

# Summary

NSW  
Ombudsman's  
Annual Report  
1992-1993

# Note

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This is a summary of the NSW Ombudsman's Annual Report for 1992 - 1993.

Copies of the full report are \$10.00 and are available from:

**The Media Officer  
Office of the NSW Ombudsman  
3rd Floor  
580 George Street  
Sydney 2000  
Ph: (02) 286 1000**

Details are on the order form on the back page of this summary.



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# Introduction

***Under section 30 of the Ombudsman Act, the Ombudsman of New South Wales is required to submit an annual report to Parliament. This is the eighteenth 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 1993.***

This report also includes an account of the Ombudsman's functions under the Police Service (Complaints, Discipline and Appeals) Amendment Act 1993 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 1993) have been mentioned in some cases in the interest of updating material.

The case material contained in the report covers the broad range of complaints made to the Ombudsman from the significant and complex to the ordinary. The report aims to give the flavour of the cross section of matters dealt with by the Ombudsman.

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.

The Police Service (Complaints, Discipline and Appeals) Amendment Act 1993 expanded this role even more (see police section).

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 ap-

proval for the appointment of the Deputy Ombudsman and Assistant Ombudsmen be removed from Cabinet to allow the Ombudsman control over those appointments.

A further amendment in 1993 enabled the Ombudsman to present reports directly to the presiding officer of each House of Parliament.

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.

*cont page 3*



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 FOI Act.

## Aims and Objectives

Traditionally the Ombudsman was created to bring the lamp of scrutiny to the actions of the executive to protect the citizen from unfair actions. While there may be alternative means of redress in some cases, the Ombudsman has been seen as a means of achieving resolution that is less formal, less costly and more expeditious.

The primary function of the Office is to receive and, where appropriate, investigate complaints about matters of administration, including determinations about the release of information

under the Freedom of Information Act, within the NSW public sector, and about the conduct of police and to report the findings and recommendations arising from these investigations to the authority concerned, the responsible minister and if necessary to Parliament.

To support this mission, the Office has the following corporate goals:

### Complaint Assessment

To give priority to those complaints which identify structural and procedural deficiencies in NSW's public administration, and individual cases of serious abuse of powers especially where there are no alternative and satisfactory means of redress.

### Complaint Resolution

To resolve complaints about defective public administration.

### Investigations

To promote practical reforms in public administration through recommendations arising from effective and resource-efficient investigations employing fair procedures.

### Complaint Handling in the Public Sector (CHIPS)

To promote the development of effective internal complaint handling in public authorities to ensure accountability and customer satisfaction.

### Internal Management and Accountability

To improve management systems and practices to enhance service delivery and to provide effective accountability mechanisms to meet the Ombudsman's statutory obligations and corporate objectives.

### Financial Services

To make the most effective use of financial and physical resources through improved financial planning and controls.

### Organisational Environment

To ensure productivity, staff development and a creative, safe and satisfying work environment.

### Access

To increase community awareness of the role of the Ombudsman and to promote access for disadvantaged groups. ●

## Access

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

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

<b>3rd Level</b>	<b>Telephone: (02) 286 - 1000</b>
<b>580 George Street</b>	<b>Toll free : (008) 451 - 524</b>
<b>SYDNEY NSW 2000</b>	<b>Facsimile : (02) 283 - 2911</b>

The Office is open to the public between 9 am and 5 pm, Monday to Friday.

Appointments outside these hours can be arranged. ●

# Management and Structure

The principal officers of the Office of the Ombudsman are:

- ▶ David Landa, Attorney at Law - Ombudsman
- ▶ John Pinnock, BA LL.M (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), - Principal Investigation Officer

B. Soc Work (Hons)

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 Challenge of Change

*When I look back at the past year, the dominant impression is one of change and its impact, not just on this Office, but right across the NSW public sector. More often than not these changes are in response to a range of factors, particularly fiscal restraint. But I have also noted, as a factor, the beginnings of a new responsiveness to community needs and concerns.*

Within this Office, I have reviewed my approach to our chronic financial problems. Traditionally, I have reported to Parliament on the consequences of inadequate funding, most importantly a reduction in our ability to meet an increasing number of cries for help from the public. The Government's response generally has been negative.

Some savings have been achieved by increasing efficiency, but the effort has been overwhelmed by the upsurge in the number of public complaints.

### A New Approach

It is time for a change. Sticking to the old ways is no answer. It is not enough for an Ombudsman merely to find fault, without contributing to the improvement of the systems and the attitudes which so often produce the faults and the complaints we receive.

A mediation course I undertook at Harvard University last year convinced me even more strongly of the value of an open and more responsive approach to complaints and complainants, and the office has pushed ahead with a number of initiatives to encourage this approach across the public sector.

Out of this has come a changed approach on our part toward the government. I am endeavouring to demonstrate to the Government that there is more than enough reason, in dollars-and-cents terms, to recognise the profitability of much of what the Office does and its unique capacity to do it.

Although the response to date has been mixed, there is no doubt that the economics of our investigations of public complaints and of our special projects more than pays for itself.

### Brougham Report

My Office's recent report on the Department of Community Services and Brougham House, for example, while not exactly welcomed by the minister, the department or its director-general was not only accepted, but was acted upon with a thoroughness and speed which I expect should save the department a great deal of money in improved procedures, the closing-off of a major leakage of funds and the cost of recurrent similar problems.

When one considers that the Brougham Report could be seen by the department as akin to a consultant's report, the cost of which might well have been a hundred thousand dollars in fees, the overall benefit is even greater.

Such positive outcomes are indicative of a new attitude within  
*cont page 4*



## Overview *cont*

the public sector and my Office will continue to advance the positive side of its work in the belief that as a quality control mechanism, the Ombudsman in fact, saves the government many times the cost of our budget.

## CHIPS

Projects such as our Complaint Handling in the Public Sector program and its associated mediation training, have contributed to a greater receptiveness by much of the public sector to this Office's work.

The CHIPS program itself has been well received. It is an essential aspect of the Government's Guarantee of Service. Without such an initiative, the Guarantee of Service risks being seen as mere rhetoric. CHIPS, however, will give government departments the tools needed to deliver service and solutions promised in their guarantees, corporate plans and mission statements.

As almost 30 per cent or more of the complaints about government departments coming to this Office relate to service-delivery issues, CHIPS has the potential to reduce this category of complaints and to free up our resources for the more serious and the major systemic issues.

Although I believe that reports which clearly reveal maladministration and other deficiencies should be viewed by both Government and public sector managers as valuable performance audits, this has not always proved to be the case. In my report on Toomelah and the Office of Aboriginal Affairs (OAA), I highlighted the considerable deficiencies in the advice the Premier, as the responsible minister, was receiving and the

shortcomings in the performance of the OAA. Although this report was received with hostility and denial, its major recommendations were nevertheless subsequently implemented.

In micro-economic terms, better handling of complaints and reduced investigation costs can add up to significant savings and can benefit everyone concerned.

By introducing better systems in this area and securing their acceptance throughout the public sector, my Office saves the government many times the cost of our budget.

## Consultation

To help achieve this kind of outcome, I have embarked on a program of personal consultation with chief executive officers of government agencies to explain the value of the CHIPS program and to underline the advantages available from my Office's involvement in this process of accountability and openness in dealing with complaints and complainants.

I am also consulting with CEOs of agencies involved in complaints about denied access under the Freedom of Information (FOI) Act, in an endeavour to increase the use of alternative dispute resolution (ADR) wherever possible. From our experience to date and from a review of the New Zealand system, ADR is a more effective form of resolution than investigation in many cases.

The Office also will survey agencies on their perceptions of the function of the Ombudsman's Office to pinpoint problems with investigation processes and to correct any inefficiencies.

On the police side, the Office continues to encourage and

to support the use of conciliation in resolving the lower level police complaints.

Hopefully, these contacts will encourage a more open attitude to customer needs, both generally and for FOI.

## Budget

Once again, I must report that while complaints continue to increase, resources continue to decline. Future funding for the Ombudsman's Office looks precarious, with budget projections indicating a 1994/1995 deficit of \$235,000 followed by \$446,000 in 1995/1996.

It is too early for our initiatives to impact on our financial position. To meet the problem, we can cut staff and cut services to the public. But, when my Office is the last resort for so many people, this is hard to accept. To work within Treasury's current allocation in 1994/1995, up to five positions may need to be lost and in 1995/1996 there may need to be a decrease of up to ten positions. For the total staff of 71, clearly the future of the Office looks bleak.

## Office Review

After strenuous efforts over the past three years, the adequacy of the Office's resources was examined recently by the Joint Parliamentary Committee on the Office of the Ombudsman. In addressing the Committee in December 1992, I said:

*Three key changes to the Office of the Ombudsman in my term to date have been undoubtedly in order:*

*cont page 5*

## Challenge of Change *cont*

1. The setting up of the Joint Committee on the Office of the Ombudsman.

2. Complaint Handling in the Public Sector (CHIPS)

3. The Tink Committee - legislative changes to the police complaints system (effective 1 July 1993)

*The fourth has not I trust yet come about, but surely is about to become manifest. That is, the loss of public credibility in the Office of the Ombudsman - and a return to the days when it was perceived as a token - "A Toothless Tiger".*

*The Committee's role is crucial in keeping a balance between the administration, the executive arm of government and the Ombudsman.*

*I do not mean the committee is an advocate of the Ombudsman, but rather it be seen as an arbitrator to determine the conflict currently apparent between the executive of the NSW Government and the Ombudsman.*

*The stakeholders in the dispute are the Parliament and the public. This is possibly the most important hearing the Committee is likely to have for many years. It is not just simply a review of the resources of the Ombudsman, because in assessing that the Committee needs to judge just what the Office has to do and how we are performing in the delivery of service expected by the public. The Committee's role is to help and to improve the office's function in any way appropriate.*

## Letters to the editor

### Ombudsman office no place for politics

THE personal vindictive attack in Parliament last week (9/9) by the former chairman of the parliamentary committee of the ombudsman, John Turner, was outrageous, particularly when contrasted with the performance of his predecessor Andrew Tink.

Mr Tink's committee produced a meaningful and valuable contribution that will produce dividends for the public for years to come.

Mr Turner showed himself unable to rise above petty party politics. This is unjustified and unforgivable when dealing with the institution of the ombudsman.

My term of office concludes in 18 months, around the time the Government faces the polls for re-election. Long after I and the present Government have faded from memory, the im-

portance and significance of the Ombudsman's Office will be reinforced.

Mr Turner served his fellow committee members poorly, as he did the institution of the ombudsman, and the NSW public. His personal attack raised issues that he had the power to raise in committee and to resolve, yet he chose not to do so.

His attack discredited himself and his hardworking fellow committee members. If this committee is to continue the meaningful role as in the days of Mr Tink, party politics must of necessity be left outside the committee room and total honesty must prevail.

After all, the office of the ombudsman, as well as its leader, is a non-political office.

DAVID LANDA  
NSW Ombudsman

## Reckless Slander

**Any hopes of the committee fulfilling its role as an independent arbiter were destroyed on the 9 September 1993, when the committee's report was handed down by Chairman John Turner.**

In tabling the report, Mr Turner attacked the Office of the Ombudsman on a range of issues, none of which were examined in the report. Consequently, none of the issues covered in the funding inquiry, such as the demand driven nature of the Of-

office's workload and the needs of the public, were dealt with in Mr Turner's address.

If Mr Turner had any shred of belief in the truth of his allegations, he was duty bound to raise them during the proceedings and to call for answers. Yet, he did not. Instead, he recklessly slandered both the Office and my reputation under the cover of Parliamentary privilege.

I have no doubt the Chairman's attack was as much a surprise to his fellow committee members as it was to the

*cont page 6*



## Challenge of Change *cont*

Ombudsman's Office. I responded publicly on the issue and immediately wrote to the editors of the Sydney Morning Herald and the Australian.

Besides seriously damaging the reputation of this Office, Mr Turner effectively destroyed the operation of the Joint Parliamentary Committee on the Office of the Ombudsman. My confidence in its essential importance has been undermined. I do not believe it can effectively function during the remainder of my term of office.

The cost of servicing the committee, providing it with a wealth of detailed information, has been extremely high. It is hard to see how, in the future, scarce resources could be committed with any confidence to a process now so severely tainted.

### Bipartisan Function

Joint Parliamentary committees concerning Ombudsmen have always been bipartisan. The rationale is, of course, that the institution of the Ombudsman is not only a valuable public asset, but an institution of the Parliament itself.

This Office is a relatively young institution, yet with its role of watchdog and investigator it is emerging as a crucial building block in an effective and accountable public sector. The Ombudsman is a truly independent quality control mechanism, not paralleled in the private sector.

This is not to say that the committee should be uncritical. Indeed if the committee were to believe in the truth of any of what Mr Turner said in the Parliament, its clear duty would be to investigate.

Interestingly, neither the Premier, the Deputy Premier nor

the Attorney-General gave any support to Mr Turner. The former Police Minister, the Honourable E P Pickering, MLC, although admitting he suffered from time to time when on the receiving end of critical reports about his department, acknowledged the efforts made in bringing about constructive change in recent years, and I thank him for his remarks in the House.

### ICAC

Unfortunately, Mr Turner was not the only parliamentarian to resort to the shoot-the-messenger technique during the year.

Following a major inquiry into a police complaint by Mr L H Ainsworth (refer police chapter), the present Minister for Police, Mr Griffiths, announced in Parliament that a complaint against my office by a police officer who was named in the report had been referred to the Independent Commission Against Corruption (the ICAC).

The office was put to considerable expense to rebut what was a totally unsubstantiated attack.

Rather than have those necessarily-incurred legal costs reimbursed by the government as is commonly the case where parliamentarians and public authorities are called before the Commission, the office is left to bear a substantial proportion of the costs ourselves. My requests for reimbursement and for budget supplementation have been unsuccessful to date.

From these attacks, together with our continual underfunding, one can only conclude that the Office of the NSW Ombudsman does its job too well!

It is also disturbing that the Committee's report, by its refer-

ences to evidence given before it, gives the impression that I have resisted an external management review of his Office. The correct position, as made clear by me as long ago as July 1990 (Special Report to Parliament - Independence and Accountability of the Ombudsman), is that I was opposed to a review conducted by the Office of Public Management, a division of the Premier's Department and a public authority subject to my jurisdiction.

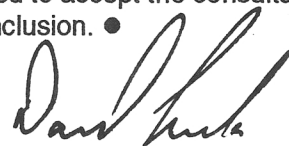
### Comprehensive Review

On a more positive note, the resources inquiry by the Parliamentary Committee on the Ombudsman was the first comprehensive review of the Office since it was established in 1974.

One valuable aspect was the management review by the committee's consultants - KPMG Peat Marwick. Their report, produced through consultation and discussion with the Office, will form the basis of a major reorganisation for the Office.

In particular, the Peat Marwick report concluded that the Office's procedures for the handling and assessment of complaints are both efficient and consistent with legislative requirements.

Even more importantly, the consultants concluded that my argument for the demand driven nature of the Office's work is correct. Notwithstanding the detailed analysis of this issue by Peat Marwick, the committee failed to accept the consultant's conclusion. ●



DE Landa

# Legal Changes

During the year the following legislative amendments were introduced:

- ▶ Police Service (Complaints, Discipline and Appeals) Amendment Act 1993.

Details of the effect of this legislation are discussed in the Police chapter of this Report.

- ▶ Community Services (Complaints, Appeals and Monitoring) Act 1993.

This legislation is discussed under the topic **Legislation by Stealth Robs Ombudsman of Jurisdiction** in the Public Authorities chapter of this Report.

- ▶ Homefund Select Committee (Special Provisions) Act 1993.

See note on Homefund in this report in chapter 4.

- ▶ Ombudsman (Amendment) Act 1993

This legislation was introduced as a result of the Memorandum of Understanding between the Government and Independent Members of the Legislative Assembly and following recommendations by the Ombudsman.

The most important reforms established by the Act are:

- ▶ to enable the Ombudsman to make his Annual Re-

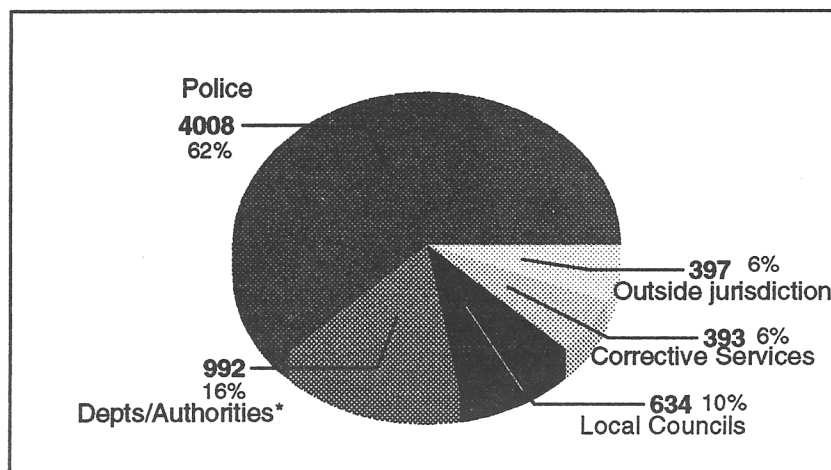
port and Special Reports direct to the Presiding Officer's of the Parliament.

- ▶ to give the Ombudsman greater access to documents held by public authorities previously subject to claims of privilege (other than legal professional privilege).

- ▶ to give the Ombudsman access to documents held by public authorities which have been exempted on the grounds of legal professional privilege, when reviewing a determination to refuse access under the FOI Act. ●

# Corporate Performance

Total Complaints Received  
1992 - 1993

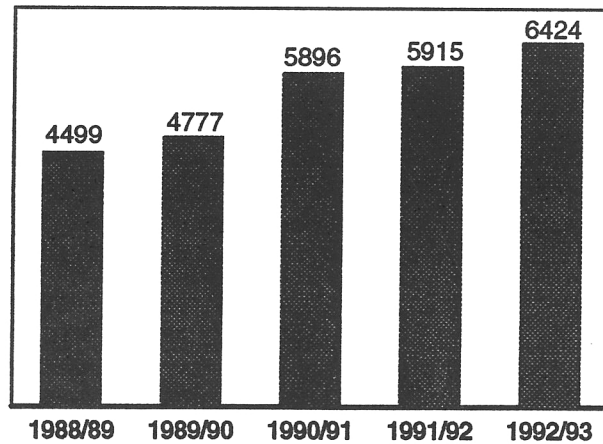


Total complaints received 6424

\*Includes complaints under the Freedom of Information Act



### Total Complaints Received Five Year Comparison



### Telephone Enquiries and Interviews

	Enquiry Staff	Receptionist	Total	% change from 1991/92
Telephone enquiries	8 506	3 565	12 071	-14%
Interviews with prospective complainants	486	-	486	-35%

### Formal Reports

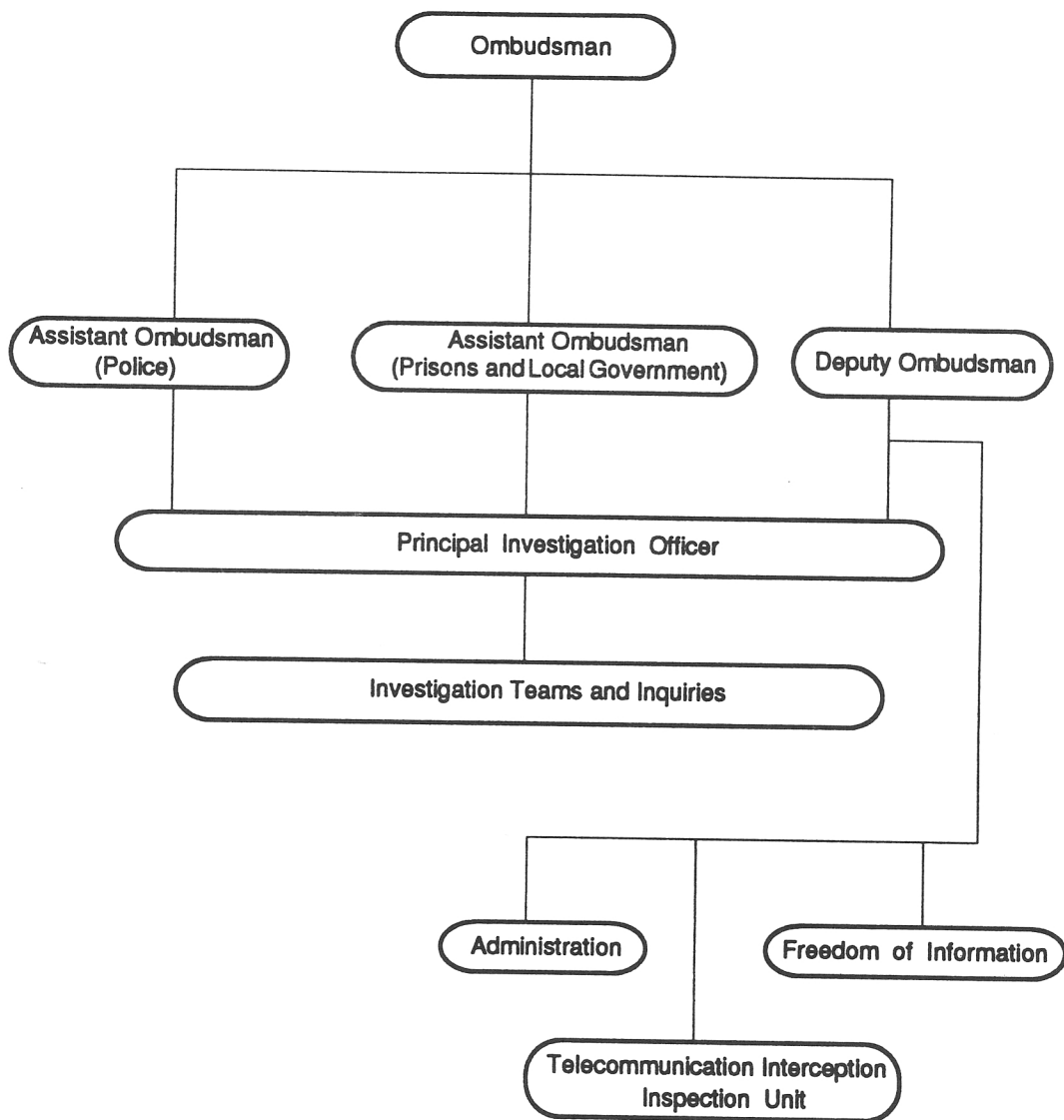
#### Ombudsman Act

	S 26(1) Conduct (Final)	No Adverse Finding
Departments and authorities	26	2
Local government/councils	8	-
Prisons	9	-
<b>Total</b>	<b>43</b>	<b>2</b>

#### Police Regulation (Allegations of Misconduct) Act

	Sustained		Not Sustained	
	Reinvestigated	Not Reinvestigated	Reinvestigated	Not Reinvestigated
Police	4	178	-	431

## Function Organisation Chart



### Staff Levels

Category	June 1993	June 1992	June 1991	June 1990
Statutory Appointments	4	4	4	3
Investigative Staff	48	52	53	52
Administrative Staff	17	18	16	15
Trainees	2	2	1	1
<b>Total</b>	<b>71</b>	<b>76</b>	<b>74</b>	<b>71</b>

# Police Complaints

## Overview

*The general themes covered in previous annual reports have continued to occur in complaints during this year. In addition, however, there were a number of spectacularly public cases which dominated the area of police complaints.*

### Angus Rigg

The attempted suicide of Angus Rigg in a police cell at Milton, as well as highlighting the problem of deaths in custody, exposed fundamental weaknesses in the internal investigation of complaints against police.

The police internal investigations into the hanging of Angus Rigg displayed confusion in responsibilities between police involved and inadequate allocation of resources to the investigating police.

It also demonstrated that complicated command and supervision structures allowed senior police to avoid direct responsibility by passing the matter elsewhere.

All of this resulted in extreme delay which, together with the unjustified suppression of the investigation material from the complainant, created the impression of a "police cover up".

The features of the internal police investigation into Mrs Rigg's complaint were not unique. Delay has been a constant problem in the investigation of complaints against police and concern has been expressed by both complainants and police under investigation.

In the Angus Rigg case, the considerable trauma experienced in the original incident was exacerbated by the inordinate delay in finalising inquiries and

the number of times witnesses had to be re-interviewed, and re-experience the incident, because of the poor quality of previous investigations.

The fallout from the Angus Rigg case produced an internal restructure of Police Service investigations, the central feature being the splitting of Internal Affairs into regional units under the direct control of the four region commanders rather than a single unit with central responsibility to the Assistant Commissioner (Professional Responsibility).

While the restructure reduces the potential for confusion in responsibility at senior levels, it increases the possibility of inconsistent approaches to internal inquiries. There will be increased responsibility on the new Assistant Commissioner (Professional Responsibility) and the Ombudsman to monitor the approaches of the separate regional units.

### Frenchs Forest

In February 1993, a story broke in the media concerning the shooting of a young police officer while on duty at Frenchs Forest police station in June 1992. There was speculation that the shooting was drug related and that police at the station were improperly involved with drugs.

The matter was referred to the State Crime Commission by the Minister for Police and an

investigation was conducted.

Media coverage of the results of that investigation reported the minister as alleging a "cover-up" by senior police. Proceedings relating to the misuse of drug exhibits by police and failures in supervision were instituted and the former Assistant Commissioner (Professional Responsibility) has not returned to duty. The shooting remains unsolved.

The failure to promptly investigate the issues as they arose from Frenchs Forest police station was compounded by the failure of the Police Service to report the allegations to the Ombudsman.

The complaints legislation requires the Police Service to notify the Ombudsman of allegations of misconduct which arise from within the Police Service even though there is no written complaint from a member of the public.

For example, an internal audit of a police station which discovers a missing drug exhibit should result in a complaint being referred by the Police Service to the Ombudsman. These matters are referred to as "internal complaints".

The Police Service has consistently opposed the notification of internal complaints arguing that such matters should be dealt with as "in house" management issues.

*cont page 11*



## Overview *cont*

The failure to report the Frenchs Forest matters to the Ombudsman was highly publicised in the media. Following this publicity it appeared that the number of internal complaints was increasing.

The Frenchs Forest story first became public on 25 February 1993.

The figures for notification of internal complaints during the year are as follows:

**1 July 1992 - 25 February 1993:**

479 internal complaints

**26 February - 30 June 1993:**

533 internal complaints.

The rate of notification in the first period was 1.99 complaints per day. In the second period the rate was 4.26 per day, more than double. While there was an increase in the number of internal complaints concerning self-injury in custody, it is not significant enough to explain the dramatic increase in rate of notification of internal complaints by the Police Service.

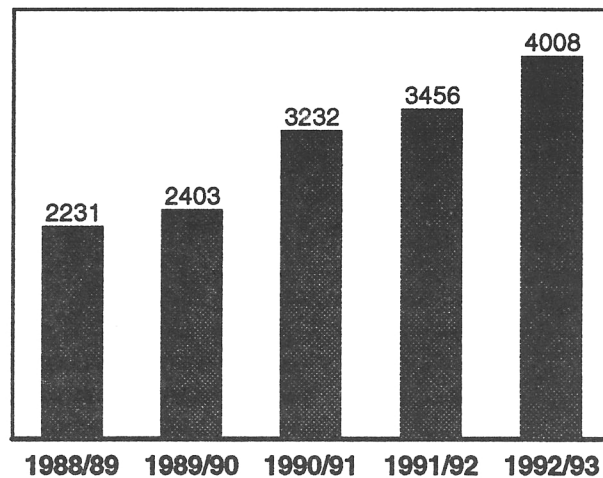
## Drug Exhibits

Internal complaints concerning missing or mishandled drug exhibits, a central issue in the Frenchs Forest matter, are worth a particular note. The number of internal complaints in this area received in 1991/92 was only two. In the 1992/93

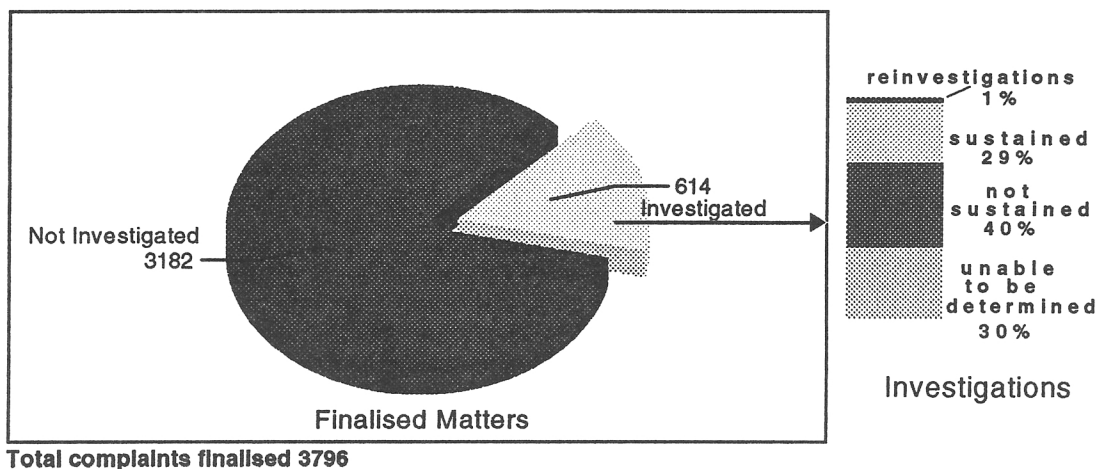
year, the number was sixteen, all received either as part of the Frenchs Forest matter or later.

It appears that the motivation for increased reporting may be concern at becoming embroiled in a scandal such as arose out of Frenchs Forest police station. ●

## Complaints Received Police Five Year Comparison



## Police Investigations Investigations



# Police Powers of Arrest

*The discretion to arrest is the most important power available to police. While arrest is obviously crucial in assisting police to maintain the peace and to bring offenders before the courts, the use, and at times, misuse of the power continues to concern the Ombudsman.*

Involving as it does the denial of liberty, the power of arrest should always be used sparingly. This principle is reflected in official police policy. Regulation 9(8) of the Police Service Regulations states that

*...police officers should not arrest a person for a minor offence when it is clear that a summons will ensure that the offender will be dealt with by a court.*

Still, evidence before the Ombudsman suggests the police have an entrenched preference for proceeding by way of arrest rather than by summons or other means. Previous annual reports have detailed instances where police have arrested for ostensibly very minor offences, such as offensive language or minor traffic offences, and this practice of the police continues.

Police Circular No 87/133 proposes that, before arresting any person, officers take into account the probability that the person will appear in court, the necessity of preventing the repetition or continuation of the offence, the requirement of preserving evidence, the safety of the public or of the offender and the prevention of interference with police investigations. The circular preserves the criterion of seriousness as the first and most important factor to consider, however.

The Ombudsman considers that the seriousness of the offence is an unsuitable criterion for arrest. Since arrest can often be considered as an additional form of punishment, it may be seen as a usurpation of the role of the courts to take the nature of the offence as the most relevant criterion in the decision to arrest.

It also allows police officers to continue to interpret any offence as a 'serious offence', including offences which are, in legal terms, minor ones. The Ombudsman hopes to promote in the Police Service an attitude that arrest is a last resort. This is particularly important for the Police Service which is moving towards a policy of 'community policing' in which officers must be seen to be acting appropriately.

## Case One

In May 1993, a man who was well known in the Gosford area through his high profile media position, was stopped by police for speeding. The driver apparently cooperated with police and provided appropriate identification.

Nevertheless, he was arrested and charged and his fingerprints and photograph remain on police records. The complainant pleaded guilty to the offence with which he was charged, but has complained about the police action in arresting him for such an offence.

This matter has not yet been determined by the Ombudsman, but on the face of the complaint, it would appear that the police had alternatives to arresting, charging, fingerprinting and bailing the complainant to appear in court.

## Case Two

There are several practical reasons why it is considered necessary for police to restrict the use of arrest. The first is obviously the trauma and disruption caused to suspects. This often

results in further charges being laid against a person who has come to the attention of the police; these are usually charges of hinder police, resist arrest or assault police.

On 5 September 1992, a woman was stopped by police for the offence of riding her bicycle without a helmet, and one of the two police officers proceeded to write a Traffic Infringement Notice. The complainant remonstrated with police, saying that she could not afford a ticket. In doing so it is accepted that she used some adjectives that are usually considered to be offensive and she was arrested by the second police officer for offensive language.

There is some dispute as to the level of disturbance the complainant caused prior to her arrest, but it seems no one else heard the conversation. Even the officer who arrested her did not hear the substance of the conversation, only the offensive words.

It is debatable how offended were the two police officers. At the time of the arrest, the complainant was restrained by her arms and handcuffed. The complainant strained in the grip of the police officers.

She was taken to the police station and charged not only with the original traffic offence and offensive language, but also with resist arrest.

These latter two matters were defended at court. The charge of resist arrest was dismissed, and the offensive language was found to be proved but no conviction was entered against the complainant

*cont page 14*

## Powers of Arrest *cont*

pursuant to section 556A of the Crimes Act.

The Police Service has decided that the allegation of unreasonable arrest, as well as the ancillary complaints, were not proved.

The Ombudsman disagrees. It is considered that the discretion to arrest is overused, often resulting in a greater disturbance of the peace than would overlooking such a minor infringement.

### Case Three

Another reason why it is considered necessary for the police to restrict the use of arrest is the link between arrest and attempted suicide or deliberate self harm in custody.

While it is accepted that the Police Service has taken steps to reduce the incidents of attempted suicide, it is undeniable that many of the people who do make such attempts need not have been in custody at all.

In May 1993, a woman was arrested in Coffs Harbour for offensive language and taken to Coffs Harbour Police Station.

She was placed in the dock and kept under constant surveillance. The woman was seen to remove her bra, place it around her neck, and try to strangle herself. Police removed her bra and stockings, but within a short time the woman was observed trying to scratch at a fresh abdomen scar with her fingernails.

Once the woman was processed, she was taken to hospital for examination and later released.

Although this case has not yet been finalised, it would appear that the police had taken all appropriate steps to prevent the woman from harming herself.

The trauma of being detained in police custody can be sufficient to lead a person to contemplate self harm.

### Alternatives to Arrest

The Ombudsman continues to stress the necessity for developing alternatives to detention in police custody.

The move away from police detention depends upon legislative or policy changes as much as upon alterations in the attitudes of individual police officers.

Until recently, arrest has been the least labour intensive method of bringing people before the courts. Often the only alternative is to summons a person, and this has required many more hours of police time to complete than does the arrest procedure.

Add to this the fact that arrest gives the police the option of fingerprinting and photographing a suspect, and it is not difficult to see why arrest is the preferred police option.

However, it may be that there is a change of attitude towards arrest becoming apparent among police, at least in relation to some offences. Many cases of unreasonable arrest dealt with by the Ombudsman involve instances of offensive behaviour, offensive language, as well as resist arrest.

In 1992, the New South Wales recorded crime statistics showed a drop of 17 per cent statewide for offensive behaviour charges, and in the Far West statistical division, which has a significant Aboriginal population, the reduction in such charges was in the order of 40 per cent.

While the Bureau of Crime Statistics could not be definite about the cause of such a reduction, it noted that:

*A decrease on recorded rates of offensive behaviour could ...result from a change in the way in which police perceive or react to such behaviour.*

A lower rate of such charges should mean a lower arrest rate and, hopefully, a decrease in the complaints about unreasonable arrest.

In several reports the Ombudsman has recommended that alternatives to arrest be developed. Rather than restrict the discretion of police officers to arrest, it is considered preferable to add to the array of options available to police, so that police response is more tailored to the particular circumstances of each case.

Recently, very short but important amendments to the Justices Act 1902 have been introduced that will give all police officers in the field the power to issue summonses or Court Attendance Notices. These should be able to be issued on the spot in a procedure similar to that of Traffic Infringement Notices.

### Trial of New Procedures

The new procedures will be trialled in five police stations in New South Wales: Taree, Narrandera, Sutherland, Manly and Waverley, each of which has been specifically targeted for a particular reason.

It is hoped that at the end of the two month trial, the procedure can be introduced statewide. Commissioner's Instructions have been prepared, but have not yet been issued, and the portable Notice books are ready to be used.

It has been suggested the Notices need not necessarily be served at the time of the offence.

*Cont next page*

# Racist Language - is it Just Talk?

Some disturbing examples of the prevalence of police use of racist and offensive language came to the Ombudsman's notice during investigations into two complaints against police.

The first involved police stations in an area that has been home to many migrants, including a large Italian community and more recently many Indo-Chinese migrants.

The racial and cultural mix of this community is evident and clearly requires from the police, in terms of hands on, face to face policing, a real appreciation of, and sensitivity to, the needs, concerns and contributions of the people they serve.

## Community Standards

However, from the evidence of this investigation, the Ombudsman is concerned that police are not meeting the high standards of community policing, so heralded in the media.

The police investigation disclosed conversations of police referring to a man of Vietnamese origins as a "gook" and another man of Italian parentage as a "wog".

At no stage in the two internal investigations conducted by senior police did they raise this

racist and offensive language with the police concerned.

To the Ombudsman's re-investigation, the police stated that such derogatory and offensive language was commonplace amongst themselves, but was never used when dealing professionally with the public. Their commanding officer was aware of the situation, but ignored the language as a "symptom" rather than a cause.

## Cultural Awareness

In the second case the police investigation concerned a complaint from a north-west NSW country town with a large Aboriginal community.

Again it would be expected that police had an awareness and understanding of the Aboriginal community's culture and concerns, particularly with regard to their relationship with police. The infamous legacy inherited by today's police officers has created a relationship of mutual distrust and suspicion that requires positive and sensitive approaches from police towards Aborigines.

However it was apparent from this investigation that a significant proportion of police commonly used such offensive terms as "coon", "black cunt", "black bastard" and "nigger". More than

half the police asked about such pejorative labels stated that they were used, but only in private conversation amongst themselves and around the police station.

As in the first case, police believed that because the use of the offensive language was in private, this exonerated them. The Ombudsman, however, does not consider that such qualification in any way reduces the discriminatory effect of the use of the words.

Firstly, the use of racially offensive language, regardless of the context, is an indication that police hold racially discriminatory views which in theory and rhetoric have been denounced by the NSW Police Service. It is a small step to see these views manifest themselves in practice through the prejudicial use of police powers and discretion.

Secondly, how can police guarantee that these words, meant for the private ears of police alone, will not be overheard by civilians or relatives of police, as in the case of an Aboriginal wife of a police officer who was offended by overhearing an officer use the term "nigger"?

Thirdly, how can police ensure these racially offensive terms are not carried over into their usual speech when serving their local community, especially given the strains created by the

*Cont page 16*

## Powers of Arrest *cont*

An example of an innovative use of the notices would be in relation to an intoxicated and offensive person. The person could be removed from the area where he or she was disturbing the peace, and either taken home or to a proclaimed place

for detoxification, and then served with a Court Attendance Notice later when sober.

It is in the interests of neither the police nor the public that intoxicated people be detained in police custody.

The Ombudsman looks forward to the statewide introduction of these notices, and it is to be hoped that police officers use them innovatively and in the spirit in which they are intended to be used. ●



# Police Evidence - Collaboration, Collusion, Perjury

***The greatest single challenge for any tribunal or investigatory agency is assessing the quality of evidence put before it. When it comes to considering police evidence, the challenge takes on characteristics which make judgement particularly difficult.***

A complaint from a police prosecutor which was considered during the year related to statements prepared by three constables for the purposes of a criminal prosecution.

The prosecutor felt that, on the basis of a previous conversation with one of the constables and the terms of the fact sheet prepared for the prosecution, it appeared that the three constables had *"conspired to prepare a brief of evidence that is false, with the sole purpose of convicting the defendant"*. It appeared from the complaint that the prosecutor did not hold the constables primarily liable but requested an investigation *"to ascertain what forces were exerted on these constables to prepare what appear to be statements made up of lies"*.

The hearing of the case the subject of the prosecutor's complaint resulted in the dismissal of the charge against the defendant. The magistrate described the statements of the constables as *"the worst verbal that I have come across in my years of experience"* and found that the police had been *"quite untruthful in the content of their evidence"*.

The failure by senior police officers to report the prosecutor's complaint to the Ombudsman, along with the complaint itself, has been taken up by the Independent Commission Against Corruption. Although the case is unusual in that the alleged misconduct was reported by a police officer, there are other examples which point to the forces which facilitate such an approach to the giving of evidence.

## Adverse Comment

Magistrates, it appears, are becoming far less inclined to accept the evidence of police witnesses as inherently truthful simply on the basis it is given by police. Complaints which are generated by magistrates' adverse comments on police evidence before them are becoming far more frequent. The laborious process of combing court transcripts and comparing them with other evidence, means that the investigation of such complaints is inherently time consuming. When the ultimate decision concerns perceptions of truthfulness, very strong evidence of untruthfulness is necessary to establish malpractice.

It does appear, however, to be almost standard police

*Cont page 16*

## Racist Language *cont*

often adversarial, hostile and suspicious contact they have with members of the public.

The Ombudsman, in his report on the police investigation into the second complaint, concluded:

*The inflammatory potential for increasing racial tensions, through the inadvertent or intended use of racially offensive terminology is obvious and cannot be ignored.*

Accordingly, the Ombudsman in this case has recommended that:

*The patrol commander instruct all staff under his supervision that racist and offensive language not be used by Police Service employees in any circumstances, nor in any place.*

*The patrol commander instruct all staff that racist language and racist conduct in any form will not be tolerated...*

*The Police Service institute a regular in-service training program to encourage empathy and un-*

*derstanding with Aboriginal and minority groups for all staff at the patrol.*

Police use of racist language is never acceptable and should be seen for what it is, the tip of the iceberg of deeper seated racist attitudes and behaviour which serve to undermine police and community relations in this State.

Cultural integration of the Police Service with the community it serves, particularly a greater number of police from minority groups, is essential to meaningful community policing. ●

## Police Evidence *cont*

practice to collaborate as to the evidence that individual police present. Such collaboration does not necessarily involve alteration of evidence or presentation of fabrications to obtain a conviction.

### Identical Statements

An investigation of a complaint arising out of a hearing before the Licensing Court partly concerned virtually identical statements presented to the Court by two police officers. Despite the obvious collaboration which occurred in the preparation of the statements, the second officer asserted that her statement was prepared independently and denied copying it from the first officer.

The police investigation, although not squarely addressing the issue, recommended that the officer be "counselled" regarding the "proper preparation of evidence for court".

The magistrate responded:

*the problem...was not so much her evidence but the manner in which it was delivered. That is, it was her persistent failure to admit that the document in question was a copy of [the other constable's] statement that was unacceptable to the Court, rather than the fact that it was a copy.*

*It is to be expected that if one officer is taking notes contemporaneously with the events that lead to a subsequent prosecution, then the corroborating officer may seek access to those notes when preparing his or her statement for presentation to the Court. If however, there is*

*some police "culture" that demands of constables that they do not admit that this has taken place or that, as in this case, the other officer's statement itself has been used as the basis of the preparation of the corroborating officer's statement, then that culture should be addressed and corrected.*

Last year's annual report (at page 60) noted a similar case. Again, there was no evidence that the police were lying about the content of their evidence, although it was clear that their denial that the evidence had been prepared in collaboration was false.

In that case, the Police Service response was to treat the matter as minor and to "counsel" the police as to their preparation of evidence. There were also indications that the conduct of the constable went beyond an individual aberration. The police prosecutor in the case noted:

*...it is not uncommon to see in court officers of a far more senior nature than [the constable concerned] giving similar versions as to statement compilation.*

In both cases, although there was nothing to suggest that police were lying about the facts behind the prosecution, the lies as to the way in which their evidence was prepared saw the cases thrown out of court.

### Recollections

It is only human for witnesses to the same event to vary in the detail of their recollection. It is also natural that witnesses to an event, where they are in frequent contact, will

later discuss the matter between themselves and compare their recollections. It is also probable that, if their recollections differ on detail, there is a tendency to iron out the differences so that a consistent picture is presented to the court or tribunal. The process is commonly referred to as "getting the stories together".

Police witnesses may lie about this process because of the adversarial nature of the proceedings in which they present their evidence. An extract from a handbook for young lawyers in 1992 on local court criminal proceedings advises defence lawyers as follows:

*Two or more police corroborating each other frequently copy from each other's statements but seldom admit doing so. Failure to admit copying and having it demonstrated to the court that copying took place, is destructive of the credit of the police officer who copied.*

*The strategy suggested is to ask the second officer if his or her statement was copied.*

*If he agrees that he copied and the statements are identical you may be bold enough to ask him to agree that his recollection of the facts is dependent upon his statement. Whether you are so bold or not, you will certainly submit at the end of the proceedings that the independent recollection of this officer (if any) was permanently and irrevocably contaminated by using his partner's statement as an aide memoire.*

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*If the second officer denies copying, the strategy is to painstakingly go through the two statements so as to demonstrate collaboration.*

*Every so often ask the officer, "Do you still say it was not copied?" or "Do you still assure the Court that the similarity is entirely co-incidental?"*

## Denial

It must appear to police witnesses that they cannot win. It appears, from the cases referred to the Ombudsman's Office, that they therefore pick the simplest course: deny collaboration and maintain the denial under questioning.

Once they admit co-operating in the preparation of their evidence they are open to a series of complex questions as to the extent their collaboration has effected their evidence and, in the hands of a clever lawyer, are easily tripped up.

## British Experience

The British police, recovering from the exposure of malpractice in the investigation and prosecution of a series of bombings, are beginning to wrestle with the problem.

In his address to police in November 1992, the Chief Inspector of Police for England and Wales, Sir John Woodcock, admitted the service was "shot through with corner cutting and expediency".

He refused, however, to accept that police were totally to blame and was reported as saying:

*changes in police culture will be extremely difficult without changes in the wider criminal justice system which tolerates...and even requires some types of police malpractice. For years police officers had to tell the courts that they had both independently performed the amazing feat of memory involved in recording a complete conversation with a*

*suspect and that they had not collaborated... The result is malpractice, not out of malice or desire for personal gain, but which begins out of good intentions. Once an officer has lied in one case and got away with it, then he or she feels less compunction another time.*

## Police Response

The NSW Police Service is not immune from the forces which lead police to lie about both the content of their evidence and the manner in which it was prepared. The response of the Police Service has been to treat such cases as exceptions and to instruct the offenders "not to do it again". It should be clear that the issue is crucial to the proper administration of justice and needs to be addressed on an institutional rather than an individual basis.

The matter has been raised with the Assistant Commissioner responsible for police training and further discussions will take place. Obviously, there will be no overnight successes. ●

# Local Government Complaints

## The New Local Government Act 1993

This landmark Act brings a new vision of local government to New South Wales, with the introduction of modern management structures and practices and a re-focussing of the part councils play in the community.

The Act significantly strengthens the accountability of local government and is likely to impact on the work of this Office in a number of ways.

### Accountability

The new Act requires councils to develop management plans and policies about their operations which must be the subject of public consultation.

While hopefully this process will assist local communities to have realistic expectations of their councils, it will also mean that councils will be forced to articulate standards against which citizens can then hold them accountable. Such moves often involve an initial upsurge in complaints to this Office.

The Ombudsman will also consider such standards when evaluating conduct of local government bodies which is the subject of complaint and investigation.

### Pecuniary Interest

Another innovation in the Local Government Act likely to significantly impact on this Office is the new arrangements for the reporting, investigation and taking of proceedings for breaches of the pecuniary interest provisions of the Act.

The Ombudsman is able to investigate complaints made di-

rectly to him about alleged breaches. He can also be requested to investigate complaints about contravention of the pecuniary interest requirements of the Act by the Director General of the Department of Local Government.

The Act empowers the Ombudsman to notify the Director General of any complaint received by him and to report to him on the outcome of any investigation.

Such reports must be presented by the Director General to the Pecuniary Interest Tribunal which has the function of conducting hearings and taking disciplinary action against a person if a complaint against the person is found to be proved.

There already appears to be an upsurge in the number of pecuniary interest complaints lodged with the Ombudsman since the passage of the new Act and it is an area that the Ombudsman will give some priority to in the coming year.

### Freedom of Information

Concurrent changes to the Freedom of Information Act also will impact on councils and this Office.

Significant among these is the repeal of section 16(2) which limited the right of people's access to information held by local councils to those documents which concerned an applicant's personal affairs.

Councils often relied upon this provision to refuse access to documents when it was placed 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.

In many of the complaints referred to the Ombudsman, preliminary examination revealed inappropriate use of this exclusion.

The repeal of this section hopefully will overcome such problems in the future.

For those councils that traditionally have had a guarded attitude to disclosure of information, however, the change will be something of a shock. The widening of the application of the Act to local government is likely to result in an increase of formal FOI applications to councils.

It is also likely that there will be an increase in requests to this Office for external review of determinations as a result.

Some councils have already adopted 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 is more cost effective.

It appears it is the experience of these councils that open access policies do not hamper their operations.

This Office believes such policies should be widely introduced provided they result in processes which are quicker than formal assessments 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. ●



# Bureaucratic Runaround or Not a Hole in One

On 9 June 1991, Mr P's car was damaged when it hit a manmade hole on Parramatta Road, as were other cars which were travelling by at that time. Mr P and another driver agreed to contact the RTA the next day and, in the meantime, they alerted both the police and Sydney City Council to the presence of the hole and its potential danger to drivers.

Workers from Sydney City Council arrived and placed barriers around the hole, but stated that the area was not the responsibility of council.

Mr P then contacted the RTA, and was advised to repair his vehicle and provide the RTA with details of the damage and cost of the repairs.

However, on 31 July 1991 the RTA wrote to Mr P, informing him that he should direct his claim to Leichhardt Council. Mr P then wrote to the council and was informed that council would contact him in due course.

In December 1991 Mr P followed the matter up with council and was told that his letter had not been received by the relevant person, so he faxed a copy of his earlier letter.

After several weeks he again contacted council and was informed that the matter had been passed to the engineering section.

Mr P wrote to this Office in April 1993, having contacted council several times and having been informed that any damage

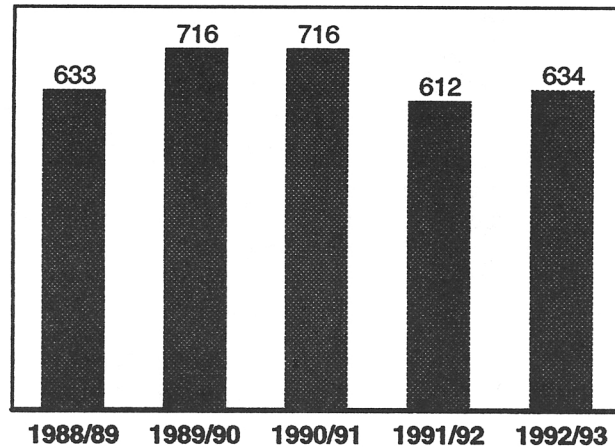
caused by the hole in the road was the responsibility of the Water Board.

This Office made enquiries into the matter and was informed by the town clerk of Leichhardt Council that he considered the matter had been poorly dealt with, but the matter was the responsibility of the RTA.

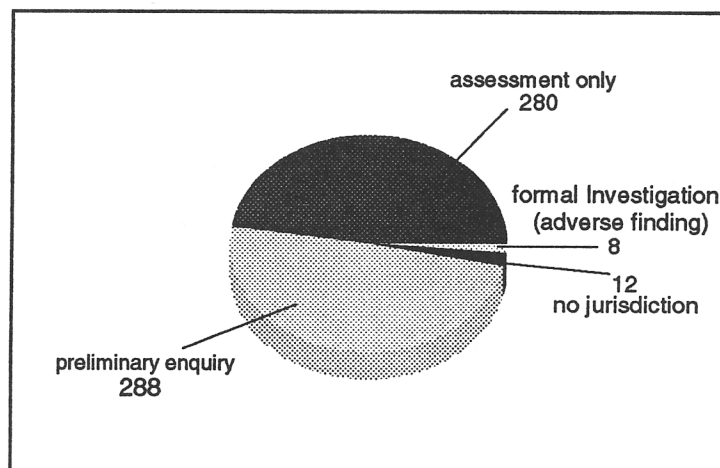
The RTA recently informed this Office that contrary to its earlier advice to Mr P, it appeared that the authority responsible for the maintenance of the road is Sydney City Council which uses South Sydney Council for works.

Enquiries are now being made of South Sydney Council. ●

## Complaints Received Local Government Authorities Five Year Comparison



## Local Government 1992 - 1993



Total complaints determined 588

## Birds of a Feather

In early November 1992 a new concrete water tank was commissioned by Nymboida Shire Council to supply water to the 450 people of the village of Coutts Crossing.

Shortly afterwards a local breeder of rare native birds had several expensive specimens die without apparent reason. An examination of the dead birds revealed a high level of bacterial infection.

Continuing tests and inquiries by the bird breeder convinced him that lime leaching from the new concrete tank had poisoned his birds.

Council tested the water just prior to Christmas 1992, found it infected and asked residents to boil water until further notice.

The Ombudsman made extremely detailed enquiries of council, the Department of Water Resources, the Department of Health Laboratories who tested the water, and Public Works who built the tank.

It became obvious that the water quality of Coutts Crossing had been variable before the new tank was built.

Council was unwilling to admit to poor testing or inadequate post construction procedures for the new tank, but they did confess that a chlorinator had worked imperfectly for some time. An air lock meant that the Coutts Crossing water was not properly disinfected for periods over the last five years.

Council took steps to replace the chlorinator and to in-

crease the level of testing in an effort to ensure the drinking water was potable.

They also provided a detailed explanation for the way they handled the problem. There was little practical purpose in this Office pursuing the matter further.

While no particular individuals in council were singled out for comment, it was clear that an unacceptable situation had been allowed to continue for too long. Not enough had been done to ensure that water quality was maintained at all times.

The Ombudsman discontinued the investigation saying that the situation had apparently been rectified and the complainant could take his own civil action to recover damages for the loss of his birds. ●

## Conditions of Consent and Dividing Fences

Hornsby Council included, in appropriate circumstances, a condition of development consent which read in part:

*Adjoining owners' consent is required for boundary fencing.*

An owner of land adjoining a property for which a development consent had been granted which incorporated this condition, complained to the Ombudsman.

Essentially, she claimed that her neighbour had not obtained her consent as required by council.

Following some enquiries of council it was discovered that technically council did not have the power to impose such a condition under the Environmental Planning and Assessment Act. The condition was intended to alert the applicant that they should obtain the consent of the adjoining owner in the spirit of the Dividing Fences Act.

In this particular case, the council was concerned to ensure some degree of privacy between the two properties and had, therefore, sought to control the scale and type of dividing fence.

This aspect was addressed by the first part of the condition of consent, but the second part may not have been enforceable at law.

Subsequently, Hornsby Council amended the wording of the condition so that it clearly relates to the Dividing Fences Act and is not a requirement under the actual development consent.

While council's intentions were in good faith, the wording was ambiguous and, as illustrated in this case, could have lead to false expectations. ●

# Public Authority Complaints

## Overview

**Three aspects concerning complaints about public authorities are striking when reviewing the work of the Office during the past year.**

Firstly, in looking at the nature of complaints set out in the table on the next page, it is notable that there have been changes in the categories of complaints received, despite the number of complaints being virtually static.

It is pleasing to see significant decreases in complaints concerning quality of service and procedural objections, particularly given the governments commitment to the Guarantee of Service and the Ombudsman's implementation of the Complaint Handling in the Public Sector (CHIPS) project, the aim of which is to encourage public authorities to develop their own complaint handling procedures.

However, there have been increases in all other categories of complaints. The most important of these are the increases in complaints about regulatory agencies, contracts/prices/tenders and in the area of policy. The last mentioned category often raises complaints that are either at the margins of, or outside, the Ombudsman's jurisdiction.

Many of the complaints, however, refer to the reasonableness/adequacy/correctness of advice provided to ministers by their departments or individual public servants. Investigations of these complaints are often difficult and frequently of little utility. As in the past year, the

Ombudsman continues to pay close attention to the increases in complaints about regulatory agencies and those relating to contracts, etc.

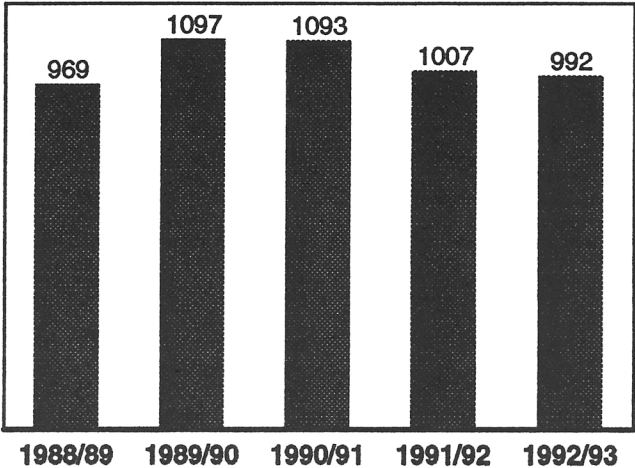
The second striking feature when reviewing the Office's work in investigating complaints about public authorities, is involvement of large resources in several investigations - the Local Government and Community Housing Program (LGCHP), Electoral Office, Brougham, Board of Studies, and the Health Complaints Unit.

All these investigations have required tremendous enthusiasm and dedication by investigation staff, together with

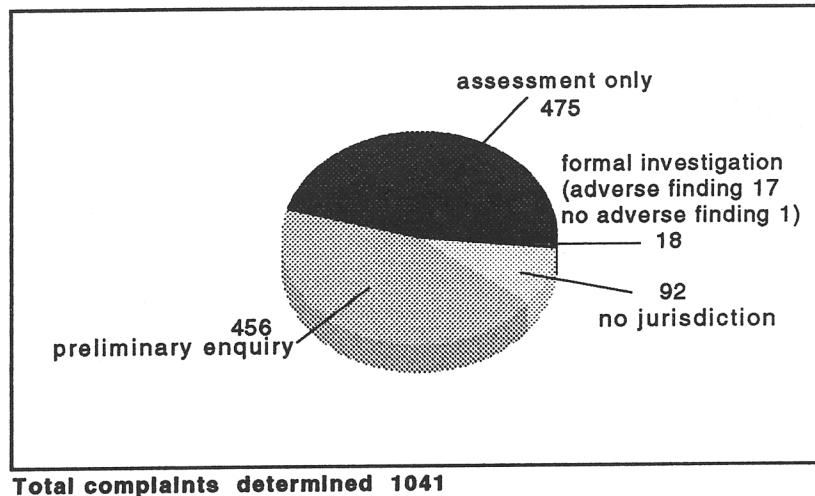
rigorous and objective analysis. The standards of these investigations without exception, remains high and in several cases exceed the best of past years.

Thirdly, increased emphasis is being given to attempting to resolve complaints by way of conciliation/mediation in the context of preliminary inquiries. Although the number of complaints the subject of mediation is still relatively small, the trend is increasing. Apart from the immediate benefits to the complainants and public authorities concerned, there are long term cost benefits and rewards to the Ombudsman's Office in the allocation of scarce investigative resources. ●

**Complaints Received**  
Departments  
Five Year Comparison



## Departments 1992 - 1993



## Juvenile Health Issues

This year the Juvenile Justice Advisory Council released a green paper *"Future Directions for Juvenile Justice in New South Wales"*, in which health issues for juveniles were specifically addressed. This report contained recommendations about programs and services for juveniles with particular needs, such as mental illness or physical disability.

Complaints received during this year have revealed shortfalls in the availability of specialist medical services to juveniles in custody, as well as a lack of clear guidelines for specific health issues.

### Psychiatric Services for Juvenile Detainees

A critical area identified by the Office of the Ombudsman is the lack of secure psychiatric services for juveniles in custody.

All juvenile justice centres employ a full-time psychologist plus a full-time or part-time drug and alcohol counsellor. A major problem for detention centre staff is access to specialist psychiatric services for children experiencing acute behavioural disorders. Public hospitals are unwilling to accept juvenile offenders for assessment due to security considerations. A person cannot be detained in a hospital against their will unless specific criteria under the Mental Health Act are satisfied. Currently, access is to adult general psychiatric units only.

These treatment constraints resulted in two seriously ill boys being admitted to Long Bay Prison Hospital last year as hospitals in the local area refused to accept psychiatric patients from juvenile justice centres.

In recognition of these problems, the Office of Juvenile Justice (OJJ) has encouraged

individual centres to establish links with local area health services in an effort to avert similar problems and to maintain continuity of residence and support systems for affected youth.

The Department of Health has confirmed that two secure units are planned for the care of acutely disturbed mentally ill adolescents in NSW. One of these will be located at Westmead, the other at Liverpool.

### Parental Notification of Accident or Illness

In November 1992 a complaint was received about the failure of staff at a juvenile justice centre to notify a parent of their child's broken arm following an accident. Letters sent to parents on a child's admission to a juvenile justice centre advise that parents will be notified in the event of accident or illness. Enquiries by this Office revealed



## Juvenile Health *cont*

that although a longstanding practice existed whereby parents would be notified of any accident or illness, no department instruction existed requiring this to be done.

The Office of Juvenile Justice acknowledged that an oversight had occurred in not contacting the parents concerned, but noted that the seriousness of the child's injury was not determined initially.

In light of this lack of a clear instruction to staff, the Ombudsman asked that guidelines for notification in the event of illness or injury be provided to staff working in juvenile justice centres. This suggestion has been adopted by the OJJ.

## Handcuffing for Security

In February 1993 enquiries were made with the Office of Juvenile Justice following a complaint from a juvenile about the use of handcuffs as a restraint after surgery, causing severe pain. The Office of Juvenile Justice supplied the Ombudsman with copies of the OJJ's general guidelines about the use of handcuffs plus a copy of the Department of Community Services memo about the use of handcuffs as a passive restraint and for security purposes. These notes discussed the use of handcuffs as a temporary restraint, such as during escort duties, rather than as a tool for providing longer term security.

The Office of Juvenile Justice has acknowledged that separate protocols need to be developed which are sensitive to residents medical treatment needs, including clinical safety and privacy issues. A handcuffing policy is now being developed. ●

# No Light at the End of Six Tunnels

Around May 1992 a couple with a property in Tumut Shire made an application to Tumut River Electricity (TRE) for power connection to their property.

A quote was prepared with a plan to source the power lines along an old stock route running parallel to the property.

As it would be necessary to clear some trees, permission would have to be obtained from the local council.

## Local Council

The applicants duly applied to Tumut Shire Council and eventually were granted permission subject to conditions, one being that as Crown Land was involved permission also had to be obtained from the Department of Conservation and Land Management (CALM).

## Crown Land

A letter dated 31 December 1992 was sent off to CALM seeking permission and a reply dated 12 February 1993 received by the applicants. No objection was raised by CALM, however, notice was given to the applicants that as all timber on Crown land was the property of the Forestry Commission it might be necessary to obtain permission also from that authority for the removal of the trees.

And so, on 1 March 1993, the frustrated applicants wrote to the Forestry Commission seeking permission and explaining that TRE had recently requested full and final instructions within 60 days or the offer of power could be withdrawn and the applicant's deposit refunded.

The Forestry Commission replied on 8 March providing authority to remove the trees in question but pointing out that approval would also be required from

- i) the National Parks and Wildlife Service;
- ii) the Rural Land Protection Board (Gundagai); and
- iii) the District Soil Conservationist (Gundagai).

## Other Authorities

One can only imagine the bewilderment of the applicants at this stage. Nevertheless, they wrote off to the three authorities on 10 March for approval for the tree removal and hoped for a prompt response. The first reply came from the District Soil Conservationist office at Gundagai. The letterhead on the paper said CALM.

The CALM office at Wagga Wagga was the first authority to grant approval for the tree removal. At that stage it looked like the applicants had gone full circle. They were informed that consent from that Department was not necessary!

The next response, dated 25 March, was from the National Parks and Wildlife Service at Tumut, withholding permission.

The applicants appealed and after further consideration the authority granted permission, on 13 April 1993, to proceed with tree clearing.

In the meantime, TRE informed the applicants that the quote given for power connection in February 1993 was valid only until 5 May 1993 and that rates could vary after that time.

*cont page 24*

## No Light *cont*

Having had no indication as yet from the Rural Lands Protection Board the applicants wrote again on 12 May requesting approval for tree clearance.

### Permission Refused

A letter dated 14 May was dispatched from the board refusing permission for the request without providing any reasons for this decision. The applicants immediately appealed the decision and pointed out that permission had been granted by the five other public authorities involved.

A few days later the applicants made a formal complaint

to the Ombudsman, submitting copies of the correspondence from the various authorities.

### Attempted Resolution

As a result of intervention by the Ombudsman, an on site meeting was arranged between one of the applicants, a representative from TRE and the Chairman of the Gundagai office of the Rural Lands Protection Board with a view to resolving the problem.

Unfortunately, as permission was steadfastly refused by the board, agreement could not be reached and the applicant's

found themselves back where they started a year previously.

Although it is difficult to lay blame on any one public authority for the inordinate delay and run-around experienced by the applicants, one wonders why they could not have been informed at the outset of the numerous authorities that would be involved in such a situation.

Having discussed this issue with the General Manager of TRE, the Ombudsman's Office was assured that this particular case would be kept in mind in similar situations whereby the potential client would be alerted to the rigmarole involved. ●

# Prison Complaints

## Overview

### Access to the Ombudsman

Apart from complaints against the police, the Ombudsman receives more complaints against the Department of Corrective Services than any other single public authority.

There are legal obligations on the department for prisoners to have free access to the Ombudsman and for the Ombudsman to be responsive to complaints from prisoners.

Section 12(3) of the Ombudsman Act requires prison supervisors to take all steps necessary to help inmates and detained persons to make a complaint to the Ombudsman if they wish. Additionally, the Prisons (General) Regulations provides for privileged correspondence between prisoners and the Ombudsman.

### Prison Visits

Officers of the Ombudsman visit correctional centres and juvenile institutions to hear complaints and to give general advice.

As these visits are infrequent, the primary purpose is to enable investigation officers to be informed of conditions and developments throughout each of the State's correctional centres and to make personal contact with senior staff.

This helps improve assessment of written complaints about particular institutions and pro-

vides contacts necessary for speedy resolution of complaints wherever possible. The visits also provide an opportunity to make inmates aware of their rights under the Ombudsman Act.

Thirty special visits were made to 23 of the main gaols in the State during the financial year, including all but three of the country gaols and those were last visited in June 1992. The most isolated correctional centres including Mannus, Grafton and Broken Hill were all included in the visiting program this year.

The Ombudsman still considers this level of service is inadequate, but is restrained by inadequate staff and financial resources.

### Telephone Contact

Prisoners are free to telephone the Ombudsman as are all members of the general public.

In the past the Department of Corrective Services required prisoners to use their telephone call entitlement to do so and to pay for the call if it was STD. In many gaols, inmates are allowed only one phone call a week and, unless a problem is extremely serious, few prisoners would forgo ringing their family or friends in order to discuss a matter with the Ombudsman's Office.

While some prison governors have had a relaxed attitude about this and have permitted

prisoners to make such calls in addition to their weekly entitlement, the policy of the department only ever recognised inmate calls to the Ombudsman as a private matter.

Negotiations with Deputy Commissioner Sulman by the Assistant Ombudsman brought a change to this policy in June 1993.

Prisoners are now entitled to phone the Ombudsman with their calls countered as additional to their normal entitlement and paid for by the department. This policy is welcomed and accords with the spirit of section 12(3) of the Ombudsman Act. It is too early to report whether this policy change will result in any significant increase in telephone contact by prisoners.

### Complaint Form

A prisoners' complaint form was developed with the support of official visitors in early 1992 and was approved by the Commissioner for use in correctional centres in June of that year.

The form was designed to stem the flow of minor and premature complaints to this Office by directing inmates to take their grievance in the first instance to gaol governors or to official visitors.

Specific instructions to this effect are contained on the form, together with other information on matters the Ombudsman is unable to investigate and a state-

*Cont page 26*

Overview *cont*

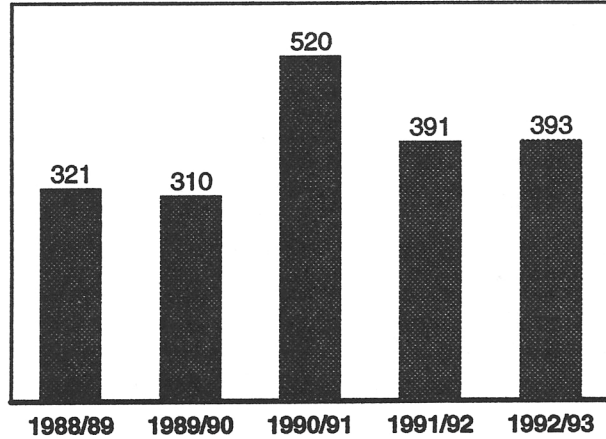
ment indicating that priority is given to complaints that are serious or affect a number of prisoners.

The Commissioner undertook to publish the form in the Corrective Services Bulletin with an accompanying instruction that it was to be photocopied and made available to inmates. There was a one year delay in this occurring, although there was some ad hoc internal distribution of the complaint form in a few gaols.

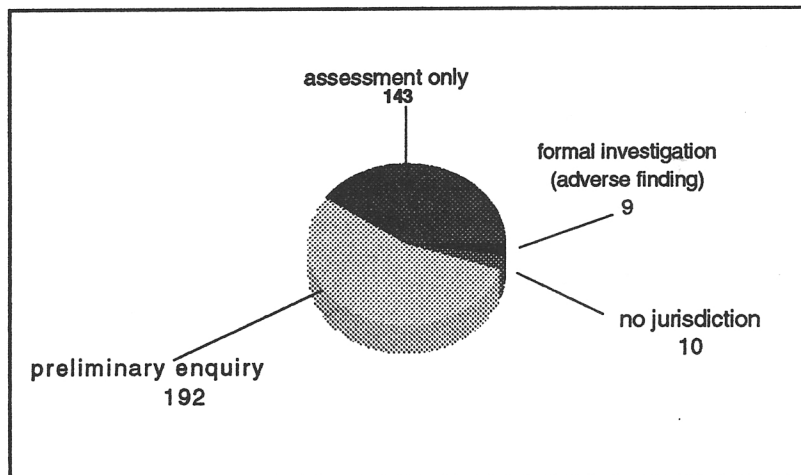
The department finally published the form in the 17 June 1993 issue of the Bulletin. The department also agreed to a number of arrangements for the use of the form as a condition of its introduction into correctional centres. They are:

1. The forms are to be available to inmates from a variety of outlets in each correctional centre, ie, wing office, general office, welfare office, etc.
2. The existence and availability of the forms is to be advised to inmates on reception and a notice is to be placed on inmate notice boards throughout each centre informing inmates of the same.
3. Envelopes are to be made available for use with the forms and the cost of the envelopes and postage is to be met by the department.
4. Inmates should not be prevented or obstructed from corresponding with or telephoning the Ombudsman even though they choose not to use a complaint form or have not seen the official visitor or

**Complaints Received  
Corrective Services  
Five Year Comparison**



**Corrective Services  
1992 - 1993**



Total complaints determined 354

the Governor to discuss their problem first.

The instruction also included the announcement of the new policy on telephone calls to the Ombudsman Office.

The department recognises that it can benefit from this

new system, as it will ensure that inmates have pursued all available avenues to resolve a problem before referring matters to the Ombudsman.

The use of the complaint form will be monitored closely during the coming year. ●

# Human Rights for Women Prisoners Attending Hospital

The Ombudsman, Westmead Hospital and the Department of Corrective Services have negotiated a solution to the abysmal state of the department's hospital escort procedures for women.

After preliminary inquiries disclosed the appalling state of what could loosely be termed the department's hospital escort procedures, the Ombudsman began an investigation into the Department of Corrective Service's guidelines and procedures for hospital escorts for women prisoners seeking obstetric and/or gynaecological treatment.

These procedures consisted of four separate documents, unworkable in form and archaic in substance. It was clearly apparent that further consolidation and improvement was needed to bring the department's treatment of women prisoners in this area, into the twentieth century.

The investigation concentrated primarily on the experience of Westmead Hospital staff in its daily treatment of patients under escort from Mulawa Correctional Centre.

About eight women per year from Mulawa attend the special care nursery and six Mulawa women delivered babies at Westmead in the year November 1991-1992. In total there were 216 attendances at outpatients from women prisoners at Mulawa Correctional Centre.

Yet for all concerned, the women, their prison guards and the attending health professionals, there appeared to be little understanding of what their relative rights were in the absence of a clearly defined protocol.

Sixteen of the eighteen persons interviewed at length during the investigation, specifically supported the need for an accessible protocol which clearly identifies everyone's rights and restrictions.

Some very disturbing and degrading examples of the failings of the current procedures were disclosed to the Ombudsman's investigation:

- ▶ Guards refused to leave the delivery suite during a woman's delivery.
  - ▶ Guards refused to allow an expectant mother to be examined in privacy and protested at the curtain being pulled across.
  - ▶ A male guard refused to allow a woman the use of the toilet in privacy and watched while she changed her sanitary napkin.
  - ▶ Guards insisted upon being present during termination and sexual assault counselling sessions.
  - ▶ A woman was handcuffed during an internal examination.
  - ▶ A guard insisted upon staying in the room with a woman during her termination, making remarks such as: "You'll get out of here and get pregnant again".
  - ▶ Guards insisted upon accompanying a mother into the very confined and glassed-in space of the Special Care Nursery where she sought some
- privacy with her newborn baby.

Shocked by such humiliating incidents, the Ombudsman set about drafting an escort protocol that recognised some respect for the inherent dignity of prisoners, in particular women prisoners seeking obstetric and gynaecological treatment.

Through the negotiation process and with the assistance and expertise of staff from Westmead Hospital, a new escort protocol was negotiated with the department which included the following reforms:

- ▶ While the escorting officers have the responsibility and authority of the law to ensure inmates do not escape from lawful custody, they should also have due regard in the circumstances to decency, self respect and privacy of inmates during the course of any medical consultation, examination and treatment. Accordingly, the escorting officer may permit a patient to be consulted, examined and treated outside an officer's view.
- ▶ Escorting officers are to remain outside the door of the patients room in circumstances where the patient is...in delivery or operating suite, in intensive care, visiting neo-natal intensive care or a special care nursery, receiving termination or drug and alcohol counselling...

*Cont page 28*



## Human Rights *cont*

- ▶ Provided the escorting officer has satisfied himself that the continued charge and supervision of the patient and the security of the hospital will not be jeopardised, the patient should be allowed to use the toilet in private, without locking the door...
- ▶ Firearms should be enclosed in full holsters and the holsters should remain concealed at all times...
- ▶ Whenever possible female prison officers are to attend when escorting a female inmate as an out-patient or in-patient for any obstetric and/or gynaecological treatment.
- ▶ Under normal conditions a sedan should be used to escort pregnant women to and from a hospital facility.
- ▶ Escorting officers are to endeavour, in every way, to preserve the dignity of the individual who, during their time at the hospital or medical facility, is firstly a person, secondly a patient and thirdly an inmate.

The Ombudsman has received advice from Westmead Hospital that since the negotiations, health professionals have noticed a marked difference in the approach and attitude of the escort officers enabling their treatment of women patients from Mulawa to be less prob-

lematic and more humane.

The Ombudsman has also received advice from the Department of Corrective Services that it is intended the reformed hospital escort procedures be promulgated state-wide for use in all correctional centres. We have come somewhat then toward achieving the ultimate aim as expressed by a doctor to the investigation:

*It would seem to me that what you are trying to do with the guards is that you want them to work for the common good of the patient, just as are the doctors and nurses... You need to use discretion and negotiation. The two groups should not be in conflict. ●*

## Periodic Detention

Every week hundreds of people attend periodic or weekend detention in gaols around NSW as part of their sentence.

Until recently absences were tolerated to an extent. Many prisoners rang in sick or simply didn't show up.

However as a result of some media attention, a review of the periodic detention scheme and changes to the legislation, inmates are being breached for unexplained absences.

Now going absent without leave from periodic detention can mean a full-time prison sentence.

An inmate recently complained that in early January he had completed his period of detention and had been given a discharge certificate.

Some six weeks later he received a summons to defend a charge of failing to report for detention during the sentence from which he had just been discharged.

The complainant said the governor of the detention centre had refused to accept some valid medical certificates for the absences.

It turned out that the medical certificates testifying to the

prisoner's ailments were written several days after the absences and stated only that the complainant had told the doctor he was sick.

However the governor of the periodic detention scheme readily admitted that to issue a discharge certificate while planning to breach the prisoner for an absence during that period was misleading and unfair.

It was agreed that governors of detention centres would be reminded that inmates should be informed of what action was planned and no discharge certificates issued under these circumstances. ●

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