriately to allegations of assault of a detainee in a detention centre.

The investigation showed a complete failure by department staff either to seriously consider the allegations, or to conduct a proper and meaningful investigation. The Ombudsman's final report recommended that the department revise its procedures for investigating complaints of assault, with particular reference to the involvement of police and to ensure all officers responsible for their implementation fully understand those procedures. The Office of Juvenile Justice advised they were acting on this recommendation.

The report also recommended the department obtain independent legal advice as to whether there were sufficient grounds to lay departmental charges against the operations manager and the acting superintendent of the detention centre. In summary, the legal advice concluded there was overwhelming evidence that both officers failed abysmally in their duty to investigate the detainee's complaint and recommended both officers should be subject to disciplinary action.

No departmental action against the operations manager, who was employed by the Department of Community Services, was possible as he had been allowed to take voluntary redundancy three days before the advice sought by the department was received.

The Office of Juvenile Justice advised that proceedings had been commenced against the acting superintendent in line with the legal advice. However, in February 1992, the director advised a further preliminary enquiry conducted by a departmental officer had concluded that insufficient grounds existed to lay departmental charges. This finding is in direct contradiction to the independent legal advice sought by the department.

It is difficult to see why further enquiries were necessary when sufficient investigation had been conducted by this Office to allow counsel to advise strongly that sufficient prima facie evidence existed. It is also not known whether this disciplinary enquiry was conducted in accordance with the very strict disciplinary guidelines raised by the industrial authority and the Public Sector Management Act.

The Director of the Office of Juvenile Justice said:

> *"Whilst it has been found that [the Acting Superintendent] was not in breach of any procedure, it is unfortunate that as the senior person he failed to ensure that all appropriate information necessary to make a preliminary assessment was gathered in order that the matter could be properly dealt with... In view of the findings of the preliminary inquiry [the Acting superintendent] will be counselled and warned. He has also been instructed that if he is employed in a managerial role he will be required to undertake a management development course to ensure his proper understanding of the responsibilities of a supervisory position".*

Mr Graham also advised that due to the review and reclassification of the officer's position, he would have to compete on merit for that position.

It is unfortunate this action by the Office of Juvenile Justice can so easily be interpreted as a whitewash. It raises again the question of whether there is any point in department's spending public funds on independent legal advice when that advice is ignored or overridden. This was addressed by the Ombudsman in his report to Parliament in the following terms:

> *"It seems extraordinary to me that a department commits itself to the expenditure of no doubt considerable funds to obtain legal advice on departmental charges and on the other hand pays the officer subject of that advice a voluntary redundancy package. I believe this to be both hypocritical and a waste of public funds".*

These comments apply equally to the conduct of the Office of Juvenile Justice.

Case Study 10

Mount Penang

Section 31 (1) of the Ombudsman Act provides that the Ombudsman may at any time, make a special report to the Minister for presentation to Parliament on any matter arising in connection with the discharge of his function. Section 31 (2) provides that the Ombudsman may recommend that such a report be made public forthwith.

On December 1991 the Premier tabled in the Legislative Assembly, a Special Report by the Ombudsman to inform the Parliament of the failure of the former Department of Family and Community Services to meet the provisions of the Children (Detention Centres) Act and its regulations, particularly in respect of instructions to departmental staff on minor and serious misbehaviour as defined in the regulations.

Background

In November 1989 a detainee had complained about being assaulted by other detainees at the Mt Penang Detention Centre. He said the purpose of his letter was to get a transfer to another establishment. He said another detainee had been given a *"discharge bashing"* and he feared for his safety.

In January 1990 he wrote again complaining of another assault. He had been kicked in the testicles by another detainee and had to be taken to hospital. He told the Ombudsman, however, his problems were now resolved because he had finally been transferred out of Mt Penang to another centre.

While the major concern of the complainant may have been resolved as a result of the transfer, there appeared to be systemic problems in the administration of the Mt Penang Detention Centre, and an investigation was commenced in 1990.

The investigation revealed that during the six - seven weeks of his custody at Mt Penang there had been over 30 reports of altercations or incidents involving the detainee. In addition staff members had reported two assaults committed on him.

There was no evidence that this misbehaviour had been dealt with in accordance with the Children (Detention Centres) Act and its regulations. Some continuing misbehaviour, including acts of violence, had been noted in the dormitory or unit diaries and was dealt with at unit management level and not referred to the superintendent.

With regard to the staff reports of assault, in the first case there was sufficient evidence provided to the superintendent, to proceed under the abovementioned Act, but he failed to follow the required procedures. In the second case of assault, a kick to the testicles the superintendent failed to gather crucial evidence, obtain a statement from the witness and properly identify the assailant. Again he failed to act in accordance with statutory requirements.

The superintendent terminated his employment with the Office of Juvenile Justice prior to the issue of the final report on the investigation. The Ombudsman decided not to recommend that his neglect be dealt with under the Public Sector Management Act, as he was no longer a public authority.

The investigation established that the standing instructions to staff on dealing with misbehaviour, particularly assaults by detainees on other detainees, were antiquated and had been made redundant by the regulations (as amended at 22 September 1989) of the Children (Detention Centres) Act. The Ombudsman recommended in his Special Report that correct instructions be issued to staff in juvenile justice establishments as a matter of urgency.

The Office of Juvenile Justice acted promptly in issuing proper instructions to staff on their responsibilities under this Act, thereby satisfying the Ombudsman's recommendations.

Aboriginals in Juvenile Justice

As in the adult prison population, aboriginal juveniles are grossly over-represented in juvenile justice centres.

On the 24 February 1992, 96 Aboriginal juveniles were in justice centres in New South Wales, while the total juvenile justice centre population was 416. Seventy-two Aboriginal juveniles were on control order, 22 were on remand and two were on a control order and remand.

At February 1992 Aboriginal juveniles comprised 23 per cent of the total juvenile justice centre population in New South Wales.

The Aboriginal population of Juvenile Justice Centres as a proportion of the total juvenile justice centre population has remained relatively stable over the past five years (February 1987 25%, 1988 - 27%, 1989 - 22%, 1990 - 21%, 1991 24% February 1992 - 23%). There has been some fluctuation in the number of Aboriginal juveniles in juvenile justice centres, with 100 Aboriginal juveniles in juvenile justice centres in February 1987, 70 in February 1989 and 96 in late February 1992.

In June 1992, 82 Aboriginal juveniles were in juvenile justice centres, with Aborigines comprising 20.7 per cent of the total juvenile justice centre population of 396.

In February 1992, the overwhelming majority of Aboriginal juveniles were in detention for property offences (55.4 per cent) while the minority were being detained for offences against the person (19.6 per cent) and good order offences (19 per cent). (All of the above statistical information was supplied by the Office of Juvenile Justice.)

The Investigation Officer, Aboriginal complaints, has participated in the

Office of Juvenile Justice working party for the Green Paper, Future Directions for Juvenile Justice in New South Wales, and will be making visits to juvenile institutions a particular focus of her outreach program.

RTA and Alternative Dispute Resolution

The Roads and Traffic Authority devised the computer Driver and Vehicle Identification System (Drives), to revolutionise motor registry transactions and to prevent the need for centralised processing of paper transactions, which previously could take up to ten days. With the gradual activation of the various programes for licensing and registration, applications dealt with over the counter have been streamlined by direct input into the computer record system. Greater administrative efficiency (in principle) should be the result.

Photograph licenses were introduced over a three year period for the three million or more licensed drivers in NSW, to increase record integrity and reduce fraudulent use of identity. A list of primary and secondary identity proofs was established to assist motor registry staff in verifying identity for the processing of license and registration applications.

Acceptable proof of identity (POI) documents include current NSW photo license (or photo license which has expired within the last two years); Australian passport; current defence force, federal, or NSW police photo identity card. Primary POI documents include a NSW photo license that has expired more than two years ago or photo driver's license from another state that is current or expired within the last two years; full birth certificate or extract; current overseas passport; Australian naturalisation or citizenship document.

Secondary POI documents include Medicare, Pensioner Health Benefit or Department of Veterans' Affairs' cards; current credit or account card from a bank, building society or credit union; telephone, gas or electricity bill not more than 12 months old. If no POI documents in the Acceptable category are available, one Primary and one Secondary POI document is required to establish identity.

Case Study 11

Assumed Identity

One matter which challenged the fallibility of this system concerned the complaint by Mr Mc that the RTA had failed to investigate the apparent fraudulent use of his driver's license, after he had reported various incidents to the authority over a period of time.

Mr Mc believed that a person had intercepted his paper license renewal notice in 1987, assuming Mr Mc's identity, but giving another address. It was subsequently established that the person using Mr Mc's identity (and driver's license) had registered a motor vehicle in the real Mr Mc's name. Mr Mc began to receive parking and traffic fines which he had not personally incurred, and which had been incorrectly attributed to him. Mr Mc brought the resultant fine defaults to the attention of the RTA and was assisted in having these matters removed from his license record. Having noted these obvious indications of fraudulent identity use, Mr Mc thought that the authority would take care of the matter and seek out the person responsible.

In 1991, Mr Mc tried to renew his driver's license, but discovered that a gold photo license already had been issued to a person with the same name, date of birth, and most astonishingly the same license number. In receiving little assistance from the authority to stop the fraudulent use of his identity, Mr Mc brought the matter to the police. Using RTA license records, police were able to locate and arrest the bogus Mr Mc, a Mr H. Mr H was charged with a number of fraud offences and eventually was convicted and fined.

The authority argued spiritedly that Mr Mc's case was an isolated one. The Deputy Ombudsman expressed the view that there may be a number of people in the community who have established another identity before the photograph licensing system, and who have therefore been able to produce a paper license as primary POI, as well as secondary POI documents obtained on the strength of fraudulent paper licenses. It is conceivable that certain types of Primary POI documents could also have been established by unscrupulous individuals.

One of the most incredible aspects of Mr Mc's case was that two licenses could be in existence at the same time, incorporating the same name, date of birth, and license number, but with different addresses and driver photos!

The Deputy Ombudsman recommended:

- the RTA take steps to ensure any suspected case of external fraud be referred immediately to the police;
- transactions such as two or more applications for replacement of a lost/stolen license in a six month period be regarded as suspicious and referred to the Internal Audit Branch via registry managers, together with other specified matters which might raise reasonable suspicion;
- a small percentage of such cases be investigated by the Internal Audit Branch, together with ongoing random investigations of suspected external fraud;
- any replacement license issued be easily identifiable eg, flagged as being the first, second or third replacement.

The chief executive of the RTA has yet to respond to the Deputy Ombudsman's final report, but has otherwise indicated satisfaction with the recommendations made in the draft report.

Collecting the Cash

The bulk of RTA complaints dealt with by this Office involve cancellation of drivers' licenses and/or motor vehicle registration for failure to pay outstanding traffic and parking fines imposed by the Police Service or Courts. In years gone by, unpaid fines resulted in the issue of warrants with a prison term of one day for every $50 owing. It was possible for a person to have many warrants outstanding, but all could be cut-out by serving time on the warrant with the highest monetary value.

A new system of penalties for non-payment of fines was devised in early 1988, with imprisonment as the last resort. When fines imposed by the Police Service such as parking/traffic infringement notices or where parking/traffic fines imposed by Courts remain unpaid, notification is sent to the Fine Default Unit of the RTA. Checks are made to see if the relevant person is a licensed driver or registered owner of a motor vehicle. If there is no record, the fines are referred back to the police or courts and can result in the issue of warrants (which have a life span of twelve years).

Where the RTA is able to match personal details with license/registration records, notices are sent out specifying the fine/s unpaid, together with additional enforcement costs, allowing further time to pay. If the fine/s are not paid in time, action is taken to cancel the relevant license/vehicle registration, and no further notice of cancellation is sent out. There are additional penalties for people who drive when their license has been cancelled, and even greater penalties for driving an unregistered/uninsured motor vehicle (up to $5000 in fines). When late payment is made to the RTA after action has been taken to cancel a license, an additional license fee has to be paid before an unrestricted one year or three year silver license can issue. If the cancelled license was a gold license, an additional penalty is the loss of the cost benefits of holding a five year license.

Many people vent their anger at RTA staff, claiming they never knew of the existence of the fines or were not responsible for the alleged offences.

Agency

The RTA acts merely as a collection agency for the Court or the Police Service, whichever imposed the fine. In rare cases like that of Mr Mc, the RTA is able to assist by removing the fine defaults from its records, but in others, the problem is of the complainant's own making. For example, in this technologically advanced policing age, camera detected offences have proved costly for people who fail to notify the RTA of the disposal of a vehicle. Parking and camera detected offences rely on vehicle registration details to identify the offending owner. If a Notice of Disposal form has not been provided to the authority within seven days of sale, fine notices are sent to the last recorded owner. When receiving a fine in these circumstances, care should be taken to immediately nominate the driver/owner of the vehicle and return the infringement notice to the Police Service, for action to be taken to send the fine to the right person.

Where a person can establish to the satisfaction of the Clerk of the Court that they did not receive a penalty notice, courtesy letter, notice of cancellation, or were unable for other valid reasons (incapacity or ill-health) to do something about the fines before the RTA became involved; an application can be made under Section 100Y of the Justices Act to have the case determined by a Court. The RTA will then remove the default information from its records until further notification from the Court.

Some complainants have sworn that they paid their fines to the Police Service or Court and still suffered license cancellation. Without proof of payment in the form of cheque stubs, bank/credit card records or receipts this Office is unable to assist, and in any case, would refer the complainant back to the Police Service or Court.

Old Offences

Many complaints made to this Office have involved fines recently referred to the RTA which were incurred as far back as 1987, causing understandable outrage. The fault here is with the backlog in processing fine defaults through the Court system for referral to the RTA. In this instance, and other rare cases of Court error, this Office is unable to assist, as the conduct of Courts or their staff is outside the jurisdiction of the Ombudsman Act.

It is extremely important to notify the RTA of the sale of a motor vehicle. With camera detected offences, if care is not taken to specify the correct driver and the fine is simply paid, the RTA will add demerit points to the license history of the registered owner, being the person in whose name the fine was issued. This can result in license cancellation for having accrued more than 12 demerit points in any three year period in NSW, Victoria or Queensland.

Quite often, complainants had difficulties with the quality of customer service offered by the RTA, including rudeness and incorrect information leading to further inconvenience. Due to the limited resources available to the Ombudsman, alternatives to lengthy written preliminary enquiries and investigation were explored with some success. Some case studies follow.

Case Study 12

Off to Gaol for my Extra Belt

Mrs L, who made enquiries of staff at her local motor registry about the legality of having a fourth seat belt fitted to the rear of the new family Commodore station wagon to accommodate her small children. Mrs L was allegedly treated poorly, told she would go to gaol if the extra seat belt was fitted, and told to shop around for a more suitable family vehicle. Investigation staff contacted the RTA's Crashlab and ascertained that although desirable from a road safety aspect, a fourth seat belt would not meet Australian design rules as it would alter the approved vehicle safety specifications.

Although the complaint did not raise an issue of maladministration, in the interests of good public relations, the matter was referred to the RTA's chief executive with a request from the Ombudsman that the complaint be conciliated by a senior officer, particularly concerning the allegation of rudeness.

Both Mrs L and the Ombudsman received an apology from the authority stating that Mrs L had been given incorrect advice, as had the Ombudsman's investigation officer. The RTA arranged to fit an additional seat belt to Mrs L's vehicle free of charge at the authority's Crashlab, along with several restraint anchorages on the parcel shelf.

Case Study 13

Registration of Stolen Cars

Mr S purchased a vehicle which had been re-registered in NSW after allegedly having been brought in from another state. In order to effect registration of this interstate vehicle, a pit inspection had to be conducted by an RTA examiner. Mr S paid $6000 to the vendor, who was actually part of a car stealing racket which involved up to 52 vehicles. The vehicles had been cut and shut; composites of wrecked vehicles with the correct engine, but with stolen chassis and bodies and altered compliance plates. The RTA's examiners failed to pick up the compliance plate and chassis alterations, and so the theft racket continued unchecked. NSW Police were able to use RTA records to locate the stolen vehicles, and confiscate them from their unsuspecting owners. Mr S was actually the owner of an engine, with virtually all of the car from the windscreen back belonging to someone else.

Mr S was able to recover $1000 for the sale of the engine, but was left $5000 out of pocket. The RTA, without admitting its liability, agreed to make an ex-gratia payment of $5000 to Mr S, following the intervention of this Office. A number of other persons similarly affected also received ex-gratia payments. The RTA holds firmly to the view that the DRIVES system will record vehicles that have been written off, to prevent these wrecks from being joined with major identifiable components from stolen vehicles and re-registered as occurred in this case.

Generally, this Office was able to resolve matters or provide cogent and satisfactory explanations to complainants, alleviating the need to embark on investigations. The process of formal investigations, due to legislative requirements and the need to observe certain natural justice principles, are often expensive and time consuming. It is best for grievances to be first raised with local motor registry managers or even RTA regional managers. Where this type of approach is not successful, complaints can be put in writing to the Chief Executive of the RTA. Only systemic problems or complaints containing prima facie evidence of maladministration or unreasonable conduct will generally be inquired into.

It is best to exhaust all avenues available through the RTA first before approaching the Ombudsman.

CONTRACTING AND TENDERING

Government departments, to a greater or lesser degree, have always used non-government companies or employees to do part of their work. From the briefest consultancy to the largest capital works project, private firms and individuals have carried out work which is essentially the responsibility of government. However the requirements and expectations placed on government departments are often, quite rightly, very different from private companies operating in the marketplace.

When they deal with a government department, the public expect that the department will behave fairly and equitably. But having put its faith in the selected contractor how does a department guarantee that the public will receive reasonable treatment? Perhaps it relies on the probity of the contractor or on the detail of the contract itself. Sometimes that is not enough.

Case Study 14

Darling Harbour Authority

As part of the construction of sporting facilities at Darling Harbour the authority wanted to install lighting on some tennis courts at the complex. A private and independent contractor was engaged to act as the construction manager for the project. The contractor called tenders for the job in October 1991. The documents stated that *"late submissions may not be considered"*.

Companies X and Y lodged tenders with the contractor within the required time and the documents were sent by the contractors to a private firm of lighting engineers for assessment. Company Y was judged to have the better equipment but company X initially won the contract because it was cheaper. The lighting engineers unofficially informed company X that it had been successful.

Six days after the closing date for tenders, and on the same day as the lighting engineers sent their assessment to the contractors, company Y lodged a further letter with the contractors saying it had made a mistake with its calculations and reduced its price. With the preferred equipment and the new cheaper price company Y was then granted the contract. When it was informed of what had happened, company X complained.

No direct evidence was found to show that staff from either the contractor or the consulting engineer provided information which would have allowed company Y to readjust its tender price.

However if the tender had been let by the Public Works Department, the Water Board or almost every other statutory authority in NSW the late tender would not have been considered, or the project would have been retendered. The matter was put, hypothetically, to a range of other public authorities and organisations that represent private industry. They all agreed that it was both undesirable and very rare for late tenders of any sort to be acceptable, and certainly not without some guarantee that any late tenderer had not had the benefit of prior information.

Clearly it is good for every organisation to be seen to be cultivating an env ironment which is conducive to ethical conduct. For government authorities it is essential. It is not just important to demonstrate that no improper conduct took place, the authority must also be seen to be doing the right thing.

In this case the Darling Harbour Authority revised its tendering guidelines to include safeguards against the dangers of accepting late tenders. Presumably these guidelines will be applied not just to the authority itself as a tenderer, but to any contractors the authority chooses to use to oversee its tenders.

Case Study 15

Public Works Department

While under contract to PWD during the installation of a sewerage system north of Sydney, heavy vehicles belonging to a construction company worked on an embankment at the rear of Mr M's house. Soon after it became evident that a retaining wall had been damaged. In accordance with its contract the company assessed the situation, accepted liability and had the wall repaired by a subcontractor, apparently to everyone's satisfaction. There was no indication that the work had ever been inspected by PWD or anyone else to ensure it had been completed to the desired standard.

More than a year later, after heavy rain the wall collapsed altogether and redirected flood waters into Mr M's house. A PWD engineer organised some immediate help for Mr M, clearing rubble and draining the water away. Mr M then made a claim on the PWD asking for the wall to be rebuilt once more and suggesting that the earlier work had been unsatisfactory. The PWD wrote to Mr M saying it relied on the earlier indemnity provided by the construction company, which by this time had gone into liquidation.

Coincidentally, the same firm was the insurer for both the Department and the construction company and it appointed a loss adjustor to now assess the matter. After a delay Mr M started to get negative feedback from the loss adjustor despite previous verbal assurances that his claim would be OK. Finally, he received a letter from the loss adjustor on behalf of the insurer baldly denying liability on behalf of the PWD.

Mr M then wrote to the PWD asking for it to reconsider the case and to repair the wall and also to tell him the reasons for denying liability. Public Works informed Mr M that its insurance cover could be jeopardised by reconstructing the wall and did not respond to the request for more information. It would have been difficult to do so as there was nothing on PWD files at that time to indicate exactly why the loss adjustor had rejected the claim. The project manager for the sewerage scheme admitted during the Ombudsman's enquiries that he'd found it hard, through the insurance broker used by PWD, to get the insurers to tell him the reason for denial of liability.

The Ombudsman has consistently maintained that as a matter of natural justice statutory authorities should supply reasons for their decisions. In this case it appears that the final decision concerning liability was made by a loss adjustor for an insurance company without fully involving the authority. Understandably, Mr M was unsure whether he was dealing with a public authority at all.

As a result of the enquiries the Ombudsman suggested that PWD make sure its insurers adopt a policy of giving clear reasons for denial of liability and that the department amend its guidelines to make clear to claimants that it was PWD making the decision.

In a prompt and positive response PWD accepted the Ombudsman's suggestions and consulted this office on altering its guidelines.

Case Study 16

Roads and Traffic Authority

The RTA decided that it needed environmentally friendly paper bags to be used as promotional bags at the 1991 Royal Easter Show. An RTA employee, Mr M, was asked to contact manufacturers and get quotes. At the prompting of a more senior officer he was also told to contact Mr L, a private public relations consultant currently working for the authority who had frequently done publicity work for the RTA in the past. There were no strict tender guidelines in use for small contracts such as this and Mr M simply rang around using the Yellow Pages obtaining quotes by telephone or fax.

A senior employee of company P, Mr B, was asked to come in to discuss his telephone quote. According to Mr B he was surprised when, during this meeting, Mr M received a phone call from what turned out to be the consultant and Mr B was asked to speak to him; a man he had never met. Mr L proceeded to try and pursuade Mr B that it was a good idea if company P used him to co-ordinate the paper bag contract. Mr B was surprised at this as Mr L did not manufacture bags and could not make a profit on the job as he would have to employ a firm to make them. It was then suggested that Mr B meet with Mr L before the RTA finalised any contract for the bags. Neither the RTA employee nor Mr L recall the phone conversation.

Company P, with its own art work section wanted to deal directly with the RTA and faxed a quote the next morning. Later that day, Mr B and the consultant met and Mr B was told that Mr L knew his company's quoted price. Mr L denied this in evidence to the Deputy Ombudsman. This alleged foreknowledge didn't concern Mr B, as he thought that the consultant wouldn't be prepared to take a loss on the job. Nevertheless, company P agreed to quote to Mr L for the bags giving the same quote as to the RTA. The next day Mr L's company quoted to the RTA. The price was slightly below that of company P. Mr L lodged an order for bags with company P in advance of any approval of his quoted price. The RTA accepted Mr L's quote and duly paid him for the bags which were supplied to Mr L through company P. However Mr L's company experienced financial difficulties and company P wer not paid for the bags. The RTA maintained these problems were for the two private parties to sort out and continued to use Mr L as a consultant.

The concern of company P is understandable. It appeared that the RTA favoured Mr L by involving him in the tender process at all. Clearly he was not a supplier of the desired article. Company P's concern was heightened by its belief that Mr L also had the benefit of information about company P's price for the bags. The tender process, as such, created a situation, by virtue of the open tenders and sloppy approval process, ripe for abuse. The continued use of Mr L as a consultant by the RTA appears to condone his bad debt to the company, which was incurred as a result of the RTA tender procedures, or lack of them.

Established Standards

The need for government departments and authorities to pursue the cheapest and best means for supplying services is not in question. However nothing relieves any statutory authority of the obligation to behave reasonably and in line with established legal and community standards.

In all of the above instances the use of a third party (a contractor/consultant) has resulted in conduct which would have been viewed harshly by this office had it been perpetrated by the authority itself. Indeed in all cases there has been an obvious lack of guidelines to govern the circumstances.

In addition there is a growing tendency for the relationship between government departments and contractors to rely heavily on the almost unsupervised actions of the contractors. In all the cases mentioned the authorities seem to have breathed an audible sigh of relief and left the performance of the service to the private sector. This is fine as long as the work performed is up to standard and, more importantly, that the procedures used comply with accepted standards and make it clear that the public authority ultimately retains responsibility.

Indeed, the last point is crucial in the Ombudsman's assessment of complaints. Only public authorities fall within the jurisdiction of this office, the actions of contractors do not. To remain publicly accountable for expenditure from the public purse all government authorities must acknowledge that it is the authority itself which must accept final reponsibility for how money is spent.

Does the Office of Aboriginal Affairs Administer Aboriginal Affairs?

Case Study 17

Last year an investigation was conducted on certain aspects of the administration of the Office of Aboriginal Affairs (OAA).

It arose from a complaint to the Ombudsman by the Toomelah Local Aboriginal Land Council and the Toomelah Aboriginal Cooperative about the lack of various government services and the levying of rates.

Appalling living conditions at Toomelah were brought into focus in 1988 following an enquiry by the Human Rights and Equal Opportunity Commission. Justice Marcus Einfeld reported on the failure of the State government and the local council to carry out their functions. He found that the (State) Ministry of Aboriginal Affairs, the authority most able to influence State and local government authorities, abdicated its responsibilities to the Toomelah community. The ministry was abolished in 1988 and in its stead, the government immediately established the OAA, which became part of the Premier's Department.

The OAA is a central coordinating agency; it described its role in a mission statement issued in December 1990 as:

- to assist and advise the Premier on the efficient effective and co-ordinated management of Aboriginal policies, legislation, programs and issues;
- to assist Aboriginal people and communities to achieve self management, economic independence and to enhance their image within the general community.

Following Justice Einfeld's report, there were immediate responses from the public authorities involved. The OAA had direct involvement in monitoring the progress made by those public authorities. The office also accepted the chair position of the Toomelah Co-ordinating Committee previously run by the Moree Plains Shire Council but wound up the committee on 21 March 1991 giving as its reason that the major government priorities for Toomelah had been achieved.

Complaint About Rates

The investigation under the Ombudsman Act identified areas of major maladministration on the part of the OAA, the most serious being in regard to the rating of Aboriginal land.

The office failed to comprehend that the Toomelah Cooperative is entitled to exemption from the application of rates under the long-standing provisions of S 132 (1)(d) of the Local Government Act, because it is a Community Advancement Society under the Cooperation Act. The investigation revealed that S 132 (1)(d) is being administered inconsistently by local authorities in NSW. A number of cooperatives and registered companies having charitable purposes, including some church and ex-servicemen's organisations, are accorded their entitlement to exemption as are certain urban Aboriginal cooperatives on the basis of their charitable purposes.

There has been a lack of sufficient research into the rating of Aboriginal land by the OAA and this has resulted in discrimination against rural Aboriginal Land Councils over a number of years.

Rate Indebtedness

S 44 A(1) of the Aboriginal Land Rights Act provides that where local government rates have been unpaid for one year, the NSW Aboriginal Land Council assumes responsibility for the debt.

NSW Aboriginal Land Council advised this Office that the total amount outstanding to Moree Plains Shire Council for the Toomelah rates account was $24,600. The total indebtedness to shire councils across rural NSW in respect of Aboriginal Land Council and cooperative land was estimated in 1991 at $1.6m.

Despite the mission of the OAA to advise the Premier on the efficiency and effectiveness of Aboriginal legislation, it neglected to advise the Premier of the consequences of S 44 A(1) of the above Act, and of related Aboriginal programs.

Other Inadequacies in Administration

In responding to Toomelah's housing and road maintenance problems, the OAA failed to properly evaluate the community's financial capacity and its ability to attract funding. Although engaged in discussion with Toomelah representatives on those problems, the OAA failed to recognise that since 1986 Toomelah had ceased to receive annual allocations from the NSW Aboriginal Land Council ($103,000 per year), and in fact had lost its funding status. During this time there were accelerating problems from the malfunctioning of the water and sewerage systems, and rectification required both funds and expertise in considerable measure.

Nonetheless, in March 1991, the OAA wound up the Toomelah Coordinating Committee saying that the government's priorities had been achieved. The decision and the office's reasoning place the credibility of the OAA in doubt. An inspection by the shire council established that the pump at the sewerage station was not working. The area was polluted with sewage solids and blocked further with paper. Part of the water supply was broken. There were outbreaks of hepatitis and gastro-enteritis. Community health was clearly at risk.

The OAA failed in its mission to assist Aboriginal communities, and failed to coordinate the management of Aboriginal programs to achieve attainable practical results.

Community Policing

The Patrol Commander at Moree has now established a consultative committee for the border towns of Goondiwindi, Boggabilla and Toomelah with support from the Queensland police. This action largely appeases the complaint about the absence of community policing.

However, confusion exists at Toomelah about the rights of police to access Aboriginal land council land. An instruction issued by the Police Commissioner as far back as 1987 included a suggested form of agreement which can be reached between the police and Aboriginal communities in such cases.

The uncertainty about access was brought to the notice of the OAA following a series of disturbances at Toomelah. As far back as December 1989, the office raised the prospect of writing to the Police Commissioner on the matter but failed to do so subsequently. The OAA avoided the examination of this aspect of Aboriginal/police relations locally and, indeed, statewide. It is an area of Aboriginal administration which should be addressed in a community policing context rather than left to be addressed reactively.

Conclusion

The investigation has confirmed the great need to maintain a central coordinating agency for the administration and management of Aboriginal affairs.

The failures and inadequacies of the OAA identified in the investigation strongly suggest, however, that there should be an audit or review of the way it operates in the future.

Status of the Investigation

The Premier, as the Minister responsible for Aboriginal Affairs, has been furnished with a copy of a draft report on the investigation in which the Ombudsman has recommended that:

1. an amendment be made to the Aboriginal Land Rights Act for the mandatory exemption from rates under the Local Government Act of land owned by any Aboriginal land council whose activities are charitable and when that land is used for purposes of the charity .
2. the Office of Aboriginal Affairs request the Director of the Department of Local Government to issue a memorandum to local government authorities reminding them that land which is owned by Aboriginal land councils or cooperatives, whose activities are charitable and such land is used for the purposes of that charity, is land to which an exemption under section 132(1)(d) of the Local Government Act applies.
3. the Office of Aboriginal Affairs calls a summit with representatives of its own office and the relevant public authorities, to discuss strategies to assist Aboriginal land councils and co-operatives which meet the definition of a charity, to obtain exemptions from rates.

4. the Office of Aboriginal Affairs conduct research to identify the Aboriginal communities where there is a deprivation of basic government services, and to prioritise those communities where health is at risk.
5. the Office of Aboriginal Affairs conduct a review of the relations between Aboriginal land councils and the police regarding access to land council land and consult with the Commissioner of Police regarding community policing programs generally.

COMMUNITY HOUSING AND DEPARTMENTAL BRICK WALLS

Case Study 18

In October 1990, a letter was sent to the Ombudsman which complained primarily about the Department of Housing's failure to answer correspondence. Initially, it seemed the specific complaint could be resolved readily. But when this office began to make enquiries the communication problems turned out to be only the tip of the iceberg, and by June 1991 a formal investigation was begun.

The investigation focused on the administration of a federally funded program which is run by the New South Wales Department of Housing. The Local Government and Community Housing Program was introduced by the Federal Government in 1984 as a specific purpose program to enable local government and community groups to expand long term rental housing options for low to moderate income and disadvantaged groups.

An unusual aspect of the program is its focus on tenant participation in the identification of housing need, design of suitable housing and ongoing self-management. The program also is the main source of public funding for rental housing cooperatives.

The Federal Government provides the funding, but each state administers the program. The system established in New South Wales has been marred by lack of communication, delays which seem to have become endemic and a mystifying tangle of bureaucratic procedures.

One of the immediate noticeable results of this poor administration was the level of unspent funding. According to the department's figures, at June 1991 it had received a total federal allocation of $36,458,000 for the seven years since the program's inception. $36,361,035 had been approved for expenditure, but only about $19,363,046 had actually been spent. The department was, therefore, holding approximately $16,997,989 and interest earned on this sum was being treated as income for general departmental operations along with interest accrued on all other funding sources. While not expressly outside the program guidelines, the ethics of this conduct is certainly questionable.

The conduct made the subject of investigation was:

i) the delay by the department in processing of applications for funding under the program;

ii) actions by departmental officers to keep organisations informed of the status of their applications for funding;

iii) action or inaction of departmental officers in relation to the establishment of procedures to facilitate the completion of projects approved for funding.

As the investigation is not yet complete, the findings and recommendations of this office will be reported when it is finalised.

It is worth noting that the size and complexity of this investigation has required almost the full attention of an experienced investigation officer for a twelve month period. This is a considerable dedication of office resources.

During the course of this investigation, complaints were received about the department's administration of other community housing programs (most notably the Community Tenancy Scheme and the Crisis Accommodation Program). It was decided that the Office was not in a position to undertake further investigations of similar scale into the Department of Housing at this point in time. Accordingly, these complaints were referred to the new Minister for Housing so that his newly appointed Director of Housing had an opportunity to resolve the issues before this Office took any positive action. The Office maintains an oversight of the internal departmental enquiry.

The minister also agreed to refer the complaints for the attention of the independent consultant examining the department's construction and purchasing functions as a result of the findings of the Royal Commission into the Building Industry.

BOARD GAMES

Case Study 19

A Higher School Certificate student complained that his HSC mathematics marks were withheld by the Board of Studies, following allegations that the student had foreknowledge of the mathematics exam questions. Withholding those marks meant the student could not be awarded his Higher School Certificate.

After preliminary inquiries, a formal investigation was launched. The issues concerned the way in which the board had informed itself of the facts of the case, whether the student had been denied procedural fairness, whether there had been prejudgment of the case and whether the decision of the board was one for which reasons should be given.

The investigation involved a detailed re-analysis of the considerable volume of evidence in the case, including an analysis of the mathematics exam questions and related mathematics problems and their answers.

A statement of this Office's Provisional Findings and Recommendations in the case was forwarded to the board on 29 June 1992. After the grant of two extensions of time, the Crown Solicitor who is now acting for the board in this case, provided a detailed response which is being considered at the time of publication.

DOUBLE PAY DOUBLE DELAY

Case Study 20

Mr X complained to the Ombudsman that the Office of State Revenue (OSR) refused to refund a duplicate stamp duty payment made on a property transaction. The sum involved was $15,000. Mr X also complained he had been required to pay a late fee on the duplicate payment although the original payment was made within time. The late fee was also $15,000, being 100 per cent of the stamp duty payment.

The complaint arose after Mr X changed solicitors part way through the transaction. His former solicitor refused to release any of the documentation and the transaction could not proceed without the stamped memorandum of transfer.

Mr X's new solicitors attempted to get a duplicate memorandum of transfer stamped, but the OSR refused because the solicitors were unable to produce the receipt number issued when the original stamp duty payment was made. The OSR record system is accessed by using the receipt number issued with payment of the stamp duty.

To enable the transaction to be finalised, Mr X paid a duplicate stamp duty fee. He then attempted to get a refund of the original payment from the OSR. Unfortunately he was in the same predicament as the receipt number was still unavailable to him. The OSR, however, did not at any time inform Mr X they could in some instances find the receipt number by searching their cashier's journal rolls (cash register rolls).

No Form No Proof

After a request by this Office to search the rolls, the receipt number was located but the application form submitted at the time of payment of the stamp duty could not be located. The OSR informed this Office that although the receipt number had been found, it was insufficient proof on it's own to allow a refund because the OSR were unable to verify whether a refund had already been paid.

Prior to the computerisation of their records system the OSR manual system employed two cancellation methods to ensure a refund had not been previously paid and when a refund was paid, a second refund would not be paid.

The application form was viewed to ensure no previous refund had been paid and then notated to the effect a refund was paid. A similar check and notation was made on the original stamped documents and the stamp was then cancelled.

In Mr X's case, the original application form could not be found and, therefore, no check or notation could be made. The OSR insisted that without being able to notate the application form there was no way they could ensure that a later refund would not be made in error. According to the OSR this situation made it essential to view and notate the original memorandum of transfer held by Mr X's first solicitor before a refund would be considered.

The OSR also was concerned that an application for a refund could have been made by a party not entitled to a refund because Mr X's first solicitor held a stamped memorandum of transfer that had not proceeded to title.

While the care shown by the OSR to prevent the possibility of a double refund being paid in this case is accepted, it would appear to have been somewhat exaggerated.

Dummy Applications

According to advice from the OSR, prior to computerisation if a refund was sought and the original application form could not be located and a manual check determined that duty had been paid, a dummy application form was created for the purposes of a refund. The dummy application was then filed as if it were the original. Had this been done in Mr X's case it would have overcome one of the major problems cited by the OSR as a reason for refusing the refund.

The OSR also was in a position to check whether a refund had previously been made by searching their cheque register. This action would have overcome the need to view the unavailable memorandum of transfer held by Mr X's first solicitor.

While it is acknowledged by this Office that Mr X's first solicitor held a stamped memorandum of transfer that had not proceeded to title, the OSR had checking systems in place which were designed to prevent such occurrences. Also when asked by the Ombudsman to confirm whether a solicitor could apply for a refund without the signature of the original purchaser, the OSR advised that although an application for a refund is usually on behalf of the purchaser by a solicitor, the formal request for the refund can only be by the purchaser. Given that Mr X, the applicant in this case, had engaged another solicitor, any application made by his former solicitor without Mr X's authority would be disallowed.

Mr X has now received his refund of $15,000 for the duplicate stamp duty payment. However the OSR was only prepared to pay Mr X his refund after he came to an arrangement with his original solicitor. Under this arrangement the solicitor agreed to present the original contract on the condition that a portion of the refund monies be signed over to him, presumably for outstanding fees.

Throughout the Ombudsman's investigation, the OSR insisted that because the stamp duty was paid under the manual system no records of the refund could be entered onto the computer. This was why the OSR considered it essential to view and notate the contract held by Mr X's first solicitor, as well as notating the original application form. This, they said, was the only system they had to prevent the possibility of a double refund.

When the OSR agreed to refund the duplicate stamp duty payment to Mr X, they requested that Mr X's second solicitor forward to them the contract he held on which the duplicate stamp duty payment was made. The OSR wanted this contract so they could notate it to the effect that no refund was payable on it. This was to prevent any future claims for a refund on this particular contract.

Although the solicitor told the OSR that the contract had been sent to them via the document exchange, the OSR has never been able to locate it.

When the Ombudsman asked the OSR how they could overcome this problem - it being the converse of the previous situation where Mr X's first solicitor held a contract that the OSR believed may become the subject of a later refund claim, the OSR informed the Ombudsman that **Mr X's refund claim would be entered onto their computer system and this would prevent any future refund claims.**

It appears incredible that the OSR could so easily remedy this particular situation by a computer notation, yet they could not or would not make such a computer notation to allow Mr X his refund previously.

The late fee payment of $15,000 paid by Mr X has now also been refunded by the OSR.

Late Fee

The Ombudsman raised with the OSR the applicability of the late fee on this transaction. The OSR said that they considered it was properly imposed because the second lodgement relating to the same transaction was outside the relevant period - even though the first lodgement had been paid within time.

The OSR has a discretion to waive or to refund late fee payments in exceptional circumstances. Prior to the Ombudsman raising the issue, it would appear the OSR did not consider Mr X's situation as exceptional.

The OSR also said that any claimants had to apply and that as Mr X or his second solicitor had not applied for a refund or a waiver it had not been considered. Given that Mr X's second solicitor had met with OSR representatives on at least one occasion and had spoken to them over the telephone at other times about Mr X's refund, it seems incredible that discussion about the late fee had not occurred. The Ombudsman also considered it unreasonable that the OSR did not raise the question of a waiver of this payment with the solicitor given the exceptional circumstances.

After advice from this Office, Mr X's second solicitor submitted an application to the OSR for a refund of the late fee payment and the refund was subsequently approved.

Although it was acknowledged by this Office that the circumstances of this complaint were unusual, the OSR had the means to resolve Mr X's problem when it first arose and even to prevent it occurring. The OSR had the means to verify the original stamp duty payment and therefore negate the requirement of a double payment. Even at the point when the duplicate stamp duty payment was made, the OSR had the means to resolve the matter. Their administrative system would have enabled them to verify the duplicate payment and the procedures would have prevented the possibility of a double refund.

The conduct of the OSR in this matter was found to be unreasonable and based on irrelevant considerations within the terms of the Ombudsman Act. As both refunds had been received by Mr X, the Ombudsman recommended the OSR conduct a management audit to ensure consistency in relation to refunds of stamp duty. He also recommended that the OSR make a written apology to Mr X.

The OSR has advised both the recommendations were implemented.

CHAPTER SIX

FREEDOM OF INFORMATION COMPLAINTS

INTRODUCTION

The following section comprises the Ombudsman's annual report on his obligations under the Freedom of Information Act 1989, as required under section 68 of that Act (as amended on 17 December 1991).

For the first time, this report includes a summary of the majority of complaints under section 52 of the FOI Act received by the Ombudsman during the year. Hopefully this information will illustrate how the Act is being used and will contribute to a better understanding of the Act in the community generally. As well, we hope it will help the smallish band of FOI specialists who, on a daily basis, are struggling to interpret the Act correctly in an environment which has a paucity of NSW legal precedent.

Also included are annual statistics, articles on various matters and some detailed cases.

FOI STATISTICS

During the year 1991 - 1992, the Ombudsman received a total of 64 complaints under section 52 of the FOI Act. This figure virtually was identical to the number of complaints received during the previous financial year. However, what is apparent is the increasing number of complaints involving complex material and voluminous documentation, necessitating a growing number of formal investigations by the Ombudsman. As observed in last year's annual report, requests by individuals and groups for more sensitive and complex documents appear to coincide with an increasing awareness and a more thorough understanding of the FOI Act.

Thirty four complaints were carried forward from the previous year and seventy two complaints were finalised. The table below shows the outcome of these finalised complaints according to category.

FOI Statistics	
Outcome	**Number**
No jurisdiction	9
Declined without any enquiry	10
Declined after preliminary enquiry	41
Resolved after preliminary enquiry	2
Investigation discontinued	8
Finding under section 26(1)	2
Total	72

Twenty six complaints from previous years were carried forward into 1992-93. The Ombudsman currently is investigating nine FOI complaints and anticipates delivering up to five final FOI reports under section 26(1) of the Ombudsman Act. In relative terms, a significant number of FOI complaints are formally investigated by the Ombudsman when compared to the percentage of complaints which proceed to formal investigation in other areas of the office's jurisdiction.

An encouraging trend in the last year has been an increase in the number of agencies which, when investigated by the Ombudsman, realise the error in exempting some or all documents and subsequently release the documents to the applicant. Such a conciliatory move by the agency usually resolves the matter, allowing the Ombudsman to discontinue the investigation, nullifying the need for a lengthy, sometimes complex, formal report.

During the year the Ombudsman received only two applications for documents he holds. The first of these related to documents concerning a complaint made to the Ombudsman. As the documents pertained to the complaint handling, investigative and reporting functions of the Office, which are exempt from the provisions of the FOI Act under Schedule 2 of that Act, the request was denied. The second applicant sought documents concerning a position he had applied for at the Office. This request related to material which was not exempt under Schedule 2. However, before any formal processing of the application occurred, the applicant decided to withdraw his application.

No Statewide Statistics or Reporting

Regulations covering the Freedom of Information annual reporting requirements of government agencies formerly required specific, detailed and complete statistics in a specified format from every agency. These were collected and compiled by the FOI Unit of Premier's Department.

The first year of operation of the Act was described by the FOI Unit in the 1989-90 FOI Annual Report, which displays the high quality of the statistical gathering system which the unit developed. The FOI Unit was disbanded before it made a second annual report.

On 17 December 1991 the reporting requirements in section 68 of the Act were amended. Each agency became responsible for their annual report on FOI obligations, for submission to the minister responsible for the agency. The amendments provided that these annual reports could be included in each agency's general annual report.

Although the amendments also provided that regulations could be made governing the information to be included in agencies' FOI annual reports, and the form in which annual reports were to be prepared, no such regulations have been made.

The consequences of these amendments and of the lack of regulations, are:

1. There is no longer any provision for a compilation of FOI statistics from each agency which would describe the operation of FOI in NSW.
2. Neither is there any standard for FOI statistical information, or for the form in which it is to be reported annually by individual agencies.

With no overall compilation or set reporting standards there will be many hundreds of FOI annual reports, almost all of which will be published within general annual reports, all containing differing types of information and all presenting that information quite differently.

It will be very difficult to collect this information and it will without doubt be impossible to analyse.

Just as many agencies shortchange the public by publishing summaries of affairs which lack most of the information for which the FOI Act intended them, this Office believes the lack of regulations covering FOI reporting requirements will lead to FOI annual reports of seriously inadequate content and format. This Office also predicts many agencies will fail to report at all as no central unit exists to monitor and to report upon specific FOI compliance.

In any case, there is no doubt the new regulations prevent any useful analysis of the operation of the FOI Act in NSW. This will make any systematic review of the Act by Parliament very difficult.

The lack of any regular analysis of the operations of the Act also makes the Ombudsman's task as an external reviewer of agency decisions under the Act very difficult. His decisions must be made in the vacuum created not only by an almost entire lack of jurisprudence arising from the NSW Act, but also by a lack of any up-to-date context.

OMBUDSMAN'S PUBLIC COMMENTS

This year saw the Ombudsman comment both by formal public address and by informal consultation, on the workings of the Freedom of Information Act and on suggested amendments to the Act.

Two speeches specifically about the Act were delivered by the Ombudsman during the year. Both were given at meetings concerning public administration.

Hallmarks of both speeches were:

- comment upon the clear decrease in commitment to FOI principles displayed by the present Government, and by officers in government departments and agencies
- the lack of expertise in FOI displayed by many of those given the job of FOI manager as part of their duties
- the complexity of the FOI Act
- the number of exemption clauses in the Act
- the problem with defining the public interest
- comment upon the initiatives taken by the independent members of Parliament to amend the Act.

The Ombudsman also made the point that the serious lack of funding to this Office may lead to a cut in FOI services by one third. This in effect has since occurred, with an FOI officer on extended leave and not replaced.

Comments on Suggested Amendments to the Act

The Office was consulted by the independent members of Parliament in relation to changes to the FOI Act. They were seeking the changes as part of the Charter of Reform negotiated with the Government. The Office made detailed and frank comment on the projected amendments, which were eventually enshrined as the Freedom of Information (Amendment) Act 1992. The Act commenced on 1 July 1992. These amendments are discussed in detail below.

The Ombudsman also made detailed comment on further projected amendments to the Act incorporated in the Local Government (Consequential Provisions) Bill 1992. The specific FOI provisions of the Bill are discussed below. In the Local Government section of this report, under the title Councils and the FOI Act there is a discussion of other aspects of FOI and Councils.

AMENDMENTS TO THE FOI ACT

Significant changes to the FOI Act were proclaimed on 1 July 1992 as a result of the charter of reform agreed to between the Government and three independent members of the Legislative Assembly in the New South Wales Parliament. The Act has changed in the following ways:

- a reduction in the time within which agencies must determine applications, from 45 days to 21 days (subject to the provison that an agency may extend this time period by a further 14 days if special circumstances exist, such as the need to consult or to locate and retrieve archived documents);
- a provision stating that it is not relevant to take into account the possibility of embarrassment to the government, loss of confidence in the government or misunderstanding of information by the applicant when determining whether giving access to a document is in the public interest;
- the removal of the right of an agency to refuse access to a document on the ground that it came into existence more than five years before the commencement of the Act;
- making a refusal to deal with an application on the ground that to do so would involve a substantial and unreasonable diversion of the agency's resources subject to internal and external review;
- providing that the Supreme Court rather than the District Court will review determinations in relation to documents the subject of a ministerial certificate. The District Court will continue to conduct all other reviews;
- limiting the power to confirm a ministerial certificate where the certificate is not upheld by the Court to cabinet and executive council documents;
- reducing the number of bodies and offices that are exempt from the operation of the Act and limiting the functions in relation to which other bodies or offices are exempt;

- providing the Ombudsman with the discretion to recommend that the release of a document would, on balance, be in the public interest even though access has been refused because it is an exempt document;
- An amendment requiring the District Court and the Ombudsman, when reviewing a determination, to have regard to any guidelines relating to fees and charges published by the minister under section 67 of the FOI Act.

The Ombudsman generally applauds the above changes to the Act, particularly those which effect his role as one of the two external review agencies. It is felt that the changes make the Act more user friendly, giving applicants more rights under the Act while promoting the philosophy of open government.

The new provision regarding the public interest is a positive move as it will promote the spirit of the FOI Act and deter agencies from withholding documents for purely political reasons. Some agencies have used such arguments in previous cases to deny an applicant access to documents.

The change allowing the Ombudsman to recommend release of a document if it is felt such release would be in the public interest, even allowing for the fact that it has been otherwise claimed as exempt, is also a welcome move. The Ombudsman feels that the public interest is really the ultimate test as to whether a document should be exempt. This particular change will allow the Ombudsman to critically assess, in terms of promoting the public interest, those arguments used for exemption of a document by the agency concerned.

Previously, the refusal of an agency to deal with an application on the grounds that to do so would unreasonably divert the agency's resources was not reviewable by the Ombudsman or the District Court. The new change means such a refusal is now subject to the external review provisions of the Act. The Ombudsman feels the reduction in the period, from 45 to 21 days, in which agencies must deal with applications, is a step forward. However, in his experience of reviewing determinations, the Ombudsman believes this may also result in more deemed refusals, even allowing for the 14 day extension in the case of special circumstances.

Amendments via Local Government (Consequential Provisions) Bill 1992

This bill proposes to extend the coverage of the FOI Act to include all information held by councils. This amendment would involve deletion of section 16(2) of the Act and would extend a person's legally enforceable right of access to council documents and to information other than the applicant's personal affairs.

Another amendment proposed in the Bill places the same publication requirements of the FOI Act on Councils as are already required of all other agencies, ie, producing and making available to the public copies of their statements of affairs, summaries of affairs and policy documents. This amendment would involve deletion of section 13.

The principal officer of local authorities for the purposes of the FOI Act is at present defined in section 6 of the Act as the "Mayor, President or Chairman, as the case may be, of the authority". The amendments would redefine the principal officer as the general manager.

There was one further amendment proposed in the discussion paper preceeding the Consequential Provisions Bill which was seen by the Department of Local Government as of some importance both philosophically and practically. The Ombudsman disagreed.

The amendment would have included councils in the provisions of section 30 and clause 5 of the FOI Act, the provisions directed to documents relating to intergovernmental relations. These provisions require that agencies shall not give access to information concerning the affairs of the Commonwealth Government or of another state without first consulting with the government concerned. The amendment would have meant that any agency holding information concerning the affairs of any council and vice versa would have been required to consult with that council prior to releasing the information via an FOI request, regardless of the type of information.

The Ombudsman presented a number of written objections to the Department of Local Government against the inclusion of councils in the provisions of section 30 and clause 5 and discussed his case with the Department. Among other arguments, the Ombudsman believed this amendment would erode the objective in deleting section 16(2), ie, to extend full FOI coverage to local government. Given the amount of information which flows between councils and the state and Commonwealth governments, the number of consultations required to process FOI applications would have been very significant. The experience of this Office has shown consultation often leads to refusal of access. While deletion of section 16(2) would theoretically extend full freedom of information to councils, the Ombudsman believed the inclusion of councils in section 30 and clause 5 would in practice have restricted access to information. It also had the potential to create a great deal of work for FOI managers.

At date of writing the final Bill Provisions Minute had yet to be presented to cabinet, but the Department of Local Government had indicated to this Office they had accepted the Ombudsman's arguments and would not be proceeding with the amendment of section 30 and clause 5.

Case Study 1

CORRECT SERVICES CORRECT?

Mr Michael Yabsley was Minister for Corrective Services when this Office received a complaint about the handling of an FOI application by the Department of Corrective Services. Mr Yabsley's ministerial expenditure had come under some scrutiny toward the end of 1990, and Mr Bob Carr, Leader of the Opposition, had sought an audit of the minister's expenditure by the Auditor General. The Auditor General was unable to conduct the audit at that time.

The chief of staff of the leader of the opposition then made an FOI application to the Department of Corrective Services for information documenting the minister's expenditure from the time he assumed the position in June 1988 to the time of the application. Examples of the type of documents covered by the application were internal purchase requisition vouchers, petty cash dockets, receipts and invoices. Many hundreds of transactions, and thousands of documents, were involved.

The applicant was charged more than $5 000 for the processing of the application, the supervision of access and for photocopying. This amount was calculated at the rate of the regulation $30.00 per hour of time spent by the department in relation to the application, and a 50 per cent reduction in the public interest, again as allowed by regulation, was then applied.

In 1989-90 the average cost per FOI application throughout NSW was about $27.00.

The applicant complained to this Office about a wide range of matters concerning the department's handling of the application, including the charges, delays in provision of access, inappropriate access procedures and withholding of information to which access had been given.

A formal investigation was commenced, and it was found, not surprisingly, that the positions of the applicant and the department were in direct conflict. The department held, for example, that, considering the amount of time which had been put into the processing of the application and supervision of access, the charges were in fact conservative. Concerning the delays, the department's position was that the applicant had agreed to them.

Complicating the matter was the fact that the Auditor General had commenced the audit requested by Mr Carr at the same time as the determination by the department of the FOI application was legally due, and that the audit had involved examination of most of the same documents to which access had been requested by the applicant.

The result was that access to the requested documents was delayed by a month, a long time in politics, and almost 75 per cent again of the legal time limit of 45 days at that time allowed by the FOI Act. Access was provided after the audit was completed although the Auditor General expected joint access to occur and in spite of a series of objections to the delays by the applicant.

A report of preliminary findings and recommendations has been circulated to the involved parties, and further submissions in relation to that report will be received and considered prior to the Ombudsman's final report.

Of the issues raised in this investigation there are some of general significance to the operation of FOI in NSW. Of these, some are:

1. FOI fees, and whether or not the NSW FOI Regulations should be amended to limit charges in some way, as in the Victorian and Tasmanian FOI Acts.
2. Delays, and whether or not applicants have any realistic choice when asked by agencies for one or more extensions to the time limit imposed by the FOI Act.
3. When many documents are involved, whether photocopies of documents included by mistake in access procedures can be refused.
4. Whether, when recovery of records over, say, 18 months old takes significantly longer than for newer records, and/or techniques for recovery have to be developed, FOI applications for such records should incur charges for all or part of the additional time taken in planning and recovery.

Case Study 2

STATE RAIL SAGA

Mr Vincent Neary, a senior engineer with the State Rail Authority (SRA) and an expert on train signalling systems, submitted an FOI request to the SRA in September 1990. Mr Neary sought access to three documents held by the Authority.

The first of these constituted two committee reports generated as a result of complaints Mr Neary made to Mr Ross Sayers, the former Chief Executive of the SRA, about irregular practices in the expenditure of SRA capital works funds. The second document was a Trail Audit Report written by the SRA's internal audit section on consultancy payments made to certain companies. The third document comprised papers relating to the awarding of a tender for the Sydney/ Strathfield/Sydenham Train Describer System. Mr Neary claimed that the tender for this system was based on very poor quality specifications and that a contract was awarded against his recommendations.

Other than a summary of one of the papers in the third document requested by him, Mr Neary was denied access to all the material. The two Committee Reports and the Task Force Report were denied as it was claimed they were exempt in accordance with clauses 9, 4(1)(e), 16(a)(i)and (iii), 6 and 7 of Schedule 1, while the contract tender documents were denied as they were felt to be exempt under clauses 15 and 16(iv). In complaining to the Ombudsman, Mr Neary provided extensive reasons as to why he felt the determination of the SRA was wrong and not based on sound legal principles.

The Ombudsman commenced preliminary inquiries into the matter and sought reasons from the SRA as to why the documents were exempt and should not be provided to Mr Neary. With the two committee reports, the SRA advised the Ombudsman the reports should continue to be exempt under clause 4(1)(e) as both the Independent Commission Against Corruption and the Auditor General were investigating issues the subject of the reports and release of the documents to Mr Neary could adversely effect these investigations. The former Chief Executive also advised the Ombudsman that he no longer believed the Trail Audit Report to be exempt and that he would subsequently release it to Mr Neary.

One of the Ombudsman's investigation officers made inquiries with both the ICAC and the Auditor General about their position on these matters. As a result of the inquiries, it not only appeared that the exemptions claimed by the SRA in respect of the two committee reports may not have been reasonable, but that two SRA officers had advertently misrepresented the positions of the ICAC and the Auditor General and had subsequently misled the Ombudsman in his inquiries.

A formal investigation of the SRA was commenced immediately. In order to ascertain if the Ombudsman was misled in his inquiries by the two SRA officers, the Deputy Ombudsman held a formal hearing under section 19 of the Ombudsman Act.

During the Ombudsman's investigation of Mr Neary's complaint, Mr Sayers obtained a legal opinion from the Crown Solicitor's Office as to whether the documents requested by Mr Neary were appropriately exempt. The Crown Solicitor's Office advised that it was its preliminary view that the only matter which the SRA could reasonably claim as exempt would be information pertaining to third parties' business and personal affairs. As a result, Mr Sayers advised he was prepared to release all material requested by Mr Neary which did not concern the affairs of third parties. Mr Neary eventually gained access to quite a number of the documents he sought, but only after the SRA claimed it had difficulty in identifying certain of the documents requested by Mr Neary.

The investigation into this matter is continuing, with a statement of preliminary findings and recommendations having already been sent to Mr Sayers and Mr Neary. The central issues being examined are:

- whether either of the two SRA officers misled the Ombudsman in his inquiries
- the impact of the FOI Act on the SRA in terms of consultancy contracting work
- whether the remaining documents denied to Mr Neary have been appropriately exempted
- Mr Neary's allegations that he was adversely treated by SRA personnel and management
- the conduct of the SRA originally exempting virtually all documents to which Mr Neary sought access.

Case Study 3

Does Public Works Work?

Mrs D, on behalf of an environmental group based in a medium sized country town, requested from the Public Works Department all the documents it possessed concerning the proposed construction of a pipeline to pump waste water from a factory in the town to a specified site some distance away. The factory and the pipeline were privately owned. The department, through the Minister for Public Works, was seeking to subsidise the construction of the pipeline.

The department refused to give Mrs D access to any documents it had, claiming that everything was exempt under clauses 9 and 7 (1) (b) of Schedule 1 of the FOI Act. The department did not attempt to either consult with Mrs D about what exactly she wanted nor did it attempt to specify the sort of documents it had about the matter, as it should have done under the provisions of the Act. Additionally, the department's reasons for not providing Mrs D with access to the material were highly inadequate and did not comply with the requirements of the Act.

Mrs D subsequently applied for an internal review. In its response the department identified twelve documents as relating to Mrs D's request. It still refused to provide her with access to these documents, claiming they were exempt in accordance with the same two clauses previously relied upon.

However, the department did give Mrs D a copy of a letter from the former Premier to the Deputy Premier advising that no special government subsidy would be forthcoming for the construction of the pipeline.

Following Mrs D's complaint to the Ombudsman, inquiries were made with the department and its entire FOI file was obtained. It was found that, not only were there an immense number of documents relating to Mrs D's request, far more than the twelve previously claimed, but that part of the letter from the former Premier to the Deputy Premier given to Mrs D had been deleted without informing her, which was strictly in breach of the provisions of the FOI Act. The department's file on the matter provided to the Ombudsman was in such a mess, it was not possible to adequately assess all the material.

The Ombudsman subsequently began a formal investigation of the department. The Ombudsman sought from the department an itemised list of all documents it held which pertained to Mrs D's request and reasons as to why it had handled the matter so badly.

At a meeting held at the Ombudsman's offices, two departmental staff informed an investigation officer that Public Works had dealt with only a very small number of simple FOI applications, hence their poor handling of Mrs D's complex application and that part of the letter from the former Premier to the Deputy Premier was released to Mrs D as it was felt that, if it was revealed to her the subsidy was not to go ahead, she would not pursue the matter.

At the meeting the department also advised it would challenge the jurisdiction of the Ombudsman to investigate the department on the basis that Mrs D's environmental group had not appropriately requested documents under the FOI Act. On a more positive note, the department stated it would begin to negotiate with Mrs D on the release of documents.

The Ombudsman subsequently determined that the department's attempt to challenge his jurisdiction was unfounded and he would pursue the matter. The department then indicated that it accepted this view and would attempt to provide as many of the documents to Mrs D as possible.

In the end, Mrs D gained access to a large number of documents, with only a minority denied to her largely on the basis that they concerned the business affairs of a private company. The department still refused to provide her with a full copy of the letter from the former Premier to the Deputy Premier. Although the Ombudsman did not agree with the reasons the department claimed for exempting the remaining part of the letter, the matter was resolved on the basis that Mrs D was happy with the material she had obtained.

SUMMARY OF CASES
JULY 1 1991 - JUNE 30 1992

The following table gives a case by case description of the majority of FOI complaints received by the Ombudsman during the year.

The table includes the name of the public authority complained of, the nature of the complaint, a description of the documents to which access was refused if relevant, the position of the public authority, and the outcome or current status of the complaint.

SUMMARY OF FOI CASES
JULY 1 1991 - JUNE 30 1992

Public Authority	Complaint and Document Description	Agency Position	Outcome
Auburn Municipal Council	Poor determinations. Access refused. Documents - complaints from third parties, report of council's finance and works committee.	Third party documents refused under cl 13, no part specified. Report refused under ordinance 1 cl 14(3) of the Local Court Regulations, and s632 of the Local Government Act.	Preliminary enquiries continuing.
Blue Mountains City Council	Unreasonable demands by council regarding complaint's animals. Refusal to release documents through FOI. Documents identifying the names and addresses of complainants to the council about the applicant.	Exempt under cl 13(b).	Declined on the basis of lack of resources of the Office.
Botany Municipal Council	Access refused. Documents - transcript or copy of tape of a public council meeting.	Initially refused under cl 22 of FOI Act and fee returned, then under s16(2) of the Act in a second letter. On review, decided to allow that the tape be listened to but only by those persons or their solicitors whose personal affairs were deemed to extend to the contents of the tape.	Declined on basis of resources; applicant informed of s27(2) of FOI Act.
Building Services Corporation	Access refused under cl 4, 11 and 13. Documents concerning action taken by the corporation on complaints about licensed builders. Documents submitted by corporation to Royal Commission into the building industry.	Cl 4 on the basis it would prejudice investigation by the Royal Commission, cl 11 on the basis the Royal Commission is a court or tribunal and cl 13(b).	Preliminary enquiries with the corporation continuing.
Charles Sturt University, Riverina	Refusal to amend documents. Applicant wished removal of his name and other identifying details on certain university documents relating to disciplinary proceedings.	Two documents amended. University placed notation on remaining documents in accordance with section 46.	Preliminary enquiries continuing.
Chief Secretary's Department	No reply to FOI application. No internal review sought. Documents concerning alleged breaches of Charitable Collections Act.	Deemed refusal.	No jurisdiction under s52(2(a) - No internal review.

SUMMARY OF FOI CASES (continued B) JULY 1 1991 - JUNE 30 1992

Public Authority	Complaint and Document Description	Agency Position	Outcome
Community Services Department	Refusal to supply information. Documents relating to a complaint made to the department about the children at risk.	All documents released except those which indentified the notifier of the children at risk. Exempted pursuant to cl 4(1)(b) and 13(b).	Declined following preliminary enquiries as department's decision to exempt material was justifed.
Department of Conservation and Land Management	Access refused to a letter of complaint to the department from a former employee identifying work related problems in tne departmental office where the applicant worked.	Cl 13(a).	Complaint was declined as there was no prima facie evidence that the determination by the department was wrong.
Department of Corrective Services	Failure to supply reports and remove incorrect reports from documents contained on applicant's warrant file.	All documents refused.	No jurisdiction as applicant had not sought internal review.
Department of Corrective Services	Documents relating to Internal Investigation Unit enquiry.	Access provided to most material but some documents exempted under cl 6 relating to personal affairs of others.	Declined as applicant had not sought internal review.
Department of Corrective Services	Documents refused, application mishandled and delayed, excessive fees. Internal audit of ministerial expenditure refused, access to most documents (source documents of ministerial expenditure) released.	The few exempt documents were refused under cl 9. Fees, which amounted to about $5,000 after public interest reduction, were conservative. Delays primarily responsibility of applicant.	Formal investigation.
Department of Corrective Services	Failure to amend personal records. The applicant, an inmate, sought an amendment of documents which described him as a high security risk.	The department agreed to amend the documents to describe the inmate as a potential high security risk. It would not further amend the documents.	Declined following preliminary enquiries as it was felt the department's decision was reasonable.
Department of Family and Community Services	Access refused. Documents related to identity of informants in a child protection notification and to reports related to that notification.	Cl 4(1)(b) and cl 13(b) were used. Secrecy provisions of another act were mentioned, the prejudice to future supply not being in the public interest was claimed.	No jurisdiction under s.52(2)(a) - no internal review.
Forestry Commission of NSW	Documents refused.	Deemed refusal under s24(2).	No jurisdiction under s52(2)(a) - no internal review.
Forestry Commission of NSW	Documents refused.	Deemed refusal under s24(2).	No jurisdiction under s52(2)(a) - no internal review.

SUMMARY OF FOI CASES (continued C)
JULY 1 1991 - JUNE 30 1992

Public Authority	Complaint and Document Description	Agency Position	Outcome
Forestry Commission of NSW	1. Withholding information after FOI access granted. 2. Falsification of harvesting plan date. Documents refused though promised - extensive list of documents (10 broad categories) relating to the Dorrigo management area, including harvesting plans, flora & fauna research reports, logging history maps and many more.	Deemed refusal of internal review under s24. Access theoretically granted via "informal" letter, but few documents actually released through FOI. Commission claimed many documents released via subpoena due to concurrent court case.	Investigation continuing; complainant and commission mediating.
Forestry Commission of NSW	Documents refused though promised - extensive documentation in relation to a number of forestry regions. Documents included annual reports, management plans, forest type maps.	Deemed refusal of internal review under s24(2) - access theoretically granted via "informal" letter but few documents actually released through FOI. Commission claimed many documents released via subpoena due to concurrent court case.	Investigation continuing; complainant and commission mediating.
Forestry Commission of NSW	Possible overcharging and not receiving enough information.		No jurisdiction under s52(2)(a) - no internal review.
Goulburn City Council	Failure to provide information. Documents relating to appointment of applicant as council official and funding of position.	Council claimed many of the documents did not exist or could not be found. Others refused on the basis they do not relate to the personal affairs of the applicant in accordance with s16(2) of the FOI Act.	Matter under consideration.
Harness Racing Authority of NSW	Various documents held by the authority concerning the certifying and approval process of sulkies.	One document not found, one document provided, two held by a Federal authority and the request for the other document not addressed.	An investigation was discontinued after it was found the claims of the authority about the documents were reasonable.
Hastings Municipal Council	Access refused to tape recording of a council meeting in which applicant claimed he was maligned.	Council denied access to the tape on the basis the tape was not a council document in terms of the FOI Act.	Following an investigation by the Ombudsman, it was determined the tape was a council document in accordance with the FOI Act. The investigation was discontinued on the basis no material on the tape related to the personal affairs of the applicant pursuant to s16(2) of the Act.

SUMMARY OF FOI CASES (continued D)
JULY 1 1991 - JUNE 30 1992

Public Authority	Complaint and Document Description	Agency Position	Outcome
Hawkesbury Hospital	No replies over a four month period to an FOI application for hospital records of applicant.	None. No action had been taken at time of complaint.	Applicant's solicitors sent copy of their letter of complaint to this Office, to the hospital. Within a week all documents were sent to her with an apology. Complaint withdrawn.
Health Department	Access refused. Documents - interim report on psychosurgery.	"It is not within the provision of the FOI Act to instruct that the interim report be made public."	Declined due to remoteness in time of original application.
Ambulance Service of NSW	Access refused to document relating to a complaint made about the applicant, an employee of the Ambulance Service.	Cl 16(a)(iii). Public interest reasons in cl 16 not addressed. Claimed documents related to disciplinary matters and would effect the operations of the Ambulance Service if released.	Following an investigation by the Ombudsman, the Ambulance Service agreed to release all documents to the applicant.
Gunnedah District Hospital	Access refused to documents relating to the applicant's employment at the hospital.	Hospital claimed it no longer held certain documents. Other documents were refused as they were held to be confidential but no clause of schedule 1 was claimed.	Following an investigation by the Ombudsman, the hospital board agreed to release all documents to the applicant.
Health Department	Access refused to a statement by a health care worker concerning applicant which was held by the complaints unit of department.	Cl 4(1)(c) used to exempt, on basis health care worker's wellbeing was a paramount consideration.	Preliminary enquiries continuing.
Broken Hill Base Hospital	Access refused to reports on efficiency of the hospital's services.	One report released, two reports refused under cl 9 and 13(b).	One report released following investigation by Ombudsman. Complaint subsequently withdrawn.
NSW Department of Housing	Administrative incompetence, overcharging.	Application was handled properly and fees were reasonable, with 50% reduction applied.	Preliminary enquiries were made. Decided that complaints regarding conduct were insignificant, and fees charged were reasonable.
NSW Department of Housing	Documents on departmental guidelines for housing ex-prisoners and forensic detainees.	The department claimed it did not possess any such documents.	Declined owing to enquiries being made by the Ombudsman on an identical matter concerning the department.

SUMMARY OF FOI CASES (continued E)
JULY 1 1991 - JUNE 30 1992

Public Authority	Complaint and Document Description	Agency Position	Outcome
Kogarah Municipal Council	Documents relating to the applicant's property and council documents held concerning the applicant's building application.	Access to some documents provided but many documents exempted under cl 10.	Following investigation by the Ombudsman, the council agreed to allow the applicant to inspect all council's files on the matter.
Ku-ring-gai Municipal Council	Various council documents requested. An amendment to two documents sought.	An amendment to one document granted - amendment to other documents denied. Access to documents refused under cl 12.	Declined as applicant had not sought internal review.
Ku-ring-gai Municipal Council	Access refused. Documents on files specifically relating to applicant's house and land. Deemed refusal of internal review request.	Under cl 16(2) documents did not relate to applicant's personal affairs.	Preliminary enquries were made. Complaint declined on basis of resources and age of complaint.
Department of Local Government and Cooperatives	All documents held relating to a complaint received by the department about the applicant.	Documents refused under cl 13(a) and 13(b).	Declined as applicant lodged appeal with the District Court pursuant to s53 of the FOI Act.
Department of Local Government and Cooperatives	Access refused. All documents held relating to a complaint received by the department about the applicant.	Documents refused under cl 13 (a) and 13(b).	Declined following an appeal to the District Court by another applicant on the same matter.
Maritime Services Board	Access refused, documents missing, overcharging. Documents-related to applicant's boat and mooring, many very old and related to previous owners of mooring.	Documents refused under cl 6 and cl 7. No subsclause of cl 7 specified, no reasons given.	Formal investigation continuing.
National Parks and Wildlife Service	Access refused - documents regarding certain transactions of land by third party; unreasonable delays.	Deemed refusal of internal review request.	Preliminary enquiries made. Documents were released. Complaint was considered primarily resolved.
Newcastle City Council	Documents concerning council affairs.	Refused in accordance with cl 16(2) that information does not relate to the personal affairs of the applicant.	Complaint declined as council's decision correct.
Pacific Power	Documents forming part of an SES contract of a Pacific Power executive. Documents concerned duties and performance criteria of the position.	Access refused under cls 6, 7(1)(c) and 9.	Information released following report by Ombudsman
Pacific Power	Documents concerning a commercial contract between a private company and Pacific Power. Applicant was a sub-contractor in the matter.	Documents exempted. Cl7(1)(b) 7(1)(c), 10 and 16(a)(1V). Cl 7(1)(c) claimed re affairs of private company, while 7(1)(c) claimed re affairs of Pacific Power.	Preliminary enquiries underway.

SUMMARY OF FOI CASES (continued F)
JULY 1 1991 - JUNE 30 1992

Public Authority	Complaint and Document Description	Agency Position	Outcome
Department of Planning	Extensive documentation relating to development of a site by the department and the local council.	Many documents were claimed as destroyed or could not be found as they were old. Some documents claimed as exempt under cl 10 but department released these anyway.	Declined on the basis of the age of documents and the release of other material by the department.
NSW Police Service	Access refused. Documents - warrants under Listening Devices Act 1984, affidavit in relation to the warrants.	Initial application - deletions under cl 6, total exemptions under cl 11 and cl 4(1)(e). Internal review - total exemptions upheld, using cl 11 (a) and (c) only. Investigations by a special unit must not be prejudiced.	Internal review decision on cl 11(a) upheld, therefore 11(c) not considered. Judge in chambers is a court. Consideration of issue of warrants and actual issue of warrants, are judicial functions.
NSW Police Service	Amendment to a large number of documents concerning the applicant.	Agency refused to amend documents as there was no evidence provided by the applicant that the information was incorrect or misleading.	Following preliminary enquiries matter was declined as there was no evidence the documents were incorrect or misleading.
NSW Police Service	All documents concerning a traffic infringement notice.	Refused under cl 4(1)(d) or until applicant paid traffic fine or took matter to court.	Declined as police response considered appropriate.
Port Stephens Shire Council	Access refused. Documents - letters from third party to council complaining about applicant. Second internal review refused.	Council initially determined to release, subject to deferral, as third party had requested internal review. On review, council reversed its decisions and exempted letters. Applicant requested review, but council read act as precluding second review, even though for different person than first review.	Preliminary enquiries made. Act may be read as precluding the right to a second review but as not necessarily precluding authority from conducting a second review. Council decided to conduct review for applicant's reiterated original decision to release. Complaint was declined.
Port Stephens Shire Council	The third party in the above complaint complained about council's reversal of its decision to exempt letters, and of its conducting a second review.	Council awaited Ombudsman's review, having made its decision.	Preliminary enquiries were made. Complaint declined on basis of resources and age of complaint.

SUMMARY OF FOI CASES (continued G)
JULY 1 1991 - JUNE 30 1992

Public Authority	Complaint and Document Description	Agency Position	Outcome
Public Works Department	Information deleted from documents, other documents not released. Documents were reviews by PWD of tenders and submissions of successful tenderer.	Access refused under cl 9 and cl 13(b).	Preliminary enquiries were made. Complaint declined on basis of resources and age of complaint.
Randwick Municipal Council	Documents concerning access to a section of footpath in Kingsford and documents concerning council's road opening agreement.	Deemed refusal pursuant to s24(2) and 34(6) of the FOI Act.	Currently under investigation.
Real Estate Services Council	Complaint that an advance deposit requested by the council was excessive.		Applicant advised to amend FOI request.
Real Estate Services Council	Documents relating to a complaint made to the council about the applicant.	Documents refused under cl 16, documents concerned the personal affairs of a third party.	Declined as applicant wished to lodge an appeal with the District Court under section 53 of the FOI Act.
Roads and Traffic Authority	A document identifying the name and address of a complainant to the RTA about improper actions of a company involved in RTA contracts.	Document refused under cl 13(b)	Declined on the basis of resources and also because the applicant had already obtained sufficient information.
Roads and Traffic Authority	Access refused. Documents - management reviews of North, West, South and Central regions of RTA. Deferral date passed without release and postponed for three months.	Access refused under cl 19(1)(a)(i) and cl 9(1)(b), as document not yet finalised. Access granted to final documents subject to deferral.	Preliminary enquiries were made. Declined, on basis of utility.
Roads and Traffic Authority	Access refused. Documents - a final report on future directions of road transport.	Refused under cl 1(1)(a) as an attachment to a cabinet submission.	No jurisdiction under s52(2)(a). No internal review.
Roads and Traffic Authority	Access refused. Documents - project deed between RTA and Interlink Road Pty Ltd re construction of Western F5 Tollway.	Cl 7 (1)(a)(b) & (c) - documents contain information of financial arrangements and corporate structure developed at considerable expense.	Preliminary enquiries continuing.
Shoalhaven City Council	This complaint covered a number of general issues with two FOI components: 1. Complaint forms by complainant requesting council take action on smoke nuisance and report regarding smoke nuisance not released. 2. Complainant as third party objected to release of letters he had written about smoke nuisance to Premier and SPCC, of which council had copies.	1. Council claimed documents were missing or destroyed, and that complainant had already been given the only report. 2. Council determined release, with deletions [of identifying information] under cl 6.	Preliminary enquiries made. 1. Decided no further evidence likely to emerge to challenge council's claim. 2. Council decision upheld. Complaint declined.

SUMMARY OF FOI CASES (continued H)
JULY 1 1991 - JUNE 30 1992

Public Authority	Complaint and Document Description	Agency Position	Outcome
Shortland Electricity	Access refused. Documents - 5 categories relating to a fire said to have been started by defective council equipment and to the installation of that equipment.	Under s16(2), council claimed documents did not relate to personal affairs of applicants but to council's electricity operations as a whole.	Documents were subpoenaed for court case. Complaint was withdrawn.
State Authorities Superannuation Board	Documents concerning superannuation payments by the board.	Most documents released but some refused under cl 6 and cl 10.	Declined as the Office concurred with the board.
Sutherland Shire Council	Deemed refusal of documents. This application was an expanded version of a previous application subject of complaint to this office. Documents related to the sale and zoning of a park opposite applicant's home.	Council sought to postpone processing of this application until processing of previous application was complete.	Matter under consideration.
Sutherland Shire Council	Access refused. Documents - report on contamination assessment of land directly opposite homes of applicants. Report of development application.	Report was on public display but was withdrawn as faulty and consequently likely to affect a local industry. FOI application was made, a deemed refusal eventuated and an internal review report was refused under cl 9(1).	Preliminary enquiries continuing.
Pacific Power	All documents relating to the possible future construction of a power station.	A number of documents were released. Most documents refused on the basis release would have an adverse effect on the affairs of Pacific Power or would disclose the business or personal affairs of third parties. Consultation with third parties proceeded over eight months.	Currently under investigation.
University of Technology - Sydney	Access refused. Documents - examiners' reports on applicant's masters thesis, and correspondence between the university and the examiners.	Reports refused under cl 9, correspondence refused under cl 16. No sub-clauses specified, but 16(1)(iii) implied. Public interest not addressed re cl 16.	Preliminary inquiries made. Complaint declined on basis of resources and age of complaint. Deputy Ombudsman commented internal review did not address the second half of the application.
Water Board	Access refused. Documents related to complainant's personal dealings with board re debt repayment.	The board claimed it had supplied all information which could be found and which was covered by the application.	Preliminary enquiries made. No evidence supporting complaint found. Complaint declined.

CHAPTER SEVEN

OPERATIONAL REPORTS

HUMAN RESOURCE MANAGEMENT

Staff

As at 30 June 1992 the Office of the Ombudsman employed a total of 76 staff. A comparison of staff levels over the past four financial years is as follows:

Staff Levels				
Category	**June 1992**	**June 1991**	**June 1990**	**June 1989**
Statutory Appointments	4	4	3	4
Investigative Staff	52	53	52	53
Administrative Staff	18	16	15	13
Trainees	2	1	1	1
Total	76	74	71	71

The above figures include staff on leave without pay and their replacements.

Wage Movements

There were no exceptional movements in wages, salaries or allowances.

Personnel and Industrial Relations Policies and Practices

Training and Development

During the reporting year a number of internal training courses were organised including:

- Induction
- Selection Techniques
- Assessing Telephone Complaints
- Decline Letters

Staff also attended courses conducted by external agencies. Courses included:

- Mediation and Negotiation
- Occupational Health and Safety for committee members
- Industrial Relations for Line Managers
- Supervision/Management

The Office of the Ombudsman met its obligation under the Training Guarantee Act.

Performance Management

The Office, along with all public sector agencies, is required to have in place a performance management system by the 31 December 1992.

The Principal Investigation Officer and the Human Resource Manager will have responsibility for the design and implementation of a system. Consultation with all staff will occur.

Occupational Health and Safety

During the reporting year the Occupational Health and Safety (OH&S) Committee:

- conducted workplace inspections
- commenced a review of the Offices' restricted smoking policy
- participated in an emergency evacuation drill

As required by the Occupational Health and Safety Act and Regulations, elections for new committee members were held in February 1992.

Dispute Handling

The elected grievance handlers dealt with a number of minor matters that were finalised to the satisfaction of the staff member concerned. The grievance procedure was reviewed as a consequence of the Industrial Relations Act.

The Ombudsman had discussions with the Public Service Association concerning the attendance of workplace union representatives at management committee meetings.

Structural Efficiency Principle (SEP)

The SEP Joint Consultative Committee (JCC), comprising union and management representatives, continued to work towards the implementation of SEP in the Office of the Ombudsman.

The job evaluation process was commenced with the selection of a consulting firm - the Hay Group. Under the guidance of the Hay Group, the JCC will select the benchmark (or peg) positions to be evaluated. It is expected that the evaluation of the peg positions will be completed by the end of September 1992.

New Awards

No new awards were negotiated.

Part-time work

During the reporting year, one staff member sough approval to work part-time. That application was approved.

Trainees/Apprentices

The Ombudsman approved an increase in the number of trainees employed under the Australian Traineeship Scheme. The Office now has two trainees. The Office does not employ apprentices.

Absenteeism

Staff absences on sick leave are reviewed on a quarterly basis and, if the need arises, staff with an unsatisfactory record are counselled.

During the reporting year, a review of work patterns was undertaken to assess the extent that staff were forfeiting hours under the Office's flexible working hours scheme. Staff gave to the Office 6,779 hours the equivalent of $150,126. This figure does not include unpaid work after 6pm or on the weekend.

Equal Employment Opportunity (EEO)

The major EEO achievements of the year were:

- the appointment of an investigation officer (Aboriginal complaints)
- an increase in the number of staff who are Aboriginal
- an increase in the number of staff with a physical disability
- computerisation of EEO data - 100 per cent of staff responded to the EEO questionnaire
- continuation of the rotational program for investigative assistants

EEO strategies for the 1992/93 year include:

- developing and implementing a performance management system
- attendance of key staff at a Train the Trainer course
- senior investigation officers will attend a supervision/ management course
- specific job related training for investigative assistants to enhance promotional prospects
- implementing job evaluation

The following tables detail the representation of EEO target group members at the Office of the Ombudsman.

Representation and Recruitment of Aboriginal Employees and Employees with a Physical Disability						
	1991/92			1990/91		
	Total Staff	Aboriginal	PWFD*	Total Staff	Aboriginal	PWFD*
Total Employees	76	3/3.9%	9/11.8%	74	2/2.7%	3/4.1%
Recruited in the year	12	1/8.3%	1/8.3%	30	0/0.0%	0/0.0%

**People with a physical disability*

Consultants

During the year the Office of the Ombudsman used a number of consultants to provide expert advice or assistance.

Consultancies costing at or in excess of $30,000

There were no individual consultancies costing at or in excess of $30,000.

Consultancies costing less than $30,000

Ten individual consultants were engaged at a total cost of $42,457.

	Representation of EEO Target Groups within Levels					
	1991/92			1990/91		
	Total Staff	Women	NESB#	Total Staff	Women	NESB#
Below Clerical Officer Grade 2	2	2 (100.0%)	0 (0.0%)	2	2 (100.0%)	0 (0.0%)
Clerical Officer Grade 1 - Clerk Grade 1	13	11 (84.6%)	10 (76.9%)	14	12 (85.7%)	12 (85.7%)
A & C Grades 1 - 2	8	8 (100.0%)	7 (87.5%)	7	7 (100.0%)	5 (71.4%)
A & C Grades 3 - 5	8	6 (75.0%)	5 (62.5%)	9	7 (77.8%)	3 (33.3%)
A & C Grades 6 - 9	37	24 (66.7%)	5 (13.9%)	33	22 (66.7%)	5 (15.1%)
A & C Grades 10 - 12	4	2 (66.7%)	0 (0.0%)	4	1 (25.0%)	0 (0.0%)
Above A & C Grade 12	5	0 (0.0%)	1 (25.0%)	5	0 (0.0%)	1 (20.0%)
Total	76	53 (69.7%)	28 (36.8%)	74	51 (68.9%)	26 (35.1%)

 # Non-English speaking background

Major Works in Progress

The Office had no major works in progress.

Land Disposal

The Office did not dispose of any land/properties.

Funds Granted to Non-government Organisations

No funds were granted.

Research and Development

The Office of the Ombudsman was not involved in any research and development projects.

Overseas Travel

The Ombudsman travelled to the USA to attend a negotiation/conciliation course at Harvard University.

Senior Executive Service

Number of CES/SES positions

Number of CES/SES Positions		
Level	**Total CES/SES End of Current Year**	**Total CES/SES End of Previous Year**
8	-	-
7	-	-
6	-	-
5	-	-
4	1	1
3	-	-
2	2	2
1	-	-
CEO under S.11A*	1	1
Total	*4*	*4*

**CEO positions listed under S.11A of the Statutory and Other Offices Remuneration Act 1975, not included in Schedule 3A of the Public Sector Management Act 1988.*

There were no SES positions being filled by women this financial year nor last financial year.

Performance Statement - CES/SES Officers

Name: David Landa

Position & Level: Ombudsman - statutory appointment under the Ombudsman Act.

Period in position: All of reporting year

Results:

This financial year marked a distinct transition for the Office of the Ombudsman. Against a background of rising complaints and steadily falling resources, two Special Reports were tabled in Parliament last year. Both covered the resources issue and its impact on the Office's independence and performance.

Neither gained a hearing from the Government or funds from Treasury. Ultimately, it became clear that the issue needed to be canvassed before the Joint Parliamentary Committee on the Office of the Ombudsman. Accordingly, the committee announced its inquiry into funding on 25 June 1991.

The terms of reference are to:

A assess the adequacy of the funds and resources available to the Ombudsman to effectively perform his functions;

B examine the Ombudsman's case for an increase in funding for his Office; and

C recommend any changes to funding levels necessary for the Ombudsman to perform his functions.

The need to adequately address the committee's terms is requiring considerable resources from within this Office, including the costing of the entire investigative process and demonstration of the demand driven nature of our operations.

In the meantime, the Office had to address its immediate problem of too few resources for too many complaints. Consequently, strategies were implemented to stem the number of complaints and to reduce expenditure. Inherent in this process, was a need to maintain public confidence in the Office in the face of its harsh complaint decline policies and to continue demonstrating the relevance of the Office

Limiting complaint numbers in this Office cannot be based on an arbitrary decision to pull the plug at some predetermined ceiling. Consequently, two distinct groups of complaints, namely minor and systemic, were identified and revised management strategies implemented.

The first strategy targeted the minor complaints that should be readily resolved within the relevant department in the first instance. For example the 30 per cent of general complaints concerning service issues, such as rudeness and failure to give reasons for decisions, are essentially management issues capable of resolution by the departments concerned.

These type of complaints are declined and complainants are directed to contact the relevant departmental head. If they are not satisfied, they are invited to again approach this Office. To develop public confidence in this system, we needed to ensure departments were adequately equipped to handle and resolve their complaints. To this end, we developed a model complaints handling policy for public sector agencies.

Known as CHIPS (Complaint Handling in the Public Sector), this policy has three separate directions:

1. to redirect minor complaints away from this Office and back to the originating department
2. to assist authorities to develop effective complaint management strategies
3. to maximise the use of conciliation techniques.

Further details on the CHIPS project are included in chapter one.

The second strategy was to concentrate investigative resources on complaints which are possibly the result of systemic problems and, by definition, demonstrate a need to remedy inappropriate administrative practices. Therefore, the resources of this Office are directed to resolving problems that are either major or are affecting many people.

This focus on major and systemic issues results in investigations of public significance, usually involving public safety, waste, neglect or even deceit. These investigations and the associated reports clearly demonstrate the Office's primary role as an effective and economical watch dog. The alternatives to Ombudsman investigations of this nature generally are expensive royal commissions or court cases.

As well, our experience in handling public complaints has demonstrated a need to consider the effectiveness of various alternative techniques, in particular conciliation and mediation. To this end, during the year I attended courses in conciliation and mediation at Harvard University, Boston. Both the practical aspects and the opportunity to meet with leading international proponents of these techniques has been invaluable for my own Office.

The use of conciliation for minor complaints in the police area has increased and our initial results are positive. The development of the CHIPS project should lead to an increase of conciliations in other areas of the public sector. As a problem solving technique, mediation has significant potential in resolving disputes between government agencies, which can otherwise become costly, legalistic battles.

In this sense, the office began a shift from being a wholly reactive regulator of public sector agencies to being partly a proactive educator and a resource for the public sector.

Further comments on the operation of the Office are contained in the Overview topic in chapter one.

Value of Recreation and Extended Leave

The monetary value of recreation leave and extended leave (long service leave) owed in respect of persons employed within the Office of the Ombudsman, for the 1990/91 and 1991/92 financial years is as follows:

Value of Recreation and Extended Leave		
	Year ended 30 June 1992	**Year ended 30 June 1991**
Recreation Leave	$206,950	$184,171
Extended Leave	$379,006	$373,174

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 this policy in writing when orders for goods or services are placed with them. Where there is unjustified delay in the payment of an account, the supplier can bring the matter to the attention of the Minister, who may award a penalty interest rate. Details of any penalty interest imposed must be included in the annual report.

Accounts on Hand as at 30 June 1992	
Current (ie within due date)	*$96,375.13
Less than 30 days overdue	$ 505.00
Between 30 and 60 days overdue	$ 0.00
Between 60 and 90 days overdue	**$ 131.58
More than 90 days overdue	$ 0.00
Total Accounts on Hand	$97,011.71

* This figure includes $86,552.26 of taxation and superannuation deductions payable on the 7 July 1992 as well as payroll tax amounts also payable on the 21 July 1992.

** There have been discussions with this company regarding the satisfactory performance of service. The account has been paid.

Target Levels

For 1992-93 and future financial years, it is the aim of the Office of the Ombudsman to pay at a minimum 98 per cent of all accounts on time (as stated on the invoice). Those accounts not paid on time would be subject to some form of negotiation with the supplier as to performance of service.

Problems Affecting Prompt Processing of Payments

The Office does not have a problem with the prompt processing of accounts. This is due to the small number of accounts processed and the computerisation of the accounting function. Delays in processing occur only when the Office questions the performance of the service.

No complaints about delays in processing accounts have been received nor has the Office had to pay a penalty interest payment.

Risk Management and Insurance Activities

The Offices major areas of implementation of risk management principles are computerisation, assets and occupational health and safety.

Computerisation

During the reporting year the Office organised off site storage of computerised backup tapes. In addition, screen locks were loaded onto all personal computers and a virus scanning program was loaded onto designated machines used for file transfers.

Assets

The Office developed an Asset Maintenance Plan that identifies appropriate maintenance strategies. Key objectives of this plan are:

- ensure an accurate record of assets exits
- identify maintenance tasks and rank them in priority order
- review maintenance priorities

Outcomes to date include:

- completion of a computerised assets register, conduct of a stocktake to ensure information is accurate and, where required, update records
- establishing priorities for new equipment and maintenance requirements in budget planning process
- review of maintenance contracts and, where appropriate, changing level of coverage.

Occupational Health and Safety

The OH&S Committee was active in the identification and reduction of risks in the workplace. In particular, the committee inspected the workplace to identify hazardous areas. An emergency evacuation drill was conducted.

There was a small number of minor workers compensation claims during the year.

Additional Risk Management strategies include:

- implementation of Treasurer's directions concerning claims processing and sampling
- investigating electronic funds transfer of payroll deductions
- review of after hours access to the Office

Insurance

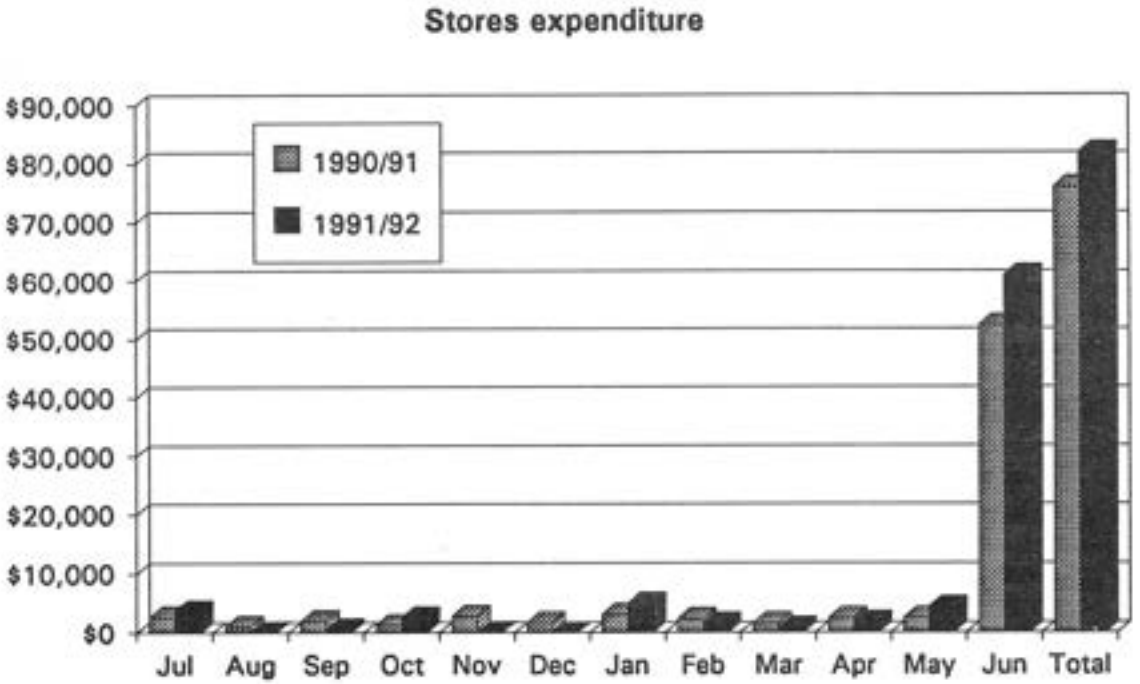
The Office is insured by the Treasury Managed Fund - the NSW self insurance scheme.

Major Assets on hand

Major Assests on Hand				
Description	**As At 30June 91**	**Purchases**	**Disposals**	**As at 30 June 92**
Computers and related equipment				
Mini computer	2	1	1	2
Terminal servers	2	-	-	2
Personal computers	21	4	-	25
Terminals	37	8	-	45
Printers	21	1	1	21
Software	26	1	-	27
Photocopiers	7	-	2	5
Television and video equipment	7	-	-	7

Expenditure on Stores

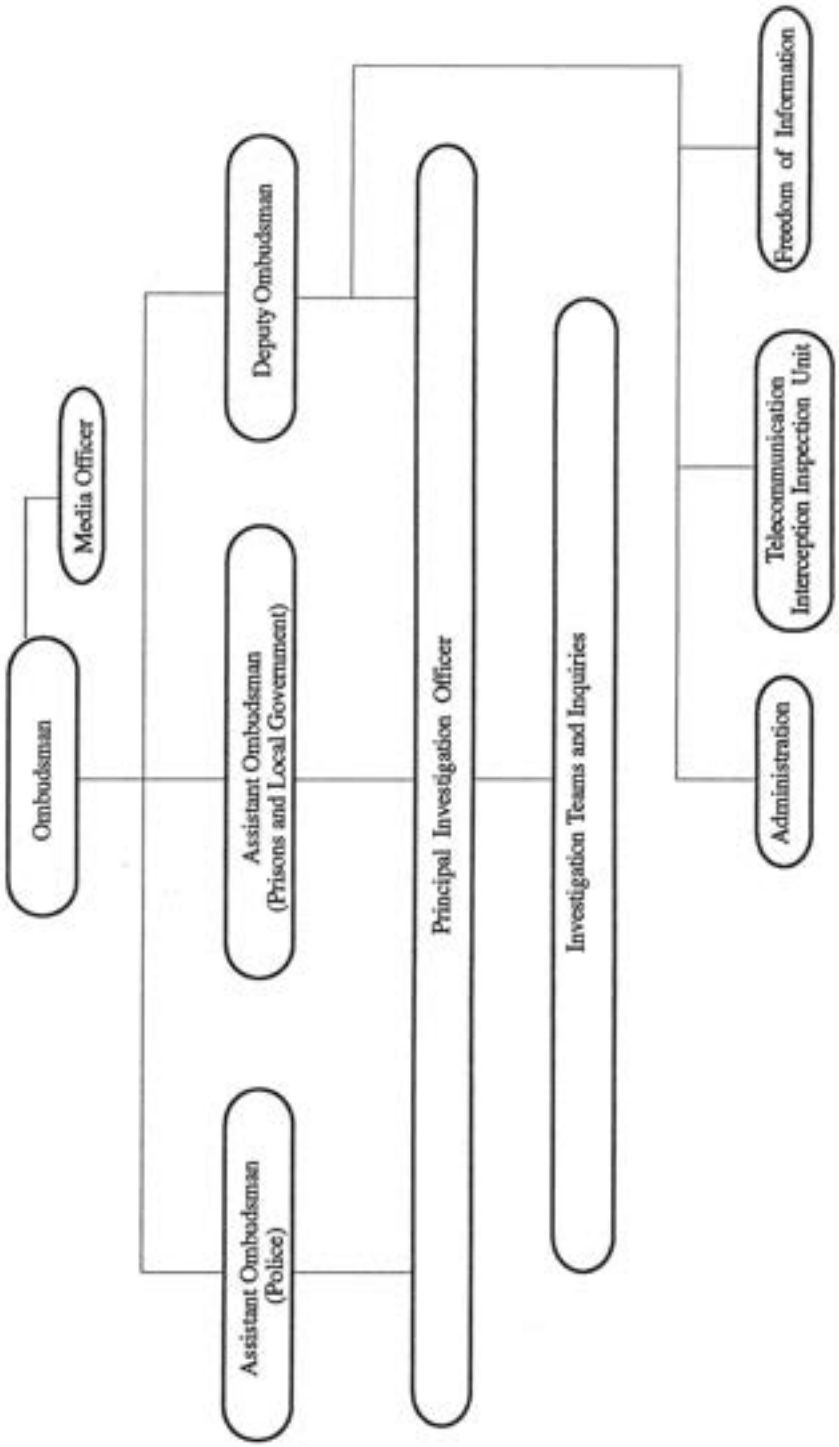
The stores graph indicates the expenditure trend of stores and equipment for both the 1990/91 and 1991/92 financial years.



Functional organisation chart part 1

*General refers to all complaints except police, prisons and local government

Functional organisation chart part 2



PERFORMANCE INDICATORS

Performance indicators for the year are set out in the following tables. Performance indicators are under review and will be enhanced to increase the effectiveness of Office reporting.

Telephone Enquiries and Interviews				
	Enquiry Staff	**Receptionist**	**Total**	**% change from 1990/91**
Telephone enquiries	10,890	3173	14,063	+38%
Interviews with prospective complainants	745	-	745	+25%

Complaints Received - Comparative			
Ombudsman Act:			
	1991/92	**1990/91***	**1989/90***
Departments and authorities (other than Corrective Services)	1125	1214	1124
Local Councils	629	728	728
Department of Corrective Services	393	522	313
Outside jurisdiction	393	280	314
Total	2540	2744	2479
Police Regulation (Allegations of Misconduct) Act:			
Complaints against police	3375	3152	2352
Total	5915	5896	4831
**Amended figures to include complaints under FOI legislation*			

Formal Reports			
Ombudsman Act			
		S 26(1) Conduct (Final)	**No Adverse Finding**
Departments and authorities		13	1
Local government/councils		7	3
Prisons		9	6
Totals		29	10
Police Regulation (Allegations of Misconduct) Act			
	Sustained		**Not sustained**
	Reinvestigated	Not Reinvestigated	Reinvestigated
Police	4	198	3

Compliance with Recommendations
1 July 1991 - 30 June 1992

These figures only relate to complaints which proceed to full investigation.

	Departments and Authorities (excluding prisons)		Corrective Services		Local Government - Councils		Police Service		Totals	
Number of cases involved	10		4		8		37		59	
Nature of recommendations	Accepted	Not Accepted	Accepted	Not Accepted	Accepted	Not Accepted	Accepted	Not Accepted	Accepted	Not Accepted
Change in action	2				1		1		4	
Change in legislation										
Change in policy										
Change in procedure	6		3	1	3	1	12		24	2
Disciplinary action	2						17	1	19	
Ex gratia or other payment	4				1		9		14	
Review/investigation			1		2		3		7	1
Issue direction or instruction to staff	6		1	1	2		11	1	20	2
Provide information to public					3				4	
Other	6				2		15		13	
	26	Nil	5	2	13	1	58	3	105	5

In some cases more than one action may have been taken on an individual case.

RESULT CATEGORIES - COMPLAINTS UNDER OMBUDSMAN ACT

The tables on the following pages show the results of investigations into councils and public authorities. The categories used and relevant descriptions are listed below.

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 be 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 (ie, matter resolved, no utility in proceeding or withdrawn by complainant).
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.

Result of Complaints - Public Authorities									
AUTHORITY	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Agriculture Department	0	5	10	0	0	0	0	2	17
Anti-Discrimation Board	0	1	1	0	0	0	0	0	2
Art Gallery of NSW	1	0	1	0	0	0	0	0	2
Attorney Generals Department	0	4	6	0	0	0	0	0	10
Australian Gas Light Company	0	0	1	0	0	1	0	0	2
Board of Optometrical Registration	0	1	0	0	0	0	0	0	1
Board of Senior School Studies	0	1	1	0	0	0	0	0	2
Building Services Corporation	0	11	17	0	4	0	0	0	32
Charles Sturt University, Riverina	0	0	0	0	0	0	0	0	0
Chief Secretary;s Department	0	0	2	0	0	0	0	0	2
Clarence River County Council Flood Mitigation Authority	0	0	2	0	0	0	0	0	2
Co-operative Societies, Department of	0	0	1	1	0	0	0	0	2
Coal and Oil Shale Mine Workers Superannuation Tribunal	0	1	0	0	0	0	0	0	1
Commercial Services Group	0	0	1	0	0	0	0	0	1
Community Service Department of	2	27	35	2	0	2	1	3	72
Consumer Claims Tribunal	1	8	5	0	0	0	0	0	14
Corrective Services Department	3	165	209	42	9	10	6	9	453

Result of Complaints - Public Authorities									
AUTHORITY	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Crown Solicitors Office	0	0	1	0	0	0	0	0	1
Dairy Corporation of NSW	0	1	1	0	0	0	0	0	2
Dental Board of NSW	1	1	0	0	0	0	0	0	2
Department of Conservation and Land Management	0	1	4	0	1	0	0	0	6
Department of Consumer Affairs	0	6	10	4	1	0	0	0	21
Department of Courts Administration	0	2	0	0	0	0	0	0	2
Department of Minerals and Energy	0	1	2	0	0	0	0	0	3
Dust Diseases Board	0	0	3	0	0	0	0	0	3
Environment Protection Authority	0	0	6	2	0	0	0	0	8
Fish Marketing Authority	0	0	0	0	0	0	0	1	1
Forestry Commission of NSW	2	4	3	0	0	0	0	0	9
Government Insurance Office	0	27	11	1	1	0	0	0	40
Grain Corporation Ltd NSW	0	0	0	0	0	0	0	1	1
Guardianship Board	1	3	2	0	0	0	0	0	6
Harness Racing Authority of NSW	0	0	1	0	0	0	0	0	1
Health Department (Prison Medical Service)	0	11	13	2	1	0	0	0	27
Health Department of NSW	0	22	13	3	1	0	0	1	40
Home Care Service of NSW	0	1	2	0	1	0	0	0	4

Result of Complaints - Public Authorities									
AUTHORITY	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Housing Department of NSW	0	32	78	11	0	3	0	1	125
Hunter District Water Board	0	2	2	0	0	0	0	0	4
Industrial Relations and Employment, Training and Further Education Department of	0	0	7	1	0	0	0	0	8
Land Titles Office	0	3	0	1	0	0	0	0	4
Lands Department of NSW	0	2	9	3	1	0	0	0	15
Legal Aid Commission of NSW	0	32	12	2	4	0	0	0	50
Liquor Administration Board	3	2	0	0	0	0	0	0	5
Local Government & Co-operatives Department	0	2	2	1	0	2	0	0	7
Local Government Grants Commission	0	0	1	0	0	0	0	0	1
Macquarie University	0	2	2	1	0	0	0	0	5
Maitland Rural Lands Protection Board	0	2	0	0	0	0	0	0	2
Maritime Services Board	0	7	5	1	1	0	0	0	14
Motor Vehicle Repair Industry Council	0	3	0	0	0	0	0	0	3
Museum of Applied Arts and Science	0	0	1	0	0	0	0	0	1
National Parks and Wildlife Service	1	5	2	1	0	0	0	0	9
NSW Fire Brigades	0	1	0	0	0	0	0	0	1
Office of Education and Youth Affairs	0	0	1	0	0	0	0	0	1

Result of Complaints - Public Authorities									
AUTHORITY	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Office of Juvenile Justice	0	2	2	0	0	1	0	0	5
Office of State Revenue	0	14	10	4	1	0	0	0	29
Office of Protective Commissioner	1	1	3	0	0	0	0	0	5
Office of Sheriff	2	1	1	0	0	0	0	0	4
Pacific Power	0	1	2	0	0	0	0	0	3
Planning Department	0	6	4	0	1	0	0	0	11
Police Service	5	23	26	16	0	1	0	1	72
Property Services Group	0	0	1	0	0	0	0	0	1
Psychologists Registration Board	0	0	1	0	0	0	0		1
Public Prosecutions Office	0	0	1	0	0	0	0	0	1
Public Trust Office	2	6	9	0	0	0	0	0	17
Public Works Department	0	6	4	0	0	0	0	0	10
Real Estate Services Council	0	1	0	0	0	0	0	0	1
Registrar General, Department of	1	0	0	0	0	0	0	0	1
Registry of Births, Deaths and Marriages	0	3	1	2	0	0	0	0	6
Rental Bond Board	0	1	0	0	0	0	0	0	1
Residential Tenancies Tribunal	1	2	0	0	0	0	0	0	3
Roads and Traffic Authority	1	38	40	10	4	2	0	1	96
Rural Assistance Board	0	1	1	0	0	0	0	0	2

Result of Complaints - Public Authorities									
AUTHORITY	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Rural Lands Protection Board	0	2	3	0	1	0	0	0	6
School Education, Department of	0	15	11	1	9	1	0	1	38
Soil Conservation Service of NSW	0	1	2	0	0	0	0	0	3
Sport and Recreation & Racing Department	0	1	0	0	0	0	0	0	1
State Authorities Superannuation Board	0	6	5	0	1	0	0	0	12
State Bank	0	37	2	0	0	0	0	0	39
State Contracts Control Board	0	1	1	0	0	0	0	0	2
State Electoral Office	1	2	4	0	0	0	0	0	7
State Lotteries Office	0	5	0	1	0	0	0	0	6
State Rail Authority	0	21	7	2	0	2	0	0	32
State Transit Authority	0	9	3	0	0	0	0	0	12
Strata Titles Office	1	1	0	0	0	0	0	0	2
Sydney Cricket and Sports Ground Trust	0	0	1	0	0	0	0	0	1
Teacher Housing Authority	0	1	0	0	0	0	0	0	1
Technical and Further Education	0	1	6	1	0	0	0	0	8
Totalizator Agency Board	0	0	0	0	0	0	0	1	1
Transport, Department of	0	4	7	1	1	0	0	0	13
Treasury Corporation	0	1	0	0	0	0	0	0	1
University of New England	0	2	0	0	0	0	0	0	2

Result of Complaints - Public Authorities									
AUTHORITY	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
University of New South Wales	0	0	2	1	1	0	0	0	4
University of Newcastle	0	1	2	0	0	0	0	0	3
University of Sydney	0	2	0	0	0	0	0	0	2
University of Technology	0	0	0	0	0	0	0	0	0
University, Western Sydney, Nepean	0	0	1	0	0	0	0	0	1
Valuer Generals Department	0	14	7	4	2	0	0	0	27
Waste Management Authority of NSW	0	1	0	0	0	0	0	0	1
Water Board	0	37	24	4	1	2	0	0	68
Water Resources Department	0	1	2	1	0	0	0	1	5
Wollongong University	0	0	1	0	0	0	0	0	1
Workcover Authority	1	2	6	0	0	1	0	0	10

Result of Complaints - Local Government									
COUNCIL	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Armidale City Council	0	0	1	0	0	0	0	0	1
Ashfield Municipal Council	0	5	0	0	1	0	0	0	6
Auburn Municipal Council	0	0	3	0	1	0	0	0	4
Ballina Shire Council	0	2	1	0	0	0	0	0	3
Bankstown City Council	0	8	0	2	0	0	0	0	10
Bathurst City Countil	0	1	6	0	0	0	0	0	7
Baulkham Hills Shire Council	0	4	2	0	0	0	1	0	7
Bega Valley Shire Council	0	4	3	0	0	0	0	0	7
Bellingen Shire Council	0	2	1	1	1	0	0	0	5
Blacktown City Council	0	4	7	1	0	0	0	0	12
Blue Mountains City Council	0	10	9	1	1	0	0	0	21
Bombala Shire Council	0	0	1	0	0	0	0	0	1
Botany Municipal Council	0	0	0	0	0	0	1	0	1
Broken Hill City Council	0	0	1	0	0	0	0	0	1
Burwood Municipal Council	0	4	2	0	0	0	0	0	6
Byron Shire Council	0	2	2	0	0	0	0	0	4
Cabonne Shire Council	0	1	1	0	0	0	0	0	2
Camden Municipal Council	0	1	0	0	0	0	0	0	1

Result of Complaints - Local Government									
COUNCIL	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Campbelltown City Council	0	6	1	0	0	0	0	0	7
Canterbury Municipal Council	0	1	4	1	1	0	0	0	7
Casino Municipal Council	0	2	1	0	0	0	0	0	3
Cessnock City Council	0	2	0	0	1	0	0	0	3
Cobar Shire Council	0	1	0	0	0	0	0	0	1
Coffs Harbour City Council	0	6	2	0	0	0	0	0	8
Concord Municipal Council	0	2	0	0	0	0	0	0	2
Coolah Shire Council	0	1	0	0	0	0	0	0	1
Copmanhurst Shire Council	0	0	1	0	0	0	0	0	1
Corowa Shire Council	0	0	1	0	0	0	0	0	1
Cowra Shire Council	0	0	1	0	0	0	0	0	1
Culcairn Shire Council	0	1	0	0	0	0	0	0	1
Deniliquin Municipal Council	0	1	0	0	0	0	0	0	1
Drummoyne Municipal Council	0	1	1	0	0	0	0	0	2
Dubbo City Council	0	2	0	0	0	0	0	0	2
Eurobodalla Shire Council	0	4	0	0	0	0	1	0	5
Evans Shire Council	0	1	1	0	0	0	0	0	2
Fairfield City Council	0	5	4	0	0	0	0	0	9

Result of Complaints - Local Government									
COUNCIL	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Forbes Shire Council	0	0	0	0	0	0	0	1	1
Gilgandra Shire Council	0	1	0	0	0	0	0	0	1
Glen Innes Municipal Council	0	1	0	0	0	0	0	0	1
Gloucester Shire Council	0	2	1	0	0	0	0	0	3
Gosford City Council	0	14	13	3	1	0	0	0	31
Goulburn City Council	0	0	1	0	1	0	0	0	2
Grafton City Council	0	1	1	1	0	0	0	0	3
Great Lakes Shire Council	0	4	2	1	1	0	0	0	8
Greater Lithgow City Council	0	2	1	1	0	0	0	0	4
Greater Taree City Council	0	0	2	0	0	0	0	0	2
Gundagai Shire Council	0	0	1	0	0	0	0	0	1
Harden Shire Council	0	1	0	0	0	0	0	0	1
Hastings Municipal Council	0	9	3	0	0	0	0	0	12
Hawkesbury Shire Council	0	8	1	0	0	0	0	0	9
Holbrook Shire Council	0	1	0	0	0	0	0	0	1
Holroyd Municipal Council	0	2	0	1	0	0	0	0	3
Hornsby Shire Council	0	9	8	1	1	0	0	0	19
Hume Shire Council	0	1	1	0	0	0	0	0	2

Result of Complaints - Local Government									
COUNCIL	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Hunters Hill Municipal Council	0	1	0	0	0	0	0	0	1
Hurstville Municipal Council	0	2	0	0	0	0	0	0	2
Illawarra Electricity	0	0	4	0	1	0	0	0	5
Kempsey Shire Council	0	4	1	0	0	0	0	0	5
Kiama Municipal Council	0	2	0	0	0	0	0	1	3
Kogarah Municipal Council	0	4	4	0	0	0	0	0	8
Ku-Ring-Gai Municipal Council	1	4	5	1	1	0	0	0	12
Kyogle Shire Council	0	0	1	0	0	0	0	0	1
Lake Macquarie City Council	0	11	6	1	0	0	0	1	19
Lane Cove Municipal Council	0	3	3	0	0	0	0	0	6
Leichhardt Municipal Council	0	5	5	0	1	0	0	0	11
Lismore City Council	0	4	1	0	1	0	0	0	6
Liverpool City Council	0	3	2	0	0	0	0	0	5
Lower Clarence County Council	0	0	1	0	0	0	0	0	1
Maclean Shire Council	0	3	3	0	0	0	0	0	6
Macquarie County Council	0	0	1	0	0	0	0	0	1
Maitland City Council	0	1	2	0	1	0	0	0	4
Manilla Shire Council	0	1	0	0	0	0	0	0	1

Result of Complaints - Local Government									
COUNCIL	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Manly Municipal Council	0	4	2	0	1	0	0	0	7
Marrickville Municipal Council	0	3	0	0	0	0	0	0	3
Monaro Electricity	0	0	0	1	0	0	0	0	1
Mosman Municipal Council	0	3	1	1	0	0	0	0	5
Mudgee Shire Council	0	2	0	1	0	0	0	0	3
Mulwaree Shire Council	0	3	1	0	1	0	0	0	5
Murray Shire Council	0	0	2	0	0	0	0	0	2
Murrurundi Shire Council	0	2	0	0	0	0	0	0	2
Muswellbrook Shire Council	0	4	0	0	0	0	0	0	4
Numbucca Shire Council	0	1	0	0	0	0	0	0	1
Narrabri Shire Council	0	3	0	0	0	0	0	0	3
New England County Council	0	1	0	0	0	0	0	0	1
Newcastle City Council	0	10	3	0	0	0	0	0	13
North Sydney Municipal Council	0	1	2	0	0	0	0	0	3
Northern Riverina County Council	0	1	0	0	0	0	0	0	1
Northern Rivers Electricity	0	2	0	1	1	0	0	0	4
Nundle Shire Council	0	1	1	0	0	0	0	0	2
Oberon Shire Council	0	2	1	0	0	0	0	0	3
Orange City Council	0	1	0	1	0	0	0	0	2

Result of Complaints - Local Government									
COUNCIL	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Parramatta City Council	0	3	3	2	0	0	0	0	8
Parry Shire Council	0	2	0	0	0	0	0	0	2
Penrith City Council	0	8	4	0	0	0	0	0	12
Port Stephens Shire Council	0	1	6	0	0	0	0	1	8
Prospect Electricity	0	7	5	0	0	0	0	0	12
Queanbeyan City Council	0	1	1	1	0	0	0	0	3
Randwick Municipal Council	0	5	5	0	0	0	0	0	10
Richmond River Shire Council	0	1	1	0	0	0	0	0	2
Rockdale Municipal Council	0	6	1	1	0	0	0	0	8
Ryde Municipal Council	0	3	4	0	1	0	0	0	8
Scone Shire Council	0	1	0	0	0	0	0	0	1
Shellharbour Shire Council	0	1	2	0	0	0	0	0	3
Shoalhaven City Council	0	6	12	1	1	0	0	0	20
Shortland Electricity	0	1	1	0	0	0	0	0	2
Singleton Shire Council	0	1	0	0	0	0	0	0	1
Snowy River Shire Council	0	1	0	0	0	0	0	0	1
South Sydney City Council	1	13	4	0	2	0	0	0	20
Southern Mitchell County Council	0	1	0	0	0	0	0	0	1

Result of Complaints - Local Government									
COUNCIL	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Southern Riverina County Council	0	1	0	0	0	0	0	0	1
Southern Tablelands County Council	0	1	0	0	0	0	0	0	1
Strathfield Municipal Council	0	0	1	1	0	0	0	0	2
Sutherland Shire Council	0	7	4	1	0	0	0	0	12
Sydney Electricity	0	10	2	1	0	0	0	0	13
Tallanganda Shire Council	0	1	2	0	0	0	0	0	3
Tenterfield Shire Council	0	2	0	0	0	0	0	0	2
Tumut River County Council	0	0	1	0	0	0	0	0	1
Tumut Shire Council	0	1	0	0	0	0	0	0	1
Tweed Shire Council	0	4	1	1	1	0	0	1	8
Ulan County Council	0	2	1	0	0	0	0	0	3
Ulmarra Shire Council	0	1	1	0	0	0	0	0	2
Wagga Wagga City Council	0	2	0	0	0	0	0	0	2
Walcha Shire Council	0	2	0	0	0	0	0	0	2
Warringah Shire Council	0	13	9	0	0	0	0	0	22
Waverley Municipal Council	0	6	4	0	0	0	0	0	10
Wellington Shire Council	0	0	1	0	0	0	0	0	1
Wentworth Shire Council	0	0	1	0	0	0	0	1	2

Result of Complaints - Local Government									
COUNCIL	NJ	DECO	DECE	RES	NPFE	DIS	NAF	AF	TOTAL
Willoughby Municipal Council	0	5	2	0	1	0	0	0	8
Wingecarribee Shire Council	0	0	5	1	1	0	0	0	7
Wollondilly Shire Council	0	0	2	0	0	0	0	0	2
Wollongong City Council	0	6	5	0	0	1	0	1	13
Woollahra Municipal Council	0	4	3	1	0	0	0	0	8
Wyong Shire Council	0	5	4	0	0	3	0	0	12
Yarrowlumla Shire Council	0	2	0	0	0	0	0	0	2
Yass Shire Council	0	0	0	0	0	0	0	1	1
Young Shire Council	0	2	0	0	0	0	0	0	2

Summary of Result Tables									
Departments/Statutory Authorities	31	673	688	127	47	28	7	23	1624
Local Government	2	371	242	32	25	4	3	8	687
Outside Jurisdiction (not associated with above)									384
Current as at 30.6.92									386
							Sub Total		3081
Less Current as at 30.6.91									702
Total for year ended 30.6.92									2379

OFFICE OF THE OMBUDSMAN

FINANCIAL STATEMENTS

For the Year Ended 30 June 1992

OFFICE OF THE OMBUDSMAN
3RD FLOOR 580 GEORGE STREET, SYDNEY 2000
TELEPHONE: 286 1000

Our reference:

Your reference:

FINANCIAL STATEMENTS FOR THE YEAR ENDED 30 JUNE 1992

Pursuant to Section 45F of the Public Finance and Audit Act 1983, 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 Financial Reporting Code under Accrual Accounting for Inner Budget Sector Entities, the applicable clauses of the Public Finance and Audit (Departments) Regulation 1986 and the Treasurer's Directions;

(b) the statements exhibit a true and fair view of the financial position and transactions of the Department; and

(c) there are no circumstances which would render any particulars included in the financial statements to be misleading or inaccurate.

David Landa
Ombudsman

19 SEP 1992

BOX 12 GPO
SYDNEY NSW 2001

AUDITOR-GENERAL'S OPINION

OFFICE OF THE OMBUDSMAN

To Members of the New South Wales Parliament and Ombudsman

Scope

I have audited the accounts of the Office of the Ombudsman for the year ended 30 June 1992. The preparation and presentation of the financial statements, consisting of the accompanying statement of financial position, operating statement and statement of cash flows, together with the notes thereto, and the information contained therein is the responsibility of the Ombudsman. My responsibility is to express an opinion on these statements to Members of the New South Wales Parliament and Ombudsman based on my audit as required by Sections 34 and 45F(1) of the Public Finance and Audit Act 1983. My responsibility does not extend to an assessment of the assumptions used in formulating budget figures disclosed in the financial statements.

My audit has been conducted in accordance with the provisions of the Act and Australian Auditing Standards to provide reasonable assurance as to whether the financial statements are free of material misstatement. 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 presented fairly in accordance with the requirements of the Public Finance and Audit Act 1983, and Australian accounting concepts and standards so as to present a view which is consistent with my understanding of the Office of the Ombudsman's financial position and the results of its operations.

This audit opinion has been formed on the above basis.

Audit Opinion

In my opinion, the financial statements of the Office of the Ombudsman comply with Section 45E of the Act and present fairly the financial position of the Office as at 30 June 1992 and the results of its operations for the year then ended in accordance with Statements of Accounting Concepts and applicable Accounting Standards.

E. LUMLEY, FCPA
DIRECTOR OF AUDIT
(duly authorised by the Auditor-General of New South Wales under Section 45F(1A) of the Act)

SYDNEY
15 October 1992

OFFICE OF THE OMBUDSMAN

Operating Statement for the year ended 30 June, 1992

	Notes	Actual 1992 $'000	Budget 1992 $'000
Operating Expenses			
Employee related	5(a)	(3,444)	(3,647)
Maintenance and Working	5(c)	(1,011)	(1,144)
Depreciation	5(b)	(163)	(157)
Total Operating Expenses		(4,618)	(4,948)
Operating Revenues			
User charges	6(a)	1	1
Other	6(b)	19	0
Total Operating Revenues		20	1
Net Gain/(loss) on sale of plant and equipment		1	0
NET COST OF SERVICES		(4,597)	(4,947)
Consolidation fund recurrent allocation		4,246	4,286
Acceptance by Crown of Office liabilities		299	453
Operating result		(52)	(208)
Consolidation fund capital allocation		0	0
Return to Crown on sale of assets		(1)	0
Operating result after capital allocation		(53)	(208)

The accompanying notes form part of these statements

OFFICE OF THE OMBUDSMAN

Statement of Financial Position as at 30 June, 1992

	Notes	Actual 1992 $'000
Current Assets		
Cash	7	196
Prepayments	8	76
Total Current Assets		272
Non Current Assets		
Plant and Equipment	9	819
Total Non-current Assets		819
TOTAL ASSETS		1,091
Current Liabilities		
Creditors	10	204
Provision	11	207
TOTAL LIABILITIES		411
NET ASSETS		680
Equity		
Equity as at 30 June, 1991		733
Accumulated surplus/(deficit)	12	(53)
TOTAL EQUITY		680

The accompanying notes form part of these statements

OFFICE OF THE OMBUDSMAN

Cash Flow Statement for the year ended 30 June, 1992

	Notes	Actual 1992 $'000
Cash flow from operating activities		
Payments		
Employee related		(3,070)
Maintenance & working		(1,075)
		(4,145)
Receipts		
User charges		1
Other		19
		20
Total Net Cash Used on Operating Activities	15	(4,125)
Cash Flow from Investing Activites		
Purchases of property, plant & equipment		(65)
Proceeds from the sale of property, plant & equipment		2
		(63)
NET CASH OUTFLOW FROM OPERATING AND INVESTING ACTIVITIES		(4,188)
Government Funding Activities		
Return to Crown on sale of assets		(1)
Consolidated Fund Recurrent Allocation		4,246
Total Net Cash provided by Government		4,245
Net Increase/(decrease) in Cash		57
Opening Cash Balance		139
CLOSING CASH BALANCE	15	196

The accompanying notes form part of these statements

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements

1. THE DEPARTMENTAL REPORTING ENTITY

The Office of the Ombudsman comprises all the operating activities of the Office.

2. SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

The Office's financial report has been prepared in accordance with Statements of Accounting Concepts, applicable Australian Accounting Standards, the requirements of the Public Finance and Audit Act, 1983 and Regulations, the Treasurers Directions and the Financial Reporting Directives published in the Financial Reporting Code for Inner Budget Sector Entities.

The Operating Statement and Statement of Financial Position are prepared on an accruals basis. The Cash Flow Statement is prepared in accordance with AAS 28 - "Statement of Cash Flows".

The Financial Report is prepared in accordance with the historical cost convention. All amounts are rounded to the nearest one thousand dollars and are expressed in Australian Currency.

(a) Employee related expenses

The cost of employee entitlements to long service leave and superannuation are included in employee related expenses. However, as the Office's liabilities for long service leave and superannuation are assumed by the Crown, the Office accounts for the liability as having been extinguished resulting in non-monetary revenue described as "Acceptance by Crown of Office liabilities".

The amounts expected to be paid to employees for their pro rata entitlement to recreation leave are accrued annually at current pay rates.

(b) Government allocations

Monetary and non-monetary resources which are allocated to the Office by the Government and which are controlled by the Office are recognised as revenues of the financial period in which they are received. Non-monetary allocations are recognised at fair value.

(c) Acquisition of assets

The cost method of accounting is used for all acquisitions of assets regardless of whether resources are acquired separately or as part of an interest in another entity. Cost is determined as the fair value of the assets given up at the date of acquisition plus costs incidental to the acquisition.

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements (Continued)

The "recoverable amount" test as set out in AAS 10 does not apply to budget sector agencies in respect of the year ended 30 June 1992 and subsequent financial years. This exemption is granted under Section 45EA of the Public Finance and Audit Act which came into effect on 1 July 1992.

It is the Treasurer's view that the "recoverable amount" test should be applicable to a physical non-current asset of an agency when, and only when, the service potential of that asset is dependent on its ability to generate net cash inflows. In the case of departments, the service potential of their assets is related to their ability to assist in the achievement of social service delivery objectives. As the objectives do not encompass the generation of net cash inflows from the deployment of resources over their useful lives, the service potential of the assets of the department is related to the provision of goods and services as an end in itself, rather than to the generation of cash flows.

The application of the "recoverable amount" test would have resulted in the assets being given a nil value in the accounts.

(d) Depreciation

Depreciation is charged for on a straight line basis against all depreciable assets so as to write off the depreciable amount of each depreciable asset as it is consumed over its useful life.

3. CHANGE IN ACCOUNTING POLICY

In previous years the Office's financial statements were prepared in the format determined by the Public Finance and Audit (Departments) Regulation, 1986 and Treasurer's Directions. With the application of the Financial Reporting Code under Accrual Accounting for Inner Budget Sector Entities for the financial year commencing 1 July 1991, the Office has adopted full accrual accounting in the preparation of the financial statements. This has had a significant impact on the accounting treatment for many items and has required the reclassification of others. Therefore, comparative figures for 1990/91 are not available. The exemption to exclude comparative figures is provided by paragraph 1.11 of the Financial Reporting Code under Accrual Accounting. Budgeted amounts for the Statement of Financial Position and Cash Flow Statement are not included. This exemption is granted by Treasury under Section 45EA of the Public Finance and Audit Act, 1983.

4. BUDGET REVIEW

The actual net cost of services was lower than budget by $349,496. This favourable result was primarily due to a reduction in operating expenses, due to salaries not being increased by the budgeted amount, and prepayments being higher than expected. Changes to the calculation of superannuation costs also contributed to this lower than budget result.

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements (Continued)

5. OPERATING EXPENSES

	1992 $'000
(a) Employee related expenses comprise the following specific items:	
Salaries and wages	2,648
Superannuation entitlements	242
Payroll tax and fringe benefits tax	230
Recreation Leave	252
Long Service Leave	57
Workers Compensation insurance	13
Other	2
	3,444
(b) Depreciation is charged as follows:	
Computer equipment	66
Furniture and fittings	13
Office equipment	43
Leasehold improvement	41
	163

(c) Included in Maintenance and Working Expenses were amounts relating to Audit Fees (External $9,300 and Internal $17,005) and payments to consultants ($42,457).

6. OPERATING REVENUES

	1992 $'000
(a) User charges comprise the following items:	
Commissions on Health & Life Assurance	1
(b) Other revenue comprises:	
Trainee subsidy	17
GIO managed fund distribution	2
	20

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements (Continued)

7. CURRENT ASSETS - Cash

	1992 $'000
Cash at Treasury	196
Cash on Hand	1
Cash at Bank	(1)
Total Cash	196

8. CURRENT ASSETS - Prepayments

	1992 $'000
Rent	49
Training	9
Subscription/Maintenance	11
Other	7
	76

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements (Continued)

9. NON-CURRENT ASSETS - Plant and equipment

	Computer Equipment	Furniture & Fittings	Office Equipment	Leasehold Improvement	Total
	$'000	$'000	$'000	$'000	$'000
At cost or valuation					
Balance 1 July, 1991	327	129	215	491	1,162
Additions	58	1	6	0	65
Disposals	(1)	0	0	0	(1)
Balance 30 June, 1992	384	130	221	491	1,226
Accumulated depreciation					
Balance 1July, 1991	81	21	74	68	244
Depreciation for the year	66	13	43	41	163
Balance 30 June, 1992	147	34	117	109	407
Written Down Value					
At 1 July, 1991	246	108	141	423	918
At 30 June, 1992	237	96	104	382	819

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements (Continued)

10. CURRENT LIABILITIES - Creditors

	1992 $'000
Operating activities	
Salaries and Wages	192
Maintenance and working expenses	12
	204

11. CURRENT LIABILITIES - Provisions

	1992 $'000
The movement in the provision for employee recreation leave is as follows:	
Balance 1 July, 1991	184
Increase in Provision	23
Balance 30 June, 1992	207

12. EQUITY - Accumulated surplus/(deficit)

	1992 $'000
Balance 1 July, 1991	0
Operating Result for the year	(53)
Balance 30 June, 1992	(53)

13. UNCLAIMED MONIES

All amounts unclaimed are forwarded to the Treasury for credit of Special Deposits Unclaimed Monies Account and are available for refund from that account. No unclaimed amounts have been held in the accounts of the Office of the Ombudsman in excess of two years.

14. COMMITMENTS FOR EXPENDITURE

		1992 $'000
(a)	**Lease Commitments**	1,643
	Aggregrate operating lease expenditure contracted for at balance date but not provided for in the accounts:	
	Not later than one year	620
	Later than one year but not later than 2 years	617
	Later than 2 years but not later than 5 years	406
	Later than 5 years	-

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements (Continued)

	1992 $'000
Representing:	
Cancellable operating leases	18
Non-cancellable operating leases	1,625
Commitments in relation to non-cancellable operating leases are payable as follows:	
Not later than one year	610
Later than one year but not later than 2 years	609
Later than 2 years but not later than 5 years	406
Later than 5 years	-

15. NOTE TO CASH FLOW STATEMENT

(a) Reconciliation of Cash

For the purposes of the Statement of Cash Flows, the Office considers cash to include cash on hand, cash at bank, and at Treasury. Cash at 30 June, 1992 as shown in the statement of cash flows is reconciled to the related items in the statement of Financial Position as follows:

	1992 $'000
Cash at Treasury	196
Cash on Hand	1
Cash at Bank	(1)
	196

(b) Reconciliation of Net Cash used in Operating Activities to Operating Result after Capital Allocation

	1992 $'000
Operating Result	(53)
Depreciation	163
Increase in provision for recreation leave	23
Increase in creditors	65
Increase in prepayments	(76)
Government appropriation	(4,246)
Gain on sale of plant	(1)
Net Cash used in Operating Activities	(4,125)

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements (Continued)

16. PROGRAM INFORMATION

	Notes	Program No. 1
		(a)
		1992
		$'000
Operating Expenses		(4,618)
Total Operating Expenses		(4,618)
Operating Revenue		
User charges		1
Other revenue		19
Gain/(loss) on sale of non-current assets		1
		21
NET COST OF SERVICES		(4,597)
Government Allocations	(b)	4,544
Operating Result after consolidated fund allocations		(53)
Total Assets		1,091

(a) Program 1 - Investigation of citizen's complaints and monitoring and reporting on telecommunications interception activities.

Objectives: To permit an independent inquiry into citizens' complaints against decisions and actions of State public sector bodies and/or their officers. To ensure eligible authorities' compliance with telecommunications interception legislation. To perform an external review function under the Freedom of Information Act.

OFFICE OF THE OMBUDSMAN

Notes to and Forming Part of the Financial Statements (Continued)

(b) Government Allocations

Consolidated fund recurrent allocation	4,246
Crown acceptance of liabilities	299
Return on sale of assets	(1)
	4544

17. CONTINGENT LIABILITIES

There were no contingent liabilities at balance date.

END OF AUDITED FINANCIAL STATEMENTS

CHAPTER EIGHT

APPENDIXES

CODE OF CONDUCT

Background

The Office of the Ombudsman is constituted under the Ombudsman Act, 1974. Its operations are governed principally by that Act and the Police Regulation (Allegations of Misconduct) Act, (PRAM Act) 1978. It also has specific operational responsibilities under the Freedom of Information Act, (FOI Act) the Telecommunications (Interception) (New South Wales) Act (TIIU Act) and the Independent Commission Against Corruption (ICAC) Act.

The Office is accountable to the public of New South Wales through Parliament and its operations are essentially independent of the government of the day. The Office has a prime obligation to the public interest which demands that the work of the Office and the conduct of its officers and staff must maintain public confidence and trust.

The basic charter of the Office is to receive, investigate and report on complaints about the administrative conduct of public authorities and alleged misconduct of police officers, to determine complaints and, where appropriate, to make findings and recommendations.

The Mission of Office of the Ombudsman is:

- to promote fairness, integrity and justice in public administration by reviewing the conduct of public authorities, including police, through independent, efficient investigations and reports

In pursuit of this mission the Office seeks the achievement and maintenance of high standards of conduct on the part of the State's public authorities. In its own operations, the Office is committed to observing standards at least as high as those it commends to others.

Introduction

This code applies to the Ombudsman and all staff of the Office, whether by way of appointment, secondment, contract, temporary arrangement or on a fee for service basis. It is subject to annual review and revision from time to time as circumstances require.

It sets out basic principles which officers and staff are expected to uphold and prescribes specific conduct in areas central to the exercise of the Ombudsman's functions and powers.

Basic Principles

The public have a right to quality service from the Office of the Ombudsman. That service will be characterised by

- the vigorous pursuit of truth, without fear or favour
- courteous, attentive and sensitive treatment of individuals and organisations with which the Office deals
- conscientious and competent discharge of all duties and responsibilities
- fair procedures
- the setting aside of personal interests and views in discharging functions
- the efficient and effective use of the resources of the Office

Legislative Obligations

You are always obliged to act in accordance with the provisions of the legislation under which the Office undertakes its functions (Ombudsman Act 1974, PRAM Act 1978, TIIU Act 1987, FOI Act 1989, and ICAC Act 1988) and the Ombudsman's policies, directions and delegations as set out in memorandums and procedure manuals.

You are to become and remain fully conversant with those instruments.

You should also be conversant with the principal provisions of other public sector legislation having general effect upon the Office, including the Public Sector Management Act 1988, the Anti-Discrimination Act 1977, the Occupational Health and Safety Act 1983, and the Public Finance and Audit Act 1983 and observe them.

Personal Conduct

You are to deal with other staff and the public with honesty, courtesy and consideration, and to refrain from conduct or behaviour which may damage the reputation and standing of the Office and its staff.

Professional Conduct

You are expected to discharge your duties with care and thoroughness, in compliance with all lawful instructions and with close attention to:

- honesty and integrity
- accuracy and completeness
- consideration of all relevant facts
- particular merits of the case
- impartiality and procedural fairness
- equity and natural justice
- accountability
- consistency in equivalent situations
- Office policy
- discretion and tact
- conflicts of interest

You must maintain adequate documentation to support any decisions made. You must not unduly delay taking action or making decisions.

Any verbal communications on sensitive or important matters are to be recorded accurately and immediately and brought to the attention of an appropriate senior officer.

Conflicts of Interest

To maintain the integrity of the Office, personal interests (financial and otherwise), associations and activities must not conflict with your duties. The Ombudsman is entitled to know if there is even a remote possibility of a conflict arising.

You must make full and frank disclosure to the principal investigation officer or the relevant statutory officer of any conflict, either real or potential, which may be seen to impact on the impartial exercise of your duties. If necessary, you must disqualify yourself from having any involvement in particular matters where that conflict arises.

If you are in any doubt whether to disclose a potential conflict of interest, you have an obligation to consult the principal investigation officer or the relevant statutory officer. Such consultations will be treated confidentially and may avoid harm or embarrassment to the Office and yourself.

Acceptance of Gifts or Benefits

You must not accept any gift or benefit that could be seen by a member of the public as intended or likely to cause you to do your job in a particular way, or deviate from usual procedures.

Generally any such offers should be declined except in cases where the offer is of some token kind and it would be rude or offensive to refuse, or where the offer is also to associates who share a common task and purpose and which does not impose any obligations that may conflict with your duties (eg, modest hospitality offered on visits to institutions, during meetings of working parties, selection committees, etc).

You must always decline offers from individuals or organisations that are complainants to the Office or that you know to be the subject of an investigation by the Ombudsman.

You must never solicit any money, gift, benefit, travel or hospitality in association with your duties.

Consultation and Reporting

You have a duty to report any operational problem or difficulty you identify to your direct supervisor, or where appropriate, to a more senior officer.

You have a duty to consult your colleagues or supervisor when you have any doubt about the way in which you should exercise your delegated powers or fulfil your duties.

You have a duty to seek approval for any action that you do not have delegated authority to take or that is the subject of any specific direction or policy of the Ombudsman or a senior officer requiring consultation or approval.

You must report without delay to the principal investigation officer or the relevant statutory officer any complaint that is made about the exercise of the functions of the Ombudsman or the conduct of yourself or another staff member.

You must inform the Ombudsman of any case where there is reason to suspect corrupt conduct within the meaning of the ICAC Act whether occurring within or outside the Office in view of his obligation of notification under the Act.

General Accountability

You are responsible for your own acts and omissions and will be held responsible for them.

If you have a supervisory role, you will also be held responsible for any foreseeable acts and omissions of your staff which by their seriousness, repetition or common occurrence are matters that you should know of and correct if you are exercising responsible management, leadership and supervision.

If you have a supervisory role, you therefore have a duty to make sure the staff under your control or leadership have a clear understanding of their duties, how they are expected to perform those tasks, and what results are expected.

You must notify the Ombudsman or the relevant senior officer of any precautionary or remedial action that is necessary to take in respect of any staff under your leadership or supervision or any function or responsibility of the Ombudsman which you are unable to take yourself.

Confidentiality

You must always comply with the obligations of confidentiality in respect of the work of the Office prescribed by the legislation under which the Office undertakes its investigations, monitoring and reporting.

You must not access or disclose any of the sensitive information that the Office receives or has access to except in the proper performance of your duties.

You must not use any information that you obtain in the course of your duties to gain improper advantage for yourself or for any other person, that would cause harm or discredit to the Office or any person, or would be inconsistent with your duties.

Public Comment

You must not engage in public comment, whether through public speaking engagements, comments to newspaper or radio or television journalists, letters or articles to newspapers or other publications that:

- comments on the work of the Office unless you have prior permission or delegated authority of the Ombudsman
- is the expression of private views but by implication is capable of being perceived as official comment from this Office

You can disclose official information which is normally given to members of the public seeking that information.

In discussing any other work of the Office outside the Office, you must confine yourself to material that has entered the public domain by way of Annual Reports, Special Reports to Parliaments, Reports of the Joint Parliamentary Committee on the Ombudsman, media releases authorised by the Ombudsman or public addresses given by the Ombudsman or other statutory officers.

You must refer all media enquires to the media officer unless you are the designated officer to take media calls in relation to some specific issue.

The constraints on public comment and the obligations to observe and protect confidentiality still apply when you leave the employ of the Ombudsman.

Use of Office Resources

You must use any resources and equipment of the Office economically and without waste.

When using equipment you must exercise care and follow service requirements. When using shared equipment, you must ensure that your use does not unnecessarily impede access by others or assume unreasonable priority.

You must not use your work time or obtain or use stores items such as stationery, equipment or postage for a private purpose unrelated to the work of the Office unless authorised.

When using Office resources for an authorised private purpose you must ensure that they are secure and properly cared for, used in your own time, do not interrupt the work of the Office or access by colleagues for official purposes, and supply any consumables yourself.

When you leave the employ of the Ombudsman you must return all equipment and documents that belong to the Office.

You must not incur expenditure on behalf of the Office unless authorised. If incurring authorised expenditure, you must adhere to all relevant requirements of the Public Finance and Audit Act, Treasurer's Directions, Office policies and any financial delegations you have.

Security

You must maintain security of the Office and any keys or mill keys that you have.

You must make yourself familiar with any security procedures followed in the Office including emergency and fire procedures.

Outside Employment

You must obtain approval for any outside employment that you are engaged in or are considering.

You must not engage in any outside employment or remuneration that would conflict or compromise your duties as an Officer of the Ombudsman.

Sanctions

You should be aware of the various sanctions that may be applied for the breach of any provision in the legislation governing the work of the Ombudsman or your employment under the provisions of the Public Sector Management Act.

Sanctions may be applied if you are involved in:

- criminal or other improper conduct, either in the course of your duties or in your private life, that would bring discredit on the Office of the Ombudsman or the public service
- unsatisfactory performance of your duties
- breaches of this Code of Conduct
- breaches of your terms of employment
- breaches of any provisions of the Acts mentioned in this code

Any sanctions applied will depend on the seriousness and nature of the breaches and may include counselling by a supervisor or member of senior staff, a record of behaviour documented and placed in your personal file, the deferment of salary increments, not being recommended for renewal of contract, formal disciplinary or criminal action.

LIST OF TABLES AND CHARTS

Chapter **Page Number**

Chapter Four

Complaints About Prisons

Chapter Five

Complaints About Other Public Authorities

Chapter Six

Freedom Of Information

Chapter Seven

Operational Reports

TABLES OF CASE STUDIES

Table of Case Studies Chapter One - Management and Structure			
Authority	**Case Study Title**	**Topic Reference**	**Page No**
Corrective Services Commission	1. Inside Information was Unreliable	Remission entitlements	7
Police Service	2. Alarm Prompts Unwanted Excursions	Reimbursement of costs	8
Department of Lands	3. Renewed Life of Lease	Delay in processing of application	8
Lithgow City Council/ Electricity Commission	4. Dust-up Over Dust is Settled	Failure to act	9
Water Board	5. Steamed up over Selective Courtesy	Compensation/ inadequate policy	9
Manly Municipal Council	6. Garbage Bin - Sin of Omission	Failure to inform	9
Totalizator Agency Board	7. Solo Cash Counters Face Motza Trouble	Inadequate procedures	10
Coal and Oil Shale Mine Workers Superannuation Tribunal	8. Late Lump Lacked Interest	Compensation for delay	11

Table of Cases
Chapter Two - Police Service

Case Study Title	Topic Reference	Page No
1. Four Years and Six Months	Delayed Investigations	33
2. Four Years and Still Going	Delayed Investigations	34
3. Double Dishonesty	Inadequate Discipline	39
4. Just Working the Dog	Abuse of power/conciliation	41
5. Immoral Beat	Discrimination	41
6. Effective Harassment	Discrimination by age/race	42
7. Kids and Cops	Discrimination by race	43
8. Double Trauma	Sexual harassment	46
9. Under Supervision	Sexual harassment	47
10. Hands On	Sexual harassment	47
11. Policy Academy I	Sexual harassment	48
12. Police Academy II	Sexual harassment	48
13. Party Tricks	Sexual harassment	49
14. Police Academy III	Sexual harassment	49
15. Mistreating Victims	Domestic violence	51
16. No Action	Domestic violence	51
17. Summons	Abuse of power to arrest	52
18. Swear By Me	Abuse of power to arrest	53
19. Arresting Kids	Abuse of power to arrest	53
20. Handcuffs	Abuse of power to arrest	54
21. On the Job	Misuse of office	56
22. Don't Trespass on my Land	Misuse of office	56
23.Don't Tell My Daughter What to Do	Misuse of office	56
24. Outright Harassment	Misuse of office	57
25. Protection of Family	Misuse of office	57
26. Access Police Data Base	Misuse of office	58
27. On the Political Hustings	Misuse of office	59
28. The Beer was Cheap	Misuse of office	59
29. Police Evidence	Abuse of Process	60

Table of Case Studies
Chapter Three - Local Government

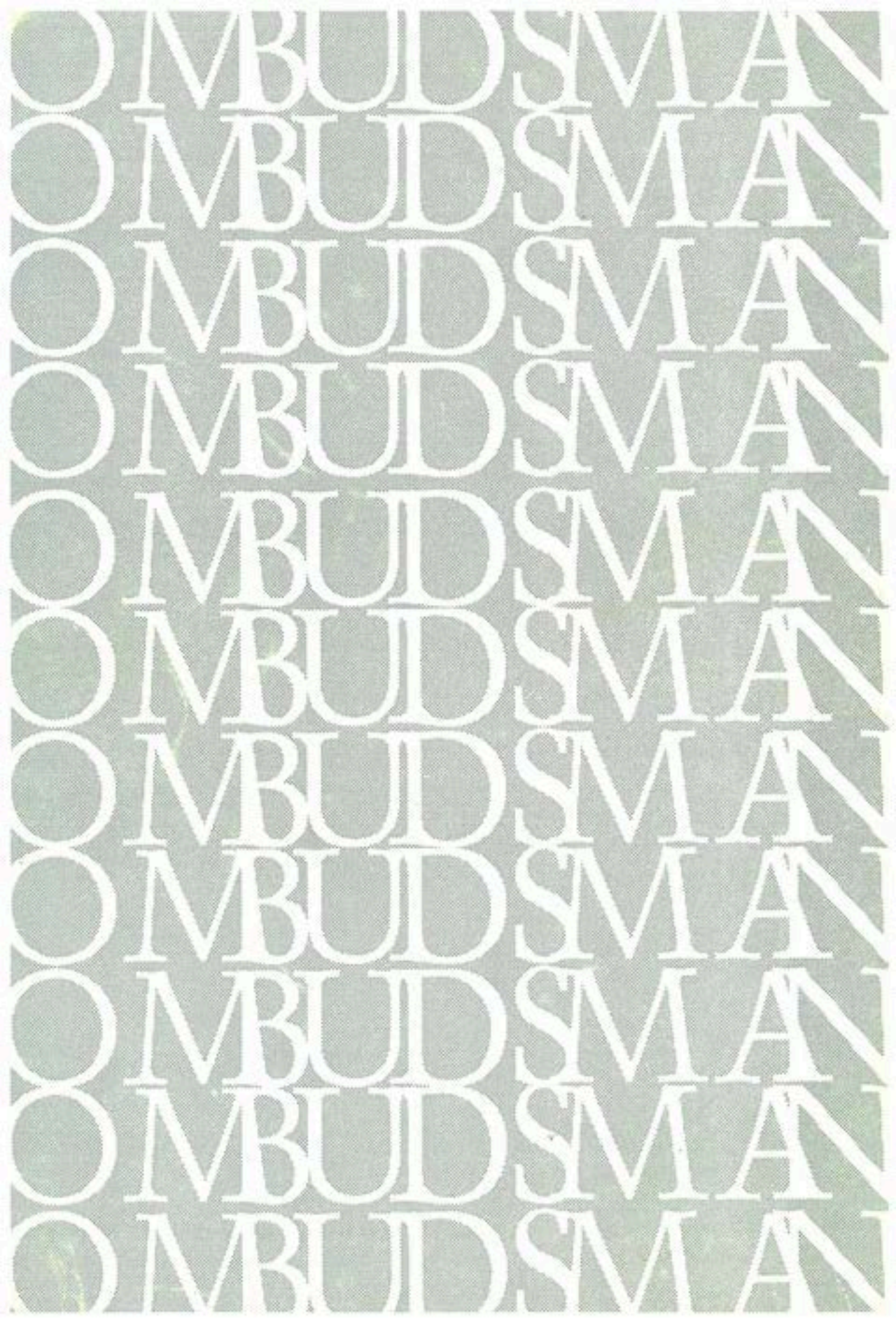
Council/Shire	Case Study Title	Topic Reference	Page No
Warringah	1. Do Not Swim Here	Non-compliance	89
Tweed Shire	2. Notification of adjoining Owners	Non-compliance	91
Orange	3. Fee for Service	Unreasonable conduct	92
Port Stephens	4. Land Slip Hazard	Non-compliance	92
Wollongong	5. Tree Preservation	Non-compliance	92
Kiama	6. Rates	Failure to inform	93
Newcastle	7. Drainage	Non-compliance	93
Corowa	8. From Woe to Go	Failure to act	94
Woollahra	9. Conditions of Building Approval & Development Consent	Failure to act	94
Gosford	10. Subdivision	Incorrect determination	95
Auburn	11. Flood Plans	Freedom of Information Act	100
Bankstown	12. Scheduled Premises	Pollution	101
Sutherland	13. A Slow Burn	Pollution	102
Baulkham Hills	14. Planning by Stealth	Pollution	104
Forbes	15. Tenders V Quotes	Delegated power	106
Anon	16. Delegating the Tender Process	Delegated power	107
Narrabri	17. Conflict of Interest	Conflict of Interest	108
Parramatta	18. Seins for the Memories	Parking Fines	110
Lake Macquarie	19. Squares the Account	Abuse of trustee position	111
Maclean	20. Collecting Rates on No Man's Land	Failure to act	112

Table of Case Studies Chapter Four - Prisons			
Prison	**Case Study Title**	**Topic Reference**	**Page No**
Parklea	1. Parklea Riot	Assault/inadequate regulations	124
Maitland	2. Maitland Fraud	Fraud/inadequate Procedures	127
Goulburn	3. The High Security Unit	Conditions in goals	128
Long Bay	4. Third World Conditions	Conditions in goals	131
Goulburn	5. High Security Unit	Segregation as punishment	138
Dept of Corrective Services	6. Which Six Months?	Segregation as punishment	139
Anon	7. Dayleave	Decision making	141
Dept of Corrective Services	8. Carriage and Retention of Legal Papers by Prisoners	Decision making	142
Dept of Corrective Services	9. Private Cash Printouts	Decision making	143
Dept of Corrective Services	10. Interstate Transfer on Welfare Grounds	Decision making	144
Prison Medical Service	11. Psychiatric Care & Communication	Responsibility	146
Prison Medical Service	12. Medical Care in Crisis	Responsibility	147

Table of Case Studies
Chapter Five - Public Authorities

Authority	Case Study Title	Topic Reference	Page No
Dept of Health - Public Health Division	1. Septic Insanity	Over regulation	153
Department of Health - Public Health Division	2. Service - No Thanks	Over regulation/accreditation	155
Department of Health - Public Health Division	3. The Seaweed Swindle	Over regulation	155
Dept of Lands/Dept of Agriculture and Fisheries	4. The Raw Prawn	Over regulation/delay	159
Office of Juvenile Justice - Kariong	5. Inspection following Riotous Behaviour	Safety/regulations/ training	161
Office of Juvenile Justice - Yasmar	6. Yasmar	Safety/regulations/ training	162
Office of Juvenile Justice	7. Minda	Discipline/regulations/ training	163
Office of Juvenile Justice	8. Conditions in Centres	Entitlements - telephone calls and visits	169
Office of Juvenile Justice	9. Departmental Whitewash	Failure to prosecute	170
Office of Juvenile Justice	10. Mount Penang	Inadequate regulations	171
Roads & Traffic Authority	11. Assumed Identity	Failure to investigate	174
Roads & Traffic Authority	12. Off to Goal for my Extra Belt	Rudeness/inadequate advice	176
Roads & Traffic Authority	13. Registration of Stolen Cars	Inadequate procedures	177
Darling Harbour Authority	14. Darling Harbour Authority	Tendering guidelines	178
Public Works Dept	15. Public Works Department	Contractors and liability	179
Roads & Traffic Authority	16. Roads and Traffic Authority	Tendering procedures	180
Office of Aboriginal Affairs	17. Does the Office of Aboriginal Affairs Administer Aboriginal Affairs?	Inadequate administration	181
Department of Housing	18. Community Housing and Departmental Brick Walls	Failure to administer/delay	184
Board of Studies	19. Board Games	Procedural fairness	185
Office of State Revenue	20. Double Pay Double Delay	Unreasonable conduct	186

Table of Case Studies Chapter Six - Freedom of Information Act			
Authority	**Case Study Title**	**Topic Reference**	**Page No**
Dept of Corrective Services	1. Corrective Services Correct	Fees/delay	196
State Rail Authority	2. State Rail Saga	All documents exempt/mislead Ombudsman	197
Public Works Dept	3. Does Public Works Work?	Denial of access/mislead	199
Note: Also refer to Summary of Cases. pp 201 - 208, for a list of FOI review applications			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