THE NEW ZEALAND OMBUDSMAN

BY

ULF LUNDVIK

Former Chief Parliamentary Ombudsman

Sweden

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1. INTRODUCTION

In this century and particularly after World War II there has been, in practically all developed countries, an enormous expansion of the public service. The economic and political evolution within the nations and their assumption of new responsibilities, in the field of social welfare as well as elsewhere, were the main contributing factors to this expansion. In most of the countries the public service, while it expanded, also underwent significant structural changes. A proliferation of special bodies and ad hoc tribunals could be observed, often grown up in a haphazard fashion.

The growth of the public service and its coinciding transformation gradually evoked considerable concern among the public. Some went so far as to contend that the citizens were delivered at the mercy of an anonymous bureaucracy, exercising wide discretionary powers. In wide circles it was felt that the private citizen should be given a better protection against the increasing centralisation of power in the hand of the state.

The question how to obtain such a protection was discussed in various countries for some considerable time. In the Common Law countries the control of the administration has traditionally been exercised by the Courts of Law. The procedure, however, is costly and slow. The review is furthermore mainly restricted to questions of legality. In view of these difficulties there has gradually developed

a system of administrative tribunals. Even this system, however, has been found to have its shortcomings. In continental Europe there exists, more or less developed, a system of administrative Courts who hear appeals against administrative decisions. These courts are usually empowered to consider not only questions of law but also questions of fact and expediency. On the whole this system seems to work well, yet often slowly. Some mistrust has, however, been expressed in the Courts' impartiality.

The discussion long concentrated on these already established methods to control the administration and on the question how they could be improved. Towards the end of the fifties, however, another quite different means of external control began to attract attention. That was the system of the Ombudsman.

This system, in its modern form, originated in Sweden. The constitution adopted in 1809 in that country contained a provision for the election by Parliament of a "Justitieombudsman" (Ombudsman for Justice). He should be a man "of known legal ability and outstanding integrity" and his duty was to supervise, in his capacity as a representative of Parliament, the observance of laws and regulations by all officials and judges. The constitution was to be supplemented by an act of instruction to the Ombudsman. Since this had been passed, Parliament on March 1, 1810 elected the first Ombudsman, Baron L.A. Mannerheim. He, like his successors, was authorized to supervise all state officials, both civil and military, until 1915 when a separate office was created for a Military Ombudsman. In 1957 the jurisdiction of the Ombudsman was extended to embrace also municipal officials. Finally, in 1968 the offices of the Ombudsman and the Military Ombudsman

were merged into one office comprising three (now four) Ombudsmen.

The Swedish office long remained unique. In 1919 Finland, after gaining its independence from the rule of the Russian Tsar, inaugurated an Ombudsman office. This, however, attracted little attention in other countries. It was not until Denmark, through the constitution of 1953 and a special enactment of 1954, established an Ombudsman office mainly following the Swedish pattern that the Ombudsman concept began to attract general attention in countries outside Scandinavia. The first Danish Ombudsman, Professor Stephan Hurwitz, who assumed office in 1955, soon began to write and lecture about his office in English. This stimulated an interest which rapidly spread in the Anglo-Saxon world. In 1957 there began to appear articles about the Ombudsman system in English language publications and in the years that followed such articles became numerous.[1]

2. THE TRANSFER OF THE OMBUDSMAN SYSTEM TO NEW ZEALAND

The Ombudsman concept attracted special attention in New Zealand. In this country the public service had expanded no less than in other developed countries and there seems to have been a widespread concern about the consequences that might ensue. Discussions had been going on for some length of time among lawyers and politicians on how to best control the administration. As early as in 1953 Dr. O.C. Mazengarb advocated[1a] the establishment of an office, similar to that of the Roman praetor, to protect the citizen against possible malfaisance of the administration. In 1957 the New Zealand Institute of Public Administration held a convention about the exercise of administrative discretion. In several of the papers delivered at the convention[2]

various ways to control the discretion were discussed: ministerial control, legal control, control through administrative tribunals and parliamentary control. The presentation the same year in the United Kingdom of the Franks report on administrative tribunals and enquiries[3] stimulated the debate in New Zealand.

The abovementioned articles on the Ombudsman system were soon observed and read in New Zealand and the seeds thus sown fell on fertile ground.

In 1959 two prominent persons from New Zealand, the Hon. H.G.R. Mason, then Attorney-General in the Labour Government and Dr. J.L. Robson, then Duputy Secretary for Justice, attended a United Nations seminar on Judicial and Other Remedies against the Illegal Exercise or Abuse of Administrative Authority, which was held at Kandy, Ceylon for participants from the Asia and Far East region. There were presented at the seminar two working papers prepared by European authors.[4] One was written by Professor C.J. Hamson, a leading British academic lawyer, and one by Professor Hurwitz. Hamson's paper discussed and compared the methods evolved in the United Kingdom and in France for the protection of the rights and liberties of the citizens. It also mentioned, although briefly, the office of Ombudsman in Denmark. Hurwitz' paper dealt with "The experience of Parlimentary Commissioners in certain Scandinavian Countries" and had particular reference to the Danish Ombudsman system.

The papers were discussed at the seminar in their authors' absence. While the participant from Australia spoke in favour of the Ombudsman system other participants were not satisfied that the system would be practical in their respective countries. According to the

abstract of the proceedings the participants from New Zealand did not take part in the discussion.[5]

Upon his return to New Zealand the Hon. H.G.R. Mason published a short account of the seminar in the New Zealand Law Journal.[6] He said that the delegates had agreed that something further could and should be done to protect the individual citizen and that this could be achieved without serious detriment to public administration. He went on to say that he was reflecting on how best to achieve the objective of giving the citizen a right of appeal to an independent tribunal on the justice of official decisions. No action was however, taken by the Labour Government.

In the National Party there awoke, meanwhile, an interest in the Ombudsman concept. The Hon. J.R. Marshall (later Sir John Marshall), who had been Attorney-General in the National Government before 1958, at the Dominion Legal Conference in April 1960 advocated the establishment of an administrative appeal authority with a function essentially the same as that which eventually became the function of the New Zealand Ombudsman. He materialized his suggestions in a short note which was put as an item on the National Party's policy programme for the general elections to be held late in 1960. The note reads:

> "Citizens Appeal Authority
>
> The National Party believes that good Government in a democracy requires the cooperation of the people in accepting as fair and reasonable the decisions of the administration. To ensure that members of the public in dealing with Departments of State have the right and opportunity to obtain an independent review of administrative decisions, the National Party proposes to establish an appeal authority. Any person concerned in an administrative decision may have the decision reviewed. The procedure will be simple and provide for

> review to be by written application or in appropriate cases by hearing. To avoid frivolous appeals, a reasonable fee should be charged - to be refunded at the discretion of the authority. The appeal authority will be an independent person or persons responsible not to Government but to Parliament. The authority will have access to Departmental files and the power to summon witnesses.[7]

The National Party won the 1960 elections and formed the new Government. Pursuant to its election programme the Government now had a Bill drafted with provisions for an Ombudsman office. Responsible for the work was the Hon. J.R. Hanan who had become Attorney-General and Minister of Justice. The Hon. J.R. Marshall, who was now Deputy Prime Minister, took part in the work as well as Dr. Robson, now Secretary of Justice, and other prominent persons.[8]

The Bill that resulted out of this work was inspired more by the Danish model than by the Swedish one. The differences between these two offices are not great, yet in some respects significant. The Danish system of Government resembles more to that of New Zealand than does the Swedish system. Moreover, the rules for the Danish Ombudsman were then recently enacted and therefore more up to date than those in Sweden. It was under these conditions natural for the New Zealand draftsmen to look at Denmark sooner than at Sweden.[8a] Another reason might have been that the literature in English about the Swedish office was at that time scanty. That the Bill was inspired by the Danish model does not mean however that the New Zealand institution became a mere copy of the Danish one. In several respects there are substantial differences. The plan and wording of the New Zealand Bill was also wholly dissimilar from the Danish rules.

The Bill was introduced in Parliament in August 1961. However, it

did not proceed that session beyond a first reading. Partly, this was due to pressure of other work and partly - it was suspected - to the fact that the Bill received a rather poor Press. The Bill was withdrawn, redrafted and revised and then reintroduced in June 1962 in a considerably improved form.[9]

It may be mentioned that late in 1961 there had been published in the United Kingdom the "Whyatt Report"[10] recommending the establishment of an Ombudsman office (Parliamentary Commissioner). The report was observed in New Zealand but it did not influence the drafting of the 1962 Bill. It was stressed during the subsequent debates in Parliament that the proposals in the Whyatt Report were by no means as far reaching as those in the New Zealand scheme.[11]

The 1962 Bill was the subject of intensive debates in Parliament which, however, mainly focused on details. The only question that caused a division was that of the name of the new office. In the governmental Bill the officer was called Parliamentary Commissioner for Investigations. On the recommendation of the Statutes Revision Committee Parliament ultimately, with a majority of 30, decided that the officer should be called Ombudsman. With some further amendments the Bill was finally passed on September 6, 1962. The Short Title of the Act became The Parliamentary Commissioner (Ombudsman) Act 1962 (henceforth in this paper referred to as the Ombudsman Act 1962 or merely the 1962 Act). Next day Parliament unanimously decided to recommend the Governor-General to appoint Sir Guy Richardson Powles, K. B.E., C.M.G., as the Ombudsman on and from the 1 October 1962.

The New Zealand Ombudsman system became the model for many Ombudsman offices subsequently established.[12] Even the statutes that

were enacted usually followed the New Zealand pattern closely. The office of the Parliamentary Commissioner for Administration in the United Kingdom, established in 1967, was somewhat differently construed and the New Zealand system, although it exercised an influence, did not serve directly as a model. In the same year, 1967, Ombudsman offices were created in the Canadian provices of Alberta and New Brunswick and both these offices were patterned closely on the New Zealand model. Also subsequent Ombudsman offices in the Canadian provinces are similar to the New Zealand model. To some extent the Quebec office of the protector of the public, represents an exception as the statute establishing the office is somewhat differently planned and worded. In 1971 the Ombudsman system spread to Australia and the enactments in the different states are all more or less influenced by the New Zealand Act.

3. THE OFFICE

The Ombudsman office, established in New Zealand in 1962, was initially small. During the first six months the Ombudsman was assisted by a staff of only four (a legal officer, an administrative assistant, a secretary-typist, and a typist). The number of complaints received in that period was 304. In the following twelve months (the year ended 31 March 1964) 760 complaints were received. The intake remained more or less constant for some years but in the year ended 31 March 1971 it rose to 1,107. In the year ended 31 March 1976 it was 1,315. For the whole period from 1 October 1962 to 31 March 1976 the intake was 12,091. By the end of that period the number of staff had increased to 11.[13]

By far the greatest number of the complaints received up to 31 March 1976 or 1,484 were directed against the Department of Social Welfare. The Department of Justice was the target of 901 complaints, the Department of Education 767 and the Inland Revenue Department 588. 459 complaints were directed against the Police Department and 457 against the Police. Out of the 12,091 complaints received under the period no less than 3,942 were declined for lack of jurisdiction, 1,816 cases were discontinued under sect. 14 (1) in the 1962 act or sect. 17 (1) in the 1975 Act (see post p.38), 894 were withdrawn, 5,185 cases were investigated but only 1,220 of these were found justified. The remaining 254 cases were still under investigation at the end of the period.

In 1975 a major extension of the jurisdiction of the Ombudsman was decided, the greatest significance of which was to bring local government organizations under his purview. This part of the reform, materialized in the Ombudsmen Act 1975, came into effect on 1 April 1976. In view of the increased intake of cases that was expected to ensue, essential changes were made to the organization of the office. Provisions were made for the appointment of more than one Ombudsman and for temporary appointments. A Chief Ombudsman was to be responsible for the administration of the office and the coordination and allocation of the work between the Ombudsmen. Sir Guy Powles was appointed Chief Ombudsman and Mr. G.R. Laking, C.M.G., Ombudsman, both from 13 October 1975. Mr. A. Eaton Hurley was appointed Ombudsman, temporarily from 1 March 1976. Two regional offices were established, one in Auckland and one in Christchurch. Mr. Hurley took charge of the Auckland office and assumed responsibility for the investigations of complaints against local organizations in the populous northern part of the North Island.

Mr. Laking, operating mainly from Wellington, handled cases concerning local government elsewhere in New Zealand and took over part of the cases against central government agencies, the rest being handled by the Chief Ombudsman. In 1977 Mr. Laking succeeded Sir Guy Powles as Chief Ombudsman, while Mr. L.J. Castle, C.M.G., was appointed Ombudsman. The work is divided essentially in the same way as previously, Mr. Castle taking the work that used to be allocated to Mr. Laking. As a consequence of the extension of the jurisdiction the staff was increased considerably and numbered 31 by 31 March 1979.

As was expected the intake of complaints rose as a result of the 1975 reform. In the year ended 31 March 1977 2,075 complaints (of which 707 against local organizations) were received, in the following year 2,010 (of which 443 against local organizations), while in the year ended 31 March 1979, 1,635 complaints (of which 422 against local organizations) were received.

4. THE OMBUDSMAN'S FUNCTION

Although the National Party's programme for the 1960 elections referred to the Ombudsman as a "citizens appeal authority" and the same or similar expressions were frequently used during the debates in Parliament leading up to the passing of the Bill, the Ombudsman Act 1962 did not give him power to reverse any act or decision nor to order any steps to be taken. He can however, as was specifically set out in sect 19 (3)[14], recommend that some kind of remedial action be taken and such recommendations have proved to be highly efficient as they usually, not to say nearly always, are followed albeit sometimes under protest.[15]

The purport of a recommendation can be that the matter should be referred to the appropriate authority for further consideration or that a decision should be cancelled or varied. If the subject matter of the complaint is an omission the recommendation would be that the omission be rectified. It is even open to the Ombudsman to suggest that any other steps should be taken. Formal recommendations have often not been necessary as the matter has been settled informally during the course of the Ombudsman's investigation. In the year ending 31 March 1975, for instance, only 9 recommendations were made, while next year the number was 19. The cases where the grievance has been redressed informally, without any recommendation made, have been far more frequent. This can in part be explained by the frequent occurrence of the Ombudsman bringing new facts to light in the course of his investigation.[16]

Whether or not a formal recommendation has been made the result of the Ombudsman's intervention has often been highly satisfactory to the complainant. Social or superannuation benefits that have been unduly withheld have been paid out,[17] or studentships granted which had previously been refused.[18] Special licenses or permissions which had been denied without good cause have been granted, etc.[19] Frequently the Ombudsman has got the grievance settled through an ex gratia payment.[20] Similarly he has sometimes obtained the waiver of an obligation , partly or in full. For instance, once when a Department had obtained judgment for a sum of $376, the Ombudsman, in view of special circumstances, recommended the Department to settle for half the sum owing and it was done.[21] On a few occasions even special legislation was resorted to in order to have the grievance settled.[22]

When considering these examples one should bear in mind that they refer to cases where the complaint was investigated and found justified. These cases, however, represent only a minority of all. Out of a total of 12,091 complaints received up to 31 March 1976 only 1,220 were classified as investigated and justified (see p. 9 ante).[23] In most cases the Ombudsman has thus not found cause to criticize the administration. Frequently he has concluded his report by expressing the view that the authority concerned had handled the matter in a fair and reasonable way or pronounced some similar opinion.[24] He has even found necessary to advise a few complainants that they should cease groundless attacks on Departments or officials.[25] The Ombudsman can therefore be said to function to no little extent as a shield to the administration.

To return to the topic of the recommendations, a recommendation should be addressed to the appropriate Department or organization and a copy given to the Minister concerned. If the recommendation is not followed the Ombudsman may send a copy of it to the Prime Minister and may thereafter report to Parliament, thus making the matter public. This ultimate sanction of publicity and of parliamentary and public opinion has, so far as the Annual Reports up to and including the Report for the year ended 31 March 1979 indicate, never been used and only three times has the Ombudsman found it necessary to send a copy of his report to the Prime Minister.[26] All three times this led to favourable result, yet in one case subsequent events made the efforts fruitless.[27]

In the respect now dealt with the New Zealand Ombudsman's position is similar to that of his Scandinavian colleagues. None of them can reverse or vary a decision complained against. Nor can they order any remedial action to be taken. They can only recommend.

The abovementioned provisions authorized the New Zealand Ombudsman not only to recommend the redress of individual grievances. He may also recommend that a practice, that seems unreasonable, unjust, oppressive, or improperly discriminatory, be altered or that a law be reconsidered or that any other step should be taken. Such more general recommendations have become more and more frequent in the Ombudsman's practice. Even when the individual complaint which caused the Ombudsman to open an investigation was found not justified or when the matter was rectified the Ombudsman has often continued his investigation in view of making a general recommendation.[28] Most of these recommendations have been followed. Some advocated substantive reforms, some procedural reforms.[29] Also when dealing with general problems the Ombudsman has requently obtained results through informal discussions and interventions.

One problem which for a long time caused the Ombudsman concern and which was the subject of numerous complaints was the bonding system. To secure an adequate number of properly qualified citizens to serve in appropriate positions the state provided young persons with studentships on the condition that they entered a bond that they, after completing their education, performed for a number of years a specified service. If they failed to pass their examination or left the service before the expiry of the time, they were forced to repay what they had received. The Ombudsman finally succeeded to get a more flexible policy adopted.[30] Another problem concerned recovery of overpayments of social security benefits. As a result of the Ombudsman's submissions the rules were amended so that such debts could be written off if the overpayment was caused by an error to which the beneficiary had not contributed and he had received the amount paid in good faith.[31] Social

security benefits was the subject of yet another submission of the Ombudsman's. Some beneficiaries were receiving overseas pensions. When determining the rate of the New Zealand benefit the Social Security Commission had decided to cease taking into account any tax which was payable on the overseas pension. This meant that certain overseas pensioners received a smaller net amount in total than the life-long New Zealand resident. The Ombudsman considered this to be inequitable and contrary to the long established policy that the overseas pensioner should as far as possible be placed in the same position as regards his pension and benefit as the life-long New Zealand resident. There were discussions with the Inland Revenue Department and the law was amended in such a way as to remove the retrospective effect the inequities which had concerned the Ombudsman.[32] Other examples of the Ombudsman's activities in this field are his interventions to promote better procedure in various departments[33] and to secure coordination of their work.[34]

Finally it should be mentioned that from 1969 and on the Ombudsman received an increasing number of complaints from inmates of penal institutions. The majority of these complaints related to the conditions at one particular prison, the Paremoremo maximum security prison. Together with a retired senior magistrate the Ombudsman twice conducted extensive inquiries at this prison. Their joint reports contained a number of recommendations of a general nature.[35]

Also the Ombudsman's activity to promote general reforms has a parallel in Scandinavia. The Ombudsmen there have ever since the inception of their offices made numerous recommendations for altering of bad practices, amending of statutes or the enactment of new laws.

However, unlike the New Zealand Ombudsman, they have been more active in the field of procedural reforms than in that of substantive reforms.

In other respects the function of the New Zealand Ombudsman is somewhat differently construed than that of his Scandinavian colleagues. To some extent the Ombudsmen in New Zealand and in Scandinavia have different attitudes towards the cases. This must be seen against their different historical backgrounds.

The Swedish Ombudsman, whose office as has already been said was established in 1809, was originally mainly a prosecutor. His duty, as set out in the constitution of that year, was to supervise the way laws and regulations were implemented by public servants and to prosecute those who in their official capacity had committed any fault or had neglected their duties. Prosecution is nowadays seldom instituted and has since long ceased to be the Ombudsman's main weapon. Yet the Ombudsman's attitude is still to a considerable extent similar to that of a prosecutor. He often proceeds like a fault-finder and his main weapon is criticism, often directed against an individual public servant. The redress of individual grievances is not his primary concern; he is more anxious to prevent the fault from being repeated. Yet the outcome of the Ombudsman's intervention will often be that the matter is rectified.

The rules for the Danish Ombudsman imply a similar attitude. It is specifically said that the Ombudsman "shall keep himself informed as to whether any person, comprised by his jurisdiction, pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties". If he finds that a Minister should be held

responsible, under civil or criminal law, for his conduct of office, he shall notify the responsible committee of Parliament. If he finds that any other official has committed a crime in office he may order the prosecuting authority to institute preliminary investigation and to bring a charge before a Court of Law. The Ombudsman may also order the opening of disciplinary proceedings. These powers are seldom or never resorted to. Like his Swedish colleague the Danish Ombudsman, however, often pronounces criticism.

The New Zealand Ombudsman was not given the power to institute or order prosecution. He was not meant to be a critic of individual public servants. This was repeatedly stressed by the Attorney-General, The Hon. J.R. Hanan, during the parliamentary debates that preceded the passing of the Ombudsman Bill. During the second reading of the Bill he said inter alia: "The (Ombudsman) is not being set up to conduct a witch hunt. The Government is merely concerned to provide a regular and independent review of acts and decisions".[36] On the other hand, in a previous debate, he pointed out that the Ombudsman would be in a very powerful position to criticize Government administration.[37]

In section 11 (1) of the Ombudsman Act 1962 the Ombudsman's principal function was set out to be to investigate decisions, recommendations, acts, or omissions relating to a matter of administration and affecting any person or body of persons in his or its personal capacity. If, as a result of the investigation, the Ombudsman formed the opinion that something was wrong he could, as has already been demonstrated, make a recommendation. Nothing seems to prevent a recommendation being made for the prosecution of an official found

at fault. It was even expressly prescribed, in sect. 15 (6), that the Ombudsman, if he was of opinion that there was evidence of any breach of duty or misconduct on the part of any officer or employee, should refer the matter to the appropriate authority. This specific provision seems to have been applied only once[38] and no recommendation has, up to 31 March 1979, been made for the prosecution of an official.[39] There have, however, been occasions when the Ombudsman's informal interventions seem to have produced similar results. In a case when a traffic officer had acted unfairly the Department informed the Ombudsman that suitable action had been taken against the officer.[40] In another case where a police constable had conducted an interrogation in a way that the Ombudsman found open to criticism the Department agreed that some admonitory action would be taken.[41] That the Ombudsman carefully considers any allegation which has serious aspects concerning personal conduct and integrity on the part of an official is demonstrated by a case, referred to in a case note of the Report for the year ended 31 March 1965 (p. 14). A company had been denied compensation from the Department of Civil Aviation when its tenancy at a Government-owned aerodrome was terminated and it alleged that the decision was influenced by the attitude of a senior officer of the Department. The Ombudsman examined the case and found no evidence to support the allegation.

The cases now mentioned form exceptions. Normally the Ombudsman's investigations are not directed against individual officials. When taking the oath of the office the first Ombudsman, Sir Guy Powles, said in full consonance with what had been expressed in Parliament when the Bill was passed: "I am not going to indulge in any witch-hunts nor look for scapegoats".[42] A study of the Ombudsman's Annual

reports confirms that Sir Guy and his successors have faithfully adhered to this principle.

A recommendation made by an Ombudsman can imply a criticism of a practice, a statute, or of an individual decision. Outspoken criticism is, however, seldom found and when pronounced the criticism is usually low profiled.[43] Criticism against an individual official is most unusual.[44] The Ombudsman's primary concern has evidently been to redress individual grievances which have been brought to his attention through complaints. The occasions when the Ombudsman's interventions have resulted in the matter being rectified are numerous. As has been demonstrated above the Ombudsman has also frequently succeeded to get bad practices altered, fairer rules issued or other more general reforms brought about. All these activities have parallels in the practice of the Scandinavian Ombudsmen, yet the New Zealand Ombudsman's concentration on the redress of individual grievances reflects a somewhat different attitude than theirs.

On some occasions the New Zealand Ombudsman has successfully applied a method for solving disputes which is not mentioned in the Ombudsman Acts nor has any perceptible parallel in Scandinavia. In situations where the parties seemed to be at arm's length from one another the Ombudsman has occasionally succeeded to bring them together for a conference where the matter was settled.[45] A similar method was once used in a case, where to the detriment of the complainant and others, various public organizations could not agree on the policy to pursue (railways advertising along highways).[46]

5. THE JURISDICTION OF THE OMBUDSMAN

Under the Ombudsman Act 1962, sect. 11, the Ombudsman's purview comprised Government Departments and organizations, named in a schedule to the Act, as well as officers, employees and members of the same Departments and organizations.[47] An amendment to the Act in 1968 brought officers and employees of educational boards and hospital boards under the Ombudsman's purview. A major extension in the jurisdiction was made in 1975 through the Ombudsmen Act 1975. It extended the jurisdiction (defined in sect. 13) to local organizations named in the schedule. Also some central organizations, who had not previously been mentioned, now came under the Ombudsman's supervision. Under both Acts the Ombudsman's function was, however, restricted to investigation of decisions, recommendations, acts and omissions that related to a matter of administration and affected any person or body of persons in his or its personal capacity. Some other restrictions were also made.

To commence with the organizations or persons who come or do not come under the Ombudsman's purview, the Governor-General and the Cabinet are not embraced by his jurisdiction. Nor does his jurisdiction extend to individual Ministers as does the Ombudsman's jurisdiction in Denmark and Finland but not in Sweden. However, the New Zealand Ombudsman is specifically authorized to look into recommendations made by a Department to a Minister. The Attorney-General, the Hon. J.R. Hanan, during the second reading of the 1962 Bill explained the consequences thus: "The (Ombudsman) can call for the departmental file which will contain not only the Department's recommendation, but usually the Minister's decision. If the Minister follows the recommendation any criticism by the (Ombudsman) of the

of the recommendation will in fact be a criticism of the Minister's decision. If the Minister does not follow the recommendation of his officers and advisers, then that fact will doubtless be stated by the (Ombudsman) in his report. In addition, and this is important, this House will have an opportunity of calling on the Minister to justify his actions and it must be remembered that members will be armed with the (Ombudsman's) findings."[48]

In the Ombudsman's practice departmental recommendations have been investigated on numerous occasions and in several instances criticised. The converse case has also occurred, namely that a Minister has decided not to accept or act upon the recommendation made by his Department.[49] According to a statement, made in 1964 by the Ombudsman, neither of these types of cases has caused any unsurmountable difficulties or frictions.[50] The Annual Reports do not indicate that any such difficulties or frictions have appeared since.

As a matter of curiosity it may be mentioned that the Ombudsman twice has conducted an investigation, the subject of which was a recommendation to a Minister who in his turn advised the Governor-General who made the ultimate decision.[51]

When, through the Ombudsmen Act 1975, the Ombudsman's jurisdiction was extended to local organizations, the governing councils of local authorities were not included. The jurisdiction comprises only decisions, recommendations, acts or omissions of members of the staff of local authorities, or of committees, subcommittees or individual members of governing councils. A decision of the governing council as such is presumably often based upon a recommendation from a committee

and when this is the case the Ombudsman feels free to investigate the recommendation and, when appropriate, to suggest that the council reconsider the matter.[52]

As in Denmark, but unlike what is the case in Sweden and Finland, the Courts of Law do not fall under the Ombudsman's purview. It was considered incompatible with the principle of the independence of the Courts to let the Ombudsman supervise them.[53] This has not, however, impeded the New Zealand Ombudsman from investigating acts and omissions of Court offices[54] or of the Registrar of a Court.[55] In a case that revolved round the official records of ownership of Maori land the Ombudsman expressed the opinion that the Maori Land Court had made an error.[56] From the case note it appears that the fault was committed by the staff of the Maori Land Board or by the Court staff.

Under sect. 11 (5) (b) and (c) in the 1962 Act and sect. 13 (7) (b) and (c) in the 1975 Act the New Zealand Ombudsman is expressly excluded from investigating decisions, recommendations, acts, or omissions of any person in his capacity as a trustee or acting as legal adviser to the Crown or acting as counsel for the Crown in relation to any proceedings. The Attorney-General, the Hon. J.R. Hanan, during the second reading of the 1962 Bill explained the reasons for these exclusions thus: "The Public Trustee acts in a fiduciary capacity and in carrying out a trust is not performing an administrative function at all; he is performing a strictly legal function. As the acts of trustees are substantially controlled by the Courts of the land and under the normal rules, it was considered that the Public Trustee and other trustees should not be within the

ambit of the (Ombudsman). --- (Legal advisers to the Crown) are excluded as an application of the principle that communications between solicitors and their clients are privileged."[57]

In a few cases where Crown Counsel was involved the Ombudsman has been confronted with problems as to his jurisdiction. In case No. 1985[58] the complainant had been acquitted in the Supreme Court on charges of forgery and uttering. His application for costs was refused by the presiding Judge. His application to the Minister of Justice for an ex gratia payment was also refused so he complained to the Ombudsman. The Ombudsman found the Minister had acted upon the advice of Crown Counsel. The opinion of the Crown Counsel in question began by stating that there were three aspects of the matter, the second being "the propriety of the Minister authorizing any ex gratia payment after the Judge has ruled that no costs should be awarded". The Ombudsman held that the opinion, in respect of the second aspect, was not a legal opinion within the meaning of the relevant Cabinet rules but was an opinion upon an administrative matter and that it was not therefore excluded from the jurisdiction of the Ombudsman. (The Ombudsman, however, agreed that an ex gratia payment should not be made. "Here was a matter which the legislature had placed within the unfettered discretion of the trial Judge, and it would be contrary to the principles of the Rule of Law for such an exercise of judicial discretion to be nullified by an act of the executive. Such a course could be considered only if the Minister had knowledge of relevant matters which were unknown to the Judge.") - In another case, No. 2628[59], where the Ombudsman held that the advice of Crown Counsel was not itself subject to his investigation, he questioned the adequacy of the instructions Crown Counsel had received.

As in Sweden and Denmark the Armed Forces are comprised in the jurisdiction of the Ombudsman. Yet the New Zealand Ombudsman, unlike his Scandinavian colleagues, cannot investigate any matter relating to a member of the Armed Forces so far as the matter relates to the terms and conditions of his service or any order, command, decision, penalty, or punishment given to or affecting him in his capacity as such a member.[60] The reason given for this rule was that members of the Armed Forces already had a comprehensive system of redress for grievances.[61] It was also held that it would be wrong to permit a member of a disciplined force to complain to the Ombudsman about orders he has been given.[62]

From the Ombudsman's Reports may be noted a case where a complaint about the refusal to award an Efficiency Medal was declined from lack of jurisdiction.[63] The Ombudsman held that the grant or refusal of such a medal was a matter that related to the terms and conditions of Army Service. - In Rep. 1979 p. 8 the Ombudsman expressed the opinion that the relevant terms of the provision (in short: any matter relating to a member of the Armed Forces) should not be interpreted as applying only to complaints by members of the Forces or to complaint against actions which affect only members of the Forces. A complaint against the operations of pilots of Navy helicopters, who had flown in a manner that was allegedly hazardous to civilians, was therefore declined for lack of jurisdiction.[64]

In the Report for the year ended 31 March 1969[65] the Ombudsman mentioned that he had submitted a memorandum to the Minister of Justice suggesting, inter alia, statutory amendments which would permit the Ombudsman to exercise substantial jurisdiction over

Armed Services complaints involving non-disciplinary matters. Discussions with the Minister of Defence and Secretary of Defence revealed that steps were being taken for the issuing of a new procedure for the dealing with complaints by servicemen. The procedure was issued early in 1970 and the Ombudsman took no further action for the time being.[66] It appeared however that the procedure was not open to all kinds of complaints, particularly concerning superannuation matters, and his Report for the year ended 31 March 1970[67] the Ombudsman expressed concern about the limitation of the redress of wrongs procedure and of the jurisdiction of the Ombudsman. In the Reports for the following three years the Ombudsman referred to complaints about the adjustment of servicemen's pensions to the cost of living and about the effects of a compulsory reduction of the retiring age of officers which had taken place several years previously.[68] Both these problems were reported to have been settled by the Ministry of Defence in a way that was at least partially satisfactory to the servicemen.

As has been previously mentioned the Ombudsman's jurisdiction is subject to a general restriction in so far as his function is to investigate decisions etc. which relate to a matter of administration. This provision has been a stumbling-block to many complainants. The statistics[69] show that up to 31 March 1976 no less than 3,078 complaints were declined for lack of jurisdiction under the main operating section 11 (1) and 13 (1) respectively in the Acts of 1962 and 1975. The majority of these, or 2,410, were directed against organizations not named in the schedules to the Acts. The remaining 668 were presumably considered not to relate

to matters of administration.[70] Many Ombudsman Acts subsequently adopted in Commonwealth countries contain a similar provision, restricting the Ombudsman's jurisdiction to "a matter of administration", "administrative functions", or "administrative acts". While the interpretation of these terms has caused considerable difficulties elsewhere,[71] the problems with which the New Zealand Ombudsman has been confronted in this area seem to have been of minor magnitude.

The limitation to "a matter of administration" excludes, inter alia, two things: matters of policy and professional acts and decisions.

As regards matters of policy, it was during the debates in the New Zealand Parliament clearly understood that they would fall outside the purview of the Ombudsman.[72] As the Ombudsman has rightly pointed out, the distinction between a matter of administration and a matter of policy is sometimes difficult to draw.[73] A study of the Ombudsman's Annual Reports shows a tendency on his part to pursue investigations even when the matter complained of involved some aspect of policy.[74] The authority to proceed with these investigations could, at least in some of the cases, be derived from the Ombudsman's right to recommend that practices be altered and laws reconsidered.

Many times the question has been, not so much whether or not the Ombudsman had jurisdiction, as of what issues he thought proper to pursue and how far he meant he should pursue them. As examples can be cited cases No. 179[75] and No. 9292[76]. In both of these cases the Ombudsman looked into some aspects of the matter, in the latter particularly to the procedure leading up to the decision, but did not criticize the decision itself. The former complaint related to the

provision of licenses for new importers of chemicals, which was deemed to be, at the relevant time, a matter of policy. The latter case revolved round the refusal of the Ministry of Agriculture and Fisheries to allow the Honey Marketing Authority to pay more than a certain amount a pound to producers of honey. The Ombudsman held that the determination of the amount was one in which Government policy did play and must be allowed to play a large part. A third case, No. 2372,[77] related to the construction of a gas turbine station. The Ombudsman said: "Matters such as the above, particularly when the concern an enterprise of the magnitude of the proposed --- station---, are definitely those of policy and not administration. They fall to be decided at Government level. The Ombudsman is concerned to investigate only matters relating to administration, and this inquiry therefore had to confine its attention to the actions and recommendations of the Department itself".

Professional acts and decisions were not expressly mentioned when the 1962 Act was passed. When in 1968 the Ombudsman's jurisdiction was extended to officers and employees of educational boards and hospital boards, a specific provision was inserted excluding action taken by doctors and dentists in respect of treatment and excluding all actions taken by teachers, assistant teachers and training college students. These specific exceptions were believed to be designed to ensure that professional decisions were excluded from the jurisdiction of the Ombudsman.[78] The Ombudsman Act 1975 contains no such exclusions. The Minister of Justice, the Hon. Dr. A.M. Finlay, during the second reading debate expressed the opinion that a professional act or decision is not a matter of administration and therefore not within the competence of the

Ombudsman to inquire into.[79] He invoked the evidence given by the Ombudsman before the Statutes Revision Committee that such acts or decisions are outside his jurisdiction. In his Report for the year ended 31 March 1976 the Chief Ombudsman said: "The presence of these specific exceptions in the previous legislation raised some doubt as a matter of statutory interpretation as to the relationship between administration and professional decisions and it was to remove this doubt that the express exclusions were not represented in the 1975 legislation. Complete reliance is now to be placed upon the phrase 'relating to a matter of administration', as a fundamental pillar of the jurisdiction of the Ombudsman".[80]

From the Annual Reports can be cited case No. 2051.[81] A head-master of a state school complained that the Department of Education had decided that the provision of certain specialised teaching equipment was not covered by the subsidy scheme and therefore supplies of the equipment could not be obtained for the school. After a preliminary investigation the Ombudsman found that the decision did not relate to a matter of administration within the meaning of the Ombudsman Act 1962, but was based wholly on the professional judgment of the Department as to the value of the equipment concerned. The investigation was discontinued.

The fact that the matter complained of involved difficult technical considerations has not discouraged the Ombudsman from pursuing an investigation. Examples that can be cited are case No. 1051[82] (the realignment and upgrading of a section of a state highway), case No. 1060[83] (the disposal of stormwater) and case No. 2833[84] (the railway freight-rate structure).

A field where the ambit of the Ombudsman's jurisdiction has been frequently discussed relates to the activities of the Police. The Police are named in the schedule to the 1962 and 1974 Acts which means that the Police in principle are subject to the purview of the Ombudsman. But in some cases there has been doubt expressed whether the acts or decisions of the Police could be considered as matters of administration and therefore comprised in the jurisdiction of the Ombudsman. The Police have contended that decisions whether or not to accept a complaint or whether or not to commence a criminal prosecution do not relate to matters of administration. It has been argued that these decisions are independent exercises of judgment involving a professional exercise of discretion vested in the Police.[85] Similarly, during the debates preceding the passing of the Ombudsman Act 1975 the Minister of Justice, the Hon. Dr. A.M. Finlay, maintained that decisions relating to whether a prosecution should or should not be brought were not matters of administration.[86] He said it was a discretion that resides with the Police alone and, being at least a quasi-judicial discretion, not examinable by the Ombudsman.[87] The Ombudsman, however, has not accepted these views. On several occasions he has investigated complaints concerning the refusal of the Police to procede with an inquiry or to institute prosecution.[88] - Another controversial question has been the admissability of complaints containing allegations of Police brutality or similar malfeasance. The Commissioner of Police considered it to be his duty to investigate complaints which could be the subject of disciplinary proceedings. An agreement was reached between the Commissioner and the Ombudsman that the Ombudsman defer his investigation of such complaints until the

Commissioner had carried out his inquiries.[89] In the Ombudsman Act 1975 there was inserted a specific provision, sect. 13 (7) (d), which defined more precisely the practice. The provision excluded from the jurisdiction of the Ombudsman action of the Police which may be the subject of disciplinary inquiry under sect. 33 of the Police Act 1958, unless a complaint relating to that action has been made to the Police and the complaint has either not been investigated by the Police or the complainant is dissatisfied with the result of the investigation. The Minister of Justice, the Hon. Dr. A.M. Finlay maintained in Parliament that the provision contained an extension of the Ombudsman's jurisdiction,[90] a statement which hardly corresponds with the Ombudsman's view.[91]

Sections 11 (1) and 13 (1) in the Acts of 1962 and 1975, respectively, furthermore limit the scope of the Ombudsman's jurisdiction to decisions, recommendations, acts, or omissions affecting any person or body of persons in his or its personal capacity. Whether or not such a personal interest was involved has sometimes been the question at stake. In case No. 2790,[92] for instance, the complainant maintained that the Electricity Department formulated its bulk special charges to electricity distribution authorities in such a way as to affect their finances adversely and unfairly, resulting in imposition of unjustified charges on consumers (including himself). After full consideration, the Ombudsman concluded that the complainant's personal interest (as an individual consumer) was too remote to ground a valid complaint under sect. 11 (1) of the 1962 Act. In case No. 2755[93] the outcome was the opposite. The Christchurch Clean Air Society complained that the Mines Department intended to produce a fuel

"totally unsuited to the Christchurch conditions" and to encourage the use of it by advertising. The Department, aware of the complaint, consulted Crown Counsel who advised that the Christchurch Clean Air Society was a proper complainant but that the Ombudsman had jurisdiction to carry out a full investigation only if it were first shown that one or more persons or bodies of persons had been personally affected as a result of the pollution of the air of Christchurch, they being sufferers from chronic asthma. The Ombudsman then proceeded with the investigation.

An important restriction on the Ombudsman's right to intervene was made in sect. 11 (5) (a) of the 1962 Act corresponding to sect. 13 (7) (a) in the 1975 Act. The Ombudsman is precluded from investigating "any decision, recommendation, act, or omission in respect of which there is, under the provisions of any enactment, a right of appeal or objection, or a right to apply for a review, on the merits of the case, to any Court, or to any tribunal constituted by or under any enactment, whether or not that right of appeal or objection or application has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired". The reason for this provision was explained to be that the Ombudsman was meant to supplement existing procedures, not to replace them.[94]

On some occasions the Ombudsman has been confronted with the problem whether the remedy that actually was available was a right of appeal, objection or application for review within the meaning of the provision. The right to seek an injunction from a Court was deemed not to exclude the Ombudsman's jurisdiction.[95] In another

case[96] an objection to the decision of the Ministry of Works and Development to realign a highway had been lodged with the Town and Country Planning Appeal Board and had been heard by the Board. The Ombudsman held that he had jurisdiction as the Board had no power of decision on the objection; it could only make a report and a recommendation to the Minister. In a third case[97] the Ombudsman's jurisdiction was challenged by the Department concerned as the complaint disclosed a claim for damages in respect of which recourse could be had to a civil claim against the Department under the Crown Proceedings Act. The advice of the Crown's legal adviser was sought and it confirmed the Ombudsman's opinion that he had jurisdiction.

In this context may also be noted a case[98] where the complaint was against a ruling made by the Inland Revenue Department in advance of the transaction concerned being carried out. At that stage the complainant had not available the statutory right of objection so the Ombudsman had jurisdiction to investigate the matter.

The provision now discussed has undoubtedly reduced the scope of the Ombudsman's jurisdiction to no little extent. When, on 1 May 1974, the Social Welfare Appeal Authority was established and appeals to this authority were allowed against decisions of the Social Security Commission this brought about a significant reduction in both the complaints the Ombudsman received against the Department of Social Welfare and in the complaints into which he undertook an investigation.[99] For this and presumably also for other reasons the Ombudsman submitted to the Government that the provision in the 1962 Act excluding his jurisdiction when the complainant had a legal remedy at his disposal, should be made applicable at the discretion of the Ombudsman.[100] The Ombudsman

referred to what was the case elsewhere. It may therefore be mentioned the British Parliamentary Commissioner Act 1967 and many subsequent Ombudsman Acts in the Commonwealth have, while retaining in principle the prohibition to investigate when there is a right of appeal etc. to a Court or a tribunal, authorized the Ombudsman to investigate "notwithstanding that the person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect him to resort or have resorted to it".[101] In the Ombudsman Act 1975 New Zealand followed this model. Subsequent Annual Reports indicate that the Ombudsman is prepared to exercise, under special circumstances, his discretion to conduct investigations although a right of appeal or a similar remedy is or was at the complainant's disposal.[102]

In this context it should be noted that sect. 14 (1)(a) in the 1962 Act, which corresponds to sect. 17 (1) (a) in the 1975 Act, authorizes the Ombudsman in his discretion to refuse to investigate any complaint <u>within his jurisdiction</u> if it appears to him that under law or existing administrative practice there is an adequate remedy or right of appeal, other than the right to petition Parliament, for the complainant, whether or not he has availed himself of it.[103] This provisions was explained by the Attorney-General, the Hon. J.R. Hanan, thus: "--- there may be remedies or a right of appeal other than to a Court or tribunal. For example, a Department might have a system of permitting an appeal by one officer to a superior officer. That may in the circumstances operate quite fairly. The (Ombudsman) may be satisfied that the procedure is quite right."[104]

Finally it should be mentioned that if a question arises whether the Ombudsman has jurisdiction to investigate any case or class of cases he may, under sect. 11 (7) in the 1962 Act and sect. 13 (9) in the 1975 Act, apply to the Supreme Court for a declaratory order determining the question. The Annual Reports, up to and including the one for the year ended 31 March 1979, indicate that the Ombudsman has never applied for such an order. On a few occasions the possibility of so doing was discussed but for one reason or another the expedient was never resorted to.[105] In some cases where there were doubts whether the Ombudsman had jurisdiction or where he admittedly lacked jurisdiction he has proceeded with an investigation with the connivance or at the request of the authority concerned.[106] It has also happened, in cases where there was no cause for criticism or intervention, that the Ombudsman has left it open whether or not he had jurisdiction.[107]

6. THE SCOPE AND NATURE OF THE OMBUDSMAN'S INQUIRY.

The Ombudsman has not restricted his activity to see that Government Departments and other public authorities proceed legally. Like his Scandinavian colleagues he has devoted much energy to promote a good and fair administration based on a high standard of morality in the public service. His philosophy has been that public authorities must do more than just meet the minimum requirements of the law. He has held that they, in their dealing with the citizens, should respond to higher demands as to equity and fairness than private organizations. This may be illustrated by a case where the Government Life Insurance Office had refused to consent to the transfer of the insurance cover on a building on which the Office

had a mortgage, despite the fact that the Office had previously given an assurance regarding freedom of transfer. The Ombudsman said that it seemed to him that as a Government commercial concern, Government and not private commercial ethics were involved, and that the Office ought therefore to honour the undertaking whether or not private commercial concerns would be likely to do so.[108] On numerous occasions the Ombudsman has recommended that an ex gratia payment be made to the complainant although the authority concerned was under no legal obligation to pay.[109] The Ombudsman in these and similar cases has sometimes specifically referred to natural justice[110] or to the authority's moral or equitable obligation.[111]

The practice now set out has a parallel in Scandinavia and may well denote a new element in the history of law, the development of a new equity. As in medieval England the Chancellors evolved a set of rules to remedy the defects in the Common Law, so the Ombudsmen now introduce rules based on principles of morality and fairness to supplement the statutes where they fall short.[112]

The statutory background to the New Zealand Ombudsman's practice is the provisions contained in sect. 19 of the Ombudsman Act 1962 and sect. 22 in the Ombudsman Act 1975, which authorize him to take action, inter alia, when he is of opinion that the decision, recommendation, act, or omission which was the subject matter of his investigation was unreasonable, unjust, oppressive, improperly discriminatory, or just wrong. He can also take action when he finds that in the making of the decision or recommendation, or in doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking in account of irrelevant considerations.

It has been contended[113] that these provisions give the New Zealand Ombudsman a broader scope of inquiry than have his Scandinavian colleagues who "concern themselves with the permissibility of administrative acts, with maladministration in short; they rarely reappraise the evidence or suggest revised exercise of discretion". As can be inferred from what has just been said about the New Zealand Ombudsman's practice having a parallel in Scandinavia the statement contains an exaggeration. Some differences in the Ombudsmen's attitudes can, however, be discerned. As has been mentioned above, in the chapter on the Ombudsman's function, the New Zealand Ombudsman concentrates more on the redress of individual grievances than do his Scandinavian colleagues.[114] As regards Sweden it must also be borne in mind that Sweden has a well developed system of administrative Courts and that the Ombudsman does not normally intervene when the complainant has a right of appeal. Apart from these differences it seems that the New Zealand Ombudsman has a somewhat bolder approach to the cases, particularly when the complaint concerns a discretionary decision. The Scandinavian Ombudsmen have traditionally been wary to substitute their own discretion to that of the competent authority. They will normally intervene only if the decision is clearly wrong or if the discretion has been exercised for an improper purpose or on irrelevant grounds. The New Zealand Ombudsman has gone a bit further.

One problem on which the New Zealand Ombudsman has frequently focused his attention should be mentioned in this context. It concerns the proper exercise of discretion in individual cases and the tendency prevalent in many organizations to fetter their discretion through internal rules. The Ombudsman succinctly put forth the

issue in his Report for the year ended 31 March 1964 (pp. 5 and 6): "The --- difficulties arise when so many decisions must be made that the power to make them has to be delegated, and the more widely the power is delegated, the greater the difficulties become. If the discretion is wide, there is clearly the danger that varying decisions might be given by different delegates even where the facts are similar, and this would cause justifiable dissatisfaction on the part of the public. On the other hand, if the authority that delegates the power lays down too many rules of practice or defines too closely the standards of judgment to be used by the delegates in making decisions, these decisions may in effect cease to be truly discretionary. In other words, the exercise of the discretion is unduly restricted, and decisions are made 'according to the book' instead of 'according to conscience'." The Ombudsman went on to say that the problem arose continually and that it seemed the most that could be done was for him to highlight the problem so that both delegating authorities and delegates might realise the dangers.[115] The problem can be discerned in several cases mentioned in subsequent Reports. In Rep. 31 March 1966 p. 54, for instance, the Ombudsman concluded that the Social Security Commission, in the particular case there set out, had exercised its discretion in a proper manner and in accordance with a guiding rule which he found to be both soundly based and reasonable. In Rep. 31 March 1968 p. 8, the Ombudsman, on the contrary, held that the manner in which the Social Security Commission had exercised its discretion in a number of cases was unjust. The practice was of long standing and elements of policy were contained. The Ombudsman therefore recommended that legislation be resorted to to limit the Commission's discretionary

authority. The recommendation did not, however, meet Government approval and no effect was given to it.[116]

In Scandinavia and particularly in Sweden, where the Ombudsman has traditionally been selected from the judiciary, the Ombudsmen frequently take up questions of law and express opinions on how statutes should be interpreted. On some occasions the New Zealand Ombudsman has made similar statements.[117] Authority to proceed in this way can be derived from the abovementioned sections, 19 and 22 respectively in the Acts of 1962 and 1975, which authorize the Ombudsman to take action when he is of opinion that a decision, recommendation, or act appears to be contrary to law or was based wholly or partly on a mistake of law. However, the New Zealand Ombudsman has not often taken up questions which explicitly relate to the interpretation of statutes and his whole attitude to legal problems is far more cautious than that of his Scandinavian colleagues. Sometimes his comment has merely been that only a Court could decide the issue,[118] sometimes he has recommended the authority concerned to seek legal advice.[119]

7. BASES FOR THE OMBUDSMAN'S INVESTIGATIONS.

Under section 11 (2) in the 1962 Act, corresponding to sect. 13 (3) in the 1975 Act, the Ombudsman may make an investigation either on a complaint made to him or of his own motion. Every complaint shall be made in writing.

Anyone is allowed to complain. The system prevailing in the United Kingdom and in France where the Ombudsman can be approached only through a member of Parliament, has no counterpart in New Zealand

(nor anywhere else).

The Ombudsman may, however, under sect. 14 (1) of the 1962 Act, corresponding to sect. 17 (1) of the 1975 Act,[120] in his discretion refuse to investigate (or to investigate further) a complaint within his jurisdiction if it appears to him,

a. that under the law or existing administrative practice there is an adequate remedy or right of appeal, other than the right to petition Parliament, for the complainant (whether or not he has availed himself of it), or

b. that, having regard to all the circumstances of the case, any further investigation is unneccessary.

The Ombudsman may moreover, under sect. 14 (2) in the 1962 Act, corresponding to sect. 17 (2) in the 1975 Act, in his discretion decide not to investigate (or not to investigate further) a complaint, if the complaint relates to any decision, recommendation, act or omission of which the complainant has had knowledge for more than twelve months before the complaint is received by the Ombudsman, or if in the Ombudsman's opinion,

a. the subject-matter of the complaint is trivial, or

b. the complaint is frivolous or vexatious or is not made in good faith, or

c. the complainant has not a sufficient personal interest in the subject-matter of the complaint.

From the statistics for the time from 1 October 1962 to 31 March 1976 may be noted that 1,816 complaints were discontinued pursuant to subsections (1) (see above) while 162 complaints were

declined under subsections (2).[121]

The Ombudsmen evidently feel that they are obliged to investigate every complaint within their jurisdiction which cannot be declined or discontinued under the abovementioned provisions.[122]

Under the 1962 Act there should be paid on every complaint a fee of one pound ($2), the Ombudsman having the right to waive the fee under special circumstances and also to direct that the fee be refunded if he decided not to investigate the complaint. The fee was intended as a deterrent to frivolous complaints. It was, however, found that the fee created more work than it was worth and that it did not achieve its purpose.[123] So, with the passing of the 1975 Act it was abolished.

The right to take up matters of the Ombudsman's own motion has been used very sparingly.[124] The difference between the New Zealand and the Scandinavian Ombudsmen's way to operate is significant in this field. In Sweden, for example, about 200 - 400 cases are normally initiated every year. To some extent this difference between the Ombudsmen's use of their right to intervene of their own motion can be referred to the fact that the New Zealand Ombudsman, unlike his colleagues in Denmark and Sweden, is not supposed to conduct regular inspections of authorities with no connection with any particular case which is under investigation. Especially in Sweden such inspections have been very common and observations made during the course of an inspection have frequently caused the Ombudsman to open one or more new cases.

In New Zealand as in Scandinavia it frequently happens that

the Ombudsman in the course of an investigation makes discoveries which have no direct bearing on the complaint yet seem important enough to cause him to pursue the investigation in a new direction.[125] At least in Sweden such extended investigations are usually registered as separate cases, initiated by the Ombudsman, while in New Zealand they are not normally so registered. This may account for some of the statistical differences.

Under section 11 (3) in the 1962 Act and sect. 13 (4) in the 1975 Act investigations may be initiated by Parliamentary Committees. It is declared that any Committee of Parliament may refer to the Ombudsman, for investigation and report by him, any petition that is before that Committee for consideration or any matter to which the petition relates. The Ombudsman shall then investigate that matter, so far as it is within his jurisdiction, and make such report to the Committee as he thinks fit. Little use seems to have been made of this provision so far.[126]

The Ombudsman Act 1974 introduced a provision, sect. 13 (5), to enable the Prime Minister, with the consent of the Chief Ombudsman, to refer to an Ombudsman for investigation and report any matter, other than a matter concerning a judicial proceeding, which the Prime Minister considers should be investigated by an Ombudsman. The intention was originally to give also any other Minister, with the consent of the Attorney-General, the right to refer matters to the Ombudsman. "The unwise use of this power could result in the office of Ombudsman being catapulted into current areas of political controversy as a convenient means whereby Government can unload itself of a problem." [127]

The provision has been used twice; in 1975 when the Prime Minister referred to the Chief Ombudsman for investigation certain controversial matters concerning the Security Intelligence Service [128] and in 1978 when the Chief Ombudsman undertook to conduct an investigation into the issue of import licenses by the Department of Trade and Industry to a certain firm. In the Annual Report for the year ended 31 March 1979[129] the Chief Ombudsman mentioned this referral by the Prime Minister and said:"Although it is not specifically stated in the wording of section 13 (5), I interpret the reference to the Prime Minister, as did my predecessor, to mean that in making any such referral he is acting on behalf of Parliament as a whole and accordingly any issue referred to the Chief Ombudsman under this provision should bear the agreement of the Opposition. The desirable link which the Chief Ombudsman has with Parliament should not be replaced or overshadowed by a link with Government."[130] In this particular case full agreement was reached between the Prime Minister, the Leader of the Opposition, and the Chief Ombudsman.

8. ACCESS TO INFORMATION; MAINTENANCE OF SECRECY

In order to conduct an investigation an Ombudsman must have access to relevant information. The New Zealand rules, contained in sections 16 and 17 of the 1962 Act and sections 19 and 20 of the 1975 Act, are based broadly on the same principles as those established in Denmark.[131] Information may be withheld from the New Zealand Ombudsman if the Attorney-General certifies that the giving of the information or the production of the documents might prejudice the security, defence, or international relations of New Zealand, or the investigation or detection of offences, or might involve the

disclosure of the deliberations of Cabinet or of proceedings of Cabinet, or of any committee of Cabinet, relating to matters of a secret or confidential nature, and would be injurious to the public interest. Otherwise "the rule of law which authorizes or requires the withholding of any document or paper, or the refusal to answer any question, on the ground that the disclosure of the document or paper or the answering of the question would be injurious to the public interest shall not apply in respect of any investigation by or proceedings before (the Ombudsman)".[132] Crown privileges are thus considerably curtailed in the proceedings before the Ombudsman.[133] The power of the Ombudsman to require production of evidence is, on the other hand, subject to limitations set up to protect the privacy of individual citizens. With the previous consent in writing of the complainant the Ombudsman may, however, require even secret information provided it relates only to the complainant and his request must be complied with.[134]

Like his colleagues in Denmark and Sweden the New Zealand Ombudsman is authorized to enter upon premises occupied by any Department or organization subject to his jurisidiction. The Attorney-General may, however, from time to time exclude the application of this rule if he is satisfied that security, defence or international relations might be prejudiced.[135]

The access to information does not necessarily correspond with a right to disclose the facts discovered. Here again New Zealand has adopted rules similar to those of Denmark.[136] Every investigation by the Ombudsman shall be conducted in private[137] and in principle he is bound to maintain secrecy in respect of all

matters that come to his knowledge in the exercise of his functions.[138]

However, it is specifically enacted that he may disclose such matters as in his opinion ought to be disclosed for the purposes of an investigation or in order to establish grounds for his conclusions and recommendations.[139] This rule does not extend to any matter that might prejudice the security, defence, or international relations of New Zealand or the investigation or detection of offences, or that may involve the disclosure of the deliberations of Cabinet.

It should be mentioned in this context that the Ombudsman is obliged by statute[140] to submit each year a report to Parliament on the exercise of his functions. The Ombudsman's Rules 1962 furthermore provide that the Ombudsman may from time to time, in the public interest or in the interests of any person or Department or organization, publish reports relating generally to the exercise of his function or to any particular case or cases investigated by him, whether or not the matters to be dealt with in any such report have been the subject of a report to Parliament.[141]

9. THE OMBUDSMAN AS AN OFFICER OF PARLIAMENT

New Zealand followed closely the Danish and Swedish pattern also when establishing the relationship between the Ombudsman and Parliament. During the parliamentary debates leading up to the passing of the Ombudsman Act 1962 it was repeatedly stressed that the Ombudsman was to be an officer of Parliament, responsible to Parliament and that he must enjoy its confidence.[142] He was not to be a member of Parliament.[143] Unlike his colleagues in Denmark and

Sweden, who are elected by Parliament, the New Zealand Ombudsman is appointed by the Governor-General. The appointment is, however to be made on the recommendation of Parliament. It was emphasized during the debates that this is an unusual provision as most appointments are made by the Government.[144] It was nevertheless understood that Government would make a recommendation to be discussed by Parliament.[145]

As in Denmark, but not in Sweden where the election is for a term of 4 years, the Ombudsman was to be appointed (or reappointed) after every general election to Parliament. The purpose of this rule was to enhance Parliament's influence and to insure that it could always have the Ombudsman wanted.[146] This system was, however, abandoned in 1975. In order to give an Ombudsman some security of tenure it was then enacted that the appointment was to be for a fixed term of 5 years.

The Ombudsman may at any time be removed or suspended from his office by the Governor-General, acting upon an address from Parliament, for disability, bankruptcy, neglect of duty, or misconduct.[147]

The Ombudsman (since 1975 the Chief Ombudsman) is empowered to appoint his own staff. Yet the number of persons shall be determined by the Prime Minister and their salaries and the terms and conditions of their appointments shall be approved by the Minister of Finance.[148] With the prior approval of the Prime Minister the Ombudsman may from time to time delegate any of his powers to his employees.[149]

Like his colleagues in Denmark and Sweden the Ombudsman, as was set out in the previous chapter, must submit an Annual Report to Parliament. He is also authorized to make special reports.[150]

As mentioned in the chapter on the bases for the Ombudsman's investigations any Committee of Parliament may refer to the Ombudsman a petition which is before the Committee for consideration or any matter relating thereto. After investigating the matter the Ombudsman shall report to the Committee. It has also been mentioned that the Prime Minister since 1975 reform may, with the consent of the Chief Ombudsman refer matters to an Ombudsman for investigation and report, and that it has been contended that the Prime Minister, in so doing, acts on behalf of Parliament as a whole.

In this context it should be mentioned that the 1962 and 1975 Acts contain provisions[151] for consultations with Ministers that have no counterpart in the rules for the Scandinavian Ombudsmen. Pursuant to these provisions the Ombudsman may, in his discretion at any time during or after any investigation, consult any Minister who is concerned in the matter of the investigation. On the request of the Minister the Ombudsman shall consult the Minister after making the investigation and before forming a final opinion. The 1975 Act[152] also prescribes that the Ombudsman, when dealing with a local body, may in his discretion consult the Mayor or Chairman of the Organization concerned and that he shall so do upon request or when the subject of the investigation is a recommendation to the said official.

At least in Sweden it is most unusual that the Ombudsman consults a Minister and any attempt of an Ombudsman to adopt regularly such a practice would probably be violently resented by Parliament it could jeopardize the Ombudsman's independency. The Ombudsman is Parliament's man and any hobnobbing with members of the Government would be contrary to old Swedish traditions.[153]

F O O T N O T E S

1. See e.g. David Mitrany in Manchester Guardian 6 and 7 August 1957, F.H. Lawson in Public Law, 1957, pp. 92-95, and S. Hurwitz, "Control of the Administration in Denmark: the Danish Parliamentary Commissioner for Civil and Military Government Administration", in Journal of the International Commission of Jurists 1958, pp. 224-243; also printed in Public Law, 1958, pp. 236-253. - In the early articles the officer was referred to as Commissioner or Parliamentary Commissioner. The word Ombudsman has since then come into common use in English speaking countries and will as a rule be used in this paper.

1a. In an address to the Justices Association in Wellington.

2. See Bureaucracy in New Zealand, ed. by R.S. Milne, Wellington, 1957.

3. "Report of the Committee on Administrative Tribunals and Enquiries", Cmnd. 218.

4. Printed in Remedies against the abuse of administrative authority --selected studies, United Nations, New York, 1964.

5. See 1959 Seminar on Judicial and other Remedies Against the Illegal Exercise or Abuse of Administrative Authority. Perandeniya (Kandy), Ceylon, 4 - 15 May, 1959. United Nations, New York, 1959.

6. Aug. 1959, Vol. 35, p. 221

7. See Parliamentary Debates (N.Z.). 1962, p. 1062

8. See Parliamentary Debates (N.Z.) 1962, p. 1010 and 1975, p. 654. A detailed account of the work is given by John L. Robson in "The Ombudsman in New Zealand", Occasional Paper in Criminology, No. 11, Wellington, 1979, pp. 1-6.

8a. Dr. Robson, according to what he has told the author of this paper, had visited Denmark but not Sweden.

9. In his Report for the year ended 31 March 1975, p. 13, Sir Guy Powles, the New Zealand Ombudsman, said with reference to the Bill: "It is now an open secret that it was personally redrafted at a weekend meeting of a high-level group consisting of those gentlemen then holding, respectively, the posts of Minister of Justice, Secretary for Justice, Solicitor-General and Law Draftsman.

10. "The Citizen and the Administration. The redress of grievances." A report by Justice. London, 1961.

11. See Parliamentary Debates (N.Z.). 1962, pp. 118, 1024 and 1025

12. The Norwegian Ombudsman assumed office on January 1, 1963. The enactment establishing the office was however passed in June 1962 (i.e. before the enactment in New Zealand) and was not influenced by the New Zealand Bill. The model for the Norwegian office was the offices in Denmark and Sweden.

13. For the data see the Ombudsman's Annual Reports, particularly the Report for the year ended 31 March 1976. For analysis of the statistics (up to 31 March 1975) see Larry B. Hill, The Model Ombudsman, Institutionalizing New Zealand's Democratic Experiment Princeton, N.J. 1976.

14. Cf. sect. 22 (3) in the Ombudsman Act, 1975

15. E.g. Rep. 1966, p. 61, Case No. 2141, Rep. 1968, p. 68, Case No. 3061.

16. E.g. Rep. 1964, p. 33, Case No. 756.

17. E.g. Rep. 1966, p. 57, Case No. 1707, p. 58, Case No. 1749, Rep. 1968, p. 51, Case No. 3531 and Rep. 1972, p. 74, Case No. 6188.

18. E.g. Rep. 1972, p. 32, Case No. 6439.

19. E.g. Rep. 1964, p. 24, Case No. 952, p. 39, Case No. 79, Rep. 1966, p. 11, Case No. 1044, Rep. 1970, p. 21 , Case No. 46,

20. E.g. Rep. 1968, p. 39, Case No. 3074, p. 67, Case No. 3020, Rep. 1970, p. 66, Case No. 3821 and Rep. 1975, p. 42, Case No. 8642.

21. Rep. 1973, p. 20, Case No. 6846; other examples (where no judgment was involved) Rep. 1973, p. 64, Case No. 6658, p. 66, Case No. 6676, and Rep. 1974, p. 62, Case No.8138.

22. E. g. Rep. 1965, p. 58, Case No. 623, and Rep. 1969, p. 28, Case No. 2963

23. Statistics from Rep. 1976, pp. 54-55

24. E.g. Rep. 1965, p. 65, Case No. 1375, p. 68, Case No. 473, Rep 1970, p. 53, Case No. 4657 and Rep. 1973, p. 22, Case No. 7082 and p. 59, Case No. 7630.

25. Rep. 1964, p. 5

26. Rep. 1969, p. 10, Rep. 1970, p. 70, Case No. 4534 (cf. Rep. 1971 p. 71) and Rep. 1974, p. 21, Case No. 7798.

27. In the Ombudsman Act, 1975, which extends the Ombudsmen's jurisdiction to local bodies, it is prescribed, sect. 22 (3), that the Ombudsman, when dealing with such a body, shall send a copy of his recommendation to the Mayor or Chairman of the organization concerned. In sect. 23 it is furthermore laid down that, when the Ombudsman has prepared a report relating to a local body, he may send to the principal administrative officer of the organization concerned a written summary of his report and require the officer to make copies of that summary available during ordinary business hours for inspection by members of the public without charge.

27. The availability of the report for inspection shall be notified through the newspapers.

28. E.g. Rep. 1964, p. 30, Case No. 829, Rep. 1971, p. 76, Case No. 5115, Rep. 1975, p. 44, Case No. 9386, and Rep. 1979, p. 48, Case No. W 13204.

29. Larry B. Hill, The Model Ombudsman (see note 13) pp. 210 and 213 avers that between 1 Oct. 1962 and 31 March 1975 the Ombudsman was responsible for at least 177 separate reforms of the administrative process. 54% of these were substantive in nature, 46% were procedural. As to the content of the reforms see op.cit. pp. 217-234. - As regards law reforms see Sir Guy Powles in Journal of Administration Overseas, Vol. VII, 1968, pp. 290- 291.

30. See Rep. 1975, p. 6

31. See Rep. 1974, p. 7

32. Rep. 1973, pp. 10 and 11

33. E.g. Rep. 1965, p. 34, Case No. 968, and Rep. 1973, p. 60, Case No. 7878

34. E.g. Rep. 1970, p. 45, Case No. 4047 and p. 48, Case No. 4737

35. See Sir Guy Powles, "The role of the New Zealand Ombudsman in penal complaints: an individual approach", in Conference of Australasian and Pacific Ombudsman, Wellington, New Zealand, 19 -22 November 1974, pp. 53-75

36. Parliamentary Debates (N.Z.) 1962, p. 1015

37. Parliamentary Debates (N.Z.) 1961, p. 1806

38. Rep. 1968, p. 65, Case No. 2557

39. The possibility of making such a recommendation was discussed in Rep. 1978, p. 13. The time bar was considered to be a practical obstacle.

40. Rep. 1967, p. 81, Case No. 2812

41. Rep. 1966, p. 85, Case No. 2054

42. See Sydney Morning Herald 25 Sept. 1963

43. An exception is the fierce criticism of the Department of Education ("a careless flouting of the law") pronounced in Rep. 1972, p. 18.

44. Critic against a police sergeant in Rep. 1971, p. 60, Case No. 5218.

45. E.g. Rep. 1964, p. 36, Case No. 897 and Rep. 1966, p. 68, Case No. 1653

46. Rep. 1969 p. 11 and p.73 Case No. 3415; cf. Rep 1970, p. 9.

47. The schedule included all Departments and such other bodies as could be regarded as part of the country's day to day administration. Administrative Tribunals and appeal authorities were not included.

48. Parliamentary Debates (N.Z.) 1962, pp. 1012 and 1013.

49. See Sir Guy Powles in The International and Comparative Law Quarterly, Vol. 13, 1964, p. 775, and in the Journal of Administration Overseas, Vol. VII, 1968, p. 288.

50. See The International and Comparative Law Quarterly, Vol. 13, 1964, p. 775

51. See Rep. 1976, p. 27, Cases Nos. 9405,9406, and Rep. 1977, p. 27, Case No. W10707

52. Cf. Rep. 1977, p. 37, Case No. A 4, Rep. 1978, p. 82, Case No. A116.

53. Parliamentary Debates (N.Z.) 1962, p. 1012

54. E.g. Rep. 1969, p. 47, Case No. 3651.

55. Rep. 1967, p. 51, Case No. 3038

56. Rep. 1967, p. 59, Case No. 1485

57. Parliamentary Debates (N.Z.). 1962, p. 1073

58. Rep. 1966, p. 34

59. Rep. 1968, p. 24

60. Sect. 11 (6) in the 1962 Act, sect 13 (8) in the 1975 Act.

61. Parliamentary Debates (N.Z.). 1962, p. 1074

62. Parliamentary Debates (N.Z.). 1962, p. 1013

63. Rep. 1964, p. 70, Case No. 798

64. The Ombudsman's view conflicts with the opinion expressed by the Attorney-General during the second reading of the 1962 Bill. He said that acts or decisions by members of the Armed Forces might affect private citizens and that was why the Navy, Army and Air Force were included in the schedule, because the citizen might have some grievance against a member of the Armed Forces (Parliamentary Debates, N.Z., 1962, p. 1074)

65. Pp. 7 and 8.

66. Rep. 1970, p. 8

67. P. 9.

68. Rep. 1971, p. 10, Rep. 1972, p. 9 and Rep. 1973, p. 9

69. Rep. 1976, pp. 54 and 55

70. Cf. Larry B. Hill, The Model Ombudsman (see note 13) p. 189

71. See K.J. Keith, "The Ombudsman's jurisdiction: what is a "matter of administration", in Conference of Australasian and Pacific Ombudsmen (see note 35) pp. 13-38.

72. E.g. Parliamentary Debates (N.Z.), 1962, p. 1012

73. Sir Guy Powles in the International and Comparative Law Quarterly, Vol. 13, 1964, p. 775, and in Journal of Administration Overseas, VII, 1968, pp. 287-288.

74. Walter Gellhorn, Ombudsmen and Others: Citizens' Protectors in Nine Countries, Harvard University Press 1966, cites pp. 108-110 cases where it has been held that the Ombudsman went too far (departmental campaigning in a local referendum, languid civil defence administration, entry of prison-made products into the channels of commerce). See also article by the Hon. J.R. Hanan, quoted by J.L. Robson in the "Ombudsman in New Zealand" (see note 8) pp. 30 and 31. - A more recent example where elements of (local) policy were involved in Case No. A 4 (Rep. 1977, p. 37) relating to a differential rating system adopted by a city council.

75. Rep. 1964, p. 19.

76. Rep. 1975, p. 22.

77. Rep. 1967, p. 28.

78. Rep. 1976, p. 6.

79. Parliamentary Debates (N.Z.) 1975, p. 533 cf. ibid. 1974 p. 5736.

80. Pp. 6 and 7.

81. Rep. 1966, p. 20.

82. Rep. 1965, p. 52.

83. Rep. 1967, p. 90.

84. Rep. 1968, p. 40.

85. Cf. Rep. 1978, pp. 11 and 12.

86. Parliamentary Debates (N.Z.)., 1974, p. 5736.

87. Parliamentary Debates (N.Z.). 1975, p. 534.

88. Rep. 1965, p. 67, Case No. 1583, Rep. 1966, p. 85, Case No. 1914 Rep. 1971, p. 56, Case No. 4913, and Rep. 1976, p. 49, Case No. 9916.

89. Rep. 1976, p. 8.

90. Parliamentary Debates (N.Z.). 1975, pp. 533 and 649.

91. Cf. Rep. 1976, p. 8.

92. Rep. 19 7, p. 30.

93. Rep. 1967, p. 66.

94. Parliamentary Debates (N.Z.). 1962, p. 1012.

95. Rep. 1965, p. 32, Case No. 1163.

96. Rep. 1978, p. 42, Case No. W 10657.

97. Rep. 1979, p. 7.

98. Rep. 1976, p. 24, Case No. 9532.

99. Cf. Rep. 1975, p. 7.

100. Rep. 1974, p. 7, cf. Rep. 1971, p. 10

101. In Sweden there are no express rules barring the Ombudsman's right to intervene when there is a right of appeal or similar remedy. The Swedish Ombudsman, however, does not normally intervene when there is still a possibility to appeal, whether to a Court or to an administrative authority. In Denmark there was enacted in 1959 a rule that complaints are not admissible when the matter still can be the subject of review by a higher administrative authority. The rule covers only complaints against decisions, not procedural faults. Nor does it impede the Ombudsman from investigating of his own motion. The fact that there might be a possibility to have the decision reviewed by a Court does not impede the Ombudsman from investigating a complaint.

102. Rep. 1977, p. 30, Case No. A 210, cf. Rep. 1978, p. 33, Case No. W 12378, a situation where the Ombudsman would have invoked the rule had the complaint been lodged earlier.

103. In Rep. 1975, p. 30, Case No. 9461, the Ombudsman declined further investigation as the complaint appeared to be one for which a Court of Law would be a more appropriate resort. In Rep. 1978, p. 58, Case No. W12379 the Ombudsman did not exercise his discretion to reject a complaint where an appeal could have been lodged with the Town and Country Planning Appeal Board. The Ombudsman considered that the circumstances rendered it not reasonable to expect the complainant to have exercised the right of appeal available to him.

104. Parliamentary Debates (N.Z.), 1962, p. 1074.

105. In Rep. 1965, p. 8, some general remarks are made with referrals to particular cases. Later the question seems to have arisen only rarely. In case No. 2628, Rep. 1968, p. 24, the complainant was absent overseas. In Case No. 7082, Rep. 1973, p. 22, the complainant took the opinion of counsel who advised against seeking a ruling from the

105. Court. In the case mentioned above p. 23 (Rep. 1979, p. 7) where the Department challenged the Ombudsman's jurisdiction the Crown's legal adviser upheld the Ombudsman's opinion that he had jurisdiction.

106. Rep. 1075, p. 24, Case No. 6546, Rep. 1979, p. 27, Case No. W13064.

107. E.g. Rep. 1966, p. 48, Case No. 2259.

108. See Rep. 1966, p. 23, Case No. 2078.

109. E.g. Rep. 1968, p. 39, Case No. 3074.

110. So in Rep. 1968, p. 59, Case No. 3465.

111. E.g. Rep. 1965, p. 43, Case No. 1590, Rep. 1970, p. 36, Case No. 4617(b), Rep. 1973, p. 57, Case No. 7261, Rep. 1976, p. 45 Case No. 10165.

112. Cf. Sir Guy Powles in Journal of Administration Overseas, Vol. VII, 1968, p. 291 (about the use in the Act of the word "wrong") and G. Sawer in The Annals of The American Academy of Political and Social Science Vol. 377, May 1968, pp. 67,71 and 72.

113. Walter Gellhorn, Ombudsmen and Others (see note 74) p. 118.

114. Cf. Sir Guy Powles in International and Comparative Law Quarterly, Vol. 13, 1964, p. 774: "right from the outset, the office in New Zealand has been regarded as established for the purpose, not only of checking administrative abuses ---, but also of actually reviewing administrative decisions - of securing the making of changes".

115. See also the correspondence between the Ombudsman and the chairman of the Social Security Commission in Rep. 1964, pp. 75 - 77.

116. Other cases see Rep. 1968, p. 49, Case No. 3428, Rep. 1971, p. 88, Case No. 5229 and Rep. 1979, p. 62, Case No. W 11210

117. E.g. Rep. 1965, p. 36, Case No. 1014, Rep. 1972, p. 33, Case No. 6523, and p. 74, Case No. 6188.

118. E.g. Rep. 1972, p. 87, Case No. 5617; cf. Rep. 1973, p. 31 Case No. 7250.

119. E.g. Rep. 1965, p. 38, Case No. 1665.

120. The wording of the 1975 Act is partly different.

121. Rep. 1976, pp. 54 and 55. In 1974 Dr. D.E. Paterson, Counsel to the New Zealand Ombudsman said that the discretion to refuse to investigate after 12 months was in practice only exercised after a much longer period (8 or 9 years). See Conference of Australasian and Pacific Ombudsmen, note 35 ante, p. 133.

122. Cf. Rep. 1971, p. 10, where the Ombudsman held that he should be granted an absolute discretion to determine whether or not to

122. investigate a complaint. See also Rep. 1979, p. 67, Case No. W13759 and Sir Guy Powles in Report of the Proceedings, First International Ombudsman Conference, September 6th to 10th, 1976, p. 11. -In Denmark and Sweden there are, except for the time bar, no rules corresponding to the above-mentioned provisions. In both countries it is understood that the Ombudsman may in his discretion refuse to investigate or to investigate further a complaint when he finds that the matter is not worth it.

123. See Parliamentary Debates (N.Z.)., 1974, p. 5736 and Larry B. Hill, The Model Ombudsman (see note 13) pp. 147 and 148.

124. Cf. Rep. 1975, p. 14, and Rep. 1979, p. 10.

125. Cf. Rep. 1964, p. 7.

126. One case is mentioned in Rep. 1967, p. 5. Sir Guy Powles in "Special Referral sections in Ombudsman Statutes", Occasional Paper No. 1 from the International Ombudsman Institute, says there has been only one or two isolated cases in New Zealand, cf. Walter Gellhorn, Ombudsmen and Others (see note 74) p. 151.

127. See "Security Intelligence Service", Report by the Chief Ombudsman, Wellington, 1976, p. 13, where criticism was pronounced also in other respects.

128. In his report (see note 127) p. 14, Sir Guy Powles said: "It is clear from my experience over this inquiry that any future Chief Ombudsman would have to consider seriously before giving his consent to the referral by the Prime Minister of an investigation to an Ombudsman". See also Sir Guy Powles in Report of the Proceedings, First International Ombudsman Conference, September 6th - 10th, 1976, p. 13.

129. Pp. 9 and 10.

130. Cf. Parliamentary Debates (N.Z.). 1975, p. 663 (the Prime Minister in this context was referred to as the Leader of the House).

131. In Sweden the Ombudsman has free access to all official papers, even the most secret, and can require any information from officials.

132. Sect. 17 (2) in the 1962 Act, sect. 20 (2) in the 1975 Act.

133. Parliamentary Debates (N. Z.), 1962, pp. 119 and 1014; cf. Walter Gellhorn, Ombudsman and Others (see note 74) pp. 126 and 127 about the initial resistance to the proposed rule and the effects of the rule as subsequently ascertained (no disadvantageous side effects seem to have appeared).

134. Case No. 2126 (Rep. 1966, p. 24) provides an example of the complainant giving the Ombudsman permission to examine his hospital and clinical records.

135. Sect. 23 in the 1962 Act, sect. 27 in the 1975 Act.

136. In Sweden there are no specific rules constraining the Ombudsman to observe secrecy. The Ombudsman's decisions are all open to the public. Also the incoming and outgoing correspondence is, for all practical purposes, public. Nevertheless the Ombudsman is careful not to divulge - if not absolutely inevitable - secrets that may be detrimental to state security, international relations or the national defence.

137. Sect. 15 (2) in the 1962 Act, sect. 18 (2) in the 1975 Act.

138. Sect. 18 (2), cf. Sect. 8, in the 1962 Act, sect. 21 (2), cf. sect. 10, in the 1975 Act.

139. Sect. 21 (4) in the 1975 Act. The corresponding provision, sect. 18 (4), in the 1962 Act gave the Ombudsman a more limited authority. He could disclose matters only after the completion of an investigation, not in the course of it (cf. Rep. 1975, p. 11, and Parliamentary Debates, N.Z., 1975, pp. 534 and 535.)

140. Sect. 25 in the 1962 Act, sect 29, in the 1975 Act.

141. Statutory Regulations 1962/208.

142. Parliamentary Debates (N.Z.)., 1962, pp. 1013, 1016, 1021 and 1073.

143. Sect. 3 in the 1962 Act, sect. 4 in the 1975 Act. The Danish Ombudsman Act contains a similar provision. In Sweden there is no express rule barring the Ombudsman from sitting in Parliament. During the last 50 years, at least, no Ombudsman has been a member of Parliament.

144. Parliamentary Debates (N.Z.). 1962, p. 1063.

145. When the first appointment of an Ombudsman was to be made in 1962, the Acting Prime Minister moved that Parliament recommend him to advise the Governor-General to appoint Sir Guy Powles as Ombudsman, see Parliamentary Debates (N.Z.). 1962, p. 1908.

146. Parliamentary Debates (N.Z.) 1961, p. 1806, and 1962 p. 1016.

147. Both in Denmark and in Sweden an Ombudsman may be dismissed by Parliament if he no longer enjoys its confidence, a provision which however has never been used.

148. Sect. 9 in the 1962 Act, sect. 11 in the 1975 Act.

149. Sect. 24, in the 1962 Act, sect. 28, in the 1975 Act.

150. Sect. 25 in the 1962 Act, sect. 29 in the 1975 Act. An example of a special report is the report, dated 7 Aug. 1970, upon complaints against police conduct (appendix A. 6 A to the Parliamentary Debates). See also note 127 ante.

151. Sect. 15 (4) and (5) in the 1962 Act and sect 18 (4) and (5) of the 1975 Act. There are some differences between the Acts. Here quoted is the 1962 Act.

152. Sect. 18 (5).

153. During the 10 years and 8 months that the author of this paper held office as Ombudsman in Sweden, it happened only twice that he, in the discharge of his duties, went to see a Minister. Both occasions related to a complaint about the personnel files in the Foreign Ministry. The first visit was made to inform the Minister of the impending investigation, the second to let him know the result.