Derrick Gerard Thambyah

The Ombudsmen and The Education Department

Research Paper for Administrative/Constitutional Law

LL.M. (Laws501)

Law Faculty
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THE OMBUDSMEN AND THE EDUCATION DEPARTMENT

SECTION 1

1. Introduction

This paper endeavours to see the way in which the New Zealand Ombudsmen deal with complaints lodged against the Education Department in accordance with the Ombudsmen Act of 1975. It is hoped that this analysis may shed some light as to how the Ombudsman grapples with other complaints against other government departments, agencies and local authorities, mutatis mutandis.

A study has thus been made of the important complaints made to the Ombudsmen relating to the actions of the Education Department as reported in the annual reports of the Chief Ombudsman from 1970 to 1979. It is hoped that this may provide the reader with a fair picture of complaint handling by the Ombudsmen. It must be recognised from the outset that since the Ombudsman institution is a highly personal set up, there is no standardised procedure by which complainants or departments are dealt with by Ombudsmen. In fact the Ombudsmen have strongly resisted any attempt to formalise their procedure in their dealings with complainants or departments. Analysis has therefore been restricted as to how the Wellington Office of the Ombudsman deals with grievances from the public. Usually the initial examination is whether the Ombudsman has jurisdiction to handle the complaint or not.

Prior to the above examination, I propose to briefly look at the history of the Ombudsmen in New Zealand. This shall then be followed by an investigation of the question as to whether there is a need for an Ombudsman in New Zealand.

In the concluding part of my paper the effectiveness of the Ombudmen in curbing administrative excesses is appraised, followed finally by recommendations so as to make the Ombudsmen a more effective institution within our constitutional framework.

2. The History of the Ombudsman

The spread of the Ombudsmen institution to New Zealand was in a large measure prompted by an awareness of the effectiveness of Denmark's first Ombudsman, Professor Hurwitz, after his appointment in 1955. The idea was given further impetus with the United Nations seminar on the Judical and Other Remedies against the Illegal Exercise or Abuse of Administrative Authority in Kandy, Ceylon, in 1959. Although Sir Guy Powles has been quoted as saying that the scheme in New Zealand is a native one, there is little doubt that the scheme in New Zealand is based on the Denmark organisation. In fact, the word Ombudsman

is a Swedish word which denotes agent or representative of the people or a group of people.[1]

Today, the Office of the Ombudsman has spread from the Scandanavian countries[2] from which it originated to other parts of the world, especially to those countries which share a common law tradition. New Zealand was the first common law country in which the Scandanavian institution was first established.

The history of the Ombudsmen in New Zealand began in 1960, when the National Party, which was in opposition at this time, proposed the establishment of a Citizens' Appeal Authority to provide the citizen with an independent review of administrative decisions. When the National Party were elected back into power in the election held that year, the Justice Department was given the task to draw up plans and submit a report on the Government's proposals.

In the report which followed, the Department recommended to the Government the establishment of the Ombudsman (Parliamentary Commissioner) in accordance with the institution already set up in Denmark. The Department's view was that the person who held the office should have wide powers to investigate, report and recommend to Parliament on the workings of the administration. The Department pointed out to Government that there would be no great obstacle in setting up the office here. It was made clear that the Ombudsman would not be a political appointment or have any political clout. The appointee, it was pointed out, would be basically an administrative officer with administrative powers rather than political powers. The only sanction at his disposal to ensure fair and effective administration would be the power of publicity. It was also felt by the Department that any person who was appointed to the office would be one who held a good standing in society and who would be able to exercise his judgement objectively and wisely.[3] The main difficulty which confronted the Department was the extent of the jurisdiction to be conferred on the Ombudsman, which basically boiled down to whether he should have powers over Ministers.

The Government was favourable to the idea, and in March 1961 the Minister of Justice gave the "go ahead" to the Department to draft legislation for the

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1. Donald C. Rowat, The Ombudsman Plan, McClelland and Steward Ltd (1973), p.2.
2. The institution was first set up in Sweden in 1809, then spread to Finland in 1919, to Denmark in 1955, and later adopted in Norway and New Zealand in 1962.
3. For a good introduction on the development of the Ombudsman in New Zealand, see John L. Robson, The Ombudsman in New Zealand, Occasional Papers in Criminology No.11, ISSN 0110-1773, Victoria University of Wellington, 1979, pp.1-6.

establishment of the office in New Zealand. The draft legislation which ensued was basically modelled on the Danish model of 1954.

The bill when introduced in Parliament did not receive a great deal of discussion. There were some criticisms - that the bill did not go far enough and that too much regard was being paid to secrecy. The Labour Party, which was in opposition at this time, felt that there was no need for the institution in New Zealand.

The Government did not attempt to pass the bill that year, but let it lapse. The main purpose of the Government in introducing the bill was to see how the public would react to it.

After much public and Cabinet debate, a modified bill was re-introduced in Parliament in 1962. This bill was received with greater enthusiasm than the first. After it had gone through the various Parliamentary processes, the bill received the Governor-General's assent on 7th September 1962, and became law. Sir Guy Powles, New Zealand's High Commissioner to India (1960-1962), was appointed the first Ombudsman. He was a suitable person, having been a lawyer, soldier, administrator and diplomat.[4]

In 1968 the Government extended the jurisdiction of the Ombudsman. While the 1962 Act gave the Ombudsman the power to investigate the activities of Government departments named in a schedule annexed to the Act, the 1968 extension empowered him to inquire into the activities of hospital and education boards. However, the actions of teachers, doctors and dentists were excluded so far as their professional judgement was involved.

Because the Ombudsman system proved quite successful, even wider powers were granted to the Ombudsman in 1975. A new Act which consolidated and amended the 1962 legislation, called the Ombudsmen Act 1975, was passed by Parliament. The major amendment to the 1962 legislation was the extension of the jurisdiction of the Ombudsmen to local authorities. Other amendments were the inclusion of a proviso to subsection 7(a) of section 13 which allowed the Ombudsmen to investigate a complaint notwithstanding that a right of appeal, review or objection on the merits of the case were available to the complainant to a court or tribunal; the tenure of the Ombudsmen was extended from three to five years;[5] the Prime Minister was given the power to request the Ombudsman to investigate

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4. New Zealand Parliamentary Debates (Vol.331), p.1908.
5. Ombudsmen Act 1975, section 5(1).

any matter with the approval of the Chief Ombudsman;[6] the term Ombudsmen was used in the statute for the first time;[7] the two dollar fee for the lodging of a complaint with the Ombudsmen was abolished; and an additional Ombudsman was appointed under section 3(1) and a temporary Ombudsman was appointed under section 8, making the present number of Ombudsmen working in New Zealand three. The Act also sets out in Schedules I, II and III the various departments and authorities whose decisions can be investigated by the Ombudsmen. All in all there are about 94 departments and quasi-government organisations which come within the Ombudsmen's jurisdiction. The extension of the Act was a realisation by the Government that the administrative activities of local authority officials could be just as draconian as those of central government officials.

The extension of the Ombudsman's jurisdiction also saw an increase of the Ombudsman's staff to sixteen personnel. Two regional offices, one in Auckland and the other in Christchurch, were established so as to deal with local complaints more effectively. An Ombudsman was made in charge of the regional office in Auckland, and both the regional offices in Auckland and Christchurch had a senior investigating officer, two investigating officers and supporting staff, like typist.

3. The Administration

The Whyatt Committee in the United Kingdom noted that because of the "existence of a great bureaucracy, there are inevitably occasions, not insignificant in number, when through error or indifference, injustice is done - or appears to be done."[8]

In today's modern state, the Government has grown very powerful, both in the areas in which it operates and in the machinery it has at its disposal for the proper discharge of its functions. This is especially true, since the great leap forward after the Second World War, when government realised that they had to provide for the needs and aspirations of its people. This led governments to take a greater interest in the day to day lives of the people, with a concomitant restriction on the individual's rights, liberties and freedoms. In New Zealand this increased involvement by Government in the provision of goods and services to satisfy the desires and hopes of its people led to the formation of the welfare state. In earlier times, when societies were not that complex and the Government still maintained a distance from the domain of the individual, the judiciary was in general sufficient to protect the citizen from illegal interference by the

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6. ibid. section 13(5).
7. ibid. section 3(1).
8. Whyatt Committee, The Citizen and the Administration - A Report by Justice (Stevens and Sons Ltd) (1961).

administration. The advent of the welfare state changed all this. It meant that both the legislature and the judiciary could not hope to control the expanded role of the executive or the administration in the areas under its operation. This has therefore posed a serious threat to our system of parliamentary democracy. The tremendous size of the Government has created a fear in people's minds that very soon it may result in a society where Government is not controlled by its elected representatives in Parliament but by an unaccountable bureaucracy.

As Webb points out, the "increased state activity has meant that the legislature cannot cope, or expect to be able to legislate for every eventuality. Consequently it has been necessary to give administration the power to legislate as well as to carry legislation into everyday operation. And it is largely by means of delegation, in particular delegation of discretionary authority, that such a function is achieved by administration."[9] It is this discretionary authority that has made the traditional tool of justice, the judiciary, less effective than before to protect the individual against either maladministration or abuse of power by the administration, although in recent years there has been a re-awakening by the judiciary in New Zealand in their traditional role. In any case, the passive role that the judiciary adopted for such a long time helped to give rise to a situation where the executive grew more dominant than the legislature. The situation has not even improved today, but has only grown worse. There is therefore a pressing need, especially in a welfare state, to provide the individual with sufficient safeguards against the discretionary power of the Government.

The problem is basically one of control- the control of the bureaucracy and making it accountable to the people. As things stand at the moment, control of the administration is very difficult because of its closed set-up. The problem could be solved if there was more open government and the public had access to official information. This could enable the citizen to readily evaluate the quality of his government. At the present time, a great deal of official information is shielded from public scrutiny, and this has left in the public the impression that the administration is ineffectual. A direct result of this impression can be traced to the fact that very little information is available about Government activity or its role in society.

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9. Richard John Webb, The Need for An Ombudsman, LL.M Thesis, Victoria University of Wellington, (1965), p.5.

As the administration has expanded, the number of decisions taken within departments has grown correspondingly, without any participation or evaluation by the public as to whether an action, or conversely inaction, by the departments is justified. Like all typical welfare states, the situation in New Zealand is reaching a stage where all important decisions which affect the citizen are being taken by the central administration.

Although it is possible to recognise the difficulties and dangers inherent when an administration has wide discretionary powers, it has to be recognised that the establishment of the welfare state was brought about by the consent of the people, as expressed through the democratic process. A demand for greater goods and services can only be met by Government if it had a bigger and larger administration at its disposal.

According to Weber, the only way decisions can be taken quickly and efficiently is if organisations are structured into a bureaucracy.[10] However, speed and efficiency are not synonymous with fairness, and what the public demands and expects is that governmental work be organised efficiently, speedily and with paramount regard to justice and equity. This model of Weber worked reasonably satisfactorily before the advent of the welfare state, but in today's modern and highly sophisticated society, where an ever increasing number of decisions have to be made with speed and equity, the model has become somewhat antiquated.

The problem with the bureaucracy in modern society is manifold. Because major decisions are taken at the top hierarchy of the bureaucracy, all decisions of importance have to be sent to the top before a final judgement is reached. Hence, more and more time is needed before the bureaucracy can come to an informed decision. Since Government activity is parcelled out to different departments, a major decision by one department can sometimes affect other departments. This, therefore, means that discussion and negotiation is needed with the other affected departments before a decision can finally be arrived at. This long complex procedure in the decision-making process of the bureaucracy has meant that this system of organisation has become bogged down with delays and red-tape. It also shows that it does not lead to the most efficient method of government.

Another adverse characteristic of an enlarged bureaucracy is the impersonalised manner in which decisions are made; usually decisions are arrived at without any regard being paid to the human element it will involve. Although such decision-

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10. M. Weber, The Theory of Social and Economic Organisation (ed. Talcott Parsons, trans. Henderson; Oxford University Press) (1947), p.329.

making can be said to be objective, in the sense that it is without any prejudice or bias, it, however, tends to overlook the individual case where such a decision may work unjustly. Such a system of decision-making, to cover the general run of cases, is inevitable in an organisation where because of the pressure of work there is little time to attend to the myraid of individual cases.

With a vast bureaucracy too, the citizen is excluded from the decision-making process. If open government is to become a reality in New Zealand, then an attempt has to be made to bring the public within the decision-making process. This means than that the public should have a say in the direction the Government takes.

There have been certain forceful reasons put forward by the bureaucracy as to why the public should be excluded from the decision-making process. One of the arguments put forward is that a greater say by the public would lead to a cautious and inefficient administration, due to the fact that the administration would have to explain its every move. Instead, the bureaucracy have asserted that the public should have faith in the integrity of the civil service and the checks and balances built into the system, which ensures that decisions are not taken arbitrarily but after careful consideration of each case.

Another popular argument among the bureaucrats is that non-participation by the public in the decision-making process, although it may work unjustly in the individual case, is for the benefit of the greater public good, as this allows the administration to function without pressure placed upon it from any particular group. For instance, they claim that if the Education Department wants to settle a dispute it may consider that this could best be achieved if it was done without publicity or pressure from any other group.

Because of the vast growth in the welfare state, and consequently the number of decisions that have to be made, and which are taken at different levels of the bureaucracy, it has become increasingly difficult to either control the administration or the decisions that are made.

The citizen has therefore many complaints against the administration. The reasons for the complaints can be basically put down to the fact of the lack of opportunities available to the common man to pursue avenues of redress either through Parliament, their elected representatives, the courts, the administrative tribunals, the press, or even through the administration itself. The very size of some departments with their varied functions and responsibilities contributes to the remoteness and inaccessibility of the bureaucratic officials from the ordinary man. There is therefore no personal touch between the administrator and the administrated. Sir Guy Powles, New Zealand's first Ombudsman,

noted the common errors committed by the administration are:

"(i) failure to determine relevant issues.

(ii) failure to obtain accurate and complete relevant information.

(iii) failure to consult affected parties.

(iv) failure to apply relevant information properly to relevant issues.

(v) failure to inform affected parties of decisions accurately and adequately.

(vi) failure to act in appropriate time.

(vii) failure to be prepared to revise decisions or actions which have been taken.

(viii) failure to act with appropriate demeanor and courtesy."[11]

These failures therefore give rise to a system of decision-making by the administration which gives the impression that the administration has no regard or consideration to the individual, despite even the best intentions of the officials who make these decisions.

The citizen is therefore placed in a position where he is at the mercy of the omnipresent and impersonal administration.

Many of these common errors committed by the administration could, of course, be eradicated if there were proper controls over it or if the citizen had the right channels of appeal so as to obtain redress against the errors committed by the administration. At present, however, there is inadequate control over the administration so that the citizen is left virtually helpless against any maladministration or abuse of power by the administration.

It will therefore be appropriate at this point to see what sorts of control there are over the administration.

SECTION 2

4. Controls

The primary manner in which Parliament controls the activities of the Education Department and all other Government departments is through the amount of finance which is made available to it. Hence, although the Education Department has a lot of power delegated to it to carry out its functions and the policies of the Government, Parliament controls the kind of activities it can actually undertake by holding a reasonably tight control over the finances that are available to it.

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11. Commonwealth Law Bulletin, Vol.6, No.2, April 1980, p.674.

The precise mechanics of the control are to require the Education Department, or any other department for that matter, to present Parliament with its annual expenditure, which the Department proposes to spend for the year, through the Government's annual estimates.[12] Once these annual estimates are before Parliament, they are available for public scrutiny and examination. Even though Parliament may approve the Education Department's, or any other departments', expenditure for the year, the Department does not have an automatic right to the money allocated to it. It must still obtain Cabinet's approval to spend the money on its specific projects, unless Cabinet has delegated the power to grant financial approval to other persons or bodies.[13]

Usually, if the project involves financial outlay, Cabinet requires that a Treasury report be obtained. A favourable Treasury report usually guarantees that the project would be approved by Cabinet, while an unfavourable report may mean that the chances of success are slim. Furthermore, the Controller and Auditor-General has the power to inspect the accounts of the Department to ensure that its expenditure is in proper order.[14]

Hence it can be seen that although the Education Department has enormous power, these powers can come to naught if the Department has no finances to back it.

The Education Department, like other departments, is not, however, totally dependent on Cabinet for its finances. Cabinet has, in regards to some financial matters, delegated considerable discretion to the permanent head to grant financial approval to departmental projects. In fact, as the Treasury instructions to departments show, the amount involved is quite considerable.[15]

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12. See Public Finance Act 1977, section 53(1).

13. David Preston, Government Accounting in New Zealand (Government Printer 1980), p.84.

14. Another means that Parliament uses to keep a tight control over public finance is through the Public Expenditure Committee. The Committee's job is to ensure that the appropriation made by Parliament is properly utilised by the various Government departments. An interesting point to note about the Committee is that it keeps functioning, although Parliament has gone into recess; thereby making certain that Government departments apply their funds properly.

15. Schedule to Treasury Instruction; Control of Expenditure, Authority for the Expenditure of Public Money Delegated by Cabinet on 24 January 1978 to Cabinet Committees, Ministers and Permanent Heads. However, since there is no local rating for education in New Zealand, basically all expenditure on education is from funds provided by the Government and distributed by the Department. A small amount is derived from private sources - examination fees, rents from Department lands etc., Administration of Education in New Zealand, Public Relations section, Department of Education, p.11.

Although departments may not have full control over their finances, once financial authority is granted departments usually have wide discretionary powers as to the actual manner in which Government policies, aims and objectives are implemented, within certain guidelines.

With the growing expansion of the departments, in particular the Education Department, and the vast volume of decisions that have consequently to be made, it is obvious that errors or injustices within the departments, due to maladministration or abuse of power, are bound to occur.

As K.C. Wheare points out, "Administration must not only be efficient in the sense that the objectives of the policy are securely attained without delay. It must also satisfy the general body of citizens that it is proceeding with reasonable regard to the balance between public interest which it promotes and the private interest which it disturbs".[16]

Maladministration or abuse of power can therefore be said to occur when the administration makes a decision which does not take proper account of the rights and freedoms of the individual which it disturbs or where the decision taken is completely illegal (respectively).

Maladministration and abuse of power, however, can be mitigated within the administration. People with better qualification and skill could be employed by the administration, and training in the art of management and public relation could also be provided. The only snag with this solution is the fact that it is difficult to attract the most suitable people into the administration, especially when the private sector is also vying for the skills of such calibre of people. Furthermore, there is no guarantee that more suitable candidates into the administration will completely eradicate the evils of maladministration and abuse of power.

The courts too could be granted a wider jurisdiction to combat maladministration and abuse of power than they at present possess. The shortcoming with this solution is the lack of administrative expertise[17] and antiquated procedures that the ordinary courts at present are bogged down with. Furthermore, wider powers to the court can have a negative effect on the administration. It can lead to an administration which is cautious and hesitant for fear that it may be reprimanded by the judiciary. To be an effective tool of the Government,

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16. K.C. Wheare, Maladministration and its Remedies, Hamlyn Lectures 25th Series (Stevens, 1973), p.20.

17. To overcome the administrative inexperience, an administrative division of the High Court was set up in 1968 in New Zealand so as to foster the development of administrative law by a degree of specialisation.

the administration has to be flexible and dynamic. However, care has to be taken to ensure that the administration does not become too powerful that it becomes an unruly horse which has no regard for individual rights and freedoms. What is needed is an administration which would harmonise the expanding role of Government in a welfare state with the rights of the citizen, so that a balanced administration with proper checks and balances can be developed. A system of this nature would enable the citizen to obtain administrative justice where a wrong has been committed, and at the same time provide the administration with the flexibility to perform its functions effectively.

Besides these adjustments which can be made to improve the management of the administration, there are other direct and indirect controls to which the citizen can turn to protect his fundamental rights, liberties and freedoms.

(a) Parliament

The main constitutional protection the individual has against potential arbitrary acts of the administration is Parliament; the supreme institution in New Zealand. It is only proper that it is the paramount power, considering the fact that it contains the elected representatives of our society. Looking at the history of Parliament, it will be noticed that it assumed the task of protecting the rights and freedoms of the ordinary citizen against the authority of the executive. Although Parliament is said to be supreme, the point has now been reached in our constitutional history, with the establishment of the welfare state and the consequent dominance of Cabinet, where we need to ask ourselves whether Parliament has the capacity in our modern state to control the Government or has the ability to act as an effective safeguard against maladministration or abuse of power by the administrative branch of Government.

Because of its assumed role to be the citizens' defender against the executive, Parliament, in theory, if not in practice, should be able to protect the citizen against the undemocratic actions of the administration which impinges against the liberties of the citizen. However, the adoption of the welfare state has meant that because of the greater demands made upon the state, Parliament has found it necessary to delegate part of its authority to the administration, through the executive. Delegated legislation is not necessarily bad. In fact, in our modern society, delegated legislation is not only necessary but also very desirable. Only through this manner can Parliament hope to govern the country. The only defect with this system of government is that in New Zealand once Parliament has delegated its authority to the administration, it has very little power to control the potential misuse or abuse of the power by the executive or administration. Under the Regulation Act 1936, regulations made are required to be placed before Parliament within 28 days of the next ensuing session. This

requirement is not mandatory but merely declaratory, and hence regulations made do not have to be placed before Parliament for them to become effective. It is therefore possible for a government to pass delegated legislation which interferes with the rights and freedoms of the individual and yet completely by-passes Parliament.

At the moment, the only real scrutiny of regulations is done by the Statutes Revision Committee under standing order 361. The function of this Committee is not only to look into delegated legislation but also to examine other legislation. So far as delegated legislation is concerned, the Committee can act on the initiative of the chairman of the Committee or have regulations referred to it by Members of Parliament.[18] If the Committee finds that any regulation unduly trespasses on the personal rights and liberties of the individual or makes use of unexpected or unusual powers or needs elucidation due to its form or purport they can draw Parliament's attention to it. The main drawback with this Committee is that it does not possess the power to amend any regulation it discovers to be draconian. It has only a power to report and recommend to Parliament, but no power to repeal a regulation.[19]

From this short account, it will be noticed that Parliament has very little power, having delegated its authority, to scrutinise or control the type of regulations passed.

(1) Cabinet - The advent of the party system in New Zealand has also given rise to a situation where Cabinet, because of its control of the majority party in Parliament, has now complete control over all legislation. Cabinet, by the use of strict party discipline, is now in a position to ensure that what it decides is rubber stamped by Parliament. Because of the commanding position of Cabinet, Parliament, through the individual Member of Parliament, has now reached a junction where it has lost control over the activities of the Government. The only real control that is exercised over the executive today is extra Parliamentary in nature. Only the extra Parliamentary party and to a limited extent public opinion are in any position to exert any semblance of influence over

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18. Five Members of Parliament are needed to support the motion, before the Committee would look into the regulation.

19. Although in recent years the Committee has been able to score a couple of victories, for example in the review of the Rock Lobster Regulation of 1969, Journal of the House of Representatives (1977) p.57. For a good review of this case, see Alex Frame and Robert McLuskie, Review of Regulations under Standing Orders, New Zealand Law Journal (1978), p.423.

Cabinet. Despite these and other minor limitations on Cabinet policy-making, there is no doubt that Cabinet's control over Parliament (if the realities of the constitutional controls are considered) is virtually complete.

(2) Caucus - Caucus is a well established institution within the New Zealand Parliamentary system, which wields a considerable amount of power. Although the intricate workings of caucus are shrouded in a cloud of mystery, the main function that Caucus performs is to consider proposed Government legislation, determine Government policy and formulate election manifesto.[20]

The influence that Caucus has over Cabinet or the Prime Minister is not static but varies from Caucus to Caucus and from Cabinet to Cabinet, from Prime Minister to Prime Minister and from party to party.

Before proposed legislation is introduced in the House, Caucus is usually consulted by Cabinet. Caucus may approve the legislation or approve the bill with modification or may require Cabinet to refer the bill to a Caucus committee for further consideration and debate. On certain occasions Caucus has even completely rejected a proposed legislation. Departmental officials and experts may also be called upon to Caucus committee meetings to explain the proposals of a bill.

It is difficult to determine the exact amount of influence that Caucus exerts over proposed legislation. One thing which is certain, however, is that because of Caucus close proximity with the ordinary man on the street, Cabinet now looks upon Caucus as a "sounding board" for its policies.[21]

Although the main task of Caucus is to formulate policy and examine proposed legislation, Caucus has also the potential to restrain administrative activity. "Caucus has become the critical forum where Cabinet proposals, decision and activity are questioned and debated by the governing party."[22] It is thus possible that at such meetings Ministers may be called upon to explain their department's activities. Full and frank discussions are the general rule, since the deliberations are held away from public scrutiny, unlike the debates in Parliament. Caucus, since it is conscious of retaining power for the governing party, may even criticise a Minister for the way he allows his department to be run and may even instruct him to take remedial action to correct maladministration

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20. R.S. Milne, Political Parties in New Zealand, (Oxford, Clerendon Press) (1966).

21. Because Caucus members are in close touch with their constituents they are in a position to monitor their feelings and reflect them to Cabinet.

22. E.W. Thomas, Parliamentary Control of the Administration of Central Government: Fact or Fiction?, Otago Law Review (1976), p.449.

or abuse of power within his department. Through this way, Caucus can act to check the individual minister.[23]

However, "the emphasis on party advantage which necessarily dominates all activities in Caucus, ensures that Caucus cannot be relied upon as a major source of protection for the public against the actions and decisions of the executive,"[24] or the administration.

(3) Parliamentary Committees - Parliament has in recent years tried to regain the control over legislation by the use of select and ad hoc committees.[25] To some extent Parliament has succeeded in this attempt, in the sense that it is now able, through these committees, to study and analyse proposed legislation, especially those of a non-political nature, which is likely to have scant attention paid to it in Parliament. The committees try to ensure that new legislation that is proposed to be passed does not unnecessarily impinge on the individual and that proper safeguards are provided in cases where it does conflict with the individual's existing rights and freedoms.

The only defect with these committees is that political considerations do interfere with the proper functioning of these committees.[26] Furthermore, because of the volume of legislation that has to be passed by Parliament, not all legislation comes under the effective scrutining eye of Members of Parliament, except in a very superficial way. Moreover, it would be rare for a select or ad hoc committee to consider the individual grievances of a citizen. "Indeed it would seldom be in order".[27] What is generally dealt with by these committees are matters which affect all citizens as taxpayers or as recipients of services from the administration.[28]

(4) Members of Parliament - Among the varied functions performed by Members of Parliament, one of the traditional roles which they carry out is to act as a people's watchdog. Parliament provides the Member of Parliament with an avenue where he can scrutinise proposed legislation to ensure that no draconian legislation is passed, and also acts as a forum whereby he can raise grievances and difficulties faced by his constituents due to maladministration or abuse of power by the administration.

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23. Geoffrey Palmer, Unbridled Power (Oxford University Press, 1979), p.26.
24. ibid, p.27.
25. Every year Parliament appoints select and ad hoc committees not only to look into proposed legislation but also to receive the views of interested or affected parties on proposed legislation.
26. Through its majority in these committees, the Government is able to ensure that its proposals are carried through.
27. K.C. Wheare, op. cit., p.114.
28. ibid.

Objections about maladministration and abuse of power can be raised by a Member of Parliament in Parliament on quite a few occasions. He can raise questions either in the course of a debate for Returns requesting that papers ordocuments be placed before Parliament, or when Government presents its estimates or during the debates on the annual reports by departments, or on a motion for the adjournment of the House. Besides these opportunities, the Member of Parliament can also raise matters directly with departments. These are important weapons that the Member of Parliament has to confront with maladministration or abuse of power.

Although there are restrictions on the number of questions or the chances of getting an oral reply from the minister due to the time available, questions raised by Members of Parliament are taken seriously by departments.[29]

But according to K.C. Wheare, this procedure has two inherent weaknesses. "First, the investigation is carried out by the department whose conduct is impinged and, secondly, it is based upon documents which are not available to the complainant or indeed to anyone other than the department."[30] There is therefore no machinery available to the Member of Parliament to verify the truth of the reply given by the Minister in Parliament or by the department (where the Member of Parliament had directly approached the department).

Another weakness with a Member of Parliament is that because he is elected to Parliament through the help of the party machinery, he is subject to strict party discipline. Hence, if he is a member of the governing party, he is expected to assist his Minister to defend his department against allegations of incompetency or incapacity rather than conspire his downfall and that of the party by asking questions which may put the Minister in an embarassing position in the House. Accordingly, the only criticism or questions that he will usually level against his Minister are those that do not transcend party discipline or embarass the Minister in Parliament.

Moreover, question time no longer acts as a real check on the administration. It has been turned by the Government and the Opposition as a time to debate their party politics rather than the consideration of maladministration or abuse of power by the administration, which is not of grave significance to warrant a full debate. It is therefore quite obvious that debate and question time in Parliament does not give a real opportunity to the Member of Parliament to examine the activities of departments.

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29. K.C. Wheare, op. cit., p.113.

30. ibid.

(5) Opposition - A watchful and constructive Opposition is an absolutely necessary ingredient in the successful functioning of a parliamentary democracy. It can, if it performs its questioning and scrutinising roles fittingly, act as a restraint, not only on the party in power, but also on the administration. Since public attention is focussed on Parliament during parliamentary debates, an Opposition, which is vigilant, can do a lot to help maintain the democratic process by alerting the public to maladministration or abuse of power by the Government.

A weakness with such an attention, is that it gives rise to an Opposition which criticises to make political gain rather than offer constructive alternatives. Much time is also wasted in these debates on party policy matter, in an attempt by the Opposition to discredit the Government. Hence only broad policy issues with a high political content are usually taken up by the Opposition in Parliament. Consequently, issues that deal with maladministration or abuse of power, unless they can bring political advantage, are usually overlooked by the Opposition. As Hanson and Wiseman comment, this pre-occupation with major issues make Parliament an inapt chamber for criticising trivial administrative actions.[31] Furthermore, with ministers skilled in the art of sophism, it is unlikely that much is revealed in their replies to questions. This does not allow the Opposition to get to the root cause of problems, so that the matter can be fully discussed.

Although parliamentary debates have been branded as futile by many, there is no doubt that to some extent these debates do provide a check on the administration. In fact, the fear that departmental actions may be questioned by the Opposition in Parliament, is enough for ministers to keep a close control over their departments. But there is a limit to what these debates can achieve. Since debates seem to be predominantly based on highly sensitive political issues, administrative matters which deal with individual grievances naturally tend to be by-passed. Consequently this makes the Opposition ineffective as critics of governmental maladministration.

(6) Ministers - One of the most significant means by which Parliament controls administrative action is through the notion of ministerial responsibility to Parliament. This ministerial responsibility stems from the fact that every minister is responsible to Parliament for the activities of his department. Through the minister, Parliament is therefore able to supervise the activities of Government departments. However, even though ministers are responsible for their departments, because of the pressure of work ministers have only time to

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31. Use of Committees by House of Commons, Public Law (Autumn) (1959), p.277.

see that their departments carry out the policies formulated by Cabinet. The day to day running of their departments is, in practice, left to the permanent heads.[32] But because ministers are accountable to Parliament, they do take a strong interest in the activities of their departments, to make certain that they function without giving rise to any major cause of complaint or outcry.

Although a minister will accept the administrative errors of his department, he will not accept personal blame.[33] The former power which Parliament wields to dismiss or force a minister to resign for the administrative errors of his department has today been lost, mainly because party discipline ensures that any motion of censure against a minister would not be carried through. In fact, in New Zealand's parliamentary history no minister has resigned or been dismissed through this means.[34] This in effect has made the concept of ministerial responsibility to Parliament an empty notion. It also means that there is no effective means of sanction against a minister to ensure that he prevents maladministration or abuse of power by his department.

Because the day to day running of the departments is left in the hands of permanent heads, ministers are to a large extent dependent on the departments. In some areas of administration the minister is not only dependent on the department, but is in fact controlled by it. In today's complex departmental structure, no minister can hope to master all the functions or work of his department. Unlike ministers who come and go, departments have a security of tenure which enables them to build up a mass of experience and skill to deal with the various kinds of problems that crop up. This mass of experience and skill enables departments to draw up policies or comments or recommendations on policies suggested by the minister or others. The minister who does not have the skill, training and experience of the department therefore, has to rely heavily on the department's advice. The minister is especially vulnerable if the subject consists of technical issues. In such areas the minister is even more dependent on the advice of technical experts of departments. Because the minister is usually a lay person, he is in no position to examine or evaluate the experts' advice, unless, of course, he seeks outside advice. This reliance

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32. In the Education Department, the day to day running of the Department is actually left to the four Assistant Secretaries and not the Director-General of Education - who is only responsible for the general functioning of the department.

33. E.W. Thomas, Parliamentary Control of the Administration of Central Government: Fact or Fiction?, Otago Law Review, (1976), p.443.

34. ibid.

can sometimes lead a minister to blindly follow the advice of his department and defend it in Parliament even where it is defective.

A lack of time on the minister's part, because of his heavy responsibilities, may also increase the minister's dependence on the department, and add to the influence the department has over him and in his decision making. Lack of time also prevents a minister in making every decision of the department or attending to every problem that may face the department. Lack of time also prevents any close contact between the minister and his department.[35] This therefore makes him quite remote from his department, and conversely more dependent on it for everything - from mere information to decisions on major policy matters.

From this account, it will be seen that the minister does not have complete a nd unqualified control over his ministry. Under such circumstances, even if Parliament questions a minister on the administrative actions of his department, it would be difficult for the minister to ensure that the matter is not obscured, obfuscated, excused or defended.[36]

All in all, it can therefore be concluded that Parliament has become an inefficient institution for controlling the activities of the administration or for granting redress to the individual aggrieved by the injustices of the bureaucracy.

(b) Courts

Besides Parliament there are also other institutions within the framework of our constitution to which a citizen can turn to protect his rights and freedoms against maladministration or abuse of power by the administration. One of these institutions is the courts. In fact the courts have always been regarded as the champions of the individual's rights, liberties and freedoms against the arbitrary actions of the executive, long before Parliament arrived into the picture. The courts today provide an important safeguard against the abuse of power by the administration.

The main means through which the courts control administrative action is by the use of the prerogative writs of mandamus, prohibition and certiorari, and by the use of injunction and declaratory judgement by which they can review administrative action. As Webb points out:

> "These remedies allow the courts, in different ways, to ensure that the administration only exercises authority specifically granted to it and to ensure that authority, duly granted to the administration, is exercised within the limits, and for the purposes, for which it was granted."[37]

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35. The minister is only able to see his departmental head once or twice a week.
36. E.W. Thomas, op. cit., p.448.
37. Richard J. Webb, op. cit., p.41.

In exercising their judicial review of administrative action, the courts are, however, wary to exceed what they perceive as their legitimate role within the New Zealand constitutional framework. Hence, where there is a clash between the judiciary and the executive, the judiciary are prone to back out whenever they feel that they may inadvertently trespass upon an area of activity which belongs to the executive.

Because of this cautious approach by the judiciary, certain restrictions and shortcomings have developed within the judicial process. The main shortcoming with the judiciary is that their review of administrative action is only limited to a review of the legality of the action, but does not involve an examination of the merits of the action.[38] Hence, if an administrative act, decision or recommendation involves a high policy element, the courts are especially restrained to impunge it.[39] The courts have felt that they are not the proper people to look into the merits of a decision if it concerns Government policy.

Even when review under the Judicature Amendment Act 1972 is available to the citizen to impinge an administrative action, there are certain procedural obstacles that he has to overcome before he is able to use this course of action. One of the main obstacles that the citizen has to face before he can get the courts to review an administrative action is that he must show to the court that he has "standing". Often the administration attempt to cover up their maladministration or abuse of power by disputing a complainant's right of appeal by alleging that he has no standing.

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38. Seminar on Judicial and Other Remedies Against the Illegal Use or Abuse of Administrative Authority, Kandy, Ceylon, (1959), p.8. In New Zealand maladministration can be attacked by an application for review to the Court under the Judicature Amendment Act 1972. It is by no means clear, however, whether the common law requirements for standing have been removed by Judicature Amendment Act 1972; see the case of Waikouaiti County Ratepayers and Householders Association v. Waikouaiti County [1975] 1 N.Z.L.R. 600. However, the courts interpret the concept of "jurisdictional error" and the doctrine of abuse of discretion very widely. See the cases of Anismic v. Foreign Compensation Commission [1969] 2 A.C. 147 and Padfield v. Minister of Food, Agriculture and Fisheries [1968] A.C.997 as to how the courts have interpreted these two concepts; see Damages in Administrative Law, Fourteenth Report of the Public and Administrative Law Reform Committee, Wellington, New Zealand, p.3.

39. See S.A. de Smith, Judicial Review of Administrative Action, (3rd ed., 1973), p.262.

Another restriction with which the New Zealand judiciary is burdened is the inability of the courts to strike down legislation passed by Parliament as invalid.[40] The courts in America are, however, not burdened by this restriction.

In addition to the above restriction, another major limit on the courts' power to control the administration is the prerogative that the executive enjoys on the power to pass legislations and regulations. If the Government finds that a decision of the court is unacceptable to them, they can move quickly to pass legislation to annul the decision.[41] The Government, through the legislative, is therefore able to interfere with the judicial process.

There are also other obstacles that a citizen has to face when he uses the courts to obtain redress against maladministration and abuse of power. Because of the heavy demands on the services of the court, complainants who seek the help of the court have to contend with delays in the determination of disputes. The general emphasis in most common law countries is on procedure and deliberation rather than on speed.[42]

These obstacles hamper the citizen in his search to protect his rights and freedoms and in obtaining a legal remedy against maladministration and the abuse of power by the administration. There is therefore a need to enlarge the scope of judicial review so as to enable judges to enquire into the merits of administrative acts or decisions.

(c) Administrative Tribunals

Partly to off-set the increase in the activity of state and the consequent debates between the state and the individual, and partly to lessen the burden of the work of the courts, administrative tribunals have been set up by Government to adjudicate in matters that affect the citizen, in areas where the Government has newly moved in to regulate the activity. They therefore provide the citizen with another opportunity to check maladministration and abuse of power by the administration. But unlike the judicial system which relies on procedure and formality to provide redress, the mechanics of administrative tribunals is such that it relies on less formality and procedure but speed, cheapness and simplicity, to achieve administrative justice.[43]

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40. Geoffrey Palmer, op. cit., p.118.

41. See Furmage v. Social Security Commission (unreported), Wellington Supreme Court, 12 May, 1978, M.500/77.

42. See Seminar on Judicial and Other Remedies Against the Abuse of Administrative Authority, op. cit., p.9 (hereinafter referred to as the Kandy Report).

43. ibid. p.10.

An appeal lies from the decisions of some administrative tribunals to the courts, ministers or to some other appeal authority. There are, however, some tribunals which are the final court of arbitration and from which there is no appeal to a higher authority. Whether an appeal lies to a higher authority or not, depends on the type and function of the tribunal. Usually no appeal lies from a tribunal which deals with policy consideration.[44]

The extent of the jurisdiction that the courts have over tribunals is, however, superficial in that they do not usually permit the courts to review the decisions of tribunals in regard to the merits or facts of the proceedings, but only to see that they do not act ultra vires or exceed the ambit of their jurisdiction. The rationale behind this gap in the courts' jurisdiction is that since they do not have experience or knowledge in administrative or policy matters, they do not form a suitable forum to deal with appeals from tribunals.

However, there are certain drawbacks in the tribunal system. The lack of a general code of procedure to govern the procedure of administrative tribunals can lead to injustices. Although such a system does allow for flexibility in the proceedings of each tribunal to deal with its particular subject-matter, there is a danger that the basic elements of natural justice and equity may be overlooked in the hope of achieving administrative expediency. In some administrative tribunals, because of the relaxed procedural requirement, complainants do not have a proper opportunity to present their cases or even know in advance what the case is against them, or even have a written decision with reasons given to them.[45] Accordingly, the basic standards of justice are not guaranteed to all complainants whose cases are heard in administrative tribunals.

In England the Committee on Administrative Tribunals and Enquiries, also known as the Franks Committee, which was established to look into the workings of administrative tribunals recommended that although no detailed procedure should be formulated to govern the procedure of all tribunals, individual tribunals should, however, have an orderly procedure. The Committee, among other things, also recommended that citizens should be aware of their rights, that adequate opportunity should be given to parties to present their cases, that parties be given the right to legal representation, that chairmen of

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44. No appeal lies from the Social Security Commission, Earthquake and War Damages Commission, Shops and Offices Commission Exemption Tribunal, The Prices Tribunal, Medical Advertisement Board (to name a few), cited from G.S. Orr, Report on Administrative Justice in New Zealand, (Government Printer, 1964), p.78.

45. The Citizen and Power; Administrative Tribunals; A survey by the Department of Justice (1965), pp. 31-40.

tribunals should ordinarily have legal qualifications, that appeal on a point of law should lie from a decision of a tribunal to the courts and that no statute should oust the remedies by way of certioraii, prohibition and mandamus.[46] The Committee felt that these ingredients were necessary if the decisions made by the tribunal are going to be impartial, fair and open. Because of the inadequacies of the courts and tribunals, the Public and Administrative Law Reform Committee, which was set up to look into law reform in New Zealand, recommended that an Administrative Division of the Supreme Court be set up to hear appeals from specified administrative tribunals and to "exercise the existing jurisdiction of the court in the field of administrative law".[47] The Government accepted this recommendation, and in 1968 an Administrative Division of the Supreme Court (presently known as the High Court) was established so as to foster the progressive development of administrative law by a degree of specialisation.

(d) The News Media

Another protective mechanism that is available to the aggrieved individual in times of difficulty is the news media - newspapers, television and radio. In this regard the media has often been labelled as the fourth branch of Government - an unelected opposition. In a democracy the role of the media is to investigate and research issues, to speak critically of the Government on behalf of the public and perhaps offer alternatives for future courts of action.[48]

Since television, radio and newspapers are an important source of information to most people, any administrative injustice can be made public by the press.[49] Because of the well-established democratic principles within New Zealand society, the Government is unlikely to ignore adverse publicity by the news media. The media, by publicising any maladministration or abuse of power by the administration, can thus act as an effective weapon for the public.

The media, like the other mediums open to the citizen for protection, has also certain drawbacks.

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46. Report of the Committee on Administrative Tribunals and Enquiries, Cmnd.218, (1957) (reprinted 1965), pp.91-3.

47. John L. Robson, "Ombudsman in New Zealand", Occasional Papers in Criminology No.11, Victoria University of Wellington (1979), p.2; see also Public and Administrative Law Reform Committee, Appeal from Administrative Tribunals (First Report) (1968).

48. Richard R. Falkner, The Constitutional and Political Role of the Media, Seminar paper presented on 30 July 1980 (unreported).

49. See Fitzgerald case regarding Lands Board loan, as reported in the Evening Post, Thursday, 26 June 1980.

Because of the severe time and space restrictions, a large proportion of news collected is never presented, but is by a process of selection discarded.[50] Only items of commercial value are eventually published. The news media has also to labour under certain legal restraints. The law of defamation is the primary legal restraint on the media. This is because if the media cannot prove the truth of its statements, it can be burdened with oppressive damages. Another legal restraint is contempt of court. Since the law of contempt is still vague, a considerable amount of information which is of public interest cannot be discussed by the media.

Besides these two general laws, specific legislation like the Official Secrets Act 1951 which prohibits the disclosure of official information also inhibit the media. Although the Act was passed to prevent disclosure of information which will be prejudicial to the state, the wide terms of the Act enable the administration to shield behind the Act in circumstances where it may be prejudicial to it in its disputes with the public.

As a consequence of these restrictions, the media has its limitations as a protector of the individual against administrative injustice.

In summary, it can be said that before the expansion of Government into all walks of the citizen's life, the traditional constitutional safeguards - Parliament, courts, tribunals, and the mass media - provided adequate protection for the individual against the administration. However, the expansion of the role of Government in society has meant these safeguards (which were developed at a time when Government was not committed to the welfare state) have become out-dated. Because of the shift in power from the legislature to the executive, Parliament has lost its supreme power over the activities of the administration. When the administration is attacked, Cabinet is able to use its party's majority in Parliament to fend it off. Although the individual member has power to question ministers on the running of their departments, the effectiveness that he has is limited, either because of party discipline or a lack of means to verify the truth of the explanation given by the minister. The Opposition too tends, to a large measure, to neglect administrative matters as it does not bring political advantage, as other topical issues.

Much of central Government activity too is in the hands of bureaucrats who do not have to answer to Parliament for the actions of their agencies.[51] Parliament has also no control over locally elected bodies, such as city councils,

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50. (Supra) note 55, p.2.

51. For example, the New Zealand Shipping Corporation, New Zealand Airline Corporation, the Bank of New Zealand, the Reserve Bank, and the Broadcasting Council (the list is not comprehensive).

hospital boards and education boards. Hence, mistakes or abuses by these agencies or local authorities cannot be imputed to the minister, and consequently the Government cannot be held responsible for the actions of these bodies.

The courts are also inadequate institutions to deal with administrative injustices, since much of the work done by the administration deals with policy matters, over which the courts are wary to tread on. Administrative tribunals, although they do make up for the insufficiencies of the judiciary, have certain limitations themselves. Because of their composition they tend to be biased towards the administration. Safeguards for the individual are also lacking because of their lax procedure.

These factors therefore show that the political and the legal process have minimal and quite ineffective control over the administration. There is a gap between the points where the political process is able to control the administration and judicial review is able to control the administration. This gap needs to be filled if control over the administration is to be re-established by Parliament. Thus, there is a need for some other checks and balances to be devised to properly supervise the administration and ensure that where an error has been committed it is quickly and speedily rectified.

To fill this gap, the Government introduced the institution of Ombudsman in New Zealand. As pointed out earlier in this paper, this institution was chosen because it was reasonably adaptable into the New Zealand constitutional framework, the method of presenting a complaint to the Ombudsman was simple, his investigating operation was informal, and the person holding the office was meant to be impartial and independent of the executive, the judiciary and Parliament. It was also felt by the Government that only an authority possessing all these qualities and being in a position to interpose between the minister and the department would be in a position to deal with injustices in a cheap and expeditious way.

SECTION 3

5. The Education Department

The Department of Education is one of the largest departments in New Zealand. It runs the biggest transport fleet in the country, and is also one of the largest publishers. It has in its employment nearly two thousand officers. The officers in the Department work in close association with ministers, Parliamentarian and members of the public, as well as the three hundred and fifty statutory bodies and incorporated societies which have the responsibility of controlling and managing the 3,725 schools, colleges and other agencies which

comprise the public education system.[52]

As well as the head office in Wellington, the Department has three regional offices at Auckland, Wellington and Christchurch. Each of these regional offices have a Regional Superintendent who supervises the running of the office.

(a) Structure

At the top of the Education Department stands the Minister of Education. Under the Minister comes the Permanent Head of the Department, who is the Director-General of Education. He is a public servant and is responsible for the general administration of the Department. It is his duty to ensure that Government's policy is carried out by the Department. Below the Director-General come two Assistant Directors-General, whose tasks are to assist the Director-General. The day to day running of the Department is not handled by the Director-General or the Assistant Directors-General, but by four Assistant Secretaries. They are in turn helped by thirteen Directors, whose duties are to report to the Assistant Secretaries.

It can be seen from the above account that the Department has three tiers of management: the Director-General and his deputies, the Assistant Secretaries and the Directors. "A portfolio system within the Director-General's group gives each member a specific interest in a number of key areas, so that policies, aims, objectives and administration may be kept constantly under review."[53]

"/A/t all three levels officers exercise authorities delegated to them by statute, represent the Department on the very many committees concerned with education, and provide the public with information on achievements and issues within their areas of control. Responsibilities for long term planning, economy, co-ordination, consultation and staff ceiling controls are theirs also."[54]

"The Department of Education has very wide functions that extend over all levels of education from the kindergartens to the universities and over private as well as public institution".[55] The granting of consent, approval of bursaries, approval of transfers are other aspects of the work of the Education Department.

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52. Foreword by the Director-General of Education, Directory of Organisation and Responsibilities, Department of Education, Private Bag, Wellington.

53. ibid., p.6 and 7.

54. ibid., p.7.

55. The Administration of Education in New Zealand, Public Relations Section, Department of Education, p.3.

The functions of the Department are derived from the fact that:

"(1) public education is the responsibility of central Government;

(2) its legal basis is provided in laws passed by Parliament and statutory regulations made by Order in Council;

(3) its finance is authorised by Parliament on the recommendation of the Government of the day;

(4) its administration is placed by the Education Act in the hands of a Minister of Education who is accountable, through Parliament, to the people of New Zealand."

Basically, the Department of Education acts to inform the Minister of the educational requirements of the country, and provides a means whereby Government policies regarding educational matters are expressed into "law and practice". The main task of the Department is to ensure that educational facilities and other services are available to schools, colleges and universities so as to provide for the progressive development of education in New Zealand.

(b) Functions

In detail, some of the main functions of the Education Department, are:

"(a) Planning and developing educational services in consultation with statutory and voluntary organisations;

(b) Appropriation of public money for education and responsibility for the efficient and economic use of resources;

(c) Staffing, equipping, maintenance and of upkeep of schools and other educational institutions;

(d) Preparation and administration of education building programmes and the determination of total finance for allocation to individual works, in partnership with the main controlling authorities;

(e) Recruitment, training, and re-training of teachers and the exercise of a measure of control over appointments, salaries, and the superannuation rights of teachers;

(f) Maintenance and development of school transport system;

(g) Awarding of bursaries and boarding allowances;"[56]

"(h) Controlling the correspondence school, the National Film Library, a psychological service, in-service training centres for teachers, some special schools, and certain specialist services;"[57]

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56. Directory of Organisation and Responsibilities, Department of Education, Private Bag, Wellington, p.1 and 2.

57. The Administration of Education in New Zealand, op. cit., p.5.

"(i) Publication of gazettes, circulars, magazines, news sheets, journals, bulletins, and text books for teachers and schools;"[58]

"(j) [Advise] the Government on policy matters, ranging from the care of intellectually handicapped children to the development of senior technical work, and on legislation concerned with education."[59]

The Education Department has thus very wide and varied functions. It is also a very powerful Department in that it can determine, through its advisory role to Government, the direction Government takes in educational issues. The Education Department is not the only authority which is solely responsible for education in New Zealand. In fact, the Department has to work very closely with many statutory and voluntary bodies, like the education boards, University Grants Committee, secondary school boards, primary school committees, technical institutes, teachers colleges and a large number of boards and committees appointed to advise on particular aspects of education, so as to provide help and services for the maintenance and development of the education system.

Although the Department controls the education system at the national level, district or local administration is in the hands of other bodies, such as:

"(1) Education boards and school committees for primary education;

(2) Secondary school boards for the control and managements of secondary schools;

(3) Councils for teachers colleges, technical institutes and universities; and

(4) Voluntary organisations for private schools, kindergartens and play-centres."[60]

In performing all its functions, the Department is technically accountable to the Minister to ensure that the public education system is efficiently managed. To carry out its responsibilities, the Department has a dual role: it acts as a control agency as well as an administrative arm of Government.[61]

To give some ideas as to the amount of work handled by the Department, the head office alone, on the average, handles about 1,500 written communications each day, which demands some sort of further investigation.[62]

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58. Directory of Organisation and Responsibilities, op. cit., p.2.
59. The Administration of Education in New Zealand, op. cit., p. 5-6.
60. Directory of Organisation and Responsibilities, op. cit., p. 2-3.
61. The Administration of Education in New Zealand, op. cit., p.16.
62. Foreword by Director-General of Education, Directory of Organisation and Responsibilities, op. cit.

Despite the delegated powers of the Department, in general the Education Department can only act within the limitation imposed by the Education Act 1975, which created it. In other words, it cannot act outside its jurisdiction.

Since the Education Department is a large Department, it is also one of the main departments against which allegations of maladministration and abuse of power have been made. A probable reason for this is that since it deals with one of the more important areas of Government activity, its policies and decisions affect a greater number of people than other less important departments. Although, according to the Ombudsmen Report,[63] the Education Department has a marked increase in the number of complaints registered against it, it still represents only a small fraction, considering the total amount of interaction between the Department and the public. Moreover, the Department deals with rather complicated matters of policy, and also has wide discretionary powers vested in the Director-General of Education, the Assistant Directors-General and the Assistant Secretaries. With frequent changes of policy, regulations, rules and procedures within the Department, it can interfere not only with the freedom, rights and liberties of the public but also with the teaching and student population. Frequent staff changes can lead to inexperienced personnel administering the policy of the Department.

The Education Department is a very large bureaucracy, and like all monolithic organisations, communications within the Department can be misinterpreted or misread or there may even be a lacuna in communication. This can lead to various complications, in the manner in which policy is translated, decisions made and so on. Supervision of such a large Department is also very difficult, especially when the Department offices are spread over the country, and when there are so many employees working under the Department. Consequently, maladministration and abuse of power can set in. These problems are, however, not unqiue to the Education Department, but are faced by all Government departments, agencies and local authorities.

This is where the services of the Ombudsman, who has the authority to independently review the actions of the Department, can help.

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63. Report of the Ombudsmen, 1979, p.8.

SECTION 4

6. The Ombudsmen

The Ombudsmen Act states that the Ombudsmen are officers of Parliament and commissioners for investigation.[64] By implication, this means that the Ombudsmen are neither part of the executive or the judiciary. They are appointed by the Governor-General on the recommendation of the House of Representatives. In other words, they are not appointed by the Government. Although the Government would have a major part in the selection of the Ombudsmen, it is unlikely that any person would be appointed to the position who does not have the approval of all the parties in Parliament.

The Ombudsmen hold office for a term of five years, with rights of renewal, and until their successors are appointed.[65] During their term of office, the Ombudsmen are not permitted to hold any other office or occupation without the approval of the Prime Minister. This stipulation ensures that the Ombudsmen allocate all their time for the task for which they were appointed. Any Ombudsman may resign from his office voluntarily, but has to do so on attaining the age of 72 years.[66]

The Governor-General has also the power to remove or suspend from office any Ombudsman for disability, bankruptcy, neglect of duty, or misconduct.[67] If Parliament is not sitting, any Ombudsman may be suspended by the Governor-General if it is proved that the Ombudsman has been guilty of disability, bankruptcy, neglect of duty or misconduct.[68] Any such suspension becomes inoperative beyond two months of the next ensuing Parliamentary session if Parliament does not approve the suspension. Such a clause could be liable to be abused. An unscrupulous Government which wants to stop an investigation which may prove embarrassing to it may, if the Ombudsman proves intransigent, suspend him. A more preferable solution may have been to give Parliament and no other person the right to suspend the Ombudsman or Ombudsmen. If Parliament is not sitting, then Parliament could be summoned temporarily to decide on the issue. Since the Parliament in New Zealand is not very large, it is not an impossible thing to do.

If the office of Ombudsman falls vacant when Parliament is not sitting due to the death, resignation or removal of the incumbent office holder, the vacancy

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64. Ombudsmen Act 1975, section 3(1).
65. ibid. section 5(1) and (2).
66. ibid. section 5(3).
67. ibid. section 6(1).
68. ibid. section 6(2).

can be filled by the Governor-General in Council, and whoever is appointed to the job holds office until his appointment is confirmed by Parliament.[69] If the appointment is not confirmed by Parliament within two months of the next ensuing Parliamentary session, the appointment lapses, and the position becomes vacant once again.[70]

Under the 1975 Act, if the Chief Ombudsman certifies that in his opinion an additional Ombudsman should be temporarily appointed, either during the illness or absence of any Ombudsman or for any other temporary purpose, the Governor-General may make the appointment.[71] The additional Ombudsman who is appointed for a temporary purpose cannot hold office for more than two years,[72] but may be re-appointed up to a total of five years.[73]

The Governor-General by Order in Council determines the salary for the Chief Ombudsman and the other Ombudsmen.[74] Each Ombudsman is also entitled to be paid an allowance for travelling and other expenses in accordance with the Fees and Travelling Allowances Act 1951.[75]

The Chief Ombudsman has the power to appoint his own staff to carry out the functions, duties and powers of the Ombudsmen.[76] This power to select his own staff is important to the Ombudsmen, especially if the office is to remain independent and impartial against the executive. However, the number of staff that the Chief Ombudsman can employ is determined by the Prime Minister, while their terms and conditions of appointment are decided by the Minister of Finance.[77] Although these terms seem quite straightforward, it does provide the Government with the leverage to control the effectivenesss of the Ombudsmen by the number and quality of staff they may employ. The only safeguard that the Ombudsmen have to retain their independence is the fact that their staff is not answerable to the Government, but only to them.[78]

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69. ibid. section 7(3)(a).
70. ibid. section 7(3)(b).
71. ibid. section 8(1) and (2).
72. ibid. section 8(3).
73. ibid. section 8(4).
74. ibid. section 9(1).
75. ibid. section 9(6).
76. ibid. section 11(1).
77. ibid. section 11(2) and (3).
78. They also have the power of publicity to preserve their independence.

7. Jurisdiction of the Ombudsmen

The principal function of the Ombudsmen is to investigate any decision or recommendation made to the Government or any act done or omitted relating to any administrative matter and which affects any person or persons in his or its personal capacity due to the exercise of any power or function conferred on any department, organisation or authority named in the Act, or by any officer in his capacity as such officer, employee or member.[79]

But before an Ombudsman can investigate a complaint, he has first to decide whether he has jurisdiction in the matter. As section 13, subsection (1) states, the Ombudsman can only investigate a complaint if it relates to a matter of administration. Although most complaints which are lodged at the Wellington office do relate to a matter of administration in that they relate to an administrative act, a lot of complaints still do get rejected by the Ombudsman.[80] If the act is directly due to the exercise of a professional judgement, then the act is outside the jurisdiction of the Ombudsmen. Hence, it would seem that the work performed by doctors, lawyers, dentists, teachers, accountants, architects, engineers and other professionals are generally excluded from investigation of the Ombudsmen, provided the decision, act, recommendation or omission is directly related to their professional work. The Ombudsmen Act in fact specifically provides that any action of any person who acts as a legal adviser or Crown counsel to the Crown are excluded from the Ombudsmen's jurisdiction.[81]

As Napier points out in his thesis, the Chief Ombudsman has stated that "no professional judgement can exist alone and in the abstract; it must be preceded by and followed by other acts and decisions which are not necessarily of a professional nature..... Nevertheless, he must avoid straying into the area which properly belongs to the expert."[82]

If the Ombudsmen put into practice the above interpretation of the words "relating to a matter of administration" in section 13, then it would be possible for the Ombudsmen to investigate the actions of virtually all professionals who work for Government departments, agencies and local authorities through the back door.

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79. ibid. section 13(1).
80. The reasons for this would become apparent as this paper progresses.
81. Ombudsmen Act 1975, section 13(7)(c).
82. W.G.F. Napier, "Ombudsmania Revived: The Local Government Complaints," LL.M. thesis, Victoria University of Wellington (1979), p.53 at footnote 24.

What if the action related to a matter of policy; can the Ombudsmen still investigate into the matter? In his speech given to the New Zealand Institute of County Clerks, Sir Guy Powles (New Zealand's first Ombudsman) stated that since there was nowhere in the Act where express prohibition of scrutiny of policy was made, he could assume therefore that if an act related to both policy and administration he could examine it.[83]

It would therefore seem that the New Zealand Ombudsmen are interpreting their governing Act rather liberally, unlike the United Kingdom counterpart. However, if overseas experience is anything to go by, it is unlikely the courts would accept the interpretations given by the Ombudsmen. If the cases of Booth v. Dillon (No.1) (1976) V.R., p.291; Booth v. Dillon (No.2) (1976) V.R., p.434; Booth v. Dillon (No.3) (1977) V.R., p.43; and Glenister v. Dillon (1977) V.R. 151, where the Ombudsmen's jurisdiction was in issue, are examined, it would seem that the courts place a rather more stricter interpretation on the words "relating to a matter of administration."[84] No case has arisen in New Zealand where the courts have been asked to interpret the expression. Through "careful pragmatism" the Ombudsmen have been able to produce the acceptable answers to both the complainants and the administration. (Report of the Ombudsman (1975), p.13)

Another element which has to be satisfied before a complaint can give rise to the Ombudsmen's investigation is if a decision, recommendation, act or omission complained of affects a person or body of persons in his or its personal capacity. This means that the person or body of persons who have complained to the Ombudsmen about a departmental or organisation or local authority's action must be personally affected by the action if the complaint is to give rise to the Ombudsmen's jurisdictions.

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83. Speech given to New Zealand Institute of County Clerks, 22.11.75 (unpublished); also quoted by W.G.F. Napier, ibid. p.9 at footnote 20; see also Sir Guy Powles, Aspects of the Search for Administrative Justice: with particular reference to the New Zealand Ombudsman, W. Clifford Clarke Memorial Lecture, lecture delivered under the auspices of the Canadian Institute of Public Administration (February/March 1966), p.16.

84. For a clear picture as to how the courts interpret the Ombudsmen's jurisdiction, see generally Brabyn J. article on the "Ombudsman v. the Courts", (LL.B (Hon.)) Legal Writing Requirement, Victoria University of Wellington. The cases referred to above are from the state of Victoria, Australia, where the Ombudsman legislation is drafted in slightly different terms to the Ombudsmen legislation 1975 of New Zealand. As such it is difficult to predict how a New Zealand court would decide if it is asked to determine the New Zealand Ombudsmen's jurisdiction.

A further element which has to be satisfied is that the action complained of must be against a department or organisation or local authority named in Parts I, II and III of the First Schedule to the Act. If the complaint is against any other department, organisation or authority which is not listed in the First Schedule to the Act, the Ombudsmen have no jurisdiction to deal with the matter. In the past a lot of complaints lodged at the Ombudsmen's office were rejected due to this fact. The Ombudsmen have also no jurisdiction to investigate into the running of private and public companies or into the affairs of private citizens.[85]

The table below shows the number of complaints received by the Ombudsmen from 1970 to 1979 and the number of complaints that were rejected by them as being outside their jurisdiction:

	Received	Rejected	Percentage Rejected
For the year ended 31 March 1970	759	369	48 6
For the year ended 31 March 1971	1,107	572	51.7
For the year ended 31 March 1972	1,135	587	51.7
For the year ended 31 March 1973	1,246	692	55.5
For the year ended 31 March 1974	868	492	56.7
For the year ended 31 March 1975	1,163	711	61.1
For the year ended 31 March 1976	1,315	842	64.0
For the year ended 31 March 1977	2,093	1,022	48.8
For the year ended 31 March 1978	2,010	441	21.9
For the year ended 31 March 1979	1,635	227	13.9

It will be interesting to note at this juncture that the number of complaints received by the Ombudsmen have been declining over the last couple of years. Many reasons can be attributed to this decline, but as the Ombudsmen themselves point out in their 1979 Annual Report (p.6) perhaps it can be attributed to the fact that departments have set up appeal procedures within their organisations to deal directly with complaints from the public.

The average rejection rate, it will be noticed from the above table, from 1970 to 1979 was about 47.4 percent. However, this percentage does not reveal the true picture. The graph below plots graphically the rejection rate of complaints by the Ombudsmen for the above years. It is hoped that it may elucidate the matter more clearly.

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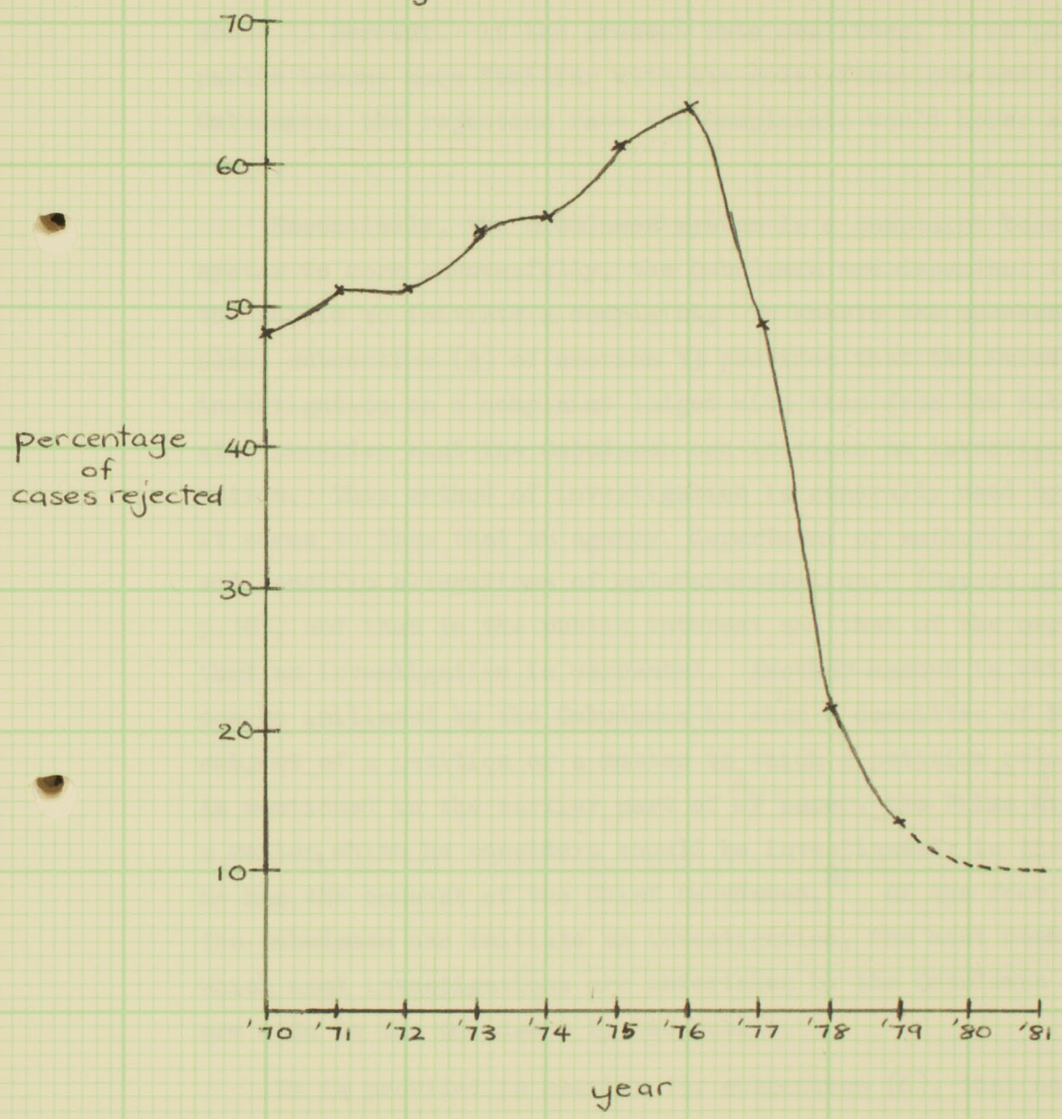
85. Although the setting up of a Commerce Ombudsman to investigate into the monopolistic practices of companies in New Zealand may be something worth considering for the protection of the consumer.

graph showing the number of complaints rejected by the Ombudsmen from 1970 – 1979



A study of the graph shows that between the years 1970-75, before the jurisdiction of the Ombudsmen was extended, the rejection rate for complaints was on the average about 56 percent. The years between 1975-77 saw a dramatic rise in the rejection rate, which climbed to a record high of nearly 65 percent in 1976 - the year when the Ombudsmen's jurisdiction was extended. The resultant confusion which this must have created in the public may have precipitated this record rejection of complaints. However, in 1978 there was an equally dramatic drop in the rejection rate to about 20 percent, with a further fall in 1979 to about 13 percent. If the present rate continues, it is possible that as the public become more familiar with the role, functions and jurisdiction of the Ombudsmen, the rejection rate for complaints would hover around the 10 percent range.

Essentially, the Ombudsmen system is a complaint based system. For the system to work successfully, the Ombudsmen are dependent to a large extent on the public to initiate a complaint. To enable the successful operation of the plan, subsection (3) of section 13 provides that the Ombudsmen can initiate an investigation on a complaint lodged with them from the public. The subsection also provides that the Ombudsmen can initiate an investigation on their own motion. This method of investigation is generally used by the Ombudsmen where it seems to them that an agency, department or authority is "subject to serious and specific allegations of maladministration," (Report of the Ombudsmen (1979), p.10), and that in the public interest and that of the organisation they feel that an investigation is warranted. Another manner in which an investigation can be initiated by the Ombudsmen is when a committee of Parliament refers a subject of a petition or a matter to which a petition relates to the Ombudsmen.[86] As mentioned in the earlier part of my paper, the Prime Minister can also refer a matter, which he considers should be investigated, to the Ombudsmen, provided he has the consent of the Chief Ombudsman.[87] Of the four methods through which the Ombudsmen can initiate an investigation, the most common method through which most investigations are undertaken by the Ombudsmen is when complaints are made to the Ombudsmen by the public.

It is provided in section 13, subsection (6), that no clause or provision in any legislation can oust the jurisdiction of the Ombudsmen even though it is provided that any such decision, recommendation, act or omission shall be final, or that no appeal, challenge or review shall be allowed. The jurisdiction of the

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86. ibid. section 13(4).

87. ibid. section 13(5).

Ombudsmen to investigate a complaint relating to an administrative action is therefore unbridled.

There are also a number of areas where the Ombudsmen have no jursidction to carry out an investigation.

The Ombudsmen have no power to commence an investigation of a complaint under an act or regulation where there is a right of objection, appeal or review available to the complainant, on the merits of the case, to the court or tribunal, whether or not that right of review, bojection or appeal has been exercised in the particular case and whether or not any time limit for the exercise of such right has expired.[88]

It would seem from the above general restriction on the Ombudsmen's jurisdiction that the intention of the legislature is to exclude the sphere of the Ombudsmen's authority in cases where the complainant has other specific remedies available to him. However, the right to object, appeal or review has to be to a court or tribunal on the merits of the case, if the Ombudsmen's jurisdiction is to be excluded. If the right object, appeal or review is therefore to so other body or authority, then the Ombudsmen have still a right to conduct an investigation.

Despite this general restriction, the proviso to section 13, subsection (7)(a), provides that the Ombudsmen may still conduct an investigation notwithstanding such a right of appeal, objection or review, if by reason of special circumstances the Ombudsmen feel that it is unreasonable to expect the complainant to resort to such a right. As Sir Guy Powles stated in relation to the 1962 Act, the Ombudsman will use his discretion and look into matters even where there is a right of review, appeal or objection to a court or tribunal, unless he can see no reason why the complainant should not use the court or tribunal to obtain his redress.[89] Usually the discretion will be exercised in favour of the complainant

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88. ibid. section 7(a).

89. Sir Guy Powles, Aspects of the Search for Administrative Justice: with particular reference to the New Zealand Ombudsman, op. cit., p.16; according to Mr Castle, the Ombudsman responsible for South Island, this section has limited relevance to local authority complaints because there are no rights of appeal to a court or statutory tribunal from decisions or recommendations from officers, committees or subcommittees of local authorities, Annual Report of the Ombudsmen (1978), p.23.

in cases where disputed questions of facts are involved or where no legal aid is available.[90] It is possible that this is how the Ombudsmen will exercise their discretion under the proviso to section 13, subsection (7)(a).

Another area where the jurisdiction of the Ombudsmen is excluded is where the act, decision, recommendation or omission is that of a person who acts as a trustee, within the meaning of the Trustee Act 1956.[91] From this it would seem that the jurisdiction of the Ombudsmen does not cover the activities of the Public Trustee.

The Ombudsmen also lack jurisdiction to investigate into any decision, recommendation, act or omission of any person who acts as a legal adviser to the Crown, or acts as a counsel for the Crown. Through this restriction, the legislature has perhaps hoped that persons who advise the Crown or act as Crown counsels would perform their tasks without the fear of knowing that their actions would be investigated by the Ombudsmen.

"Excluded from the jurisdiction of [the Ombudsmen] is any action by the Police which may be the subject of a disciplinary inquiry under section 33 of the Police Act 1958 unless the complaint relating to that action has been made to the Police and the complaint has either not been investigated by the Police or the complainant is dissatisfied with the result of that investigation."[92]

The jurisdiction of the Ombudsmen is also restricted in matters which relate to any person who is or was a member of, or provisional entrant of, the Navy, Army or Air Force so far as it relates to matters which concern the terms and condition of such member or when it concerns an order, decision, command, penalty or punishment which affects the member.[93]

These restrictions therefore ensure that the Ombudsmen do not exceed the scope of their jurisdiction and thus intrude upon areas for which they were not really intended.

If the jurisdiction of the Ombudsmen is in doubt, the Ombdusmen may apply to the Supreme Court to determine the question.[94] It is important to note here that only the Ombudsmen can take the matter up to court and no-one else if the Ombudsmen's jurisdiction is in dispute. This gives the Ombudsmen the leverage to take their matter of jurisdiction to court as and when they find it fitting

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90. ibid.

91. Ombudsmen Act 1975, section 13(7)(b).

92. John L. Robson, The Ombudsman in New Zealand, op. cit., p.13; section 13(7)(d) of the Ombudsmen Act 1975.

93. Ombudsmen Act of 1975, section 13(8).

94. ibid. section 13(9).

to do so.[95]

Besides these general restrictions on the Ombudsmen's jurisdiction, the Ombudsmen have also been given specific authority to refuse to exercise their jurisdiction in a number of circumstances:

(a) where an adequate remedy or right of appeal exist under the law or existing administrative practice, other than a right to petition Parliament;[96] or when having regard to all the circumstances, any further investigation is unnecessary;[97]

(b) where the matter complained of has been known to the complainant twelve months prior to the complaint;[98]

(c) where the subject-matter is trivial;[99]

(d) where the complaint is frivolous or vexatious or not bona fide;[100]

(e) where the complainant is not sufficiently personally affected by the subject-matter of the complaint.[101]

"In any case where an Ombudsman decides not to investigate or make further investigation of a complaint he shall inform the complainant of that decision, and shall state his reasons therefor."[102]

The Ombudsmen will usually refuse to exercise their jurisdiction under section 17(1) where the complainant has, under the law or existing administrative practice, a right of appeal to a minister, a Member of Parliament, a local authority or even a union.[103] If a department is reviewing an act, omission, recommendation or decision complained of, the Ombudsmen will also refuse to exercise their jurisdiction, unless they feel that the decision reached by the department, after the review, is unsatisfactory. The Ombudsmen generally insist that complainants exhaust their right of appeal in a department to the fullest, before they contemplate to intervene in the matter. If the complaint is in regards to the terms and conditions of employment, then the Ombudsmen will again refuse to exercise their jurisdiction if the union to which the complainant belongs can handle the matter adequately. Only when the Ombudsmen feel that it would be unreasonable to require the complainant to resort to a minister, a

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95. In the 1979 Annual Report of the Ombudsmen, the Chief Ombudsman gives an instance where his jurisdiction was challenged. However, the department which challenged his jursidiction abandoned its case after seeking legal opinion. As a result, the matter did not go to court.

96. ibid. section 17(1)(a).

97. ibid. section 17(1)(b).

98. ibid. section 17(2).

99. ibid. section 17(2)(a).

100. ibid. section 17(2)(b).

101. ibid. section 17(2)(c).

102. ibid. section 17(3).

103. W.G.F. Napier, op. cit., p.65.

Member of Parliament, a local authority or his union, will they decide to intervene on behalf ot the complainant. "The possible low chance of success of the available remedy itself does not make the remedy unreasonable."[104] The Ombudsmen find it necessary to place these restrictions on complainants, so that they can spend more time on more deserving cases, considering the limited time and staff available to them.

Under section 17(2), the Ombudsmen will generally refuse to exercise their jurisdiction where the complaint has already been redressed during the court of the investigation, where the complainant had knowledge of the complaint for more than twelve months, where the person or department complained against will be prejudiced or where the complainant has little or no personal interest in the complaint, or where the complaint is frivolous or vexatious. In the experience of the Ombudsmen, vexatious or frivolous complaints have so far been minimal.[105]

Although the Ombudsmen have the authority not to exercise their jurisdiction where the complaint is of a trivial nature, in general the Ombudsmen still investigate these matters for the simple reason that what may appear trivial may eventually turn out to be a matter of major importance.[106] According to Napier, "If the [Ombudsmen were] to undertake an investigation [in cases where there was a right of appear they] would then be making a parallel enquiry in direct conflict with the "last resort" character of the institution."[107]

A high percentage of the complaints that are made to the Ombudsmen are usually declined by them or discontinued by them after investigation on one or other of the above grounds, in section 17. Even though a considerable amount of complaints are rejected by the Ombudsmen, where possible the staff at the Wellington office usually volunteer to these complainants as to how best they could go about resolving their various problems.

Under section 15, subsection (1), Parliament can make rules to govern the workings of the Ombudsmen and may at any time in like manner revoke or vary any such rules. Under such rule-making power, Parliament can authorise the Ombudsmen to make public reports relating generally to the exercise of their functions or on any particular case or cases investigated by them, even though such reports have not been laid before Parliament.[108]

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104. ibid. p.69.
105. The Annual Report of the Ombudsmen (1978), p.23.
106. ibid.
107. W.G.F. Napier, op. cit., p.65.
108. Ombudsmen Act 1975, section 15(2); see Ombudsmen Rules 1962.

Complaints to the Ombudsmen have to be in writing.[109] At present there is no fee attached to the making of such complaints, unlike before where a fee of two dollars had to accompany the making of each complaint. The reason for the abolishment of this fee was probably to ensure that the Ombudsmen were more readily available to the public.

Complaints from persons in prison or from persons in institutions under the Mental Health Act 1911 are to be forwarded to the Ombudsmen unopened. Through this way, Parliament has hoped to protect the rights of people from these institutions who complain to the Ombudsmen without being subjugated to the fear that they will be liable to retribution from the officials who run these institutions.

8. The Investigatory Mechanics of the Ombudsmen

The Ombudsmen have deliberately tried to avoid making any rules and regulations in the conduct of their investigation, in order to make their office as accessible as possible to the public at large. The wisdom of such a philosophy is good, as the purpose of the Ombudsmen should be to determine the substance of the complaint and not whether the right procedural steps have been followed in the lodging of the complaint.

The procedure used by the Ombudsmen to deal with complaints is thorough, informal and quick. This involves the investigating officer working closely with the Ombudsmen when carrying out their enquiries.

A great deal of the work of the Ombudsmen and his staff involve personal contact, even before a written complaint is lodged and an investigation started. Often a discussion is necessary with the complainant so as to articulate a complaint in written form, which many complaints are unable to do.[110]

When a complaint is received at the Wellington office, an investigating officer deals with it; to determine whether the complaint comes within the Ombudsmen's jurisdiction. If the complaint is clearly not within the Ombudsmen's jurisdiction the complaint is rejected and the complainant is informed as to why the complaint falls outside the Ombudsmen's jurisdiction. If he thinks that the complaint falls within the Ombudsmen's jurisdiction, then he proceeds to make preliminary enquires to see whether any of the restrictions on the Ombudsmen will disqualify the complaint from being taken up by the Ombudsmen. Usually this involves a question as to whether there are any rights of objection,

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109. Ombudsmen Act 1975, section 16(1).

110. Annual Report of Ombudsmen (1979), p.13.

appeal or review to the court or tribunal. If there is any uncertainty raised by the facts of the case, the officer may contact the appropriate department concerned or the complainant to determine more facts about the complaint. Sometimes this may even involve an interview with the complainant or departmental officials, but usually it is through written communication. Usually such preliminary enquiries are necessary so as to establish the full facts of the case, because in most instances complaints are not that straightforward that a full investigation can be commenced immediately.[111]

If the preliminary enquiry reveals that the complaint falls outside the jurisdiction of the Ombudsmen or is unjustified the complaint is again rejected. The complainant is once again informed of the decision and as to the reasons for the rejection.

But if the preliminary investigation confirms that the complaint comes within the Ombudsmen's jurisdiction, the officer then sees if the complaint can be distinguished from other cases already handled by the Ombudsmen.

Only when such complaints cannot be distinguished from other cases, or where the complaint is completely novel, does the officer undertake a full investigation.

Quite a few of the complaints demand extensive investigation, but most of the complaints can be disposed of quickly. Where personal hardship is experienced the Ombudsmen and their staff attend to the complaint immediately so as to bring it to an end quickly. But if the complaint involves property rights or money, then they take their place on the list. The average time taken to dispose of a case is between 6 - 8 weeks.[112] However, some take a longer time. A main factor why some cases take a long time to be disposed of is the time taken by some departments, local authorities and agencies to furnish replies to the Ombudsmen or their staff's enquiries. Sometimes the fault may even lie with the complainant, who takes a long time to reply to the Ombudsmen's questions. Moreover, the small staff at the Wellington office (and the Auckland and Christchurch offices) also mean that the staff of the Ombudsmen are fully extended.[113] In addition to the complaints which are recorded, the staff under the Ombudsmen also attend to a lot of miscellaneous inquiries by letter, telephone and in person; many of which are outside the Ombudsmen's jurisdiction.

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111. W.G.F. Napier, op. cit., p.52.

112. Annual Report of the Ombudsmen (1970).

113. ibid.

The basic principle involved in the investigative procedure used by the Ombudsmen office in New Zealand is to invite "departments to co-operate in the investigation of complaints against themselves,"[114] unlike in the United Kingdom where the Commissioner and his staff conduct the investigation themselves by visiting the departments and examining the files. Although the procedure used by the Ombudsmen to conduct their investigations is liable to be abused by the administration, in the sense that it could leave out of their investigation evidence which may be prejudicial to them, so far such cases have been minimal.[115]

Another practice of the Ombudsmen in New Zealand is to encourage, as far as possible, direct negotiation between the complainant and department concerned, without getting too involved themselves. This therefore obviates the need to have a large staff under them, as is needed by the Commissioner in the United Kingdom.

This system of investigation used by the Ombudsmen in New Zealand can only work if the administration was run with candour and honesty, and with a sense of mission, to the people it was set up to serve.[116]

Staff at the Ombudsmen's office also make frequent trips to different parts of the country to meet with potential complainants or to provide advice to the local residents.[117] Such visits are usually publicised in advance with the help of local newspapers or radio stations. A by-product of such visits is that they enable the Ombudsmen to publicise the work they do.

As the Ombudsmen point out in their Annual Report for 1977, experience has revealed that many complaints arise out of the inadequate communication between the departments, agencies and local authorities and the individual. The Ombudsmen and their staff have therefore made it a practice to have as much personal contact as possible, by either seeing their complainants personally or visiting the place of the complaint. Through this process the Ombudsmen have tried to bridge the communication gap between the department or agency or local authority and the individual.

This communication gap, however, cannot be bridged if the Ombudsmen have no rapport with the administration. The Ombudsmen have therefore tried to keep

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114. Annual Report of the Ombudsmen (1975), p.13.

115. In any case because departmental files are made available to the Ombudsmen and their staff in New Zealand, abuse of the above kind is minimised.

116. Annual Report of the Ombudsmen (1975), p.13.

117. Annual Report of the Ombudsmen (1979), p.13; since Wellington is the capital city, most of the departmental offices are there, and the Ombudsmen or their staff are seldom required to travel outside the city for investigative purposes in respect of departmental complaints.

close liaison and consultation with departmental officials, officials of agencies and local authority officials in the hope that such a relationship will help in the resolution of disputes between the public and the administration.

If the Ombudsmen feel that a complaint comes within their jurisdiction, they can commence their investigation proper. The Ombudsmen Act 1975, section 18, subsection (1), provides that before the Ombudsmen can carry out an investigation they shall inform the departmental head of the department affected, or the principal head of the organisation affected, of their intention to make the investigation. Every investigation by the Ombudsmen is expressly stated by the Act to be conducted in private and not public.[118] Once the departmental head or the principal head of the organisation affected, as the case may be, have been informed, the Ombudsmen can carry out their investigation in any manner, as pointed out earlier, they think fit.[119] No person has a right per se to be heard by the Ombudsmen, but if the Ombudsmen are of the opinion that any report or recommendation that they may make will adversely affect any department, organisation or person, then such a department, organisation or person has to be given an opportunity to be heard.[120] The Ombudsmen may also consult with any minister at any stage of their investigation.[121] But if the minister so requests, or if an investigation deals with a recommendation made to a minister, the Ombudsmen are bound to consult with the minister after completing their investigation and before they have formed a final conclusion.[122] The Ombudsmen are under the same obligation when their investigation deals with a recommendation made to the mayor or chairman of a local authority. But in this case the Ombudsmen have a duty to consult with the mayor or chairman of the local authority concerned.[123] This is an unnecessary restriction on the Ombudsmen's powers for it provides an opportunity for indirect political pressure to be applied on the Ombudsmen by the executive.[124]

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118. Ombudsmen Act 1975, section 18(2).

119. ibid. section 18(3).

120. ibid.

121. ibid. section 18(4). Although the Ombudsmen can consult with a minister, they have no power to question a minister's decision. It is a major weakness in the New Zealand Ombudsmen's power. This means that a minister's decision, right or wrong, cannot be subject to an independent review.

122. ibid. section 18(4).

123. ibid. section 18(5).

124. On the other hand, it gives an opportunity for a decision to be altered before a recommendation stage is reached. This is particularly relevant where the minister's decision differs from department's recommendation - if so, the Ombudsmen cannot criticise the department - but must indirectly persuade the minister.

If the Ombudsmen find after their investigation that there has been a breach of duty or some misconduct on the part of any employee, they are to be referred to the appropriate authority concerned.[125]

It can therefore be seen that apart from minor restrictions on the Ombudsmen, they are free to adopt any procedure they think fit to conduct an investigation.

The Ombudsmen have also been granted certain powers so as to enable them to carry out their investigations without any hindrance. They can summon and examine on oath any officer, employee or member of any authority or department, who they feel can supply them with the requisite information, all complainants, and, with the Attorney-General's approval, any other person.[126] Crown privilege does not apply to the Ombudsmen's investigation and they can command the production of all documents which they feel is necessary to assist them in their investigation. There is an exception to this; where any person is bound to maintain secrecy due to any enactment, other than the State Services Act 1972 and the Official Secrets Act 1951. In such situations the person is not obliged to disclose any information or document if such disclosure would be prejudicial to his obligation for secrecy.[127] It is provided, however, that every person who is bound to give information to the Ombudsmen, has the same privileges in relation to the giving of information as if they were witnesses in court.[128] Any evidence given by any person is not admissible against him in any court, except in circumstances where proceedings for perjury have been instituted against him under the Crimes Act of 1961.[129] No person can be prosecuted under the Official Secrets Act 1951 or any enactment due to his compliance with any requirement of the Ombudsmen under section 19.[130] The Ombudsmen can at their discretion allow the payment of witnesses' fees, as if any person who appears before them were a witness in a court.[131]

Although the Ombudsmen can have access to a wide range of information and documents, there are certain information or documents or paper or things which are classified as non-disclosable, unless the Attorney-General approves of it by

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125. ibid. section 18(6).
126. ibid. section 19(2). This power is seldom utilised by the Ombudsmen for fear that they may turn their information investigatory procedure into an interrogation or inquisition.
127. ibid. section 19(3).
128. ibid. section 19(5).
129. ibid. section 19(6).
130. ibid. section 19(7).
131. ibid. section 19(8).

the issuing of his certificate. The instances when the certificate of the Attorney-General is needed before any of the classified information, document, paper or thing can be produced is when the disclosure of any of the above:

(a) might prejudice the security, defence or international relations of New Zealand or the investigation or detection of offences; or

(b) might involve the disclosure of Cabinet deliberations; or

(c) might involve the disclosure of Cabinet proceedings or of any proceedings of any Cabinet committee, which are of a secret or confidential nature and would be injurious to the public interest.[132]

Subject to the above limited restriction on the Ombudsmen's power of access to information, document, thing or paper, Crown privilege does not apply to any investigation or proceedings before the Ombudsmen.[133] In this respect, it will be noticed that the Ombudsmen have wider powers of access to official information than even the courts, provided the Attorney-General uses his veto powers sparingly.

In reality the Ombudsmen do not have to invoke their wide powers of investigation. In practice, because the Ombudsmen have been able to develop a close working relationship with Government departments, agencies and local authorities they have been able to gain their trust and confidence. As a result departments, agencies and local authorities are quite willing to permit the Ombudsmen or their staff to enter their premises[134] and inspect their files and documents in a spirit of goodwill and helpfulness.

Notwithstanding the fact that the Ombudsmen have access to a wide range of official information, they have to maintain secrecy in respect of all information they receive, except where disclosure is necessary to help them in their duties.

Section 21, subsection (1), provides that the Ombudsmen and their staff have to maintain secrecy in regard to all information that comes to their knowledge in the exercise of their functions. Only information which is necessary for purposes of an investigation or in order to establish the grounds for their conclusion or recommendation can be divulged by the Ombudsmen.[135] There is an

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132. ibid. section 20(1).

133. ibid. section 20(2).

134. Section 27 of the Ombudsmen Act grants power to the Ombudsmen to enter the premises of departments, agencies and local authorities to conduct their investigation. The Ombudsmen have to inform the permanent head or principal administrative officer of the department or organisation, as the case may be, of such entry. The Attorney-General can, however, exclude such entry if he considers that it may prejudice the security, defence or international relations of New Zealand.

135. Ombudsmen Act 1975, section 21(4).

exception to this power to divulge by the Ombudsmen, when the information deals with matters which may prejudice the security, defence or international relations of New Zealand or the investigation or detection of crime or the deliberations of Cabinet; in such circumstances the Ombudsmen have no power to divulge such information.[136]

In every case where an investigation has been completed by the Ombudsmen, a preliminary opinion is formed. Both parties who are involved in a complaint are informed of the preliminary decision, but only the party to whom the opinion is unfavourable is informed of the contents of the opinion, to give the party an opportunity to rebut and show cause as to why the opinion should not be maintained.[137] If no further comment is forthcoming from the party to whom the unfavourable opinion has been given, the Ombudsman then forms a final opinion. Both parties are then informed of the opinion and the reasons for the conclusion.[138]

Although the Ombudsmen can carry out an investigation, they have no power to alter any decision reached by a Government department, agency or local authority to which the complaint relates. The only power they have is to merely report and recommend on their investigation and the conclusion they have reached. Though it may be said that the power to recommend is no substitute for the authority to alter a decision, the recommendations that the Ombudsmen make and the pursuing publicity that is given to these recommendations do carry considerable weight,[139] and is usually in itself enough to exert sufficient pressure on departments, agencies and local authorities to make them change their decision or at least reach a compromise between them and the complainants.[140]

Whenever the Ombudsmen or their staff are confronted by hard cases, the problem has been solved by greater and more thorough investigation. This goes to show the dedication the Ombudsmen and their staff put into their work in order to help the citizen cope with his/her difficulties with the state machinery. Since the establishment of the Ombudsmen office the number of justified complaints has hovered around the 20 to 30 percent of the total number of complaints handled by the office each year. This percentage has remained reasonably steady, even though in some years the total number of complaints received has tended to fluctuate.

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136. ibid.

137. W.G.F. Napier, op. cit.

138. Under subsection(2) of section 24, the Ombudsmen are required by law to inform the complainant of the results of an investigation.

139. This is because no Government department, agency or local authority like to be portrayed to the public in a bad light.

140. This would become more apparent as the cases dealt with by the Ombudsmen, in regard to the Education Department, are discussed in the later part of this paper.

After making an investigation the Ombudsmen may conclude that the decision, recommendation, act or omission complained of was unfair on a number of grounds:

(a) That it is contrary to law; or

(b) that it is unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any act, regulation, or bylaw or practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or

(c) that it was based on a mistake of fact or law; or

(d) that it was wrong;[141] or

(e) that it was made in the exercise of a discretionary power used for an irrelevant or improper purpose or on the taking into account of irrelevant considerations, or that reasons for the decision should be given.[142]

Hence the type of conclusion the Ombudsmen can come to in theory are vast and flexible and can cover not only the small instances of maladministration such as delays in replying to correspondence but also major types of maladministration like errors in decision making and also instances where there have been abuses of power.

If a decision, recommendation, act or omission seem to them, after their investigation, to have adversely affected a complainant they can conclude that it was either unjust or unreasonable; if the complainant was treated differently from other persons the Ombudsmen can conclude that the complainant was treated oppressively or discriminately; if the department, agency or local authority was to make a decision, recommendation, act or omission in accordance with a law or practice the Ombudsmen can still impinge it if they feel that the decision, recommendation, act or omission was based on a misinterpretation of a law or had not taken into account all the relevant facts. Finally, the Ombudsmen can also attack a decision, recommendation, act or omission on the simple ground that it was "wrong". This is a wide-reaching word, and gives the Ombudsmen a great deal of freedom to investigate, comment and review an administrative action.

If it is a discretionary power which is what is complained against, the Ombudsmen can attack it if they find that the discretionary power has been exercised for an improper purpose or on the taking into account of irrelevant considerations.[143]

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141. Ombudsmen Act of 1975, section 22(1).

142. ibid. section 22(2).

143. It should be noted that the courts too usually strike down a discretionary power if they think it was exercised for an improper purpose or on taking into account irrelevant considerations.

The Ombudsmen can also comment on the fact that reasons should be given to the complainant on the reasons for a decision, especially in cases where no review or appeal rights are available to the complainant. As many administrative decisions interfere or are considered by many people to interfere with the citizen's rights, it should be imperative that reasons are given, so that the citizen can work out in his mind that the decisions have not been arrived at arbitrarily. If appeal or review rights are available to the citizen, it could also enable him to decide for himself the chances of his success. As the Ombudsman for South Island complaints, Mr L.J. Castle, said:

> "Reasoned opinions will encourage public confidence in the administrative process. Reasons act as a check on the exercise of discretion and will ensure that the authority has performed its function of considering relevant factors. Reasons should prevent arbitrary action. Finally the disclosure of those criteria upon which a discretion is exercised is the most valuable aspect of reasoned opinions."[144]

It can thus be seen that Parliament has given the power to the Ombudsmen to comment on every type of maladministration or abuse of power in whatever imaginable form it may manifest itself in the administration.

Although "the phrasing in section 22 is designed to be used after an Ombudsman has completed his enquiry, in practice, however, these phrases are frequently utilised at the start of or during substantive investigation."[145] According to Napier this practice is proper, as it is necessary for the Ombudsman in classifying a complaint and in bringing it within his sphere of jurisdiction to point out to the department concerned what is actually alleged by the complainant.[146]

In an indirect manner, section 22 provides the Ombudsmen with the authority to ensure that in the decision making process officials who are in control of departments, agencies and local authorities have concern and consideration for the human element it would involve. As Mr L.J. Castle points out:

> "The culture of and respect for human dignity demand from the public official a serious and profound consideration of the actual situation of his or her fellow citizen - a permanent consciousness of his fellow being. A consistent attempt must be made to approach every problem from the human angle."[147]

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144. Annual Report of the Ombudsmen 1979, p.21.
145. W.G.F. Napier, op. cit., p.113.
146. ibid.
147. Annual Report of the Ombudsmen 1979, p.21.

If the Ombudsmen come to the conclusion that the decision, recommendation, act or omission was unlawful, unreasonable, unjust, oppressive, discriminatory, based on a mistake of law or fact, wrong or if it was exercised for an improper purpose, or on the taking into account of irrelevant considerations or that reasons should be given, then they may recommend to the department, agency or authority concerned:

"(a) that the matter should be referred to the appropriate authority for further consideration; or

(b) that the omission should be rectified; or

(c) that the decision should be cancelled or varied; or

(d) that any practice on which the decision, recommendation, act or omission was based should be altered; or

(e) that any law on which the decision, recommendation, act or omission was based should be reconsidered; or

(f) that reasons should have been given for the decision; or

(g) that any other steps should be taken."[148]

Through these recommendations, the Ombudsmen are therefore in a position not only to secure redress for the individual in a wide area of Government activity but is also able to recommend to the Government "improved methods of administration, and revisions in departmental rules and in legislation".[149]

Once the Ombudsmen have completed their investigation, they must report their recommendation and the reasons for it to the department or organisation concerned.[150] They can then request the department or organisation referred to in their report to advise them within a specified time as to the proposed steps they intend to take to amend the situation.[151] A copy of the report has also to be sent to the minister in charge of the department or to the mayor or chairman of the authority or agency concerned.[152] If no further action comes about as a result of their report, the Ombudsmen at their discretion and after consideration of any depart-

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148. Ombudsmen Act of 1975, section 22(3).

149. Report by Justice, Our Frettered Ombudsman, Justice (1977), p.25.

150. Ombudsmen Act of 1975, section 22(3). These reports are made by the Ombudsmen when after an investigation they find that the complaint is justified. In practice they also make a report, even in cases where the complaints are not justified. If a complaint is abandoned or rectified in the course of an investigation, then no reports are made by the Ombudsmen, but the investigation is merely discontinued.

151. ibid.

152. ibid.

ment's or agency's, as the case may be, comments, forward a copy of their report and the comments sent in by the department or agency concerned to the Prime Minister and thereafter to Parliament.[153] In the case of local authorities, where the Ombudsmen have prepared a report, they may send to the principal administrative officer of the authority concerned a written summary of the contents of their report and require that copies of it be made available to the public.[154] However, before a written summary of their report is sent to the local authority, the Ombudsmen have to send a copy of the summary in draft form, including in the summary any comments made by the local authority to the Ombudsmen, for the local authority's perusal.[155]

If a report is unfavourable to any person he has to be given an opportunity to comment on it.[156] Usually a draft copy of the report is sent to the person affected for his comments, before a final report is prepared and sent to the department, minister, mayor or chairman concerned, as required by subsection (3) of section 22.[157] It is probable that this provision was included in the Act to enable civil servants who were specifically named by the Ombudsmen in their report to retort to any allegations of misconduct or abuse of power before the report is published.

The Ombudsmen are also obliged, in addition to making a report to the department, minister, mayor or chairman to inform the complainant of the results of their investigation.[158]

The report made by the Ombudsmen to the department, agency or local authority concerned, usually contains the Ombudsmen's recommendation to the complaint in hand and suggests ways in which it could be solved.

The proceedings of the Ombudsmen are protected from challenges from any quarter by the provision that it cannot be questioned for lack of form. The only ground on which the Ombudsmen's proceedings can be impinged is that the Ombudsmen have exceeded their jurisdiction.[159] Otherwise, no proceedings of the Ombudsmen can be challenged, reviewed, quashed or called in question in any court.[160]

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153. ibid. section 22(4) and (5).
154. ibid. section 23(1).
155. ibid. section 23(2).
156. ibid. section 22(7).
157. W.G.F. Napier, op. cit., p.87.
158. Ombudsmen Act 1975, section 24(2); see also footnote 128.
159. ibid. section 25.
160. ibid.

If the courts can quash any excess jursidiction by the Ombudsmen, it would therefore seem that to a limited extent they have a supervisory function over the Ombudsmen, albeit restricted, as only the Ombudsmen can take the issue of their jurisdiction to court.[161]

No proceedings, civil or criminal, except under the Official Secrets Act 1951, can lie against any Ombudsman or any officer appointed by the Chief Ombudsman for performing their duty, except where their actions were carried out in bad faith.[162] Similarly, no Ombudsman or any officer working under him can be called upon to testify in any judicial proceedings, in respect of any knowledge which they have acquired in the course of their duties.[163]

Any person who appears before the Ombudsmen in the course of any inquiry or proceedings to present any evidence, paper, document or thing are protected to the same extent as if they had appeared before a court.[164]

To prevent any action for defamation and to enable the Ombudsmen to carry out their task fearlessly, any report published by the Ombudsmen is deemed to be an official report for the purposes of the Defamation Act 1954.

The Ombudsmen can delegate any of the powers they have, with the prior approval of the Prime Minister, to any officer holding office under them, except the power of delegation itself and the power to make any report.[165] The delegated power, however, can be revoked at will by the Ombudsmen.[166] Any power that is delegated can take a general or specific form[167] and continues to be operative even though the Ombudsman may cease to hold office.[168]

Since the Ombudsmen are officers of Parliament, the Ombudsmen Act requires that the Ombudsmen make an annual report to Parliament on the exercise of their functions.[169] In addition to this power to make annual reports to Parliament, the Ombudsmen have also been authorised[170] to publish reports which relate generally to the exercise of their functions or to any case or cases investigated by them in the interest of any person or department or organisation, whether or not the matters dealt with in such report have already been the subject of a

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161. ibid. section 13(9).
162. ibid. section 26(1)(a).
163. ibid. section 26(1)(b).
164. ibid. section 26(2).
165. ibid. section 28(1).
166. ibid. section 28(3).
167. ibid. section 28(4).
168. ibid. section 28(5).
169. ibid. section 29.
170. See Ombudsmen Act 1975, section 15(2), and Ombudsmen Rules 1972, Statutory Regulations/208; see also footnote 100.

report to Parliament. The power to make these reports is very important to the Ombudsmen, as most of their clout to fight against maladministration and abuse of power by the administration is derived from this. As a result of this provision, the Ombudsmen are thus able to release statements to the press and thereby highlight any injustice or malpractice that they may come across.[171]

The annual reports to Parliament perform a dual function. They allow Parliament not only to scrutinise the work of the Ombudsmen but they also provide Parliament with another opportunity to examine the work of Government departments and most importantly that of public agencies and local authorities (over which they have very little control).[172]

In the annual reports made by the Ombudsmen to Parliament, the Ombudsmen have allocated a large part of these to highlighting important cases that they dealt with over the particular year. In order to maintain anonymity, the names of complainants are not disclosed, but the names of Government departments, public agencies and local authorities are published. This practice of the Ombudsmen is quite effective, for although it acts as a sanction against the administration in the sense that it can ensure that they function, as far as possible, without any maladministration or abuse of power, it provides protection to the individual in the sense that their names are not disclosed, thereby encouraging people to come forward with their complaints.

Any person who wilfully obstructs the Ombudsmen or who wilfully fails to comply with the lawful requirements of the Ombudsmen, or who makes a false or misleading statement, commits an offence under the Act and is liable to a fine of up to two hundred dollars.[173]

The Governor-General has the power by Order in Council to expand or alter the list of departments, agencies and local authorities in Parts I, II and III of the First Schedule to the 1975 Act, over which the Ombudsmen can exercise their jurisdiction.[174]

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171. Quite often the Ombudsmen release directly to the press summaries of cases which they have investigated, and which they feel need to be highlighted.

172. Although in practice very little use is made of the Ombudsmen's Reports by Members of Parliament to scrutinise the work of Government departments - perhaps because they do not deal with highly politically contentious issues; see Larry B. Hill, The Model Ombudsman; institutionalizing New Zealand's democratic experiment, Princeton, N.J., Princeton University Press (1976).

173. Ombudsmen Act 1975, section 30.

174. ibid. section 32.

SECTION 5

9. How Effective Have the Ombudsmen Been?

To determine the effectiveness of the Ombudsmen, we have to turn to the annual reports and examine some of the case notes which have been published. In the areas within their jurisdiction, it seems, from the cases they have investigated, that they have been reasonably effective. An attempt will therefore be made here to assess the influence the Ombudsmen have had over the administration by an examination of the cases they have dealt with involving the Education Department.[175]

10. Review of Cases Involving the Education Department

The Ombudsman seemed to have dealt with a variety of cases. In all the cases that he has dealt with, his paramount consideration has been to ensure that the citizen's rights, freedoms and liberties are protected against the unwarranted interference of the administration.

In case (no. 7798)[176] the Ombudsman was confronted with a case which severely tested his effectiveness. In this case the complainant, who was the chairman of the Board of Governors of a school, complained against a decision of the Director-General of Education declining to approve of Mr Z's appointment to the school's mathematics department (a position of responsibility).

From the facts, it seemed that after an advertisement was made for the position, three applications were received from Mr X, Y and Z. Mr Y was not considered, but Mr X and Z were considered. Mr X, who had majored in Geography, had taken Stage I and II Mathematics, and because of his teaching experience was classified in list B. Mr Z, who on the other hand had majored in Mathematics, was only classified in list A, which was a category lower than list B. After consultation with the school principal, the board concluded that Mr Z was the most suitable candidate.

The Education Department manual, however, provided that list A candidates cannot be appointed to a position of responsibility unless the position had been

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175. It is the Chief Ombudsman who is responsible for the investigation of complaints against departments and organisations list in Parts I and II of the Ombudsmen Act. From hereinafter till the end of this topic on the review of cases, the reference will therefore be to the Ombudsman and not the Ombudsmen, unless the context otherwise indicates.

176. Annual Report of the Ombudsmen, 1974.

advertised twice previously and there are no applicants from list B or C. The statutory authority for this manual was derived from a notice issued by the Director-General under regulation 57 of the Education (Assessment, Classification and Appointment) Regulations 1965.

In accordance with the regulation, the position was re-advertised and the deputy principal was informed that if no applications were received by 9 a.m. on the 29th December, the closing date and time, Mr Z should be informed that he was the preferred candidate. The only application to be received on time was that from Mr Z. Since no further application was received by the closing time Mr Z was so informed. However, two hours after closing time an application from Mr X was found. The board subsequently decided that although the application was late they would make no appointment at that time. Mr Z, who had in the meantime resigned his position at another school, was offered and accepted an application as an ordinary assistant at the high school.

Despite the consideration of the applications for the second time, the board still considered that Mr Z was the most appropriate person. However, the Director-General refused to confirm the position, for he maintained that the procedures for dealing with appointments to positions of responsibility are that the most qualified list C teachers will have absolute preference over teachers in lists B and A, and a suitably qualified list B teacher will have preference over a list A teacher.

The Ombudsman, however, maintained that although this procedure worked well in the majority of cases, it should not be rigidly applied especially when the student interest is paramount.

Since regulation 64(2) of the Education (Assessment, Classification and Appointment) Regulations 1965 requires the board to appoint the applicant who is the most suitable, this meant that grading was only one of the things to be taken into account. The Ombudsman felt that the Board did the right thing in concluding that Mr Z was the most suitable candidate.

Another exception taken by the Education Department was towards the manner in which the advertisement for the position was advertised. The Department felt that the advertisement was worded too restrictively and not generally.

The Ombudsman felt that the advertisement was well worded because it specified the qualification needed by the applicant.

After the Ombudsman had concluded his investigation, he sent a copy of his report as to his recommendations to the Director-General of Education and a copy to the Minister of Education as required by the Act of 1962.

The Director-General informed the Ombudsman that the Minister concurred with the Ombudsman that Mr Z was the most suitable person. However, the Director-General maintained that the position should be re-advertised in a more general manner.

The board was opposed to the re-advertising and the Ombudsman agreed. In view of the inadequate response from the Director-General of Education, the Ombudsman felt that he had to seek the Prime Minister's help. He therefore sent a copy of his report and recommendations, together with a copy of the Director-General's reply, to the Prime Minister in accordance with the provision of section 19(4) of the Ombudsman Act 1962.

As a result of the Prime Minister's being informed, considerable discussion took place between the Minister of Education, the Education Department and the Post Primary Teachers Association. Finally, a meeting was held between the Director-General and certain members of the school's Board of Governors, who reluctantly agreed to re-advertise the position in a slightly broader way.

Finally, after two years of very long discussions and negotiations, the Director-General approved Mr Z's appointment to the position. The Chairman of the Board wrote to the Ombudsman that finally justice had been done to Mr Z, and that the Education Department had also acknowledged that grading was not the only criteria in making appointments to positions of responsibility. Anyway, because of the long period involved Mr Z accepted another position of responsibility in another school and in another town out of pure frustration and despair that his application was taking so long to be confirmed, almost simultaneously to when his application was approved. Hence the whole exercise was fruitless in practical terms.

This case shows that if a head of department is not willing to conform to the recommendations made by the Ombudsman, then the Ombudsman can report the matter to the Prime Minister and then to Parliament to have the head of department's decision changed or superseded. This process shows the kind of political pressure that can be brought to bear upon the head of department if he is adamant about his decision.

The question which this cases raises is whether in a situation where the Ombudsman is unable to change the mind of a head of department he should cease to proceed with the case or whether he should resort to his only sanction - publicity - to ensure that the head of department follows his recommendation.

As the Ombudsman himself pointed out,[177] a decision as to which course he should employ would depend to a large extent on the amount of discretion the departmental head has; whether in the case in question the head has absolute discretion or whether he is lawfully subject to any "direction or advice". In case (no. 7798), the Director-General claimed that regulation 64(2) of the Education (Assessment, Classification and Appointment) Regulations gave him absolute power to either grant or withhold consent to an appointment. But section 4 of the Education Act 1964 states that "the Minister is to have the control and direction of his department and the officers thereof".[178] It can therefore be seen that the Minister has the ultimate control over his department and his officers, but this can vary from case to case, and the statutory powers have to be resorted to to determine what the respective powers of both the Minister and the departmental head are. It is possible that if the Ombudsman learns that the power to make a decision has been completely delegated to a head of department, then he may be reluctant to bring pressure to bear upon him if the departmental head is unyielding.

This case therefore shows the ability of the Ombudsman to remedy a situation which he feels warrants a re-examination when the departmental head is opposed to such a change. This indirect political clout which Parliament has given the Ombudsman may be weakened if he is unable to bring pressure through the use of publicity to obtain a change in the decision of the department.

An important point which this case highlights is that the well intentioned attempt by a school board[179] to appoint a person well qualified for a position can be undermined by bureaucratic intransigence.

Another case, also mentioned by the Ombudsman in his 1974 report (case no. 5670) (unreported), also illustrates in somewhat stark fashion the inflexibility of some departments to change their decisions once they are made. The complainant in this case maintained that his classification in the primary teaching scale was inappropriate to his qualification.

The Ombudsman, after investigation, notified the Director-General of Education, but his persistence in dealing with this case in association with another case prolonged the investigation of the Ombudsman. In his investigation the Ombudsman conducted interviews with the complainant and departmental officials

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177. Annual Report of the Ombudsman, 1974, p.21.

178. ibid. p.9.

179. Or by any citizen to perform a task.

and even paid a visit to the complainant's place of work to see him in his teaching environment, and also speak to his employing authorities, and was convinced of the justification of the complaint. A further report came from the Director-General, but the Ombudsman was unsatisfied with the decision. He therefore made a formal recommendation to the Minister.

As a result, the Department found it necessary to conduct further studies. Finally the complainant was appointed to a position which was suitable to his qualification. The whole process had taken two years and nine months to complete.

This case again indicates that departments are reluctant to change their decisions once made unless pressure is brought to bear on them from the top. The case is also a good example of the careful and thorough investigatory process used by the Ombudsman in looking into a complaint.

The Ombudsman's direct access to Government departments and files also gives him an edge over Members of Parliament and even courts, who are bound by the doctrine of Crown privilege to redress a grievance for a complainant. The Ombudsman is not bound by the above doctrine[180] and the fact that he has direct approach to Government departments and their files means that he has a distinct advantage over these traditional avenues of redress. Although case (no. 4617(b))[181] is not a good example, it does show to some extent why a complainant would be better advised to seek the help of the Ombudsman rather than a Member of Parliament or even the court.

In this case, the complainant was engaged by a state school to carry out cleaning and caretaking work. It was not specified in the contract whether he was employed as an employee or independent contractor. The rates of pay fixed approximated the rates paid for other workers in this type of job.

When the contract was terminated the Education Board held that no annual holiday pay was payable because the relationship was contractual.

The Ombudsman felt that the complainant's claim was justified, after considering all the materials furnished by the complainant, the board, the Department of Education and the Department of Labour. He therefore made a recommendation to this effect to the Director-General of Education.

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180. Except that he must conduct his investigation in private; see Ombudsmen Act 1975, section 18(2).

181. Report of the Ombudsman 1970, p.36.

The Director-General informed the Ombudsman that after considering his views on the matter the Department would accept the complainant's claim to holiday pay provided it was reasonable.

Thus, the Ombudsman was able to achieve justice in this case by merely pointing out to the Department the equity of the complainant's case.

As pointed out earlier in this paper, subsection (7)(a) of section 13, excluded the Ombudsman's jurisdiction if there is an appeal available to the complainant to either a court or tribunal on the merits of a case. In spite of this restriction and despite the fact that certain complainants may have had a right of appeal, the Ombudsman still managed to investigate into some of these cases. Case (no. 4374)[182] is a case in point. In this case the complainant was a married secondary school teacher who claimed that the country service requirement discriminated against married women because it did not generally allow married women to transfer their marital home to meet the country service requirement.

Although the Ombudsman felt that on the face of it his jurisdiction was excluded by an existence of an appeal to a statutory tribunal, he nevertheless felt that an investigation was warranted into alleged injustice arising from the administration of the country service requirement.

However, the Ombudsman, after conducting his investigation and enquiries made with the Director-General of Education, came to the conclusion that the country service requirement was not unfairly harsh to the complainant. But in regards to the complaint regarding married women as a group, the Ombudsman felt that the allegation of discrimination had some merit.

After further investigation, the Ombudsman nevertheless felt that there should not be a blanket exemption from the country service requirement for married women, but that each case should be treated individually on its merits.

He therefore found the complaint partly unjustified.

Another case in which the Ombudsman investigated into a complaint despite the fact that his jurisdiction was excluded by the Ombudsman Act of 1962[183] was case (no. 7924).[186] In this case the complainant, who was a member of the school board, attempted to secure for students who had suffered disciplinary action a formal recognition of a right of hearing by the board or a committee of the board.

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182. Annual Report of the Ombudsman, 1970, p.28.

183. This case concerned the decision of an education board, into whose activities the Ombudsman's jurisdiction was at this time excluded by the 1962 Act. The 1975 Ombudsmen Act, however, extended the jurisdiction of the Ombudsman to cover the activities of education boards.

184. Annual Report of the Ombudsman, 1973, p.28.

The complainant's attempt was unsuccessful, and he maintained that this was because of advice given by the Regional Superintendent to the Chairman of the Board, which was wrong.

The Ombudsman informed the complainant that the board was not a creature of the Department and that although advice by the Department could be given to a member of the board, final responsibility lay with the board, and that the Ombudsman did not have responsibility over independent school boards.

The Ombudsman did, however, study the letter the Superintendent wrote to the Board's Chairman; while he did not find any significant fault with the Superintendent he nevertheless found that students should not suffer expulsion and suspension from school without a right to defend themselves. This concern was also shared by the Director-General of Education, and he therefore asked the Secondary School Boards' Association and the Post-Primary Teachers' Association to meet with him to discuss the problem. A meeting was held and the Director-General set up a committee so that representatives of the two Associations could work out a method of handling such cases.

The Ombudsman then informed the complainant that he expected the committee to produce an adequate solution.

The above case therefore shows that the Ombudsmen do their best to help complainants even though their jurisdiction is excluded, where they feel that their intervention is warranted by the justice of the complaint. As the case indicates, the Ombudsman was able to highlight the complainant's grievance and thereby able to get some sort of machinery going to review the important question of granting students who had been expelled or suspended a right of hearing.

It also highlights the qualities needed by the person occupying the office of Ombudsman; since the help that was rendered to the Ombudsman by the Director-General was due to the goodwill and respect shown to the Ombudsman by the departmental head and not due to any statutory obligation upon him. To discharge adequately the functions of his office, the Ombudsman must therefore have certain personal characteristics such as diplomacy, courage, integrity, humility and an ability to deal with officials, both of the higher and lower strata of the administrative hierarchy, and very importantly with ministers to whom they may have to resort when the department or organisation remains unreasonably obstinate. He must also have a wide experience in public administration, and preferably be a lawyer as he would need to use his legal dexterity to work not only within his jurisdiction but also solve difficult problems. Because the

Ombudsman's work involves personal contact, it was necessary when the 1975 Act was passed, which extended the jurisdiction of the Ombudsman to increase the number of Ombudsmen from one to three, so that the personal element in the Ombudsman's work could be retained.

Quite often the Ombudsman is also required to investigate into delays by departments in making a decision. In one case (no.7680)[185] the complainant, which was a parent-teachers association, complained that the school committee had not been consulted in 1970 when the Ministry of Works took 25% of the school's property for a motorway and secondly that the authorities had not honoured a promise made ten months earlier to compensate the school.

The Ombudsman refused to investigate the first matter for he felt that such an investigation would not accomplish much, and quite rightly too as the event had already passed. With regard to the second matter, the Ombudsman found out that the main responsibility was accepted by the Department of Education.

In his investigation, the Ombudsman also learnt that the Minister of Education had written to the Chairman of the School Committee in 1971 to say that the school would be compensated for the loss of land by the transfer of 7 or 8 perches of land lying adjacent to the school.

In 1972 the Director-General of Education made plans with the school committee so that the matter could be settled.

In spite of this, the matter dragged on until 1973 when a contractor was asked to start work on extending the school grounds. But after the contractor started work, he was asked to cease operations because the future of the school had come under review by the Education Board.

The last information the Ombudsman heard about the matter was that the work of extending the school grounds had been completed, but that he could do no more because the future of the school lay in the hands of the Minister.

Although the Ombudsman was unhappy about the delay, this case shows that he could do no more because the future of the school was a matter for the Minister, over whom the Ombudsman has no jurisdiction. The Ombudsman is therefore powerless to do anything when he is confronted with a matter which is outside his jurisdiction unless the department or minister acknowledges that its or his actions are unreasonable, unjust, oppressive or discriminatory and is willing to accept the Ombudsman's recommendation.

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185. Annual Report of the Ombudsman, 1974, p.20.

Another case which illustrates the Ombudsman's weakness when he is confronted with Government policy to remedy an unreasonable situation is case (no.4609).[186] This case concerned the building of a school hall which was subsidised by the Government. The Education Board prepared the plan, and tenders were later called. When the plan was sent to the Education Department it was found that only laminated wood roof trusses would qualify for subsidy but not steel roof trusses, which was what was specified for the school hall. As a result the local contribution for the hall had to be increased by $1,000. The school committee alleged that the Department was unreasonable for upsetting the plan which had cost the local people $1,000 and delayed construction.

In the course of his investigation, the Ombudsman found the manner of communication between the Department, the Board and School Committee was not entirely satisfactory. He held that the Department should have made Government policy, that subsidised projects should make use of more locally produced products, more clear to the Board. The Ombudsman also felt that the Board itself should have been better informed with Government policy. These policies he felt should have been communicated to the School Committee.

In the end however, the Ombudsman felt that there was not much he could do. What had happened was a belated application of Government policy to the school over which he had no control. He therefore made no recommendation.

One of the commonest complaints against the Education Department was the bonding of young people under the teachers-training bond by the state. Thus in case (no.6846)[187] the complainant alleged that his daughter was unfit to take up a teaching career but was unfairly induced to enter teachers training college at the age of seventeen. He claimed that the expert selection committee should have classed her as unsuitable. Anyway, under family pressure, he claimed that he signed a teachers training bond to act as surety for his daughter.

A short time later the daughter developed stress and so the daughter and the complainant sought an interview with the principal of the College. The daughter maintained that as a result of the interview she thought the principal agreed to her leaving and therefore the bond would not be enforced. The principal maintained that he had made it clear that the bond would be enforced. The amount demanded was the gross amount of the remuneration received by the student, inclusive of PAYE taxation deducted at source. The complainant stated that he would have

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186. Annual Report of the Ombudsman, 1970, p.34.

187. Annual Report of the Ombudsman, 1973, p.20.

been prepared to pay the net amount. He considered that the education authorities should not require him or his daughter to pay for the mistake of the professional selection committee.

Because of court proceedings, liability under the bond was legally established at law.

However, the Ombudsman felt that because of the sincerity of belief of the complainant and his daughter that she was to be released from the bond, the sincerity of the belief in her unsuitability for teaching, the long history of the matter, the heavy expenses on both sides, it would be reasonable for the Department to settle for half the sum of the daughter's bond then owing. The complainant, Minister and the Department agreed and the matter was settled.

This complaint, and other complaints before, dealing with teachers' training bond brought into focus the justice and fairness of bonding people of such a young age.

The Ombudsman therefore looked into the question of bonding in his 1969 annual report, and especially into subsection (3) of section 197 of the Education Act 1964, the provision which validates bonds entered into by minors, to examine whether such a provision might be unjust and oppressive.

The Department of Education claimed that since the parent or guardian usually acts as surety this is sufficient to guarantee that the minor is well protected. The Ombudsman, however, felt that this was not a sufficient guarantee. The common law rule that contracts with minors are unenforceable was devised for the minor's benefit. The Ombudsman concluded in his report that teachers' training bonds were not necessarily for the minor's benefit, because it was too early in his life to determine where the minor's interest lies.

Another question that the Ombudsman looked into raised by the "education bond cases was the non-transferability of the service requirement [under the bond] between the various branches of state employment."[188] Case (no.4388)[189] gives an example of such a complaint. In this case the complainant who held a post-primary teacher's studentship accepted a position with D.S.I.R. and as a result the Education Department required him to repay his studentship bond because of his failure to meet the teaching obligation. The complainant found that he was

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188. Report of the Ombudsman, 1969, p.18.

189. Report of the Ombudsman, 1970, p.31.

unable to meet the instalments that he had to make to repay the bond and asked the Education Department for a reduction in the rate.

The Department refused. The Ombudsman was brought in to look into the matter. He explained to the complainant that the policy of the Government was to ensure an adequate supply of specially trained personnel in a particular field in the future, and that was the reason why people under the studentship were paid better than students under the general educational bursaries.

The complainant accepted this explanation and that brought an end to the matter.

This case shows that a general explanation by the Ombudsman to the complainant was sufficient to dispose of the complaint. It also goes to show that if there was better communication between the administration and public, through the release of information, a lot of causes for the friction between the individual and the administration would be removed. In many ways, the Ombudsman is thus able to narrow this communication gap by providing the citizen with the inside information which is generally not available to the citizen.

Although the Ombudsman found in case (no.4388) that the principle of non-transferability was Government policy, he felt that a rigid application of such a policy can sometimes cause undue hardship and may not be in the best interests of the country.

Another lot of cases that caused as much difficulty for the Ombudsman was where teachers-trainee students had requested a deferment "of the performance of the obligatory period of special employment in order to obtain higher educational qualifications."[190] An example of such cases is highlighted by case (no.7361).[191] The complainant, who was a music student at a teachers college, thought that the training offered there was insufficient, so at the prodding of her college principal she decided to undertake a course at Auckland University for three years.

The principal recommended to the Department three possible courses: first, that the complainant be given a studentship for her studies; second, that the teachers' training bond (under which she was obligated) be deferred until she had completed her diploma; and third, that the bond be avoided altogether. The Department rejected all these proposals, even though the principal pointed out that she would be a far better teacher in the end.

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190. Report of the Ombudsman, 1969, p.18.

191. Report of the Ombudsman, 1974, p.19.

An appeal was made to the Ombudsman who recommended to the Director-General that the complainant be granted deferment of her training and teaching obligations under the bond.

The recommendation was accepted by the Director-General on condition that the complainant transfer to secondary teaching at the end of her Secondary Teachers Training Course, to which the complainant agreed.

Although the Ombudsman was successful in this case in obtaining a flexible approach by the Department in the enforcement of the bond, other cases proved more difficult. The Ombudsman felt that the criteria used by the Department to grant these deferments was the cause of these complaints - not only was it not in the best interests of the student, it was also not in the best interests of the nation. He suggested that another criteria be adopted in the granting of deferments. This would determine whether such higher qualifications acquired by the student would be of benefit to New Zealand without incurring greater cost to the Government.[192]

As a result of the Ombudsman's queries, the whole question of bonding was taken up by the Government. In addition, the Ombudsman also took up the matter with the State Services Commission.

An interdepartmental committee was set up to study this question of bonding. As a result of this study, the former policy of bonding young people as in the past was confirmed, and a new scheme which introduced small measure of flexibility in relation to university studentships awarded to prospective teachers was authorised.[193]

The Ombudsman was, however, not undaunted by this setback but kept the pressure going against the Government to alter its policies.

As a result of the Ombudsman's recommendation, the Government in 1975 decided to change its policy in regard to the non-transferability of the service requirement between the various branches of state employment under the education bond. This change of policy will now permit bonded employees to transfer to other branches of the State Service without incurring a penalty under their bonds, provided their case came within certain guidelines. As a result of this new policy, the Ombudsman said in his report to Parliament for 1975 that it would now be possible for the bonded employee "to pursue a career in the

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192. Report of the Ombudsman, 1969, p.18.

193. Report of the Ombudsman, 1970, p.13.

direction for which he feels he is most suited,"[194] rather than be tied up in a job for which he had developed an aversion.

In his role as citizen's watchdog, the Ombudsman is always on the lookout to see whether the administration is acting within its jurisdiction and has quickly reprimanded any illegal acts. In the course of his investigation into case (no.5121)[195] the Ombudsman found that the Department had substituted its directives, which had the consent of all the parties involved, for regulation 11 of the Education (Assessment, Classification and Appointment) Regulations 1965, without amending the regulation.

The Ombudsman made it clear to the Department that this was illegal, and that it was not entitled to substitute some laws of convenience for the laws of the land because it was expedient to do so.

Despite this recommendation, the Department had not taken any remedial action at the time the Ombudsman published his annual report to Parliament.

As this case shows, although the Ombudsman was able to pinpoint a case of illegality by the Education Department, because of his inability to take any direct action he was incapable to compelling the Department to take any remedial action. The only way he could have brought pressure on the Department was if he got the backing of the Minister or Prime Minister or Parliament. If, on the other hand, he could not win this political support, there is no way he could champion the cause of the citizen against maladministration and abuse of power by the administration. This case therefore starkly brings into focus the Ombudsman's limitations as a protector of the citizen's rights, liberties and freedoms against a determined administration.

If the Ombudsman finds that the complaint has no merits he does not make any recommendation. For example, case (no.5426)[196] concerned the proper way to compute the amount of money due by the complainant to liquidate a bond debt with his former employer, the Ministry of Works. The complainant had one way and the Ministry of Works had another method.

After studying representations made by both the complainant and the Ministry, the Ombudsman found for the Department. He therefore advised the complainant as to the correct amount outstanding on the debt. The complainant accepted this and as a result the Ombudsman made no recommendation.

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194. P.6.
195. Report by the Ombudsman, 1971, p.33.
196. Report of the Ombudsman, 1971, p.40.

Very often therefore the Ombudsman's task is to explain to the complainant the Department's policies and rules, and this often clears the problem. This case also highlights the need to have a better communication system between the administration and the public. As the Ombudsmen themselves have said, many complaints against the administration have simply been due to this lacuna in communication.

Whenever the Ombudsman feels that a complaint has merit, he uses diplomacy and persuasion to help the Department to come around and see his point of view, without the need to make a formal recommendation. The number of complaints where he has needed to make a formal recommendation are small compared to the number of complaints that are amicably settled by the Ombudsman and the department concerned working out an equitable solution. Only where he is unable to change the Department's point of view does the Ombudsman resort to making a recommendation. One such case where the Ombudsman had to make a recommendation was case (no.9757).[197] This case arose out of proposals for the expansion of facilities at a teachers college. The complainant was one of the residents who was affected by the expansion of facilities and claimed that the Department had a duty to inform him and other residents of the implications and consequences to the residential properties which would be affected by any such future expansion.

It was the view of the Ombudsman that a decision to expand an educational complex in a residential area marked "A" required the Department to obtain the co-operation and goodwill from the local residents; so that the implementation of the public works can be done so in a spirit of harmony, and held that it was wrong for the Department to consider prematurely any future plans for the future development of the college, despite the existence of formal objection machinery.

He therefore recommended to the Department that it make a clear statement of the boundaries of the college, that it make available a copy of this statement to all residents, and that it discuss these proposals with the local residents.

Since the Ombudsman's recommendations were not given effect to, the Ombudsman took the matter up with both the Minister and Director-General of Education.

As a result of the Ombudsman's representations, the Department placed a copy of the recommendations together with its proposals before Government.

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197. Report of the Ombudsman, 1976, p.17.

Government decided that properties adjacent to the college would not be acquired compulsorily but only through negotiations. The Department also arranged a public meeting to inform the residents of the implications and also wrote individually to each resident of the decision and the statutory rights available.

The Ombudsman felt that the steps taken by the Department were not in accordance with his recommendations, which were that the Department consult the residents before it made any proposals to Government rather than inform them of the decision that Government had reached after it had made its proposals to Government.

The Ombudsman thought that his recommendations had wider implications not just in this case but when land is acquired for public works generally. He therefore feels that the procedure for acquiring land by the Crown should be altered and is still looking into the question.

The Ombudsman has also worked very hard to get the policy, practice or procedure of a department changed where he feels that it works unjustly or discriminately against a class of people, or is not the most suitable one under the circumstances. He has often emphasised to departments that if they have a general policy, practice or procedure for the general run of cases, the policy, practice or procedure should be flexible enough so that allowance can be made for individual cases with a different set of circumstances.[198] An example in point is case (no.W13166).[199] This case concerned a university student who was an orphan. He complained that the Education Department administered the Tertiary Bursary Regulations in such a way that it discriminated against orphans.

The Department stated that it administered the policy of unabated bursary by the location of the guardian's residence.

Although the Ombudsman had no qualms about the policy itself, he felt that in applying the policy to individual cases the Department should have regard to the circumstances of each particular case. Since the complainant had always lived away from home, he felt that the complainant should not be treated like other single students.

The Director-General advised the Ombudsman that he would recommend to the Minister to amend the abatement scheme and the way the Tertiary Bursary Regulations are administered to orphans. The Ombudsman therefore decided to discontinue his investigation.

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198. For otherwise the Department might improperly be, in legal terms, fettering its discretion.

199. Report of the Ombudsmen, 1979, p.31.

This case exemplifies the working relationship that the Ombudsman has with the administration. The administration's attitude towards the Ombudsman is not one of hostility but has rather been one of co-operation and goodwill. In most cases, the Education Department has been willing to comply, or at least reach a compromise, with the Ombudsman's recommendations. As case (no.W13166) shows, although the Department was under no great pressure from the Ombudsman, it nevertheless gave an assurance to him that their policy towards orphans would be reconsidered and amended.

Not only has the Ombudsman suggested changes to the policy, practice or procedure to the Department, but he has also suggested changes to laws and regulations which govern the Department, where he has found it to be unreasonable, unjust, oppressive or discriminatory. In case (no.4933)[200] the complainant claimed that the Education Department refused to pay for the expenses involved in his transfer.

The Department of Education considered themselves bound by regulation 16(1)(5) of the Education (Salaries and Staffing) Regulations 1957, which they felt prohibited them from paying out to the complainant.

The Ombudsman felt that the complainant was treated unjustly, so he recommended to the Department that the regulations be amended and that an ex gratia payment be made to the complainant. Both these actions were later taken by the Department.

Through his intervention the Ombudsman was thus able to promote changes to the law, thus not only helping the complainant overcome his difficulty but also helping others who may find themselves in a similar position.

The Ombudsman also intervened in a case (no.W11941)[201] where the complainant had no legal grounds whatsoever, but where the Ombudsman felt on humanitarian grounds deserved his intercession.

In this case the complainant had been overpaid by the Department of Education. The confusion arose because the complainant had the same surname and initials as another teacher who was more highly qualified than the complainant. The complainant, who was a temporary teacher, accepted the wages in good faith. The Department, however, sought to recover the amount overpaid. The complainant claimed that since she was out of work she was in no position to repay the amount.

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200. Report of the Ombudsman, 1971, p.29.

201. Report of the Ombudsmen, 1978, p.30.

The Ombudsman therefore wrote to the Director-General of Education and informed him of the circumstances of the complainant. Although the Director-General did not agree with the views of the Ombudsman, he sought Treasury approval. After consideration of the matter, Treasury approved writing off the debt.

Through his good office, the Ombudsman was therefore able to gain a symphatic hearing for the complainant who had no legal grounds on which to base her complaint. It could be safely said that had it not been for the Ombudsman's intervention in this case the complainant would have had to repay the overpaid wages. The Ombudsman was therefore able to appeal to the Department to consider the human element involved in the complaint.

As the cases I have highlighted above show, although the Ombudsman has no direct power to force a department or, as the case may be, an organisation to change its decision, if the department or organisation is determined to block out the Ombudsman, in most cases departments and organisations do take into serious consideration the Ombudsman's recommendation. There is usually an air of goodwill and co-operation in the relationship between the Ombudsman and Government departments and organisations, without the need for the Ombudsman to resort to the Prime Minister or Parliament to put pressure on the department or organisation concerned to motivate it into action. To a large degree, this co-operation and goodwill has been due to the tact, diplomacy and impartiality used by the Ombudsman in his discussions, negotiations and investigation of cases involving the administration. Another factor which has also fostered this favourable relationship has been a realisation by the administration itself that the Ombudsman has an important constitutional role to play in helping the public obtain a just and fair redress against any unwarranted interference by the state. The Ombudsman in his role as the citizen's advocate has not been one-sided however, but has on many occasions vindicated the administration against unjustified complaints by the citizen. This objective and impartial manner in which the Ombudsman has performed his task has therefore helped him to gain the trust and confidence not only of complainants but also of departmental officials, whose actions may in the end by impeached by the Ombudsman.

The cases also show that in not all instances where the Ombudsman felt that the complaint was justified was the complaint successfully resolved.[202] However,

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202. For instance, see case (no.4609), Report of the Ombudsman, 1970, p.34.

although the Ombudsman was unable to obtain redress for all complainants, this did not mean that the complainants went away empty handed. Very often, where the Ombudsman is unable to render any help, the complainants are advised as to other alternative means through which they could seek a remedy for their problems.[203] The fact that the Ombudsman was unable to help also indicates that the authority of the Ombudsman is inadequate to handle all types of maladministration or abuse of power.

As the Chief Ombudsman stated in his speech to the Invercargill Rotary Club on 13 March 1977 (unpublished):

> "The only real effective weapon which the Ombudsman can deploy is the persuasive power of logic and reason. At the end of a thorough investigation he must be able to satisfy himself and the agency concerned that all the facts are known, that they have been impartially and fully analysed and that the conclusions reached on the basis of that analysis are inescapable."[204]

Although many complaints have gone unremedied, the Ombudsman's intervention has had a therapeutic effect on complainants, especially by being given an opportunity to air their grievances to someone who is independent of the bureaucracy, and having the issues and difficulties made known to them. As the Ombudsmen themselves have made known and as the cases themselves reveal, many complaints involving the Education Department were simply due to a communication hiatus between the Department and the public or other bodies which administer the education policy of the Government. As Lynda Downs points out "the role of Ombudsman is therefore often one of mediator or conciliator, opening the channels of communication to enable parties to resolve their differences through an independent but authoratative body."[205] All the cases dealt with in this paper would seem to bear out the truth of the above statement.

The following table shows the number of complaints received and fully investigated by the Ombudsmen from 1970 - 1979 involving the Education Department.

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203. For example, the Ombudsman may refer a complainant to the court or his local Member of Parliament where he feels that the appropriate remedy can be obtained by legal or political means.

204. Quoted from W.G.F. Napier, op. cit., p.134.

205. Seminar Paper 3, delivered at Administrative/Constitutional Law, LL.M class (1980), p.3 (unpublished).

Year	Considered Justified	Not Justified	Total
1970	9	42	51
1971	8	40	48
1972	13	27	40
1973	8	38	46
1974	9	15	24
1975	10	15	25
1976	6	15	21
1977	27	33	60
1978	22	44	66
1979	5	23	28

From the above statistics it would seem after a slow tapering down of complaints involving the Education Department since 1970, there was a sudden upsurge in the number of complaints registered against the Education Department in 1977. As the Ombudsman's investigation revealed, the reason for this increase was because teachers who had applied to have their bonds transferred to other branches of the State Services under the new Government policy introduced in 1975 as a result of the Ombudsman's recommendation, had had their applications turned down.[206] The main cause for this rejection was that the bonded teachers had left the teaching profession prior to 1 May 1973, before the Government's revised policy came into effect.

The Ombudsman's investigation also revealed that the revised policy had not been made retrospective, and hence the teachers had to meet the financial obligations under their bonds. This date was chosen because it was the approximate date on which the Minister had directed the Department to suspend recovery action against teachers who had joined another department and that a cut-off date had to be found.

Although the Ombudsman was critical of the way the Department had handled the complaints, he found that the cut-off date was not unreasonable, considering the fact that some bonded teachers had left the service to join other departments as long ago as 1967. If such teachers were left off the hook, it would have been unfair, the Ombudsman felt, on other teachers who had left the teaching service before 1 May 1973 and who had repayed their bonds in full.

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206. See supra footnotes 188 and 194; see also Report of the Ombudsman 1977, p.8.

The Ombudsman felt that these complaints against the Department were unjustified, and he therefore made no recommendations for the cause of these complaints.

In 1978, the number of complaints received by the Ombudsman again increased to a record high. The Ombudsman noted in his annual report to Parliament for 1979 that most of the complaints were from teachers.[207] Many of the complaints related to the terms and conditions of their employment. In particular, the Ombudsman stated that they related to salary, entitlement to various allowances and increments and classification of qualifications. This increase in the number of complaints indicates that the adequacy of the appeal and review procedure in the Education Department is wanting.

Bonding too, the Ombudsman noted, was another major area of complaint against the Education Department in 1978.

However, the drop in total number of complaints involving the Education Department from 66 in 1978 to 28 in 1979 may be due to the improved procedure established by the Department itself to handle grievances against them by the institution of formal review and appeal machinery for this purpose.[208]

As the cases involving the Education Department reveal, the Ombudsman's job is therefore not only to act as the citizens' advocate to present their side of the story to the administration, but also to act as an appeal body to give a symphatic hearing to people's grievances, and finally act as an instrument for the dissemination of information for the administration, so that the public can hear the administration's side of the story and in the process hope that a new solution is reached where a wrong or abuse of power has taken place.

11. Publicity

The main reason why so many complaints against the administration have been lodged with the Ombudsmen's office is due to the publicity the office has received as the official watchdog for the individual against his rights being curbed or over-looked by the bureaucracy.[209]

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207. Report of the Ombudsmen, 1979, p.8.

208. ibid. p.6.

209. It is interesting to note from the annual reports of the Ombudsmen that a large number of the complainants who complain to the Ombudsmen are public servants themselves.

Since the Ombudsmen operate a complaint-based system, it is important that the services they render are well-known to the public, especially to those who most need their services, so as to enable people to come forth with their complaints. As Mr Laking, the Chief Ombudsman, points out:

> "The maintenance of grievance machinery such as the Office of Ombudsman has little justification unless it is used and the pre-requisite to use is knowledge of its existence by those who are most likely to have need of it."[210]

Although 18 years have passed since the establishment of the Ombudsmen's office, at present the office is still not well known to the New Zealand public.[211] There are still large sections in the community who have not heard of the Ombudsmen or if they have, have no idea as to their constitutional role.

In his 1971 report to Parliament, the Ombudsman pointed out that he received more complaints from city areas than from rural regions. From this it can be deduced that people in rural areas know less about the Ombudsmen than people living in large towns and cities.

To date the Ombudsmen have used the mass media - press, radio and television - and have complemented these by giving speeches at meetings and functions to publicise their role and functions.

Efforts are at present being made by the Ombudsmen's office to promote the office to the New Zealand public to increase its awareness as an institution for the redressing and rectifying of wrongs and abuses of power by the administration.

Although an advertising campaign was devised for 1977-78 to publicise the Ombudsmen's office by the printing of pamphlets and posters, nothing came of it as the $3,760 expenditure involved in the campaign was not approved by Government.[212] Granting the fact that the economic situation of the country may limit the money available, the dispensation of administrative justice should not be limited by economic considerations. If every citizen is to be offered the opportunity to use the services of the Ombudsmen, then it may be necessary to establish more regional offices of the Ombudsmen, especially in the rural areas, other than the three already established. These regional centres could be staffed by one or two investigating officers[213]

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210. Report of the Ombudsmen, 1978, p.8.

211. Report of the Ombudsman, 1975, p.15.

212. Report of the Ombudsmen, 1979, pp. 8-9.

213. Who would keep the citizen in contact with the Ombudsmen.

and supporting staff, to cater for the needs of small town people and the rural community. Not only will the establishment of these regional centres enable the citizen to take advantage of the services rendered by the Ombudsmen but it could also provide a better means of informing the public of the grievance machinery offered by the office.

SECTION 6

12. Is the Ombudsmen Act of 1975 in Need of Change

It will be noticed from some of the cases dealt with in this paper that the Ombudsmen have been severely hamstrung in their effectiveness to be the citizen's watchdog against maladministration and abuse of power, by the jurisdictional limits which have been imposed on them, especially by the provisions of section 13 of the Act. The question that comes to the forefront is whether there is a need to have these artificial restrictions on the Ombudsmen's powers, when they do not enhance the Ombudsmen from performing their job, but instead prevent them from carrying out their job as the independent reviewer of administrative action for which they were set up.[214]

Under the present legislation there is one major limitation on the Ombudsmen carrying out an effective and prompt investigation against any Government department, agency or local authority: this is the jurisdictional limitation based on section 13(1) that any investigation against any decision, recommendation, act or omission must relate to a matter of administration.

This can be a serious handicap on the Ombudsmen's powers, especially when many decisions that are taken by the administration have been interpreted by departmental heads, mayors or chairmen of organisations to be a matter of policy or a professional exercise of a discretion which is vested in the department or organisation concerned and thus exclude the Ombudsmen's jurisdiction. Although the jurisdictional limitations of section 13(1) have

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214. On the converse, the question can be raised whether there should be an Ombudsman at all when there is an elected representative who is in charge of the affairs of his department and who is answerable to Parliament for its actions. However, since the institution of Ombudsmen has already been set up in New Zealand, this question would not be pursued in this paper. Instead the more worthwhile question of how best we can improve the institution of Ombudsmen would be the main thrust in this section of the paper.

not created undue hardship for the Ombudsmen in their investigations involving the Education Department in practice, because of the co-operation shown by the Department in its dealings with the Ombudsmen, section 13(1) does, however, create a major obstacle if and when the Department choose to contest the Ombudsmen's jurisdiction.

A second difficulty which often arises against the effective investigation of a complaint against a department, or for that matter against a Government agency or local authority, by the Ombudsmen, which is not found in the Act, but which crops up in practice, is that in many cases not much that is actually said or done is written down or recorded by the department or organisation concerned.[215] In certain complicated cases this can give rise to problems for the Ombudsmen in determining the facts of the case.

Although the Ombudsmen have the power to summon witnesses and examine them on oath, this is seldom done because as Mr Laking, the Chief Ombudsman, points out, it not only involves delays in the investigation but also involves expense to the complainant and those persons whose actions are in question, since they may feel that they should be represented by counsel.[216] Furthermore, the adoption of such a method with any frequency would transform the Ombudsmen's informal investigatory procedure into a type of interrogation and inquisition.[217]

Where the Ombudsmen feel that they may need to interrogate a witness, they usually prefer that the complainant take his case to court, rather than deal with the problem themselves, as they feel that the courts are better equipped in examining and cross-examining witnesses.

Another jurisdictional limitation on the Ombudsmen is the absolute bar on them from investigating actions of the committee of the whole.[218] Although this restriction has not posed any obstacle on the path of the Ombudsmen in investigating into the actions of the Education Department itself, there could be special problems if the Ombudsmen were to investigate into the actions of statutory and semi-statutory bodies like the education boards, school committees, secondary school boards, teachers college councils, technical institute councils, the University Grants Committee, and other semi-independent bodies like the Vocational Training Council, the National Council

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215. From interview with Mr Aikman, the Chief Investigating Officer with the Ombudsmen's Office in Wellington, on 5 September 1980.

216. Report of the Ombudsmen, 1978, p.12.

217. ibid. p.13.

218. Ombudsmen Act, 1975, section 13(1).

of Adult Education, trades certification boards, the Technicians Certification Authority, the New Zealand Council for Educational Research, the Maori Education Foundation and the National Advisory Council on Pre-School Education where important decisions are often made by the committee of the whole. Although these statutory or semi-statutory bodies are not part of the Education Department they are nevertheless responsible in administering the Government's policy in education at the domestic or specialised level, and some of whose funds are provided by the Education Department. Thus, although the Ombudsmen's jurisdiction covers the Education Department, the restriction placed on committees of the whole in effect acts as a barrier against the Ombudsmen from investigating important areas of the education system.

This restriction is especially acute when the Ombudsman is asked to investigate into a complaint involving a local authority where many important decisions are made by the committee of the whole of the local council. Thus, although the Ombudsmen's jurisdiction covers the activities of local authorities, they cannot investigate any complaint if the complaint relates to a decision, action, recommendation or omission of the committee of the whole.

Moreover, a lot of time is wasted by the Ombudsmen in deciding whether to go ahead with an investigation against a local authority to determine whether the act, omission, recommendation or decision complained of against the local authority was made by an official or committee of the whole.

It may be better if the Ombudsmen were simply given a blanket authority to investigate any complaint against any department or organisation regardless of whether the act, recommendation, decision or omission was made by an official or committee of the whole. This provision would definitely help to speed up the Ombudsmen's investigatory procedure and also give more effective protection for the individual.

There are also other areas where the Ombudsmen's powers are needed to be changed. At present, the Ombudsmen's jurisdiction is excluded in complaints involving the Police, unless the complaint has not been investigated by the Police themselves or the complainant is dissatisfied with the final results of the investigation.[219] Because of this restriction, the Ombudsmen are thus unable to investigate any decisions or actions of the Police, such as the custody and care of property, the use of force and other complaints related to their operations.

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219. Ombudsmen Act, 1975, section 13(7)(d).

As the Ombudsman notes, approximately 25 percent of the complaints directed against the Police were found to be true after investigation by the Police Department itself. Although no one doubts the integrity of the New Zealand Police Force, one may wonder how many more complaints against the Police may have been found to be justified if the investigation against the Police was carried out by an independent authority like the Ombudsman.

The Chief Ombudsman wrote in his 1979 Report to Parliament that he is at the moment engaging in continuing discussion with the Commissioner of Police to improve the existing procedure of investigating complaints against the Police.[220] However, even in cases where the Ombudsmen can investigate into complaints against the Police, there are certain limitations besides jurisdictional restrictions which hamper his ability to deal effectively with complaints levelled against the Police. The jurisdictional limitation is similar to the limitation the Ombudsmen face in their investigation into complaints against Government departments, i.e. that the complaint must first relate to a matter of administration. The Chief Ombudsman, Mr Laking, points out that successive Commissioners of Police have taken the view that law enforcement operations of the Police do not relate to matters of administration, but instead involve an exercise of a professional judgement. Although other departmental heads have used this argument, the Police Department have been prone to use this argument more frequently than others. The other difficulty which the Ombudsmen face when investigating into complaints against the Police is the problem of finding written records of events that had taken place. This again is a similar difficulty which they face when they investigate into complaints against Government departments, Government agencies and local authorities. The third limitation which the Ombudsmen encounter is that of deciding on a suitable recommendation to remedy the situation when they uphold a complaint.[221] It is sometimes necessary that the appropriate remedy in the circumstances is the commencement of criminal proceedings against a person or a member of the Police. The snag is that criminal proceedings have to be commenced in a Magistrate Court within six months of the occurrence of the offence. Since many complaints take longer than six months to investigate and complete, this option is no longer available to the Ombudsmen. Although there

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220. Report of the Ombudsmen, 1979, p.7.

221. Report of the Ombudsmen, 1978, p.13.

is no time limit on the commencement of proceedings in the Supreme Court, the Ombudsmen do not, however, find this alternative attractive because of the serious and cumbersome proceedings involved. Accordingly, the Ombudsmen are left in a dilemna as to the appropriate remedy to recommend when they have sustained a complaint against the Police. Thus, it would seem that the only way for effective control over the Police to be given to the Ombudsmen would be to remove the restriction at present placed on the Ombudsmen and to give them the jurisdiction to investigate any complaint against the Police in the first instance without the need to wait and see whether the complaint has been satisfactorily investigated by the Police Department itself.

A further area where the jurisdiction of the Ombudsmen is unclear is in relation to complaints against the Public Trustee and the Maori Trustee. Although both the Public and the Maori Trustees Offices have been included into the First Schedule of the Ombudsmen Act, 1975, their inclusion seems to be in apparent conflict with the provisions of section 13(7)(b) of the Act, which excludes from the Ombudsmen's jurisdiction any decision, recommendation, act or omission of any person in his capacity as a trustee within the meaning of the Trustee Act 1956. The Chief Ombudsman is at the moment making inquiries and having discussions with both the Trustees in the hope that some solution can be worked out. To save all this unnecessary trouble and a half-baked solution, it may be better if the present Act was amended and the Ombudsmen's powers clearly spelt out in relation to both the Trustees.

Section 13(8) also excludes the Ombudsmen's jurisdiction in relation to the New Zealand Armed Forces. Mr Laking, the Chief Ombudsman, highlights the complaint of a civilian crew member of a keeler protesting at the Pintado's (an American nuclear-powered submarine) arrival in Wellington. The complainant alleged to the Ombudsman that Air Force helicoptors attempted to harass the craft, although it was legally assembled in the harbour. The Ombudsman felt that, although the actions of the Air Force came within section 13(1), he nevertheless had to decline jurisdiction because he felt that section 13(8) was wide enough to cover situations where the actions of the Armed Forces affected civilians.[222] He nevertheless wondered whether Parliament intended that the actions of the Armed Forces which affect civilians should be excluded from the Ombudsmen's jurisdiction. In fact the question can also be asked why the Ombudsmen should not have jurisdiction over the Armed Forces when the

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222. Report of the Ombudsmen, 1979, p.9.

Government feels that it is alright for the Ombudsmen to have jurisdiction over the other sectors of Governmental administration. It is especially hard on the individual citizen, as it precludes him from appealing to the Ombudsmen, if his rights are infringed by the Armed Forces. It is thus submitted that the Ombudsmen Act 1975 should be widened to bring within the Ombudsmen's jurisdiction the Armed Forces, whether it concerns a matter relating to its internal operation or whether it relates to an action of the Armed Forces which affects the citizen.[223] If this suggestion is not too attractive, then New Zealand should follow the move by West Germany and establish a Military Ombudsman, who would have responsibility over the Armed Forces.

The advantage if the Ombudsmen were given the opportunity to investigate against the Armed Forces would be the impression of impartiality it would instil in any investigation, since it would be independent of the Armed Forces structure and would also have the added advantage of being easily accessible to the public.

Probably the biggest weakness of the Ombudsmen's office is the inability of the Ombudsmen to investigate ministerial decisions. As pointed out earlier in this paper, the reason for exoluding ministers from the Ombudsmen's jurisdiction was the fear by the Government that it would interfere with the principle of ministerial responsibility to Parliament. A concession was, however, made by Government in that the Ombudsmen were given full powers to investigate any recommendation given by a department to a minister. Through this indirect means the Ombudsmen therefore had the power to criticise a minister. For if a minister followed the advice of his department which was wrong, then any criticism by the Ombudsmen against the advice also meant that it was a criticism on the minister. The only problem with such an indirect approach was that if the decision or action taken by the minister was taken by himself, without the aid of his department, then the Ombudsmen have no authority to investigate the decision or action.

There is no substantive reason why Cabinet ministers in New Zealand should be excluded from the jurisdiction of the Ombudsmen. Even in the United Kingdom the British Parliamentary Commissioner has the power to investigate actions of ministers,[224] despite the fact that other aspects of the system do not compare

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223. In Denmark, on which the New Zealand Ombudsmen Act was modelled, the Ombudsman has jurisdiction over the Armed Forces; see I.M. Pederson, Denmark's Ombudsman, p.78, in Donald C. Rowat ed., The Ombudsman, Citizen's Defender, 2ed. (George Allen and Unwin, London, 1968).

224. Frank Stacey, The British Ombudsman (Oxford University Press, 1971), p.310.

favourably with the New Zealand Ombudsmen system.[225]

In Denmark too, the Ombudsman has jurisdiction over ministers. The Folketing (Parliament) is itself outside the Ombudsman's powers. The Parliamentary Committee, which was set up in 1946 to consider the setting up of the Ombudsman institution in Denmark, prediction that jurisdiction over a minister would not cause any problem with the principle of ministerial responsibility to Parliament has borne out to be true.[226] One of the reasons is that the Ombudsman has refused to let himself be used as a political tool, by either the Government or the Opposition, and has only taken up issues which relate to matters concerning the operation of the minister's department.[227]

If the British Commissioner and the Denmark Ombudsman can look into the actions of ministers without doing any injustice in practice to the hallowed principle of ministerial responsibility to Parliament, there is no reason why the Ombudsmen in New Zealand should also not be given the same powers. When the Act was originally debated, it was recognised that the Ombudsman could help to enhance the principle of ministerial responsibility to Parliament. As the Minister of Justice, Mr Hanon, explained, ministerial responsibility means that a department is subject to the directions of its minister and that the minister is answerable to Parliament not only for his personal acts but also for the

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225. For instance, in the United Kingdom the public do not have direct access to the Parliamentary Commissioner but have to take their complaints through their Member of Parliament. Besides this weakness in the system, the Parliamentary Commissioner has also no jurisdiction over personnel matters of the civil service and has also no jurisdiction over local authorities. Most important of all the weaknesses of the British Parliamentary Commissioner is his inability to deal with matters where an abuse of power is the cause of the complaint or if the ma tter relates to an unreasonable or wrong decision. The Parliamentary Commissioner can only look into questions of maladministration; see Parliamentary Commissioner Act 1967, section 5(1), Statutes, Law Report (Vo.1) (1967), p.447; see also K.C. Wheare, Maladministration and Its Remedies, Hamlyn Lectures, 25th Series (Stevens 1973), p.119.

226. I.M. Pederson, op. cit., p.78.

227. ibid. p.79.

acts and decisions of his department.[228] Nobody seriously believes, however, that all the acts or decisions of the department are personally taken by the minister or even done at his direction. According to Mr Hanon, ministerial responsibility therefore meant that the minister was not personally responsible but is subject to examination. He therefore asks why the Ombudsman, who is an officer of Parliament, would impair the principle of ministerial responsibility if he was to report to Parliament on the personal acts of the minister or the acts of his department. If at all, he suggested, the Ombudsman jurisdiction over the actions of ministers would only enhance the principle of ministerial responsibility to Parliament, as it would provide Parliament with an opportunity to question the minister which it would otherwise not have.

This reasoning by the Minister of Justice was, however, not accepted by the Government, and the Ombudsmen were thus excluded from the power to investigate into ministers' actions. The time has perhaps been reached when there should be a change of heart and the Ombudsmen jurisdiction widened to incorporate within their powers jurisdiction over ministers.

(a) Summary

It remains that after 18 years of the existence of the office of Ombudsmen the main problem still is the question of the Ombudsmen's jurisdiction. A lot of time of the Ombudsmen and their staff is wasted investigating the question of jurisdiction before an investigation is commenced into a complaint. Perhaps the time has arrived where there should be a review of the existing legislation and some useful changes made. Such changes should enable the Ombudsmen to use the resources of their office to the fullest, so that as many complaints as possible can be dealt with by them without unnecessarily increasing the workload.

Although the graph[229] shows that the number of complaints that fall out of the Ombudsmen's jurisdiction is declining, the number still remains high.

Instead of using section 13 to restrict the Ombudsmen's jurisdiction to investigate matters which relate to administration, the proposal of Sir Guy Powles should rather be accepted and the Ombudsmen's jurisdiction extended so as to permit them to examine any complaints that they feel warrant an investigation.[230] In other words, the Ombudsmen should be granted an absolute discretion as to whether or not they should investigate a complaint, whether

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228. See newspaper "Australian", 26 November 1964; also quoted in John L. Robson, The Ombudsman in New Zealand, op. cit., pp. 36-37.

229. Supra, see page 34.

230. Report of the Ombudsman, 1971, p.10.

the matter concerns a matter of policy, administration or judgement. This will allow the Ombudsmen to better streamline their work and devote more time to cases they feel deserve their attention. A significant step in this direction has already been taken by the 1975 Act in providing the Ombudsmen with a discretion to take on a complaint despite the fact that an appeal, on the merits of the case, is available to a court or a tribunal.[231] However, such a discretion is at present being quite restrictively interpreted by the Ombudsmen, and thus a high percentage of cases fall outside the Ombudsmen's jurisdiction. To save these cases, it may be advisable to remove the restriction imposed by section 13 altogether and permit the Ombudsmen to determine the cases they would handle. As Brabyn J. explains:

> "The institution of Ombudsman can only be a success if given sufficient scope to develop as a meaningful contributor to Government and the exercise of power generally. Such development cannot be advanced by the imposition of technical and/or burdensome restrictions. The establishment of the Ombudsman is a vote for open, public Government - legislation should be interpreted accordingly."[232]

Future proposals which may be worth considering are the extension of the Ombudsmen's jurisdiction to cover private institutions, like Air New Zealand, Bank of New Zealand and other organisations which have Government support but which do not come under state control. At present a lot of state activity which can adversely affect the citizen are in the hands of these private institutions which do not have an elected representative who is accountable in Parliament for its actions. In fact, many Governments have tried to by-pass Parliamentary supervision of governmental activity by handing over to these private institutions the control of certain state activities. In fact, because of the vast growth of the modern state and the consequent responsibility of the Government to provide for the needs of its people, this has become necessary. Parliament is thus left in a position where it has no means to check and control the activities of these private institutions because there is no-one in Parliament who is answerable for the action of these institutions. However, some semblance of control can be brought over these institutions if the Ombudsmen were given the power to investigate and report to Parliament over the activities of these institutions.

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231. Ombudsmen Act 1975, section 13(7)(a).

232. "Ombudsman v. Court" (LL.B. (Hon.)) Legal Writing Requirement, Victoria University of Wellington, p.29.

It may be necessary in following with the above changes for the enlargement of the Ombudsmen's office "by the addition of specialist staff of various types to cater still further for the wide variety of subject matter covered by complaints".[233]

13. Conclusion

As Donald C. Rowat points out, the case for an Ombudsman illustrates that there is a serious defect in the Parliamentary system of Government.[234] Although there are certain imperfections in the powers of the Ombudsmen themselves, there is no doubt that their office has a very important role to play in the constitutional and political system of New Zealand.

In today's over-centralised, impersonal and bureaucratic administration, which treats the citizen as if he owes it a service rather than the other way round, the need for a person to review administrative decisions of the bureaucracy is self-evident and can be readily appreciated. From the Government's point of view, the Ombudsmen institution provides a cheap means of remedying maladministration. From the citizen's point of view, it provides a simple means of getting a complaint redressed, without the need to consult the specialist services of a lawyer. To most people lawyers are expensive and the results they can produce are of doubtful measure. The Ombudsmen, on the other hand, can perform the task of looking into a grievance and perhaps obtaining a remedy for the citizen without any charge. In some ways, they act as the public's attorney, putting across to the administration and the Government their problems in the hope that they may have the administrative action reviewed. In other ways, the Ombudsmen institution can be viewed as a public relations exercise for the Government to make known to the public that they can turn to someone when they have a grievance against the state, but giving very coercive power to him to obtain redress.

It would, I submit, be wrong for anyone to take this sceptical view. It must be realised that the Ombudsmen institution was set up in New Zealand not as the ultimate panacea to overcome administrative ills, or even to be a substitute for the existing remedies available to the citizen. The main purpose of the Ombudsmen was merely to act as an additional avenue for the citizen in obtaining administrative justice.

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233. J.L. Robson, op. cit., p.55.

234. The Ombudsman, Citizen's Defender, 2 ed. (George Allen and Unwin, London, 1968), p.ix.

There are of course limits on the kind of help that the Ombudsmen can render to the public. But within the scope of their jurisdiction, there is no doubt that the office of the Ombudsmen has really been a success. The biggest advantage with the Ombudsmen system is that it enables the Ombudsmen to go behind the veil of secrecy, behind which civil servants take shelter, and fully investigate a complaint. They can name any official they feel is responsible for the maladministration or abuse of power. The official, however, is protected by the Act, in the sense that the Ombudsmen must give him an opportunity to rebut any allegation. Such a power to name an official therefore enables the Ombudsmen to cast away the veil of secrecy under which the guilty official can take refuge. It also provides the Ombudsmen with a leverage to act as an effective deterrent against injustices by the administration. No department likes to be projected in a bad light or to be known to be inefficient or maladministrated or incompetent or unfair, especially when it involves the reputation of ministers, officials and the department as a whole. The refusal of the Ombudsmen to cover-up for the maladministration or abuse of power by the department therefore acts as an effective deterrent.

Our constitutional theory that the minister remains accountable to Parliament and that he accepts responsibility for the actions of his officials as they are supposed to act on his behalf, places difficulties on the public's access to information. In a democracy this is an anachronism, since it acts as an obstacle to the public access to information and for open government. The courts are powerless to act in this area because of the operation of the doctrine of Crown privilege. The policy of the courts is that it is up to Parliament to control the administration. If therefore there is no clear case of arbitrary use of power, the courts are content to leave Parliament to rectify the matter. Even in cases where there is a clear breach of administrative discretion, outdated and complicated procedures stand in the way of a successful hearing. In fact, the courts' belief that the doctrine of ministerial responsibility would act as a check on maladministration and abuse of power can in some cases have the opposite result and lead to, as one leading jurist put it, "administrative irresponsibility".[235]

Through their ability to publicise defects in the Government bureaucracy, the Ombudsmen have been able to make up for the shortcomings in our present

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235. Donald C. Rowat, The Ombudsman, Citizen's Defender, op. cit., p.291.

system of controls over the administration and have been able to reduce the typical administrative faults, namely unwarranted secrecy, communication breakdown and rigidity in administrative decisions. Even the fact that decisions deal with an element of policy has not detered the Ombudsmen from intervening and trying to negotiate a review of the policy, as the cases involving the Education Department illustrate.

In an indirect manner, the Ombudsmen have thus been able to instil into the administration that it should adopt a certain standard of administrative moral and conduct, and perhaps revamp its practices, procedures and policies to achieve this. By continuing to criticise the administration when an injustice has been committed the Ombudsmen have not only been able to redress wrongs but have also been able to bring to the attention of the public the inefficiencies of the administration. In a very real sense the Ombudsmen have therefore been able to provide the public with a powerful tool to combat against mal-administration and abuse of power. Unlike the ordinary courts which suffer from the fact that they are too costly, complicated, cumbersome and even lack sufficient powers of review, and the Member of Parliament who is handicapped because the doors of the administration are shut to his investigation, the Ombudsmen have the advantage of being given special powers to carry out an independent investigation and prompt the administration to reconsider its actions through their powers of criticism and publicity. Thus, although the Ombudsmen do not have any direct coercive powers, it has not hindered them from carrying out their functions as "grievancemen".

Another big advantage with the Ombudsmen system is that it has fitted in well within the New Zealand constitutional system. The Ombudsmen have not displaced or alienated the Member of Parliament from his constituents as some people have feared, but have in fact relieved the workload of many of them. Complaints which formerly went to the Member of Parliament are now being diverted to the Ombudsmen. The Member of Parliament is thus left with complaints which they are best suited to deal with, and consequently this will definately help to enhance their image in the long run.

It may be worth considering, in attempting to safeguard the citizen against administrative injustice, the establishment of an administrative court system. Since the Ombudsmen and the administrative courts will perform the same task but through different ways - the administrative courts will have power to review cases on their merits and quash any decision which is wrong, while the Ombudsmen have the power to review actions of the administration and attempt to obtain a remedy through the means of criticism and publicity -

there should be no conflict in their task. This system has already been established in France, which has both an Ombudsman and a Counseil d'Etat to keep the administration under proper check and control. There is no reason why such a system cannot also be implemented in New Zealand.

Other changes, less drastic in their nature, may also have to be made. Procedure and practices of the administration may have to be amended; Parliament may have to re-exert its influence over the executive by curbing its discretionary powers and strengthening its controls; free legal aid must be made more readily available; and much wider opportunities must be provided to the citizen for appealing against administrative decisions.[236] Only in this way can the administration be brought under the proper supervision of both Parliament and the people.

The Ombudsmen have an important role to play in these changes. They help to provide Parliament with a means to keep a check on the executive, especially at a time when the executive is becoming omnipotent, and at the same time provide the citizen with the safeguards to combat against maladministration and abuse of power.

It is good to know that in New Zealand, after 18 years of operation, both the general public and the administration have begun to appreciate the value of the Ombudsmen's office. It is hoped that with a greater confidence in the office, it would in the future lead to a strengthening and extension of the jurisdiction of the Ombudsmen so as to enable them to perform their functions more effectively.

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236. Donald C. Rowat, The Ombudsman, Citizen's Defender, 2 ed. (George Allen and Unwin, London) (1968), p.291.

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