THE 15TH
AUSTRALASIAN
AND PACIFIC
OMBUDSMAN
CONFERENCE

23-25 OCTOBER 1995

Organised by COMAC, Hong Kong
THE UNIVERSITY OF HONG KONG
LIBRARIES

Hong Kong Collection
gift from
Hong Kong. Office of the Commissioner for
Administrative Complaints.
THE FIFTEENTH AUSTRALASIAN AND PACIFIC

OMBUDSMAN CONFERENCE

23-25 OCTOBER 1995

ORGANISED BY COMAC, HONG KONG

MINUTES OF PROCEEDINGS
Preface

The International Ombudsman Institute (IOI) holds global meetings once every four years. During the interim, members of the Australasian and Pacific region make use of a regional forum - the Australasian and Pacific Ombudsman Conference (APOC) to meet annually.

The 15th APOC was hosted by the Commissioner for Administrative Complaints (COMAC), Hong Kong during 23 - 25 October 1995. Forty-three overseas delegates and observers from eighteen countries attended this conference. It is hoped that these minutes not only record the proceedings for those attending but also serve as reference materials for those ombudsmen who did not attend and other people who are interested in ombudsmanship. It is also hoped that the evaluation results of the conference will be of use to organisers of similar conferences in future.
I. List of Delegates and Observers

II. Opening Ceremony
   1. Speech by Mr Andrew SO, COMAC, Hong Kong
   2. Speech by Sir Ti-liang YANG, the Chief Justice, Hong Kong
   3. Response by Mrs Marie-Noelle Ferrieux-Patterson, Ombudsman of Vanuatu, on behalf of the delegates

III. Overseas Messages
   1. Message to the participants of the 15th APOC from Mr Marten Oosting, President International Ombudsman Institute
   2. Message to Mr Andrew SO from the Hon K Trevor Griffin, MLC, Attorney General and Minister for Consumer Affairs, South Australia

IV. Agenda Items
   1. Development of the Ombudsman concept and its future
   2. Diversification of function in the Ombudsman office
   3. Corporatisation & privatisation
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Communication</td>
<td>25</td>
</tr>
<tr>
<td>5. Further developments in public access to justice and the Ombudsman</td>
<td>29</td>
</tr>
<tr>
<td>6. Performance measurements</td>
<td>30</td>
</tr>
<tr>
<td>Ombudsman case management plan</td>
<td></td>
</tr>
<tr>
<td>- performance indicators</td>
<td></td>
</tr>
<tr>
<td>- establishing priorities</td>
<td></td>
</tr>
<tr>
<td>- legislation requirements</td>
<td></td>
</tr>
<tr>
<td>7. Jurisdiction of the Ombudsman in relation to courts and tribunals</td>
<td>40</td>
</tr>
<tr>
<td>8. Implications for the Ombudsman of the work of the Commission on Government (Western Australia)</td>
<td>42</td>
</tr>
<tr>
<td>9. Jurisdiction and/or legal policy consideration</td>
<td>43</td>
</tr>
<tr>
<td>10. Administrative actions vs policy</td>
<td>49</td>
</tr>
<tr>
<td>- mutually exclusive?</td>
<td></td>
</tr>
<tr>
<td>11. Implications for the Ombudsman of the role of the university &quot;visitor&quot;</td>
<td>52</td>
</tr>
<tr>
<td>12. The Ombudsman - moral judgements and the development of ethical principles for local government</td>
<td>56</td>
</tr>
<tr>
<td>13. Ethical standards in public life: responsibilities and accountability of public office-holders</td>
<td>56</td>
</tr>
<tr>
<td>CONTENTS</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>14. External professional advice to assist resolution of complex cases</td>
<td>61</td>
</tr>
<tr>
<td>15. Ombudsman Information System (OMBIS) Report</td>
<td>71</td>
</tr>
<tr>
<td>16. Orientation and skilling of new Ombudsman</td>
<td>75</td>
</tr>
<tr>
<td>17. Study visits/attachments for Ombudsman staff</td>
<td>80</td>
</tr>
<tr>
<td>18. Workshop II for investigating officers</td>
<td>80</td>
</tr>
<tr>
<td>19. Complaints against police</td>
<td>86</td>
</tr>
<tr>
<td>20. Conflict of interest in relation to police</td>
<td>86</td>
</tr>
<tr>
<td>21. Code of conduct</td>
<td>93</td>
</tr>
<tr>
<td>22. Report of Regional Director of International Ombudsman Institute</td>
<td>94</td>
</tr>
<tr>
<td>23. The Sixth International Ombudsman Conference to be held in Argentina in 1996</td>
<td>97</td>
</tr>
<tr>
<td>24. Next APOC in 1997</td>
<td>98</td>
</tr>
<tr>
<td>25. Regional initiatives, membership, assistance in establishment of new Ombudsman institutions.</td>
<td>99</td>
</tr>
<tr>
<td>26. Conclusion</td>
<td>101</td>
</tr>
<tr>
<td>CONTENTS</td>
<td>Page</td>
</tr>
<tr>
<td>----------</td>
<td>------</td>
</tr>
<tr>
<td>V. Photos</td>
<td>103</td>
</tr>
<tr>
<td>VI. List of Abbreviations of Countries/Regions</td>
<td>107</td>
</tr>
<tr>
<td>VII. Evaluation Results</td>
<td>109</td>
</tr>
<tr>
<td>VIII. Appendices</td>
<td>117</td>
</tr>
</tbody>
</table>
I. List of Delegates and Observers
## Delegates

**Hong Kong**  
Mr Andrew SO (The Chairman)

**Australia**  
Mr Frederick Albietz (Queensland)  
Mr Eugene Biganovsky (South Australia)  
Mr Peter Boyce (Northern Territory)  
Mr Robert Eadie (Western Australia)  
Mr Ronald Green (Tasmania)  
Dr Barry Perry (Victoria)

**Fiji**  
Ratu Jone Cure Mataitini

**New Zealand**  
Sir Brian Elwood [Chief Ombudsman]  
Judge Anand Satyanand

**Papua New Guinea**  
Mr Simon Pentanu [Chief Ombudsman]  
Mr Ninchib Tetang

**Solomon Islands**  
Mr Frank Pororara

**Vanuatu**  
Mrs Marie-Noelle Ferrieux-Patterson

**Western Samoa**  
Mr Maiava Iulai Toma
Observers

Argentina
Prof Dr Jorge Luis Maiorano
Dr David Azulay
Mr Oscar Rube’n Gorosito
Miss Maria Del Carmen Paraju’a’ Mora’n

Canada
Ms Dulcie McCallum

China
Mr Guang-qin JI
Mr Wen-jian SUN
Mr Yu BU

Fiji
Mr Emori Tudia

Hong Kong
COMAC staff

India
Justice H H Kantharia

Japan
Prof Masajiro KAMADA
Mr Moritaka SHIROMA
Mr Hisao TSUKAMOTO

Korea
Prof Sei-hoon LEE
Mr Sung-soo CHO
Mr You-yeob CHU
Dr Young-rim JEE

Macau
Dr M F Oliveira E Silva

Malaysia
Mr Kam Chiu NG

Pakistan
Justice Abdul Shakurul Salam
Raja Mohammad Khurshid Khan

Thailand
Mr Taksapol CHIEMWICHITRA
Ms Sirinda JUNTARAK
Mr Chukiert RATANACHAICHAN
Ms Nongluck SATHITSATHIEN
Mr Kamtorn UDORRITTHIRUJ
Mr Chaiwat WONGWATTANASAN

United Kingdom
Mrs Frances Jill McIvor, CBE, QSM
Prof Diane Longley
II. Opening Ceremony
Sir Ti-liang, Ladies and Gentlemen,

I would like to express my hearty welcome to all the ombudsmen and representatives of kindred organisations attending the Opening Ceremony of the 15th Australasian and Pacific Ombudsman Conference.

The Office of the Commissioner for Administrative Complaints, or COMAC in short, was established in Hong Kong in 1989. Initially COMAC operated under a referral system, accepting for investigation only complaints referred by unofficial members of the Legislative Council. Following a comprehensive review, legislative amendments were passed in June 1994 to widen my power and jurisdiction. The main amendments were:

- replacement of the referral system by direct access by the public to me for lodging of complaints;
- expanding my jurisdiction outside the Government to major public bodies;
- allowing me to publish anonymised investigation reports at any time; and
- giving me the power to initiate direct investigations even when no complaint was received on the matter.

The widening of power and jurisdiction further enhanced the mission of COMAC, which is to serve the community of Hong Kong by redressing grievances and addressing issues arising from maladministration in the public sector, and through the independent and impartial investigations, to bring about improvements and promote fairness in public administration.
Despite our relatively short history in ombudsman work, Hong Kong has been given the honour to host the 15th APOC. And the response has been most encouraging. Here to-day we have more than 40 delegates coming from over 18 countries. I deeply appreciate the enormous support you all have given to this event and I am fully aware of the high expectations you have on this conference.

In this conference, we shall have a tight agenda. I hope that through open and candid discussion, ombudsmen’s personal professionalism would be enhanced; information would be exchanged freely to assist the resolution of problems confronting us; and the aims and concepts of ombudsmanship would be promoted. Most of all, I sincerely hope that the Conference would enrich mutual understanding and expand links of communication between us. And I hope your stay in Hong Kong will be a pleasant one.
Ladies and Gentlemen,

I am very honoured to be here to officiate the opening of the 15th Australasian and Pacific Ombudsman Conference. I would like to welcome you all to Hong Kong.

This is the first time that Hong Kong has been given the honour to host such an international ombudsman conference. Probably some of you came to Hong Kong for the first time. Geographically, Hong Kong is only a tiny piece of land on the earth. But upon your visit to Hong Kong, I trust that you will be impressed by the energy and prosperity of this international city, a city which is not only a communication centre but also one of the most important financial and commercial centres in the world. Hong Kong’s success has not come about by chance. It is founded on the effort and commitment of six million people. It is also founded on good administrative system and fair judicial system.

To maintain the rule of law, the Judiciary tries all prosecutions and determines civil disputes, whether between individuals or between individuals and the government. In the performance of judicial act, members of the Judiciary are completely independent of the administrative and legislative organs of the government. The mission of the Judiciary is to maintain fairness.

Similarly, the mission of Ombudsmen is to promote fairness in public administration and redress grievances. In this aspect, we have a common goal. This is why I highly appreciate the Ombudsman institution, which is a comparatively simple and quick way for the resolution of complaints. Without the Ombudsman institution, a number of cases may have to end up in court eventually with all the time and expenditure a trial entails.
I strongly believe that the Government has an obligation to answer to the community which it exists to serve. For the community, the Ombudsman institution provides an effective channel to tell the government its expectations. For the government, the Ombudsman institution serves as an effective driver of better policy making, better performance and better service. It is obvious that the role of the Ombudsman in an open and efficient government is very important.

I sincerely hope that through this conference, the aims and concepts of ombudsmanship could be further developed and promoted. And I am sure this conference will be a successful one. Thank you.
3. RESPONSE BY MRS MARIE-NOELLE FERRIEUX-PATTERSON

OMBUDSMAN OF VANUATU

I am very conscious and appreciative of the honour you have given me in inviting me to respond to the excellent speeches at this occasion. It is not only a special pleasure for me as a very new member of the Ombudsman society but also my first visit to this unique piece of territory, which is at the centre of the world’s focus now and will be so for the next number of years.

The nature of our work as Ombudsmen appears to carry inevitably with it some degree of personal isolation within our respective communities as we go about our task on investigating on injustices. As a result, this meeting of representatives of national bodies performs a vital and strengthening function. It does truly say that a trouble shared is a trouble halved. And I am confident that the time we spent together in our professional and personal pursuit will encourage and strengthen each one of us.

I was appointed the first Ombudsman of the Republic of Vanuatu, small islands in Western Pacific, in 1994 after fourteen years of independence. And it does prove to be a difficult task to create the office. As a consequence of the Australasian and Pacific Ombudsman Conference last year, I have greatly benefited from assistance and cooperation from Ombudsmen present here today. And this has helped my office to make significant progress including the passing of an Ombudsman Act and training programme for my newly appointed staff. Therefore, I fully appreciate the benefit that such a conference can bring.

Now I want to say that we are all greatly indebted to our host as well as our organisers for all the work that such a gathering embraces. And I am confident that they will be rewarded by your memorable conference and the small but vital contribution to the course of fairness and justice in our respective societies. Thank you.
III. Overseas Messages
I. MESSAGE TO THE PARTICIPANTS OF THE 15TH APOC FROM MR MARTEN OOSTING, PRESIDENT INTERNATIONAL OMBUDSMAN INSTITUTE

Being an Ombudsman is, to a certain extent, a lonely job. This is one of the reasons why contact with colleagues from other jurisdictions is such a stimulating experience. For the international communication and cooperation of Ombudsmen, within the framework of our world organisation, the International Ombudsman Institute, the regions have a key role. The Australasian and Pacific region is an excellent example of the significance of such regional contact. For many years, the Ombudsmen of this region have met on a regular basis, with changing hosts. You used that opportunity to exchange experiences, and thus contributed to the quality of your work. In this respect, I would also like to mention the initiative of Sir John Robertson, the former Chief Ombudsman of New Zealand, to organise a Workshop for investigators, in 1993, with an interesting manual as a lasting output. Given the geographical structure of the Australasian and Pacific region, it is not easy to establish and maintain such good and regular contacts. I am also fully aware of the practical problems which some of our colleagues from the Pacific encounter with funding the travel expenditures, which are considerable indeed. The more I appreciate the good collegiality and the solidarity which made it possible to establish such a remarkable tradition of continuity in your mutual contacts.

You decided to have the 1995 APOC in Hong Kong, at the invitation of Mr Andrew So. This meeting is a most interesting one, because it goes beyond the significance of a meeting of the Ombudsmen of the Australasian and Pacific region. I highly appreciate your decision to invite especially representatives from Asian countries. Of all regions of the world, the Asian region deserves special attention of the IOI. Some of the countries in Asia have established their Ombudsman scheme, or a similar independent institution to deal with complaints of the citizens about their government. However, compared to other regions, there is still a lot of work to be done in Asia in order to promote the further development of the institution of the Ombudsman, adapted to the specific conditions and circumstances of the country concerned. It is essential that the existing Ombudsman institutions in Asia can be assured of the sincere interest of their colleagues in other regions, and of their willingness to cooperate with them. And it is also very important that those countries in Asia who would like
to consider the establishment of an Ombudsman institute have the possibility to
make an appeal to similar institutions in other countries, both in Asia and in
other parts of the world, and to the International Ombudsman Institute. Your
meeting in Hong Kong is a remarkable step in this respect.

I can assure you of the interest of the world community of Ombudsmen in this
process of strengthening the cooperation between the Ombudsmen of the two
neighbouring regions: one with a long tradition of international contact between
Ombudsmen - the Australasian and Pacific region - and one in which this
contact needs further development - the Asian region. I was pleased to see that
also representatives from outside these two regions participate in your
conference.

I regret not being able to attend your meeting, and thus to show my sincere
interest in your work. I have asked our friend Eugene Biganovsky, the IOI
secretary, to read this message to you. October 16-18, the Board of Directors
of IOI had its annual meeting, in the Hague. We took notice of the
developments in all regions of IOI, and discussed the development of IOI, given
the rapid growth of membership, and hence of the diversity in IOI. Eugene may
report further about the outcome of our debates. We also took final decisions
with regard to the next IOI World Conference, in Argentina, October 1996. I
sincerely hope that all of you will be able to participate in that conference, and
that those Ombudsman institutes in your region who are not yet voting members
of IOI will decide to join our world organisation in the year to come. Anyhow,
I look forward to meeting you all in Buenos Aires next year. In the meantime,
I wish you a most successful, and pleasant conference in Hong Kong.
2. MESSAGE TO MR ANDREW SO
FROM THE HON K TREVOR GRIFFIN, MLC,
ATTORNEY GENERAL AND
MINISTER FOR CONSUMER AFFAIRS,
SOUTH AUSTRALIA

I would like to take this opportunity to convey a message of goodwill and friendship to you and your country from myself, personally, and the Government of South Australia.

The people of this State and the people of Hong Kong have enjoyed a special relationship for many years and we look forward to continuing that warm and sincere friendship.

I wish you the very best for the 15th Australasian and Pacific Conference including Ombudsman Week. In addition, I invite you to visit the South Australian Parliament should you, in your official duties, ever decide to visit Australia.
IV. Agenda Items
1. **DEVELOPMENT OF OMBUDSMAN CONCEPT AND ITS FUTURE**

Robert Eadie (WA) opened the discussion on this subject. He remarked that the subject had been discussed previously in the last APOC and he would like overseas delegates to express their views on this subject. He considered that the concept was not only developed geographically. The challenges now facing the Ombudsman was that on the one hand much of the functions had been brought under the sphere of Ombudsman, but on the other, government took matters outside the jurisdiction of Ombudsman.

Sir Brian Elwood (NZ) agreed that the concept had extended worldwide which was fundamental and universal. He quoted that 10 years ago, there were only 54 voting members of the International Ombudsman Institute, but now it had 91 voting members representing 75 countries worldwide. The concept was better accepted than any other time in the history of the world both in strength and acceptability. It was the Ombudsman’s role and privilege to help to ensure that the citizens got the service they were entitled to receive from the government and to ensure the service was reasonable and fair within the law.

Simon Pentanu (PNG) opined that there was public demand on the Ombudsman for making rapid response to grievances especially the ever increasing population in the third world and the increasing demand for services of the Ombudsman.

Mrs Ferrieux-Patterson (Vanuatu) shared that a new legislation was enacted in her country this year whereby there would be some aspect of revolution of the Ombudsman law. Action was taken to examine and review the work of the Ombudsman office since its set up. Legislation would include the possibility to enforce some recommendation by the Ombudsman on the complaints where the checks and balances were missing in smaller countries.
Fred Albietz (Qld) expressed that the importance of the Ombudsman process was a value-added process. He cited that the Queensland Ombudsman Office had been set up for 21 years. It had received 700 written complaints in the first year, but the number of complaints increased from 2300 some 5 years ago to 3700 last year. The success of the Office led to the acceptance of the role of Information Commissioner and who may soon assume the role of the Privacy Commissioner. The concept of Ombudsman in Queensland had been well accepted by the government and would gain strength accordingly.

Barry Perry (Vic) shared that in Victoria, a Complaint Authority was set up in 1986 which had jurisdiction over the complaints against Police. However, it was disbanded in 1988 with the creation of the post of a Deputy Ombudsman who took over the responsibility of handling complaints against Police. Recently, the role of Deputy Ombudsman was combined with that of the Ombudsman. There was a general acceptance of the community that complaints against police were in the hands of Ombudsman.

Eugene Biganovsky (SA) expressed that the Ombudsman concept was too successful in South Australia which led to the idea of setting up a private Industry Ombudsman. However, in some respect, there was a perceived threat to the Parliamentary Ombudsman because there was the tendency to use the term Ombudsman in other sphere. Hence some legislation might be required to protect the name of Ombudsman. In Australia, concern was expressed to the reinforcement of fundamental features of Parliamentary Ombudsman especially independency, flexibility and credibility. There was a growing awareness of Ombudsmen to give greater consideration for better complaint handling rather than a Complaint Registry. Besides, the involvement of performance measure had a direct relevancy to the development of Ombudsman’s concept.

Ratu Jone Cure Mataitini (Fiji) remarked that the concept of Ombudsman was new to Fiji. The Office was viewed as a government department. Though the Ombudsman was supposed to be impartial, but nothing had been done to increase the power of the Ombudsman. He did not work particularly and directly to the Parliamentary Committee as like
other countries. He had no jurisdiction but technically he took up complaints against the administrative action and prepared reports. The Ombudsman had no power to deal with Police and Prisons. But internal procedures were available for the departments to deal with complaints against Police and Prisons. Recommendations had been forwarded to the Prime Minister to strengthen the power of Ombudsman by constitutional change, yet the decision was still awaited. However, action would be taken to submit a paper to the Constitution Review Committee of the Fiji Government.

Sir Brian Elwood (NZ) remarked that regional support would be lent to the Ombudsman of Fiji in preparing the submission to the Constitution Review Committee of his country.
2. **DIVERSIFICATION OF FUNCTION IN THE OMBUDSMAN OFFICE**

Ronald Green (Tas) shared that over the past few years, the Tasmania Ombudsman had changed from the traditional parliamentary role to a number of new functions, viz the appeal for freedom of information; the role of Public Service Commissioner; and jurisdiction over Public Service Authority and code of ethics of the public service. On the question of development, he commented that one should consider whether it was necessary for a diminution to the effectiveness of the traditional role of Ombudsmen. Consideration should be given whether there was a need for an expansion to accept revolutionary or standardisation of the Ombudsman's role. Should Ombudsmen respond to financial problems or utilise expertise or professional reputation to provide the kind of service which was outside the traditional ombudsman area, such as in matters of arbitration or conciliation services? These were questions for the members to consider.

Anand Satyanand (NZ) cited an example of New Zealand whereby both flexibility and independence were exercised. He shared that in the last 12 months, the New Zealand Government had much concern over the conditions of the prison. An interim measure was arranged to encourage the Ombudsman to carry out work in the prisons without legislative enactment. Investigators were recruited and pamphlets were distributed to both prisoners and the Prison Management. The Ombudsman visited the prison at regular interval. Three reports on deaths in custody had been compiled and cases on informal resolution were also included. Significant problems were identified and attended to by the Government.

Peter Boyce (NT) expressed that in the Northern Territory of his country, the Ombudsman also handled health complaints and there was a legal services typed function of the Ombudsman Office. The Office worked towards the least-cost approach whereby specialized expertise would be employed to handle complaints. In contrast, the classical type of Ombudsman, who reached out for complaints, was considered to be cost-
Eugene Biganovsky (SA) shared that the Ombudsman’s function in Queensland had been branching out. The office received resources in handling health complaints, but not in the area of freedom of information. He pointed out that it was not the question of resources, but the appropriate kind of resources.

Sir Brian Elwood (NZ) expressed that his office was willing to absorb increasing role, but one should be careful of two points. The first one was the classical role to review the administrative action of the government should remain. This was the strength of the Ombudsman concept. The other point was that Ombudsman should not confine to the functional role which created an impression of unwillingness to adjust to change. In New Zealand, the role of Ombudsman in Prison was harmonious with the traditional concept and his office was willing to take up additional function provided there were additional resources. The price of agreeing to take up additional services was that existing resources could not cope and new resources were required. If existing resources could not cope with additional functions, then new additional resources were required. But caution should be made that Ombudsman was not afraid to take on additional responsibility, but he should not stretch himself and run himself into criticism for unsatisfactory performance.

Robert Eadie (WA) opined that the Ombudsman’s role be extended to the Prison was discussed in South Australia in 1991, and the discussion proved to be essential. In future, the Ombudsman should keep in touch with what was happening in prison. However, caution should be made that if one assumed this role, other roles would also step in. He added that some Ombudsmen had already taken up the role as an inspector of telecommunication on the complaint over the interception procedures of Police. He had reservation over such role, though NSW had already assumed such role. He echoed Sir Brian’s view that while taking up additional role there should be right kind of resource and right sort of people to carry out the additional tasks.
Fred Albietz (Qld) pointed out that diversification did lead to a mix of power. The traditional power of Ombudsman was only recommendatory, but as Information Commissioner he had a power of determination which might sometimes conflict with the government. He quoted an example of handling a case recently on the release of information. Two injunction orders were applied but his decision was confirmed by the Court on appeal. He commented that one should not be frightened of the mix of power especially when the power of determination was beneficial to the Ombudsman role.

Dulcie McCallum (Canada) shared that she had jurisdiction over 2800 authorities at present. Her Office had doubled its staff and budget over the last year when compared with 3 years ago she only had jurisdiction over 180 authorities. In response to Sir Brian’s comments on the challenge to the type of growth to an Ombudsman, she commented that Ombudsman should not become a government’s solution to a problem, he should hang on the Ombudsman’s concept of credibility, acceptability and universality. It was an opportunity to define the role of Ombudsman more clearly with government and what they should do. Public education within government should be encouraged as to how to be administratively fair and not only just relying on the redress of the complaint mechanism.
Barry Perry (Vic) opened the discussion by sharing with members the experience of Victoria. He pointed out that Victoria had completed not only corporatisation but also privatisation of some of the public utilities. Such process had taken out the jurisdiction of Ombudsman over some of the utility companies. The Electricity Company was an example of corporatisation and the Water Supplies and Sewage Services were soon to be privatised. Privatisation in the form of contracting out of service was quite prevalent in Victoria. As a result of which, Ombudsman had no jurisdiction over such services. The primary function of Ombudsman was accountability of government administration. In Victoria, the electricity industry was having an Industry Ombudsman setting up under the Company Law with a Board comprising members from the retail industry. The Board provided budget for the Ombudsman. He investigated the activities of the particular industry and was accountable to the people of the companies of which the complaint was directed against. In this respect, it might be a lessening of accountability of the public utility in providing electricity service to the people of Victoria. As for the Water Supplies and Sewage Services, they had been corporatised and were yet to be privatised. They were already outside the jurisdiction of Ombudsman and would not be accountable to him. The means for redressing complaints from these privatised utility companies might be through court or through the Office of Trading. In fact, in certain complaints, ombudsman might be one possible way of redressing complaint through informal resolution. But now such complaints had to go to court for resolution, which was quite costly in Victoria. He added that another area of privatisation was the privatisation of Prisons which would be implemented by the end of the century. However, legislation had been amended to continue Ombudsman’s jurisdiction over the prisons even they were privatised because the government still considered there was a primary responsibility to look after the welfare of the prisoners. However, one would ask if the company was privatised, would the fundamental role of the Ombudsman over that company continue as before? Moreover, though the public company was corporatised, it still exercised the same function with the same staffing, it would therefore be desirable to continue jurisdiction over such bodies until such time it was privatised. On the question of contracting out, statutory bodies or
local Councils which originally had been subject to the jurisdiction of Ombudsmen, avoided the jurisdiction of the Ombudsman by contracting out. Hence, the accountability was far less than before. When there was a conflict between the consumer and the contractor, people could not approach the Ombudsman as it became a private dispute. The issue of accountability would come into question as once the statutory bodies were privatised, the only redress relied on court.

Ratu Jone Cure Mataitini (Fiji) shared that he had no jurisdiction over complaints between private companies and persons, but many complaints to Ombudsman were against lawyers which he had no jurisdiction either. As for those statutory bodies or private companies, if they had become privatised but with contribution or shares from the government, then Ombudsman would continue to have jurisdiction over it.

Mrs Ferrieux - Patterson (Vanuatu) expressed that all the services such as water, electricity and telecommunication in Vanuatu were all in the hands of big international companies except those companies that government demanded to have major shares. The conference had thrown some light on her discussing the matter with her Attorney General on the access of Ombudsman to private companies.

Eugene Biganovsky (SA) shared with members that prior to 1994, South Australia had jurisdiction over state agencies, local government, universities, public hospitals and Government Insurance Commission. It had experienced some process in privatisation and corporatisation in various degrees. There were ways for Ombudsman to enter into enquiry to those departments or agencies depending on the specific wordings of the respective Act. He was able to look at independent contractor or others because the wordings of the Agency and that of the Administrative Act provided for it. Apart from corporatisation and privatisation, there was a rush to the notions of quality assurance or charters which attached to the process of corporatisation and privatisation. For those organisations remaining in the responsibility of Ombudsman, they might face the challenge when it came to ethical issues. On the other hand, the Ombudsman might face the challenge from the companies which considered themselves providing the best service and questioned why the
Ninchib Tetang (PNG) pointed out that in Papua New Guinea, the Ombudsman had jurisdiction over private enterprise only to the extent that it involved discrimination issue. There were still problems on the jurisdiction of Ombudsman over the corporatisation of statutory bodies where government had major funding and share holdings. These organisations might not be under the jurisdiction of the Ombudsman. There was an example of a case which took 2 years for the court to decide whether Ombudsman had jurisdiction over the institutions or statutory bodies established under the Act of Parliament providing services to the general public. A decision was still to be made by court whether those corporations or statutory bodies, which had government’s major fundings or share holdings, should be under the jurisdiction of Ombudsman.

H H Kantharia (India) expressed that "Ombudsman" meant the authority to enquire into misconduct, maladministration or act of corruption of the public servants. In India, there were various Ombudsman Commissions set up to attend to grievances from women, slavery, minority community or complaints against Police. Corporatisation and privatisation would be against the concept of Ombudsmen.

Kam Chiu Ng (Malaysia) shared that in Malaysia, the Ombudsman could go into private companies, especially privatised monopolies, where a senior officer was responsible for administrative complaints. The government had a golden share in its policy decision or to the extent that of approving the chairman of the corporation. The Ombudsman could have access to all the files or requested the government servants to declare assets. However as in private monopoly, it was very difficult to gain access and the investigation should have to go from the top management. The Ombudsman did handle complaints against doctors and lawyers. He had 64 staff and in every ministry and government department, there was a staff officer designated to handle complaints. The Ombudsman had the right to ask why there was a delay in handling complaints. But he had no authority over policy and corruption matters. He just handled maladministration and injustice.
Mrs Jill Melvor (UK) pointed out that some agencies in the UK, though separated from or hiving off from the government, were subjected to the jurisdictions of the Ombudsman if they were under the administration or jurisdiction of the parent departments. She cited an example of the privatisation of the Water Industry over whom the Ombudsman did not have jurisdiction because it had its own complaints system.

Eugene Biganovsky (SA), in response to the Chairman, Andrew So (HK)'s enquiry on the Comparative Ombudsmen's Digest, informed that the preparation of a booklet was discussed by the Australasian and Pacific region as far back as 1982. The Digest would include legislation of the region and serve as a reference point to the various changes occurred throughout the region. However, the task became complicated not only because of the growth in the region but also because of the growth relating to each jurisdiction in the region. The project was once abandoned in APOC's meeting in Papua New Guinea in 1989. It had been taken up and discussed in 1990 in Solomon Islands during a Conference. In 1991, the Conference at Adelaine agreed to establish a regional computer register which included legislation, articles, special reports and matter of significant importance in the region. The idea of an information register was still alive and the objective was to provide countries in the region a ready access to any sort of information for the assistance in the establishment and development of the Ombudsman Office.

Sir Brian Elwood (NZ) enlisted the assistance of members to supply information to the International Ombudsman Institute so that a resource base could be set up.
Ronald Green (Tas) opened the discussion on this issue. He was the delegate for the Commonwealth Ombudsman in Tasmania. Recently he had been working very closely with the Child Support Agency through a series of seminar for its staff and he had to deal with an enormous number of Commonwealth complaints against the Agency. He was convinced that many of the complaints were unnecessary, which originated from: poor communication; unclear, inadequate or unconvincing instructions to members of the public; constant failure to speak to the public in a language in which they could understand; constant failure to inform the public on the progress of their complaints; not returning phone calls and not being available to provide service. He saw it as a major systemic issue, which seemed to have been lost in considering the subject matter of the complaint and that though already homing in on the main body of the complaint, the ancillary issue of the bad communication was by itself a public service-wide systemic problem. He therefore raised this issue to see partly if other delegates had similar experience and to urge others to examine this subject closely. While addressing the Agency which was the cause of so many complaints, he had indicated that it would be beneficial to both the department and to the ombudsman such as himself who had so few resources if the number of complaints could be reduced by improving the communications. The bottom line to all of this was the delivery of service.

Ratu Jone Cure Mataitini (Fiji) fully agreed that poor communication was a main source of complaints for the Ombudsman Office of Fiji. It had been mentioned in their annual reports for a number of years that the Public Service Commission in Fiji had to issue circulars to each head of department on the issue of poor communications to the public especially in answering phones and the lack of other courtesies to complainants in the office. A lot of the complaints to the Ombudsman would have been eliminated if the department had given clear explanations to the complainant.
Sir Brian Elwood (NZ) reported on a move that he and Anand Satyanand had instituted in their current year's annual report that they had very carefully signalled that they were shifting their office in terms of their traditional approach slightly away from being reactive to proactive. The proactive move centred on communications which resulted in their discussing with agencies of government and public corporations, the method and style by which the system was communicating both with itself and with the public at large. It covered the quality of report writing within the system and the message was that it was to the interest of the ministers that they received good reports from their advisers so that they as ministers could communicate better with the public either in terms of their own document or speech preparation and also in terms of information which needed to be released under the Official Information Legislation. So the decision they made collectively was that communication was the name of the game so far as citizens' inter-action with the governments - central, state and local was concerned. He thought that it was a new role for ombudsmanship generally to focus upon the method and style of communication and it beheld the ombudsmen present to set good examples in the report produced to clearly identify the problems, the options for solving the problems and the solution on the various options chosen and be prepared to say why a particular option had been chosen.

Robert Eadie (WA) stated that faulty communication was the heart of many of the ombudsman's problems. The Australian Banking Ombudsman said on the radio recently that the banking industry was facing similar problems. He quoted two examples on the problem of failing to say what was exactly meant and the confusion that followed. The first one concerned a caravan park in Scotland where the local authority had put up a sign saying that overnight stays were not allowed but the maximum stay was 24 hours. The second example related to an advertisement in UK for the appointment of judges. The advertisement stated that any applicant who knew anything about themselves which might prove to be an embarrassment to the Lord Chancellor should state this information in their applications. Then the advertisement also stated that an affirmative response would not necessarily disqualify the applicant!
Eugene Biganovsky (SA) said that on this question of communication, there was an interesting issue. He had come across many instances where the complainant was pursuing a choice of remedies particularly in case of faulty communication that was tantamount to negligence or negligent misstatements and was actionable as a tort in a court of law. The dominant concern was one of tort and there might be substantial damages. It would be highly unlikely that he would intervene in those circumstances particularly if the matter involved conflicting accounts, possibly legal arguments and disputes as to the quantum in matters of general damages. There were many instances where the ombudsman, in lesser costs, might make quite effective recommendations for ex gratia compensation in the case of faulty communication. Faulty communication could give rise to a whole range of remedial relief by an ombudsman where the court could not provide but on the other hand ombudsmen lacked, perhaps, the jurisdiction or ability to award damages in the same way as a court. It would be interesting to hear whether his colleagues had been involved in these dilemmas and the pressure that came from the public to seek some sort of remedy.

Simon Pentanu (PNG) said communication was an area that they had looked at. Under the Papua New Guinea Ombudsman’s (PNGO) jurisdiction, there was an area, Leadership Code which was a code of conduct under which the PNGO could prosecute members of parliament and other leaders defined under the code. One of the areas where there was misconception from the public was where in their view the ombudsman could deal with all types of complaints and that every complaint put forward to the commission would automatically obtain a positive result. In an attempt to address this issue in June 1995, the PNGO organised a seminar and invited all department heads and heads of statutory corporations to attend. In the seminar, it was conveyed to those attending that on many instances, the PNGO depended on the responses from the departments for their investigations and the departments’ cooperation was required to expedite the investigations on some of the complaints. Because the PNGO could prosecute offenders under the Leadership Code, the departments had been shying away from providing information on the ‘leaders’ in such investigations. If the departments had co-operated, some of the matters could be sorted out through telephone or in person at the PNGO’s office rather than shying away and failing to provide the information required for investigation. The PNGO also
embarked on an education program involving the educational institutions, high schools, universities and colleges in an attempt to explain the different roles of the PNGO under the Complaints Jurisdiction and the Leadership Jurisdiction. The PNGO received a lot of attention relating to the Leadership Jurisdiction because, while the recommendation under the Complaints Jurisdiction were not enforceable, some of the investigations under the Leadership Jurisdiction had resulted in the prosecutions of certain leaders in the Leadership Tribunal. Sometimes, such prosecutions tended to take the focus away from the accomplishments of the traditional ombudsman in addressing the grievances resulting from mal-administration. The people had expected that because of such prosecutions, the PNGO could also bring results in terms of their complaints against mal-administration. With the co-operation of the PNG Broadcasting Commission, once a week there was a program called the Nation's Watchdog for half an hour during which various senior officers went on interviews on the air. The responses from members of the public were positive. The PNGO also put out an advertisement once a week in one of two newspapers which resulted in an increase in sales for that newspaper because people were interested in what the Ombudsman Commission was all about. These were some of the PNGO attempts to communicate with its clientele and the public.
Eugene Biganovsky (SA) advised the gathering that he had prepared a paper on the process to enhance the accessibility of the Ombudsman to the citizens of South Australia. It was a process of setting up "gatekeepers" utilising the Justices of Peace already in existence. He was inspired by the contribution at the last meeting in Lake Tahoe made by Professor Kamada when he referred to his scheme of councillors throughout Japan and apparently there existed in France a not dissimilar system with the delegates of the mediators. The scheme that he had suggested in using Justices was simply this: those persons to be appointed by the Ombudsman would be located in the regions, even in remote regions of the state. The offices to be used would be Court Registries. In his experience, no amount of growth in awareness, no amount of travel by the Ombudsman, no amount of resources that he had put into the journeys that he made was sufficient to provide access for people who needed to approach the Ombudsman. He also had the toll-free telephone access and circuit visits throughout the state and various co-operative arrangement with colleagues in other states, particularly in Victoria, Northern Territories and Western Australia and there was in existence an internal referral system and indeed with some of his colleagues, he was able to delegate his power to them and vice versa and even then, it was not enough to provide sufficient access to the public. He would train these persons who were located in various parts of the state and they would be accessible to members of the public who would not have to travel 8 or 9 hours to his central office in Adelaide. The Justices would be able to deal with simple matters and would refer matters into appropriate channels which was very much part of the ombudsman's role. In addition to the two and a half thousand investigations that he carried out each year, there were thousands upon thousands of contacts made. He had built upon special systems and he had networks amongst the aboriginal community with the various different tribes in the state, but that was not adequate. The system of Justices was one modelled on the experience of Japan. This demonstrated that one could learn from others' experience and this was one of the fruits of such meetings as the present one.
Ronald Green (Tas) said while the ombudsmen were ensuring that government departments were accountable, the ombudsmen themselves had to be accountable and be properly accountable. He was wondering how to measure the performance of an ombudsman. In his case, he tried to discuss his performance in his annual report in accordance with the objective as set out in his mission statement: about the time to deal with case, the details of his findings, the responses that he received from the government departments to his recommendations, the degree to which he had achieved an improvement in access and equity. He would talk about systemic issues but he was left with the sense that it was not adequate. He did not have the answers and he would like to hear from other people. The question that he faced was: Were the ombudsmen having an impact on Government? It seemed to him that we were doing the primary task of responding to complaints and they were not having an impact on Government. He did not know if they were really fulfilling our role as it should be. It would be rather disappointing if they only did as one Commonwealth Ombudsman said a few years ago that they just spent their times putting out bush fire. He had heard a couple of times performance measured in terms of numbers, that the numbers of complaints were rising. A department head pointed out to him that if the number of complaints was on the rise, then may be their performance was not so good after all and Government was not improving. He would welcome comments on this issue.

The Chairman, Andrew So (HK) then proposed to move up the agenda item on Ombudsman Case Management Plan, Performance Indicators, Establishing Priorities and Legislation Requirements to be discussed then as these topics were related to performance measurements. Philippa Smith had suggested these topics but she could not attend the conference. Sir Brian was invited to comment.
Sir Brian Elwood (NZ) said that the great difficulty that ombudsmen faced was also a difficulty faced by the Judiciary and the view that was adopted in New Zealand a couple of years ago in relation to satisfaction performance measurements was to say that as soon as the Judiciary was subject to similar performance measures then so should the ombudsmen. The outcome of a satisfaction survey might just accord with the success enjoyed by the individual concerned so that if an ombudsman upheld the complaint, there was satisfaction, and vice versa if the ombudsman did not uphold. But he thought that it was a little bit more sophisticated than that and he would not be surprised if there was a trend requiring ombudsmen to judge by a carefully worded survey how the public perceived the Office of the Ombudsman in a particular jurisdiction. He suspected that they were on the verge of doing that in New Zealand. At the present time their parliamentary committee wanted them to answer the question that had been put forward by Ron Green - What influence we were having upon the process of government. And it was partly in response to that kind of question that Anand Satyanand and Sir Brian had decided to move on in terms of their traditional work to see if they could avoid the need for complaints. In other words, they might well be satisfied when their complaint numbers decreased because if they did decrease then the system itself, encouraged by the ombudsmen, might be performing better. So performance of the ombudsmen and performance of the system were issues at the forefront as they went about their work in the future.

Anand Satyanand (NZ) would like to add to what Sir Brian had said that communication and their ability to communicate and to encourage communications was the heart of being successful in their roles. It was interesting to hear of all the strategies being employed, whether one was in a relatively sophisticated situation or in a smaller state. There was a need incumbent on all the ombudsmen to reach out to the community. And whether it was done by radio and television in PNG, by the use of clinics or by the use of the Franco-Japanese mode of utilising people in the community, this would all help the ombudsmen to achieve what they needed to as office holders. There was an ephemeral quality about creditability. The creditability of Office as Ombudsman required the holder to do something that was quite difficult, namely to create a feeling of trust in the community and in the Government, but secondly, at the same time, also to create where necessary an element of discomfort. The two things of trust and discomfort is quite a challenge for the
ombudsman. He thought that Ron Green had opened up a most interesting avenue in this topic by saying that communication and the need for an ombudsman to be challenged was of fundamental importance.

Mrs Ferrieux-Patterson (Vanuatu) understood from previous year’s meeting that performance basically involved the number of cases or complaints received and how many had been dealt with. In her experience in Vanuatu, the number of cases was one thing but the workload generated by each case was vastly different and she was having a difficult time when she attempted to measure her own performance. She wondered if anyone had any experience with a system that could provide one with the amount of resources required for a particular case type so that one could easily account for the utilisation of one’s resources for the cases being dealt with and prioritise one’s work depending on the resources available and be able to account for its use.

Robert Eadie (WA) raised the issue of complaint reduction in relation to the claim that an increase in the number of complaints was an indication that the ombudsman was failing in his duty. One difficulty was that the ombudsman did not always have control over the situation. In Western Australia, the new Commissioner of Police had stated that if the police had been guilty of misconduct, he wanted to know about them. He was encouraging complaints to be made whereas his predecessor adopted a rather low key approach in these matters and people were discouraged from complaining. So there was a difficulty here, as some agencies were increasing their profile for good reasons to ensure an interest of public accountability. And if the public were not satisfied, they should be able to come forward to an ombudsman for a proper external review. On the other hand, taking a contrast, there was a local government jurisdiction and he was conscious of the fact that many complaints were coming into the ombudsman’s office when they should have gone to the councils. One particular head of a council accused him of being less than fair to that council for disclosing the number of complaints against that council, which was the highest in the state. But it was pointed out that the number did not tell very much as there was no mention of the number of cases substantiated. However, it was significant that the complaints were lodged with the ombudsman and not with the local council concerned. For those councils with far lower number of complaints, they tended to
have a good, effective system dealing with people’s concerns, and people would get a proper hearing on their problems resulting in only a small number of complaints being lodged with the ombudsman. Thus the position was much more complicated than it appeared; the ombudsman did not, and should not claim to, have sufficient control over the situation. There were certain things that could be done to reduce the number of complaints like by encouraging councils to introduce their own system but in other areas the ombudsman had no control. With regard to Mrs Ferrieux-Patterson’s question, it was difficult to try to show the difference in the amount of effort that had to be applied to the much more complex complaints against the many run-of-the-mill straightforward ones. All he could do was to set out a broad approach in his report which dealt with objectives, performance indicators and all the rest of it but indicating quite clearly to parliament and the Auditor General who acted as the ’enforcer’ of the system that there were many complaints where one could not apply a formula across the board to them because they were far too complex and took up too much time.

Ratu Jone Cure Mataitini (Fiji) regarded the reduction in the number of complaints to the ombudsman as a sign of success of the ombudsman’s office. Thanks to the explanations given by his staff, the public understood where to go first before they complained to the ombudsman’s office as a last resort after they had failed to have their problems resolved satisfactorily by the departments. The two departments in Fiji with the most number of complaints were the Police and the Prisons. Regarding visits by the staff of the Ombudsman, it depended on the Commissioner of Police or the Commissioner of Prisons whose agreement was required. The Ombudsman had no constitutional right to go directly to them. There had been an increase in the number of cases of Police assault against suspects and if the suspect sustained injury, the Police would not let the Ombudsman look at it. The Ombudsman should have a constitutional right to demand to look at any prisoner, whether he was in a police cell or in the prisons. At the present, it depended on the willingness of the Police or Prisons Department to allow the Ombudsman’s staff to visit any complaint coming through civilian friends or relatives that they had been ill treated inside the jail. The Fijian Ombudsman had no right in this respect and depended on the permission granted by these institutions.
The Chairman, Andrew So (HK) then invited K K Wong, Deputy COMAC to describe the dilemma faced by the Hong Kong Ombudsman who was being bombarded with an increasing number of complaints, as a result of the amendments to the COMAC Ordinance.

K K Wong (HK) referred to a newspaper report published a while ago with the caption saying that "the Ombudsman falls victim to his own success". The Hong Kong Ombudsman office had been in existence for six years. In the first five years of its history, it operated on a referral system and people could not make their complaints directly to COMAC. The complaints should first be lodged with a member of the Legislative Council before they were channelled to COMAC. In those years, on the average, COMAC received about 170 complaints per annum. A review of the COMAC Ordinance was done in 1993 and in 1994 the Ordinance was amended, widening the Commissioner’s power and jurisdiction. One important feature was that the referral system was abolished and people were allowed to have direct access to COMAC for the purpose of lodging complaints. As a result, in the first year of operation under this new jurisdiction, the number of complaints had increased by almost 10 times to about 1,600 as compared with the previous figure of 170 per annum. COMAC knew that there would be an increase in work load and was given additional resources to handle the increase. But no one anticipated that the increase would be about tenfold and the additional resources were therefore insufficient. COMAC also gave publicity to his additional power and jurisdiction on television and through other publicity campaigns, e.g. for those present at the Opening Ceremony of the Ombudsman Week, they would see the start of a series of roving exhibitions in an attempt to explain to the people what COMAC could do for them. Together with this publicity it attracted plenty of complaints and the number was still on the increase. If the present trend continued, it would be 13 or 14 times more than what COMAC used to receive previously. This was the dilemma that COMAC was facing. Amongst the increase in power and jurisdiction, the Ombudsman had been given the power for Direct Investigation (DI). The DI focused on problems which COMAC came across very often through repeated complaints, or complaints which in the view of COMAC if not nipped in the bud might become major problems. So far COMAC had conducted five DIs, focusing on matters which were the subject of repetitive complaints. It was hoped that through the DI, one could get to the root of the problem
and have it eradicated once and for all. Unfortunately, sometimes it was not all that successful. For instance, a paper tabled for general information, as requested by the complainants, was from people living in roof top squatter huts that was the subject of one of the DI during which it was recommended to Government that the system should be reviewed as the policy was considered unfair. But Government was unable to accept the recommendation on resource grounds. With the surge in the number of complaints, COMAC had to scale down on the publicity campaign. Previously, a complaint could be processed to completion in about 3 months. Now it would take 6 to 9 months.

Maiava Toma (W Samoa) commented that it is an interesting experience to hear about: looking at the complaints that did come in and taking action to save oneself's later work by looking at this question that Ron Green had raised, it was difficult to focus on a measure of performance in the work of an ombudsman. Hence if based purely on the number of complaints received, the results could be misleading. In some cases, the ombudsman might be devising ways to boost the statistics. Perhaps for one's own satisfaction, one way was to look at the categories of complaint that came in one's way, as was done by the Hong Kong Ombudsman's office. If one saw a reduction in the pattern, then one would know that he must have some impact on the administration.

Eugene Biganovsky (SA) said he had spoken to Philippa Smith just before leaving for the conference. Apparently, Philippa had intended to raise the subject on the survey that she was conducting. She had prepared an evaluation form that she would send to her customers - the complainants to see if they were contended with the ombudsman's service. He wondered if other ombudsmen had considered this as a performance measuring tool. He knew from the meeting in Perth that David Landa of New South Wales had informed those present of a slightly different device, a survey conducted by private consultants engaged at a cost. The interesting thing about that survey was that the results of that survey were different to some of the expectations within the ombudsman's office. The view itself had to be altered. These were some of the devices being used and in fact David Landa had produced a guarantee of service which he displayed prominently in his office and in his various reports. He had adopted that model and he attached his
guarantee of service to his complainant in every letter of response. That guarantee of service specifically stipulated the performance promises that each complaint would be effectively commenced within 14 days upon receipt and the average completion time was four weeks and a result available within three months of a formal investigation. If there was any complaint about that, the complainant might then approach him directly as a personal appeal if there was any problem within his office. So there were all those practical ways in which to respond to these needs and he thought it was incumbent upon the ombudsman to do all these things simply as a matter of moral leadership. After all, since the ombudsmen were the ones expected to tell others how to behave, surely they ought to know how to behave themselves.

Barry Perry (Vic) said that he had a dissenting view on the issue of customer satisfaction: first of all, the need to clearly define or identify who was a customer of an ombudsman and secondly decide what constituted satisfaction. To him the ombudsman was an independent arbiter of the facts, to get to the truth of the matter, and if a wrong needed redressing, then the ombudsman should make every attempt to redress the wrong. He did not see, in Victoria, his customers as only the complainants. His customers would include the Parliament, the citizens, the community and equally the departments who were the subjects of his investigations. If one was to conduct a survey, one should not concentrate on just one class of customers. Recently he tabled a report in Parliament. It was an investigation into an allegation of corruption against one of the most senior members of the Victorian Police Force. His findings were unable to find any basis for the allegation that he was involved in corruption. Nevertheless he severely criticized the officer for placing himself in a position where there was a potential conflict of interest for having personally pursued an enquiry on behalf of a friend. To him, the officer was unable to distinguish the possibility of a conflict between his public duty as a Police officer and his responsibility or association with friends and family. When the report was published in Parliament, the complainant was quite bitter that the findings were not in his favour, and that there was no corruption on the part of the Police officer. The Police was absolutely bitter that he had criticized one of their most senior member. The editorial of the leading daily newspaper, assumed to be speaking for the community, said that the report raised more questions than it had answered and the question was whether the man was guilty of
corruption or not. So at the end of the day, if he were to survey the customer on that day, he would have been rated zero. But to him the investigation did get to the truth of the matter and he had satisfied nobody but himself. Therefore, he would voice a word of caution on the criteria that ombudsmen would adopt to determine whether their role had been fulfilled. To him, the role of the ombudsman was an independent arbiter to seek out the truth and, if injustice was found, to do the utmost to redress the wrong. At the end of the day, that had to be the measure and he had yet to meet a complainant who was happy that his complaint had not been upheld. The complainant might accept it if he believed that the investigation was independent. Therefore, he questioned whether satisfaction was being looked at there. Equally, the ombudsman’s responsibility to the departments was to demonstrate that he was impartial. He was not there to defend them but neither was he there to witch-hunt. Therefore the satisfaction of the department was of equal importance. The Victorian Ombudsman was an officer of Parliament, he reported to Parliament. He recently refused to accept a complaint referred to him by the Parliament, basically on the ground that the Parliament did not have the constitutional power to do so. He did not gain any votes of confidence from the Parliament by rejecting the case on the grounds that Parliament did not have the power to ask him to investigate that particular matter which was outside the jurisdiction of the Ombudsman and outside basic Government administration. Yet Parliament still referred the case to him and thus it was rejected. At the end of the day, Parliament was not happy with the Victorian Ombudsman. He would however argue that he was no more than doing his job. Therefore, satisfaction should be a goal, and not the sole determinant of how the office was viewed which should be done far more widely.

Ronald Green (Tas) said he would both support and disagree with Barry. He supported the point that the customer was more than just the client and the ombudsman’s clients were all those around him. One needed to ask everybody in the appropriate way just whether or not they were satisfied with one’s service. He wanted to do that in Tasmania and had consulted the Sociology Department of the University of Tasmania who replied that it could be done but it would be extremely costly and the idea was dropped. But he would not be swayed from doing it simply because some people would not give a just response. Statistically, if the sample was large enough and the survey was conducted properly, one would get a
Sir Brian Elwood (NZ) said that he tried to address this issue. Indeed, it was the conflict explained by Anand Satyanand earlier. He said that the ombudsmen, who were neither advocates for the complainant nor prosecutors of the agency complained about, became the advocate only when the impartial investigation had been completed and then they were advocates of the conclusions that had been drawn. It was particularly important to bear that in mind when an ombudsman went about his work because if ombudsmen were seen as advocates for the complainant, then they could not expect cooperation from the organization being reviewed or investigated. The ombudsmen would immediately place themselves in the adversarial situation for which they were an alternative. The ombudsmen were not part of the adversarial system in the conventional interpretation of those words. So he thought it was particularly important that if the ombudsmen did participate in satisfaction or performance measurement surveys, the ombudsmen should so phrase the questions that they were seeking a response to the ombudsman’s systemic competence rather than to the outcome achieved through the use of the process.

Dulcie McCallum (Canada) agreed conceptually with what Sir Brian had referred to as taking a pro-active approach and reaching out to authorities and try to educate them in order to prevent complaints and her statistics would show that the BC ombudsman reached about 24,000 complaints last year and it had started to drop, notwithstanding her jurisdiction had expanded dramatically, partly because of this approach. In the paper (Appendix 1) being circulated, she had included a win-win-win approach where the people being served by the authority, the authority, the administration itself and the ombudsman were all happy and satisfied that a systemic review had met the needs of those concerned. What she would like to raise was really the notion that the impartiality of the ombudsman, if one went back to the notion what a classical ombudsman was, as he nurtured the relationship with the authorities whether it be the Cabinet, the prime minister or any minister of the crown. As he nurtured in order to educate and advance administrative fairness, the ombudsman found himself in a place that may, from the perspective of the public (whom she did not see as her customer except in the global sense), that notion of impartiality was critical. She pointed out that the BC ombudsman office
had been very cautious on that balance of educating government, becoming an effective tool for them to find their own quality assurance and included in that communication and all the other principles of ombudsman without compromising the ombudsman’s impartiality and need for independence. In order to be effective, the move that the New Zealand ombudsman was making was critical. One must stop looking at the ombudsman as a tool to prosecute individual public servants. That critical to a whole preventive model was respect for those working within the system and respect for complaints notwithstanding that they were often very challenging by the time they got to the ombudsman’s office. But to depersonalize the whole goal of administrative fairness was more difficult in some regions and that was not to say that the ombudsman did not also look for corruption where corruption actually existed. It was imperative that the front line workers, in order to engage them in education of public service, must be respected.
7. JURISDICTION OF THE OMBUDSMAN IN RELATION TO COURTS AND TRIBUNALS

A paper (Appendix 2) on this item from Robert Eadie (WA) had been circulated prior to the conference.

Robert Eadie (WA) indicated that there had been a wide-spread international interest in the jurisdiction of the ombudsman in relation to the judiciary. He was of the view that it was inappropriate for the classical ombudsman to review the actions of courts. His conclusions on this issue were: (i) some of the actions of courts to be made subject to external review should be the function of a judicial ombudsman or commissioner of some kind; (ii) there was a role for the ombudsman in relation to the administrative actions of tribunals and some of the legislation might have to be modified in order to avoid possible dispute; and (iii) in relation to the actions and decisions of the staff of courts and tribunals, there was certainly a role for the ombudsman to be able to look into these people’s actions provided that they were matters administrative in nature and that the ombudsman did not get into the merits of the decisions. On the last conclusion, he was looking forward to the advice of the Solicitor General of WA on the matter. He saw that the legislation passed by the UK Parliament in relation to both court and tribunal staff might give rise to problems because it was framed in such a way that there was specific exclusion of any action taken at the direction or with the authority of the courts or tribunals.

Anand Satyanand (NZ) pointed out that there was always a problem with defining what the jurisdiction was between courts and tribunals. He said that there were two different concepts being married in the notion. The original concept of an ombudsman in the Scandinavian system was that he was the grievance person who could look into any matters that happened to a citizen as a result of an action of the Executive or the military or the courts. But today Parliament and Government pay heed to the notion of separation of powers. This states that Parliament must be separated from the Executive and in turn separated from the Court. Legislation had drawn certain lines which excluded the ombudsman’s
jurisdiction over courts and tribunals. It was now therefore difficult for
the ombudsmen to deliver to the ordinary citizen any satisfaction so far
as courts or tribunals were concerned because of the legislation.
However, the ordinary citizen was not so much concerned about the
difference between the courts and tribunals as the ombudsman was.

In response, Robert Eadie (WA) said that it was a problem to reconcile
the traditional Scandinavian approach and the current approach in
determining how far an ombudsman should have jurisdiction. On minor
officials in courts and tribunals, there was a strong case that an
ombudsman had jurisdiction in relation to purely administrative actions
which did not infringe upon adjudicative process of the court and tribunal
itself.

Eugene Biganovsky (SA) stated that there had got to be differences in
jurisdiction over the courts and tribunals and that an ombudsman should
know his own jurisdiction.

Simon Pentanu (PNG), when asked to describe the relationship between
his Commission and the judiciary, said that over the years there were a
number of complaints against the courts, mostly in terms of administration
of justice rather than legal questions. It was prescribed in the PNG
Constitution that the Commission should not enquire into a decision by
the court except the decision showed that there was apparent defect in law
or administrative practice. The view taken in recent years by the
Commission was that provided the scope of investigation was confined to
administrative conduct of the court, the Commission would be acting
within its jurisdiction if it investigated a complaint about delay in
handing down decision by the court. The basis for this proposition could
be found in the Constitution. He cited a case in which the matter had
been delayed for over two years by the court. While the Commission did
not want to be seen as encroaching into jurisdiction over legal matters, at
the same time the administration of justice could not amount to
miscarriage of justice in that the matter should not be delayed before a
court for that length of time.
8. IMPLICATIONS FOR THE OMBUDSMAN OF THE COMMISSION ON GOVERNMENT

A paper (Appendix 3) on this item from Robert Eadie (WA) had been circulated prior to the conference.

Robert Eadie (WA) pointed out that in WA the Commission on Government (COG) had under consideration far reaching issues impacting upon the role of the ombudsman. He outlined the background which gave rise to the set up of the COG which looked at many issues concerning the state government, such as government privileges, corruption, whistleblowing and improper conduct. He viewed that the SA model of whistleblowers protection was a practical one and achieved a reasonable balance of interest between whistleblowers and the subjects being complained against. On corruption, he saw that instead of setting up another organisation it would be better to try to improve the power, functions and resources of the existing Official Corruption Commission because of WA’s smaller population. He felt that improper conduct was a difficult area because no one could give a satisfactory definition of improper conduct and to distinguish it from maladministration and corruption. He indicated that in NSW the Independence Commission against Corruption encountered major difficulty in the area of serious improper conduct when dealing with the dismissal from office of high level state officials and the NSW state government was trying to tidy up and to plug the gap.
Barry Perry (Vic) opened the discussion on this issue by drawing the attention of the meeting to the fact that in Victoria, the jurisdiction of the Ombudsman was limited in respect to legal issues. He explained that the Ombudsman there might not investigate an administrative action where the complainant had a right of redress or to seek a right of redress through a court or tribunal unless the Ombudsman himself believed that it was a matter that merited his investigation to avoid injustice. He further elaborated that such was indicative of an attempt by the (Victorian) Parliament to draw a clear distinction between the Ombudsman as an avenue for seeking redress in the legal sphere and the forum of the courts but the attempt had failed because of the introduction of the proviso which gave the Ombudsman a very unclear discretionary jurisdiction in what could really be legal matters. The Ombudsman in Victoria could therefore make a subjective decision to investigate or not to investigate potentially legal matters, subject only to the ordinary recourse of a judicial review of his exercise of such a subjective and discretionary power. His own personal preference was that if the subject of a complaint involved a straight question of law, e.g. negligence which was a purely legal concept, the matter should be left for a legal determination by the courts. If it was more a question of a combination of legal and administrative issues, then possibly he would initiate an investigation. If the matters at issue were of purely a technical/engineering nature requiring adjudication of conflicting views by experts witnesses for both sides to determine where or not there was negligence, he would definitely refrain from getting involved. He took the opportunity to solicit opinions and comments from other participants in the discussion on the circumstances in which he, as an Ombudsman, could exercise his discretionary jurisdiction to investigate a matter that basically was more a question of law than it was really of administration.

Sir Brian Elwood (NZ) responded by mentioning his experience in dealing with similar matters in his own country. He pointed out that in the course of looking at a complaint involving the making of both a negligent and careless statement by the offending party, he had decided to exercise his jurisdiction and recommended an ex-gratia payment
without specifying an exact amount, leaving it to the complainant to negotiate with the complainee department - the Department of Justice - and leaving it to the complainant to come back if she could not resolve the amount with the Department. He explained that in so doing, he did at the beginning make an effort to explain to the complainant that he thought the matter at issue was one of law and that he, as the Ombudsman, would prefer it being settled in the courts through the making of a claim for negligence. The complainant had, however, argued that she should not be made to go to the courts to initiate legal proceedings because she did not want to risk her personal finances. She accordingly asked if the Ombudsman could pursue the matter as an administrative one. After weighing all the factors involved, he finally came to the view that a statement which was negligent and made in the course of administration was in fact one that he could properly investigate. He concluded his remarks by stating that in that particular case, the complainant eventually received a sum of (NZ) $60,000 by way of an ex-gratia payment from the Department of Justice.

Ronald Green (Tas) cited a similar case handled by him in Tasmania in which the Hydro-Electric Commission had, through what he perceived as negligence, failed to process an application for permanence. Owing to the state of the relevant legislation at the time, it meant that the applicant would miss out on being eligible to join the retirement benefits fund. He, on receipt of a complaint from the applicant, decided that he should be able to look at the matter not only because if was just grossly unfair but also simply because it was in his view legally negligent. He was after all authorized by his Act to investigate matters that were unlawful. If his decision to investigate was to be successfully challenged and found to be unlawful, he could then fall back on the fact that the investigation was necessary because the applicant had been treated unfairly and unreasonably. He further pointed out that what he would normally look at, as he did in that particular case, was the cost involved and the nature of the matter being either excessively complex or minor. If it was minor, he would take it and initiate an investigation. If the matter was excessively complex, he would not pursue it. He stressed that he did exercise his jurisdiction in that particular case and pursued it for a long time. The investigation was successful and ended up with the complainant being awarded an ex-gratia payment of (Aus)$150,000.00 from the Commission.
Eugene Biganovsky (SA) indicated that he had followed the same approach in his handling of a number of cases of a similar nature. In each of such cases, there was clearly an alternative remedy to the courts but he had invariably decided to consider its administrative aspects and secured, at the end, a remedy. One of these cases involved a housing trust agency which was under his jurisdiction. The agency sold a house built on highly reactive soil to the complainants. The house in due course developed structural problems but the complainants decided at first to pursue the matter by way of an ordinary complaint to the agency which turned out to be unsuccessful. They then turned to him for assistance. He was aware that there were good and valid reasons for the complainants to take the agency to court for a settlement but that the legal costs would be high and that they might not in the end secure an appropriate remedy through the legal avenue. Having considered such and other related factors, he decided to investigate and eventually persuaded the agency to purchase the house back at its original price from the complainants as if it were not so damaged which enabled the complainants to buy another house of a proper value. He firmly believed that there were always circumstances in which a complainant might not get a really effective and appropriate remedy by taking the "hard line" of instituting formal legal proceedings.

Peter Boyce (NT) responded by stating that he himself had gone through exactly the same experience. He nevertheless took the opportunity to caution his colleagues to be aware of situations where an Ombudsman's investigation could be inappropriately utilized by the complainant as a cheap "discovery process" for information relevant to his intended legal action. He indicated he had personally come across a case in which he had discovered that his Office was being so utilized by a solicitor.

Sir Brian Elwood (NZ) drew attention to the situation in NZ where any information gained as a result of an Ombudsman's enquiry conducted under the Ombudsman Act would not be allowed to be used as evidence in any court hearings. He pointed out, however, that he had another jurisdiction under the Official Information Act where use could be made of that Act to get information either as a purview to the issues of proceedings or even during the course of proceedings. He emphasized that his Office was nevertheless very reluctant to have the Official
Information Act used as an alternative to the so-called discovery process. He concluded that in terms of investigations conducted under the Ombudsman's Act, there was no such problem.

Robert Eadie (WA) recalled that Mr Jack Richardson, the first (Australian) Commonwealth Ombudsman in one of his earlier annual reports, did set out some useful criteria for the exercise of the discretion in these cases. He recommended such criteria, described by him as both helpful and practical, to all the participants. He believed that the same criteria had also been referred to in a book entitled Federal Administrative Law written by Professor Dennis Pearce, another Commonwealth Ombudsman.

Eugene Biganovsky (SA) added that in the Australasian region as he understood it, one could not get damages in public law for ultra vires actions. He was aware that the situation in Canada was somewhat different and the courts there had indeed awarded damages for ultra vires actions. In any event, he was of opinion that an Ombudsman should be able to exercise an option to intervene and deal with matters by way of providing recommendations for ex-gratia compensation to complainants aggrieved by ultra vires actions.

Anand Satyanand (NZ) commented that in NZ any claim for jurisdiction in arguable circumstances by the Ombudsman could result in an action mounted in the courts by way of a judicial review and that the problem could then be judiciably defined and resolved.

Sir Brian Elwood (NZ) endorsed Judge Satyanand's view and added that although the courts in NZ, including the Court of appeal, had indicated their reluctance to sit on the shoulders of the Ombudsman when he exercised his jurisdiction, they would, whenever necessary, look at the question whether or not he indeed had such jurisdiction. He opined that the problem raised by Dr Perry could be determined by a court if the complaint involved a major issue. However, he stressed that his decision to intervene in the case involving the Department of Justice, referred by him earlier on during the discussion, did not meet any challenges. Both
parties, the complainant and the Department of Justice, were indeed satisfied with the exercise of his jurisdiction in that particular instance as an alternative to making a claim for negligence against the Department by the complainant in the courts.

K K Wong (HK), on the request by the Chairman, briefly introduced the relevant provisions in the COMAC Ordinance governing the exercise of his discretionary power to investigate complaints which might have alternative legal remedies in a court or tribunal. He pointed out that COMAC would not normally investigate a complaint where an appeal or objection could be made to any tribunal or board, or where a remedy was available to the complainant through the courts other than by way of judicial review, unless COMAC himself was satisfied in the particular circumstances that it was not reasonable to expect the complainant to resort or have resorted to such legal proceedings. He stressed that COMAC was given a very wide discretionary power to determine whether a complaint was within his jurisdiction, subject of course to any judicial review to be taken by either party viz the complainant and the complainee department, in case of a dispute. COMAC could not and would not initiate any investigation into any complaint where a court action had already been instituted.

Abdul Shakurul Salam (Pakistan) commented that the jurisdiction of the Ombudsman in Pakistan in this particular aspect was more or less the same as the described by K K Wong. There was, however, one difference. He explained that unlike COMAC in Hong Kong who was appointed under an ordinance, his counterpart in Pakistan was appointed by way of a Presidential Order issued under the national constitution with the consequence being that any decision made by the Ombudsman would be final and immune to challenges in any court, tribunal or before any authority. The courts could only entertain petitions against the Ombudsman made in very restrictive circumstances, e.g. if and when it alleged that what the Ombudsman had done in a particular case was completely outside his jurisdiction. He further commented that when dealing with complaints involving adjudication of conflicting evidence and requiring ascertainment of facts through, for instance, cross-examinations of witnesses and the production of expert opinions, he would personally prefer to referring the complainants to the courts for settlements if they
could afford to do so, thus enabling himself to have more time to handle complaints from the poor and the uneducated.
ADMINISTRATIVE ACTION VS POLICY - MUTUALLY EXCLUSIVE?

A paper (Appendix 4) on this item from Fred Albietz had been circulated prior to the conference.

Fred Albietz (Qld) opened the discussion by pointing out that in Queensland there had been a challenge to his authority on the basis that the matter under investigation was not a matter of administration but that of policy. He continued by referring to his discussion paper in which two Australian cases supporting the proposition that matters of policy were different from those of administration were outlined. He added, however, that there were dissenting opinions expressed by Canadian courts. In his opinion, the controversy had arisen primarily because the term "matters of administrative" was clearly defined by legislation whereas that for "matters of policy" was not. He opined that much of the difficulties currently being experienced in distinguishing between policy and administration would be resolved were the word "policy" identified and explained with more particularity. He elaborated that in his paper, he attempted grouping "policies" into three broad categories. The first was what he would truly describe as government policy which involved making value judgements on matters like the allocation and distribution of resources. The second contained those providing procedural guidelines as to how various statutory discretionary powers might be exercised by the departments concerned. Those in the third category would provide, on the other hand, guidance as to a preferred interpretation of a statutory provision to eliminate ambiguity. According to his own analysis, genuine government policies, i.e. those within the first category, should fall outside an Ombudsman's jurisdiction but not the other two. He further pointed out that in terms of issues relating to local governments, there was, as indicated in his paper, a recent Court of Appeal decision in Queensland which made it very clear that the local law-making process was in fact an administrative action and should therefore not be caught up in this argument. He concluded his opening remarks by re-stating his firm view that an Ombudsman should not intervene in matters which were truly government policies and vice versa.
Robert Eadie (WA) commented that he had personally found Mr Albietz's paper very helpful as its contents were pertinent to a discussion which he had had during his visit to a member of the staff of Ms Dulcie McCallum (of British Columbia)'s office on the extension of the ombudsman's jurisdiction relating to municipalities in Canada. He, however, took the opportunity to query Mr Albietz on the reason(s), if any, for the inclusion of the phrase "unconnected with a statutory function" which qualified his statement at the very end of his paper.

Fred Albietz (Qld) responded to Mr Eadie's query by stating that he would take that phrase out if the paper was to be re-written.

Eugene Biganovsky (SA) joined in the discussion by drawing attention to the background of one of the two Australian cases referred to in Mr Albietz's paper, i.e. Salisbury City Council v Biganovsky (1990) 70 LGRA 71, to which he himself was a party. The case involved a dispute between him and the local council on whether he had jurisdiction over the policy of the council in relation to the use and occupation of council premises by community groups, etc. He stressed that no challenge was ever made to him at the outset and the challenge only came when he published his draft investigation report as the council obviously did not like his recommendations. The matter eventually went to the Supreme Court not by way of a judicial review in the ordinary sense because there was already a provision in the (SA) Ombudsman's Act that provided for jurisdictional challenges. During the course of the hearing, the judge who heard the case was referred to the Canadian case of Friedmann 1984 14 CLR 129 (which supported a broader interpretation of the term "matter of administration") and (the more restrictive) Victorian position. In his opinion, the judge himself at the end was a little lost in the so-called "hills and dales" of the much disputed policy-administration distinction. He, the judge, did, however, conclude the case by making a ruling to the effect that the Ombudsman could not investigate policy per se but that once there was an administrative "hook"(sic), the Ombudsman might investigate and it would be in the proper exercise of the function of the Ombudsman to draw attention to the policy in his report if he felt it was "rotten".
The Chairman, Andrew So (HK) concluded the discussion by commenting that the crux of the matter was how to decide, in the spectrum of any policy cum administrative issue as to when policy ended and administration began. He regretted that such was often a grey area that an Ombudsman had to contend with. In any event, in order to conduct a really thorough investigation, an Ombudsman was often required to look at both the administrative procedures as well as the accompanying legal position. In this respect, one had to be aware that what was legal might not be necessarily reasonable. In addition, when an Ombudsman felt that there was a need for him to pronounce his own value judgement on a certain policy and declared it to be "rotten", he was simply stating his position and not asking for the policy to be reversed. Such was the situation he as COMAC had to face in Hong Kong.
11. IMPLICATIONS FOR THE OMBUDSMAN OF THE ROLE OF THE UNIVERSITY "VISITOR"

A paper (Appendix 5) titled “The University Visitor” from Robert Eadie (WA) had been circulated prior to the conference.

Robert Eadie (WA) introduced his paper and cited his observation made in Western Australia wherein persons with grievances against universities have a choice of approaching the university visitor or the Ombudsman. He highlighted the practical implications arising from the visitor concept, and in particular, the problems concerning the overlap of the two roles between a visitor and an Ombudsman.

Fred Albietz (Qld) said that the university visitors in Queensland and New South Wales performed purely ceremonial roles. Peter Boyce (NT), Ronald Green (Tas) and Eugene Biganovsky (SA) shared a similar observation. Sir Brian Elwood (NZ) said that the New Zealand visitor was the Governor General and as a university visitor, he performed both ceremonial and substantive roles. He was not aware that his office had ever been brought into any area where the visitor’s jurisdiction had been declined and his office had been requested to take over. Barry Perry (Vic) noted that the Governor of Victoria was the visitor whose jurisdiction had declined recently on the basis that the matters were more appropriate to the Ombudsman. He saw no problem in Victoria in this respect so far.

Robert Eadie (WA) pointed out the undesirable phenomenon that the position of the Governor itself might in some way be adversely affected as a result of the Governor’s handling of some high profile complaint cases wherein complainants could hardly be contented whatsoever. Also, he observed that there was a resource implication in the light of the growing tendency that persons who remained dissatisfied with the outcome of the Ombudsman’s investigation of their complaints about universities would resort to the Governor in his capacity as the visitor. He therefore suggested the possibility of making the role of WA’s
university visitor more ceremonial rather than substantive.

Anand Satyanand (NZ) said that as universities tended to become multi-campus organisations and some campuses might even go across various States, the question of whether an individual’s grievance about a university would be dealt with by one visitor or visitors/Ombudsmen in other countries would be an interesting subject to be looked into in the future.

The Chairman, Andrew So (HK) said that, in Hong Kong, it was not within COMAC’s jurisdiction to deal with complaints about universities. He found that most of these complaints currently lodged with the court or relevant councils were on personnel and conditions of service matters over which he did not have jurisdiction.

Sir Brian Elwood (NZ) noted that on employment related matters, ombudsmen would inevitably refer them to relevant tribunal/court for dispute resolution. Ombudsmen should not get too much involved in these university issues on the basis that there was a satisfactory alternative mechanism available within the university to sort out the matters. Mrs Jill McIvor (UK) endorsed the view that Ombudsmen might not be in the place to put the issues of the higher education sector under their ambit.

Guang-qin Ji (China) shared the observation that, in China, there were designated offices under the ambit of the Ministry of Supervision or other supervisory organisations for supervising the conduct and disciplines of the personnel in universities. Jorge Luis Maiorano (Argentina) expressed that the issues in the university sector were special in nature. Currently, the constitution in Argentina provided the national Ombudsman with jurisdiction to investigate such complaint cases. Abdul Shakurul Salam (Pakistan) said that the Ombudsmen in Pakistan were extremely cautious in exercising jurisdiction over university matters. Investigation was limited to cases arising from student grievances only, not in personnel and appointments matters. Recommendations would not be made on these cases and the university authority would be requested to settle the issues satisfactorily.
Young-rim Jee (Korea) said that the Ombudsman’s Office in Korea did not have jurisdiction over universities in matters of complaint. Chaiwat Wongwattanasan (Thailand) noted that the universities in Thailand were government organisations. While respecting their liberty over academic and curriculum matters, their administrative operations were subject to laws like other government agencies. He expected that the Ombudsman’s Office in Thailand would have jurisdiction over universities in the future.

Hisao Tsukamoto (Japan) said that the Management Co-ordination Agency (MCA) in Japan had jurisdiction over national universities, but not local universities. Since that there was constitutional guarantee of academic freedom, it would not be the MCA’s jurisdiction over academic matters. Regarding employment matters, there were employment grievance procedures under the Public Services Laws.

H H Kantharia (India) expressed that in India, the Ombudsman had no jurisdiction over universities. However, the Ombudsman could exercise jurisdiction to handle complaints arising from employment matters in government colleges. Simon Pentanu (PNG) said that the Ombudsman in Papua New Guinea had jurisdiction over the chancellor of the university as well as the members of the university council.

Dulcie McCallum (Canada) shared her observation in British Columbia that the Ombudsman had jurisdiction over universities and colleges for about 1½ years. Prior to that time, the Ombudsman only had jurisdiction over some of the large universities by virtue of the way on which their boards were constituted and appointed by the government. In those cases where the Ombudsman had no jurisdiction, the notion of visitor had been used to oblige the university authority to provide remedy.

Kam Chiu Ng (Malaysia) said that universities in Malaysia were government bodies where the chancellors and vice-chancellors were appointed with the consent of the government. The Ombudsman had jurisdiction over matters such as abuse of power, fraudulence of entry qualification, etc. However, matters concerning curriculum and
performance of academic personnel were under the supervision of the Ministry of Education and outside the jurisdiction of the Ombudsman.
An executive summary (Appendix 6) of a paper titled "Ensuring ethical standards in public life: responsibility and accountability of parliamentarians and other public officials" from Simon Pentanu (PNG) was tabled at the conference.

The Chairman, Andrew So (HK) suggested and members agreed that items 12 and 13 would be discussed together.

Eugene Biganovsky (SA) highlighted the issues pertaining to the involvement of the Ombudsman in the formulation of the Code of Conduct for public officers, particularly, in the area of conflict of interest. He invited members and observers to provide him with information and materials on this item to contribute to relevant conferences in the future.

Simon Pentanu (PNG) briefed members that his paper had been presented to the Commonwealth Parliamentary Association Seminar in May 1995. He highlighted that in Papua New Guinea, the Ombudsman Commission was established directly under the Constitution and was not subject to direction or control by any person or authority. The Constitutional Planning Committee gave the Commission the jurisdiction to supervise the enforcement of the Leadership Code which applied to a wide range of public office-holders in the upper echelons, including the investigation of political corruption. Within the Leadership Code, specific ethical standards were set out in the form of a detailed set of provisions in the Organic Law on the Duties and Responsibilities of Leadership. The enforcement of these Constitutional Laws, and ethical standards entrenched within them, was not, of course, simply a matter of
investigating corruption and referring leaders for prosecution. The Commission could in effect educate the general public on the requirements of the Leadership Code, and could even influence the election of leaders. While the three Ombudsmen in Papua New Guinea were also subject to the Leadership Code, there was still the question that there was no established mechanism to oversee the conduct of the Ombudsmen. Further, the vigorous enforcement of the Leadership Code would possibly be at the expense of the performance of the Ombudsman’s traditional roles. Given the anti-corruption work done by the Ombudsman Commission, especially in many cases against politicians, it was understandable that the Commission was in a less advantageous position in bidding resources from the government.

**Dulcie McCallum (Canada)** shared her observation that there were a growing number of officers of legislature in British Columbia. The incumbent of the Conflict of Interest Commissioner was approved by the Legislative Assembly and then appointed by the Premier. The Commissioner’s Office was a small operation with one supporting staff member only. He had no jurisdiction over the local government. The focus of his work was only on the conflict of interest matters in relation to the elected members of the Legislative Assembly. Therefore, she would also handle complaints about cases involving conflict of interest by elected officials for School Boards, Hospital Boards and local government authorities, etc. The question regarding the jurisdiction of the Commissioner and that of her office would become more complicated when local government councillors were involved. It would depend on which role they performed at the time when the decision was made. She was grateful that the Commissioner was very helpful and that he would serve as her adviser in handling cases related to local elected officials on conflict of interest matters.

**Sir Brian Elwood (NZ)** emphasised the importance of creditability of an Ombudsman and urged caution in the language used in this regard. It would be advisable not to move outside the traditional area of commenting on the reasonableness of administrative actions. On the subject about ethical standards and morals, he suggested that an Ombudsman should rely on revealing the facts to speak for themselves. From the facts identified, he/she could draw conclusion within the
framework of his/her power. He cited his observation in New Zealand’s local government and pointed out that it was an Ombudsman’s duty to remove the potential of abuse of power, particularly at the political level. By setting out a framework for a separation of roles, politicians were to work on policies in an open environment, and officials/professionals within the local government system were to implement the policies. In other words, the citizens would approach the system only, but not the politicians, when they sought services from the local government. The politicians were given an auditor role on behalf of the wider community to ensure that the officials/professionals and the system acted reasonably, fairly and lawfully within the framework of policies. As an Ombudsman, he/she should look at the system and the structure of the system in order to avert the potentials for abuse of power that were often present in a situation where there was a confusion of roles. The Ombudsman was not in the place to have power to penalise any politician who went beyond the accepted norm of behaviour. Instead, as in New Zealand, it was the duty of the court or the Auditor General.

Jorge Luis Maiorano (Argentina) emphasised that the Ombudsman concept must be put into context within the government machinery in existence. In Argentina, identified misconduct would be brought to the court. In this respect, he considered that an Ombudsman had a responsibility to ensure ethical standards required for good governance.

Robert Eadie (WA) took the point that it might not be appropriate for an Ombudsman to interfere in the discretion and judgement made by the elected members and officials in local government provided they had not infringed the criteria enshrined in laws. Abdul Shakurul Salam (Pakistan) endorsed the view that as an Ombudsman, one should rely on facts and observe the principle of objectivity when passing judgement.

Ninchib Tetang (PNG) said that in Papua New Guinea, the Leadership Code was brought in for complementing the complaint jurisdiction of the Ombudsman Commission with a view to ensuring that the political leaders were held accountable for the conduct within the political system. As regards the control over the conduct of the Ombudsmen, he added that there was a provision in the Constitution which clearly set out the
conditions that would lead to the disqualification of an Ombudsman from holding his public office.

**Mrs Ferrieux-Patterson (Vanuatu)** endorsed the view that the Ombudsman should basically rely on facts to speak for themselves in the course of the investigation work. In her sphere, she also expressed concern about the lack of knowledge of the ethical standards in public life and about the resistance she would have in exercising jurisdiction in this respect. She also considered that the appointing authority of the Ombudsman could be taken as an effective mechanism for check and balance purpose.

**Maiava Toma (W Samoa)** shared the view that there should be a separation of roles between politicians and public officials. He noted that W Samoa was similar to Papua New Guinea in that politicians exerted influence on the administration of public service. **Simon Pentanu (PNG)** also expressed concern about the political influence in public administration in Papua New Guinea. He emphasised that the appointment of officials should be based on merits, and cited an experience where his office had won a court case against the Government for non-compliance of appointment procedures in consulting the Public Services Commission. **Fred Albietz (Qld)** noted that the introduction of legislation to govern the code of ethics in the public sector was vitally important to prevent misconduct.

**Frank Pororara (SI)** raised the question as to who should be in the place to set the ethical standards for politicians. In his sphere, he commented that voters might not be well-informed as expected. **Robert Eadie (WA)** quoted the example in New South Wales that there were amendments to the legislation to require the state parliament to set up an all-party committee for the purpose of preparing and enforcing a code of conduct for members. **Ninchib Tetang (PNG)** said that apart from the Leadership Code, the Constitution in Papua New Guinea also provided a set of specific provisions to forestall the maladministration functions by politicians.
Peter Boyce (NT) highlighted a case in Western Australia where several Chief Executive Officers of government departments who were found to align themselves more with the direction of the political leader than good administrative principles. The message brought around was positive as they suffered the ultimate sanction of criminal prosecution. He also noted that the Ombudsman’s Office in New South Wales had recently published some documents outlining the guidelines for good administrative conduct and practices both for public servants and local government bodies. They were a collection of examples of real life situations examined by the Ombudsman over a period of years and gave good practical advice in this respect. These publications would be useful to colleagues in other countries.

Sir Brian Elwood (NZ) suggested that to tackle the problem in relation to the biased decisions by local elected officials, the Ombudsman could initiate to restructure the local government into a small number of stronger units and to underpin these units with a mechanism, like a community board, allowing for political input from the local community. The philosophy was to have the units of the local government strong in an administrative sense with sufficient number of competent people for the work. This would help avoid the potential for conflict of interest within both the political and administrative mechanisms.

Eugene Biganovsky (SA) endorsed the view that there should be a division between political and administrative roles. The concept of reasonableness, in his view, was not limited to the provisions set down by laws. With ample case experience, the Ombudsman would continue to play a variety of roles in the formulation of the code of conduct and ethical standards in public service.
A paper (Appendix 7) from Fred Albietz (Qld) on this item had been circulated prior to the conference.

Fred Albietz (Qld) initiated the discussion by highlighting that in the past 13 years or so the Queensland Ombudsman had engaged outside consultants to provide professional/technical advice to assist in resolving complex cases. There had been nine occasions on which expert advice had been sought and his paper quoted those cases where advice from external consultants had been obtained. The Office had funded QC’s legal advice for challenges to the Ombudsman’s jurisdiction. Very often they had to defend the challenge seriously. The bulk of legal work had been done in-house and in the office. Where an agency relied upon professional advice, the Ombudsman could accept the advice or should it be unsatisfactory, other professional opinion in the same area of expertise, whether it be engineering, surveying or medical, needed to be obtained. The practice of engaging external consultants had been very successful for certain cases. He was interested to know the extent which other jurisdictions used external, professional advice to help resolve complex cases, particularly in Hong Kong where panel advisers had been in operation.

K K Wong (HK), at the request of the Chairman, briefed members about the Hong Kong system. COMAC had three panels of advisers: engineering, medical and legal. This was a relatively new innovation when compared with some other jurisdictions: all the panel advisers held honorary appointments and were not permanent staff of COMAC. They did not receive any remuneration for their work which was a community service. Though COMAC did not deliberately seek to be involved in investigating professional decisions/judgements, there were complaints concerning engineering matters, medical service or patient care etc which involved maladministration. It was therefore useful to have sound professional advice before a decision was made as to whether the complaint was substantiated. In this connection, all the possible
alternatives had been considered. It was neither feasible nor practicable for the staff to possess all the expertise which might be required, given that the incidence of seeking professional advice was infrequent. Legal advice was required, on some occasions, for some complicated matters although COMAC did have some legally trained staff. As regards medical advice, the scope might vary considerably so that no single medically-qualified advisor could render all the advice required. Given that the advice should be authoritative and independent and that the adviser should be of sufficient standing, it would be too costly to equip the office with all the necessary expertise amongst its staff members. In the early days, COMAC tried to engage some professionals and honoraria were paid for their consultancy sought. On the expansion of COMAC's jurisdiction, the three panels of advisers were instituted. Advisers on the legal and medical panels were mostly academic people working in the universities while those who served on the engineering panel were largely professionals in private practice. As regards conflict of interest, Hong Kong had not had such a problem since the advisers were not working in the Government. The legal advisers, being non-civil servants, were to review the legal advice given to the Government in the context of the complaint, whereas the engineering advisers, in their private practice, would not normally have any conflict of interest in the cases in which their advice was sought. As for the medical advisers, they gave their independent advice for complaints lodged against hospitals. There were two teaching hospitals in Hong Kong. Should circumstances require, the medical advisers in the hospital would be requested to give independent comment and advice on the complaint lodged against the other hospital. In accordance with the relevant guidelines circulated to the panels of advisers, they were obliged to declare their interest, if any, when rendering their service. In case of any conflict of interest, the case would be assigned to another adviser. The system had so far worked very well. Even though there was no particular case for advice, seminars would be organized periodically to discuss problems of mutual interest and concern. The advisers treasured the chance to serve the community through the investigation by COMAC. They found their work rewarding and were more than willing to serve on the panels. This was well reflected by the majority of the legal and medical advisers who having served on the respective panel for one year, agreed to serve for another term of two years.
Eugene Biganovsky (SA) was interested in knowing more about the Hong Kong system by raising three questions regarding (a) the form of advice given - whether it was written advice and whether the advice was given as specific or general instruction; (b) the need for confidentiality - how to ensure confidentiality when an outside person was engaged in giving his advice to the ombudsman who had the legal and ethical obligation for paramount confidentiality in discharging his duties; and (c) the conflict of interest - he had not resolved his mind as to how this could be avoided on practice.

K K Wong (HK) replied that concerning the form of the advice, there were on average twelve advisers on each panel who worked on a roster basis in order that cases were evenly distributed. Depending on the nature and complexity of advice sought, different methods were used. Telephone calls were made for simple cases. In the event of more complicated cases, briefs on the complaint were prepared for the information of the adviser who was requested to give advice and/or comments on specific point or question raised. The adviser then provided written advice which was useful and sometimes in pages as in the case of some legal advice. As to confidentiality, COMAC was very careful and concerned about this. Advisors were formally appointed, under the COMAC Ordinance, as staff of COMAC. In so doing, they were subject to the secrecy provision of the ordinance. Simultaneously they enjoyed the immunity conferred by the ordinance and would not be liable for any damage caused by their advice given to COMAC. Regarding the conflict of interest, the advisers were provided with notes and instructions which alerted them of certain areas they should watch out for. For instance, the legal advisers were reminded that they could not represent either party in cases which they had advised on for subsequent litigation in court.

If there were situations where the matter for advice fell outside the expertise of all the advisers, the duty adviser would be asked to nominate any other suitable person who would be in a position to give the specific advice. Subject to the consent of the person concerned, he might be appointed to be COMAC's adviser for that particular case, or treated as a professional providing consultancy to COMAC. In the latter case, the information supplied to the consultant would have to be screened by COMAC and the duty adviser so that only those data which were necessary and relevant to the consultancy (instead of the full information...
on the case) were provided.

On Eugene Biganovsky's further enquiry as to how the advice was taken in totality, K K Wong elaborated that COMAC tended to approach and visualize the problem from an ordinary person's point of view and that the professional advice so sought would not necessarily be binding on him. Instead COMAC would exercise his judgement and discretion, having regard to the professional advice, in drawing up his conclusion.

Mrs Ferrieux-Patterson (Vanuatu) responded that because of limited resources and scarce professional knowledge, professional advice was used extensively in the country. There were three categories of the professional advice she obtained: private, bilateral and international. On the private level, there were not many professionals in her country and most of them were expatriates. They, being expatriates, wished to stay away from an ombudsman and did not want to be involved in the ombudsman's investigation. She cited some examples of seeking professional advice from a public department for the prisons, which were falling apart, and from an engineering company in the area of building condition. She was prepared to hire some professionals to valuate the fifty government houses which were put on sale, so as to compare with the valuation worked out by the government. Bilaterally and internationally speaking, she had made a variety of contacts with the Legal Counsels in Papua New Guinea because there was not any legal counsel in her country. In addition she contacted the British Commission on such specific things as the establishment of a charter and code of conduct for comment, etc. On the international side, professional advice was called for specific problems such as trades and the trade procedures. She had been so fortunate as to be helped by the United Nations which sent some experts specializing in criminal justice and prison to her country to render advice on the problem, the approach and the standard which should be reached and advise the people with whom she worked, e.g. the police. She went overseas for medical advice since this was not available in her country where the superintendents of the hospitals were not capable nor willing to make any decision or conclusion for the cases concerned.
Ronald Green (Tas) informed that he had certainly made use of external consultants in Tasmania. The Act allowed him to breach the normal rule of confidentiality if it was necessary, in the course of his investigation, to reveal the details of the complaint. The Act also allowed him to disclose the information with the permission of the complainant or the party concerned. These helped him to overcome the problem of confidentiality. By citing an example whereby engineering advice was needed in relation to a flooding problem, he pointed out that for most of the time, it was not necessary for the consultant to know the name of the complainant and the exact details of the complaint. He used external professional advice in two main areas: (a) for such area as engineering, medical or legal, when expertise was required to help make a judgement for a certain complaint and (b) for finalizing a critical and controversial report. In the latter case, he usually obtained free advice from a prominent expert of very high standing e.g. professor in an university via a lunch. This seemed to be the best way to diffuse his critics since advice from a prominent expert had been sought for controversial issues. On occasions that such advice could not be made available from an appropriate professor or from a public branch, his Office had to pay someone for the professional advice after negotiation for a reasonable return. Due to the lack of funds, he was more inclined to seeking the utmost co-operation from experts in the universities and public service.

Barry Perry (Vic) reacted that his office was cautious in avoiding technical arguments in engineering matters. In the light of his Office’s actual experience, he opined that it was desirable to have an expert to sit back and judge the case from an arm’s length if the staff of an ombudsman’s office possessed some expertise in a certain area. An ombudsman was not to form any standard on the basis of perfection but should act according to laws and what was reasonable. On the other hand, he had encountered some difficulties in complaints against police since those who had the scientific expertise were either employed by the police or worked under the contract of the police. He quoted a case situation that in the course of his investigation of the death of a person who was shot dead by the police, he was unable to find any forensic expert who was not associated with the police. Eventually he found an expert in the medical profession to help. He then cited another example whereby a person suffered from brain damage during a police interview. There was conflicting evidence as the view of the neurological expert
contradicted with the advice given by the forensic expert. He turned to the law society for a neuro-surgeon who was outstanding in his field so as to resolve the problem. His expert advice that the person could have suffered brain damage twenty-four hours before he was in the police's custody was well accepted by the parties concerned. Neither criminal nor civil litigation proceeded thereafter. He concluded that to resolve the situations, it would be very helpful to seek the advice of a prominent expert who was well recognized in the field since everybody was prepared to accept his advice. His advice to members especially his fellow Australian ombudsmen was that for a medical matter involving the police and should they have no expert of their own, the professional colleges would be more than willing to help.

Robert Eadie (WA) joined the discussion by stating that his office made use of internal expertise for legal matters as he was a lawyer and two other staff had legal qualification and backgrounds. In other areas, they had been able to persuade people who had expertise in departments, hospitals or equivalent to provide their advice free of charge. The people were chosen carefully, with consideration given to avoiding conflict of interest. In handling complaints against the police, his office had obtained helpful advice from the chief forensic pathologist of the state. However, such free service from one department or another could no longer be made available after the application of the user-pay principle. He made a recent submission to ask for a modest sum of money i.e. A$10,000 to be included in his budget to help pay the cost of consultancy services. Despite the very lukewarm support given him by the presiding officer, the other senior presiding officer who had been involved in one case and was also a Member of the Parliament did not realize the problem. It was believed that expert advice of authority and standing could be obtained outside the system. This had been done but the result was not satisfactory. He hoped that a modest budget provision would be made available to pay helpful authorities in certain cases.

In reply to the question raised by Abdul Shakurul Salam (Pakistan), K K Wong (HK) pointed out that in COMAC, an investigation report was to be prepared for every complaint being investigated and that where relevant and applicable, the report would present the concerned professional advice in the findings and the conclusion of the report before
the complaint was concluded. Given the COMAC Ordinance, the expert opinion given to COMAC could not be used as admissible evidence in court. Furthermore a copy of the report would be given to the complainee organization whose comments would be reflected in the report before COMAC drew his final conclusion. K K Wong further explained that the complaint was concluded by COMAC having regard to the professional advice given to him and that in case any party concerned including the complainant did not agree to the findings and conclusion of the report, he might advance his reason for an appeal. In the circumstances, COMAC would take into account the new evidence, if any, or review if any area had not been appropriately covered in the report before he decided on whether to uphold the appeal.

The Chairman, Andrew So (HK) endorsed K K Wong’s view and added that in the Hong Kong system, the findings and the conclusion of an investigation report constituted an independent opinion rather than a judgement and that there was not any intention to operate a court of law. Should there be any dispute, either the complainant or the complainee organization could ask for a judiciary review.

H H Kantharia (India) drew attention to the principle of natural justice in this context. He thought that the principle of natural justice would have been violated if the opinion of the complainant was not heard before his complaint was settled in the way mentioned previously.

The Chairman, Andrew So (HK) commented that this was a controversial issue which varied from one jurisdiction to another. In accordance with the uncontested way of resolving disputes, both the complainant and the complainee organization could be brought together to discuss the problem so identified and air out their opinion.

Anand Satyanand (NZ) responded to the philosophical issue by pointing out that the point raised about the principle of natural justice would be easily acknowledged by a person with a legal background. He said that there was a problem also of someone other than the Ombudsman taking responsibility for the ultimate decision. According to his opinion,
authority for the recommendation or the responsibility for the suggested answer should be shouldered by the Ombudsman. He argued that if the Ombudsman were to rely upon the advice of another person, then the Ombudsman’s decision would be subject to review in the Courts.

Jorge Luis Maiorano (Argentina) shared his experience in Argentina that the ombudsman had a wide jurisdiction which contained human rights including protection of the environment, protection of consumers and the conduct of administration. They organized an institution which had staff with inter-disciplinary professions e.g. legal, medical, accountant analyst, social analyst, engineer and specialist in environment. Although the staff were capable of fulfilling the professional advice required, it was necessary for the ombudsman to seek some external expert advice. The advice so obtained was not binding on the ombudsman who made the decision. If a complainant was not considered as a party involved in the legal sense, he did not have any right to go to court for a review of the ombudsman’s decision. As such, the ombudsman did not have any legal deliberation and he tackled the matter from a moral point of view: In cases where the complainants were the parties concerned, the ombudsman had to follow the judicial procedure. The major characteristic was that the ombudsman was informal in his procedures whereas they emphasized on human means, not necessarily procedures.

Eugene Biganovsky (SA) followed up the discussion by putting forward two questions: (a) who paid for the external professional advice and (b) the handling of conflicting advice if the complainant got professional advice of his own. In his reply, K K Wong (HK) said that in Hong Kong, only the person who was individually aggrieved could take the complaint to COMAC. There were cases put forward by some solicitors which were however not entertained because they were not the persons individually aggrieved.

Ronald Green (Tas) pursued the question of natural justice which he thought was important. According to the procedures of his jurisdiction, he requested the external consultant in the beginning to express his report in such a way that he could provide it to the complainant. As to conflict of advice, he told the complainant that he could challenge the professional
advice if he had obtained different advice elsewhere. In dealing with conflicting advice, both the complainant and the complainee organization were asked to come in and to confront each other if they so wished. They would be asked to bring the matter to court if the ombudsman was not in a position to make any conclusion.

**Dulcie McCallum (Canada)** commented that the Hong Kong panel system was very interesting and creative. She shared her perspectives that in seeking external professional advice, there might be issues for cases where the government wished to obtain expert advice and that it would be dangerous if the government intended to stand on the legalistic point of view. She therefore tended to force the government to resort to independent advice of its own and to obtain it in the beginning. This could also help solve the financial problem of who should pay the cost of the consultancy. On the other hand, a number of professional bodies e.g. doctors, lawyers etc. came under her jurisdiction. She was interested in establishing an advisory committee and wished to know whether other systems had a similar jurisdiction and if affirmative, how it was managed in this context.

**Eugene Biganovsky (SA)** responded that all those professional bodies were under his jurisdiction and it was necessary to decide how far to go. He also drew information from other professionals. There should be opportunities for the aggrieved parties to appeal in court if necessary although this might be tricky sometimes. This explained why the external professional advice needed to be sought informally during lunch.

**K K Wong (HK)** reacted to Dulcie McCallum’s comment on asking the administration to get professional advice by pointing out that the idea was appealing but might not be sufficient and practicable in Hong Kong because such advice would not be accepted as independent. He cited an example concerning a complaint for patient care to illustrate that because of the hospital set-up in Hong Kong and the culture, the review of the complaint by another doctor and/or the Public Complaints Committee of the public organization would merely be regarded as an in-house review and not an independent one.
The Chairman, Andrew So (HK) added that the Barristers’ Association and the Law Society had been approached to see if professional advice could be provided but the cost of their consultancy was required. In the circumstances, he contacted the universities and succeeded to enlist the assistance of the academic people whose free services were found to be very useful.
A paper (Appendix 8) on this item from Ms Philippa Smith (Cwth) had been circulated prior to the conference.

The Chairman, Andrew So (HK) opened the discussion on the issue. He invited Eugene Biganovsky (SA) to give some background information to Members about the OMBIS which was a computer database supporting the work of ombudsmen.

Eugene Biganovsky (SA) briefed Members on the history and objective of the OMBIS. The suggestion for such a database was first raised and discussed at the APOC held in Papua New Guinea. The idea was to establish a register of all the useful information, including papers and documents, held by different ombudsman offices. The register would enable ombudsman offices to access to the information held in other ombudsman offices when necessary. The mechanics and funding of the proposed database were further discussed and developed at subsequent APOC meetings and it was decided that the idea should be pursued. OMBIS was then established with the information supplied from all jurisdictions. The database was available in both hard copy and computer disk. It was available to all ombudsman offices, including those outside the region, through subscription.

As one of the noble objectives of OMBIS was to assist newly established offices to gain access to useful information held in other offices, Eugene Biganovsky asked if Members were aware of the OMBIS and had made use of it. He also requested Members' cooperation in continuing to supply the necessary information to OMBIS in order to maintain the database. On the increase of subscription fee proposed in the OMBIS Report, he considered that it might be more appropriate for the matter to be discussed privately.
Eugene Biganovsky also took the opportunity to ask members to respond to a separate survey conducted by the IOI on the profile of ombudsman offices for the compilation of an up-to-date ombudsman directory which would be a very useful resource.

Mrs Ferrieux-Patterson (Vanuatu) found the OMBIS a useful database and she had used it for reference of legislation when she prepared for the set-up of her office.

Sir Brain Elwood (NZ) suggested that the Chairman ascertained from Members if there were any objections to the continuation of the OMBIS. In this connection, he noted that Anand Satyanand had indicated his interest in helping to review the direction the OMBIS was taking and bring in new perspective of what was available and what could be achieved. On the proposed increase in the subscription fee, he considered that if the system was to continue, it would be necessary to accept the cost consequence identified in the OMBIS Report.

The Chairman, Andrew So (HK) said the proposed increase was AUS$50, i.e. from AUS$400 to AUS$450 per annum. He asked if Members had any objection to the modest increase.

Mrs Ferrieux-Patterson (Vanuatu) commented that every office would have its budgetary considerations in subscribing such database but would need to pay for the service in any case.

Ratu Jone Cure Mataitini (Fiji) sought clarification on whether the increase would apply flatly to all Members irrespective of the frequency of use. He asked whether something like a sliding scale could be considered because some offices were using the database more than the others.

Sir Brain Elwood (NZ) advised that only an annual subscription fee was charged and no fee was charged for use of the database. The idea of a fix
and flat fee was considered as the most equitable on the basis that if there was any inequality, it would be addressed subsequently. He therefore considered that the question of inequality of contribution should be pursued on an individual member basis outside the forum of a formal debate.

**The Chairman, Andrew So (HK)** confirmed with Members that there was no objection to the continuation operation of the OMBIS. It was agreed that the increase of subscription fee proposed in the OMBIS Report should be adopted.

**Eugene Biganovsky (SA)** asked whether other regions had something similar to OMBIS and suggested that the idea be considered if such database was not already in place.

**Jorge Luis Maiorano (Argentina)** said that the concept of ombudsman had been widely spread in Latin America in the past few years and only three Latin American countries had not yet had their ombudsman offices. He supported the idea of OMBIS for the Latin American Region because it would facilitate the sharing and interchange of information between different institutions of different countries.

**The Chairman, Andrew So (HK)** noted from his recent visits to Puerto Rico and Mexico that a new conference was being set up for Latin American ombudsmen. He considered it more appropriate for the new conference to discuss and decide on the need for a database like the OMBIS for the Latin American region. He nevertheless would like to follow up on the question raised by Eugene Biganovsky about providing information on the profile of ombudsman offices to the IOI. While his office had completed the survey form and submitted the same to the IOI, he was concerned that the request of the IOI was only made on a loose sheet attached to the IOI Newsletter sent to members. Also, there seemed to be a lack of unified definitions for the terminologies used in filling the survey form. For example, there should be standardization in the meaning for terms like parliamentary ombudsman, executive ombudsman, industrial ombudsman and specialized ombudsman, etc.
Sir Brain Elwood (NZ) had the same observation and shared the Chairman’s concern regarding the IOI survey. He said that he and Eugene Biganovsky had raised the matter with the IOI with a view to bringing about improvement in its request for information from ombudsman offices. On the standardization of the terminologies used, he considered that it would indeed be a difficult task and it might be necessary for the IOI to simplify its survey form in future surveys.
A paper (Appendix 9) on this item from Anand Satyanand (NZ) had been circulated prior to the conference.

The Chairman, Andrew So (HK) invited Anand Satyanand to present his paper.

Anand Satyanand (NZ) went through his paper. In concluding his presentation, he emphasized that a programme of the kind he suggested would not endeavour to convey that this was the only one way of doing things but would rather be a vehicle to show that there were very often many ways in which appropriate results could be achieved. It was however important that a successful programme would have to be ombudsman led and ombudsman driven. He also recognized that this was a novel kind of idea to float into the ombudsmen community and it might take some considerable time for the matter to be considered.

The Chairman, Andrew So (HK) thanked Anand Satyanand for presenting his very novel idea and invited Members’ views on the subject.

Peter Boyce (NT) found the presentation stimulating. In his case, he lacked the kind of orientation the paper proposed when he took up his office. He nevertheless had the biggest advantage of knowing two ombudsmen when he took up his office and they had acted as his mentors. He therefore suggested that a mentor type programme be put into place for new ombudsmen. That is, somebody as part of the organization would contact the new ombudsman and letting the latter know that he would be the latter’s first point of contact and would be there to offer help when needed.
Eugene Biganovsky (SA) considered the idea presented a good one and he concurred with process presented. In his case, he also managed to find his mentors when he first took up his office.

Robert Eadie (WA) endorsed the views of the others and added that he wished that when he was appointed an ombudsman for the first time, he had the benefit of a careful analysis of the problems involved in the transition of the kind which was presented in the paper as it certainly provided plenty of food for thought. He himself had survived by trial and error but also had the benefit of having his colleagues to help him to find his way. He considered what was presented in the paper would be a useful aid to enable a new ombudsman to adapt to the different demands of a new role.

Mrs Ferrieux-Patterson (Vanuatu) concurred with what Peter Boyce had said. If there had been a guide prepared for her, it would have helped her more in taking up her new office. She was nevertheless lucky to find her mentors sending her documentation when she was appointed and have the opportunity to attend a conference a few weeks after her appointment. She considered that being a new ombudsman in the Pacific was even a more lonely and isolated job than those in Australia. She had a difficult time when she was new to her job trying to feel her way concerning even basic things such as presentation of reports. Orientation was therefore important for new people and more so for those in the Pacific Islands.

Maiava Toma (W Samoa) thanked Anand Satyanand for his presentation and endorsed the comments made by other ombudsmen. He added that the framework prepared by Anand Satyanand was very comprehensive. Any new ombudsman taking up his new job would be very wise to focus his work in a manner outlined in the paper. Referring to his experience, he commented that it would also be invaluable to have an experienced man around who could help and to know that the colleagues in the region were all very willing to offer assistance.
Sir Brian Elwood (NZ) considered the idea should be moved forward. He suggested that Anand Satyanand liaised with Philippa Smith with a view to adding this kind of programme to the information base available through the OMBIS and bringing forward a formal training programme for consideration at the next meeting in Argentina next year. This would enable Anand and Philippa to tap in people like John Robertson who would have time next year to devote to a project of this nature which would be close to his heart. Sir Brain further considered that given a commitment to concept, it would be possible at very reasonable cost to put together a programme at least initially in written form which could be supplemented by the mentor approach and if necessary a self-funding training programme which could be held from time to time.

The Chairman, Andrew So (HK) asked whether Sir Brain's idea was to move the motion from APOC to IOI if the intention was for the project to be further discussed in Argentina next year.

Sir Brain Elwood (NZ) replied that the idea should be kept as a regional initiative. In this connection, the recent IOI meeting had significantly advanced the importance of the regions in carrying out active programmes, so that a costly bureaucracy would not be created at the international level. The direction of IOI had indeed been changed from an international organization to an umbrella for strong regional organizations. Therefore, it would be entirely consistent to keep the idea as a regional initiative and have it regionally controlled. If other regions would like to pick up the idea, then that would be a matter of their choice. As to his suggestion that the project be further discussed at the Argentina meeting next year, Sir Brain explained that as a group, members of the conference would not meet until next year for any formal adoption. The concept could however be advanced by written communication and telephone communication in the interim.

Eugene Biganovsky (SA) drew members' attention to that Australian ombudsmen met each year at the day before the conference of the Australian Institute of Administrative Law. Members of the conference could therefore have the opportunity to meet in Sydney if they so wished. And since the concept just presented was so important and vital to the
interests of both existing ombudsmen and future ombudsmen, he suggested that members should meet in Sydney. Other parties who wished to join in could come. The meeting however would not be a meeting like APOC but would be for specific purposes. It would generally discuss matters of interest to the federal system and would be an appropriate forum for discussing the orientation project.

Sir Brain Elwood (NZ) said that he was not aware of the meeting in Sydney which would facilitate the involvement of his office and in particular Anand in the project. However whether Members should meet on that occasion would depend on what Philippa and Anand could report on progress of the project by then.

Robert Eadie (WA) commented that the meeting might be necessary because other matters could perhaps also be considered. The idea put forward by Eugene Biganovsky could therefore be developed to cover other matters of mutual interest and concern to members of the region.

Sir Brain Elwood (NZ) reiterated that there could be a meeting in Sydney if there were special matters to discuss. Otherwise, he did not consider that Members would want to extend the concept of formal meetings when it became of financial burden particularly for those members under budgetary pressure.

The Chairman, Andrew So (HK) suggested the meeting leave the venue for the formal meeting for the time being and asked if Members would like to put a formal motion for the subject discussed.

Anand Satyanand (NZ) thanked Members for their positive response to his idea and went on to register his experience in the development of the judicial orientation programme in New Zealand. In that project, he had derived considerable benefits through communication with other judges of the Pacific. For the present project, he noted that if the idea worked, the customers would be fellow ombudsmen from New Zealand, Australia and also those from the Pacific. Hence, colleagues of the region,
including those from Samoa, Solomon Islands, Vanuatu and Papua New Guinea should be involved in the development of the programme.

Eugene Biganovsky (SA) proposed a motion that

- Anand Satyanand to develop with Philippa Smith the programme on orientation and skilling of new ombudsmen, subject to consultation with all interested members of the Australasian and Pacific Ombudsman Conference; and

- to incorporate the programme into the OMBIS system.

Peter Boyce (NT) seconded the proposal.

There being no objection, the motion was carried.

The Chairman, Andrew So (HK) in concluding the item, shared with Members his experience when he first took up his office. He was certain that a training programme would be most helpful to new ombudsmen.
17. & 18. STUDY VISITS/ATTACHMENTS FOR OMBUDSMAN STAFF

WORKSHOP II FOR INVESTIGATION OFFICERS

Eugene Biganovsky (SA) moved the Hong Kong Motion titled "the orientation and skilling of new ombudsmen".

The Chairman, Andrew So (HK) seconded the motion and moved on to the subject of study visits/attachments of ombudsman staff as proposed by Frank Pororara.

Frank Pororara (SI) stated that the subject matter was more relevant for the Pacific Island ombudsmen than for the larger jurisdictions. It was found that an investigator interacting only with his own ombudsman with no external infusion of ideas might be learning bad habits as well. The idea of the motion was to have ombudsman staff of one Pacific Island jurisdiction to undertake study visits to another island jurisdiction or to Australia and New Zealand. One was aware of the financial implications of conducting such activities and the speaker's attendance of the present conference in fact owed much to the support and assistance provided by Australia. The funding of ombudsmen staff making such visits was understood to be available from amongst the various governments concerned if suitable proposals were tabled.

Mrs Ferrieux-Patterson (Vanuatu) also favoured a government to government approach because international commitments were considered more conducive to obtaining funding approval than an internal approach made by an ombudsman's office with its own government.

Ratu Jone Cure Mataitini (Fiji) explained that in Fiji there was a civil service training centre which was meant for public servants only. Fijian Ombudsman staff were appointed by the government and if one staff member went on a training course he would need to be replaced for the period by another civil servant. This would require government approval.
In 1994 a staff member was sent to Perth for the Ombudsman Conference but the ombudsman would not have control over his future deployment.

**Sir Brian Elwood (NZ)** stated that the aforementioned observation will be included as part of the final submission in order to emphasise the need for independence of the Fijian office.

**The Chairman, Andrew So (HK)** stated that there was no doubt the need existed for training ombudsman staff and investigators which raised the issue of funding. He understood funds for such training needs were available from various agencies of the UN, as well as from Canada, America and Germany.

**Mrs Ferrieux-Patterson (Vanuatu)** observed that her presence at this conference was aided by the Australian and French Governments and support was known to be available from also the Bangkok office of the UN ESCARP who aided PNG in the past and would also assist her own staff to visit PNG in the future.

**Ninchib Tetang (PNG)** recounted that the American Embassy in Port Moresby suggested the Asian Foundation as a funding source.

**The Chairman, Andrew So (HK)** believed that organisation was based in San Francisco and in this brain storming session all possible funding sources would be considered. The crux of the matter was whether obtaining outside funding in any way violated any principles.

**Sir Brian Elwood (NZ)** was also similarly concerned especially in view of the NZ budget cuts experienced in the last three years. The NZ Parliament was said to be sympathetic towards maintaining financial viability of the ombudsman’s office but Sir Brian Elwood to maintain independence would not go to the government for funds. In spite of the financial constraints NZ had offered assistance at cost by way of training courses to other ombudsman staff but the return air travel had to be
funded elsewhere.

The Chairman, Andrew So (HK) suggested that for PNG or Solomon Islands staff members to attend courses in NZ funding for air travel should be secured first.

Sir Brian Elwood (NZ) believed that varied from case to case but he would prefer it to be on a government to government basis as a development aid and not pursued through the ombudsman’s office to ensure independence and autonomy and that there was no pressure put on the ombudsman. On this basis he would unofficially support his government to offer assistance to another government in need of funding of transportation cost if it would make the approach.

Maiava Toma (W Samoa) was gratified that major jurisdictions expressed support of such an idea in aid of the smaller neighbours and a resolution passed to this effect would facilitate the issue being brought to the attention of the respective governments. The registering of such interest would enhance acceptance of the idea amongst nations leaving the ombudsman offices to make the training arrangements.

The Chairman, Andrew So (HK) wondered if the idea of setting up a regional foundation had ever been thought of in the past with the required funding being contributed by various governments for the specific purpose of training ombudsman staff.

Sir Brian Elwood (NZ) noted that there had been no formal set up as such and assistance in this regard on a government to government basis would not require the formal set up of such a foundation. A resolution was sought to reaffirm the willingness of governments to help each other in offering training courses on the basis that transportation costs remain self-funded by the offices requiring such training assistance. It is then for these offices to seek funding on a government to government basis and NZ would pursue that end independent of that application.
Peter Boyce (NT) indicated that it was not uncommon in Australia to go to the Federal Government for such funds and therefore he might be able to intercede more actively in this regard.

Barry Perry (Vic) and Ronald Green (Tas) observed that the said practice was more the exception than the rule.

Mrs Ferrieux-Patterson (Vanuatu) noted one disadvantage of the government to government approach was its slow progress and the fact that in smaller nations the ombudsman office was very much subject to the government’s decisions. External funding would offer more independence.

Eugene Biganovsky (SA) mentioned the tremendous success of the IOI funded Investigators’ Conference at Fiji which culminated in the publication of a manual now under worldwide circulation. As most of the colleagues present here were members of the IOI one would not want to overlook this source of funds.

The Chairman, Andrew So (HK) understood the priority to be to obtain funding within APOC on a government to government basis before attempting external sources. Prior to agreeing on a motion for the meeting on this subject, he sought the opinion of those present whether the promotion of the concept of ombudsmanship for the region should also be considered. He enquired further whether there existed an ombudsman office in Tonga or Pago Pago.

Sir Brian Elwood (NZ) felt that the region should indeed promote such a concept although that already would be the primary role of the IOI. He therefore suggested that while APOC concentrated on the training issue it should also offer support to the IOI, although these should remain two separate issues.
The Chairman, Andrew So (HK) doubted whether one should hold on indefinitely for IOI to play an active role, even though Sir Brian Elwood considered the concept was already being developed by convention and by precedents because of the lack of a written constitution or philosophy (apart from guidelines) on the subject.

Robert Eadie (WA) suggested external funding sources should be pursued at the same time whilst governments were being lobbied for such funds.

Sir Brian Elwood (NZ) did not see the resolution precluding any one to one arrangement and what was being sought in terms of training assistance on a collective basis was for the sake of maintaining independence without the ombudsman office having to go to its own government for training funds. External funding nonetheless remained an option on an individual office basis and that would accommodate the special situations that had developed on occasions in Australia.

Robert Eadie (WA) expressed satisfaction with Sir Brian Elwood’s remarks and affirmed his continuing effort in putting pressure on the Commonwealth Government.

Simon Pentanu (PNG) emphasised that, like in the case of Solomon Islands, the fundamental problem remained with the smaller countries where the ombudsman office was part of the civil service and thus relied heavily on government funds allocated to the department to which it was attached. To achieve a resemblance of independence for the Fijian ombudsman effort was being made to assist him by drafting guidelines and even legislation to that end. In Vanuatu enacted legislation had enabled the ombudsman office to have access to operating funds which the government became obliged to provide to the ombudsman as an institution. In this regard legislation was viewed as a more practical or even pragmatic way of dealing with the issue of independence.
The Chairman, Andrew So (HK) enquired if any motion was ready to be tabled.

Sir Brian Elwood (NZ) suggested a motion be formulated in the context of this conference's willingness to facilitate on an interchange basis the training of investigating staff, and that then gave the basis for practical arrangements to be worked out. The keyword was "to facilitate".

The Chairman, Andrew So (HK) put forward the said motion, which was seconded. There being no objection, the motion was carried.
Robert Eadie (WA) opened the discussion on "Complaints against police" by referring to a report of the annual conference of the International Association for Civilian Oversight of Law Enforcement (ICO) which was held the month before in Vancouver, British Columbia, and which many delegates from the Australasian and Pacific Region had attended. The conference had included topics such as human rights, disclosure and access to information, policing and use of force by police, high speed pursuits, civilian oversights, and aboriginal policing and oversight. From the many formal and informal discussions, participants of the conference had come to a general realization that not all systems were transplantable, since different countries in different parts of the world had their own norms, culture, and hence ways of doing things. In particular, he pointed out that although the United States had not embraced the ombudsman concept, Professor Samuel Walker, a significant academic contributor at the conference, had indicated his belief that the ombudsman concept might offer some solution to the problems which the United States had been facing, including the civilian oversights of police. He reported that the next ICO meeting would be held in Washington, DC in 1996, and invited all who were interested, including the observers, to attend.

Barry Perry (Vic) stated that since he took up the job of Deputy Ombudsman of Victoria in 1988, he had observed that among the variety of complaints he received, the following three categories had been found to be "perennial" problems. These included, most commonly, complaints against demeanour (such as harassment, victimization); secondly, complaints against assaults; and thirdly, conflict of interest. With regard to assault, this was a problem which both the Ombudsman and the police were aware of, and that every effort had been made to create an environment where the potential of assault to persons in custody or during arrest could be reduced. In the case of complaints against demeanour, very often these involved one-on-one situations where no independent evidence was available, and hence investigation into complaints of this nature was difficult. As a result, such kind of complaints were virtually
forced out of the complaints system. On the other hand, however, the conflict of interest situation was a blind spot which the police had often failed to see. He then quoted the following examples to illustrate the inappropriate use of power by police officers which had amounted to conflict of interest: a police officer demanding, whilst on duty, compensation from a motorist who had damaged his uniform in an accident which occurred at a time he was off-duty; a police constable participating in the interview of a suspect who was alleged to have broken into his house; police officers receiving free beer from hotels within their own policing district; and a high ranking police officer making inquiries into an offence on behalf of his friends.

Robert Eadie (WA) quoted another example on the conflict of interest situation. He mentioned that a lady had once engaged in a netball game which had become overheated, with a lot of pushing and shouting from participants of both sides. When the lady returned home, a policewoman who had taken part in the game, together with her fiancé who was also a policeman, approached the lady in full uniform and laid charges on her. He pointed out that it was difficult for the police officers to understand that it was inappropriate for them to handle the matter in that way.

Peter Boyce (NT) brought in a further example where the father of a child who had become the victim of a theft whilst in school, made inquiries on the child’s classmates by himself, instead of calling for another police officer who had no knowledge or relationship with him or the child for assistance. He was of the view that there needed to be some form of publicity for reinforcing the view to police officers that they should keep themselves aware of conflict of interest situations, which they should avoid. In this connection, he reported that the circulation of management bulletins and general orders which set out what constituted conflict of interest and how to avoid these situations had proved to be of some assistance.

Ronald Green (Tas) pointed out that there did not seem to be much problem with conflict of interest situations in Tasmania. However, he observed that there had been two other problems with the police there - firstly, they were reluctant to give apologies even when they were found
to have been wrong; secondly, they did not accept the application of civil standards of proof in internal investigations, and insisted on adopting the criminal standard.

Ratu Mataitini (Fiji) indicated that in Fiji complaints against the police would be referred to the police themselves for investigation. In this connection, he wondered whether members would interpret this as a conflict of interest situation. He pointed out, however, that this system had proved workable in Fiji. In cases where there were doubts over the investigations by the police, he could call for the police files and check if the appropriate disciplinary proceedings had been properly conducted, and if so, would inform the complainant of his findings. Should the complainant remain dissatisfied, he would then bring the two parties together in order that they might settle the matter.

Barry Perry (Vic), in response to Ronald Green’s observations, explained that there were in fact other investigations into misdemeanour of police in Victoria. Yet, only the subject of conflict of interest had been a blind spot. He indicated that the Ombudsman had made hundreds of recommendations to the police and these were generally accepted. He cited the most prominent example of a total disbandment and re-organization of police intelligence system undertaken by the police in response to the Ombudsman’s recommendations. However, he was frustrated that whenever recommendations related to conflict of interest were made, lively debates would ensue. He therefore re-emphasized his point that the conflict of interest alone was a blind spot, that the police just did not see the problem here.

Mrs Ferrieux-Patterson (Vanuatu) reported that she did have jurisdiction over the police, who were generally co-operative in accepting her recommendations in relation to general points of complaint. This was different from the trend observed in other countries, and she believed that this was made possible basically because the crime rate was low in Vanuatu. In addition, the police there were used to follow some rules, such as the minimum treatment rules stipulated by the United Nations, so that it would be easy to point out to them what rules they had breached. In fact she had found it more successful in dealing with the police than
with the rest of the public service. On the other hand, she did admit that conflict of interest was a problem in Vanuatu, as in other countries. The situation in Vanuatu was that people tended to give first priority to their own selves and their families, and this was justified in their own social system. It was therefore difficult for her to rectify the situation as this would mean going against the Vanuatu system.

**Anand Satyanand (NZ)** made the observation that it would be difficult to persuade people in a corporate entity that they did have allegiance to respect which went beyond the wearing of the uniform. He was also interested to learn from Barry Perry, who had a wealth of experience in handling police complaints, the type of strategy that could be applied in facing an organisation whose senior personnel were reluctant to accept the Ombudsman’s recommendations.

**Barry Perry (Vic)** replied that in Victoria there were in fact not many occasions where the recommendations of the Ombudsman or Deputy Ombudsman were not accepted. Probably the one instance where the recommendation to the Chief Commissioner of Police was not accepted involved the withdrawal of certain charges against a person who had resisted arrest by the police arising from a police raid of premises in which the wrong premises was raided. Under the Victorian Legislation, should the Chief Commissioner not accept the recommendations, the matter would be submitted to the Police Minister. In case matters of criminality were involved, the Police Minister would refer them to the Director of Public Prosecution for consideration. If, however, what were at state were disciplinary or administrative matters, the Police Minister had the authority to direct the Chief Commissioner to accept the Ombudsman’s recommendations. In the particular case mentioned above, the matter was eventually brought to the attention of the Director of Public Prosecution. Hence, the issue was resolved formally by way of legislation. In reply to the question raised by Anand Satyanand, he admitted that after the Ombudsman had completed his investigation, his power was limited to that of making recommendations only. Apart from applying persuasion in order for the recommendations to be accepted, the Ombudsman might report the matter to the Parliament. So far, there were about six occasions when this channel was resorted to. However, this had proved unsuccessful since these cases were not even debated by the
Parliament. Hence, he considered it especially important for the Ombudsman to ensure that his findings were factually correct, that the reasonings of his investigations were sound, and that the recommendations were appropriate to the circumstances as a means to strengthen his persuasiveness. In some instances, he might then approach and debate with the Minister responsible for the department in question, and this had proved quite successful.

Maiava Toma (W Samoa) reported that there were not many complaints against the police in Samoa, basically because people were not keen to lodge complaints against the police. He considered that the police were not only totally blind to the conflict of interest situations, but also to the fact that they might do things wrongly. He quoted the case that a police officer assigned to investigate a theft in a shop had found the culprit and recovered the stolen money. However, the police officer then used the money himself and afterwards came to apologize to the shopkeeper, saying that he was in need of the money, and offered to repay the shopkeeper by instalments.

Robert Eadie (WA) remarked that in Western Australia, in order to improve the situation among the police, it was finally decided to appoint a Commissioner of Police from outside the province.

Simon Pentanu (PNG) reported that the Ombudsman in Papua New Guinea did have jurisdiction over the police. Although the police themselves had set up a Police Complaints Unit a few years ago to handle this kind of complaints, the number of people approaching the Unit had gradually diminished, and more and more people would rather choose to complain to the Ombudsman. He indicated that the reason for this was primarily that conflict of interest of police was involved in the complaints. In such instances, the Ombudsman would try to involve the Police Complaints Unit in the investigation as well, particularly when these were directed against members of the constabulary. He added that the question of "ethnic loyalty" raised by Mrs Marie-Noelle Ferrieux Patterson earlier had also existed in Papua New Guinea.
The Chairman, Andrew So (HK) explained that in Hong Kong, complaints against the police were dealt with by the Complaints Against Police Office (CAPO), an establishment within the police itself. The CAPO was in turn monitored by an independent body, the Independent Police Complaints Committee, of which he was an ex-officio member. There was presently a move to make this Committee a statutory body. In addition, the Administration had lately intended to include both the police and the Independent Commission Against Corruption under Schedule One of the COMAC Ordinance, which comprised the statutory bodies under the jurisdiction of the COMAC, so as to facilitate full implementation of the Access to Information Code of Practice. At present, he did not receive a large number of complaints against the police - of the 641 written complaints received by his office during the past three months, only 20 (3.1%) were against the police. Of the 129 potential complaints, 3.8% were against the police. On the other hand, out of the total 12,700 enquiries received during the same period, only 132 (7.6%) were related to the police. He then invited the observers to tell of whether they had jurisdiction over the police.

Jorge Luis Maiorano (Argentina), M F Oliveira E Silva (Macau), Kam-Chiu Ng (Malaysia), H H Kantharia (India), Sung-soo Cho (Korea) and Raja Mohammad Khurshid Khan (Pakistan) indicated respectively that they did have jurisdiction over the police.

Guang-qin Ji (China) reported that it was the Ministry of Supervision that had jurisdiction over the police in China.

Dulcie McCallum (Canada) remarked that consequent to an amendment of the Police Act, the police was removed from the jurisdiction of the Ombudsman after 1979. At present, she could only exercise jurisdiction over the police boards but not police officers. However, an officer of the legislature would soon take up the post of Public Complaints Commissioner for Police.

Diane Longley (UK) expressed that in the United Kingdom, complaints against the police were handled by a police complaints authority instead
of by the Ombudsman.

Hisao Tsukamoto (Japan) confirmed that the Management Co-ordination Agency as a national agency did not have jurisdiction over the police complaints in Japan.

Taksapol Chiemwichitra (Thailand) reported that Thailand did not have any Ombudsman institution. However, there were many channels which the aggrieved persons could approach for complaint, including the police department, the Petition Commissioner, and the Committees on Justice and Human Rights in the House of Representatives and the Senate respectively.

Abdul Shakurul Salam (Pakistan) supplemented that in Pakistan the police came under the jurisdiction of the provincial government. As he was working at the federal level, he had had no jurisdiction over the police.
Ronald Green (Tas) briefed the meeting that in this current administrative climate of change and acknowledgement of codes of behaviour, etc., there was an attempt to lift the standard of the public service above the standard applied by private enterprise. In view of the circumstances, it would be necessary for the Ombudsman also to maintain a standard at least one step above that expected from the public service. The Ombudsman could be seen as performing a quasi-judicial function, and a very high standard would be expected in his dealings whether with the public, or with the government, or between Ombudsmen themselves. He therefore drew that attention of all present that this might perhaps be something they should be paying attention to.
Eugene Biganovsky (SA) said that he had heard from various directors that there were deep concerns about the direction of the IOI and the apparent lack of relevance of the IOI to the needs of the members of the region. One concern was on the definition of the regions and the number of directors on the ever-increasing Board. There was also an increasing number of members throughout various regions in the world such as Eastern Europe and Latin America but there was a lack of representation from the Caribbean. A committee was established to look at this business of regions and regional boundaries. Members of the committee had formalized a proposal strengthening the idea of regions so that each would be part of IOI and at the same time a much stronger entity in itself. It was hoped that this proposal would encourage those who were not members of the IOI to become members and existing members to stay on. Another concern was on the value and benefit of one’s membership. There was a need to ensure that members were getting the full benefit of being a member of the IOI. He further informed that he and the Chairman of the 15th APOC, Mr Andrew So, were embarrassed by the precipitated action on the part of the principal office in Alberta of reassigning Hong Kong to the Asian region without any consultation with Hong Kong. He and Mr So were dismayed as Hong Kong had agreed to host the 15th APOC. Besides, Hong Kong was one of the best members of the Australasian and Pacific Region. Hong Kong was only restored to its desired place of choice after a great deal of writing. The proposal that was put to the IOI Board thus reinforced the principle that members had to build on the strength of the region and had to look at the bottom-up approach. An important resolution was subsequently passed to the effect that no voting member would be transferred to another region without proper consultation with that member, and any voting member might elect to become a member of region of choice subject to consultation with the voting member of that region. The By-laws would need to be overhauled to overcome those problems and to reflect the needs of the membership. He continued to say that a very good representative committee had been formed with a member from each region to examine the various aspects of the By-laws. He undertook to write a brief report on this and other items discussed at the IOI Board meeting and circulated it to members.
when he returned to Adelaide. He hoped members would look at the report seriously and constructively.

Sir Brian Elwood (NZ) was concern that the IOI was being pushed in the wrong direction. There were proposals to create a relatively significant bureaucracy domiciled in Canada. This would result in significant financial burdens for IOI members without visible corresponding benefits. There was no place for an international organisation such as IOI to undertake a political role on the world stage as this would be inconsistent with members’ role of ombudsmanship in their jurisdictions and he had succeeded in persuading the IOI to turn towards the right direction. He hoped that this direction would be consolidated in the Argentina conference. He was confident that members could achieve what they wanted under an umbrella organisation with an international overview. With the establishment of more ombudsman offices, it would be important for the individual ombudsman to decide which region he wished to belong. He invited observers of the 15th APOC to join the Australasian and Pacific Region. He conceded that the strength of the region was based on the bottom up approach and the objective should be to improve the status and competence of individual ombudsmen in individual jurisdictions. This could be achieved effectively at the regional level as members in the region could communicate better. An international organisation like the IOI with limited financial resources could not communicate effectively with a growing membership. By outlining the problems with the IOI structure, he was certain that members would realize that changes were in the wind and there was every likelihood that APOC members would be able to put into place an effective, significant and important organisation at the Argentina conference which would benefit all in the years ahead.

The Chairman, Andrew So (HK) noted that all the achievements made at the IOI Board meetings would be included in a paper to be circulated to APOC members.

Eugene Biganovsky (SA) drew the attention of those who wished to be a member of the IOI to the By-laws in particular By-law number 5. Interested parties could approach him if they would like to discuss
anything concerning membership.
3. THE SIXTH INTERNATIONAL OMBUDSMAN CONFERENCE TO BE HELD IN ARGENTINA IN 1996

Jorge Luis Maiorano (Argentina) thanked the IOI for showing confidence in Argentina and for choosing Buenos Aires to host the "VI International Conference of the International Ombudsman Institute". The IOI Conference would be held in October 1996 and the main theme would be the challenges that an ombudsman had to face in the 21st century. There would be plenary sessions and workshops and information pamphlets on the Conference were ready for distribution. He then introduced the speakers and subjects of the plenary session and workshops and hoped to receive positive response and support from IOI members and observers.

The Chairman, Andrew So (HK) thanked Jorge Luis Maiorano and added that any member/observer who would like to obtain additional information on the "VI International Conference of the IOI" could approach Jorge Luis Maiorano.
24. NEXT APOC IN 1997

Peter Boyce (NT) requested members to consider nominating the Northern Territory, Australia to host the APOC in 1997.

Ratu Jone Cure Mataitini (Fiji) regretted that Fiji was unable to host the APOC on two occasions and supported Northern Territory in hosting the APOC in 1997.

Members unanimously agreed that the 1997 APOC be held in the Northern Territory, Australia.

Peter Boyce (NT) explained that the Northern Territory was not a state of Australia and did not hold statehood status. It was important that the Northern Territory’s application be considered as it was pushing strongly for statehood and felt that the hosting of the 1997 APOC would enhance its image. The Northern Territory had a population of 180,000 people in 1.3 million square kilometres. Darwin, its capital, had a population of some 80,000 people and had very well-established infrastructure, amenities and facilities.
Sir Brian Elwood said that he and Mr Eugene Biganovsky had prepared a carefully drafted letter to the Members of the Fiji Constitutional Review Commission so as not to cause any offence to the intention of not interfering with the affairs of other countries and to enable Ratu Jone Cure Mataitini (Fiji) to use the letter as evidence to support his submission for specific legislative changes.

Ratu Jone Cure Mataitini (Fiji) expressed his gratitude to the way the letter was drafted and said that it could not be interpreted as interference by members of APOC. He would refer Members of the Fiji Constitutional Review Commission to the letter when he made his own submission on the amendments to the present Ombudsman Act in Fiji.

Sir Brian Elwood (NZ) thanked Ratu Jone Cure Mataitini for his comments.

Robert Eadie (WA) wondered whether it was appropriate to ask Philippa Smith (Commonwealth) to sign the letter as well.

Sir Brian Elwood (NZ) pointed out that the letter was prepared on the basis of those meeting in Hong Kong. It was unfortunate that Philippa Smith could not be present but it would be very appropriate for her to write an independent letter to say that she was aware and supported what her colleagues were doing.

The Chairman, Andrew So (HK) concluded by saying that a copy of the letter would be sent to Philippa Smith. He then invited members to sign the letter to the Fiji Constitutional Review Commission.
Sir Brian Elwood (NZ) reported that the case management system in New Zealand was operating very well. A paper on the physical characteristics of the case management system had been prepared by Anand Satyanand and could be made available to interested members.

Mrs Ferrieux-Patterson (Vanuatu) thanked the Ombudsman, Papua New Guinea for the assistance given to Vanuatu in the creation of the ombudsman office. A memorandum of understanding had also been signed between the two Governments to speed up the process of cooperation.
26. CONCLUSION

The Chairman, Andrew So (HK) remarked that various issues of concern to Ombudsmen had been raised and discussed at the 15th APOC. He believed that there was no fixed model for Ombudsmen. There were different social systems, cultures and hence different authority and jurisdictions. Some particular topics, such as complaints against police, might not be of immediate concern to every Ombudsman but many would agree that it was an interesting issue worth discussing. He was also certain that members had learnt something through the discussions on the various issues and their ombudsmanship would be enhanced correspondingly. Fruitful thoughts and new initiatives were abundant in the Conference. He was confident that the Conference had left members a lot of food for thought and the contact and friendship established would be maintained and renewed in the years to come. He then declared the proceedings closed and wished the next APOC to be held in Northern Territory, Australia in 1997 a great success.
V. Photos
Mr Andrew SO, COMAC of Hong Kong, giving his welcoming address during the Opening Ceremony of the 15th APOC.

The Hon Sir Ti-liang YANG, the Chief Justice of Hong Kong, officiating at the Opening Ceremony of the 15th APOC.
Mrs Marie-Noelle Ferrieux-Patterson, Ombudsman of Vanuatu, responding on behalf of the delegates during the Opening Ceremony of the 15th APOC.
Mr Andrew SO, COMAC of Hong Kong, chairing the 15th APOC

The 15th APOC in progress
VI. List of Abbreviations of Countries/Regions
<table>
<thead>
<tr>
<th>Abbreviations</th>
<th>Countries/Regions</th>
</tr>
</thead>
<tbody>
<tr>
<td>HK</td>
<td>Hong Kong</td>
</tr>
<tr>
<td>NT</td>
<td>Northern Territory, Australia</td>
</tr>
<tr>
<td>NZ</td>
<td>New Zealand</td>
</tr>
<tr>
<td>PNG</td>
<td>Papua New Guinea</td>
</tr>
<tr>
<td>Qld</td>
<td>Queensland, Australia</td>
</tr>
<tr>
<td>SA</td>
<td>South Australia</td>
</tr>
<tr>
<td>SI</td>
<td>Solomon Islands</td>
</tr>
<tr>
<td>Tas</td>
<td>Tasmania, Australia</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Vic</td>
<td>Victoria, Australia</td>
</tr>
<tr>
<td>WA</td>
<td>Western Australia</td>
</tr>
<tr>
<td>W Samoa</td>
<td>Western Samoa</td>
</tr>
</tbody>
</table>
VII. Evaluation Results
Evaluation Results

No. of questionnaires returned: 18

1. Overall impression of the Conference: Mode - Excellent

<table>
<thead>
<tr>
<th>Rating</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description</td>
<td>Poor</td>
<td>Fair</td>
<td>Satisfactory</td>
<td>Good</td>
<td>Excellent</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. of persons</td>
<td></td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>15</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2. Participation: Mode - Excellent

<table>
<thead>
<tr>
<th>Rating</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description</td>
<td>Poor</td>
<td>Fair</td>
<td>Satisfactory</td>
<td>Good</td>
<td>Excellent</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. of persons</td>
<td></td>
<td>1</td>
<td>4</td>
<td>4</td>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3. Degree of frank discussion: Modes - Good, Excellent

<table>
<thead>
<tr>
<th>Rating</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description</td>
<td>Poor</td>
<td>Fair</td>
<td>Satisfactory</td>
<td>Good</td>
<td>Excellent</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. of persons</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td>8</td>
<td>1</td>
<td>8</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
4(a). Goals and/or objectives established:

- very well established
- excellent
- facilitation of networking renewal, excellent results on all aspects
- these (goals & objectives) were well covered
- active, information received, informal contacts made
- fulfills objectives of the APOC
- involved everyone, exposure to each other's experience
- communication and sharing of experience between ombudsmen in the region and other observers was reached
- these (goals & objectives) were achieved
- I think the objectives were well achieved by way of experience shared and request for assistance being entertained
- achieved all objectives of this informal but serious group
- important milestone - training for new ombudsmen
- I believe that the goals and objectives such as promotion of professionalism in the discharge of roles, exchange of ideas and information to assist in solving problems and assistance in establishment of new jurisdiction and the proper education of investigations to complaints have been established.
- very clear and worthwhile discussion of Fijian problems and role of IOI and OMBIS. To contribute to and strengthen regional functions and support.
- They were excellently summarized by Mr So in his closing remarks.

- International understanding of the working and ability or the institution of ombudsman achieved.

- good

- Improving collegiality and professional standards. For myself as an ombudsman, the benefit of hearing other viewpoints and opinions and approaches was most helpful.

4(b). Amount and utilization of time:

- excellent / good / well done / most efficient (7 cases)

- very adequate amount, good utilization

- very good. Some very interesting discussions which could have been dwelt on for considerable time but focus on issues maintained very well and all aspects for discussion well covered.

- well balanced

- very well managed although I thought the observers were too liberal with their voice when invited to comment. Punctuality excellent!

- No time wasted. Excellent use of time.

- The timing was well controlled by the chair.

- Management of the time allowed was sharp and efficient and to the point.
- The timings and the chairman's hold on the proceedings was excelled in an excellent manner enabling the speakers to speak on relevant matters instead of digressing into other avenues.

- appropriately and flexibly managed by the chairman

- full time devoted

- the programme was excellently devised with the effort of support staff not to be unnoticed in the delivery.

5. Strong points of the Conference:

- thorough and meticulous organisation and planning

- excellent local organisation and excellent venue

- organisation, ombudsmanship, informal & frank discussion

- excellent venue, very well structured and administrated, generous contribution to entertainment and meal by host

- organisation, chairmanship, informative

- covered considerable ground, disciplined chairing, full participation

- informal and almost equal participation

- organisation, presence of the observers (sharing more experience)

- opportunity for equal participation by delegates

- keeping to the timing and encouraging of participation by members and observers
- informative, frankness and genuine attitude of help fully displayed by all

- value added discussion, frankness and openness

- pleasure setting. The agenda was set out very well. The timing was right. The organizing of the conference was superb.

- strengthening of regional role and clarification of general problems confronting ombudsman. All of considerable help to new members and smaller countries.

- the camaraderie of the APOC members and the chairman’s care to involve the observers, COMAC staff

- frank discussion on all topics

- your support is excellent

- the style with which everything was presented the spirit of the staff of the COMAC, HK.

6. Weak points:

- nil (8 cases)

- an earlier release of final agenda and supporting papers would have been helpful

- lack of interpreter facilities for guests, slightly rigid approach to chairmanship

- too liberal with participation by observers but this is not a criticism

- presence of observers was both strong and weak point for time use of the conference and preventing may be total openness and
total informality
- time for informal discussion was inadequate
- intermittent receipts of instruction before the conference
- sometimes just a little overlap between areas of discussion, but this is probably inevitable
- too much time was spent on discussion of regional topics
- traffic jam, time
- the difficulties created by the number of observers needing to be taken into account

7. Recommendations for improvement:

- nil (12 cases)
- All conferences evolved gradually. The highlight of the conference may be taken further at subsequent conference.
- buffet arrangement is faster for service than ala carte
- Socially, a tour of Hong Kong should have been permitted. For a person coming for the first time, there was no time to see the beauties of the city.
- perhaps more formal papers submitted
- the receipt of forms etc especially on programmes etc are to be sent at one time
- observers should have enough time to speak
8. Other comments:

- nil (4 cases)
- a very worthwhile and enjoyable experience
- well done
- difficult to match the excellent standards set by this conference
- an excellent conference
- all COMAC staff very courteous, kind and helpful
- a very delightful conference
- the service desk, manned by COMAC staff, was extremely efficient and helpful
- the organisation was very very excellent
- overall, a very satisfying experience
- I would congratulate the COMAC staff for a well organised programme and of the hospitality which is second to none.
- thank you for a well organised and happy, friendly conference, and regular inclusion of observers in discussion and social activities
- we would like once again to thank the commissioner and organising committee for the opportunity and the hospitality provided us in this APOC conference
- the team of COMAC under the leadership of Mr So worked very hard, honestly, sincerely and with full devotion. Congratulations.
congratulations for a fine effort all around which has left in the minds of the delegates and observers a positive spirit and some optimism for the future.
VIII. Appendices
Appendix 1
(page 38)
This paper has been prepared for the 15th Australasian and Pacific Ombudsman Conference and International Ombudsman Symposium October 24, 1995

A WIN-WIN-WIN APPROACH
THE LIFE OF A PUBLIC REPORT

A keystone of administrative fairness is the right to be heard. When people are in a psychiatric crisis, living with a long term psychiatric disability, or are unable to function optimally due to the symptoms of their illness or the effects of treatment, they are often discredited and considered unable to participate in decisions affecting their lives. Historically, many practices and procedures were developed without patients' input or involvement. Yet what we heard from patients throughout our investigation into Riverview Hospital was their desire to be heard and listened to. In a psychiatric facility, most aspects of a person's life are defined by administrative decisions made by others. Our report attempts to outline an administrative model with numerous interdependent components, some of which are already being developed using patients' and hospital input, that will enable patient participation in decision-making, both individual and collective.

I begin with an assumption that the Ombudsman is a model of social reform. When a systems review is undertaken the Ombudsman must see...
herself as a change maker at the macro level. The Ombudsman Act of British Columbia gives the Ombudsman broad and remedial powers to investigate and to recommend. This powerful legislation enabled our Office to undertake a comprehensive systems review of this large psychiatric facility and to make broad and sweeping recommendations for reform.

I will begin by setting the stage for the investigation. Riverview Hospital opened on April 1, 1913. Its original capacity for patients was 405 people. It grew to its maximum capacity by 1956 at which time it had 4,306 patients and 2,000 staff. In 1992, when this investigation was commenced, it remained the largest psychiatric facility with 850 patients. There is, as there is in many jurisdictions, a plan in place to continue to downsize the number of patients served. It is intended by the year 2000 there will be 550 patients and the psychiatric facility will deliver tertiary care. In addition to the status of Riverview Hospital, it is important to note that in September of 1992 when the investigation was announced, the consultative review process of our provincial mental health legislation had broken down. There seemed to be irreconcilable differences between the self advocates, the medical professionals and the parents.

There had also been a major incident at Riverview Hospital involving one patient who had been discharged against his will. He was eventually removed from the premises by the police which greatly angered him. This patient had been and continues to be an outspoken advocate for the rights and interests of patients within Riverview Hospital for a considerable period of time. He had gained a great deal of attention from the administration of the hospital causing some tension as he was so tenacious and persistent in his approach. This then sets the stage for the beginning of the Ombudsman review.

I will now move through the various stages of planning for and completing the investigation and report which was eventually called "Listening: A Review of Riverview Hospital".
1. **Overall Approach to Report**

   At the Office of the Ombudsman in British Columbia, all of the Investigating Officers work in self-directing or self-managing teams. Riverview Hospital fell within the jurisdiction of the Health Team. At the beginning of an investigation of this type it is important that the Officers assigned and their team appreciate the overall approach that the Ombudsman wishes to take. In my opinion, generally speaking it is important to be "hard on the merits" of the case but "soft on the people" involved. It is equally important to take a principled approach to service and administration and not focus on the misconduct or administrative misadventure of those working for the authority. Every effort should be made to the outset to aim for mutual gains for all the parties involved, including the Office of the Ombudsman. This approach then focuses on looking for a solution or solutions carefully crafted to meet the legitimate interests of all parties, to the extent possible. The goal is to resolve conflicting interests fairly and to find solutions that are durable, appropriate and that will make a difference.

2. **When Do You Know the Time is Right?**

   What are the factors that an Ombudsman should take into account in deciding to undertake a systemic review of the administrative practices of an authority?

   - Has there been repeated and similar complaints from those receiving service from this authority over a long period of time?

   - Has there been a case of some notoriety such as this case where an advocate for people with mental illness had a complaint against the administration of the psychiatric facility on discharge, who claimed he had not been listened to and that he been penalized for being a self-advocate complaining about the administration of the facility intended to serve his psychiatric needs?
If either is yes, have the complaints been about service or procedure/practice/policy that is fundamentally inconsistent with administrative fairness?

Has it affected individuals receiving a service from this authority in a way that goes to the heart of what the service to be delivered is about? For example, in a psychiatric facility, is the question about access to a second medical opinion about invasive treatment? Or as in a correctional facility, is the question about the opportunity to complain to an independent, impartial representative of the authority who will conduct an investigation into a complaint about physical abuse or mistreatment?

A tragic event attracting significant public attention [i.e. through the media] which if the Ombudsman did not respond to, itself could be the subject of criticism. For example, where a child commits suicide in a public institution.

Has there been a complaint received from a party who is not directly connected to the issue but who raises an important matter that ought to be considered by the Ombudsman, particularly where the issue in all likelihood would not come to her attention other than through a person who is not directly affected? For example, a complaint from the mother as to whether or not children who are under the age of minority should be vaccinated on mass for Hepatitis B without adequate notice to parents and on their own consent without possible full and adequate information provided in advance.

3. **How Do You Begin?**

It may be important to make an announcement at the beginning of the review. What are the factors to take into account as to whether or not to issue a press release at the outset of the investigation? In the case of Riverview Hospital, the people intended to be served by the authority,
those for whose benefit the hospital is established, may have difficulty knowing about the review. Because of the challenges facing them as individuals due to illness or side effects of treatment, they may not be in a position to complain or learn of the systemic review of the Ombudsman even if they are resident at the time. Patients may be transient and once living in the community maybe overwhelmed by daily challenges such as poverty and housing, thus not being fully aware of such a review taking place.

Are there other individuals such as loved ones who would benefit from hearing about the systems review through the news?

It is important to give formal notice to the authorities and other parties potentially adversely affected prior to proceeding with any press release. Avoiding a confrontational approach at the beginning may be very important.

In giving notice take the broadest of perspectives as to who might be affected by a comprehensive review of the largest psychiatric provincial facility. For example, giving Notice to the Ministry of Health enabled me to later make recommendations to them, having made findings that part of the reason patients were unable to get administrative fairness at Riverview Hospital was lack of a provincial mental health advocate to whom patients could complain about Riverview Hospital.

4. **Brainstorming the Framework**

At the beginning of the exercise brainstorm with the Team the general areas which, from past experience, the Ombudsman knows need to be addressed.

Explore what a table of contents might look like, what are the areas of administration that have caused problems in the past, what is the area that has given rise to this systemic investigation if that is applicable, what are the major reforms that you want to achieve in
order to prevent complaints to the Ombudsman in the future, and most importantly, where are the gaps in service or administration that may be a problem for people who cannot complain because of the situation in which they find themselves. In the case of Riverview Hospital, what was front and centre at this stage was how does an ombudsman develop a system that is not dependent on the complaint being made upon which the ombudsman model is based?

5. Directing the Ombudsman Investigating Officers

- Ensure the investigation follows the framework as designed and that the Officers responsible for the investigation are clear on the direction the systemic review is to take.

- Hold regular team meetings to ensure there is adequate consultation and input.

- Be prepared to modify the outline as the investigation progresses and not be too rigid about the outcomes originally hoped for.

- Revise and reconsider regularly along the way.

6. Planning Consultation with the Major/Minor Authorities

- Put your mind to a strategy that will help the authority(ies) buy into the recommendations so they might fit into their own need to prove themselves, to demonstrate their commitment to those they serve, and to meet the expectations of the Ombudsman.

- Permit the authority(ies) sufficient time to meet the challenge of the proposed recommendations. In doing this, understand the administrative direction of the authority. Be patent.y clear on the direction of the systemic review as it progresses. In other words, give the authority the opportunity to believe it is their idea and, that
changes you conceive of are actually what they had in mind all along. It is often true.

In our review a prime example is the Hospital’s Charter of Patient Rights. For years this has been an idea considered by Riverview Hospital. We indicated it was likely that we would propose a Charter as a recommendation. The self-advocates and the hospital began work on a consultative process with patients and their loved ones to develop a Charter of Rights which was in large part complete at the time the Report went public.

7. **Who are the Interested parties/Witness?**

- What is the process by which you decide who should be interviewed? We attempted to obtain evidence from all those who would be affected by the recommendations.

- In order to conserve time and resources there was an effort to gather evidence in creative ways, for example, at self-advocacy group meetings.

```
“patients need patience”
```

a. **Self-Advocacy Within the Hospital**

Researching this may require considerable time and effort. Riverview gave the Ombudsman a dedicated office and a parking space.

* self advocates within hospital may be discharged
* give message to the patients of how important they are
* Ombudsman to attend the patient’s meetings
* patients may be limited in the extent to which they can participate due to effects of illness and treatment

Ombudsman for the Province of B.C.
b. **Self Advocates and Self Advocacy Groups Outside the Hospital**

- ideally the groups represent de facto consumers - collective wisdom
- many discharged patients require support or are unable to participate because their energies are devoted to coping with medications, poverty, housing, discrimination
- In this case "Listening" ensured that everyone who should be listened to became critical
  - considerable political resistance on the part of community advocacy groups to participate in study
  - seen to legitimate the hospital by trying to “fix it”
  - our strategy had to be one of convincing them that, by improving the quality of the lives of those while they required hospitalization, the continuum of service would be improved
  - ironically the hospital, enhanced by its new direction and remarkably improved patient-centred practice, has become the leader in mental health for the whole province.

c. **Evidence of the representatives of the authority**

Such as the staff/volunteers whose lives are defined by the work of the authority.

- many may fear an Ombudsman review
- workers may have competing interests
  - to management
  - to patients
- who are the key players who will be responsible for having to respect and implement many of the recommendations?

Choose the representative of particular groups, carefully. For example, should you interview the Director of Nursing or all ward head nurses and in what the setting in which you interview them?

- Prevent sabotage by not missing anybody who wants to say something at the facility.
• Do outreach for the unknown witness by advertising in volunteer, professional, and hospital newsletters.
• Focus on confidentiality by having a private phone number/answering machine and setting up private interviews with Ombuds Officers.

8. **Highlights of the Contents of the Report**

There were 94 recommendations in the "Listening" report. (See Appendix B for a summary of the recommendations) They were directed at 4 authorities including Riverview Hospital, the Ministry of Health, the Ministry of Social Services and the Ministry of the Attorney General. I want to stress that the primary goal of the "Listening" report was to make recommendations for fair administrative practices to be put in place that would function without complaints coming forward from patients at the hospital. By that I mean when people are being served by an authority and they may not be in a position to complain due to illness or treatment, it is imperative that the Ombudsman look for solutions that will assist an authority to be inherently fair in its practices. Ombudsman statutory models are premised on someone coming forward with a complaint. When people are disenfranchised or disempowered for one reason or another one must look beyond the traditional complaint model in order to ensure fairness.

The report focuses on several areas of concern to those being served. There is a section on legal rights which incorporates a proposed statement of principles and the Hospital's **Charter of Patient Rights**. The statement of principles (attached as Appendix A) are intended to act as guidelines for those working for the authority against which they can measure their conduct and decision making. The second major area dealt with is quality of life issues including admissions, privacy, food services, clothing, use of tobacco, and restraints. The latter section includes a discussion of physical, chemical and environmental restraints. The treatment concerns and review mechanisms form the next chapter. A major challenge throughout this
investigation was the belief of many medical professionals that for an Ombudsman to delve into treatment issues was inappropriate. This portion of the Ombudsman report focused on the process for patients around treatment issues and made recommendations regarding a request to change a caregiver, the right to a second opinion, the right to access patient charts and medical information, the availability of treatment plans in plain language, and the right to seek a medication review. It was clear at the outset of the investigation that a large issue for patients was lack of planning for discharge. The hospital accepted the recommendation that discharge planning would begin on admission. This would enable people where discharges happened on an unplanned basis to have some supports in place immediately on discharge. The discharge plans cover such issues as money, housing, transportation and advocacy.

The final chapters of “Listening” canvass and propose an advocacy model that is multileveled. The idea was to have a provincially appointed advocate who could facilitate advocacy at the community level rather than delivering it directly. It was recognized that many forms of advocacy must take place in order to maximize the quality of people's lives. Advocacy in the legal sense was discussed in addition to the role parents and front-line professionals play in advocacy. Most importantly, there was considerable discussion on the role of self-advocates and the newly formed Patient Empowerment Society at Riverview Hospital that provides collective advocacy for all of the patients. For those patients who have individual concerns, a Patient's Relations Coordinator was put in place, a position jointly held half-time by two people, one of whom is a self-advocate.


* Choosing a name that is plain, nonbureaucractic and not cumbersome. It must be inviting.
A catchy name like "Listening" gains notoriety easily. It also focuses the public's attention on an element of administrative fairness repeatedly.

Design the report so it is in a form the public wants to read. This means a report cover that is an attractive colour and design.

Host a joint press conference with self-advocates, representatives of the authority and the Ombudsman particularly where, as in this case, all three parties agree with all 94 recommendations!

10. Follow-up on the Report

Often the practice has been that an Ombudsman Report becomes an end in and of itself.

Need to develop a strategy around implementation. Make no assumptions that an authority will continue to measure its conduct against the recommendations without the watchful eye of the Ombudsman.

How do you continue to nudge?
   i) Challenge the authority to report within a set period of time and include this as a recommendation in the report.
   ii) Hold the CEO accountable regularly.
   iii) Invite the CEO to write a guest article in your annual report. By doing this you encourage the CEO to take public pride in her achievements.
   iv) Invite CEO to speak at the Ombudsmans' Conference. In our case this was the first time an authority has been invited.
   v) Agree to be included in her annual report.
   vi) Permit and encourage closure:
       • important for authority and their need not to be always under the active watch of the Ombudsman
       • allow for closure a reasonable period of time May 1994 - March 1996.
       • Give notice of intention to celebrate full implementation. Try to coordinate the closure with an appropriate date. In this
case the Ministry of Health plan to announce the appointment of the Provincial Mental Health Advocate. Therefore, this date has been linked to the closure with Riverview Hospital.

Most of all celebrate your achievements. Pull in all of the parties to the extent possible and help them move towards a new working relationship. I was fortunate in that the new Board of Trustees and the new Chief Executive Officer had recently been appointed at Riverview Hospital. They had no vested interest in past practice. The CEO was insightful and was progressive in her approach. Through her own endeavours and by providing advice and guidance throughout the investigation, she was able to steer her organization towards a resolution of our investigation and significant institutional reforms. I wish to quote now from a guest comment that the Chief Executive Officer of Riverview Hospital provided at the invitation of myself in my 1994 Annual Report. I quote:

"I'd like to say a few words about the fascinating process that began in the fall of 1992 when the Ombudsman began her review of Riverview Hospital. I'm not sure either the Ombudsman or I knew what to expect. However, in retrospect, the success of the process seems to have hinged on a number of variables that came together:

- a new Ombudsman prepared to tackle a very complex subject
- a new Board of Trustees committed to making a difference for those the organization serves
- a consumer advocate with solid external support unprepared to accept no for an answer
- a new senior manager building a management team with "customer" focus.

Each of these four functioned as an advocate for change during the process. The first twelve months were very challenging as we tried to lay the groundwork within the hospital for a more receptive and supportive service approach..."
that puts the customer at the centre. We also knew we
needed to find ways not just to "service" advocacy but to
collaborate constructively with patients and their families. A
cultural shift in this is not tinkering around the edges - it's
fundamental and it's got to do with power and shifting the
balance of it. At Riverview 1800 staff would be asked to give
up some of their power in their one-to-one clinical
relationships with patients and their family members as they
developed care plans. In addition, a new infrastructure
needed to be developed to include patients and family
members in the larger organizational decision-making
process.

The organization was anxious about the investigation. They
felt there had been enough public scrutiny and enough
criticism. Ombudsman's investigations and reports are not
usually welcome events. However, as the Ombudsman and
her staff began to compile their data, identify common
themes and develop preliminary recommendations, so too
did the new board and the senior management team. And the
ideas from these two processes of inquiry built one upon the
other and served to reinforce each other's findings. With each
passing month, the kinds of changes that were needed and
how they could be made became clearer to us and to the
Ombudsman. Perhaps the best example is the evolution of
our thoughts on advocacy services. In retrospect, it was
fortunate that the scope of the review expanded and both the
review and the report took longer to complete than we
originally anticipated. The extra time allowed us to work
together to refine the ideas on advocacy that were being
promulgated in the hospital and those that appear in the
report.

Positive change is occurring at Riverview Hospital and the
process of the Ombudsman's "Listening" review has been a
pivotal element in facilitating this change. Her report also

Ombudsman for the Province of B.C.
lends credibility and external validity to the conclusions reached internally by the board and senior management. The balanced tone and tenor of the report also helped the staff respond positively to the recommendations.

The process the Ombudsman followed in her review of Riverview Hospital was, in my view, a model process, an ideal process. Though it may not always be attainable, the Ombudsman and the authorities she reviews can always strive for this ideal.”

I hope this overview of one system’s investigation done by the Office of the Ombudsman in the Province of British Columbia has been of assistance to you and I thank you for requesting that I provide this paper.

Appendices

A. Summary of Recommendations

B. Statement of Principles
CHAPTER ELEVEN: SUMMARY OF RECOMMENDATIONS

Each recommendation is listed in this chapter in the order it occurred in the text. No priorities are assigned. The first digit of each recommendation number reflects the chapter where the recommendation is found, (for example, Recommendation 6-18 refers to the eighteenth recommendation in the sixth chapter).

CHAPTER TWO: FAIRNESS FOR PATIENTS - A PRINCIPLED APPROACH

2-1 That Riverview Hospital develop and implement a comprehensive implementation program of the Riverview Hospital's Charter of Patient Rights that will include staff training and familiarisation of patients and families with the contents and purposes of the document. The process should include incorporation of this information in orientation materials for all new staff, patients, and families of patients.

2-2 That Riverview Hospital ensure a coordinated approach is taken to applying the Hospital's Charter of Patient Rights to particular incidents and issues within the Hospital, including an accessible system for receiving allegations of violations of the Charter, investigating into the facts, interpreting the rights contained in the Charter and applying them to the particular situation, and determining an appropriate course of action on conclusion of an inquiry. The Hospital should also use the Charter as a guide in the development and audit of all Hospital policies. Responsibility for some or all of these coordinating functions may be assigned to the recommended new position of Patient Relations Coordinator at Riverview Hospital, discussed in greater detail in Chapter Eight.

CHAPTER FOUR: LEGAL RIGHTS

4-1 That the "Guidelines for Review Panels" should be incorporated into Regulations under the Mental Health Act following the remaining consultation with interested parties including: present and former patients, families, lawyers experienced in acting for patients, community groups, representatives of Riverview Hospital, and professional groups involved in psychiatric care and treatment.
LISTENING
Province of British Columbia

4-2 That the Ministry of Health work with the Review Panel chairpersons to develop a separate budget and purchasing arrangement for the Review Panels that would accurately reflect and reinforce its independence from Riverview or other psychiatric hospital facilities.

4-3 That the Ministry of Health revitalize the consultative process for reform of the Mental Health Act and develop new or amended legislation with vigor. That attention be given to drafting a definition of "mental disorder" that is consistent with the Canadian Charter of Rights and Freedoms and Provincial Government guidelines on inclusive language in its references to disability, and by removing "mental retardation" from the definition.

4-4 That the Provincial Government propose to the Legislature amendments to the Mental Health Act for the purpose of introducing procedural fairness into decision-making concerning the provision of psychiatric services, including:

- independent review, by Review Panel or otherwise, of assessments of patient competency to consent to treatment;
- independent review, by Review Panel or otherwise, of decisions to provide psychiatric treatment without a patient's consent;
- clarification, possibly through a definition of "treatment", that any exceptional mechanisms for obtaining consent or approval for treatment of involuntary patients extend only to psychiatric treatment.

4-5 That the Provincial Government should dedicate appropriate resources to ensure any expanded Review Panel jurisdiction can be carried out in a fair, accessible and expeditious manner.

4-6 That a Bill or Charter of Patient Rights be incorporated into British Columbia's mental health legislation to apply to all provincial mental health facilities and psychiatric units following consultation with consumers, mental health professionals and other interested parties.

4-7 That the Office of the Public Trustee designate staff positions to be responsible for receipt and processing of all financial requests regarding persons in residential care facilities in British Columbia including, but not restricted to, Riverview Hospital.
CHAPTER ELEVEN: SUMMARY OF RECOMMENDATIONS

4-8 That Mental Health Services, Riverview Hospital, and the Public Trustee, in consultation with the community, produce plain language guides describing the impact of guardianship legislation on mental health care and treatment, for patients and families; and that these authorities develop standard professional practices that respect the spirit and content of the legislation, and simplify its application.

4-9 That the Provincial Government propose to the Legislature amending the Mental Health Act to make advance health care planning available to all consumers of mental health services. Pending revision of the Act, that the Provincial Government propose that the guardianship legislation be amended, prior to its proclamation, to extend the same rights to persons who may become involuntary patients as it provides to all other health care consumers.

CHAPTER FIVE: QUALITY OF LIFE

5-1 That Riverview Hospital's policy on admissions be made more flexible, to permit re-admission of patients who have been recently and formally discharged or who have been long-term Riverview patients, without having to be re-admitted through psychiatric units in general hospitals.

5-2 That protocols and policies be developed by the Ministry of Health, Riverview Hospital, Mental Health Services, the Greater Vancouver Mental-Health Society, and the governing bodies of acute care hospitals with psychiatric or referring emergency units, to promote the regular sharing of progress and discharge notes with respect to individual patients between the referring and treating agencies, while respecting patients' rights of confidentiality.

5-3 That in the design of any renovated or new hospital facilities on the Riverview site, the principle of maximizing privacy for individual patients be adopted, including the use of single rooms wherever feasible. This factor ought to be considered by the Ministry of Health in planning regional mental health care.

5-4 That the design of any new or renovated hospital facilities undertaken on the Riverview site and Hospital policies incorporate a maximum degree of accessibility.
5-5 That Riverview Hospital clarify and publicize its policy that kitchen areas on wards are for the use and benefit of the patients, not the staff.

5-6 That Riverview Hospital consult with the Patient Empowerment Society about ways to provide clothing to patients that are appropriate.

5-7 That the Ministry of Health and Riverview Hospital expand vocational program opportunities, and in particular, opportunities that attract incentive payments, and that the payment scale for vocational work be significantly increased. The Ministry of Social Services should exempt incentive payments paid by in-patient vocational programs from being deducted from the comforts allowance.

5-8 That the Ministry of Health and Riverview Hospital work together to develop effective education programs that assist interested patients to reduce or stop their smoking; that renovations to or redevelopment of Riverview Hospital should incorporate smoke-free living units for patients who do not smoke.

5-9 That Riverview Hospital develop a protocol with the local RCMP detachment and Crown Counsel with the goal of providing clear guidelines for police, as to when to attend and investigate and for Crown Counsel, when to prosecute allegations of criminal behaviour by patients.

5-10 That the "Patient Abuse by Staff" policy include a statement that patients who are the victims of alleged abuse which may constitute a criminal offense be advised at the outset of an internal investigation of their right to contact the RCMP.

5-11 That the "Patient Abuse by Staff" policy direct the appropriate Vice-President and the Vice President, Human and Material Resources, in consultation, or other senior administrative personnel, to consider at the outset of every investigation whether the staff member, against whom an allegation has been made, should be removed from any direct contact with the patient involved or patients generally pending outcome of the investigation.

5-12 That information about the incident investigation policy with respect to allegations of patient abuse by staff members be included in orientation materials made available to patients and their families.
5-13 That the Riverview Hospital restraint policy require that a physician must reassess the continued need for restraint at specified minimum periods of time.

5-14 That Riverview Hospital policy on chemical restraint, or "medication interventions", make reference to the need to administer medications in the least invasive manner possible, and only in association with non-threatening communication intended to explain to the patient the need for, and nature of, the medication being administered. In addition, the policy should require that the reason for the medical intervention is recorded by the physician.

5-15 That Riverview Hospital ensures that "use of restraint" records be kept by all wards on a monthly basis, using a standard format that would yield consistent and comparable data on several factors, including number of restraint incidents, nature of restraint employed, who ordered (doctor and/or nurse) and duration of restraint on a hospital-wide basis.

5-16 That in the design of any new psychiatric hospital on the Riverview site, or renovations to existing patient care buildings at Riverview Hospital, rooms used for seclusion meet the highest standards of comfort consistent with safety and privacy for patients and staff, including toilet facilities.

5-17 That Riverview Hospital seclusion policy specify that where a patient is placed in seclusion by nursing personnel pending an assessment and order of seclusion by a physician, that the nurse in charge co-sign the seclusion order.

5-18 That Riverview Hospital develop standards for locked wards and criteria for deciding when it is appropriate to transfer a patient to a locked ward. Informal patients should not be transferred to locked wards unless their status has first been reassessed and changed to involuntary.

5-19 That in addition to monitoring the use of restraint measures, Riverview Hospital keep records on the frequency, duration and reasons for restricting patients to pajamas.
5-20 That Riverview Hospital develop a process to receive and respond to complaints by patients who feel that they have been unfairly or inappropriately restrained, including where they had grounds or clothing privileges restricted. The process should respect the principles of administrative fairness and therefore involve a review of the decision to restrain or restrict "preferences", and should permit the patient to be heard. Information about the review process should be included in orientation materials for both patients and families, and be posted on all wards.

5-21 That the Ministry of Health engage in a consultative process to examine ways in which decisions to use physical and mechanical restraints, and seclusion, in psychiatric hospitals could be made subject to review by the Review Panel or other administrative tribunal.

CHAPTER SIX: TREATMENT CONCERNS AND REVIEW MECHANISMS

6-1 That the Ministry of Health provide additional funding to Riverview Hospital for the purpose of expanding counselling and psychotherapy services for Hospital patients, particularly in the area of sexual abuse counselling, for patients/survivors, and that the Hospital incorporate these services into its clinical programs.

6-2 That Riverview Hospital develop a policy which enables clinicians to seek consultations from colleagues both inside and outside the Hospital.

6-3 That Riverview Hospital direct the Medical Quality Assurance Committee to review its mandate and the way it operationalizes its mandate given the need to review clinical practices absent patient complaints.

6-4 That Riverview Hospital develop protocols with professional associations governing clinical personnel at the Hospital with respect to referral of, and reporting back on, matters with the potential for professional discipline; in particular, that Hospital policy require referral of any allegation of sexual abuse of a patient by a staff member to their governing professional body, in addition to any internal recourse or referrals to police authorities; and that Hospital policy clarify the reporting relationships between clinical departments and senior administration on matters of potential misconduct.
6-5 That Riverview Hospital revise its policy on patient access to her or his own clinical records to ensure that it is consistent with common law and the Freedom of Information and Protection of Privacy Act, and in particular, to remove unnecessary barriers to access such as the requirement to provide reasons for the request or the strict enforcement that the request be in writing.

6-6 That Riverview adopt a single standard form for recording the essential features of an integrated patient centered plan of care. These features include:

- diagnosis;
- modalities of treatment (medications, special behaviour programs, skills acquisition programs, etc.);
- explanations of what each modality intends to accomplish and how;
- prognosis;
- discharge plan;
- a section for patient input and signature; and,
- patient goals and outcomes.

This form should be included in the progress notes on the patient's chart, and be available to the patient and hospital personnel involved in treatment or responsible for reviewing treatment. When a patient is illiterate, marginally literate, visually impaired, blind or unable to read, the plan should be read and explained to them verbally or made available on audio-cassette tapes.

6-7 That Riverview Hospital develop a standard process for receiving and responding to patient requests to change care-givers, with the ability to limit the number of requests over time, on the basis of what is fair and reasonable in the circumstances.

6-8 That the Ministry of Health and Riverview Hospital develop a program that would permit hospital patients to obtain a second medical opinion on request. The program would have the following features.

- a standard and plain language form for initiating the request;
- recognition of the patient's right to name a qualified psychiatrist from whom an opinion will be sought, subject to availability and her or his agreement to do so.
- recognition of the patient's right to receive a copy of the opinion.
LISTENING
Province of British Columbia

- payment by the Medical Services Plan for patient-requested second opinions, in particular for non-staff clinicians; and,
- reasonable limits on the intervals between second opinions obtained at the request of an individual patient, in light of factors such as the seriousness or invasiveness of the treatment proposed (for example, no limits on second opinions for recommended courses of treatment for Electro-convulsive Treatment).

CHAPTER SEVEN: LEAVING RIVERVIEW

7-1 That the British Columbia Buildings Corporation engage in a process of open public consultation with respect to the future use or sale of the Riverview grounds before any decisions are made on that subject.

7-2 That Riverview Hospital consult in a timely and meaningful way with patients and consumers of community mental health services in the planning of bed closures.

7-3 That Riverview Hospital adopt policy that sets basic standards for discharge planning, including:

- that the discharge planning process begin as soon as practicable following a patient’s admission to the Hospital;
- that the patient be involved at every stage, and that family members be involved, subject to the patient’s agreement; and,
- a checklist of items that require attention for every patient, when a patient is discharged without an item having been dealt with, an explanatory note would be written.

7-4 That the Ministry of Social Services create a position for a transition staff person to Riverview Hospital, at a Supervisor level, possibly stationed at the Coquitlam District Office of the Ministry or on the Hospital grounds. Responsibilities would include taking applications for GAIN and GAIN for Handicapped from patients, liaising with Ministry Offices around British Columbia, coordinating the exchange of information where appropriate and preparing educational materials to sensitize Ministry of Social Services staff to the needs of patients returning to their home communities.

7-5 That Riverview Hospital and the Ministry of Social Services develop a protocol to facilitate the exchange of information on patients admitted to and discharged from the Hospital, while respecting patients’ rights of confidentiality and privacy.
7-6 That identification necessary to apply for income assistance and other social services be provided and obtained for patients admitted to Riverview Hospital. Without such identification, either through the creation of a fund to pay the costs of obtaining identification, or by waiving those costs for hospitalized patients, through a coordinated effort by Riverview Hospital and the Ministry of Social Services.

7-7 That Riverview Hospital provide patients (in advance of discharge) with a "letter of introduction" to Ministry of Social Services offices that would contain information needed to open an income assistance file, including employability status if appropriate.

7-8 That the Provincial Government establish a fund to provide a transitional cash payment of up to $200 to discharged patients leaving Riverview Hospital.

7-9 That the Provincial Government work with municipalities and the housing development sector to greatly expand the quantity and diversity of low-cost housing options available to persons with mental illness, especially those discharged from Riverview Hospital. Particular emphasis should be placed on expanding semi-independent or interdependent housing opportunities.

7-10 That Riverview Hospital and other relevant authorities study expanding transitional and emergency housing opportunities for discharged patients or Hospital grounds.

7-11 That Riverview Hospital provide all patients prior to discharge with an information kit that gives information in plain language on how to live successfully in the community, including:

- medications and side-effects;
- addresses and phone numbers of community mental health and other support services;
- how to obtain identification if lost after discharge; and,
- how to open a bank account and do basic budgeting.

7-12 That the Ministry of Health and Riverview Hospital improve the quality of transportation and supports for patients traveling to their home destinations.

7-13 That the Ministry of Health fund pilot projects that would bring groups of former patients into Riverview Hospital to meet with
patients to exchange information on living successfully in the community following discharge.

7-14 That Riverview Hospital include in its discharge planning a referral to local advocates in the locality where the patient will be living following discharge. This could be included in the discharge survival kit. (See Recommendation 7-11.)

7-15 That Riverview Hospital policy state that every patient who has scheduled a Review Panel hearing be advised that should the Review Panel order them decertified, they are welcome to remain in Hospital on an informal basis while community arrangements are made.

7-16 That the Ministry of Health and Riverview Hospital review ways to improve short-term discharge planning for patients decertified by Review Panel order, including assigning a duty social worker to cover evenings or have Panels to sit only in the daytime.

7-17 That the Ministry of Health provide resources to permit, and with Riverview Hospital encourage, visits by Mental Health Centre and Team staff to follow clients recently admitted to Riverview Hospital and meet with patients who will be discharged to their catchment areas.

7-18 That the Ministry of Health and Riverview Hospital actively explore ways to increase opportunities for staff exchanges between the Hospital and community mental health services.

CHAPTER EIGHT: A RESPONSIVE RIVERVIEW

8-1 That Riverview Hospital adopt a policy on complaints that incorporates the principles of administrative fairness, including accessibility, simplicity, investigative responsibility that is independent, written acknowledgment and response, a third party complaints process and an internal appeal.

8-2 That Riverview Hospital create a senior administrative position of a Patient Relations Coordinator (PRC) to assume responsibilities for coordinating the complaints-handling process at Riverview Hospital, including but not limited to:
CHAPTER ELEVEN: SUMMARY OF RECOMMENDATIONS

- monitoring and supporting policies and processes that are intended to expand the participation of and communication with patients and family members in Hospital activities, (such as ward meetings and implementation of the Hospital’s Charter of Patient Rights);
- reporting regularly to the Board of BCMHS on results, problems, and opportunities in the PRC’s areas of responsibility; and,
- acting as liaison with the Office of the Ombudsman and any other external agencies with respect to patient complaints matters.

8-3 That Riverview Hospital develop a "How to Complain", or "How to Be Heard" brochure for patients and families that outlines, in plain language, how a patient can make a complaint. Included should be examples of the types of complaints that can be made, and how complaints are responded to, as well as referring to available sources of advocacy support.

8-4 That the Attorney General table an amendment to Ombudsman Act as soon as possible to create a specific exception to section 57 of the Evidence Act for the purpose of Ombudsman investigations making clear that release of the report to the Ombudsman does not waive the privilege provided to hospitals by section 57.

CHAPTER NINE: EXISTING ADVOCACY RESOURCES

9-1 That Riverview Hospital review the recommendations made in "What Families Want From Riverview" dealing with major family concerns to see which still remain to be acted upon and develop an action plan.

9-2 That training be made available to Riverview staff sensitizing them to the needs of family members, and how to respond helpfully to their inquiries, input and comments.

9-3 That procedures be developed to ensure that family members are advised of all significant changes in a patient’s care, including medications, physicians, legal status, and decisions to discharge the patient, subject to the patient’s rights to limit or refuse disclosure, and that families know who they can contact with questions. This information ought to be provided in the family’s orientation package.
LISTENING
Province of British Columbia

9-4 That the present schedule of regular reporting to a patient’s family be reviewed for its adequacy, and that families be advised on the admission of a relative of their opportunity to have meetings with the treatment team at regular intervals.

9-5 That Riverview Hospital staff know how to access existing Provincial funds to support family members’ travel costs for visits to Riverview Hospital and that they inform family members of these procedures. Where a patient has been served in her or his local community and intends to return, this continuity of natural support provided through visits, is critical.

9-6 That ward and program staff at Riverview Hospital plan more opportunities to include interested family members in patients’ activities.

9-7 That Riverview Hospital staff be available to receive advice, concerns and input from family members, even when a patient has refused to consent to the disclosure of personal information to their family members.

9-8 That family members who are denied information, on the grounds that the patient has refused to permit disclosure, be advised of their ability to make a complaint to the Hospital (PRC) so that the matter can be reviewed.

9-9 That Riverview Hospital administration develop a specific policy outlining the role of staff as front-line advocates and confirm the Hospital’s present understanding that retribution of staff for participation in advocacy efforts will not be tolerated.

9-10 That Riverview Hospital include in its orientation materials an explanation regarding the protection against retribution for contacting the Ombudsman as provided for in the Ombudsman Act.

9-11 That Riverview Hospital adopt a policy that expressly authorizes staff members to refer patients to available formal advocates.

9-12 That the Ministry of Health appoint at least one former patient of Riverview Hospital as a trustee on the BCMHS Board.

9-13 That Riverview Hospital develop a protocol to permit representatives of designated consumer organizations general access to wards during visiting hours and other pre-arranged times.
9-14 That individuals or advocacy groups denied access to patients be advised of their ability to file a complaint to have the matter reviewed to the internal complaints process.

9-15 That Riverview Hospital take steps to encourage wards and other programs in the Hospital to invite representatives of consumer advocacy groups from the community to speak at gatherings of patients, and that the Hospital monitor the frequency with which this happens.

9-16 That Riverview Hospital develop opportunities to bring consumer advocates from the community together with Hospital administrators and staff, including inviting advocates to sit on Hospital policy and planning committees, and by having staff and advocates work jointly on patient information programs, such as discussions on living successfully in the community with soon-to-be-discharged patients.

9-17 That Riverview Hospital policy refer to facilitating contacts between patients and consumer advocacy organizations as a part of discharge planning.

9-18 That the Office of the Public Trustee, the Ministry of Health, and Riverview Hospital ensure the preparation of plain language information kits for the use of persons who may wish to consider applying for substitute decision-maker status with respect to a hospitalized patient under the new guardianship legislation. Contained in the package should be information on how individuals can act as advocates for patients as an alternative to seeking appointment as a substitute decision-maker or guardian.

9-19 That the Attorney General in consultation with the Legal Services Society consider ways of expanding the availability of legal advocacy to patients, particularly those hospitalized outside the Lower Mainland, including representation before the Review Panel or on section 27 Court applications, in whole or in part, on the legal aid tariff.

9-20 That Riverview Hospital adopt policy establishing minimum requirements for ward community meetings, including

- a minimum frequency,
- meetings to be chaired by a patient, or co-chaired by a patient and PES, or, when a patient is not available, chaired by PES.
- minutes of meetings to be typed, kept posted on the ward, and copied forwarded to Directors of Nursing for each Program, the Patient Empowerment Society and the Patient Relations Coordinator;
- meetings to begin by reviewing previous meeting's minutes; and,
- a regular agenda item for issues or complaints of patients, and for updates on responses to issues and action taken raised at earlier meetings.

9-21 That Riverview Hospital and the Patient Empowerment Society undertake a process to identify the kinds of issues that could be delegated for decision by patients at ward meetings.

9-22 That Riverview Hospital provide education and instruction for staff and patients on constructive meeting formats to encourage and maximize participation and consider development of an instruction manual to that end.

9-23 That Riverview Hospital adopt policy that recognizes and affirms the legitimate role of a patient advocacy body run by present and former patients, and independent of the Hospital's governing authority, in representing a collective voice of patients and engaging in advocacy on systemic issues of concern to Hospital patients.

9-24 That Riverview Hospital work with a patient-run advocacy body to develop protocols covering such issues as the use of facilities on hospital grounds for office and meeting space, and a flexible, effective and meaningful communication and reporting relationship between the Hospital and that body.

9-25 That Riverview Hospital adopt a policy encouraging staff involved in patient care to be supportive of, and respectful toward the participation of individual patients in collective patient advocacy.

9-26 That Riverview adopt policy stating that all patients who wish to attend regularly scheduled meetings of the patient-run advocacy body have the right to do so, including the right to be escorted if they do not have ground privileges, unless their attendance would constitute a real danger to self or others, which reasons are to be documented by the attending physician.

9-27 The Riverview Hospital adopt policy stating that patients who attend regularly scheduled advocacy meetings be compensated for the time away from their usual vocational work placement.
9-28 That the complaints process and treatment review mechanisms discussed earlier in this report be made available to individual patients who believe treatment decisions are unfairly or unreasonably restricting their patient advocacy activities.

9-29 That pending any decision to coordinate the funding of a range of advocacy activities through other Ministries or branches of the Provincial Government, or through non-profit public interest agencies in the community, the Ministry of Health provide core funding for the activities of the patient advocacy body at Riverview Hospital.

CHAPTER TEN: A PROVINCIAL FRAMEWORK FOR INDIVIDUAL ADVOCACY

10-1 That the Provincial Government appoint a Mental Health Advocate for the Province of British Columbia, with the following mandate:

- to report annually and as required to the public on the state of the mental health service system in B.C., and on the issues being encountered by consumers, service providers, advocates, and those they support; and
- to provide a single information and referral source for advocacy resources in mental health services in B.C.

That the model be based on a consultation with community organizations and that the Ministry of Health make a proposal for the model within 2 to 3 months of this Report.

10-2 That in addition to appointing a Mental Health Advocate, the Provincial Government, in consultation with Riverview Hospital and community advocacy organizations, support the creation of a network of advocacy services for individual consumers of mental health services, including a program for non-legal advocacy for individual patients at Riverview Hospital, by:

- establishing fair and clear criteria for the funding of advocacy services by non-profit societies; and
- funding services that meet established criteria, where a recognized need exists for formal advocacy, including at Riverview Hospital.

10-3 That Riverview Hospital support the development of a program of formal, non-legal advocacy for individual patients of the Hospital by
authorizing Hospital staff to participate in advisory capacities to the program as invited, working with the program on protocols to facilitate the activity of its advocates, and otherwise taking steps to include and encourage the program at Riverview Hospital.
3. STATEMENT OF PRINCIPLES

In undertaking this investigation, we were aware of the need to develop and articulate the core principles that could serve as a basis for our inquiries and recommendations. We adopted a Statement of Principles. It starts with the recognition that every individual is entitled to be treated with dignity and respect. These principles represent the framework for this Report:

1. Every person is entitled to be treated with dignity and respect.

2. Every person is entitled to have the rights and freedoms guaranteed under the *Canadian Charter of Rights and Freedoms* respected regardless of her or his place of residence or disability.

3. Every person has the right to be heard and listened to regardless of disability or method of communication. Where individuals live in a protected environment that restricts their right to make decisions, every effort must be made to enable individuals to disagree, i.e., to say no, except where it can be demonstrated that respecting an individual's choice will jeopardize the safety of the individual or others.

4. Every effort must be made to enable people to advocate on their own behalf and, where necessary, individuals and patients as a collective are to be provided with the necessary mechanisms and supports to make their wishes known and acted upon. Those responsible for decision-making in an institutional setting must recognize the importance and legitimacy of advocacy.

5. Where a person's place of residence restricts mobility and ability to advocate on her or his own behalf, he or she has the right live in an environment that promotes and can demonstrate fair and equitable treatment.

6. All services and supports provided within an institutional setting are to be accessible, physically and intellectually, to those for whose benefit the institution is intended.

7. Where decisions are made that affect the lives of institutionalized people, as individuals or as a group, those responsible for making the decision must include those affected in the decision-making process regardless of any assessment of competency done for other purposes.
3. Any decision-making process must be inclusive. The decision-making process must be accessible, understandable, responsive and expedient to those it affects including individual patients, patients as a collective, families, friends and advocates.

9. Where a decision is contrary to a person's or a group of patients' wishes, those responsible for making the decision shall give reasons for that decision in a clear and accessible form that is understandable and meaningful to them.

10. A mechanism that enables all persons to complain must be in place particularly in an institutional environment where peoples' lives are, in large part, controlled by professionals, treatment, physical setting and medication. The complaint mechanism must not have any threshold criteria based on legal, or medical capacity or competency.

11. Those responsible for managing and administering the institutional setting must give priority to being accountable to the patients and their families and to ensuring that the facility is a welcoming place that is open to those it serves, their advocates and the community at large.

12. Those responsible for the treatment and care of people who are labeled mentally ill should demonstrate the optimum level of tolerance, understanding and affection for those they serve to set a standard for the community at large to emulate.

13. Psychiatric services delivered in an institutional setting must be viewed and structured as part of a larger continuum of provincial mental health care.

14. Patients have the right to know. For example, the orientation materials provided to a patient on admission should be reviewed with them again when the patient's situation has improved. Written materials should always be clear and in plain language. Non-written materials such as audio or video cassettes, should also be available. All language used at the Hospital should strive to be respectful and non-ablest.

15. Everyone has the right to self-determination. Every effort should be made by Hospital administration to respect that right to the extent possible. All legal mechanisms that enhance a person's right to be self-determining should be equally available to patients at Riverview Hospital.
Appendix 2
(page 40)
INTRODUCTION

Colleagues may recall that I presented a paper on the *Jurisdiction of the Ombudsman in relation to staff of courts and tribunals* at the 14th Australasian and Pacific Ombudsman Conference held in New Zealand in October 1994. Although much of what I said in that paper remains relevant (and a good deal of it will be included in this paper), I have decided to broaden the focus of this paper.

I have done so in recognition of the current international interest in this issue as evidenced by three papers presented at the 1994 International Ombudsman Institute (the IOI) Conference held in Taipei, and by the inclusion on the preliminary programme for the 1996 IOI Conference to be held in Buenos Aires of a paper by the Swedish Ombudsman (Claes Eklund) entitled "*The Ombudsman Specialized in Judicial Matters*".

A further development in the past year is that, as indicated in my paper on the Western Australian Commission on Government, I have been required to make a submission to that body regarding the gaps in my jurisdiction. One of the 'gaps' (highlighted in last year’s paper) appears to permit the staff of the Small Claims Tribunal to escape scrutiny. I will return to the current status of this issue later in the paper.

It will become apparent from the views put forward in this paper that, in common with many other Ombudsmen and academics, I view the position of the courts and tribunals themselves as being considerably different from the position of the staff of those bodies. This view will be expanded upon in the paper but, broadly speaking, the difference, in my view, is based on a distinction between the "judicial" and the "administrative" functions of the court or tribunal. It will also be apparent that I view any involvement of
Parliamentary Ombudsmen in the adjudicative function of courts and tribunals as being inappropriate.

IN RELATION TO COURTS

The issue of whether Ombudsmen should have jurisdiction to consider the administrative actions of courts was discussed extensively at a conference on the "The Ombudsman Concept" hosted by the IOI in Taipei in 1994.

Papers were presented by Mr Adolfo de Castro (the Ombudsman of the Commonwealth of Puerto Rico), Ms Pirko Koskinen (Deputy Ombudsman of Finland) and Professor Timothy Christian (Dean of the Faculty of Law at the University of Alberta, Canada). An earlier paper on "The Special Relations of the Canadian Provincial Ombudsmen with the Courts and Quasi-Judicial Authorities" was presented by M. Jacques Meunier (Deputy Protecteur du Citoyen for the Province of Quebec at an IOI Conference entitled The Ombudsman: Diversity and Development, held in Canada in 1992.

The papers are interesting in that they represent diametrically opposing views on the need for courts and tribunals to be required to be accountable for their administrative actions to an independent external review body, such as the Ombudsman. I will briefly summarise the views put forward. (A more detailed summary appears at Attachment A.)

The case in favour of the supervision of the courts by the Ombudsman

A strong case for the Ombudsman to be involved in the supervision of the courts was put forward by the Ombudsman of Puerto Rico (Mr Adolfo de Castro) and the Deputy Ombudsman of Finland (Ms Pirko Koskinen), both of whom already exercise considerable powers in relation to the courts.

In Finland, the Ombudsman apparently has virtually unlimited power to consider both adjudicative and administrative activities by the courts, the only limitation being that, where a decision by the court is, or could be, the subject of an appeal, the Ombudsman refers the complainant to the appropriate appeal authority and does not become involved. According to Ms Koskinen, the broad extent of the Ombudsman's powers in relation to the courts is moderated by the fact that they are recommendatory and are, therefore, subject to acceptance or otherwise by the courts.
In Puerto Rico, the ability of the Ombudsman to investigate the actions of the judiciary is viewed by the Ombudsman as the "most efficient tool the citizen has at hand to safeguard his supremacy over the political process". He views his jurisdiction in relation to the courts as being beneficial to the judiciary in that it ensures both that judges strictly comply with their constitutional obligations and the optimum functioning of the judicial system.

The Finnish and the Puerto Rican Ombudsmen do not view their jurisdiction over the courts as interfering with judicial independence.

The case against supervision of the courts by the Ombudsman

The contrary view is put forward by the Canadian presenters of the papers referred to above. Professor Christian is strongly of the view that the facility for any external review of the actions of the courts is not only likely to impair the independence of the judiciary but is, most probably, unconstitutional in the Canadian context.

M. Meunier's view is not quite so 'hard line' but he, nevertheless, expresses grave reservations on the appropriateness of any supervision of the courts in relation to their adjudicative function.

The Australasian context

The fairly conservative 'Canadian' view would probably come nearer to representing the prevailing view in Australasia than the view put forward by either Adolfo de Castro or Pirko Koskinen. Certainly, I have no doubt that the extensive role of the Finnish Ombudsman would find very few supporters in Western Australia.

A recent paper by Mr Justice Robert Nicholson, formerly of the WA Supreme Court and now of the Federal Court of Australia, explores the notions of judicial independence and accountability and whether they can co-exist. Broadly speaking, his Honour concludes that the judicial branch of government has "probably been historically and in actuality one of the most accountable areas of government", largely because, for the most part, proceedings are conducted in public, judges must publish full reasons, decisions are subject to appeal and lawyers are free to criticise judicial reasoning.

Based on his experience as Ombudsman and as a previous Director of Consumer Affairs, the former Victorian Ombudsman, Mr Norman Geschke, expressed strong support for the
notion of a Judicial Ombudsman. In his 1991 Annual Report he advocated the introduction of a system of formal oversight of the actions and administration of courts and tribunals. He dismissed the argument that 'accountability' and 'independence' are mutually exclusive concepts, considering them to be "essentially complementary factors in the administration and implementation of the law".

Many of the complaints he had ultimately referred to the Attorney General or the Director of Consumer Affairs involved allegations about the attitude or indifference of magistrates, judges or referees and a failure to follow established procedures. Although he accepted that he, like most other Ombudsmen, clearly had no jurisdiction to investigate complaints about the actions of courts and tribunals, he felt that, on the basis of the number of complaints he received (in 1991 there were 68 complaints about courts, 27 about the Small Claims Tribunal and 12 concerning the Residential Tenancies Tribunal), it was evident that there was a need for some form of external review.

Mr Geschke stressed, however, that his preference was not to expand the role of the Parliamentary Ombudsman; instead he suggested that there should be "a Judicial Ombudsman or Judicial Commissioner to receive and investigate judicial complaints."

Conclusion

In the Australasian context, it is probably unrealistic to propose that the Parliamentary Ombudsman be given jurisdiction over the actions of courts as such, even those actions that may be characterised as "administrative" rather than "judicial". If there is a case for at least some of the actions of the courts to be made subject to external review by an independent agency, the solution possibly lies in the suggestion made by the former Victorian Ombudsman.

IN RELATION TO TRIBUNALS

In my view, the argument for excluding tribunals from the Ombudsman’s jurisdiction has been greatly overstated. Just because a body (whatever it is called) may have some or all of the attributes of a tribunal does not necessarily mean that it should be excluded from jurisdiction. It seems to me that, to exclude all so-called tribunals would be inconsistent with the concept of accountability.

In effect, the Ombudsman’s jurisdiction is already restricted to "matters of administration", which demonstrates that matters of "adjudication" (the term used by Ms
Koskinen in her paper) are not contemplated by the *Parliamentary Commissioner Act* (Western Australia), nor in the practical application of the statutory provisions.

However, in view of the apparent deep division of opinion as to whether the Ombudsman should have the power to examine the actions (albeit administrative actions) of tribunals, it may be necessary to insert a specific formula into the legislation to define more closely the limits of the Ombudsman's jurisdiction in this area. In my submission to the Commission on Government on this issue, I suggested a formula on the following lines:-

**Matters which should be outside jurisdiction**

The *proceedings and decisions* of those tribunals:

(i) required by statute to be presided over by a judge (or former judge), magistrate or legal practitioner of not less than 7 years' standing; and which

(ii) having power to compel the attendance of witnesses and hear evidence on oath or affirmation

**Matters which should be within jurisdiction**

(i) *Administrative* actions which are incidental to tribunal proceedings - for example, failure to answer correspondence or failure to provide an adequate response to reasonable notice of inability to attend hearings;

(ii) *Administrative* actions to give effect to tribunal decisions - for example, failure to respond adequately to notice of a practical inability to comply with an order.

**IN RELATION TO COURT STAFF**

Under the *Parliamentary Commissioner Act* (WA), Masters and Registrars of the superior courts are specifically excluded from my jurisdiction (as are judges, Stipendiary Magistrates and "other courts of law"). However, *court staff* are in a different position. By "court staff" I mean public servants who serve in the court system and with tribunals, but are the employees of departments of the Public Service. The staff of the courts themselves have always been part of the government department charged with the responsibility for servicing the courts - the Ministry of Justice (formerly the Crown Law Department). The definition of "department" in the *Parliamentary Commissioner Act* includes the officers and employees of that department. Section 14(7) of that Act makes
it clear that I am able to investigate the actions of officers and employees of an agency which is within jurisdiction, even though the actions may have been taken on behalf of an agency (such as a court or a tribunal) which is not within jurisdiction.

The position is then, that the actions of court staff are within my jurisdiction. Reports on complaints about the actions of such staff have always been sought as a matter of course from the Ministry of Justice (or its predecessor) and, to my knowledge, at any rate until recently, there has never been any difficulty in obtaining them.

What I am not permitted to do (nor would I wish to do) is to question the merits of any decision of a court (or tribunal).

IN RELATION TO TRIBUNAL STAFF

The basic position is that, in my view, staff of tribunals, like court staff, have always been within jurisdiction (and should continue to be so). The problem which I highlighted in my paper at the 1994 APOC Conference, and which has not yet been resolved, relates to the staff of a particular tribunal - the Small Claims Tribunal.

Until recently, the Small Claims Tribunal fell within the portfolio of the Ministry of Fair Trading (then known as the Ministry for Consumer Affairs) which had always been prepared to provide me with reports on administrative issues involving members of its staff servicing the Tribunal, including the Registrar. The rationale for seeking reports on matters raised by complainants is that the staff in question are public servants who are ultimately responsible to the head of the department and are, therefore, answerable to him for their administrative actions. A similar rationale applies to court staff (see above).

In 1993, responsibility for the Tribunal and its staff (including the Registrar) was transferred to the Ministry of Justice and, not long after the change, the Senior Referee of the Tribunal challenged the power of the Director General of the Ministry of Justice to obtain from the Registrar factual 'background' reports on complaints to my office about the actions of staff of the Tribunal.

The basis for his challenge is that the activities of the Small Claims Tribunal are judicial and, as the Registrar is a mere "cipher" who carries out the Senior Referee's instructions, the Registrar's actions are also judicial in nature and beyond the scope of the Director General to question.

He argues that this is in line with the legal advice obtained by the then Director of the
Ministry of Consumer Affairs, when the Small Claims Tribunal fell within that portfolio, namely that the Director could direct public servants working with the Tribunal to provide reports except in respect of any judicial functions the Referee might have.

The challenge by the Senior Referee appears to arise from his assumption that I am trying to assert my jurisdiction over the Tribunal itself, which is not so. In my opinion, the complaints which I have received (and continue to receive) relate to actions of staff of the Tribunal which are quite clearly administrative.

As I observed in last year’s paper, the Senior Referee’s stance is essentially a separation of powers approach similar to that taken in the Victorian case of *Glenister v. Dillon* (which is not binding in Western Australia). For the reasons outlined in last year’s paper, I think it unlikely that a jurisdictional challenge on a similar basis would succeed today. But I cannot confidently predict the outcome of such a challenge in Western Australia, given that senior members of our judiciary are very protective of what is regarded as the proper preserve of the courts in such matters.

In order to resolve the impasse (which has arisen partly because of the failure by the Director General of the Ministry of Justice to assert his authority and direct that I be provided with reports on the administrative matters referred to him), I asked the Director General to obtain a legal opinion from the Solicitor General. He undertook to do so but, unfortunately, because of the resignation of the then Solicitor General to take up a position on the Supreme Court Bench and a long delay in the appointment of his successor, to date, the matter remains unresolved.

The delay is unfortunate in that it means I am unable to provide the growing number of complainants (particularly the complainant whose complaint gave rise the problem almost 2 years ago) with a satisfactory response. However, I have recently been informed that the new Solicitor General is looking into the matter and I am hopeful that his advice will resolve the problem.

This jurisdictional problem is not unique to Western Australia. The UK Parliamentary Commissioner, for one, has experienced similar challenges to his jurisdiction. Legislation was passed by the UK Parliament with a view to addressing the issue in relation to both court and tribunal staff (see Attachment B). However, I am sceptical whether the amending legislation will solve the problems that have arisen because it is framed in such a way that there is specific exclusion of any action taken at the direction or on the authority of any person acting in a judicial capacity or as a member of a relevant tribunal. The Senior Referee of the Small Claims Tribunal would no doubt argue that, on the basis of such express exclusions (which he would maintain are already implicit in the
WA legislation), the complaints which I have received about the actions of the staff of the Tribunal are outside my jurisdiction.

CONCLUSIONS

1. If there is a case for at least some of the actions of the courts to be made subject to external review by an independent agency (and I am not yet entirely convinced that there is), it would be more appropriate to consider appointing a Judicial Ombudsman or Commissioner to discharge such a function.

2. On the other hand, I believe that there is a role for the Ombudsman in relation to the administrative actions of tribunals. In order to avoid possible doubt or confusion, it might be desirable to insert in relevant Ombudsman legislation a 'formula' prescribing the limits of the Ombudsman's jurisdiction in this area (as suggested on page 5).

3. In relation to the actions and decisions of the staff of courts and tribunals, I am of the view that, at any rate in Western Australia, these already fall within the Ombudsman's jurisdiction to the extent that those actions and decisions are administrative in nature. (However, in view of the ongoing problems I am currently experiencing, I look forward to the Solicitor General's advice on this matter, particularly in relation to the Small Claims Tribunal).

Parliamentary Commissioner for Administrative Investigations

Perth, Western Australia
October 1995
ENDNOTES

1. The papers are included in the International Ombudsman Institute publication "The Ombudsman Concept" (1995), edited by Professor Reif.


3. At page 413

4. [1976] VR 550
THE CASE FOR SUPERVISION OF THE COURTS BY THE OMBUDSMAN

Mr Adolfo de Castro - *The Ombudsman and the Myth of Judicial Independence*

The Ombudsman of the Commonwealth of Puerto Rico is already able to investigate the actions of the judiciary and views this extension of his jurisdiction as -

"beneficial to the judicial service in that it does not mean, in any way, either mistrust or any kind of underrating of the actual judges. It is a mechanism which, on the one hand, reinforces the idea of having the judicature strictly comply with the constitutional obligations which bind it to the protection of fundamental rights and, on the other, procures its utmost functioning."

Using a statement by Professor Fernandez of the School of Law of the University of Puerto Rico, he further justifies the need for review by the Ombudsman on the ground that the courts must be converted "into really contemporary institutions, conscious of their obligation of accountability" through "proper explanation to the people (the real sovereign power) by way of their advocate, the ombudsman."

Mr de Castro supports the universally accepted concept of the need to preserve the independence of the judiciary and acknowledges that the ombudsman’s functions cannot be permitted to harm in any way "either the dignity or the independence which the constitution confers upon judges", but does not interpret this to mean that there are areas "exempt from control".

He believes, that, in many jurisdictions, some or all of the essential prerequisites for the concept of judicial independence - special judicial training, a uniform system of promotion, a salary which ensures financial independence, the establishment of a judicial association, a guarantee of the absence of political interference - may be absent, making the concept of independence more "mythical" than actual.

In conclusion he supports the extension of the Ombudsman’s jurisdiction to the actions of courts and tribunals as

"the most efficient tool the citizen has at hand to safeguard his supremacy over the political process."
Ms Pirko Koskinen - Investigating the Judiciary

The views of Ms Koskinen (Deputy Ombudsman of Finland) on the appropriateness of the review by the Ombudsman of the actions of the courts are very similar to that expressed by Mr de Castro.

The Ombudsmen of Sweden and Finland are the only Ombudsmen in the world who have an unlimited right to supervise the legality of the activities of the courts. In Finland, both the independence of the judiciary and the Parliamentary Ombudsman’s responsibility for ensuring that the courts obey the law and fulfil their obligations in relation to their actions are provided for in the Constitution Act.

Ms Koskinen also views the "independence" of the judiciary as an admirable concept which is, unfortunately, in real terms, as open to indirect influence (appointment of judges, the payment of salaries, budgetary constraints - all quite legal) as any other public official or body.

She divides the activities of the courts into:

"adjudication" - judicial decisions on substantive matters where the interpretation of the law and discretion have a role and which would be subject to appeal.

This type of activity would not be the subject of review by the Ombudsman; and,

other decisions - which includes decisions on judicial process, procedural matters or other auxiliary or supplementary administrative activities, not subject to appeal.

These functions are no more "judicial" in character than that of many other public sector bodies and are therefore, quite rightly (in Ms Koskinen’s view), within jurisdiction.

Moreover, a large proportion of legal decision-making that affects the citizen has been removed from the courts and transferred to other administrative bodies in the public sector. For example, the police make the decisions in relation to traffic fines. The (public) prosecutor can decide not to bring charges even if there is sufficient evidence that a crime has been committed; in minor criminal matters, he can also make legally enforceable decisions.

She claims that this shift of responsibility has, in effect, at the very least distorted the distinction between 'adjudication' by the courts and 'decision-making' on legal issues by other government agencies.
Having said this, it appears that the Finnish Ombudsman is able to look at all of the activities of the courts, whether this involves adjudication, auxiliary or supplementary functions or administrative or other functions transferred to the courts. The unlimited extent of the Ombudsman's jurisdiction (which includes the power to recommend annulment of a Supreme Court decision, usually on the basis of clerical or procedural errors, though not to deal with matters which are sub judice or subject to appeal) is qualified, according to Ms Koskinen, by the fact that the Ombudsman's powers are recommendatory and not determinative.

Ultimately, although criticism of the courts by the Finnish Ombudsman is not a rare occurrence, it tends to be focussed on the conduct of the courts in various situations - for example,

* instructions given to attorneys
* insufficient or erroneous instructions for appeal
* defects in the reasoning for judgments
* unnecessary delays or postponements
* clerical errors
* etc

In this way, the extent of the Ombudsman's jurisdiction can also be applied to the staff of the courts.

Although she acknowledges that the institution of Ombudsman is probably best qualified for the role (on the basis of impartiality, good authority, level of expertise and knowledge, together with the ability to take on both major and minor enquiries), Ms Koskinen does not, unreservedly, recommend that it should be the Parliamentary Ombudsman who should be responsible for supervision of the courts and their staff. She is of the view that an appropriate independent agency would need to be considered in the context of the standing and integrity of the courts and the extent of the powers available to the agency.

THE CASE AGAINST SUPERVISION OF THE COURTS BY THE OMBUDSMAN

Professor Timothy Christian - Why no Ombudsman to supervise the Courts in Canada

Professor Christian's paper is based in part on his disagreement with the proposals put forward by Professor Rowat, a leading proponent of the introduction of the Ombudsman system in Canada at the First San Juan Ombudsmanship Congress in 1991. Professor
Rowat was strongly in favour of the extension of the Ombudsman's jurisdiction to include supervision of "the administration of justice and the personnel of the courts other than judges", and the behaviour and procedures of judges, but not the content of their decisions which are subject to appeal.

Professor Christian suggests that the proposals put forward by Professor Rowat (and evident in the papers presented by both Mr De Castro and Ms Koskinen) failed to take account of, and potentially interfered with, the constitutional guarantee of judicial independence. In his view, judicial independence requires complete freedom from external pressure and influence from any body or agency exercising authority derived from the State, including the Parliamentary Ombudsman.

He is also sceptical of the relevance of the Scandinavian models to a country such as Canada which operates on a federal system. He explains that, in Canada, the Prime Minister of the central government has total power between elections which are held every five years. Provided the governing party retains a parliamentary majority, it may promote and pass any legislation which is constitutionally proper; it is the responsibility of the courts to decide the constitutional validity of such legislation. He argues that this situation would be fertile ground for political influence if there was any opportunity for supervision of the courts by an external review body.

His opposition to any extension of the Ombudsman's jurisdiction to include supervision of the courts is based on his view that the purpose of the Ombudsman is to check the Executive. The judiciary has a broader function which requires it not only to monitor the Executive, but also to ensure that the entire government complies with the provisions of the Constitution. He concludes that it is for the judiciary to decide what measures interfere with its independence and that, in his view, any attempt to insert the Ombudsman as an external review agency in relation to the courts would be disallowed "as a constitutional interference with judicial independence" on the basis that the "unique role of the judges as "guardians of the Constitution" would be compromised".

M. Jacques Meunier - The Special Relations of the Canadian Provincial Ombudsmen with the Courts and Quasi-Judicial Authorities

In his opening comments, M. Meunier (Deputy Ombudsman of the Province of Quebec) refers to the question of the Ombudsman's jurisdiction in relation to courts as being rather "delicate". He goes on to consider not only the concept of supervision of the courts but also examines the position of the Ombudsman in this regard in the provinces in Canada. On his analysis, it appears that, in some provinces, the Ombudsman is specifically
excluded from investigating the courts, whereas, in others, where there is no specific statutory restriction, the Ombudsman has had to rely on the statutory interpretation applied by the courts themselves.

His views on the inappropriateness of supervision of the courts by the Ombudsman do not appear to be as immovable as those expressed by Professor Christian, as he acknowledges that there may be circumstances where external review might be justified and, indeed tolerated, in relation to bodies having "quasi-judicial" functions. These he interprets as being functions performed by an administrative authority which, being established as part of the machinery of government, can only be considered as administrative.

ENDNOTES

1. Pages 129-137 of *The Ombudsman Concept*

2. At page 132 of *The Ombudsman Concept*

3. At page 131 of *The Ombudsman Concept*

4. Pages 121-127 of *The Ombudsman Concept*

5. It should be noted that the extent of the Finnish Ombudsman's jurisdiction is, in broad terms, much wider than that of many other Ombudsmen - myself included. For example the Finnish Ombudsman is even able to supervise the activity of private insurance companies which decide on the payment of statutory pensions and benefits.

6. At pages 139-148 of *The Ombudsman Concept*

5. (1) Subject to the provisions of this section, the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority...

...

* (6) For the purposes of this section, administrative functions exercisable by any person appointed by the Lord Chancellor as a member of the administrative staff of any court or tribunal shall be taken to be administrative functions of the Lord Chancellor's Department or, in Northern Ireland, of the Northern Ireland Court Service.

** (7) For the purposes of this section, administrative functions exercisable by any person appointed as a member of the administrative staff of a relevant tribunal -

(a) by a government department or authority to which this Act applies; or

(b) with the consent (whether as to remuneration and other terms and conditions of service or otherwise) of such a department or authority, shall be taken to be administrative functions of that department or authority.
SCHEDULE 3

MATTERS NOT SUBJECT TO INVESTIGATION

* 6A. Action taken by any person appointed by the Lord Chancellor as a member of the administrative staff of any court or tribunal, so far as that action is taken at the direction, or on the authority (whether express or implied), of any person acting in a judicial capacity or in his capacity as a member of the tribunal.

** 6B. (1) Action taken by any member of the administrative staff of a relevant tribunal, so far as that action is taken at the direction, or on the authority (whether express or implied), of any person acting in his capacity as a member of the tribunal.

(emphasis added)

* Added by Courts and Legal Services Act 1990 (UK) s.110

** Added by Parliamentary Commissioner Act 1994 (UK) (op. early Oct 1994)
Appendix 3
(page 42)
Background

The Royal Commission into Commercial Activities of Government and Other Matters was set up in January 1991 to investigate and report on a number of matters centred around whether there had been any corrupt, illegal or improper conduct in respect of certain activities involving the Government of Western Australia, its departments, agencies, instrumentalities and corporations. These matters came to be known collectively by the convenient tag of "WA Inc."

In Part II of its Report, released in November 1992, the "WA Inc" Royal Commission recommended the establishment, by legislation, of a Commission on Government (COG) to be modelled, in large measure, on the Electoral and Administrative Review Commission of Queensland (EARC).

Establishment and functions of Commission on Government

The COG was established by the Commission on Government Act 1994, the long title of which states its purpose as being:

"to establish a Commission to inquire into certain matters relating to public administration and relevant to the prevention of corrupt, illegal or improper conduct in the public sector."

The Act requires COG to look into 24 specified matters, and any other matters, to the extent to which it considers them relevant to the prevention of corrupt, illegal or improper conduct by or involving public officials. Its specific "references" include an examination of such matters as: the secrecy laws of the State; the functions and terms of reference of an Administrative Appeals Tribunal (AAT); legislation and other measures necessary to facilitate the making and investigating of whistleblowing complaints and appropriate protection for whistleblowers and others; the role, powers and functions of the State's Official Corruption Commission; the State electoral
system; and Parliamentary privilege. (Overall, a daunting task indeed!). COG has, to date, produced discussion papers on (inter alia) all of these topics, with the exception of the AAT. (I have made submissions on several of these discussion papers.) In addition, COG's first report, dealing with (inter alia) the secrecy laws of the State, the electoral system and Parliamentary privilege, was published in August 1995.

Relevance of COG to the Ombudsman

Problems of gaps in jurisdiction etc
The activities of COG are relevant to my office in a number of respects. One of the areas of particular interest is its involvement in respect of my jurisdiction. Attempts have been made over a number of years to close the gaps in my jurisdiction by replacing the present Schedule of inclusion of statutory authorities with a formula that would automatically catch all government agencies. (At present, only government departments and local authorities are included on an automatic basis; the remaining bodies (those referred to as statutory authorities) have to be individually specified in a Schedule to the Act under which I operate, i.e. the Parliamentary Commissioner Act (the PC Act.).)

Following publication of my 1994 annual report, the State Opposition introduced a Bill which would very nearly have achieved the main aim of including all government agencies automatically. However, the State Government opposed the Bill and decided instead to ask COG to add the matter to its references. After a public hearing to help it decide whether it would comply with the Government's request, COG decided to consider the question of my jurisdiction, and other matters pertaining to my role and functions, (but in conjunction with its existing reference rather than as a discrete matter). This may mean that the matter will not be finally considered by COG until early 1996.

COG's decision has both positive and negative aspects. The negative aspect is that, on the basis of its current timetable, consideration of the important question of the gaps in my jurisdiction may well be further delayed. On the other hand, on the positive side:

- COG has agreed to look into the question of my jurisdiction and other matters, and may ultimately have some worthwhile recommendations to make;
the important part played by the Ombudsman in the accountability process will be given further recognition and publicity;

as well as the question of rationalisation of my general jurisdiction, this may lead to examination and recommendations of other broader matters such as the legislative means to achieve more effective functioning of my office (e.g. in relation to complaints against police).

COG has yet to address the jurisdictional and other issues which it has undertaken to examine (see further below, in relation to COG's reference No. 7). However, another important development in the meantime is that, despite having earlier indicated that it would await advice from COG before acting on the matter, the State Government has apparently been looking at my proposals for dealing with the jurisdictional issue, and otherwise improving the legislation under which my office operates. Although I cannot be more specific at this stage, I am reasonably hopeful that the Government will introduce legislation on these issues in the fairly near future.

**Secrecy laws of the State**

As previously mentioned, one of the topics dealt with in COG's first report is the secrecy laws of the State. On the whole, I believe the report is a very impressive document, especially having regard to the limited time available to COG to compile it. However, I am seriously concerned about one aspect of the report.

COG's very first recommendation is that [all] existing statutory secrecy provisions should be repealed and the State's Freedom of Information Act should be the governing legislation for determining when information held by (sic) the Government should not be disclosed. From the terms of the report, it would appear that this recommendation is intended to apply to the secrecy provisions of the PC Act, even though my office is not a part of Government but, rather, an independent agency of the State Parliament.

With the greatest of respect to the Commission, it seems to me that, in relation to my office, it has failed to grasp the fundamental distinction between legislation designed to protect the workings of government, on the one hand, and legislation designed to protect the confidentiality and integrity of information relating to complainants to my office, and those about whom complaints are made, on the other hand.
In my view, if the Commission's recommendations in this area are implemented, the effectiveness of the role of my office will be considerably impaired.

It has been suggested that concerns such as those which I have expressed can be met, firstly, by the existing general exemptions in the FOI Act and, secondly, by the Commission's proposals on privacy. I do not believe this to be the case, for the reasons which I explained to COG, prior to the publication of its report, in both written and oral submissions.

I have expressed my concerns about this issue to the Presiding Officers of the State Parliament, the State Premier and the Leader of the Opposition.

**Whistleblowing and corruption**

The topics of whistleblowing and corruption (including the concept of "impropriety" or "improper conduct" are covered by COG's specific references Numbers 11 and 13 which are on the following terms:

**Whistleblowing**

"11. The legislative and other measures that should be taken -
(a) to facilitate the making and the investigation of whistleblowing complaints;
(b) to establish appropriate and effective protections for whistleblowers; and
(c) to accommodate any necessary protection for those against whom allegations are made."

**Corruption and improper conduct**

"13. The appropriate role, powers and functions of the Official Corruption Commission for the prevention and exposure of impropriety or corruption within the public sector with consideration given to the respective roles of other agencies and legislation."

COG issued a Discussion Paper in August 1995 covering both topics. I have recently made a submission to COG on the issues raised in the Discussion Paper. The main points made in my submission are -

(a) As regards whistleblowing:
(i) if it is decided to introduce a legislative scheme in Western Australia, the South Australian Whistleblowers Protection Act 1993, with appropriate modifications to suit Western Australian requirements, could be a realistic and practical model to follow;  
(ii) if such a scheme is to be introduced it should apply to the whole of the public sector and, as regards the most serious public interest disclosures, to the private sector as well;  
(iii) it is preferable to utilise the expertise of existing agencies to coordinate and operate a whistleblowers' protection scheme rather than to create a new agency for this purpose.

(b) As regard corruption and improper conduct:

(i) The main focus of proposed legislation in this area should be on ensuring that matters involving criminal conduct are adequately covered;  
(ii) it is not necessary to establish a high profile (and highly resourced) body on the lines of the Independent Commission Against Corruption (New South Wales) or the Criminal Justice Commission (Queensland) - instead, the existing Official Corruption Commission (OCC) should continue to operate, but with appropriate amendments to its legislation and the provision of additional resources as necessary;  
(iii) the current role of the independent accountability agencies (including the Ombudsman) in relation to improper conduct should continue, with suitable improvements and modifications where necessary;  
(iv) the OCC should be provided with special powers, exercisable after consultation with the Ombudsman, to set up an inquiry with Royal Commission powers on an ad-hoc basis, where appropriate; and  
(v) complaints against the police should continue to be dealt with by the Ombudsman, whose powers in this area should be enhanced.

Other matters  
There are other matters in the COG list of specific references which are of particular interest and relevance to my office. The most significant of these matters is Number
"The necessity and framework for legislation governing monitoring, control and Parliamentary scrutiny of State-owned companies, trading enterprises, partnerships and statutory authorities."

It is understood that it is primarily in relation to this topic that COG intends to deal with the role, functions and jurisdiction of my office (at any rate in relation to matters other than police). A Discussion Paper addressing the various issues will no doubt appear in the near future.

Another COG reference of considerable interest to my office is Number 5:

"The functions and terms of reference of an Administrative Appeals Tribunal and its relationship to the respective roles of the judiciary and the executive."

This topic will no doubt also be the subject of a Discussion Paper in due course.

Conclusion
I think it will be apparent from this brief summary that COG's wide-ranging inquiries will have considerable implications for the office of Ombudsman in this State. Arrangements are being made for details of COG's Discussion Papers and reports (and of my responses to the former) to be entered on the OMBIS data base. Any delegates who may not have access to OMBIS may obtain details direct from my office (contact Mrs Jane Burn, facsimile 61-9-325-1107, telephone 61-9-220-7555).

Parliamentary Commissioner for Administrative Investigations
Perth, Western Australia
October 1995.

* Note: COG has deliberately not been dealing with its references in numerical sequence.
Administrative Action –v– Policy – Mutually Exclusive?

"(L)ines of demarcation, setting apart administrative from non-administrative functions ... run up hill and down dale, over dizzy heights of distinction and through dense jungles of statutory enactment, hither and thither around "ifs" and "buts", "whens", and "howevers" until they become altogether lost to the common eye" (Woodrow Wilson)

1. Challenge to jurisdiction

From time to time the jurisdiction of an Ombudsman to investigate the administrative actions of a public sector agency is challenged on the grounds that the decision is a policy decision and hence falls outside the Ombudsman's jurisdiction.

2. Definition

Most jurisdictions define "administrative action" in similar terms. The Queensland definition is "any action relating to a matter of administration and includes -

(a) a decision and an act; and

(b) the failure to make a decision or do an act (including the failure to provide a written statement of reasons in relation to a decision); and

(c) the formulation of a proposal or intention; and

(d) the making of a recommendation (including a recommendation made to a Minister)."

3. Analysis of case law

Support for the proposition that there is a distinction between matters of "administration" and matters of "policy" is found, in particular, in two Australian court decisions. In the Victorian case of Booth v Dillon (No. 2) (1976) VR 434 the Supreme Court held that the appropriate sleeping arrangements for prisoners and issues relating to the provision of funds for changing that accommodation were matters of policy and not administration and thus were outside the scope of the Ombudsman's jurisdiction.

The second case is Salisbury City Council v Biganovsky (1990) 70 LGRA 71 where a single Supreme Court judge, Mullighan J, held that the policy of a local government council in relation to the use and occupation of council premises by community groups and the terms of licensing and rental arrangements in respect thereof was not a "matter of administration" and the Ombudsman had no jurisdiction to investigate the relevant local government policy. Surprisingly, His
Honour did think it would be in the proper exercise of the function of the Ombudsman to draw attention to the policy in his report if he felt it were unreasonable or unjust.

The judgments do not provide any detailed analysis or reasons for drawing the distinction between administration and policy and the South Australian judgment appears to be contradictory in that having found the Ombudsman had no jurisdiction to investigate Council policy, the Ombudsman would have to investigate before he could draw attention in his report to the policy and state whether it was unreasonable or unjust. This contradiction highlights the difficulties that have arisen because the Australian courts have failed to provide any guidance as to the distinction.

On the other hand, the Canadian courts have displayed no such inhibitions. In R v British Columbia Development Corporation v Friedmann (1984) 14 CLR 129 the Supreme Court of Canada held "the phrase 'matter of administration' encompasses everything done by government authorities in the implementation of government policy. I would exclude only the activities of the legislature and the courts from the Ombudsman's scrutiny" and went on to say ""There is nothing in the words 'administration' or 'administrative' which excludes the proprietary or business decisions of governmental organisations. On the contrary, the words are fully broad enough to encompass all conduct engaged in by a governmental authority in furtherance of government policy – business or otherwise". The Court also said the Ombudsman's Act "represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil".

4. Categories of policy

Much of the difficulty currently being experienced in distinguishing between policy and administration would be resolved were the word "policy" identified and explained with more particularity. Three broad categories of policy spring to mind:-

1. Policy in the sense of value judgments by government, allocation of resources, distribution of largesse and general governmental intention towards the electorate;

2. Policy in the sense of providing procedural guidelines as to the manner in which discretionary powers granted by statute might be exercised by agencies in particular circumstances; and

3. Policy in the sense of providing guidance as to a preferred interpretation of a statutory provision where there is some ambiguity.

In most jurisdictions the first category of government policy would not be within the jurisdiction of the Ombudsman because the Ombudsman Act does not authorise the Ombudsman to question the merits of a decision made by a Minister of the Crown or by the Cabinet. This restriction does not apply where the policy decision
is that of a public sector agency, that is, government department, statutory authority or local government authority.

I would contend that both procedural and interpretative policies fall within the jurisdiction of the Ombudsman. Administrative action includes the formulation of a proposal or intention and such policies have been formulated with the intention of providing guidance as to the manner in which a statutory power is to be exercised in a particular set of circumstances.

Occasionally a public sector agency will make an interpretative policy as to the manner in which a relevant statutory provision is to be interpreted and applied by decision makers in the agency. In a recent case investigated by this Office "B" a prisoner sentenced to life imprisonment had been on remand for two years prior to being sentenced. The Corrective Services Commission policy interpreted a statutory provision in a way which rendered "B" and others in similar circumstances ineligible for consideration for reclassification or parole until a particular length of time had elapsed from the date of the sentence. The Commission ignored for the purposes of calculation any time spent on remand. On normal principles of statutory interpretation the Commission's interpretation was difficult to sustain. On that basis the Commission's interpretation was challenged and after review the Commission altered its policy to include the period of time spent on remand.

5. **Local government policy**

The jurisdiction of the Queensland Office to investigate questions of policy has now come into sharp focus because a new Local Government Act has been enacted and makes provision for local governments to promulgate local law policies. Local laws replace the traditional term "bylaws". Local governments have to follow a prescribed process in promulgating local law policies and these provide guidance in the manner in which the local authority would prefer to see the local law implemented. In practice, it is not unusual for local governments to make policies which purport to extend local government powers beyond those granted by the statutory provision. My view is that the Queensland Ombudsman has jurisdiction not only to investigate the local law policy making process on the basis of it being a formulation of an intention by the local government, but also the implementation of the policy.

Notwithstanding the traditional separation of powers doctrine which has been utilised by Australian courts to determine whether a matter is legislative, judicial or executive (administrative), the recent Court of Appeal decision in the Queensland case of Resort Management Services Limited v Council of the Shire of Noosa (1994) QPLR 305 has found that the process which a local government goes through in making a local law is an administrative action and not a legislative action. The relevant passage of the court judgment is in these terms -

"It is not easy to comprehend the reasoning associated with the Appellant's submission that its (the Council's) resolution is not of an administrative character because (i) it involves the determination,
implementation or application of policy or (ii) is (or might be) influenced by political considerations. These are not features which distinguish legislative from administrative decisions. On the contrary, such features are commonly associated with decisions by executive government which are quintessentially administrative in character."

6. Conclusion

I venture to say that the occasions when successful distinctions will be drawn between administration and policy to endeavour to turn off the Ombudsman's "lamp of scrutiny" will be limited to those policy decisions which can be truly classified as policy decisions of the government of the day unconnected with a statutory function.

F N Albietz
Parliamentary Commissioner for
Administrative Investigations
(Queensland)

October 1995
Historical Background
The University Visitor concept developed from the Papal representative in the United Kingdom who in medieval times carried out inspections ("visitations") of Church charitable institutions. After the Reformation, the Monarch became the head of the Established Church in England and took over the Visitor role. The Monarch, as the chief donor of property for charity, became Visitor of an increasing number of educational institutions as well as hospitals and orphanages. In the case of privately endowed charitable institutions, donors similarly had the right to appoint a representative, or visitor, to ensure that the property they donated was used for the purposes intended. The role of inspecting and reporting to the donor gradually expanded to one of hearing grievances from members of the institution. The first universities were charitable institutions and hence had "Visitors".

The Visitor Concept in Australia
In Australia, where Universities (even the private ones) are created by Acts of Parliament, governments generally followed the English practice of appointing a Visitor (usually the Governor). University Acts included provisions along the lines:

"The Governor of the State of Western Australia shall be the Visitor of the University, and shall have authority to do all things which appertain to Visitors as often as to him shall seem meet." (University of Western Australia Act, section 7)

Even in cases where the legislators did not appoint a Visitor (e.g. the Australian National University), however, it has been suggested that the Governor (or Governor General) may be the Visitor by virtue of the common law.
The Visitor’s role has been the subject of legislative intervention in recent years in both New South Wales and Victoria. In New South Wales, the Visitor’s powers have been drastically curtailed to the point where the functions of the office have been purely ceremonial since 1994.\(^2\) (I understand that the New South Wales legislation was amended following a Supreme Court case in which it was decided that it was inappropriate for the Visitor to award merely solatium (in the sense of compensation as a solace for injured feelings only) rather than full compensatory damages.\(^3\) There is perhaps a warning in this for "overzealous" Visitors and Judges - governments may not retain the Visitor concept if it involves substantial financial outlays for universities.)

In Victoria, on the other hand, the amending legislation has left the Visitor’s powers intact but has expressly provided that the Visitor’s jurisdiction is not exclusive: i.e. a person affected by a decision of a university in Victoria can now seek relief from a court under the Administrative Law Act even though the issue may be within the jurisdiction of the Visitor.\(^4\)

Although Visitors have exercised their jurisdiction in Australia relatively sparingly (probably no more than 50 times in the last 120 years\(^5\)), the concept is of particular relevance to Western Australia for three reasons. Firstly, a small but significant (in terms of the resources involved in investigating them) number of complaints against universities are received by the Ombudsman each year. Secondly, one of the universities in the State is not within the Ombudsman’s jurisdiction and I have on occasions referred aggrieved students of that University to the Governor as Visitor because I have not had the power to deal with the complaints they presented to me. Thirdly, in a recent judgment, publicised in Western Australia, the Western Australian Industrial Relations Commission determined that a grievance, concerning failure to confirm tenure, of a former university lecturer should be dealt with by the Visitor rather than the Commission. (I should add here that in Western Australia, unlike some other jurisdictions, the Ombudsman has extensive jurisdiction with respect to employment matters.)

The powers and procedures of Visitors are not set out in legislation but are derived from the common law. Commentators refer to:

"...the lack of defined procedures; uncertainty about the true extent of visitorial powers; uncertainty about the extent to which Visitors must observe the rules of Natural Justice..."\(^6\)
However, the position as I understand it is outlined below.

**Extent of Jurisdiction**

It appears to be well established that the Visitor’s jurisdiction is confined to questions of a "domestic nature". Domestic matters have been said to include "whatever relates to the internal management of ... the institution." The subject matter of disputes in which Visitors have exercised their jurisdiction in Australia has included:

* the requirement that the Professor of Classical and Comparative Philology at the University of Melbourne must not be a "man in holy orders" (1871);

* the date on which examination prizes would commence at the University of Melbourne. (1884);

* dismissal of a Professor at the University of Tasmania (1962);

* students "wrongfully" purporting to hold Student Representative Council offices at the University of Melbourne (1979);

* length of lecturer’s study leave at Murdoch University (1980);

* dismissal of Head of Law School at Macquarie University (1989);

* termination of candidacy of a PhD student at Newcastle University (1990);

* refusal to award a degree to a student at the Flinders University of South Australia (1991).

**Exclusive jurisdiction**

Although the matter is not free from doubt, it appears that, except to the extent to which the position may have been expressly modified by legislation, the jurisdiction of the Visitor is exclusive of the courts (except to the extent to which the courts may intervene in their supervisory jurisdiction, by way of judicial review). In Victoria, for example, the Supreme Court held that it had no jurisdiction in the matter of a student who had been excluded from the University of Melbourne, as it fell within
the exclusive jurisdiction of the Visitor. However, as indicated above (see page 2), the position in Victoria has now been expressly modified by legislation.)

Initiation of complaints
Visitations may be initiated either by complainants' petitions to the Visitor setting out their grievances and seeking the Visitor's involvement or, so it seems, by the Visitor intervening on his or her own initiative. Visitations on the Visitor's own motion are very uncommon and it has been suggested that this aspect of the Visitor's jurisdiction is "at least obsolescent". However, in 1974 the Governor of South Australia, who was ex officio Visitor of the Flinders University of South Australia, attended a student meeting on his own initiative in an attempt to resolve student unrest.

Non-acceptance of complaints
Visitors will normally refuse to exercise their jurisdiction in cases where the petitioner has not exhausted all avenues of review within the university. Also, the Visitor may decline to become involved if there has been substantial delay in bringing the petition (e.g. the Governor of Tasmania dismissed a petition in the Orr case partly because it was submitted six years after Professor Orr's dismissal).

Procedures
Although there are some old English cases which suggest that the Visitor may, when hearing and determining complaints, proceed in any manner he or she deems appropriate, commentators suggest that it is unlikely that modern courts would permit visitors to adopt whatever procedure they please.

Visitors are able to delegate the function of investigating and hearing complaints but cannot delegate the power to make the decision. It is usual for the Visitor to appoint a lawyer or judge to act as an "assessor" to do the investigation and tender advice to the Visitor.

Although the Visitor (through the Assessor) is acting judicially when hearing a complaint, the proceedings are said to be conducted with a minimum of formality. The Visitor is not bound to proceed according to the rules of common law and is not bound by the rules of evidence. However, the rules of natural justice must be observed and, although it is open to question whether they are required to do so, Visitors in Australia have adopted a practice of giving full and lengthy reasons for
their decisions.

In practice, Visitors are not often required to hear evidence - their task is usually one of examining the available documents including written submissions from the parties.

It is unclear whether Visitors have the power to compel persons to give evidence, demand the production of documents, and administer oaths and affirmations. While these "powers" have been exercised in the past by Visitors, who assumed that they had the same powers as their religious forebears had under church law, some commentators argue that it is doubtful whether there is any legal basis for the assumption.

Although it is also doubtful if the parties have a right to demand legal representation during the Visitor's investigation, Visitors in Australia have permitted parties making oral submissions to be represented by counsel.

Scope of Investigation
Although commentators argue that Australian Visitors, like their English predecessors, have the authority to rehear and redecide matters on the merits, they generally will not interfere with an honestly exercised discretion. In a Victorian judicial decision it was stated that

"The Visitor does not sit on appeal from the honest exercise of such a discretion, and it is not material to argue that different persons, exercising that discretion with equal honesty, might have reached a different conclusion."

Remedies available to Visitors
Visitors can grant whatever form of relief they think appropriate. This includes damages (e.g. damages may be granted in lieu of reinstatement in the case of employment matters) and costs. It would appear that in certain circumstances, the Visitor may, having regard to the best interests of the University, decline to grant relief to which a petitioner would otherwise be entitled.

Finality of decisions
The traditional view is that the Visitor's decision is without appeal to any other domestic court or court of law. However, the extent to which actions of Visitors...
are subject to judicial review by a court has not been conclusively resolved. The courts might review the decision where the Visitor has exceeded jurisdiction or erred in law. On the other hand, where the Visitor has acted within jurisdiction and has not been guilty of any error in law in reaching his or her decision, it appears that courts will not interfere with the merits of the decision.

Practical implications for Ombudsmen
In circumstances where members of a university come to the Ombudsman concerning matters which are outside the Ombudsman's jurisdiction, it may be appropriate to refer the complainant to the Visitor. On the other side of the coin, a Visitor might choose to refer a matter to the Ombudsman rather than investigate it him/herself.

It is also possible that a person, disgruntled with the outcome of the Ombudsman's investigation of a complainant about a University, might then approach the Visitor. I have been able to find three occasions on which this has occurred in Australia although there may well be others. In 1974 a former employee of Monash University complained to the Visitor after she was dissatisfied with the outcome of the Victorian Ombudsman's preliminary inquiry into her complaint of unfair dismissal. The Ombudsman had been satisfied that the complainant had a remedy at law, that it was reasonable for her to resort to that remedy, and that the complaint did not merit investigation to avoid injustice. The Visitor refused to accept jurisdiction in the matter.

Much more recently, in 1994 and in 1995, dissatisfied complainants to my office lodged petitions with the Governor of Western Australia, His Excellency Major General Michael Jeffery, AO, MC, in his capacity as Visitor of the University of Western Australia and Murdoch University. The petitioners were a student dissatisfied with his exclusion from a course and a former academic staff member whose honorary fellowship had been withdrawn. The second case has attracted some media attention and it was I who informed the former academic staff member of his right to approach the Visitor. At this stage I do not know what conclusion the Visitor reached concerning the two petitions.

At the other extreme, it is possible that a person disgruntled with the Visitor's decision might complain to the Ombudsman. I know of no case where this has occurred. Although the Visitor's decision would be outside the Ombudsman's jurisdiction, the complainant's original grievance might not be. In theory, the Ombudsman might disregard the Visitor's decision and investigate the grievance
from scratch. In practice, I believe most Ombudsmen would decline to become involved in the matter, either on the basis that the Visitor's decision had conclusively determined the issues or alternatively in exercise of their general statutory discretions. In any event, a University faced with a conflict between a determination of the Visitor and a recommendation of the Ombudsman would no doubt regard itself as having little choice but to stick by the Visitor's decision (unless, conceivably, the Ombudsman's investigation was concerned with matters of defective administration falling outside the scope of the Visitor's enquiries.)

Another issue which does not appear to have been canvassed in the literature is whether the Visitor's exclusive jurisdiction with respect to internal matters affects the Ombudsman's powers. I would not think that a problem should arise here because the Ombudsman's powers are derived from statute whereas the Visitor's powers are derived from case law and there is not complete consistency between cases on the issue. Nevertheless, a University displeased with the Ombudsman's involvement in an issue might try to raise the issue - I understand that in New South Wales in the mid-1980's there was considerable disquiet amongst some members of the Macquarie University Law School concerning the Ombudsman's investigation of a complaint from a student concerning an examination grade.

Conclusion
The Visitor concept has been variously described as a "mischievous anachronism"30 and a "swift, cheap and final"31 form of alternative dispute resolution for universities. The role has many similarities to that of the Ombudsman and, at least in some states, persons with grievances against universities have a choice of approaching the Visitor or the Ombudsman. Should knowledge of the existence and role of the Visitor become more widespread through the recent publicity in Western Australia, it is possible that the number of complaints to Ombudsman about universities could decrease with more complainants going to the Visitor instead. Practical problems concerning the overlap of the two roles might then occur.

I would welcome comments by colleagues concerning their experience with the University Visitor in their jurisdictions.

References
This paper relies heavily on the articles mentioned in the Endnotes, and I am indebted to Mr Adrian Chua, a senior law student at the University of Western Australia, for much of the research involved in preparing it. Unfortunately, much of
the available literature is becoming dated and current primary research by Whalley and Price may reveal some changes in Australian visitorial procedure in the last ten years.

Parliamentary Commissioner for Administrative Investigations

Perth, Western Australia.
October 1995.


5. R J Sadler, "The University Visitor: Visorial Precedent and Procedure in Australia" (1981-3) 7 University of Tasmania Law Review 2 at p. 8 indicates that at that stage it appeared that Visitors in Australia had exercised their jurisdiction on five occasions. However, I understand that there has been a significant increase in visitorial activity since Sadler’s article was written, particularly in Victoria.


7. Thomas v University of Bradford [1987] 1 All ER 834; Patel v University of Bradford Senate [1978] 1 WLR 1488 at 1493; Re Macquarie University; Ex parte Ong (1989) 17 NSWLR 113; see again Goldring at p. 21 and Sadler at pp. 6-7, 23-29.


15. Sadler, pp. 21-23.


17. R v Bishop of Ely (No. 2) (1794) 5 TR 475.


25. *Re Macquarie University; Ex parte Ong* (1989) 17 NSWLR 113 at 140.

26. *Rigg v University of Waikato* [1984] 1 NZLR 149; but see again *Re Macquarie University; Ex parte Ong* at 118.

27. Sadler, pp. 28-29.


29. Ibid.

30. Attributed to a former Governor (and therefore *ex officio* Visitor) and Chief Justice of Western Australia by Walley and Price p. 8.

Appendix 6
(page 56)
ENSURING ETHICAL STANDARDS IN PUBLIC LIFE:
RESPONSIBILITY AND ACCOUNTABILITY OF PARLIAMENTARIANS AND OTHER PUBLIC OFFICIALS
(IN PAPUA NEW GUINEA)

EXECUTIVE SUMMARY OF A PAPER

PRESENTED
BY SIMON G. PENTANU
CHIEF OMBUDSMAN OF PAPUA NEW GUINEA

TO THE
COMMONWEALTH PARLIAMENTARY ASSOCIATION SEMINAR
AT PORT MORESBY
PAPUA NEW GUINEA

MAY 1995
ENSURING ETHICAL STANDARDS IN PUBLIC LIFE:

RESPONSIBILITY AND ACCOUNTABILITY OF PARLIAMENTARIANS AND OTHER PUBLIC OFFICIALS

(IN PAPUA NEW GUINEA)

EXECUTIVE SUMMARY

1. INTRODUCTION

The essence of holding public office is the duty of trust which is attached to the office. The office-holder is the trustee and the public is the beneficiary.

Public office-holders have a duty to uphold the dignity and independence of their offices; to discharge their duties with a strong sense of commitment to the public interest; and to steer clear of decisions that are motivated by self-interest. These duties are all part and parcel of the ethical standards which - at least in most Commonwealth countries - a public office-holder is supposed to be guided by on every day in which an office is held.

When ethical standards break down - which is what happens when decisions are motivated by some hidden agenda - the whole system of government also breaks down, and markets and systems, as well as the people within them, become corrupted.

This paper gives an explanation of the steps that have been taken in Papua New Guinea to try and ensure that the ethical standards of public office-holders do not break down. I will focus attention on the steps that can be taken by our
Ombudsman Commission, because from any frame of reference it is a unique institution which has a special role to play in this area. In particular, it is necessary to examine the role of the Leadership Code, the enforceable code of ethics which the Commission administers. I will also briefly address some of the other institutions and devices used to maintain ethical standards in this country.

However, before looking at Papua New Guinea, it is important to examine what is meant by the concept of "ethical standards", and in particular the notion of what some people might call "low" and "high" standards.

II. THE CONCEPT OF ETHICAL STANDARDS: THE IMPORTANCE OF PLAYING BY THE SAME RULES

1. ETHICAL STANDARDS ARE NOT UNIVERSAL

There are some systems of government in which the ethical standards expected of public office-holders are entirely different to those that have been traditionally entrenched in Commonwealth countries. In some countries, the government and the private sector are so closely interlocked that a minister or other public official, when making a government decision, will invariably be making a decision which may have a bearing on his or her own interests.

One tends to automatically regard these countries as having "lower" ethical standards than their own. But that is really a misconception. The better view is that the ethical standards which guide public office-holders simply differ from country to country.

Ethical standards are not universal; and this is a critical consideration to bear in mind as every country in the world becomes more internationalised and the global village phenomenon increases.

It is surprising how often this may not be appreciated by those who are ignorant or arrogant or recklessly indifferent to the social and political aspirations of the country in which they operate.

2. RECOGNITION OF DIFFERENT STANDARDS IS VITAL FOR ANY "ETHICAL" SYSTEM OF GOVERNMENT

An appreciation of the different ethical standards which apply in different countries has a number of implications for the way in which the processes of government are conducted in a country such as Papua New Guinea; including the way in which those in the private sector do business with government.

First, when people from other countries are dealing with a public office-holder, there must be a preparedness to adjust their ways to the ethical standards which apply in the public office-holder's home country.
Secondly, there must be an alertness, on the part of public office-holders, to the
different ethical standards which apply in the foreigner's country of origin.

Thirdly, because of the inevitable confusion created by the mixing - and perhaps
clashing - of ethical standards, there is a greater need to crystallise the ethical
standards which apply in the home country.

Fourthly, there needs to be a system for enforcement of ethical standards.

Only when these processes are gone through can there be an "ethical" system of
government, i.e. one in which all the parliamentarians and other public officials,
and all those in the private sector, operate by the same rules.

III. THE ROLE OF THE OMBUDSMAN COMMISSION IN MAINTAINING
ETHICAL STANDARDS

1. UNIQUENESS OF THE OMBUDSMAN COMMISSION

The Ombudsman Commission of Papua New Guinea is a multi-faceted
institution, which obtains its uniqueness from two special features. First, it
performs a number of different functions, which in other countries are distributed
among different institutions of government. Secondly, it has a special status as
an independent constitutional institution.

2. DIVERSE FUNCTIONS OF THE OMBUDSMAN COMMISSION

(a) The three primary functions

The Ombudsman Commission in this country has three primary functions,
conferred by Section 219(1) of the Constitution. These are:

- to investigate alleged wrong conduct and defective administrative
  practices on the part of governmental bodies: the so-called
  "traditional" area of the Ombudsman Commission's work;

- to investigate alleged or suspected discriminatory practices;

- to supervise enforcement of the nation's Leadership Code.

I would suggest that there may be few other ombudsman institutions in the world,
which have such a broad range of functions to perform.

(b) The subsidiary functions

In addition to the three primary functions, the Commission has a number of
subsidiary functions. It is, for example, one of the few public bodies authorised
by the Constitution to make special references to the Supreme Court to seek the
Court's binding opinion on questions relating to the interpretation or application of the Constitutional Laws. In this respect, the Ombudsman Commission has been authorised to maintain a watching brief over the nation's constitutional development.

(c) The Constitutional Planning Committee's strategy

The conglomeration of diverse functions within the one institution was a deliberate strategy of the Constitutional Planning Committee, which was anxious to avoid the unnecessary proliferation of institutions of government. The vision of the Constitutional Planning Committee was a bold one. The investigation of political corruption, for example, has in many countries not been regarded as part of a "traditional" ombudsman's function. Some ombudsmen seem to shy away from this rather dirtier side of an ombudsman's work. But in Papua New Guinea we have no choice.

On any given day, the Ombudsman Commission can be required to investigate minor complaints on the part of individual citizens - who might, for example, have had their electricity unfairly disconnected by the electricity authorities - but at the same time, the Commission may be engaged in an intensive and sophisticated investigation into the alleged corrupt conduct of those holding the highest public offices in the land.

As a result, the Commission projects itself to the public in many different ways: it can be a "friend" for individuals in need; a mediator; a protector of human rights; a guardian of the Constitution; an adviser to the country's leaders; and a fierce and sometimes feared law enforcement agency. Amongst all these diverse functions, the bold vision of the Constitution's founding fathers has also given the Ombudsman Commission the mandate to maintain and enforce - and to some extent set - ethical standards in public office.

3. CONSTITUTIONAL INDEPENDENCE OF THE OMBUDSMAN COMMISSION

In addition to its multiplicity of functions, the other feature of the Ombudsman Commission which sets it apart from similar institutions in other countries is its constitutional independence. The Ombudsman Commission is established directly under the Constitution and is not subject to direction or control by any person or authority. History so far shows that the Ombudsman Commission has been vigilant in its defence of the independence which these provisions of the Constitution have conferred upon it.

(a) An example of assertion of independence: the cartoons incident of 1992

In March 1992, for instance, the three members of the Ombudsman Commission were summoned before the bar of the National Parliament to give an explanation for the inclusion in the annual reports of the Commission of several cartoons dealing with the ethical standards of parliamentarians, and ministers in particular
(see appendix). The cartoons were considered by the Parliamentary Privileges Committee to be offensive and an apology was sought from the Ombudsman Commission.

However, the then Chief Ombudsman declined to apologise. Instead, he gave a measured and rational explanation to the members of the Parliament on the educational value of the cartoons and the need to maintain ethical standards in public life. There were subsequently, in Parliament, some rather undignified attacks made on the Ombudsman Commission and the personal integrity of its members. Comments by members of Parliament were quite emotional and a draft resolution was circulated which called for the immediate sacking and imprisonment of all three members of the Ombudsman Commission. Fortunately, a certain amount of sanity eventually prevailed, when it was realised that Parliament lacked both the power of imprisonment and the power to remove the members of the Ombudsman Commission from office.

Though the Ombudsman Commission was put under great pressure by the Parliament, the integrity of the institution was reasserted; demonstrating the value of having a truly independent institution operating outside the three principal arms of the National Government.

(b) The Ombudsman Commission as part of the "fourth arm" of government

Unlike in some countries where ombudsmen are officers of or closely linked to parliament (e.g. where an ombudsman's jurisdiction depends on a complaint being channelled through a member of the parliament) or where ombudsmen form a part of the executive, in Papua New Guinea, the Ombudsman Commission stands well apart from these arms of government.

In fact, together with other independent constitutional institutions and office-holders, the Ombudsman Commission actually forms the fourth arm of government.

IV. THE "TRADITIONAL" FUNCTION OF THE OMBUDSMAN COMMISSION

1. POWERS AND PROCEDURES

The Ombudsman Commission performs the traditional function of an ombudsman by conducting investigations into allegations of "wrong" conduct on the part of governmental institutions.

These investigations are conducted in accordance with the Organic Law on the Ombudsman Commission, in the normal way that ombudsmen in other countries investigate maladministration.
2. MALADMINISTRATION INVESTIGATIONS AND THE BUILDING OF CODES OF ETHICS

An investigation and report by the Ombudsman Commission under its traditional jurisdiction has an important role to play in developing codes of ethics for public officials in this country. For example, the Ombudsman Commission has recently conducted two major investigations into public works projects where the decision making processes of government were considered highly irregular, due to the failure to adhere to proper ethical standards.

The Commission's Poreporena Freeway Report concerned a contract entered into by the State in 1992 for the design, finance and construction of a freeway in Port Moresby at the cost of many millions of dollars. The freeway project suffered greatly because, in the rush to have the contracts signed on the eve of the last National Elections in 1992, rules and proper procedures were not followed. There was little concern about law or ethics. Those involved were primarily concerned about making a quick decision. The senior bureaucrats were concerned about giving the politicians the advice that the politicians wanted to hear.

The Ombudsman Commission was able to use its report of the investigation into the freeway project to inform (and remind) public office-holders and the public at large on matters such as the public tender requirements of the Public Finances (Management) Act; the role of the Public Works Committee and the Parliament in monitoring public works projects and controlling public expenditure; the control of overseas borrowing by the State; the laws governing foreign investment; and the constitutional limits on the powers of ministers.

3. REPORTS CAN FALL ON DEAF EARS: THE DISCIPLINED FORCES HOUSING PROJECT REPORT AND ITS AFTERMATH

History shows, however, that the Ombudsman Commission still has a long way to go in effectively "marketing" its reports into mal-administration and defective government decision making processes. The Freeway Report was tabled in Parliament in March 1993, but just a little over 12 months later the Commission presented a very similar report to Parliament, this time concerning a housing project for the disciplined forces, financed principally by a substantive commercial loan from four foreign banks.

The project had been awarded to a foreign company after high level negotiations between the governments of the two countries involved. But when the Ombudsman Commission investigated the decision-making process, it became obvious that the mistakes of the freeway project had been repeated. The project was not put to public tender; no other company was given any opportunity of bidding for the project; and a certificate of inexpediency was issued in unsatisfactory circumstances by the Tenders Board.
As in the case of the freeway project, the result of the flagrant disregard of the laws of Papua New Guinea - and the ethics which those laws reflect - was that the market had been corrupted.

The aftermath to the Commission's report was even more disheartening. The report was presented in Parliament in September 1994, but there has been absolutely no debate on it.

4. THE CAUSES OF APATHY

Perhaps one of the main reasons for the Parliament's apathy towards the housing project report was the Commission's failure to put the blame for the breakdown in ethical standards on any particular Minister or public office-holder. It seems to be an unfortunate fact of life that few people will sit up and take notice and few newspapers will be sold, if particular public office-holders cannot be targeted with responsibility for a decision-making process that has broken down. The "fear" which arises when the Ombudsman Commission engages in a Leadership Code investigation (which can result in prosecution and dismissal from office) does not seem to arise when the Ombudsman Commission engages in a mal-administration investigation under the Organic Law on the Ombudsman Commission. Hence, the same mistakes continue to be made.

V. THE LEADERSHIP JURISDICTION OF THE OMBUDSMAN COMMISSION

In contrast to its traditional area of jurisdiction, the leadership jurisdiction of the Ombudsman Commission gives the Commission a more direct role to play in the setting of ethical standards. In this part of the paper, I will outline how the Leadership Code of Papua New Guinea operates.

1. WHO DOES THE LEADERSHIP CODE APPLY TO?

Section 26(1) of the Constitution provides that the Leadership Code applies to a wide range of public office-holders, including:

- all parliamentarians;
- the Judges and other constitutional office-holders;
- all heads of departments of the National Public Service;
- all members of the boards of statutory authorities;
- the Commissioner of Police;
- the Commander of the Defence Force;
- all of Papua New Guinea's ambassadors.

In short, the Leadership Code applies to the upper echelons of public office-holders. The only high public office-holder excluded from the ambit of the Leadership Code is the Governor-General, who is the Queen's representative as Head of State.
2. **HOW IS THE LEADERSHIP CODE ENFORCED?**

To fully appreciate the significance of the Leadership Code, it must be understood that it is not simply a set of idealistic rules. The Leadership Code is enshrined in the Constitution.

The task of administering the Leadership Code has been given to the Ombudsman Commission. There is a separate Organic Law - the Organic Law on the Duties and Responsibilities of Leadership - dealing with the Leadership Code. It gives the Commission similar investigatory powers to those given to it under its "traditional" jurisdiction.

If the Commission conducts an investigation into allegations of misconduct in office against a leader and finds that there is a prima facie case of misconduct in office, it is obliged to refer the matter to the Public Prosecutor for prosecution before an independent leadership tribunal. The tribunal is then obliged to adopt an investigatory role. It is not merely an adversarial body. If the tribunal, after deliberating on a matter, reaches the conclusion that a leader has been guilty of misconduct in office, it is then required to make a recommendation as to the penalty to be imposed, the most serious penalty being dismissal from office, with an automatic three year disqualification from holding elective public office.

3. **WHAT ETHICAL STANDARDS ARE EMBODIED WITHIN THE LEADERSHIP CODE?**

(a) **The general duties of leadership**

The key provision of the Leadership Code is Section 27 of the Constitution. It imposes a number of general duties on all leaders which are essentially as follows:

<table>
<thead>
<tr>
<th>A LEADER HAS A DUTY to conduct himself in such a way, so as:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) not to place himself in a position in which he could have a conflict of interests or might be compromised when discharging his public or official duties; or</td>
</tr>
<tr>
<td>(b) not to demean his office; or</td>
</tr>
<tr>
<td>(c) not to allow his public or official integrity, or his personal integrity, to be called into question; or</td>
</tr>
<tr>
<td>(d) not to endanger or diminish respect for and confidence in the integrity of government in Papua New Guinea.</td>
</tr>
</tbody>
</table>

A BREACH OF ANY OF THESE DUTIES CONSTITUTES MISCONDUCT IN OFFICE.
It may be thought that the general duties of leadership are expressed in such broad terms, that they are not workable.

These criticisms, however, are unwarranted. The general duties of leadership have been relied on and applied in all recent matters referred to the Public Prosecutor by the Ombudsman Commission. They are certainly not unworkable.

(b) Specific ethics - the Organic Law on the Duties and Responsibilities of Leadership

As seen from the above analysis, the general duties of leadership are of the type which are common to all Commonwealth countries, even though they may not be found in a constitution or other written law.

Papua New Guinea's Leadership Code does not however end with the general duties of leadership. We also have, as an integral part of the Code, a detailed set of provisions in the Organic Law on the Duties and Responsibilities of Leadership.

The key features of the Organic Law are as follows:

(i) The obligation to furnish annual statements

In Papua New Guinea, every leader is required to lodge an annual financial statement with the Ombudsman Commission. The statement details the leader's financial affairs over a twelve month period.

The statements enable the Ombudsman Commission to closely monitor the financial affairs of all leaders, so that, for example, any unexplained build-up in a leader's assets do not go unchecked.

(ii) Asking for and accepting benefits

There are a number of provisions of the Organic Law which prohibit a leader from asking for or accepting a benefit; particularly in relation to action taken by reason of the leader's official position.

By way of example, I refer to the violation of ethical standards by two former Ministers in the last Parliament. The cases had a common theme in that, following an extensive investigation, the Ombudsman Commission had concluded there was a prima facie case that the former Ministers who had voluntarily resigned from the ministry, had combined to put excessive, unreasonable and improper demands to the then Prime Minister, immediately prior to a planned motion of no confidence in the Prime Minister.
The leadership tribunal found the two former Ministers guilty on all counts relating to asking for public money.

The decisions in the above cases were very significant in terms of refining and reinforcing the ethics of leadership which are embodied within the Leadership Code. Previously, motions of no confidence had been occasions on which ethical standards may not have been adhered to very strongly by our parliamentarians. The hearing of the matters by the leadership tribunal performed the very valuable function of publicly airing allegations which had hitherto been the subject of rumour and innuendo.

The cases also illustrated the sometimes sharp distinction between what might be regarded as the "customary" obligations of a Papua New Guinean leader (especially the idea that a leader is expected to share personal wealth among the leader's own people) and the obligations imposed by the Leadership Code. Traditional obligations can sometimes cut across the ethical standards embodied in the Code.

(iii) **Prohibition against leaders dealing in matters in which they have an interest**

There are a number of provisions of the Organic Law which prohibit leaders from dealing in matters in which they have an interest. For example, all leaders are required to reveal to the Ombudsman Commission the nature and extent of their interest, or the interest of their associates, in a matter in which they have to deal in their official capacity.

(iv) **Restrictions on shareholdings and directorships by leaders**

Leaders in Papua New Guinea are prohibited from holding shares or other investments in any foreign enterprise without the written approval of the Ombudsman Commission. This prohibition extends to the leader's spouse and children under voting age.

In addition, a leader is prohibited from holding shares in any company, if this could reasonably be expected to place the leader in a position in which he or she could have a conflict of interests or might be compromised in the discharge of public or official duties.

(v) **Prohibition against leaders engaging in other paid employment**

The Organic Law provides that a leader who remains or engages in any paid employment other than his or her official employment after becoming a leader, without obtaining the written approval of the Ombudsman Commission, is guilty of misconduct in office.
(vi) **Duty to apply public money strictly in accordance with the conditions on which it is allocated**

The Organic Law states that a leader who intentionally applies any money forming part of any fund under the control of Papua New Guinea to any purpose to which it cannot lawfully be applied, is guilty of misconduct in office.

The ethical standard imposed by the Organic Law, is that public money must be applied strictly in accordance with the conditions on which it is allocated. As the leadership tribunal has indicated in a number of cases, these conditions can be either express or implied. In a recent case, the fact that the guidelines which the leader was operating under did not expressly say that public money was not to be given to his political associates or his own business group, did not save him when he was prosecuted before the tribunal. The leader had been allocated the money on the implied condition that it could not be used for that purpose. Nor is it necessary to show that the money has been applied for the use of the leader concerned. The Organic Law recognises that it is a breach of trust, for a leader to use any public money contrary to the conditions on which he or she has been entrusted with it, whether the money is directed to the leaders' own use, or somebody else's.

4. **RECENT DEVELOPMENTS IN ENFORCEMENT OF THE LEADERSHIP CODE**

(a) **Education as well as prosecution**

Though much of the work of the Ombudsman Commission is devoted to the investigation and preparation of cases for prosecution, the Commission also has a significant role to play in informing and educating leaders on the requirements of the Code and generally steering them along the path that leads away from being referred for prosecution. This is an especially important function in a country such as Papua New Guinea, where, for example, at each National Election there is a turnover of more than 50% of sitting members. This means that there is always a steady flow of new parliamentarians coming into high public office.

My experience as an officer and as Clerk of Parliament over twenty-four years is that the vast majority of new members arrive on the scene with high ideals of representing their constituents with propriety and passion, and in so doing furthering the national interest. However, they are subject to great pressures of office as well as traditional obligations. They are appointed to ministerial positions and become involved in political power plays, even when they have virtually no previous experience as a public official and certainly no ministerial experience, and very little understanding of the requirements of the Leadership Code. Education of leaders is therefore a vitally important function that the Ombudsman Commission must perform.
So, what the Commission is doing is strengthening its role as an adviser to the country's leaders and concentrating more on the preventative aspects of its work. Prevention is invariably better than prosecution.

In my view, the success of the Ombudsman Commission should not necessarily be judged by the number of leaders who are referred for prosecution, but by the number of leaders who the Commission saves from prosecution. This can be done by informing members, particularly when they first enter Parliament, of the leadership obligations and ethical standards required of their position.

(b) Section 27(4) directions: protecting leaders from themselves

The Ombudsman Commission is well placed to prevent breaches of the Leadership Code from occurring by virtue of the special powers given to it under the Constitution. Section 27(4) states:

"The Ombudsman Commission ... may ... give directions, either generally or in a particular case, to ensure the attainment of the objects of the Leadership Code."

In a number of instances, the Ombudsman Commission has been able to give directions to particular leaders to alter their conduct, which has been regarded as questionable.

Section 27(4) directions are particularly useful in the case of Ministers. In Papua New Guinea, as in most Commonwealth countries, a Minister is given political responsibility for the agencies of government entrusted to him, but this carries no necessary power of direction or control. This is a constitutional principle which some of our parliamentarians find difficult to understand. The result is that on many occasions, Ministers become actively involved in the day-to-day running of their departments. The system of administrative discipline consequently breaks down and the morale of the officers of the departments collapses. The Ombudsman Commission obviously has an important role in informing Ministers of the limits on their powers, but it can also be quite proactive by giving directions to Ministers who step out of line in this way.

(c) The use of general directions to enforce ethical standards and raise the overall quality of leadership

The Ombudsman Commission's power to give directions can also be used more generally to help raise the standards of leadership. The Commission is, for instance, in the process of giving general directions in order to maintain accountability and control over large amounts of public money which have been appropriated under the 1995 National Budget to the Electoral Development Fund.

This is basically a slush fund scheme, whereby each of the 109 members of the National Parliament is allocated K300,000.00 to spend on infrastructure projects within their electorate.
The idea of parliamentarians being directly involved in the handing out of public money may be a strange concept to observers from outside Papua New Guinea. Unfortunately, however, it is a practice which has become more common over the years, as successive governments have attempted to deal with the problem of not getting goods and services to the people in the rural areas, by allocating money to each member of the National Parliament for "direct" distribution. The result of this, in my view, is that the inefficiencies in the system have become even worse. But not only that, the increased use of slush funds has also resulted in an upsurge in major cases of abuse of office.

Members of Parliament continue to put themselves at peril by attempting to legitimise this method of allocating public money. It is a regrettable practice, as it is quite clear that the Electoral Development Fund and other slush fund schemes have little support, either from the large majority of Papua New Guineans or from our donor countries and donor agencies.

VI. ROLES OF THE DIFFERENT ARMS OF GOVERNMENT IN MAINTAINING ETHICAL STANDARDS

Where there is a constitutional mandate given to one particular institution to maintain ethical standards in public life, there can be a tendency for other institutions to become complacent and underplay their own role. Some of the arms of government in Papua New Guinea are guilty, I believe, of a lack of alertness to the problems that we face.

1. THE CONSTITUTIONAL OFFICE-HOLDERS

As indicated earlier, the degree of independence conferred by the Constitution on a number of constitutional office-holders and institutions, including the Ombudsman Commission, means that they in effect form a fourth arm of government, which operates outside the legislature and the executive, but which remains subject to the control of the judiciary. Some of these office-holders have a critical role to play in maintaining ethical standards, but they are yet to fully perform their true respective roles.

The Public Prosecutor and the Public Solicitor, for example, are still administratively part of the Department of Attorney-General. This means that these two supposedly independent officers are entirely dependent on the Executive for their recurrent funding and their resources.

The office of the Auditor-General is another independent constitutional office yet to fulfill its role of maintaining an effective check on the abuse of public money and property of Papua New Guinea. Many times in the past, the potential of the reports of the Auditor-General to expose waste and misappropriation of public money has not been fulfilled, because publication of the reports has been delayed, sometimes for years after the allegations of misuse of public money have been raised.
2. **THE PARLIAMENT**

The performance of the National Parliament as a vehicle for imposing accountability on public office-holders has, in my view, markedly declined over the years. The Parliament is supposed to be the sounding board of the nation, a place where all decisions of parliamentarians and other public officials should be subject to vigorous and regular scrutiny. Unfortunately, however, we have seen a decline in the number and duration of meetings of Parliament. Consequently, serious matters and important affairs of the nation are not given the prominence and attention they require. Too many times, legislation and other important issues are being rushed through Parliament without adequate debate. A very expensive practice of running whole speeches of Ministers and members has developed over recent years, where whole pages in the newspapers carry speeches that did not get to be made in Parliament.

Insufficient use is being made of question time, which is one of the most important and active periods in the day-to-day life of a parliament. Questions without notice are an avenue to expose the government and its ministers to allegations of impropriety, and accountability can be brought to bear directly through the parliamentary process. In parliaments in other countries, there is a considerable amount of accountability through the parliament itself. When allegations of impropriety are raised, the pressure put upon a parliamentarian can be so great that he or she is forced to resign, often out of respect for the office, as much as an admission of guilt. Very rarely does this happen in Papua New Guinea.

In fact, in my view, the overall legitimacy of Parliament as an arm of government may be on the decline. There is a disturbing trend, whereby Parliament is in danger of becoming a rubber stamp for National Executive Council decisions. Parliamentarians are also reluctant to stand up as representatives of their constituents, and probe and question and seek answers to what are often obvious breaches of ethical standards.

3. **THE NATIONAL EXECUTIVE**

One alarming development in Papua New Guinea's system of government, is the tendency for governments to push aside career bureaucrats and make political appointments to senior governmental positions. This has meant that the Public Service has been handicapped in its role of providing balanced and competent advice to the government.

The reason for this is that many departmental heads are finding themselves in a "Catch 22" situation. On the one hand, if they always give advice which their Ministers consider "acceptable", they will be not be acting professionally. On the other hand, if they give professional and balanced advice, they feel as if they may be removed from office. The principle of the Public Service being required to give professional advice - without fear or favour - is one of the foundation stones of the system of accountability in any system of government. Unfortunately there has been an erosion of this in Papua New Guinea.
Another reason for the breakdown in administrative and political discipline is perhaps the lack of a strong political party system in Papua New Guinea. The proliferation of political parties means that it can be difficult for the Prime Minister of the day to maintain discipline within his Cabinet. This has meant that it is sometimes left to the Ombudsman Commission to take disciplinary action against a Minister who might get out of hand; whereas if the political party system were well entrenched, the Prime Minister would be in a position to exercise stricter control.

4. THE COURTS

In any system of government, the courts have an enormous role to play in maintaining a system of accountability and control, especially through the process of judicial review of administrative action. In Papua New Guinea, the National Court and the Supreme Court have shown a willingness to actively engage in judicial review; and the integrity of the decision-making processes of government has been enhanced as a result.

Last year, the Supreme Court was required to deal with important issues of accountability when it adjudicated upon the constitutionality of the resignation and re-election of the Prime Minister of the day, in September 1993. It is of great benefit to the nation that the People of Papua New Guinea, from whom all constitutional power emanates, can rely on the Courts to actively address these fundamentally important issues.

VII. CONCLUSION: IS THERE AN ETHICAL SYSTEM OF GOVERNMENT IN PAPUA NEW GUINEA?

In any system of government, the ethical standards required of parliamentarians and other public officials must be clearly understood. In Papua New Guinea, however, we are at the crossroads. By and large, the ethical standards of public office-holders have been laid down in the Constitution, and there is a system in place for the enforcement of those standards. On the surface, these features of our system of government are very encouraging. But are there still some deep-seated problems.

Some traditional obligations of leadership tend to cut across the ethical standards of public office demanded of our leaders by the Leadership Code. The increasing exposure of our country and its leaders to different and varying ethical standards arising out of overseas connections also creates many problems in the application of the Code.

The Ombudsman Commission has a range of options at its disposal for ensuring that ethical standards are maintained. There are very clear provisions in the Constitution dealing with these issues, and the two Organic Laws which the Commission administers reinforce the strong duty of accountability built into our system of government through the Constitution.
The enforcement of these Constitutional Laws - and the ethical standards entrenched within them - is not, of course, simply a matter of investigating corruption and referring leaders for prosecution. The Ombudsman Commission is focusing more and more on informing and educating leaders and the general public as to the requirements of the Leadership Code. Preventing misconduct by our leaders is just as important as referring them for prosecution.

In simple terms, the Ombudsman Commission's role as a law enforcement body is really to ensure that the rules of society are observed. In this regard, the Constitution has clearly required the Ombudsman Commission to ensure, through legislation, that responsibility and accountability is brought to bear on elected leaders and other public officials to ensure ethical standards and accountability in public life.
Appendix 7
(page 61)
1) Background

a) Incidence of use

In the past 13 years or so the Queensland Ombudsman has engaged outside consultants to provide professional/technical advice to assist in resolving complex cases. Details of the nine occasions on which expert advice has been obtained are shown in attachment 1 and relate to -

- challenges to the Office's jurisdiction (legal) - 2;
- issues involving questions of law and statutory construction (legal) - 2;
- flooding/drainage (engineering) - 2;
- surveying matters - 2; and
- road construction (engineering) - 1.

b) Alternatives

The bulk of legal work has been done in-house. With engineering matters, the Office has either challenged those engineering opinions (eg in one case involving flooding of private property by the Logan Motorway the Office analysed three engineering opinions that had been obtained by the protagonists) or it has been left to the complainants to obtain their own professional opinion (eg Cowe v Transport - B1925-93/94, where a number of residents claimed that a new rail bridge would cause flooding of their properties. The Office gave them a copy of the Transport engineering report rejecting their concerns and inviting them as a group to obtain their own engineering advice to the contrary).

With surveying matters, the Office engaged a private consultant where the complaint was against the Surveyors Board (Major's case) but has also enlisted the expertise of the professional board (Keenan's case). In that case a review by the Surveyors Board of a private surveyor's actions (at the request of the Lands Department) led to criticism by the Board of the Department and a satisfactory outcome.

2) Present situation

a) Technical/professional actions

The Office examines administrative actions from various aspects. These include
whether or not an action or decision was contrary to law, based on a mistake of law, or was otherwise unreasonable, unjust, wrong, etc. No problem arises with ordinary questions of fairness in administration that don’t involve technical arguments.

However, if an agency does something which the Office suspects is wrong legally or in some other way such that a professional or technical judgment is involved the Office has a problem as it is not an expert in those areas. The agency can be asked to get an appropriate opinion. If it declines or does so and produces an opinion supporting its stance the Ombudsman still has a problem.

Legal challenges to the Ombudsman’s jurisdiction also occur from time to time.

b) Should technical/professional opinions be challenged

One school of thought is that if an agency provides a professional opinion supporting its action then its action is ipso facto reasonable. That view has been taken in the past, ie the Office has told complainants that by relying on the advice of professionals such as legal advisers or engineers the agency can’t be said to be acting unreasonably.

However the situation may not be that simple.

Firstly legality doesn’t equal reasonableness. One can act legally but unreasonably.

Secondly, past experience has shown that some of the legal opinions relied on by agencies have been notoriously inadequate eg private solicitors giving totally unresearched advice especially to Councils supporting their actions (e.g. Rechenberg). The Ombudsman would be remiss if he or she accepted such advice at face value.

Thirdly, legal opinions are based on the facts briefed, which can be inadequate or inaccurate.

Accordingly it is not enough that an agency simply rely on professional advice, whether it be engineering, legal, town planning, medical or a host of other disciplines that exist in the community.

Obviously jurisdictional challenges must be met head on, and senior legal opinion sought if the Ombudsman can’t resolve the matter directly.

3) Results to date

As attachment 1 indicates, the Office has succeeded in every case where a consultant has disagreed with the agency, (which has been in most cases). This may indicate that –

* ‘the Office doesn’t use consultants enough;
the Office is good at "picking the cases", in which to use consultants;

not many cases require consultants.

In any event it can be said that the use of consultants has been a success and the practice should, budget permitting, be continued.

4) Future suggestions

It would not be financially feasible to call in outside consultants every time the Office was confronted with a professional or technical opinion supporting an agency's actions. For example consultants' advice could theoretically be sought in the common cases outlined in attachment 2.

It is therefore appropriate to establish guidelines for seeking outside professional/consultant opinion. Factors to be taken into account include those listed in attachment 3.

Obviously, if funds permitted it would be appropriate to access outside professional advice whenever thought necessary. However money is the problem, with such advice costing an average of between $1,000 and $2,000. It would be interesting to see how the Hong Kong Office's panel of experts (if I understand the situation correctly) operates and is funded.

F N Albietz
Parliamentary Commissioner for Administrative Investigations (Queensland)

October 1995
## CASES WHERE ADVICE FROM EXTERNAL CONSULTANTS OBTAINED

<table>
<thead>
<tr>
<th>File Name &amp; Number</th>
<th>Agency</th>
<th>Complaint</th>
<th>Sticking Point/Issue</th>
<th>Consultant</th>
<th>Opinion of Consultant</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Munro A737-82</td>
<td>Harness Racing Board / Appeals Board</td>
<td>Failure to give reasons for decision</td>
<td>The Board challenged PC's jurisdiction to investigate Appeal Board decisions</td>
<td>K W Ryan, QC</td>
<td>Matter within PC’s jurisdiction</td>
<td>Jurisdiction accepted, satisfactory reasons given</td>
</tr>
<tr>
<td>Major A1360-86/87</td>
<td>Surveyors Board</td>
<td>Refusal to discipline surveyor</td>
<td>The Board argued that the Surveyors Act did not enable it to take disciplinary or other action in the circumstances</td>
<td>Peter Dawson and Assoc. (Surveyors and planners)</td>
<td></td>
<td>The Board accepted it had power to act and proceeded on that basis</td>
</tr>
<tr>
<td>Rauchenbach W0096-87/88</td>
<td>Calliope Shire Council</td>
<td>Approval of drainage system with inadequate overland flow</td>
<td>The Council did not accept that its design disadvantaged the complainant</td>
<td>Ian Black BE, M.Eng.SC (QUT) (Hydraulic engineer)</td>
<td>Design faulty and inadequate overland flow and insufficient capacity</td>
<td>Complainant sold out, but Council undertook remedial work</td>
</tr>
<tr>
<td>Andrew W0629-88/89</td>
<td>QEC</td>
<td>Refusal to recognise previous service for long service and other purposes</td>
<td>QEC argued that compassionate grounds could not constitute special circumstances. Crown Law advised whether the grounds adduced by the employee constituted special circumstances was a matter entirely for QEC</td>
<td>Ian Hanger, QC</td>
<td>QEC’s position was totally erroneous and furthermore it would be unreasonable not to regard the complainant’s circumstances as special for the purposes of the Act</td>
<td>QEC accepted the advice and recognised the previous service</td>
</tr>
<tr>
<td>Rechenberg G0924-89/90</td>
<td>Gooburrum Shire Council</td>
<td>Sewerage charge on land</td>
<td>Council’s legal entitlement to levy the charge. Local solicitors had supported Council’s position</td>
<td>Conrick, Barrister-at-Law</td>
<td>Legality of charge doubtful</td>
<td>Charges dropped</td>
</tr>
<tr>
<td>File Name &amp; Number</td>
<td>Agency</td>
<td>Complaint</td>
<td>Sticking Point/Issue</td>
<td>Consultant</td>
<td>Opinion of Consultant</td>
<td>Outcome</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------</td>
<td>-----------</td>
<td>-------------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Brady D1664-90/91</td>
<td>LAO</td>
<td>Unfair Legal Aid funding to ex-wife</td>
<td>LAO claimed that it could not allow us access to its files because of confidentiality provisions and our complainant, who was the husband of the legally aided person, did not have a sufficient direct interest to give PC jurisdiction. Had QC's opinion to that effect</td>
<td>Cedric Hampson, QC</td>
<td>Person being sued by a legally aided person stands to be affected by that litigation and therefore has an interest in whether legal aid has been properly granted to other party</td>
<td>LAO accepted QC's opinion not withstanding its own QC's opinion to the contrary</td>
</tr>
<tr>
<td>Kalman W2019-91/92</td>
<td>DOT</td>
<td>Drainage from main road roundabout</td>
<td>Had roundabout construction caused or exacerbated drainage problem for adjacent land holder/complainant</td>
<td>Ian Black</td>
<td>Supported DOT</td>
<td>Complainant disparaged Black's opinion and submitted further information. Further report awaited</td>
</tr>
<tr>
<td>Trainor B0212-93/94</td>
<td>DOT</td>
<td>Access to property rendered dangerous by new roundabout</td>
<td>Department denied that roundabout caused danger, saying it was constructed in accordance with relevant design standards.</td>
<td>G Middleton (Traffic engineer)</td>
<td>The Department had misinterpreted design standards and intersection was dangerous to complainant</td>
<td>Department hasn't explicitly admitted any error/danger, but presently exploring ways of addressing the situation</td>
</tr>
<tr>
<td>Keenan K0051-93/94</td>
<td>Lands</td>
<td>Inaccurate survey on title deed</td>
<td>Responsibility for correcting error - was it the department's as custodian of titles or the complainant's (through his surveyor) to investigate and prepare a plan which would correct the department's records</td>
<td>Surveyors Board</td>
<td>Failure on both sides, but department's initial denial of responsibility clearly wrong</td>
<td>Department paid complainant all survey costs caused by the inaccurate title deed survey</td>
</tr>
</tbody>
</table>
ATTACHMENT 2 - SCOPE FOR USE OF CONSULTANTS

- **Flooding/drainage:** every time such an issue arises – drainage engineer.

- **Roadworks:** every time a road safety or road design issue arises – traffic engineer.

- **Statutory construction, common law:** every time we disagree with an agency's interpretation of the law – senior counsel.

- **Child protection:** every time DFSAIA says parents aren't properly looking after their children or couples aren't suitable for adoption – consultant social worker.

- **Employment:** every time an employment panel eg for assessing teacher applicants, says a person is not of the required standard – educational consultant; industrial advocate.

- **Education:** every time a TE score or field position is challenged on the basis of some defect in the scoring process – statistician; educational consultant.

- **Education:** every time a University says an applicant hasn't completed enough research or hasn't properly completed a practical component of his course – expert in the field.

- **Town planning:** every time a Council approves a development where no right of appeal exists – town planning consultant.

- **Generally:** whenever an agency relies on a professional or technical assessment – private expert in the field.
ATTACHMENT 3 - GUIDELINES FOR USE OF CONSULTANTS

- how persuasive and comprehensive is the professional advice upon which the agency relies?

- how unfair does the agency's action seem?

- how big is the issue? How does it compare to the cost of obtaining a consultant’s opinion?

- how well placed is the complainant to afford his/her own advice (e.g., an impecunious workers' compensation complainant v a group of wealthy cane farmers)? Can the costs be shared by the parties (a la Rechenberg)?

- how well placed is this Office financially to obtain such advice?

- is the complaint specific to the individual or does it have broader community implications?

- is a challenge to our jurisdiction involved (if so and we assert jurisdiction then legal opinion would appear to be necessary in every case, as per Legal Aid challenge of two years ago)?
Appendix 8
(page 71)
1. (a) Number of reports/updates distributed for OMBIS and
   (b) number of reports, articles or books documented.

   (a) OMBIS puts out a quarterly newsletter and an Index that is basically yearly.

   The Newsletter consists of a short update on any recent events concerning OMBIS plus reviews on a selection of recently indexed reports, articles, books etc. that are thought to be of particular interest.

   The OMBIS Index has so far been distributed twice with a cumulated version due later this year.

   (b) The number of books, reports or articles indexed are

   - 1st Index, items indexed - 1000
   - 2nd Index (supplement), items indexed - 220
   - new items indexed (to be put in cumulated version) - 200

2. Usage - what indicators do we have as to who is using OMBIS and how often it is being used.

   The only indicator the Commonwealth Ombudsman's library has on OMBIS usage is through inter library loan statistics of requests for material from the OMBIS index or newsletter and general requests for information from the register. In the last financial year (1994/95) the library has received approximately 72 requests for either loans or photocopies of articles or information. A large proportion of requests come from the New South Wales, Victorian and Northern Territory Ombudsmen's offices. The Commonwealth Ombudsman's office has also made some requests for material or information from OMBIS. Other one off requests for help or information include the former New Zealand ombudsman Sir John Robertson's request for the OMEIS index to be sent to him to use as an aid in helping set up an ombudsman's office in Malta.

   These statistics on inter library loans would not be a very comprehensive indication of usage. Material indexed in OMBIS which is of interest to other ombudsman offices may simply be acquired rather than borrowed or borrowed from other ombudsmen, this office would not be involved unless the report originated from here.
To obtain a good indication of contributor satisfaction and usage of OMBIS a questionnaire requesting information could be sent out to all contributing ombudsmen. An OMBIS questionnaire was sent out in December 1993 to contributors (returned forms are in library files) however another such form would perhaps give a better indication of usage now the register is more established.

3. Subscriptions paid and not paid in last financial year from OMBIS contributors.

subscriptions paid - the ombudsmen from
Queensland, Victoria, New South Wales, Western Australia, Northern Territory, Tasmania, New Zealand, Papua New Guinea, Samoa, Hong Kong, Vanuatu and the Solomon Islands.

subscriptions not yet paid - the ombudsmen from South Australia, Cook Islands and Fiji.

4. What subscription level is needed from OMBIS contributors to cover this financial years cost.

Projected costs for OMBIS 1995-96

Salaries
1 x P/T ASO Class 3 - 5 Hours per week $4,715

Consultants
Production of cumulated version of OMBIS $1,000

Miscellaneous
Printing - 30 copies of index $640
Floppy disks $100
Stationary $50
Postage $300 $1,990

Total $6,805

Suggested subscription level to cover costs of OMBIS for 1995-96 - $450

15 x $450 = $6,750
5. Overall evaluation.

The OMBIS database provides a current awareness service to Australian and Pacific Island Ombudsmen who may otherwise find it difficult to gain relevant information concerning ombudsmen and administrative law, specifically catering to the Australasian/Pacific region.

The Commonwealth Ombudsman’s Library has received many requests for either information or loans and photocopies of articles indexed in OMBIS. The number of books, reports, articles and general information requested in 1994/95 was 72, considerably more than recorded for the same period of 1993/94 which was 28. These statistics indicate that the register is being used and that the usage may be increasing.

The subscription level of $450 needed from contributing ombudsmen to cover the expected costs of OMBIS for 1995/96 is very close to the original amount estimated for this period of $400. Most OMBIS contributors have paid their subscriptions for the last financial year and those not received may have simply been lost in the mail. Reminders for overdue subscriptions were not sent as no time limit for their receipt was set. Subscription reminders for this financial year should be sent out with the new cumulated index. A request for payment within a certain time could be sent with this years subscription reminder and another reminder sent out for those not received within this time.

Looking at the available figures I think that OMBIS has been and should continue to be a useful tool to Australian and Pacific Islander Ombudsmen.
Appendix 9
(page 75)
ORIENTATION AND SKILLING OF NEW OMBUDSMEN

A contribution to Workshop Discussion on Day Two of the 15th Australasian and Pacific Ombudsman Conference at Excelsior Hotel Hong Kong on 24th October 1995

by Judge Anand Satyanand of New Zealand
Introduction

There are two reasons for my being asked to address this topic. The first is that I am one of the newer members of the Ombudsmen community, having taken up office in New Zealand in February of 1995. This necessitated an orientation and skilling process for myself as to the new tasks. Secondly, in my former role as a District Court Judge, I had had a long term association with continuing professional education programmes. This had been specifically in the fields of trial skills improvement courses for lawyers and in orientation programmes applicable to the judiciary. Accordingly, the notion of what may be required and useful for newly appointed Ombudsmen caused me to correspond with the conference organisation when ideas were solicited for this week's programme. I wish to acknowledge the encouragement I have received, to advance this topic, from my New Zealand colleague, Sir Brian Elwood and Mr Eugene Biganovski of Adelaide, Australia.

Numbers and Need

Although in a world-wide sense, the number of Ombudsmen is not large, there is a continuing change of complement as people come to the end of their terms of office and are replaced by new appointees. It is a fact that becoming an Ombudsman usually follows at least one prior career. This means that in almost every country there will be new appointments to office, on a regular basis and there will always be new people seeking the information and the insights with which to attain proficiency in the shortest possible time. My contribution, today, endeavours to see whether there might be developed a process which all newly appointed Ombudsmen could obtain access to if desired.

Description of Ombudsmen's Role

Our meeting in Hong Kong this week, serves to underline that whilst there may be differences of nomenclature and approach and differences of emphasis in our work, the role is that of offering to each citizen of our respective countries, some kind of guarantee of independent and impartial assessment of grievance which may have arisen as a result of action by central or local government. An Ombudsman should never become either an advocate for the complainant or an extra branch of the organisation against whom complaint is registered. The results which are achieved may depend on local conditions and local expectations. If I may quote a former United States Chief Justice, Justice Melville Fuller who once said that "a difference of opinion does not preclude an overall harmony of purpose". May I suggest that a search for common themes in our work may lead to identification of those things which need emphasis for a newly appointed Ombudsman.
Background and Needs of Persons Appointed

A moment's thought will confirm that the backgrounds of new appointees will differ markedly. Many may have a legal training, others still may have undertaken careers in administration or politics. Going from almost any other occupation to that of Ombudsman involves change of work style and pattern and often of attitude. New skills need to be acquired and used. Old ties need either to be severed or at the very least modified. It can be safely assumed that the wish and responsibility of each newly appointed Ombudsman is to attain, maintain and advance competence. The goal of an orientation or skilling programme, if such is accepted, for new Ombudsmen, should be to enable this or to improve their professional competency.

What May Be Needed to Address This

Principles applicable to adult education should be applied, underlining the ability of adults to learn by sharing experiences rather than by being "taught" in a traditional sense. In adult learning, the emphasis or focus is on the learner rather than the teacher. Adults find it easy and convenient to absorb by reading and by discussion. Indeed, adults differ from children in learning by their willingness, at least usually, to engage in active participation which both stimulates and engenders interest. The role of provider of the programme is to facilitate, not to direct or dictate. Accordingly in an adult environment, such things as good quality written material, panel discussions, workshops, simulations and case studies are often more feasible and desirable than traditional instruction by lecture. There is accordingly less need for such things as written exercises or examinations which suit ordinary pedagogic methods. Other adult education methods worth consideration for new Ombudsmen include Assessment of Needs. This is a technical term which describes the periodic systematic assessment and analysis of the participants' learning needs, responsibilities and performance. A needs assessment is a process used to define the gap between existing and desired knowledge, skills and attitudes. It is an integral part of the education cycle. From this learning, objectives can be established, the curriculum designed, the instructional methods selected and both pre and post evaluation conducted.

Each segment of any programme which may then be developed should have a clear concise written statement of intended learning objectives and should be specifically designed and implemented to achieve those objectives. There should be continuing evaluation of whether the stated learning objectives and expectations of the participants were achieved.
It may be possible to develop researched written materials including manuals and guidebooks which might assist the new Ombudsman's performance in an effective, efficient and, if it is conveyed by Ombudsmen to other Ombudsmen, in a knowledgeable manner.

Components

A statement of preliminary objectives for the development of a skilling programme could read as follows:-

- To assist new Ombudsmen to acquire the knowledge, skills and attitudes required to perform their responsibilities fairly, correctly and efficiently;

- To help new appointees to office preserve the integrity and impartiality of the Ombudsmen system;

- To enhance public confidence in all quarters in the Ombudsmen concept.

The orientation process which would then be developed would include elements of written materials, in the first instance and then progressively, substantive instruction and what I would term an "advisor ombudsman" process. This last mentioned item would require volunteers of experienced Ombudsmen being willing to convey advice and insights to those more latterly appointed. It might be that recently retired Ombudsmen of the past would be willing to offer their services for this to happen.

The contents of the suggested orientation would, in my view, include topics such as:-

- transition to the new position
- reviews of recent work of the past
- effective use of staff and resources
- case management techniques
- community and media relations
- overviews of applicable legislation.

Written material would be developed so that Ombudsmen could have appropriate examples of:-

- checklists
- sample procedural language
- forms
- model dispositions of cases
- directories of government organisations and community groups.
From these would come the ability for an individual Ombudsman to choose what he or she might choose to implement in his or her own jurisdiction.

Conclusion

Some twenty years ago, the thought that Judges might need education programmes to assist their proper functioning would have been unthought of in many countries. A very significant attitudinal change to that has come about in that arena in the intervening period. The thrust of my remarks today is to suggest that the following words of Victor Hugo, which at least some may recall to mind, might apply to what one can call the "Ombudsworld." Victor Hugo wrote "An invasion of armies can be resisted, but not an idea whose time has come."

Anand Satyanand
October 1995

BIBLIOGRAPHY


"A Judicial Orientation - the Australian Approach", L Armytage, NSW, Australia, 1994


"The Judges" M D Kirby, the Boyer Lectures, Sydney, NSW, Australia, 1983

