LL.M. CONSTITUTIONAL LAW

RESEARCH PAPER

THE OMBUDSMEN AND THE COURTS

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> "For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth - that let no man in the world expect; but, when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for."

John Milton evokes thoughts of judicial wisdom and sublime conflict resolution in the title of the discourse[1] from which these words are taken, as well as in the words themselves. He was writing in defence of the freedom of the press in response to an order of Parliament requiring the approval and licensing of books before they could be published. Over three hundred years later, Sir Guy Powles, when the Ombudsman of New Zealand, used the same words[2] to summarise what he saw to be the function to which the holder of the office of Ombudsman should aspire. It is not an exaggeration to assert that the New Zealand Ombudsman, and indeed, Ombudsmen around the world have aspired to perform, within the limits of their jurisdictions, such a service. It is clear that Milton's words are applicable in a wider context. Indeed, it could be applied to all institutions and media involved in the resolution of conflict.

In this paper, the Ombudsmen and the Courts, perhaps the most significant and certainly the most obvious of the other conflict resolving institutions, will be examined and compared. It is my purpose to examine the similarities and differences that can be discerned in the two institutions. That obviously presents a vast panorama of investigation and I do not intend to even attempt to cover all of that field. I have decided to

1 Areopagitica (1644)

2 W. Clifford Clarke Memorial Lecture - "Aspects of the Search for Administrative Justice: With particular Reference to the New Zealand Ombudsman" (1966) I Canadian Public Administration 133 at 157

limit the examination in a number of ways. The first is almost a matter of necessity. The Ombudsmen's jurisdiction in New Zealand is limited by s 13 (1) of the Ombudsmen Act 1975[3] to the Government departments and organisations specified in the 1st Schedule to the Act[4]. The Ombudsman is never directly concerned with disputes between private individuals and bodies. His jurisdiction is exclusively over governmental activity (whether it be central or local). However, within the governmental field most departments and organisations are subject to his investigation. In addition though, it must be noted that the Ombudsman does not have jurisdiction over many tribunals which are intimately linked with the activity of Government in this country[5].

On the other hand the courts have jurisdiction to administer the law and to regulate the whole field of human endeavour. Consequently, not only is it impracticable to compare the Ombudsmen with the courts in all their fields of jurisdiction, but also unnecessary. It may well be that it is appropriate to consider some aspects of the activity of the courts in the area of private law but in this paper I will be concerned almost solely with public law - the relationship of the individual to public authorities; and even more specifically with that part of public law where the courts have concerned themselves with the supervision of the activity of government. Secondly, in examining the differences and similarities of the institutions the paper will focus primarily on the third step in the process of conflict resolution outlined by John Milton. The word that a lawyer uses to describe the area the paper will be concerned with is "remedies". That describes a part of what will be considered but my subject matter is wider than a comparison of a legal remedy like the injunction with a similar, or dissimilar, "remedy" of the Ombudsmen. The area of inquiry is perhaps better described by saying that the paper will examine the "resolution"

3 Unless otherwise stated all references to sections of the New Zealand Act will be to the Ombudsmen Act 1975.

4 The Ombudsmen's jurisdiction is limited in a number of other ways as s 13 (1) itself shows. See also ss 13 (2), 13 (7), 13 (8), 14.

5 e.g. Town and Country Planning Appeal Boards, Local Government Commission, Commerce Commission, Transport Licensing Authorities and Transport Licensing Appeal Authorities, Social Security Appeal Authority.

of a complaint to, or case before, the Ombudsmen or the courts. In some situation it may be said that even "resolution" is too restrictive a word. What will really be being considered can only be described as a "response" of the Ombudsmen or the courts of a person coming to them. The reasons for this particular limitation are firstly; to limit the scope of the inquiry to a manageable size for a paper of this sort. Secondly, as will be explained, part of the purpose of this paper is to consider the constitutional ramifications of these two institutions working side by side in a similar area. The results that such achieve as a part of their response/resolution processes are the most likely to show whether their activity is of constitutional significance. The third limitation I have put on the scope of the inquiry is that to a large extent the paper will be concerned with the situation as it pertains in New Zealand. That is not to say that illustrations and developments will not be taken from the institutions in other countries where that is appropriate.

Having made a detailed analysis of the response/resolution processes of the two institutions it is then my object to evaluate what effect, if any, they have had upon each other. I will then consider and evaluate their respective contributions to government and then try to discern whether there is any constitutional significance in their contributions.

Before proceeding it is necessary to note five points. First, it is useful to state the obvious. Although this paper will be primarily concerned with two particular institutions, they cannot be divorced from the societal context in which they operate. Just as they have a part in shaping that society, so that society moulds them to meets its needs. This fact will be of particular significance when towards the end of the paper the impact of each of the institutions is considered in relation to the constitution. A closely related factor relevant to that consideration is that the Ombudsmen and the courts operate alongside other conflict resolving agencies. It would appear obvious that the activity and development of the latter is going to affect to some measure the activity and development of the former. Secondly, this paper almost exactly marks the fifteenth anniversary of the inception of the office of Ombudsman in New Zealand[6]. On one hand it may be said that 15 years

6 On the 1st October 1962

is by far too short a time to provide a reasonable basis upon which the institution can be validly compared with that of the courts whose history and development stretches over centuries. That contention cannot be dismissed in any off-hand manner but on the other hand it may be said that the Ombudsman institution in this country has moved beyond being a fledgling, that it has established itself as a significant part of the constitutional structure and that the 14,184 complaints it has received [7] in those fifteen years provide more than a sufficient basis upon which to begin a comparison. Furthermore, the fact that one of the institutions, the courts, has, as it were, always been a part of our constitutional scene and has had a part in moulding its development, but has now been joined by another institution which operates in a similar sphere presents within itself a challenge to examine and evaluate the constitutional import of such an addition. Thirdly, it is clear that a factor which must have an important bearing on the whole inquiry is that the institution of the Ombudsman is dependent for its existence upon a statute whereas the courts originate from the king as the fount of justice and have, especially in the area of their supervision of the executive arm of government, an inherent jurisdiction which is supplemented by statute. To be more accurate, that is true of the Supreme Court, which, as far as the courts are concerned is the central actor in the supervision of governmental activity and which has inherited its jurisdiction from the Court of Queen's Bench, In addition the courts have had centuries to develop their approach to their supervisory role and, by virtue of the doctrine of precedent, to have developed it along particular lines.

Fourthly, the institution of the Ombudsman has operated during a period of judicial activism in relation to the supervisory role, and the comparison of the institutions must be in the light of that.

Fifthly, in New Zealand the Ombudsman institution has just undergone significant development in that the Ombudsmen Act 1975, which as to the relevant parts came into effect on 1 April 1976, brought local government authorities within the ambit of the Ombudsmen's jurisdiction. Although it does not extend the basis upon which an Ombudsman can begin

7 Up to 31st March 1977. 1977 Report p.4.

an investigation[8] is nevertheless an important step in the development of the institution and while its effect is still somewhat unfathomable, it can be seen in some measure to support part of Professor Hills' thesis[9] that the process of the institutionalisation of the Ombudsman involved the office, and the efficacy and usefulness of its operation, being accepted on a widespread basis both within government and without. It should also be noted that the 1975 Act provides for the appointment of "one or more Ombudsmen".[10] That provision is not without importance to the development of the institution.

Each of these five factors must be kept in mind in the course of the examination of the response/resolution processes of institutions and will be particularly relevant when the constitutional ramifications are considered and when possible developments for the future are canvassed.

The Approach

As I suggested before there is a challenge, to analyse and evaluate the importance for the constitution of the fact that these two institutions are working side by side in a similar field, inherent in the fact that

8 That can be qualified by saying that the 1975 Act repealed these parts of the Parliamentary Commissioner (Ombudsman) Act 1962 that were added to that Act by the Parliamentary Commissioner (Ombudsman) Amendment Act 1968 relating to professional activities of employees of Hospital Boards and Education Boards which were brought within the jurisdiction of the Ombudsman by that amendment. They appeared in the 1962 Act as s 11 (1A) & s 11 (5) (d) & (e) and prevented the Ombudsman from investigating any decision, recommendation, act or ommission relating to the professional activities of these employees. Under the 1975 the Ombudsman's basis of jurisdiction is "relating to a matter of administration", s 13 (1), which would appear to allow the Ombudsman to investigate the actions of teachers if they are "relating to a matter of administration" and consequently there may be said to be some extension of jurisdiction in this way.

9 Larry B Hill, "The Model Ombudsman", Princetown University Press, 1976.

10 s 3 (1)

one of the institutions is a newcomer with particular characteristics of its own. It is primarily for this reason - the Ombudsmen being recent intruders upon the scene - that in analysing the work of the institutions more emphasis will be placed on the output of the Ombudsman in the last fifteen years. Although the work of the courts in this area is not easily delineated and compactly described (especially in the wake of recent and continuing judicial activity) its general outlines and myriad details have nevertheless been the subject of considerable study and documentation[11]. On the other hand, the Ombudsman institution has been subject to a number of descriptive studies[12], but its "common law" has received little elucidation[13]. Its "common law" holds the most importance for the purposes of the present study.

The way I intend to proceed with the comparison of the institutions is first to outline some of their basic structural, procedural and essential similarities and differences. Then the particular responses that each of the institutions can make to an individual coming to them will be outlined. It will then be appropriate to examine in detail the substance of the response/resolution processes of each institution. This will be done by having regard to each of the spheres where the institutions have a direct impact, by virtue of their response, in turn. First, they will be considered as to their impact for the individuals who come to them. Secondly, their impact upon the public authorities over which they have a supervisory jurisdiction will be examined. At that point it should be possible to summarise the salient features of the response/resolution processes of the two institutions and to note a number of miscellaneous but relevant factors before evaluating what the similarities and differences mean and whether they point to any future developments.

11 e.g. S A de Smith, "Judicial Review of Administrative Action" (3rd edition) 1973; J A G Griffith and H Street, "Principles of Administrative Law" (4th edition) - to name only two major texts.

12 W Gellhorn, "Ombudsmen and Others", 1967; D C Rowat, "The Ombudsman - Citizens Defender" (2nd edition) 1968.

13 But see e.g. G Sawer, "The Jurisprudence of Ombudsmen" 1971; 30 Public Administration, p221 and K J Keith, "The Ombudsman and 'Wrong' Decisions" 197], 4 N.Z.U.L.R., p361.

The Basic Characteristics

If a person is asked to describe the similarities and differences between the Ombudsmen and the Courts, the chances are that he will immediately set about pointing out that the Ombudsman is a nice chap who works in nice offices and is always ready to listen to you but who doesn't really have much bite to his bark whereas the courts are rather distant, terribly formal places which only those who work in them understand but which, if you can get them to see your point of view will order that justice be done and which have the power to see that it is done. The point is that the immediate tendency is to focus upon obvious differences that exist between the institutions. However, a case can be made out that from a constitutional point of view it is the characteristics that are common to both institutions that are important (or at least as significant as the differences) in determining the impact of the institutions.

(a) Essential Similarities

The first is a composite of a number of activities that are common to both but which can be subsumed under the statement that both bodies are in the business of conflict resolution, of the doing of justice. It is true that the courts have a function of interpreting, declaring and upholding the law but that function in the perspective of the whole work of the courts is ancillary to their primary aim of resolving conflicts, whether they be between the state and the individual in criminal matters, the individual and the state in public law matters, or individual and individual in private law matters, and of seeing that justice is done. The Ombudsmen also have ancillary functions, some of which will be considered presently, but their primary function is to continue the search for and achieve administrative justice.[14] The components to this common trait which are also common to both institutions are the fact that they are complaint based, information eliciting and

14 See e.g. 1965 Report of the Ombudsman, New Zealand, p5; and the title and substance of Sir Guy Powles lecture to the Canadian Institute of Public Administration - "Aspects of the Search for Administrative Justice", opcit n.2.

issue determining bodies.

The other major similarity of the two institutions is that they have jurisdiction in the same area - the supervision of the activity of governmental bodies. As will be seen, that supervision is carried out in different ways and is to some extent over different things but it is in a common area.

The combination of these factors - similar ambitions for the same territory - may be significant in the constitutional context because it admits of the possibility first, of an ascendancy conflict and secondly, (one of the institutions having claimed the territory for itself, or for its ultimate control), of resultant constitutional reverberations and development. The point may be better understood in an analogy. Consider the case of two men who are set a task by their employer of cultivating crops. One of the men has had several years previous experience at the job, but the other is better equipped both in a talent for cultivation, physical build and the implements he has at his disposal to carry out the task at hand. It soon becomes apparent to the employer that the second man is far more efficient and productive at the cultivating task. It is also apparent to the other man. This could lead to conflict between the two but more than likely would lead to the employer placing the effective labourer in a position of responsibility over the first man, or perhaps even doing without the services of the first man altogether, in the hope that he could further increase his production and efficiency and perhaps move into processing and marketing his own goods. To be sure, the analogy is replete with assumptions about the ways of the world and carefully avoids alluding to the possible effect of the problems and the realities of life but my point is that the possibility of one being preferred to the other does present itself. As much can be seen from the rise and fall of the Court of Star Chamber during the sixteenth and early seventeenth centuries. It is admitted that the times are not as turbulent as they were then and the constitution is more stable now than it was then. Nevertheless, the constitutional scene in New Zealand is by no means static and the fact that both the Courts and the Ombudsmen are actors in that scene means they have the chance to make their mark upon it.

(b) Basic Differences

As has been stated, the common characteristics of the two bodies and the affect of them is important to a constitutional evaluation of them. The differences must also be closely noted especially as the possession of certain characteristics to the exclusion of the other may show which body is better equipped to perform the tasks which are set before it.

It has already been noted that the Ombudsman institution is statute based whereas the courts have an inherent jurisdiction which has been built up during centuries. This would seem to suggest that the Ombudsmen are somewhat more limited in extending and developing their jurisdiction than are the courts. On present realities that is largely true, but it is not necessarily so. First, the ability to develop jurisdiction is, for both the courts and the Ombudsmen, dependent somewhat on external factors; the most important being whether Parliament or perhaps more correctly, the Executive is content to let them continue in their activities. If it is not then it can prune their growth with legislation. Secondly, it has been noted by Professor Keith that, "the concept of jurisdiction has a more rubbery character in the case of the Ombudsman than in the case of the courts."[15] Examples which illustrate this will be noted when the substance of the responses are examined but the fact is that the Ombudsmen are examining things under the rubric of "relating to a matter of administration" that are beyond the contemplation even of those who were closely associated with the inception of the institution in New Zealand.[16] The fact that there is a statutory basis for the office and jurisdiction of the Ombudsman isn't prohibitive of any development but nevertheless it would appear to allow a more limited development than that attainable by the courts.

Another essential difference is that from the inception of the office of Ombudsman in New Zealand the Ombudsmen were conceived of as having close links with Parliament. Indeed, the very name of the instituting Act - the Parliamentary Commissioner (Ombudsman) Act 1962 - clearly demonstrates this intended link. A short perusal of the 1962 Act indicates that the link was expressly and deliberately formulated. The Parliamentary Commissioner was to be "an officer of Parliament"[16A], he was to be appointed

15 K J Keith, "The Ombudsman's Jurisdiction: What is a 'Matter of Administration?" "Proceedings of the Conference of Australasian and Pacific Ombudsmen 1974" p.14.

16 e.g. The Honourable Ralph Hanan, 1961 NZPD 1807.

16A 1962 Act s 2(1) cf. 1975 Act s 3(1).

"on the recommendation of the House of Representatives"[17], he was to resign his office "by writing addressed to the Speaker of the House of Representatives"[18], he could only be removed from office "upon an address from the House of Representatives"[19], the House of Representatives could make rules for the guidance of the Commissioner[20], his ultimate sanction in a particular case was a "report to Parliament"[21] and he was required "in each year to make a report to Parliament on the exercise of his functions under (the) Act" .[22] Although all of the sections establishing this link in the 1962 Act have been almost exactly repeated in the 1975 Act, and therefore, it may be said, the link with Parliament is as basic as it ever was to the institution, it can also be argued that the 1975 Act represents a change in the status of Ombudsmen as a parliamentary officer. In extending the Ombudsmen's jurisdiction to local authorities it was obviously inappropriate that the Ombudsman, as the ultimate sanction in a complaint against a local authority, should report to Parliament. Consequently, the solution of having the Ombudsmen reporting the results of their investigations to the full committee of the local authority will the additional right to require the publication of their findings[23] can be seen to be somewhat in derogation of the idea that the Ombudsman was Parliament's man, a tool to enable the better control of the excesses of executive government. However, it is a fact that in New Zealand the status of the Ombudsmen as officers of the legislature has never been as important to the operation of the institution as it has in Britain, for instance, where the Parliamentary Commissioner is directly linked to a parliamentary select committee and where he can only investigate complaints that are passed on to him by memebers of Parliament[24]. Nevertheless, the link however important it may or may not be is provided for in the New Zealand statute and this fact is obviously in marked contrast to the courts. Over the

17 1962 Act s 2 (2) cf. 1975 Act s 3 (2).

18 1962 Act s 4 (3) cf. 1975 Act s 5 (3).

19 1962 Act s 5 (1) cf. 1975 Act s 6 (1).

20 1962 Act s 12 (1) cf. 1975 Act s 15 (1).

21 1962 Act s 19 (4) cf. 1975 Act s 22 (4).

22 1962 Act s 25 cf. 1975 Act s 29. See also 1962 Act ss 6, 8 (2), 11 (3) as to further manifestations of the link.

23 s 22 (6) & s 23.

24 ss 4 & 5; Parliamentary Commissioner Act 1967.

centuries the courts have increasingly loosed themselves from their shackles to the king and have forged for themselves a position of integral importance in the British style of constitution, such that a strong and effective judicial arm of government is considered essential to the system of checks and balances which in turn are seen as essential to the working of the constitution. The catchword to be applied to the courts and to the judiciary who sit in them is "independence". They are in no sense delegates or extensions of Parliament. Manifestations of the recognition of this independence may be seen in the Judicature Act 1908. Judges of the Supreme Court and the Court of Appeal are to be appointed by the Governor General (with no requirement that it be upon the recommendation of the House of Representatives)[25], are to hold office during good behaviour[26] until they reach the age of 72 [27]. It is true that they may be removed from office on the address of the House of Representatives for certain misconduct[28]. However, their tenure of office is secure and to a large extent beyond political manipulation. All this is elementary. However, it needs to be noted because the origins and constitutions of these two institutions are obviously going to have an effect on their impact and future development. To this end it is also necessary to notice that the Ombudsman is not so much Parliament's man as to be subject to every whim and storm of Parliamentary life. His independence is safeguarded in a number of ways in the statute and is asserted in practice. First, and obviously, his area of jurisdiction is set down by statute[29]. Secondly, his salary is a charge on the Consolidated Reserve Account[30] and so he can't be subject to parliamentary pressure in that area. Thirdly, his term of office is for five years[31] which although it provides more room for political influences than in the case of the judiciary, is nevertheless effective to bridge over a change of power at elections. Fourthly, the Ombudsmen are empowered to regulate their own procedure, although that power is subject to the Act and any rules made for the guidance of the Ombudsmen by the House[32]. It is obvious that although some measure of independence is reserved to the Ombudsmen they are nevertheless not in the position of independence enjoyed by the judiciary.

25 s 4.

26 s 7.

27 s 13.

28 s 8.

29 See n. 4 supra

30 s 9.

31 s 5.

32 s 18 (7).

Another difference between the two institutions is that of size. The institution of Ombudsman started in 1962 with one Ombudsman in Wellington and as the work load has increased and the jurisdiction has been increased over the years, so has the staff increased until now there is a total of three Ombudsmen with a supporting staff of twenty-eight spread between three offices in Wellington, Auckland and Christchurch[33]. The courts are in clear contrast with the Supreme Court alone having a total of sixteen registries linked to courthouses and twenty judges on the Bench, to say nothing of the hundreds of supporting staff. In the past this has meant that the Ombudsman's office has become renowned for its friendly personalised nature which no matter how hard an attempt is made to achieve such a personal touch in the courts where it is perceived as desirable, such as in the Magistrates Court in its domestic jurisdiction, it is never really attained. More will be noted of the affect of this factor when the impact of the institution responses on the individual is examined.

A major difference between the Ombudsmen and the Courts is their method of information eliciting (which has been noted as a common trait). The methods may be described as investigatory, in the case of the Ombudsmen, and adversary, in the case of the Courts. At this point, to note the special powers conferred upon the Ombudsmen to enable them to carry out their investigations[34]; that each technique has its own advantages and disadvantages, which means that each is better suited to different tasks; and that the two institutions <u>are</u> differently equipped in this respect is sufficient.

A difference which is linked to the last two is that of formality. Only a limited knowledge of the institutions is needed for it to be clear that the requirements made of a complainant in bringing his complaint to each, the procedure employed in considering a complaint, and environmental factors like the physical layout of a courtroom, the way a judge is dressed and the requirements as to address of a judge are very much more formal in the case of the courts than in that of the Ombudsmen. Again, the relevance of this difference will be discussed as the paper proceeds.

The final difference that I wish to note at this stage is probably one of the better known distinctions between the Ombudsmen and the Courts. It is the fact that the Ombudsmen have no direct coercive power - they cannot demand that their decision on a particular matter be put into effect and

33 1977 Report of the Ombudsman p.9.

34 s 18 (2), (3) & (7) & s 19 (1), (2), (3) & (4)

then enforce it if it is not. They can only recommend.[35] On the other hand the courts not only have the authority to make a determination of a matter; they also have the machinery to see that that determination is complied with. However, the situation is not as simple as it may appear on the face of it, as will be analysed in more detail later. Suffice it to say that even though the Ombudsman only has been given a power of recommendation his success rate in having recommendations complied with is admirable. This may be indicative of two things or a combination of both of them. It may show that the Ombudsman and the administration which he investigates share in common the same or very similar normative values. It may also be that the sanctions able to be wielded by the Ombudsmen by virtue of their status, and those of the power to report to Parliament and use publicity are more efficacious than they would first appear. The other side of the coin is that the courts are not in a position to enforce orders made against the Crown but as de Smith says, "This is not a matter of any consequence, for the Crown does comply with judgements against it."[36]

The picture, as so far described, shows that the Ombudsmen and the Courts have two essential traits in common and that while there are a number of structural and procedural differences discernible, they may not be as different as they at first seem.

What are the responses that can be made to a complaint?

In this section of the paper I wish merely to set out the different responses that are made by the Ombudsmen and the Courts.

The Ombudsmen, when they receive a complaint may:

- decline it for lack of jurisdiction

  on the grounds that it does not relate to a body within their jurisdiction (s 13 (1) & 1st Sch)

  on the grounds that it is not "relating to a matter of administration (s 13 (1))

  on the grounds that one of the other jurisdictional restrictions exclude it (s 13 (7) (b) (c) (d), s 13 (8), s 14)

35 s 22 (3) & (4)

36 S A de Smith, Constitutional and Administrative Law, 1971, p.596.

- decline it consequent on an exercise of their discretion under the proviso to s 13 (7) (a) (relating to the existence of right of appeal and it being unreasonable to expect the complainant to resort or to have resorted to it), and s 17 (1) (a) and s 17 (2) (relating to adequate remedies being available and to too great a delay in bringing the complaint or whether the complaint is frivolous, vexatious, not in good faith or trivial, or there is no sufficient personal interest in the complainant).

- give advice to the complainant or refer him to an appropriate person or body capable of assisting him even if the complaint has been declined on either of the above bases.

- begin an investigation of the complaint but have it withdrawn by the complainant in the course of the investigation (for any number of reasons personal to the complainant).

- begin an investigation of the complaint but discontinue it under s 17 (1) (b) for reasons including:

  a finding that there was in fact a jurisdictional limitation on the investigation.

  the complaint being rectified by the department or body being investigated to the complainant's satisfaction before the investigation is completed.

- investigate the complaint, find it not justified and make no suggestions or recommendations (s 22(3)).

- investigate the complaint, find it not justified but make a suggestion or recommendation to the department or body against whom the complaint was made (s 22 (3)).

- investigate the complaint and find it justified (s 22(3)). (Rectification made by the department or body against whom the finding was made or rectification no longer possible because e.g. the situation giving rise to the complaint had passed).

- investigate the complaint, find it justified and make a recommendation (s 22(3)).

There are two further things to note about a response which involves a recommendation. If a recommendation is not accepted by the department or body to which it is made then the Ombudsmen have, in the case of organisations included in Parts I & II of the Ist Schedule to the Act, a power under s 22 (4) to send his report and recommendation to the Prime Minister and can then report to Parliament. In the case of Part III organisations they can have their recommendation published. The other point is that the recommendations made need not be specifically related to the complaint which spawned it. It can involve a reference to any of the matters in s 22 (3) (b) to (g); which include the examination of any law or practice on which the decision, recommendation, act or ommission, which gave rise to the complaint, was based.

The Courts, when an action is brought before them may:

- decline it for lack of jurisdiction

  e.g. the Magistrates Courts have specific limits on their jurisdiction under the Magistrates Court Act 1948.

  the Supreme Court is not particularly hindered in this respect, especially in the area of its supervisory role except that it may feel compelled to decline for a lack of jurisdiction where an original jurisdiction has been conferred by statute upon a special tribunal.

  Nevertheless it will retain its supervisory role over that tribunal in the exercise of its jurisdiction.

- decline it for a procedural defect

  e.g. where the plaintiff/applicant has no locus standi, or where a time limit operates as a bar. (However, this possibility is often modified by virtue of a discretion residing in the court. e.g. to extend time limits where very good reasons are shown - (R594 of the Code of Civil Procedure)).

- decline it on the basis that no cause of action is disclosed[37], hear and determine the action according to law and:

  - dismiss it as not being sustainable in fact

  - dismiss it as not being sustainable in law

37 For a recent example see Takaro Properties Ltd (in receivership) and Another v Rowling [1976] 2NZLR 657.

- dismiss it in the exercise of discretion that e.g. an order of the court couldn't be supervised, or that alternative remedies were available, or that the applicants delay and conduct precluded relief.[37A]

- grant the relief claimed or some other appropriate relief as provided for in the Judicature Amendment Act 1972 whether it be an order[38] quashing the decision made, or prohibiting an attempt to act in excess of jurisdiction, or compelling the matter to be determined according to law or enjoining some activity or declaring the law and/or the rights and duties of the parties or referring the matter back to the appropriate body for reconsideration with directions.[39]

The above is only an outline of the possible responses which the courts can use in respect of complaints that come before them. To fill in the minutiae would require a book or two on Court practice and procedure.[40]

It has already been noted that the Courts employ an adversarial procedure in order to elicit the facts and the law relevant to the matter before them. This is significant in this context of possible responses because it means, in principle, that the courts response in any particular case is limited to (or at least strongly influenced by) the case that is presented to it by the parties before it. In practice of course the courts do direct the parties to relevant matters that they are aware of. However, that is not always the case. For instance, if objection to the locus standi of a party is not made by another party then the courts' deliberations may take place without the matter being considered.[40a] Furthermore, the courts are not in a position of being able to attempt to ascertain the salient facts for themselves, nor are they expected to research their own law. In the judicial system those tasks are ostensibly for the parties and their counsel appearing in the case. By comparison the Ombudsmen, although they depend to some extent upon the area of inquiry being indicated by the complainant, are, in principle and in practice, nowhere near as limited as the courts to the case presented to them by the "parties". They have the means to investigate

37A See de Smith, "Judicial Review of Administrative Action", Part Three generally, pp 372-77, 389-95, 456-61, 500-04.

38 Judicature Amendment Act 1972 s 4 (1)

39 Judicature Amendment Act 1972 s 4 (5)

40 In addition, an intimate association with each of them is not necessary for the purposes of this paper, in the same way as the details of the Ombudsmen's procedure are not essential.

40a See e.g. Prescott v Birmingham Corporation [1955] Ch.210

the complaint irrespective of the activity of the "parties", and they make use of those means.

A perusal of the different ways that a court can respond to an action before it would seem to indicate that it has open to it a narrower range of responses than that open to the Ombudsmen. Remembering what has been said about the inability of the court to enforce orders against the Crown it can be noted that at one end of the spectrum the Ombudsmen have a practice of giving advice to complainants or of referring them to the person equipped to deal with their problem.[41] There is no similar practice or procedure employed by the courts. At the other end of the spectrum the Ombudsmen have the express power to make recommendations in respect of:

> "A rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may br unreasonable, unjust, oppressive, or improperly discriminatory."[42]

The job of the courts is to uphold the law. For that reason cases can be found in the reports where the courts have declared regulations,[43] bylaws[44] and practices[45] invalid because they are contrary to the law. But the courts are not in a position to declare a rule of law or any statutory provision invalid or illegal.[46] Their job is to uphold the law, not to question it or amend it and the doctrine of precedent is one of the safeguards to ensure that that is done. The Ombudsmen

41 See e.g. 1967 Report p.3, 1977 Report pp. 11 & 12.

42 s 22 (1) (b)

43 e.g. F E Jackson and Company Limited v Collector of Customs [1939] NZLR 682 where a regulation made prohibiting "allgoods" was not regulatory in terms of the statute.

44 e.g. Staples & Co (Limited) v The Mayor, Councillors, and Citizens of the City of Wellington (1900) 18 NZLR 857

45 e.g. Anderson v Valuer General [1974] NZLR 603 where methods of valuation employed were not in accordance with the statute

46 The position is somewhat different in a jurisdiction like Canada where the British North America Act 1867 is to be complied with. See also Thorson v Attorney-General of Canada etal (No 2) (1974) 43 D.L.R. (3d) 1 at p.11 per Laskin J. It is similarly so in countries having written constitutions. The constitutionality of legislation is a justiciable issue.

are not so restricted and have generally[47] interpreted their power liberally (even to the extent that Sir Guy Powles felt able to comment on a Bill - the Immigration Amendment Bill 1968 - and to discuss it with the Minister and departmental officials while it was in the course of its passage through the House[48]), and to exercise it in appropriate circumstances. In 1969 the Ombudsman noted that:

> "(the power) entails, provided the other requirements of my jurisdiction are met, an examination, in appropriate cases, of departmental studies and recommendations leading to the submission of the draft legislation to the House and also an examination of the substance of the legislation itself as passed. This has been found in practice to be a useful aspect of the jurisdiction."[49]

He also commented that the power was most frequently exercised in relation to subordinate legislation. Nevertheless the power does extend to principal legislation and is exercised in respect of it. The courts are restricted to dealing with the matters before them (which in turn is dependent upon what use the parties present). They

47 But see case no. W11570 against the Accident Compensation Commission reported at (1977) INZAR p.113 - G Laking, Ombudsman. The fact that an investigation had not been completed within the terms of s 22(1) - the complaint not having any basis in the light of the existing law - was said to preclude the making of a recommendation under s 22(3)(e) even in the light of the fact that there was a potent injustice perpetrated by the law. The Ombudsman did also note that there was a right of appeal coming within s 13(7)(a) but felt disinclined to exercise his discretion in accordance with the proviso. This seems to be in contrast to the approach of the Ombudsman in the past, who, where there was a law as obviously discriminatory as the one in this case, had no hesitation in recommending a change - as a sort of own motion procedure. In this case the Ombudsman doesn't appear to consider the possibility of proceeding on his own motion under s 13(3). As to the availability of appeal point, it would seem that this would have been an entirely appropriate occasion when the Ombudsman could exercise his discretion in favour of the complainant. The state of the law rendered pointless the exercising of appeal rights. Furthermore, if this approach is right, how can an unjust statutory provision ever be the subject of a recommendation for no complaints including them could ever be fully investigated.

48 1969 Report p.8

49 ibid

are primarily concerned to do justice in the particular case and if injustice has been due to an invalid bylaw then they will declare it to be so. But that declaration of invalidity is ancillary to the primary task. The courts do not concern themselves with possibilities of future injustice whereas the Ombudsman is to attempt to secure justice in particular cases as well to secure administrative justice generally for the benefit of future generations. That much must be seen to be the import of his power to make recommendations about unreasonable, unjust, oppressive or improperly discriminatory practices and laws. Before leaving this point it is necessary to note that irrespective of there not being an express power in the courts to make recommendations regarding legislation they nevertheless have a considerable affect on legislation. It is obvious for example, that great areas of statute law are merely codification of the case law developed by the courts.[50] Other enactments are in response to decisions of the courts which show up manifest injustice. In addition there are examples of cases where direct comment has been made on a statutory provision by a member of the bench in the course of a case and which comment has been taken notice of by the legislature and has resulted in (or at least contributed to) appropriate statutory amendment.[51]

The Substance of the Response/Resolution Process

Before embarking upon an analysis of the activity of the two institutions in this aspect, I wish to note a technical detail. In this section of the paper the impact of the response/resolution proferred by either the Ombudsmen or the courts in different contexts will be considered first in relation to the individuals who bring complaints and secondly, in relation to the department or body against whom the complaint is made. In the process of doing this however there will be some overlap in the factors considered. For instance, when a complaint is rectified for one

50 e.g. Sale of Goods Act 1908 based upon the Sale of Goods Act 1893 which was an attempt at codification of the common law, Crimes Act 1961.

51 A recent example is the criticisms of s 108 of the Land and Income Tax Act 1954 by Lord Wilberforce in Mangin v Inland Revenue Commissioner (N.Z.) (1970) IATR 835 at 845 and the harsh words of McCarthy P in Commissioner of Inland Revenue v Gerard [1974]. 2 NZLR 279 at pp, 280-281 - the result being what is now s 99 of the Income Tax Act 1976.

reason of another that is important for the individual complainant but it also involves some cost on the part of the department which is of some significance to it. The substance of the process almost always affects both the complainant and the organisation complained against, and more often than not the impact is significant for both parties. This fact should not be lost sight of while each is considered separately.

(A) Response Touching Individuals

Some of these have already been mentioned when the responses that each institution was able to make were considered.

(i) Advice and referral service[52]

This is a trait which appears to be universal to Ombudsmen and in some offices is being seen as an increasingly important task even though nowhere is there statutory authority for it. It is a practice which has grown from two sources. The first is that from the beginning of the offices it was apparent that many complaints were coming to the Ombudsmen that were outside of their jurisdiction but which they, in the light of the aims of the institution, were reluctant to turn away without any solace or help at all. The second is simply that such a service was a need of the population and they determined to attempt to meet that need within the resources available to them. This activity of the Ombudsmen in some offices is coming to be considered so significant to their task that they are keeping relatively detailed statistics in respect of them[53] and for instance in the office of the Ontario Ombudsman an index of services and individuals along with addresses, telephone numbers and relevant information is being developed in order to be able to quickly provide complainants and enquiries with helpful information in respect of their problem or question.[54] Clearly, the courts do not involve themselves in a task such as this at all (except perhaps to the extent that it may be said that solicitors are daily called upon to give advice as to wide ranging matters, and that they

52 N.41 supra. See also 1970 Report of the Alberta Ombudsman, p.9; 1976 Report of the Alberta Ombudsman, p.7; 1970 Report of the Manitoba Ombudsman, p.10.

53 e.g. 1st Annual Report of the Ontario Ombudsman 1975-76; H.S. Doi, Ombudsman, Hawaii, "The Work, Staffing and Administration of an Ombudsman's Office", Proceedings of the Conference of Australasian and Pacific Ombudsmen. 1974, pp 87-88.

54 1st Annual Report of the Ontario Ombudsman 1975-76 pp. 49, 81.

are officers of the court - however most members of the public would not make such a connection and the significance of that fact for them, which is what is under consideration, is non-existant). It may be cogently argued that the court should not be involved in any kind of informal advice referral service - that is not their job and they are not equipped for it. The force of that argument is apparent but to argue about whether or not the activity should be pursued is not the point of considering it. The point is first, to notice that the Ombudsmen do do it and the courts do not and secondly, to guage the significance of it for the individual. Here is encountered a theme to which allusion has already been made and to which we will return. It is that of the personal approach and personal contact which has been possible and has been deliberately followed by Ombudsmen everywhere. Randall Ivany, Alberta's second Ombudsman who took office in 1974, stated the three central goals of his office to be:

" (1) Availability
(2) Flexibility
(3) Humanisation[55] "

All three can be seen to be important to the Ombudsman's office being known for the personal touch but the goals of availability and humanisation are especially important. In his first report the Ontario Ombudsman also expressed an awareness of the fact that it was important not to let his office develop into a bureaucracy and so become distant from the public,[56] and the personal humane approach of Sir Guy Powles while he was incumbent of the office in New Zealand is so famed as to be beyond the need for references. In modern, impersonal society where alienation abounds in many forms the existence of an official who is prepared not only to sit down and listen to problems and complaints, but also appears willing to do so on a personal level would seem to be almost universally accepted as a powerful and desirable attribute of the Ombudsman institution, and to have a beneficial impact on the lives of those individuals who come into contact with it.

55 1974 Report of the Alberto Ombudsman p.5

56 ibid n.54 supra, p. 48. However, when the elaborate office organisation and system of that office is considered along the massive number of complaints (10,587 - it took approximately twelve years for New Zealand to reach that total) received in the first year office, I wonder how effectively they will fulfil their objectives.

(ii) Dealing with the complaint

(a) Informality

This factor has already been considered under the heading of basic differences and not much more needs be said about it except that it is linked to the theme of personal service. It could be explained from the individual's point of view by saying that when a case is taken to the courts you are required to play the game their way and if you break the rules then you bear the consequences. However, when you take a complaint to the Ombudsmen the requirements are not so strict and the rules of the game are worked out by consultation as the game proceeds. The informality of the Ombudsman/client relationship would appear to be more attractive to individuals.

(b) Speed

In 1970 the Ombudsman stated,"The Ombudsman procedure should be kept informal, thorough and expeditious."[57] That almost amounts to a paraphrase of the words of John Milton with which this paper began. Obviously, expedition is an important element in the doing of justice. That fact is recognised by the courts as well as the Ombudsmen. However, in this respect the courts are hindered by a massive and ever-increasing workload and by the cumbersome procedures used in dealing with cases (which, ironically, have been developed to ensure the doing of justice). The Ombudsman also noted in the 1970 report that the majority of cases that he dealt with were finished with in six to eight weeks.[58] The Hawaiin Ombudsman, Herman Doi, quoted in his paper presented to the Australasian and Pacific Ombudsmen's Conference in 1974 the figures of 35.73 days (i.e. approximately five weeks) as being the mean time in which investigated complaints were dealt with in the 1971-72 year, and of 42% of complaints being dealt with in a week, 54% being dealt with within two weeks and 69% of complaints being dealt with within four weeks.[59] Obviously, the courts are in no position to compete with these kind of records. The final determination of a case from the time it is brought will involve months. It is of course clear that the courts will move with expedition where

57 1970 Report p.9.

58 ibid

59 "The Work, Staffing and Administration of an Ombudsman's Office" opcit, p.87A.

special prejudice is involved, on an ex parte application if need be. However, that is not of much use if the action is against the crown, for injunctions will not issue to the crown[60] and so neither will interim injunctions. There are no such things as interim declarations.[61] The applicants only hope in such a situation is that the crown will facilitate the bringing of the substantive action to trial. Even if there has been expedition on an interlocutory matter that is no guarantee that the substance will be finally determined any earlier.

It should also be noted that the Ombudsmen also have cases that drag on in some cases for years but they are normally as a result of circumstances beyond his control and not because he doesn't have the time to deal with them. The plain fact of the matter is that the Ombudsmen's ability to deal with a case quickly, in contrast to the situtation of the courts is a decided mark in his favour as far as the individual is concerned. A complainant whose complaint is speedily satisfied is more satisfied.

(c) Cost

This point does not need to be laboured as it is painfully obvious. It used to cost a complainant to the Ombudsman the crippling sum of one pound.[62] The outcome of the complaint had no affect on the cost. Now it costs nothing to make a complaint - the service is on the tax-payer. And the cost of taking a case to court? Who knows? Nothing further need be said.

60 Crown Proceeding Act 1950 s 17.

61 However, notice that cl.8 of the Judicature Amendment Bill (No.2) 1977 at present before the House provides for an amendment to the Judicature Amendment Bill 1972 by substituting a new s 8 including:

"(2) Where the Crown is the respondent (or one of the respondents) to the application for review the Court shall not have the power to make any order against the Crown under paragraph (a) or paragraph (b) of this section; but, instead, in any such case the Court may, by interim order: (a) Declare that the Crown ought not to take any further action that is or would be consequent on the exercise of the statutory power or (b) Declare that the Crown ought not to institute or continue with any proceeding, civil or criminal, in connection with any matter to which the application for review relates."

62 1962 Act s 13 (3) - and note even then the discretion in the Ombudsmen.

(d) Regard to personal circumstances

The Ombudsman further commented in his 1970 Report[63] that in dealing with cases before him he had regard to the personal circumstances of the complainant. It is apparent that he means by this something different from a consideration of the merits of the case (which will be examined presently) by the fact that he gives as an example the situation, "where personal distress is involved". He further says that, "where necessary the case is pressed to a very early conclusion by telephone".[64] The fact that the Ombudsman does this sort of thing is another aspect of the factor of personal dealings with individuals, and his ability to do it lies in the flexibility and informality of operation. The courts obviously do not provide such a service. However, it is not contended that members of the bench and court staff are totally unfeeling insensitive ogres. No doubt they do as much as is possible within the limits placed upon them by the system and heavy workloads, Nevertheless, they are not equipped for such a task and in this respect once again the Ombudsman - individual relationship comes out on top as far as the individual is concerned. That is even in spite of the fact that as the already been noted the courts may take notice of personal circumstances to the extent that unless they act with expedition, irreparable damage could ensue.

(e) The Communication/Explanation Role - Personalising Government

This is another aspect of the third of the goals of the Albertan Ombudsman.[65] There are numerous examples scattered through the case notes in the Ombudsman's reports indicating different aspects of this kind of response which the Ombudsman makes to individual complainants. The basis for this response can perhaps be seen in the statute in s 24(2) which says: "The Ombudsman shall in any case inform the complainant, in such manner and at such time as he thinks proper, of the result of the investigation."

That is the statutory obligation placed upon him but in practice he communicates more often with the complainant than just to notify him

63 at p.9.

64 ibid.

65 See n.55 supra

of the result of the investigation. He communicates by letter, telephone or in person as often as is necessary in the context of the case. It is safe to assert that the simple expedient of a letter is a major factor in carrying out of the role in the majority of cases. In such letters the Ombudsman is able to explain and the complainant to understand, perhaps for the first time, for example the intricacies of import law requirements and the relevant departmental policy.[66] Sometimes it involves him in establishing communication between the individual and the organisation involved as in the case where an elderly lady purchased an "own your own" unit in a block of two. At the time of settlement there was only one rate assessment for both units which was to be divided but for which the council would not issued separate receipts until it was so divided. However, in the following year arrears on the whole of the old assessment were charged to the woman who upon going to the council received no co-operation whatsoever. The Ombudsman was able to penetrate beyond obstructive clerks such that the complaint was completely rectified.[67] At other stages the Ombudsman is required to explain events to a complainant which have been confusing or irritating; as in the case where a complainant was admitted to hospital with a drug overdose. She remembered having had photographs taken of her and she objected to that. Along with other matters the Ombudsman was able to explain to her the reasons for the photos and to return the negatives to her.[68] In other cases the Ombudsman may simply win an apology to the complainant from the department.[69] A final aspect of this communicating role undertaken by the Ombudsmen, and one which is frequently used, may be called the convening function. This idea is to get all of the parties together for a conference so that effective communication can be established and any disputes can be solved.[70] This conference technique is also used by other Ombudsmen.[71]

66 e.g. Case No. W10996 against the Customs Department, Reported in (1977) INZAR 114.

67 Case No. A168 Reported (1977) INZAR 152. See also a similar case which involved a communication breakdown - 1973 Report, p.49, Case No. 7123.

68 1972 Report, p.47, Case No. 6550. 69 1964 Report, p.62, Case No. 662.

70 See e.g. 1964 Report, p.36, Case No. 897; 1972 Report, p.69, Case No. 6237; 1976 Report, p.27, Case Nos. 9405, 9606.

71 e.g. South Australia; See G D Combe, Ombudsman, South Australia, "Characteristics of Complaint Investigation Against Government Departments, Statutory Authorities and Local Authorities". Proceedings of the Conference of Australasian and Pacific Ombudsmen, 1974, p.123.

This kind of response is not really discernible in the courts. Certainly, it is not actively promoted. This is obviously understandable when it is remembered that the courts employ the adversarial approach to problem elucidation and determination. The parties are primed for a contest rather than a conference. It may be that the threat of court proceedings acts as a negative inducement come to some kind of settlement by conferring rather than by contesting.

(f) Producing results

Although all of the responses that have been considered so far and which are particularly attributes of the Ombudsman institution may be seen as attractive and desirable in the eyes of the individual complainant and as significant advantages of the institution over the courts, the fact is that the complainant doesn't go to the Ombudsman just so that he can have the edifying experience of being treated as a human being and having his problem dealt with expeditiously and cheaply. He is primarily interested in results. In this area at least the courts are not left out in the cold. Whenever they have a case before them they are faced with a situation of conflict and they are equipped to resolve that conflict justly, in accordance with the law and the facts as they are presented. When they come to a conclusion on a case, even if it has been a long and costly process, a result is produced one way or the other. It is unlikely to leave all parties entirely happy, but, nevertheless, its decision is to be followed. What then of the Ombudsmen and their lack of coercive powers? Are they just all nice frills with no practical usefulness? The overwhelming answer is no. Their success rate has been quite startling. Larry Hill in his book on the New Zealand Ombudsman, "The Model Ombudsman" notes that up to the 31st March 1975 only two among the total cases in which recommendations had been made, had not been implemented.[72] However, he does footnote this comment by saying, "(The Ombudsman) often has considerable latitude about whether or not to provoke a confrontation and he uses his political skill to avoid unnecessary clashes".[73]

72 "The Model Ombudsman", opcit n.9 supra at pp 192-3. In the two reporting years subsequent to that date, there do not appear to be any further recommendations not implemented, except to the extent that some had not been actioned by the time of the report.

73 ibid p.193 n.5.

This point cannot be ignored because if the Ombudsman become so cowed by obstinate administrators that in order to be effective when they can they reduce the number of times that they make recommendations, then the significance of pointing to high success rate is considerably reduced. It is further necessary to note the comments of New Zealand's most recently appointed Ombudsman when he is reported as saying, in addressing the Lower Hutt City Council, that "precious few" of the Ombudsmen's decisions had not been accepted by local bodies.[74] That comment may signify that in the local body field of investigation discussion and persuasion based on a thorough case are not proving to be as effective as they have been in the central government field.

Professor Hill, in the course of his extensive survey of the Ombudsman institution in New Zealand has demonstrated a very significant fact about the responses involved in the Ombudsman/client relationship. He was aware that the Ombudsman helped his clients in many ways, some of which have already been discussed. He examined what this help meant in material terms for the clients. To do so he applied a strict definition of the term "helped", viz, "clients are said to be helped only if as a result of their complaint some material circumstance has been altered in their favour".[75]

When he applied that definition to the complainants comprising his sample (which was a representative cross section of all complaints received up to the time of the survey, but with complaints against non scheduled organisation removed) he found that 16% of the Ombudsman's clients were "helped".[76] When he compared those that were helped against the case classifications to which they had been assigned by the Ombudsmen (i.e. "declined", "withdrawn", "discontinued", "not justified") he found that none of those complaints that had been declined had been "helped" and, not surprisingly, he found that complaints which had been classified as justified comprised the majority of those that were "helped", in fact they made up 52%. Complaints classified as discontinued accounted for another 28.8% of those "helped" and the most significant thing is that those complaints classified as not justified and withdrawn made up 9.6% each of those complainants who had been helped according to his definition.[77] The importance of this is perhaps not able to be grasped in the midst of

74 L J Castle - Reported in Evening Post, 23rd August 1977.

75 "The Model Ombudsman" opcit p.194.

76 ibid p.196.

77 ibid.

percentages but it is clear that the effectiveness of the Ombudsman in securing beneficial results for the people who complain to him cannot be evaluated merely on his classification of the cases. Although examples of cases where complainants have been helped, but whose cases have not been classified as justified do not abound in the reports they can be found. For instance, the case can be cited where a motel proprietor had had (on erroneous advice from the Post Office) separate telephones installed in each unit of his motel. He was somewhat disturbed to find that (contrary to the received advice) he was charged for the phones at business rates. The regulations in question, however, regulations 11 & 12 of the Telephone Regulations 1968 made it quite clear that the business rate was the appropriate rate for telephones installed in motels. Had the complainant known this he would have had a system of extension phones installed rather than separate lines for each unit, which would have made the cost cheaper. The Ombudsman therefore felt that, should the complainant wish to change the system installed, then the costs of the reinstallation should be set off against the costs of the original installation. Consequently, although the complainant was classified as not justified it paved the way for the complainant to pay less overall rates than what he was paying at the time of the complaint and to achieve that with the substantial costs to be borne by the Post Office.[78] It would be pure conjecture as to whether the courts helped parties before them in this way even when the case goes against the party in question. It is conceivable that they could but my guess if that if it did happen it would not be frequently so.

Consequently, there is on one hand the Ombudsmen who have a high success rate in getting results for their clients when the complaint is found to be of substance and also in some cases where the complaint itself is not justified, or the investigation is not completed for one reason or another, but nevertheless some benefit accrues to the complainant; but whose recommendations are not always accepted, and who may temper their activity according to some kind of political commonsense. On the other hand there are the courts who when the facts and the law warrant it are able to

78 1976 Report, p.37, Case No. 9662. See also 1977 Report, p.17, Case No. W11041 where the complaint was classified as not justified; and 1972 Report, p.100, Case No. 6660, where the investigation was discontinued.

produce a result beneficial to the plaintiff/applicant. But, it is to be noted, the law must warrant it, and as Lord Devlin has said, "I believe it to be generally recognised that in many of his dealings with the executive the citizen cannot get justice by process of law. The common law has now, I think, no longer the strength to provide any satisfactory solution to the problem of keeping the executive with all the powers which under modern conditions are needed for the efficient conduct of the realm, under proper control".[79]

That statement was made over twenty years ago, and there have been some very important developments in administrative law since then, but nevertheless there are many areas of modern government with respect to which the substantive law is not sufficiently developed and remedies are cumbersome and inappropriate (to say nothing of the procedures); in the light of the complexity, speed and pervasiveness of the governmental processes, for effective supervision to be carried out and for justice to be done.

(g) The grounds upon which results are based.

In 1971 the Public and Administrative Law Reform Committee in its Fourth Report summarised the grounds upon which the Courts will review administrative action by quoting from an article by Professor J F Northey.[80] It said, "First, that the action or decision is ultra vires.

> Second, that an error of law has been disclosed on the face of the record of the tribunal making the decision.
>
> Third, that there has been a breach of the principles of natural justice."[81]

79 Lord Devlin, "The Common Law. Public Policy and the Executive", 1956 9 Current Legal Problems, 1 at p.14, quoted by Sir Guy Powles in Aspects of the Search for Administrative Justice: With Particular Reference to the New Zealand Ombudsman", opcit n.2 at p.133.

80 "An Additional Remedy in Administrative Law" [1970] N.Z.L.J. 202.

81 Fourth Report of the Public and Administrative Law Reform Committee at p.7.

In saying that a ground of challenge was that of "ultra vires" the Committee was using a somewhat compe dious phrase which includes such matters as jurisdictional error, questions as to delegation and sub-ordinate legislation, and abuse of discretion. It may also be necessary to add to that list as a ground of review the duty to act fairly.[82] As yet however, it is a doctrine of uncertain import, scope and content any may be merely an extension of the third ground summarised - the principles of natural justice.

However, it is beyond the scope of this paper to delve into the intricacies of the substantive law. Answers to questions like "What is meant by jurisdiction?", "What is an error of law?", "What constitutes the record?" and "When is there an obligation to act in accordance with the principles of natural justice or a duty to act fairly?" are not certain in the law[83] and an examination of them in detail requires recourse to a textbook.[84]

The grounds upon which an Ombudsman can act in relation to a complaint are contained in s 22(1) & (2) of the Act. It says:

> "(1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that that the decision, recommendation, act or ommission which was the subject-matter of the investigation -
>
> (a) Appears to have been contrary to law; or
>
> (b) Was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
>
> (c) Was based wholly or partly on a mistake of law or fact; or
>
> (d) Was wrong "

82 See e.g. In re H.K. (An Infant) [1967] 2QB 617; Lower Hutt City Council v Bank [1974] INZLR 545; Dunlop v Woollarhra Municipal Council [1975] 2 NSWLR 446.

83 For a classic example of the confusion see R v Southampton Justices, Ex parte Green [1976] 1 Q.B. 11.

84 See S A de Smith, "Judicial Review of Administrative Action", opcit n. 11.

> "(2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or ommission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision."

Even a quick perusal of the subsections reveal that the grounds upon which an Ombudsman can act are similar in may respects to those upon which the courts can act. For instance s 22(1) (a) appears to cover similar grounds to ultra vires grounds used by the courts whether it be concerned with jurisdictional error or abuse of discretion or subordinate legislation ultra vires the principal legislation under which it is made. However, it is also obvious that an Ombudsman can act in situations where the courts cannot.

Ultra vires

It is clear that the courts will prevent a statutory authority from acting in excess of its statutory power. In the Ombudsman's work this ground seems to have manifested itself in two ways in particular. The first can be seen in the Ombudsman's trenchant criticism of the practice of some department to operate a policy which is in conflict with regulations which the department is supposed to be administrating. Instead of promulgating a change in the regulations they choose to ignore them.[85] The courts similarly will accept no such behaviour from the executive as is graphically illustrated by the recent case of Fitzgerald v Muldoon.[86] Neither the courts nor the Ombudsmen will tolerate the Executive attempting to act in derogation or in disregard of statutes. The second category is perhaps more in line with what the courts recognise as traditional ultra vires activity. In Shand v Minister of Railways[87] it was said in the joint judgement of North P. and Turner J., when discussing

85 See e.g. 1965 Report, p.27, Case No. 898(b); 1967 Report, p.21, Case no. 2364; 1972 Report, pp 18-19.

86 [1976] 2 NZLR 615.

87 [1970] NZLR 615.

a statutory power:

> "It if, we think, perfectly plain that this section confers on the Minister the power to come to an administrative decision and issue an executive order. When such a power is conferred on a Minister of the Crown we are of the opinion that as long as her acts within the scope of his statutory power and acts in a bona fide manner in exercising the power, his decision cannot be called in question in a Court of law..."[88]

In other words, the central task of the courts when they are faced with ultra vires claims is statutory interpretation - they must determine whether the statutory parameters have been complied with. The same process can be seen in the work of the Ombudsmen. For example, in a case reported in 1974 the Ombudsman came to the conclusion that the practice of the Immigration division of the Department of Labour to require the signing of an undertaking by relatives of visitors to the country, that no application for an extension of the permit would be made, was unlawful in terms of the Immigration Act 1964. The right to apply for such an extension is expressly conferred by the Act.[89] It is to be noticed that the language of the Ombudsman is not uniform in this field and he certainly doesn't speak in terms of vires. In a case in 1970 where there was a failure by the department concerned to notify the complainant of a right of appeal under the Act, the Ombudsman after having regarded the purpose and structure of the legislation, as well as some relevant external factors, came to the conclusion that the department failure was "wrong" under s 19(1) (d) of the 1962 Act.[90] In 1976 in a case concerned with the public use of a right of way around Lake Taupo, and the powers of the Governor-General under the statute to exempt any part of the right of way from public use by proclamation, the Ombudsman had occasion to question whether a proclamation in 1974 restricting the right of way to six metres in width was contrary to law or based upon a mistake of law. He came to the conclusion that the recommendation made by the department was "unreasonable and wrong and appeared to be contrary to law."[91]

88 ibid at p. 634.

89 1974 Report, p.35, Case No. 6896. See also 1972 Report, p.74, Case No. 6188, p.78, Case No. 6529; 1976 Report, p.25, Case No. 9991.

90 1970 Report, p.66, Case No. 3821. Cf. this case with that of Agricultural, Horticultural and Forestry Industry Training Board v Kent [1970] 2Q.B. 19, where a failure to notify a right of appeal rendered the decision invalid.

91 1976 Report, p.27, Case Nos. 9405 & 9606.

The reasons for this lack of uniformity are partly because the Ombudsman isn't required to fit his conclusion into some neat judicial formulation by precedent, but probably largely due to the flexibility which his statute provides him with. Of course it may also be that he does find several grounds upon which to base his opinion. Nevertheless, it is clear that that Ombudsman can and does base results in favour of his clients on what may loosely be termed as vires grounds.

The Shand case and the Lake Taupo case point out something which should be noted in respect of the Ombudsmen's challenge of the exercise of statutory powers. Shand's case concerned the decision of a Minister and the Lake Taupo case the issuing of a proclamation by the Governor-General. The implication in the Ombudsmen Act is clear that the Ombudsmen are not free to challenge the decisions of Ministers, let alone orders of the Governor-General, and this has been adhered to in practice. Yet it will be noted that the Ombudsman came to a conclusion of wrongness and unlawfulness in the Taupo case; but it was not in respect of the Governor-General's proclamation as such. Rather he attacked the recommendation of the department, upon which the proclamation was based. In the event the proclamation was revoked. Effectively, the Ombudsman had declared it ultra vires. Had the Minister in Shand based his decision on recommendations of the department which were not in accordance with the law, the same approach could have been taken by an Ombudsman in attacking the decision. His statute expressly allows that?[92] Consequently, the apparent limitation on the Ombudsmen's ability to challenge the exercise of statutory authority by ministers is in effect not as extensive as it first seems. However, there will be occasions where a Minister acts without considering any departmental advice, which the courts may be able to declare ultra vires, but which the Ombudsman is precluded from attacking.

Abuse of Discretion

In applying the ultra vires concept part of the task of the courts is to control the abuse of discretion. Professor de Smith, in summarising the principles which govern the exercise of discretionary powers, says,

> "The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion

92 s 13(2).

> must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it had been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously."[93]

Support for those propositions can be found in numerous cases scattered throughout the reports. For the purposes of this paper it is useful to cite Padfield v Minister of Agriculture, Fisheries and Food,[94] with respect to compelling the exercise of a discretion and the question of relevancy of considerations; R v P.L.A., ex parte Kynoch Ltd,[95] concerning the unlawful fettering of the exercise of a discretion; and Police v Gapes[96] regarding improper purpose influencing a discretion. From the first days of the office in New Zealand the Ombudsman has waged a battle against the abuse of discretion by officials. He has been particularly concerned with the fettering of discretion. In his 1964 Report[97] he reaffirmed what he had stated in his 1963 Report; namely, that care was to be taken in the exercise of a discretion and the special circumstances of each case were to be considered, that the exercise of the discretion was not to be bound by guidelines or rules that had been laid down. He noted that achieving this was made difficult by the high degree of delegation involved in running the day to day affairs of governmental departments. That being the case the Ombudsman recommended that those who delegated discretionary powers should act with care in drawing up the rules and guidelines by which they were to be exercised and that the delegates should not be bound by any rules or guidelines when it was appropriate to exercise discretion according to the merits of the

93 de Smith, "Judicial Review of Administrative Action", opcit n.11 supra at pp. 252-3.

94 [1968] A.C. 997.

95 [19]9] 1K.B. 176.

96 Unreported decision of Mr Sinclair S.M., Auckland, 7 November 1966.

97 at p.5.

particular case in hand. When this kind of approach is compared with that in the oft quoted words of Bankes L.J. in Kynochs case when he said,

> "There are on one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case ... if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand, there are cases where a tribunal has passed a rule or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes";[98]

obvious similarities are perceivable. However, although there are many cases in the Ombudsman's Reports which can be seen to be exactly on a par with Lord Justice Bankes' formulation[99] there are others that go beyond it. In such cases the Ombudsman, while deprecating the fettering of the discretion in question, sometimes does what de Smith says the courts cannot do. He examines the merits of decisions and comes to a conclusion one way or another about what the result should have been according to some sense of fairness, then recommends that the department should exercise its discretion to achieve that result. Often this process is not explicit in the Ombudsman's reasoning as it is reported in the case notes. However, some examples can be cited. For instance one complaint concerned a chimney which was damaged in an earthquake, but the damage was not discovered until two months after the event. A claim was made to the Earthquake and War Damage Commission which refused the claim as it had been made after the thirty day time limit on claims, even though it had a discretion to accept late claims. The Ombudsman was concerned that the regulations under which the Commission acted were unjust and unfair. As well as that though he felt that his complainants claim should have been accepted which meant that

98 Kynoch's opcit n. (95) at p. 184. See also Isitt v Quill (1893) IINZLR 224 at 249, 257; Hamilton City v Electricity Distribution and Others [1972] NZLR 605, 634; Turner v Allison [1971] NZLR 832 at pp 842-3, 847, 849, 854.

99 1963 Report, p.10, Case No. 326; 1968 Report, p.9; 1973 Report, p.49, Case No. 7123.

the Commission should have exercised its discretion in her favour. The Commission did reconsider and came to a decision favourable to the complainant.[100] Another case in which the Ombudsman became impressed with the merits of the complainants' cases was that concerning seventy medical students who for various reasons were, unless the Director-General of Education exercised his discretion in their favour, in a position of having to complete their studies without bursary assistance. Although the Director-General asserted that he had already exercised his discretion liberally (and here there did not seem to be any particular suggestion by the Ombudsman of objectionable fettering) he was nevertheless persuaded by the Ombudsman in relation to a considerable number of the cases that bursary assistance should be granted for an additional year. The point is that the Ombudsman didn't merely come to the conclusion that the Director-General had unnecessarily restricted the exercise of his discretion or that he had exercised it on irrelevant considerations and then direct him to exercise it again properly. He persuaded the Director-General to change his mind by reference to the particular facts of each case: the woman who had qualified as a nurse, a midwife and in theology and then returned to school to get University Entrance, before studying for a degree in medicine, and who was "deserving of special consideration on the grounds of effort alone", the student who had already graduated with a M.Sc. (1st class honours) and a Ph.D.[101] Other examples that appear in the case notes can also be cited.[102] The Ombudsman also challenged the exercise of discretion where it has been done in pursuance of an improper purpose or on irrelevant grounds or where irrelevant considerations have been taken into account. There is, for example, a case in 1972 where, owing to proposed stop-work meetings by teachers in two secondary schools, the Board of Governors of the schools lawfully decided to close the schools on the half-days in question. This action required the rearrangement of the school bus time-tables. However, the local education board refused to consent to such a rearrangement and it was clear that in doing this it was acting at the behest of the Department of Education. The Ombudsman concluded that "the department was wrong in declining to permit that rearrangement", but that as the schools had closed and had had to make special transport arrangements he could do nothing but stress that the department must,"act strictly in accordance with proper and relevant considerations, and not be moved by

100 1970 Report, p.75, Case No. 4332.

101 1971 Report, p.30, Case No. 5079.

102 e. . 1964 Report, p.28, Case No. 469; 1967 Report, p.16, Case No. 1751 (the persistent Naval officer's widow case); and note the interesting comments made in 1975 Report, p.22, Case No. 9292.

extraneous factors".[103]

In Padfields case Lord Upjohn said:

> "Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal ...(a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration."[104]

It is apparent from this, and from the decision of Mr Sinclair S.M. in Police v Gapes[105](where he found an improper purpose on the part of the Minister of Marine who was also the Minister of Broadcasting and who wished to prevent a pirate radio station from beginning broadcasting and did so by placing a detention order on the ship from which the station was to operate, allegedly on the grounds that the ship was unsafe to put to sea) that the courts and the Ombudsman act on similar principles in this area. It would also seem apparent that the courts and the Ombudsmen are both somewhat hampered when their review is conducted ex post facto. In the Education Department case discussed above the Ombudsman was unable to do anything to help the schools board (although perhaps he could have recommended that the Department reimbursed the schools' board if it had incurred any expense in making special arrangements - which would appear to be in keeping with the Ombudsman's approach in other cases) and it is clear from the cases of Rowling v Takaro Properties Ltd[106]and Takaro Properties Ltd (in receivership) and Another v Rowling [107]that the courts are unable to grant relief from damage incurred as a result of an abuse of discretion unless the abuse constitutes a recognised actionable wrong.[108]

103 1972 Report, p.29, Case No. 5804. See also 1969 Report, p.93, Case No. 3838; 1965 Report, p.38, Case No. 1665.

104 opcit, n.94 at p.1020.

105 opcit, n.96.

106 [1975] 2NZLR 62.

107 [1976] 2NZLR 657.

108 This question will be considered more closely when the kind of results produced are noted.

Natural Justice and Fairness

As has already been pointed out there is some difficulty in this area of the law and although some things would appear to be clear it is nevertheless the case that the courts are still feeling their way in it; particularly in the area of what can be termed the doctrine of procedural fairness and its relationship to natural justice. Although it is not the purpose of this paper to examine the intricacies of this exploration being undertaken by the courts, it may be said, though not with complete certainty, that, in the words of Wootten J. in Dunlop v Woollahra Municipal Council:[109]

> "The functions traditionally (even if often inappropriately as a matter of terminology) classified as 'judicial' or 'quasi-judicial' attract the rules of natural justice (including the two traditional duties and other duties arising from an overall duty of fairness). Other administrative functions not so classified attract a duty to act fairly. This seems to be the formulation of Lord Pearson in Pearlberg v Varty (1972) 1WLR 534, 537."[110]

A judicial or quasi-judicial function is to be discerned by construing the statutory provisions in question and then by considering three factors which act as pointers as to the nature of the function: Durayappah v Fernando.[111] In that case Lord Upjohn said that the three factors were,

> "first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sactions in fact is the latter entitled to impose upon the other."[112]

109 [1975] 2NSWLR 446.

110 ibid at p.472.

111 [1967] 2A.C. p.337.

112 ibid at p.349.

If a consideration of these factors lead to a conclusion that some kind of judicial function is involved then a duty to act according to the principles of natural justice arises. The "two traditional duties" are those of audi alteram partem - the right to be heard (which also would normally involve a right to know the charges which are to be answered), and of nemo judex in causa sua - the right to be judged with a freedom from bias. The content of these duties as applied to a particular situation depends upon the characteristics of that situation.[113] In a similar manner the question of the content of a duty to act fairly will depend upon the occasion on which it is said to arise.[114]

A consideration of the Ombudsman's case notes makes it clear that he too requires principles of fairness and natural justice to be observed by the bodies over which he has jurisdiction. The fact that Sir Guy Powles was trained in the law (as are all three of New Zealand's present Ombudsmen) would seem to indicate a distinct possibility that in dealing with the cases before him, he would take cognizance of the principles recognised and applied by the law. This possibility has to some extent materialised in practice in that sometimes in his reports he talks about the justice of the situation requiring a hearing or that as a matter of fairness notice should have been given. In 1965 he enumerated, as one of "three broad avenues leading to administrative justice", "...the granting of a fair hearing to a potentially aggrieved person."[116] In 1968 in talking of the basic procedured requirements necessary to satisfy the claims of justice he said:

> "the substance of the matter is the provision of the opportunity to present the case adequately, rather than the form of presentation."

It is difficult to analyse in each situation whether he was talking of what in law would be called natural justice or of fairness. The matter is not one of great significance because although the Ombudsman's terminology is not consistent it is clear that he determines whether there is a duty to provide some kind of procedural safeguards, as well as what those safeguards should be in a particular situation, in the light of the

113 Russell v Duke of Norfolk [1949] 1All E.R. 109.

114 See e.g. Dunlop's case ibid at p.471; Selvarajan v Race Relations Board [1976] 1All E.R. 12 per Lord Denning M.R. at p.19.

115 1965 Report p.5.

116 1968 Report p.6.

circumstances of the case in question. In a case concerning regulations as to the disciplining of teachers he considered that the charge should be written and there should be a right to a hearing before an impartial investigator;[117] in a case concerning objections to a scheme, which, it was alleged, would cause the flooding of the objectors farms, a "manifestly unbiased" tribunal was required;[118] a body with a financial interest should not have been a judge;[119] in a case which involved property interests, it was sufficient that eventually the complainant became full appraised of the case they had to answer, and had their answer in response considered - a hearing as such was unnecessary;[120] the ability to alter the incidence of rates without notice and consultation was not acceptable.[121] These cases reveal nothing startling but show the similarity of the Ombudsmen's approach to that of the courts. However, one case calls for further consideration.[122] It concerned attempts by the Department of Education to acquire land for the further development of a Teachers College campus. The complainant wanted the department to inform the residents of the land neighbouring the college what its designs were in respect to that land. The department argued in reply that any publicity of its proposals had to await Government approval of them; that it was the Government's decision as to what publicity should be given; that there could be no consultation with residents in anticipation of Government approval when that might not be given; that consultation was impractical in the context of continuous planning and replanning; and that in any case the procedures provided under the Town and Country Planning Act 1953 were sufficient to provide for appropriate public involvement. The Ombudsman rejoined by asserting that had there been consultation from the beginning the situation of mistrust which then obtained would have been averted. He went on to say that the doctrine that the Crown could do no wrong had to be balanced against a positive responsibility, "to be fair, open, honest and above-board in dealing with those affected and to give most sympathetic consideration to the wishes and interests of those persons."[123] The department obtained a ministerial decision on the matter before the Ombudsman had completed his

117 1964 Report, p.30, Case No. 829.

118 1964 Report, p.74, Case Nos. 365 ¢ 641.

119 1969 Report, p.93, Case No. 3838.

120 1968 Report, p.36, Case No. 3328.

121 1977 Report, p.37, Case No. A14.

122 1976 Report, p.17, Case No. 9757.

123 ibid at p.19.

investigation (to which he reacted indignantly - and justifiably so) so his recommendations were to no effect. The significant point is that the Ombudsman stongly advocated some kind of procedural fairness requirement in respect of people who were likely to be affected by subsequent decisions, at an early stage of governmental polciy formulation and planning. It is obvious that this is far beyond what the courts have been prepared to assert as situations where procedural fairness is applicable. It remains to be seen whether this approach is developed at all by the present Ombudsmen, especially in the light of the concluding comments of the case note where the Ombudsman said that he was,

> "continuing to give consideration to the wider question of whether existing procedures for the acquisition of land by the Crown could and should be modified to bring them more into line with my own views."[124]

However, it is probably significant that the department rode roughshod over the involvement of the Ombudsman in this case.

Error of Law

Short of delving into a mass of confused case law on this matter it is only profitable to note that the Ombudsmen can challenge a decision if it is contrary to law or based upon a mistake of law. Although there is to some extent a blurring of the distinction between jurisidictional and non-jurisdictional errors in the case law,[125] it is still relatively safe to assert that an error of law must appear on the face of the record before a court can review it unless the error goes to jurisdiction. By contrast, the Ombudsmen have no such restriction placed on them. They are not bound to the contents of any "record" of the decision, or alternatively, it may be viewed in the light that for Ombudsmen the record is all the documents relating to the case which are still extant - considering

124 ibid at p.20.

125 Especially if one considers the formulation of Lord Reids in Anisminic v Foreign Compensation Commission [1969] 2A.C. 147 at 171 as to what constitutes a juridictional error. See also the different approaches taken in R v Southampton Justices, Ex parte Green [1976] 1R.B.11.

that he has access to all the departmental files on the matter.

Failure to Give Reasons

It is to be remembered that the Ombudsmen's powers as to the making of reports and recommendations under s 22(3) also apply to situations where a decision is made in the exercise of a discretionary power and the Ombudsman is of opinion that reasons should have been given for the opinion.[126] On the basis of this provision it can be said that the Ombudsmen can act in an area of adminstrative activity where the courts do not. The courts have never held that there is a general duty to give reasons for decisions. However, the effect of dicta in Padfields case indicate that they may be moving towards some such position. In response to the argument that if no reasons were given then the Minister's decision could not be challenged so that it would therefore be unfortunate if by giving reasons he was put in a worse position, Lord Reid, for example, said,

> "...I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act."[127]

Unless the decider is very good at covering the real reasons for his decision, such a position appears to render pointless the omission to give reasons for a decision. Nevertheless, there is still a distinction between the two institutions in that there is a positive power in the Ombudsmen to seek reasons for decisions made pursuant to a discretion.

Wrong Decisions, the Merits of the Case and the Equity of the Case

If an Ombudsman is of opinion that a decision, recommendation, act or omission was wrong then he is empowered to take action in respect of

126 s 22(2)

127 Padfields case opcit n.94 at pp 1032-3.

it. The obvious question to ask is, "What is encompassed by the word 'wrong'?" A plain interpretation of the word would suggest that 'factually wrong' was within its ambit, and it may even be that 'morally wrong' is included also. It has been noted that the Ombudsman does characterise some of the activity the subject of complaints to him as wrong.[128] It was similarly noted that the Ombudsman has reached such a conclusion after the consideration of the facts of the case in the light of which he comes to his own view of what the decision, or whatever, should have been.[129] The courts, by comparison, are clearly precluded from examining the merits of a decision when they are exercising their supervisory reviewing jurisdiction. They are only concerned to review whether the decision has been reached according to law and not whether the decision was right or not.[130] Thus it appears that here is an area where the Ombudsmen exercise supervision over governmental activity of a particular kind which the courts are unable to do. However, the Ombudsmen have not exercised this supervision with gay abandon and gone about trying to substitute their views of an acceptable result for those of governmental officials whenever the urge may have taken them. Indeed, as Professor Keith has demonstrated[131] there are a number of contexts in which the Ombudsman has been circumspect in his review of the results of administrative decisions. In concluding his examination of these contexts he said:

> "Basic to the scope of review within this discretionary area is a conflict between two principles which were mentioned earlier: an independent official, reviewing administrative decisions, is needed in today's complex society, but the administrator, cognisant of the facts and the procedural, institutional, and policy framework, and responsible for implementing the decision, is often best qualified to decide. Whether one or other of these principles is preferred in a particular case is likely to depend, ... , on a number of factors such as: the generality of the issue and its ramifications (Will others, not immediately involved, be affected? Is a

128 See the discussion of ultra vires and abuse of discretion, supra. See also 1964 Report, p.32, Case Nos.10 & 334 (the flouridation cases); 1972 Report, p.29, Case No. 5804; 1976 Report, p.27, Case Nos. 9405 & 9606.

129 1967 Report, p.16, Case No. 1751; 1972 Report, p.26, Case No. 5362; 1977 Report, p.39, Case No. A168; Case No. A23, reported at (1977) 1NZAR p.128.

130 See e.g. Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 K.B. 223 at pp. 228, 234.

131 K J Keith, opcit, n.13 at p.225.

> positive programme over a broad area being called for? Will an increased general expenditure result?); whether appropriate principles for the exercise of a discretion have been carefully worked out and properly applied; whether the judgement involved in the decision is a professional one or one involving complicated or disputed facts which the Ombudsman is not competent or able to question; and whether the matter has already had a full and careful consideration at the appropriate levels of government."[132]

The Ombudsmen, in reviewing the facts of a case is obviously going to have regard to its particular merits; just as they have enjoined the departments to do. The fact that this naturally happens has lead to the development of the doctrine of an equitable claim to an ex gratia payment, which is noted by Geoffrey Sawer.[133] However, an examination of the case notes shows that the Ombudsman has developed an approach which is wider than an equitable claim to an ex gratia payment. It extends to the equities of the case which may lead to any manner of remedy. It is true that the Ombudsmen have most often found an equity to an ex gratia payment to exist. Examples can be multiplied.[134] One case involved a company in protracted negotiations and considerable cost toward providing a specially designed building for the housing of the National Film Studios. Inadequate liaison between the government departments concerned meant that in the end Cabinet did not grant approval for the building. Although all of the money expended was not recovered (or recoverable) the Ombudsman concluded that the equities of the case required some compensation to be paid and an ex gratia payment of $4000 was made.[135] At the other end of the scale the woman who incurred a solicitor's fee of $15, because an obstructive clerk prevented her from sorting out her incorrect rate assessment, was entitled to a reimbursement of the fee by the city council.[136] The Ombudsmen have

132 ibid at pp. 392-3.

133 G Sawer, opcit, n.13 at p.225

134 E.g. 1965 Report, p.49, Case No. 1026; p.58, Case No. 623; 1968 Report, p.27, Case No. 3148; 1972 Report, p.26, Case No. 5362.

135 1970 Report, p.80, Case No. 3947.

136 1977 Report, p.39, Case No. A168.

also considered that complainants have had equitable claims to have a debit remitted;[137] to have a special licence to run a Child Care Centre granted where stipulated criteria for the issue of an ordinary licence were not met;[138] to have, in the case where a Maori community had donated some land for a specified case, the land returned to it when it fell redundant, despite the fact that in the interim it had been declared crown land;[139] and to have, among other things, a fence erected in order to protect privacy, when the department developed a subdivision on neighbouring land.[140] Clearly, this activity of the Ombudsmen is beyond the scope of the courts work in its supervisory capacity.

Change in Law or Practice

The fact that the Ombudsmen have an express power to recommend changes in the law or in practice where they consider that law or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory has already been discussed,[141] and it was then noted that the courts also have some effect in this area. However, one point that needs to be realised as a matter of distinction between the institutions is that a change in the statute law which is brought about through an investigation and recommendation of the Ombudsman will sometimes also provide a ground upon which a result in favour of the complainant can be based.[142] On the other hand, unless the courts are able to find that any subordinate legislation before them is legally invalid, or if the legislature in amending legislation in response to judicial decisions or comment makes its effect retroactive, then a change in the law as a result of judicial activity will not provide a ground upon which a result in favour of the plaintiff/applicant can be reached.

137 1972 Report, p.68, Case No. 6859.

138 1969 Report, p.28, Case No. 2963.

139 1969 Report, p.57, Case No. 3404.

140 1972 Report, p.80, Case No. 6654.

141 supra pp.17-18.

142 See e.g. 1965 Report, p.18, Case No. 1211; p.58, Case No. 623. However, it is not always the case that a change in the law as a result of a complaint will benefit the complainant's particular situation: See 1969 Report, p.93, Case No. 3838.

Practical Effects of Responses

In this section I wish to briefly focus on what kind of things the clients of the agencies get when a response is made to their complaints which is favourable to them. This question has already been partly considered from a different point of view.[143] It was noted in that context that the courts could quash the decision complained against, or prohibit a body from exceeding its powers, or compel a body to exercise its powers according to law, or enjoin activity, or declare the law. The courts in making such orders, are not so much concerned with the result as with seeing that the law has been and is followed. In some circumstances the Ombdusmen work in the same way - they recommend that the officials reconsider the case having regard to relevant matters, or that they act within the statutory powers conferred upon them. When this is done it means that the final practical result is in the hands of the official and consequently may be in favour of the complainant or it may not. Thus practical results, in the form of money payments, more import licences, drains maintained, contracts interpreted, and so on, can be seen to flow, but indirectly, from the supervisory role of the courts and the Ombudsmen. However, it is also clear that Ombudsmen can and do review the merits of particular cases, in contradistinction to the courts, and that they come to conclusions as to the merits of a case which if accepted by the officials involved, will result in practical consequences for the complainant. It can be seen that the Ombudsman is more directly involved with the actual results achieved. There are some occasions when the courts are able to be more directly involved in producing a result for the plaintiff. That can arise when the plaintiff if able to show a right to damages for any injury suffered at the hands of government bodies which falls within the recognised actions of the general law of torts or contract. Once again this is a complicated and (perhaps) developing area of the law. Clearly there are also differences between the situation of the Crown on the one hand and other public authorities on the other.[144] In the context of this paper it is appropriate to refer to authoritative works[145] and to note that despite dicta appearing

143 supra pp.13-16.

144 See the Crown Proceedings Act 1950 and the works cited in n.45 post.

145 E.g. H Street "Governmental Liability"; J D B Mitchell, "The Contracts of Public Authorities"; P Hogg, "Liability of the Crown"; E J Houghey, "The Liability of Administrative Authorities".

in some cases[146] the courts have so far resisted the temptation to award damages for injuries sustained as a result of the negligent or unreasonable exercise of a statutory power.[147] In this respect the courts are unable to match the Ombudsmen's ability to gain for their complainants ex gratia compensatory type payments as a result of the equities of the case which has already been noted.[148]

Responses Touching Governmental Authorities

It will have already have become apparent that the process of either the courts or the Ombudsmen responding to the people who come to them involved in some way an effect on the governmental authority against which an approach is made. Very often this process will involve a cost of some description for the particular authority. In fact, almost anything that the Ombudsmen do for their clients (apart from declining to investigate their complaint or giving some particular advice or making a referral in respect of it) will involve a cost of time to the agency being investigated. The same is also true, perhaps even more so, of the courts for by the time a matter comes before them considerable time has been spent in case preparation.

Defending the Authority

It is useful to note in passing that Ombudsmen are not always in a position of criticising or attacking departments. In the 1964 Report the Ombudsman noted that sometimes he could be a valuable shield to the departments.[149] It is of course clear that the courts are able to

146 E.g. Dorset Yacht Company v Home Office [1970] A.C. 1004 per Lord Reid at pp 1030-1; Takaro Properties (in receivership and Another v Rowling [1976] 2NZLR 657 at p. 668 (as to the distinction between mistakes of a legal nature and mistakes of a factual nature).

147 Takaro Properties Limited (in receivership) and Another v Rowling [1976] 2NZLR 657.

148 supra at p. 42.

149 1963 Report, p.7. Note also 1965 Report, p.14, Case No. 954 where the Ombudsman called on the complainant to substantiate his allegations or unreservedly withdraw them.

exonerate agencies of wrongly alleged reprehensible conduct, in the course of their dealings with a case.

Controlling the Slackness of the Authority

One formidable task that the Ombudsmen have taken on is that of trying to train the bodies within their jurisdiction, in the virtue of promptness. From time to time they have commented in their case notes of the delay to which they have been subject in receiving replies to their letters, from the agency. Sir Guy Powles has also dealt with delays on the part of departments which have affected his clients.[150] On one occasion, on his own motion he chastised the Department of Internal Affairs for not having put into effect the Civil Defence Act 1962 which had sat around for somewhat over a year without any action having been taken on it by the department.[151]

Obtaining Charges in Administrative Practice

This ability of the Ombudsmen is linked to the one just discussed. Examples of changes in practice are coming about as a result of the Ombudsmans suggestions or recommendations occur throughout the reports. The kind of changes achieved include things like the clarification and updating of departmental publicity;[152] the clarification and updating of forms;[153] the clarification or drafting of internal orders and guidelines;[154] the improvement of consultations between departments (as well as with other affected bodies)[155] and improving intra-departmental procedures.[156] The cumulation of these changes introduced over the years amounts to a considerable reformative impact upon the administration.

150 1967 Report, p.44, Case No. 2729; 1972 Report, p.81, Case No. 6161.

151 1964 Report, p.35, Case No. 719.

152 1964 Report, p.26, Case No. 331; p.68, Case No. 443.

153 E.g. 1965, p.38, Case No. 1245; Case No W11576 reported (1977) 1NZAR 146.

154 E.G. 1977, Case No. W10786 reported (1977) 1NZAR p.114.

155 E.g. 1969 Report, p.53, Case No. 3761; p.73, Case No. 3415.

156 E.g. 1971 Report, p.54, Case No. 5286; p.68, Case No. 6375; 1972 Report, p.81, Case No. 6161.

There are other cases dealt with by the Ombudsman where he attempts to bring about, and sometimes succeeds, changes which can be more appropriately termed changes in policy. One case for instance involved a woman who had a state ward boarding with her. The Social Welfare Department was unable to find this girl a job and as she was not quite sixteen she was not eligible for an unemployment benefit. When she turned sixteen the board was paid out of the unemployement benefit. The complainant was told by the department that she would be paid board for the months prior to the girl's turning sixteen and that the amount would be established as a debt recoverable against the girl's future earnings. The complainant objected to such a course and the Ombudsman's investigation and representations to the department lead to a change of policy such that expenses incurred before the unemployment benefit became payable would be written off except to the extent that they exceeded the current unemployment benefit.[157] However, in this field the Ombudsmen are not always so successful at causing a change. As much can be seen from the Teachers College land case already referred to[158] and from the saga of the attempts of the Ombudsman to get the Social Security Department to change its policy regarding the 'cutting down' of the New Zealand Superannuation where superannuitants also received pensions from Britain.[159]

Obtaining Changes in the Law

It is first useful to note that the Ombudsman is from time to time, able to bring about changes in the agency's interpretation of the law which it is administering.[160] This is, of course, pre-eminently the job of the courts but the Ombudsman is also able to achieve results for complainants by virtue of a different interpretation of the law being applied.

The ability of the Ombudsmen to recommend changes in the law have already been discussed in different contexts. It is appropriate at this stage to

157 1974 Report, p.53, Case No. 8489.

158 1976 Report, p.17, Case No. 9757.

159 1969 Report, p.13.

160 E.g. 1964 Report, p.30, Case No. 754; 1972 Report, p.74, Case No. 6188; 1974 Report, p.33, Case No. 8402.

note an example of a change that was achieved by the Ombudsman; perhaps it was one of Sir Guy's more satisfying victories. In the 1969 Report[161] he noted that he had received a number of complaints concerning attempts by the Social Security Department to recover, from beneficiaries, overpayments of benefits as debts. At that time he noted that he thought the provisions of s. 94B of the Judicature Act 1908 should be applicable to such overpayments. He considered the matter again in his 1970 Report[162] and by that stage he had managed to get the Secretary to Treasury to agree with him that s. 94B should apply in cases of overpayment by the crown. However, this wasn't the case as far as Social Security benefits were concerned because by s. 86(1) of the Social Security Act 1964 there was a mandatory duty on the Commission to establish as debt when an overpayment had occurred. However, the Ombudsman kept persisting and in his 1974 Report he said :

> "...the special nature and purposes of social security benefits (mean) they can be distinguished from other payments made by the crown, and special considerations should therefore be taken into account when deciding whether the overpayment of benefit should be recovered."[163]

He then reports that his recommendations had largely been accepted and had been enacted in the form of s. 86(9A) of the Social Security Act 1964 such that the equitable considerations of s. 94B applied to Social Security benefits.

In noting these different ways that the institutions have an effect on the governmental authorities, I have not paid much attention to the influence of the courts. This is not because the courts don't have any effected in these areas for it is apparent that they do. Their pronouncement on whether a particular administrative practice is in accordance with the law or not is obviously going to influence the future of that practice.[164] Similarly an order as to the validity of subordinate legislation is determinative of the matter (which in theory, is not necessarily the case with the Ombudsmen - but in practice almost always is). It is rather because

161 At pp.12-13.

162 At pp.10-11.

163 At p.9.

164 See for example Anderson v Valuer General [1974] 1NZLR 603 where, although the court refused the plaintiff the relief claimed, it came to a conclusion on the practice of the Valuation Department which has since governed the Department's practice.

a distinction can be discerned between differing functions of the two institutions in this area. Both institutions are required to resolve conflicts, but the courts do it in relation to the law and the Ombudsmen, although they obviously have regard to the law, do it in relation to principles of administrative justice. The orientation of the two institutions is slightly different. The courts uphold and apply the law as such, while the Ombdudsmen search for and apply administrative justice. That much can be seen from the fact that the courts will only effect changes in practice and the law as a matter ancillary to upholding the law - the change comes about because the status quo was contrary to law; but the Ombudsmen can take a more direct approach to the law or practice in question and they can recommend changes not only on the basis that something is contrary to law, but also that it is unreasonable, unjust, oppressive or improperly discriminatory. The present law is not their limit - administrative justice in all facets is. To that extent the activity of the Ombudsmen in these areas is deserving of closer consideration.

Having examined in some detail the work of the two institutions in respect of the different (and similar) ways they respond to their "clients" , the grounds upon which they make those responses and briefly noted some of the practical outcomes of those responses, it is necessary to stress two points already made and then to note a few other significant factors about the two institutions before evaluating the significance of it all.

First, it is essential to any comparison of the institutions to keep in mind the special abilities of the Ombudsmen in respect of finding out the basis of each case. The fact that they have access to all the government files on a matter, that with ease they can penetrate the wall of silence that can so easily shield the reality of the internal activity of the bureaucracy in a given situation is of great significance to their ability to come to a conclusion that an act, or a practice, or a law was based on a mistake of fact or was oppressive, or contrary to law. It is perhaps of even greater significance to their ability to decide whether a discretionary power has been exercised for an improper purpose. By contrast the courts are subject to strict rules as to admissibility of evidence and their ability to get to the core of a matter is otherwise hedged about by technicalities.

The other point to be stressed is that the Ombudsmen have no power to coerce acceptance of and compliance with the conclusions they come to in a particular case. In a great many cases this is of no significance but the fact remains that officials are in law not obliged to accept the Ombudsmen's view on the interpretation of a particular regulation, or the equities of a particular case or the correctness or otherwise of some policy. The fact refusals to follow Ombudsmen's recommendations do occur, and it would seem, occur more often in the very areas where the courts are unable to conduct review, must be treated as significant.

The Ombudsman institution, has, in the course of its history in the English speaking world, employed a number of techniques and been able to fulfil certain functions which are not associated with the courts.

The first is that of publicity of the office,[165] linked, in some jurisdictions, with a peripatetic service.[166] In New Zealand, these techniques have not been employed as vigourously or as usefully as they appear have been in some other countries. The description by the Ontario Ombudsman of his and his staff's processions around the province holding public meetings and private hearings conjures up pictures of the Curia Regis travelling throughout the domain. Publicity is obviously important to the effectiveness of the institution as is indicated by the fact that on the occasions when Sir Guy Powles appeared on television the number of complaints in the ensuing days rocketed; and by the fact that the Justice Department's ratings on the "Number of Complaints per Department" chart increased dramatically after Sir Guy had conducted the investigation at Paremoremo Prison. On the other hand too much publicity could so burden the Ombudsmen with complaints that the effectiveness of the institution could be hindered, especially in the areas of expedition, thorough consideration of the complaint and personal humanising contact with the complainants.

The second is the reporting sanction. The Ombudsmen have the psychologically powerful tools of reporting to Parliament and of having his conclusions on a particular subject made known in the press. A case in point is that concerning the compulsory acquisition of a company's land by notice in the Gazette in February 1975. The company objected to the order but the Town and Country Planning Appeal Board, having regard to the

165 Note 1975 Report, p.14; Ontario 1975-76 Report, Alberta 1970 Report, p.12.

166 Alberta 1974 Report, p.5; 1977 Report (NZ), p.11; Ontario 1975-76 Report.

advanced state of the contruction of the bridge had no alternative but to hold that the taking of the land for road alignment was "sound and necessary". The Chief Ombudsman, despite his conclusion as to the justice of the situation and that the complaint was completely justified, found himself barred from acting because of a jurisdictional limitation. Nevertheless, he was able to make his views well known in the press and to Parliament.[167] Although it is unlikely that agencies and officials live trembling in the shadow of this publicity sanction it is also unlikely that it never influences a departmental response to recommendations of the Ombudsmen in the 'borderline' cases. The technique must be seen as an additional and occasionally useful weapon in the Ombudsmen's armory.

The third technique to notice is the fact that under s. 13(2) the Ombudsmen can investigate on their own motion. This gives the institution a particular flexibility in dealing with issues of administrative justice and although hasn't been used much in practice in New Zealand it has possibilities of development for the future.

A related matter is that the Ombudsman is often able to use a complaint as a springboard from which other questions and areas, not necessarily connected to the complaint but revealed by it, may be investigated. A good example is provided by the complaint concerning the entry of Officers of the Valuation Department on to private property. The complaint led the Ombudsmen to conduct a review of all the statutory provisions relating to the entry on to private property by public officers.[168] Such an ability is obviously beyond the scope of the courts work.

That ability points to a function which the Ombudsmen seem to be taking on increasingly. That is to conduct broad views of the law and the policy in a particular field. In New Zealand the Ombudsman has examined the principles and law relating to compensation for damage suffered as a result of public works;[169] the law and policy relating to the bonding system;[170] questions relating to the Mental Health legislation;[171] and the statutory provisions relating to entry on to private property.[172] I am not suggesting that the Ombudsmen have made a startling impact on the areas that have been reviewed

167 Reported Evening Post 8.8.77.

168 1976 Report, p.10.

169 1969 Report, p.14; see also 1976 Report, p.17, Case No. 9757.

170 1969 Report, p.13; 1975 Report, p.6.

171 1969 Report, p.15.

172 See also Ontario Report 1975-76, p.30 (Note also pp 19-20).

So far the effect of such reviews has been almost imperceptible. They nevertheless have a contribution to make in the area, especially in the light of the experience they gain through dealing with individual cases.

The second function which the Ombudsmen seem to exercise generally, is what can be called the didactic function. Elements of it have been alluded to throughout the paper. It involves the Ombudsmen in teaching, by the carrot and the stick method, public authorities the principles and practice of administrative justice: the undesirability of delay, the proper exercise of discretion, the rule of law and so on. In a sense the courts also function in this area but not positively so as the Ombudsmen do, not in day to day contact with officials, not in direct and frequent sermons on what is and is not to be done.

Evaluation and Conclusion

The examination of the two institutions and their response/resolution processes have pointed up a number of factors.

First, it is apparent that the Ombudsmen can respond to a complaint in a wider number of ways and with more flexibility than the courts. Secondly, the grounds upon which particular responses are based are to a large extent similar in the reasoning processes of both the Ombudsmen and the courts. In addition though, the Ombudsmen could base his conclusions on wider grounds; in particular that the activity in question was based on a law which was unreasonable, unjust, oppressive or improperly discriminatory and that having regard to the merits of the case, the decision was wrong. Thirdly, the practical results of responses which helped the individual covered a wider range in the case of the Ombudsmen than in that of the Courts: from helping by giving advice even where the matter was one beyond the limits of jurisdiction to helping by having the matter reconsidered according to the law to helping by achieving a result according to the equities of the case. Fourthly, the court is able to enforce its decisions (though not against the Crown which is of no consequence as the Crown abides by the Courts decision) while the Ombudsman is not (although again in practice it has not so far turned out to be of any great consequence). Fifthly, the Ombudsmen are able to, and do, take a more direct approach to achieving the practical redress which

the complainant seeks for the complaint to be satisfied than the courts can. Sixthly, the courts are able to review the decisions of Ministers. but to all practical effects the Ombudsmen can on most occasions also. Seventhly, in order to be effective the Ombudsmen need to maintain good relationships with the Administration, and therefore the results achieved will be somewhat tempered by that need[173] whereas the courts are not in a position where they have to avoid treading on to many people's toes too often in order to be effective. Eightly, the Ombudsmen are better equipped in dealing with the Administration to discover whole circumstances of a case. Ninethly, by virtue of factors like cost, expedition, informality and personal approach the Ombudsman would seem to be more attractive to the public at large.

An assessment of those factors as a whole could lead one to believe that the Ombudsman institution was a God given solution to end all administrative ills, and by far the more useful efficient and generally attractive of the two institutions. It is true that the Ombudsman has been the cause of a considerable body of administrative reform over the years, that it has been accepted as a necessary and desirable part of the system and that it has the potential for development. However, it has not turned the system upside down; the increased flow of complaints after television appearances would seem to indicate that there is still a vast number of complaints not coming to the Ombudsman and that in many people's minds an Ombudsman is not thought of as the first person to whom one would go with a complaint; and although there is room for development in the functions of the institution, it cannot go too far. By contrast the courts, although they can be and are criticised in respect of many things have a stabilised constitutional position and a recognised status in the community. They too, have potential for development as present judicial activity indicates. As was stated at the beginning of the paper, these two institutions or either of them are unlikely to be determinative of constitutional changes on their own. Certainly, as Mr Castle one of the present Ombudsmen has said, it cannot be envisaged that the Ombudsmen would supplant the courts[174] with respect to the supervision of governmental activity. However, both the Ombudsman institution ad the courts can be seen in the context of society and government and the trends that can be discerned to be flowing in both. The fact that there has been a long period of the growth and extension of the executive

173 See Alberta 1976 Report, p.13, quoting from a paper by Mr Maloney, Ontario Ombudsman, delivered to the International Ombudsmen's Conference 1976 called "The powers of the Ombudsman and their judicious use."

174 Reported Evening Post 23,8.77.

and its power, until now it reaches into almost every area of modern mans life can be seen to have generated a response of which both the Ombudsman institution and the present judicial activism form a part. The institution of Parliament which has been on the decline since Executive power began to increase its attempting to reassert its control of old and it is using methods like Select Committees, the Public Expenditure Committee, the Comptroller and Auditor-General and the Ombudsmen to do this. It may be that Parliament will on the basis of the present or future record of the Ombudsman institution increase its power and jurisdiction in order that its own power will be increased. However, such a move would not appear to be in keeping with the nature of the recent change to the office as to reporting and so on when jurisdiction was extended to local bodies.

Another possible development could be that the desirable attributes of both the Ombudsmen and the courts are combined in some body having special jurisdiction in administrative law matters. So far such a possibility has been eschewed in both Britain and New Zealand, despite the ardent advocation of an Anglicised Consiel d'Etat by Professor Mitchell,[175] and an Administrative court by Mr Orr.[176] Yet the fact remains that there are areas of governmental activity which are beyond effective supervision by the Courts and the Ombudsmen but which may be thought to desirable that they be subject to some measure of control.

However, in the meantime it seems apparent that the institutions will continue to fulfil their functions side by side and will no doubt develop or not according to the exigencies of society to which they will be subject. Although the Ombudsman institution has many assets and appears capable of dramatic deeds in the pursuit of justice in administration it is appropriate to end with the words of Sir Guy Powles:

> "For myself, I would urge, and have urged, a cautious approach. I would deplore any tendency to exaggerate the influence of the office, to think that the Ombudsman is the great righter of all wrongs, the Sir Galahad for the relief of citizens. But at the same time I recognise that there is a social value in a sympathetic ear into which the suffering citizen may pour pent-up grievances.

175 See e,g. (1962) Public Law 24.

176 K J Scott Memorial Lecture 1965, "An Administrative Court: Its Scope and Purpose."

> The office is not, however, a universal panacea against all adminstrative ills, but it is a fairly mundane, useful, and effective tool in the hands of the public, through the legislature to keep the administration trimmed down to size." [177]

177 "Aspects of the Search for Administrative Justice" opcit p.154.