CHAPTER III

The Ombudsman (Parliamentary Commissioner) in England,
Ombudsman in Denmark and Australia

Ombudsman (Parliamentary Commissioner) in England

The British Constitutional Background

In Britain, where there are in law no constitutional safeguards against the powers of the Sovereign Parliament, the authority of the judges might appear to be precarious compared with the impregnable constitutional status of their American brethren. But in fact they have refused, for the most part to be deterred by this handicap and have staked out for themselves a strong and well-defined position as the protectors of the citizens against unlawful act of Government. This they maintain without any express constitutional prerogative, by virtue of the respect in which they are held by public opinion and the accepted tradition that it is their primary duty to uphold the rule of law. Even if there were a written constitution, their position would probably not be defined with precision. Feeling their way, deciding case by case, they must define their power for themselves. Perhaps it is for this reason that they have at times lost confidence in their own capabilities and have vacillated in their policies.1
In our modern highly organised societies where administrative acts and decisions intimately affect the well-being and happiness of so many citizens, particularly those who are poor, life would be intolerable if there were no means of ensuring that interference by administrative action with the liberty or property of the individual did not exceed that which had been authorized by a representative legislature and that administrative decisions so authorized were fairly made.

That it was the proper rule of the courts to ensure this, needed no urging in the United States and India. In contrast the courts in England, lacking this experience of Judicial review, were slow to recognise the need to control administrative acts and decisions and hesitant to assume the role of doing so. The supremacy of Parliament, the direct responsibility of political heads of Government departments to a legislature of which they were themselves members, pointed to Parliament itself as the appropriate constitutional body to control the unfair exercise by the administration of powers, which parliament had itself conferred and could itself withdraw.
The extreme form of Parliamentary Sovereignty that prevails in Britain might indeed be thought to provide an uncongenial climate. All legislators passed in Parliament by simple majorities, and is in one invariable from except on the rare occasions when the 'House of Lords' consent is dispensed with. This everyday procedure is legally effective to repeal any and every constitutional safeguard, however sacrosanct. The Habeas Corpus Act 1679, the Bill of Rights 1689 and the Act of Settlement 1700 (which inter alia protects the tenure of the higher judges could in law be repealed with no more formality than was required for the Act of 1967 (3) which made it is crime to Pick flowers in the Atlantic Thus the powers of the courts, like all other powers and rights, are at the mercy of the Parliament.

The resources of the law

Even under the peculiar British system of sovereignty the last word on any question of law rests with the courts, and no power can take this from them so long as they exist, in their present form. If Parliament dislikes their decisions, it can alter the law by legislation in any way it pleases. But however, much it does so, its legislation is in the last
Non-legal and Non-political character

The personnel of both central and local Government, and the organisation in which they work, contribute remarkably little to administrative law in Britain. That is to say, they produce little business for Parliament and the courts, except when some legislative reorganisation is impending. It is common knowledge that the public service in Britain is in a high degree- non-political. By contrast with other countries, it is also in a high degree non-legal. The civil service is non-political. No posts change hands on a change of Government; very few civil servants have legal training. Their terms of service are normally not governed by law, or at any rate are not enforced by the courts, so that they produce virtually no litigation. They are normally not held responsible for their actions, such responsibility is borne by ministers in Parliament.

The Civil Service is thus wholly professional, based on full time employment until the early retiring age of sixty. There is an absolutely clear cut distinction between the 'permanent' officials, i.e. all regular civil servants, and their political chief who come and go with the changing winds of politics. Every minister by convention be a member of one or other House of Parliament. Any civil servant wishing to seek election to Parliament must first
resign. The only overlap is that a hereditary peer may be a civil servant, but then he is subject to the strict Code which limits the political activities of civil servants according to their function and status and makes many of them subject to departmental permission. A civil servant of the policy making class can neither be engaged in national politics himself nor can he owe his appointment or promotion to any political influence of any kind, apart from the influence on the administration of service which the government of the day inevitably exercises. Some of the most powerful people in the country are the permanent heads of the major departments. Like their subordinates, they are completely secure against loss of office for political reasons. On the other hand a strong professional tradition requires that they serve their ministers with equal loyalty irrespective of party in the last resort interpreted and applied by the court. The creative work that British judges can do is therefore not greatly impaired by their constitutional subservience.

How far should judges legislate?

Whatever weakness Parliament may have as a check on the executive, no one would say that it is not an energetic legislature. It pours out Acts incessantly and for this purpose it is driven hard by the government of the day. The
ultimate force behind this drive is the electorate, and to the opinion of the electorate Parliament and the Government are in a broad way highly sensitive.

Citizen's complaints and information

The British public has habitually made much use of the traditional channel of complaint through members of Parliament. Ministerial responsibility, which contains a great deal of reality as well as theory, used to make this channel effective in cases which had some political content and where the facts were known. But as the territory of administration expanded, and Parliament's power weakened relatively to the Government, the old method became inadequate. Accumulate discontent erupted in the Crichel Down case of 1954, when a determined complainant obtained a public inquiry which exposed culpable official conduct and minister resigned (4). Since the minister personally had been entirely blameless, it was obvious that the traditional system produced the wrong results. This affair had no legal aspect. The question was whether the Government ought to return land to its original owner when no longer needed for the purpose for which it had been acquired, and whether the owner had been given fair and considerate treatment. He had no legal rights, and the case was entirely one of what is now called maladministration. Yet by one of the oddities of history, the Government appeased the public outcry by ap-
pointing the Franks Committee which led to the Tribunals and Inquires Act 1958 and which did much for administrative law(5). The problem of maladministration was shelved until 1967, when Britain obtained her first Parliamentary Commissioner for Administration, colloquially known as the Ombudsman.

The Crichel Down inquiry resulted from the fact that those who objected to the decision were able to press their case so hard through such means as letters to the Press, public meetings etc, in addition to the Parliamentary method, and were sufficiently influential that the minister had to give way and agree to an independent inquiry. It resulted, in the words of Franks Committee report; "from the exercise . . . of informal methods of raising objection."(6). This reference to informal methods of raising objection brings us to an important distinction in the way disputes between an individual and the authority may be resolved. There may be on the hand some statutory procedure to be observed, involving either a court or a tribunal decision or the holding of an inquiry. On the other hand there may be no statutory procedure or objecting. But over most of the field of public administration no formal procedure is provided for objecting for deciding on objections.(7)
The Parliamentary Commissioner for Administration

The Parliamentary Commissioner Act 1967 which adopted the substance of an unofficial report, was put forward by the Government as a measure designed to humanise administration. This unofficial report, known as the Justice Report stated that there are two types of complaints to be considered. First, those case where an individual alleges that a decision affecting him was wrong and second, there are complaints of maladministration.

Dealing first with wrong decisions, it is generally understood that in many cases where the individual thinks the decision was wrong he can appeal to a tribunal eg. National Insurance Tribunal, income tax tribunal etc. In the second case no such right of appeal is provided. The Justice Report itself, by way of illustration cited; "thus a machinery can be imported duty-free into this country if technically superior to anything made here." This question "very suitable for a tribunal" was decided by the 'appropriate' department. The Justice Report suggested that in this type of cases the guiding principle should be that the individual is entitled to have an impartial adjudication of his dispute with 'authority' unless there was overriding considerations which make it necessary in the public interest that the minister should retain responsibility for the 'final deci-
The Justice Report concluded, after an examination of some of these procedures, that they were, for various reasons, inappropriate for the investigation of the kind of matters now in question. It then considered the Scandinavian office of Ombudsman. Though differing in detail as between these countries it has, the Report said, certain common characteristics. These are that the Ombudsman is an impartial person independent of the Government, appointed by and acting on behalf of parliament in his work of investigating complaints of maladministration made to, him by members of the public against any person acting in the service of the state.

Justice Report recommended the establishment of an institution along the lines of the Ombudsman to be called, perhaps the "Parliamentary Commissioner."

The Scandinavian countries had already appointed Ombudsman. For example New Zealand had appointed an Ombudsman in 1962 and it was plain that he was working successfully. Originally as is well known, the institution came from Sweden via Denmark, and its sudden spread to other countries owes much to the advocacy of the distinguished Danish Om-
budsman, Professor Stephan Hurwitz. Its characteristics in Scandinavia and the comparable arrangements in many other countries, have been excellently described by Professor Walter Gellhorn (11).

Like his Danish and New Zealand counterparts, the British Parliamentary Commissioner has no power to do anything but investigate and report. His function is to look into complaints submitted to him through members of Parliament from citizens who claim to have 'Sustained injustice in consequence of maladministration' (12). He differs from his opposite numbers abroad in being appointed permanently with the same security of tenure as a High Court Judge (13). This high position, combined with his ample powers of investigation, give him all the authority that an Ombudsman needs. Experience in all countries is that the best antidote to maladministration is publicity.

The Commissioner and the Law

Since the Parliamentary Commissioner has no substantive legal powers, he stands outside the field of administrative law. But he is closely connected with it, and his work will alter the aspect of many of its problems. To take just one example the law has failed to provide a solution for the problems of injustice caused by misleading official
advice. There was one case in which a company wanted to buy land for a builders' yard and were advised by the office of the planning authority that they did not need a permission for this purpose. After they had brought the land it turned out that they did need permission, and permission was refused. But they had no remedy in law since a public authority cannot be stopped from expressing his powers as it thinks best (14). It appears that the right remedy is in the hands of the Ombudsman. He treats the giving of misleading advice as maladministration, and that he is able to obtain payment of compensation, in a suitable case. A number of examples appear in his annual reports.

The Commissioner and Parliament

Objections were raised that an Ombudsman in Britain would be inconsistent with the doctrine of ministerial responsibility, and that he would deprive members of Parliament of their traditional function of taking up their constituents' grievances. Their objections were later proved to be without substance. For the Ombudsman deals with exactly the cases where the doctrine of ministerial responsibility failed to work efficiently; the ordinary run of minor and non-political complaints. Bernard Schwartz and, H W R Wade(15) feel that the Parliamentary Commissioner ability to investigate and report members of parliament can get to
the bottom of the case much more easily and if necessary call the minister to account. The authors emphasising the positive role of the Parliamentary Commissioner further stated(16) "indeed for over a century we have had a kind of financial Ombudsman in the person of the comptroller and auditor general, an officer of the House of Commons who reports with the aid of a large investigatory staff, on wasteful Government expenditure. He has proved a great help to ministerial responsibility and there seems no reason to suppose that the financial sphere is different in this respect from the administrative sphere generally. It is particularly interesting that the first Parliamentary Commissioner was Sir Edmund Compton, who was previously Comptroller and Auditor General and before that (as is usual) a distinguished civil servant. In effect, therefore, he had passed from one Ombudsman of his to another, and he could hardly be better equipped to conduct penetrating enquiries into Government departments."

The Commissioner was to receive complaints only through the members of parliament and not directly from the person aggrieved (17). But even if that were dispensed with, as in another countries, he would still fit snugly into the British constitutional pattern. The original committee thought that eventually the public ought to have direct
access to him and they recommended that the parliamentary channel should be a temporary arrangement only. It is felt that like other temporary arrangements (income tax for example) it may well prove enduring. There is much to be said for involving members of parliament as closely as possible with the commissioners work, and in maintaining him as a true Parliamentary Commissioner.

The principle connecting link with parliament is the select committee of the House of Commons to which the commissioner reports, and which examines both him and the Government departments which he criticises. This committee has played an important part, both in encouraging him to take a more liberal view of his Jurisdiction and in supporting him against ministers and their departments.

A non-legal Ombudsman

The most surprising feature of the Parliamentary Commissioner’s establishments is that neither he nor his staff of over 50 civil servants are lawyers with the exception of some four or five who had some legal training in the past. To other countries this must seem an almost incredible exercise in British amateurism the primary reason for it in the addition to the special suitability of Sir Edmund Compton for his office, was that non lawyers were actually
thought more suitable for dealing with a non legal civil service. For legal advice the commissioner has recourse to the Treasury Solicitor, who acts for all the departments which have no legal advisor of their own. Since the commissioner's work is enmeshed with the law on all sides, the legal vacuum in his office is bound to have marked effects - and at the outset it did so, particularly in his interpretation of 'maladministration.

What is maladministration?
Maladministration is the key word in the Act (18) but it is nowhere defined. The Act also contains a saving clause which prevents the commissioner from questioning the merits of a decision taken without maladministration by a Government department or other authority in the exercise of a discretion.(19)

The office of the Parliamentary Commissioner

The Parliamentary Commissioner for administration is appointed by the Crown and holds office during good behaviour (20) he may be removed by the Crown in response of an address from both the Houses of Parliament. In such matters he is treated like a judge of the supreme court and Comptroller and Auditor General. He must retire at sixty five. He cannot be a member of House of Commons; he is an ex-offi-
cio member of the Council of Tribunals. He can appoint such staff as he needs to assist him, with the approval of the Civil Service department as to members and conditions of service. There is a staff of about ninety including that of the Health Service Commission.

The first Commissioner had been before his appointment the Comptroller and Auditor General; the second and third, senior civil servants. These appointments were criticised because of the appointees' previous experiences. The present Commissioner is a lawyer. The criticisms were misplaced; but it is not yet clear that it is either an advantage or a disadvantage for the office to be held by a lawyer. The House of Commons appointed a Select Committee on the Parliamentary Commissioner. As will be seen it plays an important role in the development and work of the office.

(2) Who can be investigated?

By section 5(1) of the Act the Ombudsman "may investigate any action taken by or on behalf of a Government department or other authority to which this Act applies." To which authorities does the Act apply? It applies to departments and authorities listed in the Second Schedule to the Act. These include, in addition to the usual departments - the Home Office, Treasury, Department of the Environment,
the Foreign Office, the Ministry of Defence, etc. - the Schedule can be amended by an order in council altering or removing any entry, or by inclusion of a new entry. But only a body whose functions are exercised on behalf of the Crown may be so included - examples are the Advisory, Conciliation and Arbitration Service, and the Forestry Commission.

Reference to a department includes reference to Ministers. It follows that a decision is not outside the Commissioner's jurisdiction simply because it is taken by a Minister.

Complaints against a wide range of public bodies have been rejected on the ground that they are not listed in the Second Schedule. Examples are the Arts Council, The Gaming Board, the Police Board, the National Research Development Corporation, a New Town Development Corporation; and Traffic Commissioners, Local Authorities, the courts, the nationalised industries, and the police. The actions of such bodies will however be referred to by the Commissioner in his reports where necessary to provide a full account of matters which have been investigated.

Persons acting independently of departments are outside the Commissioner's jurisdiction, for example In-
surance Officers, Registrar of Marriages, a District Auditor. The Commissioner has ruled that Inspectors appointed by the Department of Trade to investigate the affairs of a company are not subject to his jurisdiction as they are not responsible to any Second Schedule authority, and he has ruled, for the same reason, that he cannot hear complaints against Government-nominated directors of registered companies. He has refused to investigate complaints about the administration of bankruptcy cases by the Official Receiver, for though he is an official of the Department of Trade, the Commissioner says that in carrying out his duties as a trustee in relation to the assets of a bankrupt, he acts as an officer of the court.

When an activity is hived-off from a department and given to a body for which a Minister has no direct responsibility, the effect is to remove that activity from the Commissioner's jurisdiction. This happened when for example, the Civil Aviation Authority was created. On the other hand, when certain functions of the Department of Employment were given to the Manpower Services Commission, the Commission was brought within the Commissioner's jurisdiction by the relevant legislation. The Select Committee, on the question whether the Commissioner should retain jurisdiction should be clearly considered and a decision taken on the basis of
proper study. But it would be wrong if simply as a result of changes in the machinery of Government, the area of protection at present afforded by the aggrieved citizen were diminished. The Government has undertaken to give particular attention to any change in the machinery of Government which might affect the Commissioner's jurisdiction.

Action taken by these bodies can be investigated (and action includes failure to act) provided it is "action taken in the exercise of administrative functions of that department or authority." This formulation must be intended to exclude the exercise of certain of a Department's functions and the contrast is made between administrative on the one hand, and legislative and judicial on the other.

With regard to the exclusion of the legislature, a complaint about the provisions of an Act of Parliament cannot be investigated. In one case a pensioner who had retired early because of ill-health received invalidity benefit until he was sixty-five and a retirement pension thereafter. He complained that whereas the former was tax-free, the latter was not. But an Act of Parliament provided for that: the complaint was not therefore about the department's administrative activities. The interpretation of
legislation by a Department is however an administrative function which can be and has been criticised.

With regard to the exclusion of the judiciary, judicial functions are normally exercised by courts or tribunals, whose actions are of course outside the Commissioner’s jurisdiction. It is not the case however that the actions of court officials (within the Lord Chancellor’s Department) are necessarily outside it. Again some Departmental functions can be classified, at least for some purposes, as judicial. However, there seems to be no case in which the Commissioner has refused jurisdiction on this ground alone. Certainly whatever judicial element there may be in public, inquiries held by a department does not exclude them from his jurisdiction. The Commissioner can concern himself not only with what goes on at the inquiry but with what goes on before and after. He can therefore consider complaints about the Minister’s consideration of the Inspector’s recommendation, and about his decision on an application for costs.

As mentioned above, the Council on Tribunals (of which the Commissioner is an ex officio member) also has a role in respect of inquiries. Some cases have been investigated by both Council and Commissioner.(24)
The Commissioner has investigated a complaint that a statement made by the Government in the House of Commons about Government support for a holiday travel organisation, Court Line Ltd, misled holidaymakers and caused them financial loss. He must be satisfied therefore that that statement was in the exercise of administrative functions. He had also criticised answers given to Parliamentary Questions as "less frank" than they should have been.

The allocation of time for party political broadcasts is made by an All Party Committee. Asked to investigate a complaint about the arrangements for the allocation of time for such broadcasts the Commissioner found that the considerations determining the minister's action were "essentially political" and therefore, although this was action taken in the exercise of administrative functions, he discontinued his investigation.

Action that cannot be investigated

(a) Court or tribunal proceedings available

By section 5(2) of the Act the Commissioner shall not conduct an investigation into "any action in respect of which the person aggrieved has or had a right to appeal, reference or review to or before a tribunal...[or] a remedy by way of proceedings in any court of law". Thus where a
person had appealed to a tribunal against a Ministry's decision on an application for benefit, the Commissioner could not investigate the decision. And where a complaint was made to him about the valuation of property for rating purposes the Commissioner refused jurisdiction because of the possibility of appeal to the Lands Tribunal, etc.

But the Commissioner may conduct an investigation despite the availability of such a right or remedy "if satisfied that in the particular circumstances it is not reasonable to expect the complainant to resort or have resorted to it". The Commissioner does not seem to have acted under this proviso when there was a right of appeal to a tribunal, but has done so when there was a possible remedy before the courts, as where the law was not clear, or the complainant could not afford to sue.

The exercise of the discretion to investigate a complaint when there is a possible remedy in the courts is of particular interest. Where, for example, a complaint is of arbitrary action or of a lack of natural justice, is the Commissioner excluded? This is an area in which the Courts also have a function and it is not easy to define the borderline between their jurisdiction and the Commissioner. Again, in recent years the courts have been more ready to
intervene in decisions taken under the town and county planning legislation. Is the jurisdiction of the Commissioner to that extent diminished? It is to be hoped not.

The Commissioner is aware of the possibility that a complaint may be put to him in the hope that his investigation will uncover information which will justify the commencement of legal proceedings. Where he suspects that to be the case, he may refrain from investigation, or he may require an undertaking from the complainant not to resort to litigation, but the undertaking would not seem to be enforceable by the defendant. Where, after he started his investigation, legal proceedings are brought in respect of the matter being investigated, he will terminate his investigation. Where he has completed an investigation, the complainant is not debarred from bringing legal proceedings against the department in respect of the matter investigated.

(b) Third Schedule Exclusions

The Third Schedule to the Act excludes from the Commissioner's jurisdiction matter that would otherwise be within it. This Schedule may be amended by Order in Council so as to exclude (but not add to) items in it. The exclusions are as follows.
(a). Action taken in matters certified by minister to affecting relations or dealings between the UK Government and any other Government or International Organisation. Under this the Commissioner has been debarred from consideration a complaint about payment for service in the Shanghai Police.

(b) The Commencement or conduct of civil or criminal proceedings before any court of law in the UK. Thus a complaint about a decision to institute or not to institute proceedings or about the conduct of proceedings by counsel could not be investigated.

(c) Any exercise of the prerogative of mercy. A Home Office decision not to grant remission of a prison sentence was therefore outside the Commissioner’s jurisdiction.

(d) Action taken on behalf of the Minister by a Regional Health Authority and Family Practitioner Committees. We have seen that all the actions of such authorities are done on behalf of the Minister. This paragraph excludes from the Commissioner’s jurisdiction everything done by them. But it does not exclude action taken by the Minister himself in relation to them. Thus the Commissioner has investigated a complaint about the Minister’s decision to
confirm the closure of a hospital casualty unit. The work of the Health Service Commissioner must of course now be considered in this connection.

(e) Action taken in matters relating to contractual and other commercial transactions. Thus a complaint that the government had failed to redeem a holding of War Loan was, on this ground, beyond the Commissioner's jurisdiction. The Commissioner was, on counsel's advice, unable to investigate because of this provision, a complaint about action taken in connection with guarantees under section 7 of the Shipbuilding Industry Act 1967.

Transaction relating to the acquisition or land compulsorily or in circumstances in which it could be acquired compulsorily and to the disposal as surplus of land so acquired are not excluded from his jurisdiction by this paragraph.

The exclusion of action taken in matters relating to contractual and other commercial transactions has been persistently criticised by the Select Committee on the Parliamentary Commissioner, the Government has just as persistently refused to take action to exclude this provision from the Schedule. The justification for the provision
given on the second reading of the bill, and relied on ever since, is that the office of the Commissioner is to do with relations between Government and the governed, and that he is therefore excluded from areas in which the Government appears in a different guise as a trader. It is also argued that any change would place departments at a commercial disadvantage; that departments are already subject to scrutiny (an argument that would justify doing away with the Commissioner altogether); that any change would create an unjustifiable administrative burden. The Committee has argued that because the Government disposes of so much money its position is unique, and if its purchasing policies were the subject of complaint they should be investigated, particularly if any Government were to use the award of contracts as a political weapon.

(f) Personnel matters, that is action taken in respect of civil and military employment under the Crown. Thus complaints by a Civil Servant's widow as to pension entitlement, by a member of the Armed Forces as to the termination of his service, and by a civil servant as to the way his department had dealt with an accident he had suffered at work could not be considered. The Select Committee and the Ombudsman have recommended more than once that this exclusion should be removed or modified. The arguments
advanced by the Government for this exclusion are, first, that (as with the previous exclusion) the Commissioner is there to deal with relations between Government and the governed, and not therefore between Government as employer and its individual employees; second, that adequate machinery such as the Whitley Council system, exists to deal with grievances of civilian employees. They have therefore refused to modify this exclusion also.

(g) The grant of honours and charters. Investigation of a complaint as to the unreasonable withholding of a long service medal was debarred under this provision.

(h) Action taken by or with the authority of the Secretary of State for the purposes of investigating crime or of protecting the security of the State, including action so taken with respect to Passports.

Notice that where a complaint includes a matter excluded from the Commissioner’s jurisdiction, he may nevertheless investigate any aspect of the complaint not so excluded.

One provision in the Third Schedule has been amended on the Select Committee's recommendation so as to
extend the Commissioner's jurisdiction. It relates to action taken abroad by Consular officials. The position now is that the Commissioner can investigate the actions of career (that is, not honorary) Consular officials abroad in the performance of their duties towards United Kingdom citizens who have right of being abroad from the country.

The complaint

(a) Who can complain? By section 6(1) of the Act a complaint may be made by an individual or by any body of persons, corporate or unincorporate, but not by a Local Authority or other Authority or Body constituted for purposes of the public service or of Local Government or for the purposes of carrying on under national ownership any industry or undertaking or by any other authority or by whose members are appointed by Her Majesty or by any Minister of the Crown or Government department, or whose revenues consist wholly or mainly of money provided by Parliament.

Public authorities can of course sue one another but the Ombudsman machinery is denied them. The reason is that the Office is seen as existing to protect the citizen, private person or individual. Commercial organisations are competent complainants.
By section 6(2) the complaint must be made by the person aggrieved himself. This means that if an injustice is done to 'x', only 'x' can complain, not 'y'. However, the person aggrieved can authorise another to submit a complaint on his behalf, such as a solicitor, accountant, or trade union, Conservation Societies etc. Where a complainant has died or is unable to act for himself the complaint may be made by someone on his behalf.

The complainant must be resident in the UK, or the act complained of must have been taken while he was present in the UK. The mere fact of being a foreign national does not therefore prevent one from complaining.

A prisoner is not denied access to the Ombudsman - who has said that prisoners' complaints are examined "with very particular thoroughness."

(b) How is a complaint to be made? By section 5(1) the Commissioner can investigate action taken by bodies within his jurisdiction where;

(I) a written complaint is duly made to a member of the House of Commons by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken and
(II) the complaint is referred to the Commissioner, with the consent of the person who made it, by a member of that House with a request to conduct an investigation thereon.

Thus the Commissioner cannot investigate of his own motion. He acts only on a complaint made to him. And the complaint must, according to the section, be made first to a member of the House of Commons and be referred by him with the complainant's consent to the Commissioner. The reason of refusing the citizen direct access to Commissioner can be gathered from this quotation from the White Paper which preceded the Bill:

"In Britain Parliament is the place for ventilation of the grievances of the citizen. It is one of the functions of the elected member of Parliament to try to secure that his constituents do not suffer injustice at the hands of the Government.... Members are continually taking up constituents' complaint.... We do not want to create any new institution which would make the functions of members of Parliament in this respect... we shall give members of Parliament a better instrument which they can use to protect the citizens namely, the services of a Parliamentary Commissioner for Administration.(27)".

But from the beginning, he Ombudsman has received
as many complaints direct from the public as through Member of Parliament. Complainants were advised to approach their MP. In 1977 the Ombudsman, while acknowledging that direct access could create enormous problems because of the number of complaints he might receive thought that the matter should be reconsidered. He himself, mindful of the criticism, introduced a system of indirect access by which he offers to send a complaint which appears to be within his jurisdiction to the constituent MP saying that he is prepared to start an investigation, should the member which him to do so. This leaves the members of the public concerned free to decide whether or not to proceed. If he has no objection, this spares him the need of starting the process of complaining again from scratch, while the MP has the opportunity either to discuss the matter with the constituent or to consent to the Ombudsman's investigation. When the Select Committee looked at the question of direct access, they rejected it as an alternative to the system of indirect access introduced by the Ombudsman. The Government naturally agreed. The UK Ombudsman is thus an exception to the rule of direct access which applies in most if not all Ombudsman systems. By section 6(3) a complaint must be made to a member of the Commons not later than twelve months from the day on which the complainant first had notice of the matter alleged, but the Commissioner can waive this. He appears to
do so readily. No fees of any kind are payable. There are no lawyers to be hired and paid for and there is no liability for costs, should the complaint turn out to be unjustified.

(c) The Substance of the complaint

Section 5(1) provides that the complaint is to be made by a person who claims to have sustained injustice in consequence of maladministration. The complainant does not of course have to prove injustice caused by maladministration. It is for the Commissioner to decide on the basis of the complaint made to him whether there was maladministration causing injustice. It is not enough for the complainant to allege that he suffered injustice; he does not have to specify the maladministration, but he must produce some prima facie evidence of it.

(d) "Injustice in consequence of maladministration" The Act does not define these words. On the second reading debate Mr Crossman said that the Government had deliberately refrained from trying to define "injustice" by using such words as "loss" or "damage", for these have legal overtones which could be held to exclude "one thing which I am particularly anxious, shall remain within the meaning of the word-the sense of outrage aroused by unfair or incompe-
tent administration even where the complainant has suffered no actual loss."

"Maladministration", he suggested, might include such things as "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness, and so on." This is known as the "Crossman Catalogue". The meaning of both words would, he thought, "be filled out by the practical process of case work".\(^{29}\)

What meaning has then been given to "injustice" and "maladministration" by the Commissioner's decision? Injustice clearly includes financial loss caused for example refusal to make a grant or an ex gratia payment, delay in setting an estate, injury to livestock, etc. It also includes being deprived of an opportunity to object to or appeal against a decision, and being deprived of an amenity by the closure of a museum or a railway line, or the loss of a view. Loss of privileges through being wrongly classified as a convicted rather than an untried prisoner constitutes injustice, as does the loss of access to a child through an error in the Passport Office which enabled the complainant's divorced wife to take the child abroad. To cause a person avoidable concern, distress, confusion, inconvenience or uncertainty, or to impugn his honour—these
constitute injustice.

What is maladministration? The Commissioner has said that the word might imply some major administrative failure. But in practice I look upon "maladministration" as including any kind of administrative shortcoming... the term "maladministration" is certainly imprecise. But it has been interpreted with great flexibility both by my predecessors and myself. Moreover the so-called "Crossman catalog" surely provides a very broad definition.

Delay, perfunctory consideration of a citizen's case, failure to give a complainant a full explanation of his tax position, giving incorrect advice, excessive legalism or "buck-passing", failure to take all relevant facts into account before arriving at a decision or to decide a matter on partial or largely irrelevant information, disparity of treatment as between citizens similarly circumstanced, breach of confidentiality, failure to give reasons, failure to give a full apology where the Department was clearly in the wrong all these are examples of departmental failure to come up to the required standard of administration. In addition the Select Committee has urged the Commissioner to find maladministration in decisions which appear to him to be "thoroughly bad quality" or "clearly wrong".
The Organisation Justice suggested that the Ombudsman’s powers were unduly restrictive, and that he should be empowered to investigate complaints that action was unjust, oppressive or unreasonable. The Ombudsman confirmed what his reports showed, that he already had the power to investigate complaints about unjust or oppressive action, and added that he would find no difficulty in investigating a complaint of unreasonable behaviour. (30)

Section 12(3) of the Act "drafted by the formidable pen of the Lord Chancellor himself must be considered here. It reads: "It is hereby declared that nothing in this Act authorises or requires the Commissioner to question the merits of a decision taken without maladministration by a Government department or other authority in the exercise at a discretion vested in that Department of Authority.

The first Commissioner took the view that this meant that he could investigate the administrative processes leading to a discretionary decision: if there was a defect in those processes he would ensure the prospect of a remedy by way of review of that decision, but if he found no such defect, he was not competent to question the quality of the decision even if it had resulted in manifest hardship. It was acknowledged by him that the distinction was unsatisfac-
tory and often unclear. It is no longer applied. In the Dollar Land case for example where the complaint was of the failure to appoint Inspectors to investigate a company, the Commissioner found that there was no maladministration in the process by which the decision was arrived at but he nevertheless ruled that "the discretionary decision.... not to appoint inspectors reflected an error of judgement". (31)

What then does sector 12(3) mean? It provides that the Commissioner is not to question the merits of a decision taken without maladministration. Assume a complaint of the refusal to grant a license. If the Commissioner finds nothing wrong with the procedure, that all the relevant factors were considered etc., so that there was no maladministration, he cannot say so. If he does find maladministration he can "question" the decision by displaying its defects - that is what he is there for. But as we shall see, even in that case, he cannot reverse, overrule or quash the decision.

It is not the case, as is sometimes asserted, that a "policy" decision cannot be questioned by the Commissioner (within the limits just referred to). "Suppose the "policy" were difficult to define. Certainly a decision does not escape the Commissioner's jurisdiction merely by being clothed with the epithet "policy" suppose the "policy" were
not to give a hearing, not to disclose evidence received or to delay the grant of licenses?

The investigation

By section 7(1) where the Commissioner proposes to make an investigation he must give the principle officer of the Department concerned, and any other person alleged to be concerned, an opportunity to comment on the allegations. The investigation must be in private, but apart from that rule the Commissioner can proceed as he thinks fit. He obtains information from such persons and in such manner and makes such inquiries as he thinks fit. His procedure is therefore inquisitorial; he is neither a judge nor an arbitrator arriving at a finding on the basis of evidence put before him. He ascertains by his own inquiries inside the department what the actions were which gave rise to the complaint.

To enable him to get at the facts section 8 of the Act says that he can require any person who in his opinion is able to furnish information or documents, to do so; he has the same powers as the High Court in this respect. This duty to assist the Commissioner overrides any obligation to maintain secrecy which is imposed by the Official Secrets Act or by other rule of law. Furthermore Crown privilege does not avail the Departments:
"The Crown shall not be entitled in relation to any such investigation to any privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings".

These powers are particularly important in view of the citizen's difficulties in getting at official documents.

The only limit to this ranging power is that secrecy is maintained for Cabinet proceedings and papers by the terms of section 8(4) which provides that:

"No power shall be required or authorised by virtue of this Act to furnish any information or answer any question relating to proceedings of the Cabinet or to produce so much of any documents as relates to such proceedings, and for the purposes of this subsection a certificate issued by the Secretary of the Cabinet with the approval of the Prime Minister and certifying that any information, question, document or part of a document so relates shall be conclusive." A certificate under the subsection was issued in the Court Line case. The Select Committee on the Parliamentary Commissioner has suggested that the Commissioner should have access to all papers etc., except where the Attorney General certifies that access would prejudice the safety of the state, or would otherwise be against the
public interest. The Government's response was that in no case has the Commissioner said his investigations were less than complete because of this provision; that there is no evidence that it causes difficulties for him. It could not therefore agree to the suggestion.

If any person obstructs the Commissioner or is in contempt of him the matter may be reported to the High Court which may deal with the matter as if that person had been guilty of contempt of court (section 9). But by section 7(4) the conduct by the Commissioner of an investigation "shall not affect any action taken by the Department...or any power or duty of that Department to take further action with respect to any matters subject to the investigation".

The Commissioner decides whether any person may be represented legally or otherwise in an investigation carried out by him. He takes the view that legal representation would be proper if an investigation got to the stage where it appeared that reputations were at stake. A few formal hearings have been held. The Commissioner allows a complainant who is being interviewed by a member of his staff to be accompanied by a friend or adviser if he so wishes, and the MP can attend in that capacity.
Section 10 requires that whenever the Commissioner conducts an investigation he must send to the MP who raised the matter with him a report of the result of his investigation or, where he decides not to investigate, a statement of his reasons for not doing so. Where he does carry out an investigation he must also send a report to the principal officer of the department concerned and to any other person alleged to have been concerned. He is not required to and does not normally make reports of individual investigation available to the press, though it is open to the MP or complainant available to do so. By section 10(4) he has to lay annually before Parliament a general report on the performance of his functions, and may lay such other reports on those functions from time to time. It is his current practice to lay quarterly reports of Selected Cases and occasional reports of cases of particular interest. If he finds that in any particular case injustice has been done and has not been or will not be remedied he may under section 10(3) lay a special report before Parliament. Only one such report has been laid so far. With regard to the contents of his reports, it is the Commissioner's practice to anonymise cases reported in his annual and quarterly reports. He does not therefore, identify complainant, M.P., Civil Servant or Minister involved (though his other reports do so).
BY section 11(3) the Commissioner can be prevented by a certificate issued by a Minister from disclosing in a report or otherwise, any document or class of document to any one. This does not mean that the Commissioner may not examine it and take account of what is in it. Such a certificate, which prevented him from disclosing whether or not certain documents existed, has been issued. It referred to a tax matter.\(^{(32)}\).

The view is taken that the personal standing of the Ombudsman and his ability to be personally involved with investigations is important to the success of the office. (The latter point is given as a reason for not extending his jurisdiction too widely.) A former Ombudsman said that, like his predecessors, he saw each case at least three times and approved the report.

By section 5(5) the Commissioner has a discretion to discontinue an investigation. The discretion to investigate, to refrain from investigating and to discontinue investigating is an aspect of his independence from Government.
The Remedies

It is essential to appreciate that even if the Commissioner finds maladministration causing injustice he cannot order the Department to halt or delay or speed up action, to change a decision, to pay money, or to do anything else. To report on the result of this investigation seems to be the extent of his power. But this does not mean that complainants do not get their injustices remedied. In the first place the Commissioner will expect the Department to find a remedy. Sometimes if the Department say they cannot find a remedy he will ask them to think again, or if he thinks the proposed remedy is inadequate he will say so. Secondly the Commissioner's report of his investigation goes to the principal officer of the Department. He will be concerned about the existence of maladministration in his department and should welcome an opportunity to put things right. Thirdly the Commissioner reports to Parliament which will hold the Minister responsible for what he does and what his Department does.

The Commissioner's reports have in fact resulted in a wide range of remedies being made available. Financial payments ranging from £25 to £25,000 have been made. He has prevailed upon Departments to extend the scope of a concession so as to include the complainant, to pay thirty years
arrears of war pension, to refund tax paid, to spread the payment of tax due over a longer period, to review an application from the complainant for a license or for compensation in the light of further information put before it, to speed up a decision, to issue a conditional license having previously refused to issue one at all, and to offer an apology. In one case he brought about a further review of a decision taken by Ministers and on the basis of advice to be drawn up by different officials from those previously involved; their recommendations had been accompanied by subjective judgements backed by no convincing evidence. In addition it sometimes happens that the Commissioner's investigation will throw up entitlement by the complainant to some benefit he did not know about, and the Commissioner will draw his attention to it. Even where a matter is outside his jurisdiction, the Commissioner will suggest to the complainant where he might go for help or advice.

A Complainant may get a remedy even though no maladministration is proved, as where an earlier decision, taken at a lower level, is thought on review at a higher level to have been unnecessarily heard, though not wrong.
What is to be particularly noticed is the publication of the results of an internal study of the way administrative practices may infringe legal entitlements. This study was undertaken as a direct result of a Commissioner’s report in which he found that officials had failed to act as they had been legally advised to do. This has provided an excellent example of how, very properly, the investigation...of one individual complaint can lead to a major re-examination by the Civil Service of a particular area of administrative practice. If it is a credit item to uncover maladministration, it is also a credit item to find good administration and on occasions the Commissioner praises a Department for their handling of a case. And he will not refrain from criticising an unreasonable complainant.

Sometimes no remedy is in the nature of things possible, Passport Office referred to is one. In other cases the Department has been unable or unwilling to provide a remedy, as where the repayment of overpaying tax has been delayed and the Inland Revenue has no statutory power to pay interest on the amount overpaid, but this did in fact lead to the law on the point being changed.
On the debit side the first Commissioner suggested the increased work put on departments by his investigations, and the risk that his presence would make them less willing to help members of the public with advice given outside the limits of their statutory obligations lest such advice should, on investigation by him, turn out to be wrong. The Select Committee having taken evidence on this question noted with satisfaction that the salutary effect of the Commissioner's existence continues and that Departments are revising and tightening up their procedures as a result of his activities. These beneficial effects are being achieved without an unmanageable burden being placed on Departments and ....the initial fears that work would be slowed down are being dispelled.

With regard to the impact of the Commissioner on the doctrine of Ministerial responsibility the Select Committee pointed out by setting up the office of the Parliamentary Commissioner, to some extent undermined that doctrine in that power of the Commissioner to carry out an independent investigation and to publish what he finds is an encroachment on the Minister's responsibility. It is only very exceptionally that the anonymity of Civil Servants is infringed by the Commissioner's findings.
The select Committee on the Parliamentary Commissioner

The work of this Committee has already been noted earlier. The Committee's formal terms of reference are to examine the Commissioners' reports which are laid before the House, and matters connected therewith. It does not act as a Court of Appeal from the Commissioner's findings on any particular investigation but considers important points of principle brought to light by his reports. It pays particular attention to cases where the Commissioner has found maladministration but no satisfactory remedy has been provided. It will interview the Department's Permanent Secretary. If the Committee backs the Commissioner, which it nearly always does, a remedy will almost invariably be provided by the Department. The Committee has encouraged the Commissioner to take a broader view of the meaning of maladministration and it has repeatedly criticised the exclusion of various matters from his jurisdiction. It has examined the possibility of non-departmental bodies being brought within his jurisdiction. It has examined the extent to which the various Ombudsman in the United Kingdom provide a comprehensive, accessible and effective Ombudsman service in this country.
Problems remaining

Large questions remain as to the wide areas of administrative power which as yet are excluded from the Commissioner's Jurisdiction. Chief among these are the national health service (and in particular hospitals), local Government, the police, and all personal matters in the armed forces and the Civil Service. At present the Act applies only to the Central Government departments listed in its second schedule and there is a catalogue of specific exclusion in its third schedule. Although hospitals are administered by the central Government, they are specifically excluded because other parts of the national health service (general practitioner service and so forth) are under local authorities of various kinds and it was thought that the health service must be treated as a whole. A reorganisation of the health service is now under discussion and the Government announced in 1969 that they saw a substantial case for a Health Commissioner to investigate complaints against hospitals. They also announced that in principle they accepted the case for some sort of Ombudsman system for local Government. These are two large areas where the need for satisfactory complaints procedure is generally felt and where there should be no serious problems in providing it.
The police are a more difficult matter. But here again there is considerable public demand for improved machinery and its provision is probably only a question of time. Already in 1962 a minority of the Royal Commission on the Police recommended that there should be a Commissioner of the Ombudsman type who would be clearly impartial in the eyes of the citizen. At present complaints against the police are investigated entirely by police officers.

The one great uncertainty in Britain was whether a single Ombudsman could operate efficiently in so large a country. Fortunately anxiety has proved groundless and the Commissioner has triumphed over the course of bigness. But a family of Ombudsman, each with distinct function would seem greatly preferable to a single overburdened Commissioner who would be forced to work through a large bureaucracy. Every Ombudsman needs to be a public personality and to be accessible and responsive. The success of the British Commission in taking on far greater tasks than any other Ombudsman in the world must not be allowed to make him a remote and faceless man. Subsequent legislations discussed below have provided for health service commissioners and local commissioners.
The Health Service Commissioners

The National Health Service Reorganisation Act 1973 created two Health Service Commissioners, one for England and one for Wales. The National Health Service (Scotland) Act 1972 had created the office of Health Service Commissioner for Scotland. All these offices have since their inception been held by the Parliamentary Commissioner.

The principal bodies subject to their jurisdiction are (in England) Regional and District Health Authorities, Family Practitioner Committees and the Public Health Laboratory Service Board. Authorities in this section refers to those bodies. (35)

A Health Commissioner may investigate (a) an alleged failure in a service provided by an authority; (b) an alleged failure of an authority to provide a service it was its function to provide; (c) any other action taken by or on behalf of an authority. He may investigate a complaint where it is made by or on behalf of a person, that he has suffered injustice or hard ship in consequence of the "failure", referred to in (a) or (b), or in consequence of maladministration connected with the "other action" referred to in (c).
As in the case of Parliamentary Commissioner, the Health Commissioner cannot investigate a matter where there was an alternative remedy before tribunal or court (though he has the same discretion as the Parliamentary Commissioner to do so); nor personnel matters nor contractual or commercial transactions. In addition he cannot investigate action taken by persons providing general medical, dental etc. services under contract with a Family Practitioners Committee; action taken by a Family Practitioner Committee under its disciplinary functions; nor action taken in connection with the diagnosis of illness or the care or treatment of a patient being action which in the Commissioner's opinion was taken solely in consequence of the exercise of clinical judgement.

In contrast with the Parliamentary Ombudsman system a complainant does not have to go through a member of the Commons. The argument for not requiring this is that Members do not, in respect of the actions of the authorities in question, occupy that Constitutional position which they occupy in respect of the actions of Departments. However, although a complaint may be made direct to a Health Ombudsman, he cannot investigate it unless it was first brought to the notice of the authority who was given reasonable opportunity to investigate and reply to the complaint. This is a
sensible requirement.

The complaint has to be submitted by the person aggrieved himself; but if he is unable to act for himself (and this may be the cause with these complaints) the complaint may be submitted by a member of his family or by any "body or individual suitable to represent him". This could include an employee of the authority or the Community Health Council. Furthermore an authority can itself refer (within three months) to the Commissioner a complaint made to it. (It might welcome an independent inquiry into a serious allegation.)

Like the Parliamentary Commissioner, the Health Commissioner cannot act except on a complaint. He considers that this limit on his jurisdiction "appears to conflict with the public interest". (36)

The Parliamentary Commissioner's staff are all Civil Servants, most on secondment for a few years from Departments. The Health Commissioner's staff includes a proportion on secondment from the National Health Service (though it is not, it seems, easy to get enough of the right calibre).
The Health Commissioner has the same powers to get at the facts as has the Parliamentary Commissioner. He must send a report of the results of an investigation to the complainant and to the authority, and also to the authority to which that authority is accountable (e.g. where the complaint was against the Regional Health Authority, to the Secretary of State) Where the Commissioner thinks that injustice or hardship has been sustained and has not been and will not, be remedied, he may make a special report to Parliament, he publishes twice a year a report of Selected Cases investigated by him.

The Health Ombudsman's reports and activities are within the jurisdiction of the Commons Select Committee on the Parliamentary Commissioner.

The Health Ombudsman gets about 600 complaints a year(37). About three quarters of them are outside his jurisdiction. Thirty percent or so of those are rejected because they involve "clinical judgement". The two next biggest categories of complaints rejected have been those not first referred to the authority in question; and those against general practitioners. Together these three categories account for some 60 percent of all complaints rejected as not investigable. The "clinical judgement" exclusion
excites particular interest. The Select Committee has recom-
mended that the Ombudsman should be enabled, with profes-
sional advice, to examine clinical judgement; not in order
to ensure mistakes made in the reasonable exercise of pro-
fessional judgement, but to identify and draw general rea-
sons from unreasonable actions. The medical profession is
hostile to the idea. The Commissioner has said that the
removal of the "clinical judgement" exclusion would raise a
number of complex questions, and that the implications for
his office could be far reaching.

Cases investigated include, in relation to Family
Practitioner Committees, complaints about the closure of a
branch surgery and the absence of pharmaceutical services;
and in relation to hospitals, complaints about delay in
admission, failure to provide ambulance transport, inad-
quate investigation of a complaint by a hospital, inadequate
records of an accident happening to a patient, the giving of
records of an accident happening to a patient, the giving of
treatment without the patient's consent, illegal detention
of a mental patient, and improper disclosure of medical
records.
The Local Commissioners

The main problem here was to adapt the Ombudsman concept to the different constitutional relationship that exists in local Government. In local Government there is no Government-Parliament dichotomy. Unlike MPs, Local Authority members are the Executive.

The Local Government Act 1974 provided for the appointment of Local Commissioners; at present there are three for England, one for Wales. In addition there are two Commissions for Local Administration, one for England, one for Wales. Each consists of the Local Commissioners for the country together with the Parliamentary Commissioner. But the Commission's main function is only to make the necessary administrative arrangements by acquiring premises, appointing staff etc. It is the Commissioner, not the Commission who, with his staff, investigates complaints. Unlike the Parliamentary and Health Commissioners, the Local Commissioner's staff is employed not on secondment but on a permanent basis. The staff totals about thirty-five.

The authorities subject to investigation are any Local Authority, any Joint Board, the constituent authorities of which are all Local Authorities, any police authority other than the Secretary of State, and any water authori-
ty under the Water Act 1973. As with the other Commissioners, there is to be no investigation of a matter where there was an alternative remedy before a tribunal or court, and in addition, where there was an appeal to a Minister (again subject to the Commissioner's overriding discretion). A number of additional exclusions are to be found in Schedule 5 to the Act: they can be deleted at any time by Government action. They include (a) personnel matters, (b) action taken in matters relating to contractual or other commercial transactions, including the operation of public passenger transport and of markets, and (c) certain educational functions. Only about one-fifth of the complaints submitted are within the Commissioner's jurisdiction.

How is a complaint to be made? Not direct to the Ombudsman. It must be made in writing to a member of the authority complained of and then referred by that member to the Ombudsman with the complainant's consent. But if a member who has been asked to refer the complaint to the Ombudsman does not do so, the Ombudsman can act on the direct request of the complainant. Almost as many complaints are received direct from the public as through members of Authorities. About half find their way back to the Ombudsman through a Member. (By the end of March 1981 the English Commission received 2,400 complaints through Members.) The
case for direct access to Local Ombudsman is particularly strong as a complaint has to be submitted through a member of the body being complained against. In addition the Ombudsman, before beginning an investigation, has to be satisfied that the complaint has been brought to the attention of the Authority and that it has had a reasonable opportunity to reply to it. That requirement is necessary, and sufficient.

As with the other Ombudsman the complaint may be made by a person who claims to have sustained injustice in consequence of maladministration. In addition, this Act provides that the complainant is to "[specify]" the action alleged to constitute maladministration. The Court of Appeal has acknowledged that the complainant "of necessity cannot know what took place in the Council offices.... Suffice it is that he specifies the action of the Local Authority in connection with which he complains that there was maladministration." (39)

A Local Commissioner has the same powers of investigation as the Parliamentary Commissioner,

The authority has to make copies of the report of any investigation into a complaint against it, available for
public inspection and copying for a period of three weeks. If the Ombudsman makes a finding of maladministration his report has to be laid before the authority which must tell him what they propose to do or have done about it. What if they propose to do nothing or at least, not enough to satisfy the Ombudsman? He makes a "further report". If they remain adamant he has the benefit of powers to insist on remedial action as the other Ombudsman so far referred to. Recently authorities failed to take satisfactory action in 5% of the cases where maladministration was found. Any deterioration in this matter would call for serious consideration of the Commissioner's powers.

Each Local Commissioner submits an annual report to his Commission. Now the Parliamentary Commissioner reports to Parliament. To whom do the Commissioner report? The Local Government Act 1974 provided for the appointment of two Representative Bodies, one for England, one for Wales. Wales Commission has to submit an annual report to its Representative Body enclosing the Commissioner’s reports. Now each Representative Body consists of some dozen persons who are representative of bodies which are themselves representative of authorities subject to the Commissioners’ jurisdiction. There is in this arrangement nothing like the Select Committee which is so important in supporting the Parliamentary
Commissioner. The constitution and powers of the Representative Bodies render them incapable of performing a similar function. For this and other reasons they might as well be abolished.

New Zealand’s Parliamentary Commissioner

The first Ombudsman appointed in a Common Law jurisdiction took up his office on October 1, 1962. Not only has the office been accepted in New Zealand but the word "ombudsman" has also become part of its language. The decision to appoint an Ombudsman was presumably taken because the Government was convinced that the means available to the citizen for ventilating his grievances against officials and gaining redress for administrative injuries were inadequate. The remedies available to a New Zealand citizen who wishes to challenge the validity or fairness of decisions taken by Ministers or state agencies should therefore be outlined.

Because political institutions cannot be understood or evaluated without some knowledge of their environment, a few comments on New Zealand’s Government organization should be made first. According to a recent official report there are in New Zealand forty-one departments of State or Government agencies. (40) Like their counterparts in the United Kingdom all of them are subject to the control of
a Minister who is answerable to Parliament for their administration. However, there is a significant difference between departmental administration in New Zealand and the United Kingdom. Most decisions in New Zealand are communicated in the name of the Parliament Head or senior local officer, not the Minister. New Zealand has not preserved the function that the Minister himself has taken the decision.

Existing Remedies

Apart from legal proceedings to challenge the validity of Government decisions, the citizen may, and commonly does, seek relief from administrative injury by making a complaint to his local member of Parliament or direct to the Minister. Whichever course is followed, the action taken on his complaint is likely to be the same. The member, whether he is a supporter of the Government or in opposition, sends the complaint to the Minister in charge of the department concerned and invites his comments. The Minister will send the complaint to his department and ask for a reply to be drafted. Almost invariably the departmental reply will be adopted by the Minister, and the complainant or his member will be advised that the question has been investigated and that the Minister will not be satisfied with the explanation given by the department or he will be persuaded by the representation of the member that the
decision should be varied. In a few cases the Minister will refuse to intervene on the ground that the exercise of the discretion complained of has been committed by statute to an independent agency over which he has no control e.g. the Social Security Commission or one of the tribunals exercising Judicial functions. A member could, if he wished, take the matter further by asking a question in Parliament or by seeking to have the issue debated there, but only important or patently indefensible decisions would be likely to lead to a debate.

Apart from making a complaint in the manner already discussed, in New Zealand a citizen may also present a formal petition for relief direct to Parliament. However, this form of complaint not frequently used, is likely to be the citizen's last resort, and in any event is not likely to be any more successful than action through his local member. Particularly if he has other means available to test the validity of what mendation from either of the Public Petitions Committees. For example, one of them, undoubtedly influenced by the knowledge that the company could challenge the decision in the courts (41) refused to support a petition by suppliers to a co-operative dairy company.
Because of the bearing that this public petitions procedure has on the need for an Ombudsman. An analysis of the outcome of petitions suggests, however, that this favourable comment is scarcely justified. In 1960, reports were made in respect of fourteen petitions, but only two earned from the House of Representatives a "most favourable recommendation" - without which no further action is taken(42) In only one of these two cases a claim that arose in 1936 did the Government act on the recommendation. Of the other twelve petitions, three were referred to the Government for consideration, eight received no recommendation for action and one was supported in part only.

The procedure is that petition to Parliament are referred to one of the two Public Petitions Committees. The Committee gives the petitioner an opportunity to state his case and produce his evidence; the department or organization concerned is given a similar opportunity. The Committee then settles usually immediately after the parties have withdrawn the terms of its report to the House. Whenever possible, the Committee will support the petitioner, partly because this is seen as a form of solace for petitioner. Because few of the members of these Committees have had administrative experience as Ministers, they tend to show more sympathy to the petitioner than to the department. The
House does not usually devote much time to the Committee's reports, which are almost invariably adopted. It could be said that in doing this the House is being irresponsible, but in fact members are probably influenced by the knowledge that a further careful examination of recommended petitions will be undertaken by the Government. The Cabinet committee to which petitions and the parliamentary recommendations are referred makes a close study of only those petitions which have received a "most favourable recommendation" from the House. It received a detailed and frank report from the department concerned and may call for the attendance of a senior official. This investigation is probably more thorough than that undertaken by the Committee. In their representations the departments no doubt attach considerable importance to the awkward precedent that might be created by granting the petitions, and argument to which Ministers are likely to be more sympathetic than a back-bench member. It could be argued that the public petitions procedure would be more effective if departments took the Committee more into their confidence, but departmental reluctance to do so in the presence of the petitioner and his counsel is understandable. About half of the petitions which receive a "most favourable recommendation" from the House secure some kind of award, financial or otherwise from the Government. This represents, on the 1960 figures, one petition out of four-
teen presented to Parliament. On this basis, it is difficult to contend that the public petitions procedure is an adequate substitute for investigation by an Ombudsman(43).

As mentioned above, a citizen who seeks redress by the political means, either by parliamentary petition or complaint through the local member and the responsible Minister, there is little prospect of having the decision changed. For obvious reasons the Minister will in most cases adhere to his own decision or stand behind his department's decision. Where the decision has been committed to an independent tribunal, it has been recognized that the Minister should not or cannot intervene; only legislation can effect a change. The other means available, a court action directed to having the decision declared invalid, is relatively expensive and, in order to succeed, a plaintiff must overcome the numerous advantages enjoyed by the State in litigation. The picture should not be overdrawn, however, as the Law Reports, especially for the last decade, contain many cases of successful actions impugning decisions taken by administrative tribunals. But in New Zealand there is a belief that there is room for a different sort of investigation—one that can be directed to an examination of the merits of a decision, and is so accessible and cheap that it is likely to be availed of by persons lacking the financial resources or the
confidence to take court proceedings.

The large and more or less independent agencies that dominate the administrative scene in the United States have no counterpart in New Zealand. Relatively small areas of the economy have been committed to tribunals that function outside the normal departmental organization and are in no way controlled by a Minister or his department. New Zealand practice is to set out in the statute establishing the tribunal the basic procedural rules to be observed and to authorize each tribunal to establish its own regulations, consistent with the statute, governing the conduct of hearings and its other business. This permits each tribunal to adopt rules suited to its own special needs. Because of this and other differences in governmental organization, the solution to the problem of securing fair and efficient administration probably does not lie in subjecting Government agencies to a uniform procedural statute as was done by the United States Administrative Procedure Act, 1946, and the various State codes that have since been enacted. It cannot be emphasized too strongly that practices successfully adopted in one country must be closely examined before being transplanted to another.
Much of the Report of the British Franks Committee\(^44\) is concerned with the public inquiry as a prelude to a ministerial decision, but this has not been copied in New Zealand. Here the practice has been to confer a power of decision on the person or persons who actually conduct the public hearing. The decision is not taken by an anonymous officer or group in a department to which the person conducting the inquiry makes a report. For this reason, those portions of the Frank Committee's Report dealing with Public enquiries have no direct application in New Zealand\(^45\). But that part of the Franks Report devoted to the establishment of a Council on Tribunals and the functions it could perform is of more general application. The Council was established by the Tribunals and Inquiries Act of 1958, and since then, has exercised a decree of supervision over the work of tribunals. The Whyatt Report and other commentaries have pointed out that some, but not all, of the functions of an Ombudsman could be performed by the Council.

**Interest in the Ombudsman**

No common law jurisdiction seems to have considered seriously the creation of a body similar to the French Council d'Etat with responsibility for supervising the work of the administration. The general conclusion appears to have been that the French institution is not likely to be
transplanted successfully. Whether this is so or not, there is no great difference in principle between supervision by the judicial section of the council d'Etat and control exercised by an administrative court with power to review the merits. The creation of administrative courts in common law countries has been suggested on a number of occasions, but the proposal has never been received much support. It is therefore surprising that there has been such interest in, if not enthusiasm for, the Scandinavian institution.

An explanation may lie in the proselytizing zeal of the Danish Ombudsman, Professor Stephen Hurwitz, whose radio and television appearances in the United Kingdom have popularized the office. Despite the relative youthfulness of the Danish office as compared with the much older institutions in Sweden and Finland, the Danish statute and Danish incumbent are better known in the English-speaking world.

In a speech to the Canadian Bar Association in September 1964, the New Zealand Ombudsman made it clear that, even before the United Nations Seminar held in Ceylon in 1959, to which Professor Hurwitz delivered a paper entitled "The Scandinavian Ombudsman", a few prominent New Zealand lawyers had advocated the appointment of the officer with power to review decisions made by administration. At
the New Zealand Legal Conference of 1960, R.B. Cooke delivered a paper in which he suggested that New Zealand might create an administrative court to which appeals would lie from administrative tribunals.\(^{(47)}\) This proposal was not favoured by the Hon. J.R. Marshall, a former Attorney General and now the deputy to the Prime Minister. In the discussion that followed Dr. Cooke’s paper Mr. Marshall was reported as having stated:\(^{(48)}\)

"While I would not favour an administrative court.....I do feel that there is a case for the establishment of an administrative appeal authority of an administrative, not of a judicial nature, to which any person affected by an administrative decision might appeal for a review of his case. Such an authority would have to be a very wise, a very mature, a very learned person-obviously a member of the legal profession! But he would also have to be independent of Government and responsible to Parliament, and he would have to have access to the files; he would have to have authority to call officers before him; and he would of course need to be able to get the facts, either in writing or by hearing complaint. There would also, I must admit, have to be a filing fee to restrain such a rush of reviews as might follow if it were free. However, I seriously think there is a case for investigating the possibility of an administrative appeal authority. Whether I will ever have
the opportunity of tackling that I do not know, but it is something to which the profession might give thought and possibly find a first step to restrain the abuse of power in that way".

The next move was the inclusion in the National (conservative) Party's manifesto at the general election in 1960 of a promise to consider the creation of a Parliamentary Commissioner to whom citizens might appeal against administrative decisions. After the election success of the National Party, the newly appointed Attorney General, the Hon. J.R. Hanan, made it clear that what was contemplated was something akin to the Scandinavian Ombudsman, but that his powers would be related to New Zealand's needs. It is significant that those countries which had established an Ombudsman or Parliamentary Commissioner - Sweden, Finland and Denmark - have relatively small populations; this suggested that the institution might be capable of being adapted to New Zealand's circumstances.

The success of the Scandinavian Ombudsman is generally conceded. The explanation is that the institution enjoys the confidence of the legislature, the administration and the general public. Early scepticism and suspicion have been replaced by support from those affected. It is natural
that the public servants should come to respect an institution which indirectly protects them from unfair criticism. The relatively short term of office which might have made it difficult to secure the services of a properly qualified person has not in fact proved an obstacle. The explanation may lie in the remuneration and prestige conferred on the holder of the office. For example, the Danish Ombudsman receives, according to the Act establishing the office, "remuneration at the same rate as a judge of the Supreme Court at the highest step in the salary scale"; and it would seem that politics have played little part in the appointment and reappointment of the Ombudsmen.

In 1961, about half way through the parliamentary session, the National Government introduced the Parliamentary Commissioner for Investigations Bill, but it was given no more than a first reading and allowed to lapse at the end of the session. It is now clear that the Government's intention was to gauge public reaction to the proposal. Most published comments were favourable. On further consideration only minor amendments, were introduced and enacted the next year.

In proposing the office the initiative seeks to have come from key persons like the Permanent Head of the Justice Department. Certainly there was no popular demand
for its creation, and there had been no administrative blunder comparable to the Crichel Down affair which would have prompted Government action. The Bill was treated as non-controversial and the House decided to adopt the Scandinavian title, which is the one that has been used by the press since the first Bill was introduced. So the statute was passed as the Parliamentary Commissioner (Ombudsman) Act 1962. Later on the Parliamentary Commissioner Act 1962 was repealed and the new law in 1975 was proclaimed.

Main features of the Statute

The Act contains twenty nine sections and a schedule listing the Government departments and other state organizations that are subject to the jurisdiction of the Commissioner. The influence of the Scandinavian legislation, and in particular that of Denmark, is obvious. The Commissioner is to be appointed by the Government, but through the House of Representatives (though he cannot be a member of the House or hold any other office without the approval of the Prime Minister). This method of appointment is unusual. Indeed it may be unique, in that appointments to comparable offices are normally made on the advice of the Government. But in practice it will not involve a radical departure from what has been done in the past; only the Government can be expected to have approached suitable qualified persons and
secured provisional acceptance of the post. Moreover, the Government, having a majority in the House, will normally be able to secure parliamentary approval of its candidate. The method of appointment does emphasize, however, the special responsibilities of the officer to Parliament, not the Government. His main function, after all, is to act as a watchdog over departmental administration. In this respect, the Commissioner will occupy a position comparable to that of the Comptroller and Auditor General, who frequently finds himself obliged to criticize decisions of the Government, including those taken at a high level, in his annual report to Parliament.

Although the Comptroller and Auditor General is appointed by the Governor-General on the advice of the Government, he holds office during good behaviour, and is removable by the Governor-General only on an address from the House of Representatives. The term of office of the Commissioner, on the other hand, is related to the life of Parliament. The recommendation for appointment is to be made in the first or second session of every Parliament. This means that the Commissioner will have a three-or four-year term unless the office is vacated earlier by reason of resignation, removal or suspension, or death. He may be removed or suspended by the Governor-General upon an address
from the House for disability, bankruptcy, neglect of duty or misconduct. This is similar to the provision protecting judicial tenure. During a recess, the Governor-General in Council may suspend the Commissioner. If a Commissioner dies while the House is in recess the Governor-General in Council may fill the vacancy. Such an appointment must be confirmed by the House on its resumption; otherwise the appointment will lapse.

The Commissioner is eligible for reappointment, and it is to be hoped that the reappointment of a person who has efficiently performed his duties and is still able to do so will become the rule. Whether a person will be reappointed will depend more on his personal qualities than his political affiliations. If the appointee has comparable experience (though of course in a different field) to those appointed to the higher judicial offices, into which appointments political considerations rarely enter, it is likely that the appointment would be renewed even after a change of Government. This factor is extremely important because few persons of the required competence would accept an appointment under conditions which necessitated their being politically acceptable to the Government of the day. The Attorney General, however, cast some doubt upon the conditions of appointment when he stated:
"His position comes up for review every three years, so that in effect it is easier to get rid of him than it would be to get rid of the Comptroller and Auditor General or a Judge. He will be in a very powerful position to criticize Government administration, and our Government might appoint a man who was not the concept of what an Ombudsman should be for, say, a Socialist Government, which might want a quite different type of individual. (49)"

The removal provision is not likely to be exercised: failure to reappoint is much more likely.

The Commissioner’s salary, though payable without annual appropriation, unlike that of Danish Ombudsman is substantially lower than that of a Supreme Court Judge. The relatively low salary and the provisions as to tenure make it almost certain that a retired civil servant or one approaching retiring age (between the ages of 55 and 65) will be appointed. It is unlikely that any other person with the necessary qualifications would be ready to accept the appointment, at least in the early years of the institution. Although there is a provision for the payment of a retirement allowance to the Commissioner, the age of 72—the retiring age for judges—was deleted from the Bill on its third reading. Retirement at an earlier age than 72 is probably
The first appointee to the new post is Sir Guy Powles, formerly New Zealand High Commissioner to India. Sir Guy, who is 58, has had wide experience, first as a lawyer, then as a soldier and more recently as Administrator of Western Samoa while under United Nations Trusteeship and as a senior diplomat. If any fault can be found in his qualifications, it is on the administrative side. His lengthy service abroad denied him an up-to-date knowledge of New Zealand's public administration and upon appointment he was virtually unknown to many of the senior officials with whom he must deal.

The commissioner is empowered to appoint his own staff, but the number and class of staff must be approved by the Prime Minister, and the Minister of Finance must approve their salaries and conditions of appointment. Though some Government control over staffing must be conceded, these provision appear to be unduly restrictive and may impair the Commissioners' independence of the executive.

The Commissioner's jurisdiction has been very carefully defined. It has not been possible to adhere strictly to the principle advocated by K.W.B. Middleton that
"he should not be concerned with questions of legality which is the sphere of the courts, on one hand, nor of policy, which is a matter for Parliament, on the other hand". (50) Inevitably, the Commissioner will be drawn into considerable legality and policy. His jurisdiction is confined to the acts or omissions of the department, of state and other organizations listed in the Schedule. None of the "sensitive" departments, such as External Affairs, Prime Minister's Defense or Inland Revenue, is omitted from the Schedule. Few of the statutory administrative tribunals, however, are within the Commissioner's jurisdiction, and local authorities are outside his powers, though it is now being suggested that they be included. Under the Act (sec.11) his principal function is to investigate, on complaint or of his own motion;

Any decision or recommendation made (including any recommendation made to a Minister the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organizations named in the Schedule to this Act, or by any officer, employees, or member thereof in the exercise of any power or function conferred on him by any enactment.
The following are excluded from the Commissioner's Jurisdiction:

(1) Any decision, recommendation, act or omission of any person acting as legal adviser to the Crown pursuant to the rules for the time being approved for the conduct of Crown legal business, or acting as counsel for the Crown in relation to any proceedings:

(2) Any decision, recommendation, act, or omission in respect of which there is, under the provisions of any enactment, a right of the case, to any court, or to any tribunal constituted by or under any enactment, whether or not that right of appeal or objection or application has been exercised in the particular case, and whether or any time prescribed for the exercise of that has expired.

Although the first exclusion seems to be a reasonable protection of the Crown's litigation, the second is likely to be most troublesome. In the first place, does it mean that a person with a grievance must first exhaust his other remedies before petitioning the Commissioner for review of the appellate body's determination, or does the existence of a right of review or appeal debar the Commissioner from making an investigation even after the right has been exercised. Secondly, the phrase "on the merits of the
case" is ambiguous and conceals one of the debatable issues in administrative law. It apparently means that the Commissioner can investigate cases where there is review by means of the writs because these do not involve review on the merits. But though theoretically the courts have no power to review an administrative decision on its merits, there are cases which show that this self-denying ordinance imposed by the courts is not always observed by them. It will therefore be difficult to determine in a given case whether review on the merits is available and, in consequence, whether the Commissioner has competence. However, he has been given the right to apply for a declaratory judgement as to his jurisdiction.

In order to preserve the important constitutional principle of ministerial responsibility to Parliament the Commissioner is limited to work within department and he has no direct power over Minister. But this limitation may not be as significant as it appears at first sight, for the Commissioner has power to investigate a recommendation made to the Minister; yet failure to act on a departmental recommendation has been and presumably will be rare. It is natural that Ministers should be reluctant to concede to a relatively new power to examine and criticize their decisions. On the other hand, the Comptroller and Auditor Gener-
al already has the power to comment on the financial operations of the Government and individual Ministers. A decision to extend the Commissioner’s jurisdiction to include Ministerial decision might well be taken once the novelty of the institution has worn off. The Commissioner has, after all, only a power of recommendation and if a Minister acts upon it the decision is his and the principle of ministerial responsibility is preserved.

Even if the Commissioner believes that an administrative decision is wrong, he may not alter it. His function is limited in the first instance to make a report or recommendation to the department organization and to the Minister concerned. He may fix a time within which he must be notified of the action taken on his report. If his advice is not accepted and acted on by the department, he may bring the issue to the attention of the Prime Minister and thereafter, to Parliament. Only if the decision is unchanged the House will be likely to hear of the action taken by the Commissioner. The Commissioner were authorized to make only one report to Parliament each year, he would be unable in the period between reports, and especially while Parliament is in recess, to have his criticisms ventilated in the press. But a new provision was incorporated in the second Bill enabling the House of Representatives to authorize the
publication of reports of the Commissioner's investigations, even though they had not yet been presented to Parliament: and under rules adopted by the House in 1962 the Commissioner was given this authorization. His reports are expected to state the grounds for his conclusion unless these would prejudice security, defense, international relations or the investigation or detection of crime.

It has been said by way of criticism that these modest powers will render the Commissioner important (53) the Scandinavian experience does not bear this out. Provided the Commissioner possesses the necessary qualities of judgement and act, it will almost certainly be found that the wide administrative experience gained in his office will result in his advice being accepted. It must also be remembered that few officials are likely to relish the task of defending before the Minister—or before Parliament—decisions which appear to be unfair or arbitrary. To give the Commissioner more than advisory powers would be inconsistent with and tend to diminish departmental and ministerial responsibility. Protection against the Commissioner's abuse of his powers is afforded by the provisions requiring him to have department or officer concerned an opportunity of being heard before reporting adversely on what has been done. Such a direction should have been unnecessary because observance
of this elementary, rule of good administration is precisely what it is the responsibility of the Commissioner to encourage in departmental officers.

Petitioners will pay a modest fee of 1 pound when they appeal to the Commissioner. This amount will, it is expected, be sufficient to discourage the frivolous and the crank, but not be so high that genuine complaints will be inhibited. If there had been no provision excluding the Commissioner rather than exhaust their statutory or common law remedies, complaints may be made by persons in custody on a charge or after conviction, and by inmates of mental institutions. Their letters must be sent to the Commissioner unopened by supervisors.

The commissioner is empowered to drop an investigation if existing remedies, other than a petition to Parliament, are thought to be adequate under the law or existing administrative practice. The words presumably mean that if the Commissioner is satisfied that the complainant is likely to have had or to secure fair treatment from the department concerned, he need not intervene. But it is difficult to see how he can be satisfied about a practice which may not be adopted in the particular case. He may also drop an investigation if, inter alia, the complaint has been
unduly delayed or is trivial, frivolous, or lacking in good faith, or if the complainant lacks a sufficient personal interest in it. If this introduces, in relation to the Commissioner's functions, a requirement of locus standi that scope of the new administrative remedy will be much diminished. If the Commissioner decides to investigate, however, he must inform the petitioner of the result.

Except to the extent that the Act or the rules adopted by the House of Representatives provide otherwise, the Commissioner may adopt such procedure as he thinks fit in conducting an investigation. The Act does provide certain requirements, however, before he begins an investigation, he must inform the department concerned of his intentions. His proceedings will be private and he need not hold a hearing unless he proposes to make a report adversely affecting a department or officer. He may consult the Minister. He has the power, subject to certain exceptions, to require any person, whether an officer of the relevant department or not, to furnish information and produce documents relating to an investigation. He also has the power to summon and examine on oath officials and complainants, and may examine other persons with the approval of the Attorney General. Witnesses expenses are payable. It is an offence to obstruct, mislead, or refuse to assist the Commissioner. The secret provisions
of the Public Service Act, 1912, and the Office Secret 1951, are waived if the information sought might prejudice security, defence, New Zealand's international relations or the investigation or Cabinet or a Cabinet committee, the Commissioner cannot require disclosure. The Commissioner and his staff will be required to take an oath of secrecy regarding information disclosed to them, but will be protected (though not absolutely) from legal proceedings in respect of what is said or done in the course of their official duties.

The grounds on which the Commissioner may make a recommendation or report in relation to administrative action or inaction are extremely wide. Under the Act he may take action with respect to any decision, recommendation, act or omission if he is satisfied that it:

(a) appears to have been contrary to law; or
(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
(c) was abused wholly or partly on a mistake of law or fact; or
(d) involved the exercise of a discretionary power for an improper purpose, on irrelevant grounds, through taking
irrelevant considerations into account, or where reasons should have been given for the decisions.

The action that may be taken by the Commissioner includes reference to the appropriate authority for further consideration and a recommendation that an omission be rectified, a decision conceded or varied, or a practice changed; the Commissioner may also recommend amending the law or giving reasons for a decision. These powers, especially those in relation to altering administrative practices, amending the law and giving reasons for decisions, should enable the Commissioner to use his powers of persuasions effectively and should result in necessary modifications of law and practice.

It has already been mentioned that the Act expressly empowers the Commissioner to exercise his duties despite the existence of any private clause purporting to exclude review. At the same time, the Act contains a private clause of its own, protecting the proceedings of the commissioner from being called in question in a court, except on the ground of lack of jurisdiction. It is natural that this exception should be included: the courts, as they have frequently asserted, are the proper bodies for determining the question of jurisdiction: and in the early years of the
institution the Act will very likely need interpretation of its provisions as to jurisdiction.

Among the incidental powers conferred on the Commissioner is a power of entry on premises occupied by any of the scheduled departments. However, this may be exercised only after notification to the Permanent Head of the department concerned, and the Attorney General may exclude the premises of certain departments or organizations if he is satisfied that security, defence or international relations might be prejudiced by entry and search. With the consent of Prime Minister, the Commissioner may delegate any of his powers to his employees. This requirement of consent, along with the earlier mentioned provisions requiring executive approval for staff, could lead to the classification of the work of the Commissioner by an unsympathetic Government.

The existence and powers of the Parliamentary Commissioner are not extended as a substitute for existing remedies petitions to Parliament and applications to the courts or tribunals for review of decisions. These are preserved, and in particular "the citizen's ancient right to petition Parliament" to use the Attorney General's phrase. The Act provides that the Public Petitions Committee may refer a petition to the Commissioner for investigation and
report to the Committee. This is a useful power in that the Commissioner can be expected to make a more detailed and possibly more intelligent investigation of the complaint, but it may, if it were to be used extensively, weaken parliamentary responsibility to the citizen. The power to send complaints or petitions on to the Commissioner would save the time of the members and enable them to carry out their parliamentary duties more effectively.

New Zealand's Experience

The Ombudsman has not relied solely on his annual reports to Parliament to inform the public of the manner in which his office works and disposition of the complaints he has received. Very properly, he has decided that the should give the widest publicity to the achievements of the new institution; he has therefore accepted invitations to speak to interested groups both in New Zealand and abroad, including a speech to the Canadian Bar Association in the fall of 1964. In a recent public address, he reviewed his first eighteen months in office. He said that he had received during that period 1100 complaints, 334 in the first six months and 706 in the following year. As might have been expected, the revenue departments, Customs and Inland Revenue, and the Social Security Department have attracted a large share of complaints. The intake, he reports, has been
fairly constant, averaging about fifteen per week. He has fully investigated about half of the complaints of the remaining 50 percent, only 80 are still under action and the balance of 515 have been declined for want of one reason or another.

Of those fully investigated 505, the Ombudsman has found that 107, or more than 20 percent, were justified. They led to remedial action, wither satisfying the particular complainant or changing the procedure or policy adopted or both. In slightly more than half of the justified complaints, the departments concerned rectified the matter promptly, in many cases before the investigation had progressed very far. The largest number of complaints concerned the exercise of discretion by the departments. In some cases, the complaints showed that the officials were not fully informed, or that wrong principles had been applied, or that rulings and procedures were too inflexible. Another frequent source of complaint was failure to notify the public of their rights and obligations in unambiguous language. Citizens claimed that they had been misled in many of these cases. The intervention of the Ombudsman has led to publicity materials being changed or withdrawn.
A fairly common complaint alleges unreasonable delays on the part of officials or incorrect application of the relevant legislation. A small class, recognized by the Ombudsman as important nonetheless, relates to unauthorized or improper activities by departments, for example, the espousal by a department of a point of view, and the circulation of material in support of it, on an issue, such as fluoridation of water supplies, which by Government decision was to be determined by local polls.

In one of his public address the Ombudsman stated his view of the office:

"The Office of Ombudsman is new and unique among the political systems of Commonwealth, and cannot be adequately described in the Orthodox terms of British constitutional practice. It would not be correct to say that the Ombudsman is a part of the judicial system, it is also incorrect to assume that it is part of the Administration. The Ombudsman is an officer of Parliament. He has responsibilities of a kind that have not before been fixed on any individual under the British parliamentary system. On the other hand, the office as established in New Zealand does resemble the longer established institutions in Scandinavia".
"If the office developed the formality, trappings and traditions of a Court, it would, I think fail in its object. On the other hand, if it came to be regarded by the people as another arm of Government administration, it could also fail in its object. It seems to me that the Ombudsman must carve and tread his own path, being careful to maintain his independence both of the executive and the judiciary so as to be able to build a tradition of strong and impartial criticism of Government administration on the one hand and of helpfulness to citizens in their dealings with the administration on the other. If this is achieved justice will be better served, and efficient and humane administration will be promoted".

In his second report to Parliament the Commissioner stated that he has found a need for the kind of supervision he exercises and that his powers are adequate. He also reported that the procedure of recommendation has been almost 100 percent successful. He has received full cooperation from the departments whose actions have been investigated and has been able to attend to the volume of complaints on a personal basis. He has a staff of only four, including one legal officer, and intends to keep the staff at this level even if it does result in some delays. He also mentioned that he had found cases where in his opinion the
departments showed a "too close-fisted approach" towards minor claims and a disposition to apply a predetermined rule or practice rather than exercise their discretion on the merits of each case; in another case, the Minister’s decision was based on an incorrect statement of fact. The variety of complaints, the proved need for the investigation and correction of mistakes, and the relatively small staff involved in running the office - all indicate that for a modest cost a substantial contribution is being made to better and fairer administration by the Ombudsman system in New Zealand.

It may be argued that the adoption of an Ombudsman system will result in a loss of efficiency and a diminished sense of responsibility to the Minister. This has not been the Scandinavian experience so far, and has not been the reaction of public servants in New Zealand. Instead, they take greater pains to discharge their duties in such a way as not to attract the attention of the Ombudsman. Hence his very existence results in improved administration. Moreover, his advice, based on a broad understanding of government administration, is bound to be useful, for even senior officials charged with policy-making functions are often unaware of administrative practices outside their own departments.
Even in the United Kingdom, which has a highly skilled and efficient civil service, there have been instances of abuse of power by civil servants. The Crichel Down affair, which inspired the appointment of the Frank Committee, is the best known example because it was the subject of a special investigation. How many other cases there have been where persons have suffered injustice in silence, is not known. But it is likely that many over-enthusiastic officials have exceeded or abused their powers (with the best of motives of course) and that their actions have passed unnoticed by the Government or the press. The improvements recently made in the United Kingdom to secure the proper exercise of administrative power fall far short of the Scandinavian inspired New Zealand innovation. For the payment of only a small fee citizens are now able to secure an impartial review of administrative decisions which appear to them to be unfair. Other countries will undoubtedly watch the New Zealand experiment with interest; if it can succeed in a relatively small common-law country; it may be capable of being adapted to the needs of larger ones. (55)

It is accepted by history, tradition, and past and present practice in New Zealand's type of democracy, that redressing citizens' grievances is the role of Parliament. It is one of the functions of an elected Member of Parlia-
ment to try to ensure that constituents do not suffer injustices at the hands of executive Government. Parliamentary procedures (questions in the House, adjournment debates and debates on supply) have developed for this purpose and Members frequently take up constituents complaints with the relevant Minister. Nevertheless, it is a fact that Member of Parliament today have to spend much of their time legislating and have neither the time nor the resources to pursue citizens’ grievances as vigorously as they might wish. It was in recognition of this situation that in 1962 the New Zealand Parliament appointed an Ombudsman as an Officer of Parliament with a clear mandate to address citizens’ grievances against central Government. That mandate was extended in 1976 to statutory boards and territorial local Government. In 1983 the scope of the Ombudsman’s jurisdiction was broadened with the implementation of the Official information Act, and again in 1988 with the implementation of the Local Government Official Information and Meeting Act.

Before commencing an investigation, the Ombudsman must be satisfied that the complaint is one which can properly be the subject of an investigation. This often entails identifying the complaint or complaints from the material provided by the complainant, and obtaining from the com-
plainant confirmation that the grounds of complaint have been understood correctly. Many people have difficulty in putting their complaints in writing in a manner which is capable of investigation by an Ombudsman, and it has always been seen as part of the Ombudsmen's role to assist complainants in formulating their complaints.

The purpose of an investigation under the Ombudsman Act is to establish the facts giving rise to the complaint and, having done so, to form an opinion on the merits of the complaint in terms of section 22 of the Ombudsman Act. The purpose of an investigation under the Official Information Act or the Local Government Official Information and Meeting Act to establish whether or not the decision which is the subject matter of the complaint has been made properly in accordance with the statutory requirements. The Ombudsman is required to notify the chief executive of the department or organisation concerned (or the Minister where applicable) of his or her intention to conduct each investigation and to carry out the investigation in private. In practice, when notifying the chief executive, the Ombudsman asks for a report on the complaint and see all the relevant papers.
In order to conduct an effective investigation and to form an independent and impartial opinion on the merits of a complaint, an Ombudsman must have access to all the relevant information. The powers of the Ombudsman to obtain evidence are set out in section 29 of the Act and enable an Ombudsman to require.

"...any person who in his opinion is able to give any information relating to any matter that is being investigated by the Ombudsman to furnish to him any such information, and to produce any documents or papers or things which in the Ombudsman's opinion relate to any matter as aforesaid and which may be in the possession or under the control of that person"

The information which an Ombudsman may require to be produced includes information in respect of which the holder is required by some other Act of Parliament or Regulation to maintain secrecy.

Without such power of access to information, an Ombudsman would not be able to form a considered opinion under the Ombudsman Act on the merits of a complaint or in the case of an investigation under the official information legislation, would the Ombudsman be able to determine wheth-
er or not good reason exists for withholding information without seeing the information in question.

The Ombudsman and their staff are well aware of the sensitive nature of much of the information which is made available in the course of investigations, and have appropriate procedures in place to ensure that such information is adequately protected while it is held in the office. In this regard it should be noted that even where, as a result of an investigation under the official information legislation, an Ombudsman recommends that certain information be released, it is not the Ombudsman who releases it. Furthermore, once the Ombudsman has seen relevant information, it is normally returned to the department or organization concerned, particularly where it is of a sensitive nature. Thus, the concerns which some have expressed about giving the Ombudsman access to sensitive material are ill-founded.

Delay in providing reports or "drip feeding" information to an Ombudsman protracts investigations unnecessarily. The longer the investigation takes the greater the cost to both the department or organization and to this office. Delays also only reinforce a complainant's already negative view of the conduct of the department or organisa-
tion concerned. The Ombudsman therefore looks to chief executives to provide timely responses which contain all the relevant information on the complaint under investigation and which address the issues raised.

Having obtained all the necessary information, which may involve interviewing the complainant, officials, or others who may be able to assist, the Ombudsman analyses all the material and forms a provisional view on the merits of the complaint. Where the facts are complex the Ombudsman will seek confirmation of the accuracy of his or her understanding of the facts from both the complainant and the department or organisation concerned before proceeding to form any views. Having formed a provisional view, this is put to the party adversely affected for comment and the final view is not confirmed until that party has had an opportunity to comment and have those comments taken into account. Once the Ombudsman has formed a final opinion, the parties to the complaint are notified accordingly.

It is important, therefore, for both the complainant and the organisation or department concerned to respond fully and frankly to questions put by the Ombudsman during the course of the investigation and particularly at the provisional view stage. If comments are not made at that
stage it is too late to submit comments after the final opinion has been formed and seek to have the investigation reopened, unless there is some new and material information which has only just come to light.

The Ombudsman process is essentially non-adversarial in nature, although a more legalistic approach has to be taken in cases being investigated under the official information legislation because of the nature of the review process under that legislation. (56).

The work of the office

(1) The workload

The workload of the office has continued to increase as demonstrated by the figures in 1989 set out below. (The figures in brackets are the comparable figures in 1988)

<table>
<thead>
<tr>
<th>Ombudsman official information LGOIM</th>
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<th></th>
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</thead>
<tbody>
<tr>
<td>Cases on hand at 1.4.88</td>
<td>559</td>
<td>144</td>
<td>711</td>
</tr>
<tr>
<td>New complaints received from 1.4.88-31.3.89</td>
<td>2059</td>
<td>622</td>
<td>119</td>
</tr>
<tr>
<td>Total under review during year</td>
<td>2618</td>
<td>766</td>
<td>127</td>
</tr>
<tr>
<td>Cases disposed of during year</td>
<td>2093</td>
<td>687</td>
<td>97</td>
</tr>
<tr>
<td>On hand at 31.3.89</td>
<td>525</td>
<td>179</td>
<td>30</td>
</tr>
</tbody>
</table>

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With a normal intake of between 200 and 250 new complaints a month, he must dispose of similar number of cases to avoid an outstanding caseload of more than 700, that is, approximately 350 cases each on hand at any time. Because there was an unusually high intake of cases in March 1989-318-the number of cases on hand at the end of the year was on the high side.

The increase in the workload in the official information area was due in part to the impact of the Local Government Official Information and Meetings Act on the work over a full year. However, there was also a substantial increase 29% in the number of requests for investigation and review of decisions under the Official Information Act. This has resulted in an overall increase in the workload of the office of 17.4%.

In November 1989, on a Notice of Motion in the name of the Hon. Jonathan Hunt, the House of Representatives directed the Finance and Expenditure Committee to investigate and report back by 1 April 1989 on measures which might be necessary or desirable to put the Comptroller and Auditor-General on the same constitutional basis as Officers of Parliament: place with the House of Representatives the power to make decisions on, and exercise control over, the
levels of funding for the activities of Officers of Parliament; ensure the independent and effective discharge of their duties; and define, protect and enhance the status and identity of the position of Officer of Parliament within the Constitutional framework.

Together with the other Officers of Parliament, the Privacy Commissioner and the Parliamentary Commissioner for the Environment, the Ombudsman made submission, to the Finance and Expenditure Committee.

In the event, the Committee did not accept its proposals in the form suggested, but in its report back to the House of Representatives it made 17 recommendations which it believed, if adapted, would "serve to protect and enhance the status of Officers of Parliament and ensure that Officers of Parliament are both constitutionally and practically "creatures" of Parliament and not of the executive". Among other things, the Committee recommended the establishment of a Parliament Officers Select Committee which would be responsible for recommending to the House the appointment of an Officer of Parliament, the appointment itself being made by the Governor-General on the recommendation of the House; which Cabinet would consult on any draft legislation which included the creation of an Officer of Parliament:
(3) The Ombudsman rules 1989

Pursuant to section 15 of the Ombudsmen Act, the House of Representatives made Rules authorising the Ombudsman to public reports relating generally to the exercise of their powers under the Ombudsmen Act, the Official Information Act and the Local Government Official Information and Meetings Act, or reports relating to any particular case or cases investigated by an Ombudsman.

(4) Submissions on Bills

The lack of a systematic approach ensured the consistent application of the provisions of the Ombudsman Act and the official information legislation to newly established government bodies, whether at the central or local level. In the absence of any alternative mechanism, it was imperative to monitor all legislation as it is introduced into the House of Representatives in an endeavor to ensure that the appropriate steps in respect of any proposals impugne on jurisdiction of Ombudsman, by making submissions either to the relevant Select Committee or to the Minister concerned.

The submissions are made to Select Committees on the following Bills:
(4.1) Walakato Electricity Authority Bill - This Bill proposed the establishment of a new Authority and an electricity company. While the Bill proposed that the Authority would be subject to the Local Government Official Information and Meetings Act, if made no provision for it to be subject to the Ombudsmen Act. Furthermore, the Bill made no provision for an electricity company to be subject to either piece of legislation. Given that the Authority and electricity company were the clear successors to bodies which were subject to both Acts, it was submitted that the new bodies should likewise be subject to both Acts.

(4.2) New Zealand 1990 Commission Bill - This Bill as establishing the New Zealand 1990 Commission, made no provision for the Commission to be subject to either Ombudsman Act or the Official Information Act. It drew the Select Committee's attention to the criteria contained in the report of the Legislation Advisory Committee issued in August 1987 for determining those organisations to which Parliament's various accountability mechanisms should apply.

(4.3) Law Reform (Miscellaneous Provisions) Bill - It drew the Select Committee's attention to two provisions in this Bill, clause 98 which changes the name of the New Zealand Lottery Board to the New Zealand Lottery Grants
Board, and clause 179 which removes the requirement to use registered letters for the purpose of serving notices is not to be effected by delivery in person or by leaving it at the place of residence or business.

(4.4) School Trustee Bill - It drew the attention of the Select Committee to the Legislation Advisory Committee's guidelines, and to the fact that the Boards of Trustees did not appear to be subject to the Ombudsmen's jurisdiction. The Ombudsmen sent a copy of submissions to the Minister of Education, who advised that the School Trustees Bill was interim legislation and that insofar as secondary schools were concerned, the existing jurisdiction over "governing bodies of secondary schools" was sufficient to confer jurisdiction over Boards of Trustees of secondary schools. As to primary and composite schools, he advised that Boards retain their controlling powers and remain subject to the Ombudsman's jurisdiction. The Department of Education proposes to introduce an omnibus Education Bill to disestablish education boards and confer full powers on Boards of Trustees of primary and composite schools and the Minister assured that consequential amendments will be included in the Bill.

The Ombudsman made representations directly to the
(1) Local Government Amendment Bill - It drew the Minister's attention to the Legislation Advisory Committee's guidelines on organisations which should be subject to the Ombudsman's jurisdiction, and pointed out that while the Local Government Commission had not originally had executive powers but had been primarily a facilitator of a specialised nature and had not, therefore, been subject to the Ombudsman's jurisdiction, its role had changed and it was now authorised to make "decisions relating to matters of.....local Government administration and which affected members of the public". As an instrument of Government policy in the local Government field, it ought to be subject to the normal Parliamentary accountability mechanisms which apply to all other similar departments and organizations.

(ii) Finance Bill no.3- This Bill was introduced and enacted as part of the budget legislation. Accordingly, its provisions could not be monitored and commented on before it was enacted. Nevertheless, there were some provisions in the legislation relating to charging powers about which it was bound to make submissions to the Minister of Justice, because they appeared to be inconsistent with the Official Information Act and to affect adversely the Ombudsman's operations under the Ombudsman Act.
Clause 67 of the Bill amended the Transport Act 1962 by inserting a new section 199A which provides for a charge of $55 for obtaining a traffic officer accident report. Such reports are "personal information" about the people involved in the accident, and the Official Information Act concerned requires that such information be made available free of charge where the information is readily retrievable. The provision, therefore, undermined one of the basic principles of the Official Information Act.

Of even greater concern were amendments to the Conservation Act contained in clause 42 of the Bill. These amendments gave the Director-General of Conservation very wide charging powers which had the potential not only to render nugatory sections 15 and 26 of the Official Information Act and to encompass applications and requests for action by the department in carrying out its functions under the Conservation Act, but it also had the potential to enable the department to charge complaints to the office for correcting situations arising from maladministration, and to charge the Ombudsman's Office itself for costs arising in connection with investigations.

In respect of the second matter, the Minister of Justice advised that, after discussion with officials of the
Department of Conservation, it was agreed that the provisions were not intended to encompass enquiries under the Ombudsmen Act or the Official Information Act. Clarifying legislation on this point was under consideration.

(iii) Survey Amendment Bill No.2- The Ombudsman wrote to the Minister of Justice noting that clause 6 of the Bill was potentially inconsistent with the charging provisions of the Official Information Act.

(iv) Corporations (Investigations and Management) Bill-1

The Ombudsman made submissions to the Minister of Justice about clause 23(7) of this Bill which contained provisions which would override the Official Information Act and which appeared to be inconsistent with the amendments which Parliament had made to section 19 of the Ombudsmen Act in 1987. Those amendments provided expressly for the Ombudsman to have access to information which was held under an obligation of secrecy. The Associate Minister of Justice advised in reply to submissions that in view of the sensitivity of the situations envisaged by the Bill, it was deemed necessary to be able to give an unequivocal assurance of confidentiality of information. He noted that the Legislative Advisory Committee was aware of clause 23(7).
(v) Police Complaints Authority

With effect from 1 April 1989 the Police Complaints Authority Act 1989 comes into force. This legislation established a new independent body to investigate complaints involving the Police and removes from the Ombudsman's jurisdiction under the Ombudsmen Act all complaints other than those relating to the terms and conditions of service of member of the Police.

The Ombudsman's jurisdiction in respect of the investigation of complaints involving the Police has never been satisfactory and was commented on by Sir George Laking in his report on leaving office in 1984. In that report he identified changes which he believed would be required to provide the Ombudsman with effective jurisdiction to investigate complaints against the Police as follows:

(1) "The removal of any doubt as to the jurisdiction of the Ombudsman to review all complaints against the Police.

(2) An arrangement under which the Ombudsman is notified of all such complaints at the time they are made.

The provisions contained in the Police Complaints Authority Act 1988 meet the above criteria and accordingly
the Authority has a much more effective jurisdiction to deal
with complaints about Police conduct.

An examination of the statistics relating to the
Police complaints to the Ombudsman over the past five years
demonstrates clearly that the limitation imposed by section
13(7)(d) provided that the Ombudsman may not investigate
any decision, recommendation, act or omission by a member of
the Police which may be the subject of disciplinary proceed­
ings under section 33 of the Police Act unless the complaint
had first been made to a member of Police superior in rank
to the Police officer against whom the complaint was direct­
ed, and either the complaint was not investigated by the
Police or the complainant was dissatisfied with the outcome
of complaints against the Police investigation. The table
below shows the total number of complaints against the
Police under review in each of the past five years, the
number disposed of and, of those, the number which were
declined pursuant to section 13(7)(d). It also shows the
number of cases where, having taken the complaint to the
Police, the complainants referred their complaint back to
the Ombudsman for investigation.
There are no information on how many of those who were advised that they must first make their complaint to the police actually did so, and thus it is not possible to say in how many cases the police were able to satisfy the complainant. What is clear is that between 35% to 40% (52% in 1984/85) of the complaints received had to be declined because of the limitation imposed by section 13(7)(d) of the Ombudsman Act.

It must be stressed that the Police Complaints Authority Act deals with the Official information Act and affects the Police, and the Police are therefore still subject to the Ombudsman's jurisdiction.
1.) Recommendations rejected

As noted above, four recommendations during the course of the year were rejected by the department or organisation concerned.

Under the provisions of section 22 of the Ombudsman Act an organisation has not, within a reasonable period of time after receiving a recommendation, taken, step which in the opinion of the Ombudsman are adequate and appropriate, and after considering the comments (if any) made by or on behalf of the department or organisation affected, send a copy of the report and recommendations to the Prime Minister, and may thereafter make such report to the House of Representatives on the matter as he or she thinks fit. In the case of local Government organisations, the Ombudsman may pursuant to s.23 of the Act require the organisation to make copies of a summary of the report publicly available.

History shows that in the first 26 years of the office, very few recommendations have not been acted on by the department or organisation concerned. In respect of Central Government departments and organisations, the records show that recourse has been had to the provision to report to the Prime Minister on only one occasion and this
was recorded at page 10 of the Annual Report to Parliament for the year ended 31 March 1969.

A second occasion arose during the year under review. Following lengthy investigation, the Chief Ombudsman recommended to the Comptroller of Custom that an *ex gratia* payment be made to reimburse the complainant for legal expenses incurred as a direct result of exceptional and inexcusable delays on the part of the department in report on the matters raised. He concluded that investigation in January 1986 on the basis that the complaint could be sustained. Indeed, he noted to the Comptroller that "this represents one of the most serious examples of this kind of complaint..I consider that delays of such length are quite unacceptable" At this stage he understood that prosecution action was to proceed and, because the department had taken steps at the management level to address the problems which had resulted in the delay, there did not appear to be any useful recommendation which could be made.

In July 1987 the Chief Ombudsman received further representations from the complainant which disclosed that, notwithstanding the understanding in January 1986 that the Minister of Customs had instructed the department in February 1986 that the case was to be accorded urgency, the
necessary documents had not been filed by the department until December 1986. The Chief Ombudsman discussed this complaint personally with the Comptroller. In the result the court proceedings were withdrawn towards the end of 1987 and the complainant and the department made arrangements for the goods in question to be returned to the supplier, but the complainant had by this time incurred considerable expenses which he believed should be met by the department. The Chief Ombudsman concluded that there was a strong case for the department meeting those costs which could be attributed directly to the delays on the part of the department in prosecuting the complainant and he recommended that it do so. The Comptroller did not accept the recommendation, neither did the Minister, whose consent was required to the ex gratia payment. (S7)

Given the particular circumstances of the case, the Chief Ombudsman decided he should refer the matter to the Deputy Prime Minister, to whom the Prime Minister has delegated his responsibilities under the Ombudsmen Act. As a result, the recommendation was reviewed and an ex gratia payment made to the complainant. This result enhances the value of the Prime Ministerial review which is provided for in the Ombudsman Act as one of the Ombudsmen's last resort mechanism.
The second case related to a recommendation which the late Lester Castle had made to the Police in February 1986, but which had not been implemented at the time of his death in November 1986. Mr. Castle had formed the opinion at the conclusion of an investigation that there had been an apparent breach of Regulation 33 of the Police Regulations 1959 and he recommended that the Police send an apology to the complainant in respect of that breach. The final opinion was not available to the Police until May 1989. On the basis of that opinion, Mr. Castle's recommendation was not accepted. As the office of the Ombudsman is a personal one and the recommendation in question was that of a former Ombudsman, there was no effective action which could be taken.

The other two recommendations involved local organisations. In one case the Ombudsman formed the provisional view, which was communicated to the body concerned, that a complaint about its decision to refuse to meet a claim for losses could be sustained, and that, subject to any comments which the body might make which would cause the personal view to be revised, she proposed to recommend that the complainant receive a payment of approximately $5,000. In its reply, the body advised the Ombudsman that, having considered the report, it had resolved not to accept the recommendation.
Bearing in mind that the Ombudsman had in fact been expecting to receive comments to enable her to form a final opinion and make such recommendation as might logically flow such an opinion, she sought clarification as to the basis on which it had made its resolution. From the additional material supplied it was apparent that the principal administrative officer had, in referring the provisional report to the body, recommended that it offers to make an ex gratia payment in settlement of the claim. However, it had declined to give effect to that recommendation.

In effect, the Committee had short circuited the normal procedural steps followed by an Ombudsman to meet the requirements of section 18(3) of the Act which provide that where it appears that there may be sufficient grounds for making a report or recommendation which may adversely affect any organisation or person, that organisation or person must be given an opportunity to be heard. However, it was clear that the body in question had an opportunity to consider not only the Ombudsman's draft report which set out the grounds upon which the provisional view had been formed, but it had also had a report and recommendation from its own principal administrative officer. Having considered that material it had resolved not to make any payment to the complainant. The
Ombudsman therefore concluded that the matter had been taken as far as it could, bearing in mind that an Ombudsman has no jurisdiction under the Ombudsman Act to investigate the decision of the body as a whole. It was also felt that the particular circumstances of the case did not warrant the publication of a summary of a report.

The fourth recommendation which was rejected arose from an investigation of a complaint that an authority had destroyed the complainant’s Weimaraner dog unlawfully. The Ombudsman concluded that the complaint could be sustained. The Ombudsman therefore recommended that the Authority negotiate an ex gratia payment with the dog owner. The Ombudsman also recommended that steps be taken to ensure that the legislative requirements relating to the destruction of dogs were complied with in future. While the Authority accepted the second recommendation, it declined to give effect to the first on the ground that he complied with, in future to prove ownership of the dog which had been destroyed. Consideration was given to require the Authority to make a summary of the report and findings available publicly, but it was decided instead to refer the complainant to the provisions of the Disputes Tribunals Act 1988.
One further instance occurred in which a department purported to reject a recommendation by the Ombudsman. The case concerned a Deputy Court Registrar. He submitted a report pursuant to section 100 of the Summary Proceedings Act 1975 (in itself a procedural error as this must be done under the Crimes Act 1961) which resulted in a warrant of commitment of non-payment being issued. This was served on the complainant and he was committed to pay on that day.

The Ombudsman formed the opinion in the course of her investigation that the report was deficient in not advising of matters within the Registrar’s knowledge and questionable in that it incorporated statements about the complainant unsubstantiated either in whole or in part by the facts, the most serious of which was the allegation that the complainant had failed to comply with the terms of reparation order.

At the conclusion of her investigation the Ombudsman formed the view that a serious abuse had occurred but the evidence was not such that she felt compelled under section 18(6) of the Ombudsman Act to refer the matter to the appropriate authority (at that time, the State Services Commission). She therefore recommended that the Deputy Registrar be strongly censured and a reference to the com-
plaint and the findings of the investigation be recorded on her personal file, and that the Deputy Registrar issue a written apology. After some time had elapsed, in which the department canvassed the views of the Deputy Registrar’s solicitor, the Secretary for justice advised that the Ombudsman’s recommendations would not be implemented. However, he attached to this advice a letter addressed to the Deputy Registrar and to be placed on his personal file which censured him for failing to meet the standard on his care expected of him in the very respects identified in the investigation.

**Delays**

A number of investigations involving the Department of Justice gave rise to delays which were considered by the Ombudsman to be unreasonable.

In one case a complainant requested access to personal information held about him in the form of a search warrant and supporting documents. Access was declined because in August 1986 the Official Assignee had obtained an order from the High Court that pending determination by the Court of an application by the Official Assignee on the question of his right to object to the complainant’s request, the documents were not to be inspected without the
leave of the Court, As the matter was to be determined by the Court at an early date, the investigation was discontinued.

Proceedings were filed by the Official Assignee in September 1986. However, in June 1987 the department advised that the proceedings had been discontinued in May, but did not say whether, at the same time, the Court had rescinded the order of August 1986. Unless and until that was done, the documents were still subject to the order and clarification sought from the department in July. The department referred the matter to Counsel who had acted for it, but, despite considerable correspondence and discussions with officials, it was not until December that the matter was clarified and the department instructed Counsel to seek to have the order removed. Enquiries made in March and April 1988 as to progress, disclosed that no progress had been made because Counsel for the department had been awaiting written confirmation of the oral instructions to proceed and the department had though written confirmation was unnecessary. Eventually the order was revoked in December 1988, and the complainant was able to see the information he had requested in August 1986.
As a result of the Court of Appeal decisions in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, there appears little likelihood of a similar order being made in future.

In another case involving the administrative procedures of the Companies Office, there was a delay of 10 months by the department in responding to a number of queries which arose in the course of the investigation.

Similar delays were experienced in another instance involving both the Ministry of Agriculture and Fisheries and the Crown Law Office. In December 1986 the Chief Ombudsman issued a report sustaining a complaint against the Ministry but making no recommendation as he envisaged that the issues of liability and quantum would ultimately result in litigation. It was nevertheless his assumption that the report would form the basis of negotiation between the complainant and the Ministry. The request was made in late July 1988. The matter was briefed by the Crown Law Office to a private barrister. The opinion itself had not been provided, despite the urging of this office, as on 31 March 1989.

Delays of the magnitude are quite unacceptable. Not only do the delay of the Ombudsmen's efforts to dis-
charge effectively and efficiently their statutory functions, but they also add to the level of the complainant's dissatisfaction with the department or organisation concerned. It is therefore hoped that Chief Executives will institute appropriate administrative procedures which will ensure that they and their department or organisation deal effectively and efficiently with representations, whether they be from an Ombudsman or directly from an individual or group of individuals who feel they have a legitimate grievance about the actions of the department or organisation concerned.

**Judicial Review**

The Court of Appeal delivered its judgement in the "Police briefs" case on 11 November 1988, bringing to an end a matter which had its origin in July 1983. Soon after the Official information Act came into force. The decision of the Court has major implications for criminal practice.

In March 1989 a former inmate, whose request for access to his police file had been refused in 1985, commenced proceedings for judicial review in respect of both the Police decision on his request and the subsequent investigation by the then Chief Ombudsman. It is not anticipated that the office will need to play a major part in these
Following a long running series of investigations and reviews involving the overseas investment Commission, culminating in a recommendation by the Ombudsman in respect of the Commission's ability to charge a fee for the supply of information about overseas investment application, notice was given in March that the Commission intended to seek judicial review of the Ombudsman's opinion. It is hoped that the case, if and when it is heard, will result in useful judicial interpretation on the charging provisions of both Acts.

Vetoes

Despite a steady number of recommendation on the release of official information under the Official Information Act, and two such recommendations under the Local Government Official Information and Meetings Act, there was no exercise of the veto power under either Act during the reporting year. A smaller number of recommendations were also made in respect of personal information, all of these were accepted.
Use of the Act by Opposition Member of Parliament

The year saw a sharp increase in the use of the Official Information Act by Members of Parliament and the Opposition Research Unit; 59 complaints compared with 22 for the previous year.

Traditionally an Opposition Party has had available two sources for securing information from the Government: questions in the House and participation in Select Committees of the House.

The Act provides no impediment to the members of the Opposition using it. Parliament set no restrictions on requests, nor did it impose a requirement that a requester gave reasons for seeking information. Section 12 is therefore available to the Opposition to use in the same way as any other person or organisation.

Department of Social Welfare

A steady increase in the number and complexity of cases involving the Department of Social Welfare has been noted, with 45 complaints as compared with 19 the previous year.
The benefits area has been generating a large number of complaints from individuals who have been assessed as liable parents, who have requested access to information on which the department's decision to grant a Domestic Purposes Benefit to their partner was based. Several of these cases have highlighted the difficulties involved in striking the correct balance between the privacy interest of the beneficiary and the legal right of the liable parent to information about himself, information which in most cases was supplied to the department by the beneficiary during the application process. One such case led to the Ombudsman's decision to investigate, on her own motion under the Ombudsman Act, the department's procedure for assessing and recording information supplied by beneficiaries in support of applications. That investigation was ongoing at the end of the reporting year.

Complaints have also been received in the welfare area from persons who have been accused of physically or sexually abusing their children and who have been denied access to the details of or evidence relating to the allegations. Such complaints inevitably arise from a highly charged situation in which the interests of the child, the family, and the alleged abuser need to be carefully balanced. An overlap between the Ombudsman's jurisdiction under
the Official Information Act and the Ombudsmen Act frequently arises if the complaint relates to the department's procedures for investigation as well as the refusal of access to information. Each complaint therefore needs to be carefully assessed to ascertain which jurisdiction offers the best means of addressing the concerns that have been raised.

All these complaints have shown the department to be facing extremely demanding issues under the Official Information Act. The need for careful practices to be observed in relation to the collection and use (including disclosure) of personal information is evident from the investigation that have been undertaken.

In general, the year's experience has confirmed that initial impression, but there have been some problem areas.

First, as with the Department of Social Welfare, difficulties have emerged in cases where parents have requested access to information about themselves and their children in circumstances where a conflict of interest may exist between the parent and child. Although seen most clearly in cases where there are allegations of child
abuse, difficulties may arise in any situation where the records contain information on the parent-child relationships, supplies either by the child or by other parties.

If the information sought is in form of medical records, such as records of therapy sessions, then a request by a non custodial parent may be declined under section 62 of the Hospitals Act 1957 (section 50 of the Area Health Boards Act 1963) which operates as secrecy provision overriding the Official Information Act. However, where the request is made by a parent who has retained the guardianship of the children, that parent has power to consent to the release of the children’s medical records under the Hospitals Act or area Health Boards Act. In these cases there may be some very difficult balances to strike between the interests of a child who is entitled to privacy and confidentiality in his or her dealings with medical staff, and the interests of a parent who may know that he or she has been the subject of allegations but yet cannot relate them without some knowledge of the nature of the allegations and the manner in which they were made.

Where the information held by the Board is not in the form of medical records it will be subject to the Official Information Act. In a number of cases, however, the
question of whether a record is a "medical record" has been very difficult to determine, and this has give rise to problems of interpretation.

The second problem which has arisen from investigations into Hospital Board or Area Health Board complaints is more a matter of Board administration. Normally it can find the senior administrative staff have a good understanding of the provisions of the Act. However, requests for medical information are more often made by a patient or a relative of a patient direct to the doctor involved in the treatment. Even in organisations where there has been a directive that refusals of information should be made only by senior staff with a knowledge of the Act, it can be seen that medical staff refuse to release information "because it is not in the interests of information" and failing to inform the requester of the right to seek an investigation and review by an Ombudsman. While it may be that those directly involved in the treatment of a patient are best placed to form an opinion on the interests of the patient.\(^{58}\).

**Consultants Reports on Personnel Appointments**

A trend has been developing amongst public bodies to employ consultants to interview applicants for a job and
to advise the organisation as to their suitability. The more the consultants become involved in the actual decision-making process, the more they expect to have to disclose information.

Section 27(1)(c) of the Official Information Act and 26 (1)(c) of the Local Government Official Information Act recognise circumstances where personal information may be protected, where evaluative or opinion material has been provided in respect of an appointment matter. Such information is protected where it has been supplied as a result of an express or implied promise of confidentiality. The sections are phrased in non-mandatory terms; information "may" be withheld.

In one case investigated recently, it was necessary to determine whether it was reasonable to an organisation to have relied on section 26(1)(c) of the Local Government Official Information and Meetings Act to withhold the personnel consultants' report, in the light of the requesters' right of access to personal information (section 23). The requester, at the time the investigation was commenced, had not been given any information at all about the reasons for his non-appointment.
Section 22 of the Act required that he will be given, on request, a written statement of the findings on material issues of fact, a reference to the information on which the findings were based, and the reasons for the decision in question. When the requirements of section 22 were pointed out to the organisation, it gave the requester a statement of reasons. This enabled the Chief Ombudsman to conclude that it was reasonable for the organisation to rely on section 26(1)(c) to withhold the consultant's report in the absence of reasons for the decision itself, however, it was likely that the report would have had to be made available as a means of explaining the decision.

The case highlighted the issue that if organisation delegate any part of their own decision-making process to consultants, the consultants' reports must be subject to a greater amount of disclosure under the Act than if the consultants merely advise on the appointment process. Where the report forms only part of the process, in most cases it will be properly protected by the withholding provisions.

Privacy; Correction of Personnel Information

Since last year's initiatives by the Information Authority (recommending amending of the Official Information
Act to enact rules governing the collection, use and storage of personal information) and the Department of Justice (publishing an Options Paper on the protection of data privacy), there has, as yet, been no move to widen statutory protection in the area of personal privacy.

Privacy is a very difficult area, mainly because it is so subjective but also because of the competing interests involved. For example, where a person has requested access to information which is suspected to be inaccurate or incomplete and misleading, access should ordinarily be given so that the right to seek correction of the information may be exercised. However, if the information has been provided by another individual and relates equally to both persons, e.g. a welfare report, then simplistic notions of information privacy are inadequate since the privacy of both individuals is at issue. An extremely difficult balance has to be struck between the requesters' legal right of access (which is the section 26 of the Official Information Act), and the privacy based interest of another person, who has provided personal information to the department, in controlling that information. In such cases the inevitable consequence of protecting one individual's privacy is the infringement of another individual's privacy. In Ombudsman's view, the issue posed by the Act, namely whether "disclo-
sure of the information would involve the unwarranted disclosure of the affairs of another person or of a deceased person must be considered pragmatically in light of all the circumstances in which the information has come to be held and used by the department or organisation concerned.(59)

Privacy issues are also involved in the perennial problem of determining the manner in which correction of personal information can be achieved. Most requesters want documents destroyed or information deleted as a means of correcting inaccurate or misleading information, but in most cases this is unacceptable to departments or organisations. The competing claims are difficult and sometimes impossible to resolve. However, increasing public awareness of information privacy principles has been helpful; in balancing a department's legitimate need to hold information about individuals, to enable it effectively to carry out its statutory function, relevant, up to date, complete and used only for a purpose consistent with that for which it was originally collected. Again, each case must be considered on its merits as the balance will inevitably vary in different circumstances.

What must be specified is the information that is required. Commonly this is done by reference to a particular
document, for example, a departmental report on a specified subject. However, this need not be the case. Provided what is required is clear, a request may be stated in other ways, for example, in the form of a question. The purpose of the "due particularity" requirement is to enable the recipient to enable a decision to be made on the request (i.e. whether the request is to be granted, refused or transferred).

Lack of particularity cannot, therefore, be used as a means for refusing a request which is for a large amount of specified information. Where such a request is made, the legislation contains appropriate case where the information requested cannot be made available without substantial collection or research.

Particular attention should be drawn to the charging provision in section 15. The Government Guidelines on Charging for the Official Information Act provide guidance on how the discretion to charge should be exercised. Consistent with the Guidelines, requesters who knowingly request access to large amounts of information should expect, in today's economic climate, to be charged for it. Because a reply to a question would involve an expression of opinion; for example, seeking the departmental view on a specified
topic. Whether the Act applies here is determined by asking whether the department holds the information needed to answer the question. If for example, the department has reported to its Minister on the topic in question, express its views, then it holds "official information" relevant to the request. If, on the other hand, the repress relates to something in respect of which no information is held (either in the sense of being known or in the sense of being recorded), then the Act does not require an opinion to be expressed (thus creating official information) for the purpose of a reply.

Delay Complaints

Delay complaints continue to account for a significant proportion of the complaints received. Although this year's figures contain complaints under the Local Government official information and Meetings Act, delay appears to be a greater problem for central rather than for local government.

Both Acts provide that failure to respond to a request within the 20 working day time limit is deemed to be a refusal of the request. The initial procedure adopted when such delay complaints are received is for enquiries to be made informally with the organisation to which the request
was made. This usually establishes whether the request has been received, whether it has been actioned and if not, why not, and when an answer can be expected. Many complaints are resolved by this practical means and no formal investigation needs to be undertaken. However, it is of concern that, but for the fact that the office was asked to intervene, many requesters would have waited longer for a reply.

The stretched resources of departments, and the difficulties which this causes in dealing with requests promptly, have been noted in previous reports. Even allowing for these problems, procedures need to be put in place to ensure that time limits are complied with. Such procedures have been found to be lacking with a number of departments and organisations. Where problems have been identified as a result of specific complaints, assistance has been provided, for example in the case of the Department of Maori Affairs, to enable adequate procedures and instructions to be developed.

Ministers, departments and organisations have now become more accustomed to the use of time limits for the provision of information to the Ombudsmen for review purposes. A total of 541 requirements for information were made by the Office during the year, of which replies were received
on time in all but 53 cases

As with last year, there have not been any case where there has been need to report a default to the Prime Minister (though this has been considered once or twice). The list of those not observing the notification process in this year’s report is also smaller than last year. It does not include defaults of a purely technical nature (for example a letter posted within the 20 working day period which arrived after the period had expired, or cases in which a misunderstanding arose as to the nature of the requirement that was made). In cases where defaults occurred the organisation was asked for comments which were considered before deciding whether to list the default in the Annual Report. It should be noted that, even of the organisations listed co-operation has not been lacking in other cases. Also, a number of the bodies listed have taken positive steps, following their default, to improve their procedures for handling Ombudsman correspondence.

Examples of information made available as a Result of the Review Process

- Identity of the external assessor of a thesis for a master’s degree.
- Summary of correspondence held by a local au-
- Authority in respect of a neighbour dispute.
- Maximum salaries for all designated positions within a local authority.
- Information about the value placed on particular assets transferred by the crown to a state-owned enterprise.
- Agendas for meetings of the Pesticides Board.
- List of earthquake ratings on Government buildings.
- Report to the Minister of Maori Affairs on voting irregularities in a Trust Board election.
- Recommendation to the Minister of Health by the Food Standards Committee concerning margarine and butter

Public Reports

Two reports were published during the year pursuant to the Ombudsmen's Rules; the first related to an investigation under the Ombudsmen Act by the Ombudsman into complaints about the enrollment scheme for the 1989 intake at Wellington College; the second was the report of the investigation by the Chief Ombudsman.
ORGANISATIONAL STRUCTURE

The implementation of Government's financial management reform programme will have impact on this office because it is subject to the same budgetary requirements as Government departments. The strict application of those requirements, particularly the level of financial reporting the Chief Ombudsman now has, the added responsibility of negotiating salaries and terms of conditions of service for staff, following the introduction of the State Sector Act.

In December 1988 the Chief Ombudsman concluded a wage settlement with staff based on the prevailing average of 4 percent. The increase was paid out on a flat rate of $24.45 per week to all staff earning less than $35,767.00 per annum. Those earning in excess of that figure received a 3.5% increase. This agreement runs until 10 November 1989.

The office has a small and very lean administrative structure. The First Assistant is the principal administrative officer responsible to the Chief Ombudsman for the overall management of the office both professionally and administratively. The Administration Officer is responsible, with the help of an Administrative Assistant, for the day to day administration of the Wellington Office including all records, statistical information, and incoming and outgoing
correspondence. That officer also processes the accounts and staff salaries and produces the annual statistical information for all the offices. Each Ombudsman has a secretary, and a Senior Typist together with three typists and a receptionist typist to undertake the work of the 14 investigating officers and the administration officer. The Auckland and Christchurch offices are each staffed by three investigating officers, a clerk typist and a receptionist typist.

Each investigating officer is assigned specific cases on which he or she works directly to the Ombudsman responsible for the investigation. There is no hierarchy in the accepted sense. The direct working relationship between investigating officer and Ombudsman is important because it enables the Ombudsman to direct personally the course of each investigation, and it enhances the level of satisfaction for the investigating officer.

In addition to investigative duties, investigating staff also carry a share of the educational public relations responsibilities of the office. There is no separate unit to carry out those responsibilities and investigating staff undertake a variety of speaking engagements, including talks to schools, polytechnic and university courses; maintain links with organisations such as Citizens Advice Bureau;
and are responsible for the publicity associated with clinics. Each investigating officer has a caseload of anything between 34 and 45 cases at one time, which requires a high level of output throughout to avoid a growing backlog.

Process of investigations is monitored regularly by each Ombudsman. Monthly lists of outstanding cases are produced, and at the beginning of each month each investigating officer reports on each case where action is required by the Ombudsman but the investigating officer has been unable to progress the case for more than 10 working days. This enables problems to be identified at an early stage and appropriate action taken. It also identifies when the workload in the office has reached the point where additional staff are required. The office this year has improved significantly the production of the work and avoided the need to increase the typing establishment.

**OUTPUT**

The output of the office is the efficient and effective investigation and satisfactory resolution of citizens’ grievances about the administrative acts and decisions of central, regional and local Government departments and organisations. The investigations are conducted by the Ombudsman under the Ombudsmen Act, the Official Informa-
tion Act and the Local Government Information and Meetings Act. All expenditures incurred by the office is related to the discharge of those functions. A breakdown of the expenditure incurred by the office has no income producing activities and no debtors. Creditors are paid upon receipt of accounts. The assets of the office consist of office furniture, most of which have been in the office since 1976, and equipment, most of which is not of recent origin.

To achieve its output the office must have:
- adequately trained and motivated staff;
- an organisational structure which enables the Ombudsmen to discharge their functions efficiently and effectively;
- adequate financial resources to meet the costs incurred in the discharge of these functions.

OUTCOMES

In vesting the responsibility for the investigation of citizens' complaints in the Ombudsmen as offices of Parliament, Parliament is seeking the following outcomes:
1. The independent and impartial investigation of complaints from individuals who fell aggrieved by the actions of Government at central and local level, resulting in the satisfactory resolution of those
grievances either by-
(a) persuading the department or organisation concerned that remedial action is called for; or 
(b) providing the complainant with a satisfactory explanation as to why the complaint cannot be sustained.

2. In this regard, information contained in the Ombudsmen's Annual Reports Compendia of Case Notes and public reports can be used by public administrators as training resources.

3. Enhanced public confidence in Government administration at all levels as a result of those investigations where the Ombudsman is able to provide information and explanations which give the complainant an understanding of why a particular decision or action has been taken or done. Again the published reports of Ombudsmen assist the public to understand how Government administration operates.

Ombudsman in Australia

Like the Commonwealth itself, the constitutional foundations of the Commonwealth countries have an identity as incontrovertible as it is indefinable. At least that is true of the senior members and seems to be so generally. The pessimist may see both Commonwealth and constitutional premises going the way of the Cheshire cat. But certainly
the political landscape will for a long time to come be dominated by the pervasive smile.

Various lists of the distinctive elements common to the constitutions of the Commonwealth can be plausibly urged. Making no pretence to be exhaustive or definitive, it is submitted that three grand concepts or catch phrases that would regularly appear are "parliamentary supremacy", "ministerial responsibility", and "the rule of law". Whatever their content all three have a formal popular appeal which no innovation, however attractive, can successfully challenge. Yet it is hard to see how the Ombudsman can occasionally avoid challenging some and quite probably all of them, if he is to preserve the sturdy independence which has been his Scandinavian strength. His essential function, a roving Commission to articulate authoritative judgements about frictions between the operating mechanisms of the state and individuals, runs afoul of basic presuppositions implicit in each of these Constitutional axioms.

Parliamentary Supremacy

Once a directive is attributed to Parliament, the doctrine that emerged in Great Britain and Australia which has been taken over in other Commonwealth countries (subject in federal systems to being *intra vires* whatever legisla-
ture, central or constituent. is involved) is that its command prevails and nothing else matters.

Ombudsman and parliamentary supremacy might exist in perfect harmony, for by definition they could never work at cross purposes. But equally the bureaucracy would always be doing just what Parliament would have it do and there would be no occasion for the public to supervise it, except indirectly by supervising Parliament. The difficulty is in identifying Parliament's directive. No doubt a formal reconciliation of the Ombudsman and parliamentary supremacy could, and would, be formulated by making the Ombudsman's judgements yield no explicit parliamentary disavowal but, when they're not so diavowed, by supposing them to manifest and implement the legislative will. Although by such a process courts callous to consequences have insisted on an artificial construction and have thus ignobly foisted on the legislature the blame for particularly wooden decisions, the divinity with both hedge about a judge likely will not accrue to the new-fangled Ombudsman, beyond perhaps a brief honeymoon period. It may be doubted that Parliament, people, or courts would respect a comparably cavalier attitude on his part as to what Parliament was being supreme about.
In practice, aside from the rare malversations in the nature of *détournements de pouvoirs* for which potential controls already exist, charges of administrative irregularly arise as to matters where the administrators profess to be complying with their legislative mandates. Much of the Ombudsman's work would be deciding to interpret Parliament's manifestations of will in a way other than the operating departments and officials had done. One may assume perhaps that the particular parliamentary majority instituting the office meant him to do so. But what of successor Parliaments which might be more concerned with effectuating substantive programs. They surely cannot be restrained from whittling down the Ombudsman's dominance. At the very least his status would need to be entrenched by some freeze clause like that in the Australian Bill of Rights excluding any diminution of his powers by later legislation "unless it is expressly declared by the Act"—and it has been questioned whether even by such procedural impediments a Parliament can hobble its successors.

The Rule of Law

The notion of "the Rule of Law" in its primitive Diceyan simplicity vanished even before its sponsors, as he himself recognized. Its current use in some quarters as a rhetorical shorthand for the reign of the "good men" has no
pretence to Commonwealth constitutional standing. But there is woven into it a conviction as to the role and status of the courts. Whatever offence other emissaries of empire may have given, "British justice" was generally admired and lingers as a residue throughout the Commonwealth - sometimes more obviously in its ceremonials than in any other way. True, there has been no theory of "judicial supremacy" corresponding to that in the United States and indeed its rejection is corollary of parliamentary supremacy. But there has been a popular acquiescence in the temperamental and intellectual qualifications of judges and in the fitness of their established procedures for selecting what claims by subjects deserve recognition and according that recognition by calling the favoured claims "rights".

The intricate array of prerogative writs with statutory supplementation, by means of which the courts call in question administrative action, has reserved to the courts an effect although clearly not an efficient control over administrative conduct. Attitudes throughout the Commonwealth are strongly conditioned in favour of this system of court control. Even the civil servants concur in, may, actually reveres judicial supervision of administrative performance, kissing the hand that emits them. If this supervision were regularly and fully exercised, any other,
including that of an Ombudsman, would be almost redundant. But the fortuitous way cases get before courts makes its exercise highly irregular. Indeed the existing limitation of available judicial manpower really permits of nothing else.

It would be unthinkable under the constitutional assumptions that the Ombudsman's views would prevail against, granted that they might influence, those of judges, about the administrative behaviour they do examine. In case of a clash, he must expect to find himself simply another bureaucrat open to the same certioraris and declaratory orders as the functionaries over whom he rides hard. The judicial emasculation of the private clauses solemnly pronounced by Parliament, which were designed to exclude the courts from the review of certain decisions, ought to be sufficient warning that this will be so.

But it seems to be contemplated that the primary activity of the Ombudsman will be in respect to matters never coming to court, either because they fall in areas where judges have indicated they do not wish to become involved or because the matter just happen not to be litigated. Here no overt clash with the judiciary would arise. In a country the size of a typical Commonwealth member could an Ombudsman feasibly fill the gaps arising from randomness
of judicial supervision. Supposing he could, his conclusions would perforce have an ambiguous status, since he could not hope they would be taken as authoritatively settling legal rights and duties, that being ultimately a judge’s function. Moreover, he would need to be constantly circumspect to refrain from considering anything likely to attract the future attention of a court, at the risk of finding himself cut down to size. One remembers what happened to his predecessor, the medieval Chancellor, when he also presumed as keeper of the King’s conscience to undertake an active supervision. An Ombudsman shrunk down to an ‘odd-jobs man’ doing a clean-up operation on administrative action or inaction too trivial or too sensitive for a court to review could peacefully co-exist with the courts. But one who gave signs of becoming truly effective in monitoring administration would, by threatening to challenge the judicial establishment as a power center, run afoul of the rule of law.

Ministerial Responsibility

The constitutional postulate of “ministerial responsibility” is the greatest stumbling block. With it the Ombudsman in anything like his classical form seems to be in grave and necessary conflict.
To whom if anybody a Minister is responsible is not clear. What he is responsible for is the administrative performance of the department entrusted to him and the acts and omissions of all its personnel in that context. 'The King can do no wrong' only on condition that the Minister does every wrong, answering for all maladministration within the ambit of his authority. The Ombudsman would partially relieve him from this onerous liability by ascribing fault to the individual at fault—a fair-seeming proposition but one which could occasion changes of unforeseeable consequences in the internal climate of departments and thereby in cabinet government generally. Aside from the confusion sometimes present as to the extent and nature of the Minister's personal involvement is subordiantes's projects, the major flaw might often be the structural arrangements for delegation and communication within a department—how shall responsibility for hidden defects there be assigned. Operations of and personal authorities have been criticised as intrusions on central budgetary the particular responsibility of operating departments. Interventions of an Ombudsman censuring things done or left undone would almost certainly be deemed aggravated assaults.

Neither the Franks Committees nor the "Justice" report ventured to propose arrangements which would trench
on ministerial responsibility, the latter even explicitly recognizing that the Ombudsman model would have to be modified pro tanto. It resolves nothing to define that responsibility as relating mainly to policy formation, for policy is characteristically formed by a course of conduct, by the ongoing flow of departmental performance. Solemn formal declaration are more obviously but no more essentially policy forming than are routine disposition. Their total impact may even be slighter. The Minister may indeed be jolled into tolerating Ombudsman castigation of his personnel but with serious risk if harm to the institutional web of delegation, communication and confidence without which no department can do its job. Perhaps an independent auditor of line performance to advise "management", i.e. the Minister, of the adequacy of the system of internal controls might have his place.

The Opposition, moreover, would almost certainly have fewer occasions for initiative. It is sometimes overlooked that a visible Opposition is as integral a part of a functioning Parliamentary system as is a Government. The contemporary view of the primary mission of a legislature as being the ventilation of information and opinion on issues of public concern implies an effective Opposition with a significant function. This implication seems to be confirmed
in federal countries of the Commonwealth by the legislature of some states and provinces where the pitiful Opposition representation, a symptom of public apathy, indicates that the parliamentary system has partly failed. The danger of debilitation of the Opposition is thus a further aspect of inconsistency between the Ombudsman and the organic devices of parliamentary Government.

**General Feature of Australian Ombudsman**

Australia has also opted for the Ombudsman system. Being a federation, Australia has two tier Ombudsman system: practically, each state has its own separate Ombudsman and there is the Ombudsman system at the Centre. The Commonwealth Ombudsman system was established by the Ombudsman Act, 1976. The 1976 Australian Act has been amended several times, the last Amendment Act having been passed in 1983. Most of the provisions in the Australian Act correspond with the New Zealand Act.(62)

The Ombudsman system consists of the following:

(a) a Commonwealth Ombudsman;
(b) 3 Deputy Commonwealth Ombudsman and (c) a Defence Force Ombudsman. The Commonwealth Ombudsman also acts as the Defence Force Ombudsman. The Ombudsman (including the Commonwealth Ombudsman and the Deputy Commonwealth Ombudsman) hold office for seven years.
and is eligible for re-appointment. He is appointed by the Governor-General and he retires at the age of 65 years. To ensure his independence, he cannot be removed from his office except on an address by two Houses of Parliament praying his removal on the ground of misbehaviour or physical or mental incapacity. Thus, the Ombudsman in Australia is an executive Government appoint and Parliament plays no role in his appointment. The Ombudsman has jurisdiction to investigate complaints against action taken by several major government departments and prescribed authorities. The Ombudsman's primary function is to investigate, either on a complaint or suo motu, into a "matter of administration" taken by a department or a prescribed authority. "Taking of action" includes a reference to-(a) the making of a decision, or recommendation or the formulation of a proposal; and (b) failure or refusal to take any action. Thus the positive "taking of action" includes the negative "failing to take action". Ombudsman also has power to certify that there has been an unreasonable delay in the taking of a decision. This amounts to a decision not to do the thing or act concerned and the interested person then becomes entitled to seek review of that action.

OMBUDSMAN AND CENTRAL VIGILANCE COMMISSION

Several types of action fall outside the Ombuds-
man's jurisdiction, e.g. he cannot investigate into an action taken by a Minister. The Act does not define a "matter of administration" into which the Ombudsman can enquire "not only because of the difficulty of so doing, but also by reason of a definition resulting in the establishment of doubtful dichotomies, for example, as between a matter of administration and a matter of policy." Thus, Ombudsman has flexibility and he can take a wider view of his functions. He can investigate matter arising from business activities of governmental bodies within his jurisdiction.

The Ombudsman may not investigate a complaint which is frivolous or vexatious or has not been made in good faith, or where the complainant became aware of the action complained of more than 12 months before making complaint to the Ombudsman. The complainant should have sufficient interest in the subject-matter of the complaint. The Ombudsman does not investigate a complaint where the complainant has a right of access to a court or tribunal unless he is of the opinion, that in all the circumstances of the case, the failure to exercise the right is not unreasonable. Also, the complainant should seek to have his complaint resolved by the concerned authority before coming to the Ombudsman.
Both the Ombudsman and the department concerned can refer to the Federal Court for determination, any question relating to the exercise of a power of function by the Ombudsman. Thus any doubt about the jurisdiction or power of the Ombudsman can be resolved judicially.

Like the British Act, the Australian Act does not use the term "maladministration". But, like the New Zealand Act, it lays down a catalogue of circumstances in which the Ombudsman may consider an administrative action to be defective. The crucial provision is section 15. The Ombudsman has to look for the following faults: that the action (action means decision, recommendation, act or failure or recommendation)(i) appears to have been contrary to law; (ii) is unreasonable, unjust, oppressive, or improperly discriminatory; (iii) is in accordance with the rule of law, a provision of an enactment or a practice, but the rule, provision or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory;(iv) is based either wholly or partly on a mistake of law or of fact: or (v) is otherwise, in all circumstances, wrong. The Ombudsman is not to canvass the merits of an administrative action where there is no element of maladministration, but the power in category (v) appears to be wide enough to allow the Ombudsman to canvass the merits of decision in the course of a decision of reach-
ing a conclusion that the action was wrong. Category(ii) authorises the Ombudsman to condemn an action unreasonable. The concept of "unreasonableness" here appears to be broader than the judicial view thereof. The Ombudsman applies an objective standard of reasonableness to the conduct in question. The Ombudsman can also find that a discretionary power has been exercised for an improper purpose or on irrelevant grounds. Where the action complained of involved a decision to exercise a discretionary power in a particular manner or not to exercise it at all, the Ombudsman may find that irrelevant considerations were taken into account or that reason should have been given for taking or not taking the decision, but no reasons were given.

The Ombudsman has no power to set aside a decision of an administrator, nor can he substitute his own decision for that of the decision maker. He may suggest any of the following remedial actions:(i) the defective action should be referred to appropriate authority for further consideration;(ii) some particular action should be taken to testify, mitigate or alter the effects of the defective decision:(iii) a decision should be cancelled or varied:(iv) a rule of law provision of an enactment or practice on which a defective decision was based should be altered:(v) reasons should have been but were not give for a decision to
which the section applies: or (vi) some other thing should be done in relation to a defective decision. The Ombudsman gives reasons for his opinions. Even the Ombudsman in investigating action taken under a statutory discretionary power, may require the department to refer a specified question relating to the taking of that action or exercising the power to the Administrative Appeals Tribunal. If so, reference has to be made and the tribunal then gives an advisory opinion on that question.

The functions of the Ombudsman do not end at seeking the resolution of a complaint as an end in itself. A complaint may indicate a defective administrative practice or procedure. Investigation of a complaint may reveal that though a practice or procedure is not in itself defective, there is, nevertheless, room for improvement with a view to achieve a higher level of departmental efficiency and to avoid similar complaints in future. "The Ombudsman's operations should at all times be of assistance to good management." The Ombudsman can also take a critical view of the law under which administrative action complained of has been taken. The Ombudsman thus enjoys a very wide jurisdiction to investigate official administrative action with a view to help a citizen. If a department does not take action as recommended by the Ombudsman within a reasonable time, he
can report to the Prime Minister. In addition, he may also make a special report to the Houses of Parliament. This is the ultimate means of making the Ombudsman’s role defective.

The Ombudsman has to make an annual report to the Parliament of his operations, and may, from time to time, make reports to Parliament during parts of a year.

The Act provides for the appointment of a Deputy Ombudsman (Defence Force) to whom the Commonwealth Ombudsman makes an extensive delegation of his powers.

The Commonwealth Ombudsman also has functions under the Complaints (Australian Federal Police) Act, 1981. Complaints against the police can be made to the Ombudsman. Most of these complaints relate to individual behaviour of members of the Australian Police Force. The Commonwealth Ombudsman also has functions under the Freedom of Information Act 1982. The Act accords to the Commonwealth Ombudsman a review role firstly in entertaining complaints about an agency’s delay in dealing with a request for documents. The Act also explicitly states that the investigative powers of the Commonwealth Ombudsman apply fully to complaints made about an agency’s decision under the Act, e.g. to refuse producing a document.
The Commonwealth Ombudsman receives quite a large number of complaints. During 1982-83 his office received 2887 written and 10451 oral complaints making a total of 1338 complaints were resolved partially or totally in favour of the complainants. During the first six years of the operation of this office, over 66,000 persons sought assistance from him.

A large number of cases were completed without the Ombudsman resorting to the investigation. In evaluating the work, number of complaints and that he provides very useful assistance to ordinary citizens who are in conflict with the administration are significant. His activities have led to several procedural reforms within the administrative structure.

The Australian Prime Minister has said that the institution of Ombudsman has helped the Government administration to be "responsible" adaptive and sensitive" to the needs of the citizens. According to the Prime Minister, the institution has neither come the way of ministerial responsibility nor has prejudiced in any way the role of the members of Parliament.
Chapter III
References, Notes

2. See the Constitutional safeguards in the respective Constitutions.
3. Supra note 1. p. 11
5. Ibid
6. Frank Committee Report. *Comd 218 Para 15*
7. Ibid Para 10
There were some dissatisfaction that this wide field of Public administration has not been subjected to examination from this point of view and in 1960, Justice the British section of the International Commission of Jurists initiated and inquiry into this matter and submitted its report in 1961.
10. *The Citizen and the Administration* opp.cit p. 32
opp. cit. p. 65

12. Parliamentary Commissioner Act 1967. Sec. 5(1)

13. Ibid Sec. 1 (3)


17. Parliamentary Commission Act 1967, Sec. 5(1)

18. Sec. 5(1)

19. Sec 12(3)

20. Re Fletcher's Application (1920) 2. All.ER 517 H.L.


22. Statutory Instruments 1918 S. 12(1).


27. Cohen, "The Parliamentary Commissioner and the "Mr. Filter" (1972) Public Law, p. 204.


35. The Health Service Commissioner’s Annual Report for 1979-80, HC 650, para 22.
37. Investigation of Health Service complaints is more time consuming than they are made to the Parliamentary Commissioner because of the more extensive interviewing involved.


59. Carol Harrow "Ombudsman in Search of Role", (1978) 41