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The Ombudsman in New Zealand†

Walter Gellhorn*

When the Government in early 1961 circulated a proposal to transplant the ombudsman from Scandinavia to Wellington," a top-ranking New Zealand official recently recalled, "my Department was strongly against the whole idea. We regarded it as just a political maneuver and, as a matter of fact, we may have been right at the time. But now, after nearly three years of experience, we are just as strongly in favor as then we were opposed. The Ombudsman has proved to be a good thing for the citizen—and for the Department, too."

"'OMBUDSMAN' BILL SHEER HUMBUG," proclaimed a banner headline in the official organ of the New Zealand Public Service Association, whose 48,000 members in governmental posts make it the largest employee organization in New Zealand. The proposal, the Public Service Journal continued in September 1962, "is half baked. It panders to sectional prejudices—those directed against officialdom. If it works at all, it will cause confusion and disgruntlement. . . . It is the public servant, and only he, who is to be harassed and hounded as part of the policy of halting the welfare state in its tracks. . . . The Commissioner will be a party creature—an apologist for the Government while in office and the spy of the appointing party when in opposition."1 Three years later the same periodical exulted, in its most prominent news columns, that the Ombudsman's annual report had once again exonerated the Public Service from any charge of malpractice and had found fault with relatively few decisions. "In one respect," the Journal added, "the Ombudsman has proved to be an even better friend of the Service than these figures suggest. He has laid down precedents for investigating some of the administrative acts of the State Services Commission regarding individual public servants—and has issued some sharp rebukes to the Commission. . . . It is becoming increasingly clear that the office of Ombudsman is not necessarily the trap for public servants which many of us feared when it was first established. Indeed, the present incumbent is making it probable that public servants will make more and more use of the office for settlement of otherwise unappealable grievances."2

A close analyst of the proposal to create a Parliamentary Commissioner for Investigations told the legal profession in 1962 that the office

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1 49 Pub. Serv. J. no. 9, p. 2, cols. 1, 2, 3 (1962).
2 52 Pub. Serv. J. no. 6, p. 1, cols. 1, 2, 3 (1965).
would probably be unattractive to men of talent; "very few persons would accept appointment, and those few would be least suitable."³⁸ On the very day the proposal became law later in that year, the New Zealand legislature unanimously elected Sir Guy Powles, K.B.E., C.M.G., to be the first holder of the newly created post. After having been a successful lawyer and soldier, he had served for eleven years as the High Commissioner of Western Samoa when it was a United Nations trust territory in New Zealand's charge, and had then become New Zealand's first High Commissioner (or ambassador) in India. A former Attorney General had remarked that the appointee should be "a very wise, a very mature, a very tolerant person."³⁴ Despite the earlier fear that only the "least suitable" would accept appointment, Sir Guy fully met the qualifications just quoted. An Australian law professor has well described him as combining "an intimate knowledge of his country's government and leading political and administrative personalities with a profound belief in freedom and democracy; he is shrewd, tolerant, good-humoured, imbued with a sense of the value and limits of his office, and quite without vanity or self-importance."³⁵

These sharply contrasting observations—somewhat resembling the "unretouched BEFORE and AFTER photographs" with which advertisers of reducing pills and other nostrums beguile potential purchasers—suggest a triumphal march more than a governmental activity. This article addresses itself to the question of whether the "BEFORE and AFTER photographs" tell all.

I
NEW ZEALAND AND ITS GOVERNANCE

The "ombudsman concept" is very simple. It means only that a citizen aggrieved by an official's action or inaction should be able to state his grievance to an influential functionary empowered to investigate and to express conclusions.⁶ Such a functionary does not operate in a vacuum.

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⁵ G. Sawyer, OMBUDSMEN 32 (1964). But cf. J. F. Northey, New Zealand's Parliamentary Commissioner, in THE OMBUDSMAN 135 (D. C. Rowat ed., 1965): "Sir Guy, who is 58, has had wide experience . . . . If any fault can be found in his qualifications, it is on the administrative side. His lengthy service abroad denied him an up-to-date knowledge of New Zealand's public administration and upon appointment he was virtually unknown to many of the senior officials with whom he must deal."
⁶ In the improbable event that any reader of this article is as yet unaware of the "ombudsman concept" and its Scandinavian origins, reference may be made to THE OMBUDSMAN (D. C. Rowat ed. 1965). For further discussion of Scandinavian experience, see W. Gelhorn, The Norwegian Ombudsman, 18 Stan. L. Rev. 292 (1965); W. Gelhorn, Finland's Official Watchmen, 114 U. Pa. L. Rev. 327 (1966); W. Gelhorn, The Swedish Justitie-ombudsman, 75 Yale L.J. 1 (1965).
Knowledge of an ombudsman's surroundings is prerequisite to understanding how he works.

A. The Country

New Zealand is a decidedly prosperous country, roughly the size of New York, New Jersey, and Pennsylvania in combination. Its population numbers about two and a half million. A member of the British Commonwealth of Nations, it governs itself as a constitutional monarchy. Queen Elizabeth II, the Head of State, is represented by a Governor-General. Actual power rests in the unicameral parliament, the eighty-member House of Representatives, elected triennially. Two political parties, National and Labour, have held all the seats in that body during more than three decades past.

B. The Government

The majority party—at present, the National—forms the Government. The Cabinet, comprising fifteen Ministers in addition to the Prime Minister, puts forward virtually all the legislation adopted by Parliament. Its members are the political heads of the forty-three Departments of State. Each Minister is directly responsible for law administration in the Departments he controls.

The chief executive of a Department is its Permanent Head, a high-ranking public servant responsible to the controlling Minister, but neither appointed nor removable by him. Departmental determinations are, in the main, communicated in the name of the Permanent Head or his delegate; "New Zealand has not preserved the fiction that the Minister himself has taken the decision."

Departmental personnel from top to bottom are within what is, in American official jargon, "the classified civil service." Appointments, job ratings, and salaries are determined by the State Services Commission, whose judgments in these matters have been statutorily removed from Cabinet control.

Functioning outside the departmental structure are administrative organizations designed for limited though highly important purposes.

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7 The number of Departments is given as 41 in Royal Commission of Enquiry, Report on the State Services in New Zealand 18-19 (1962). The "Schedule of Departments and Organisations to Which This Act Applies," annexed to the Parliamentary Commissioner (Ombudsman) Act 1962, lists the larger number of 43 under the heading of "Government Departments."

8 Permanent Heads and Deputy Permanent Heads are chosen by a statutory board composed of two Permanent Heads and two members of the State Services Commission. "We receive an expression of opinion by the Minister when a vacancy occurs," a member of the board recently said, "but there is no political yes or no by him or anyone else."

9 Northey, supra note 5, at 127.
They include such bodies as the National Roads Board, which decides upon the location and type of new highway construction projects, and the Earthquake and War Damage Commission, which administers a state insurance fund in aid of disaster victims. Twenty-two organizations, including those just named, have been affected by the 1962 statute that created the Ombudsman. Some are subject to ministerial control though unconnected with any department.10

C. Parliamentary Control Over Administration

The House of Representatives is the supreme authority in New Zealand. Its powers are limited not by law, but only by tradition and judgment. Ministers and those whom they direct are subject to challenge, rebuke, and revision by the House as a whole.11

Even so, while the Opposition or a private member can occasionally ask an embarrassing question, few wrongs are righted as a result of members' thrusts at Ministers. When a constituent complains to his member, the member's usual first step is to send the complaint to the cognizant Minister, with a request for his comment. The Minister in turn asks the Department to draft a reply; the reply ordinarily tells the member (and, through him, the complainant) that the Minister finds no cause for changing the decision. Only rarely do the member's representations induce a Minister to reject the departmental view of the matter.12 The Minister's stand, as the dean of the Victoria University law faculty has said, is usually "impregnable because he and his departmental officers alone have full possession of the facts."13 Agreeing that "rightly or wrongly, the Minister can plead superior knowledge as a way of disarming criticism," the present Minister of Justice has candidly added that New Zealand's

10 Northey, supra note 5, at 130: "Relatively small areas of the economy have been committed to tribunals that function outside the normal departmental organization and are in no way controlled by a Minister or his department."

11 The present Government has in fact sought to strengthen parliamentary control and to enlarge the capacity of private members to inquire into administrative actions. Improvements in the system of parliamentary control are well discussed in C. C. Aikman & R. S. Clark, Some Developments in Administrative Law (1964), 27 N.Z.J. Pub. Admin. 45, 55-60 (1965). The innovations have been especially effective in respect of examining the expenditure of public moneys.

12 Northey, supra note 5, at 128. Compare G. Powles, The Citizen's Rights Against the Modern State, and Its Responsibilities to Him, 13 Int'l & Comp. L.Q. 761, 766 (1964): "On the floor of the House the Minister is usually expected to support his department, but in the process of advising Ministers on their answers the organs of the administration are sometimes compelled to reconsider dubious decisions."

markedly insistent party discipline "has perhaps made accountability of the executive to Parliament something less than a full-blooded truth."\textsuperscript{14}

The House of Representatives also maintains a bi-partisan Petitions Committee (and, when needed, two such committees) to consider what are somewhat sentimentally called "appeals to the highest court in the land." These include prayers for relief from determinations of public organs and claims for monetary compensation, as well as proposals for general or special legislation, the latter not being pertinent to this discussion. After hearing the petitioner's evidence and receiving such material as the department involved may choose to submit, the Committee rather speedily formulates a recommendation. "Committees," the Auckland law faculty's dean has observed, "tend to be more sympathetic than the Administration towards the petitioner; in fact it is sometimes said that they have been irresponsible. Invariably, the recommendation of the Committee is adopted by the House; the resolution, together with fuller reports from the departments concerned, is then carefully considered by a Cabinet Committee and finally by the Cabinet itself. At this level the departmental view is more likely to prevail. It is understood that about half of those petitioners in respect of whose petitions the Committees make a "most favourable recommendation" receive some kind of award . . . . Committees realise that only petitions supported by such a recommendation have any prospect of adoption by the Government. This causes them to support rather more warmly than might otherwise be justified a petitioner who has a genuine grievance. . . . It is recognized that a committee which has no financial responsibility . . . is likely to make a most favourable recommendation in cases which may not entirely merit such support."\textsuperscript{15}

Members of the House with whom the work of the Petitions Committee was recently discussed were of two minds about its utility from the standpoint of persons aggrieved by administrative acts. Two prominent members of the Opposition declared that the Committee could function effectively if the Government were required to explain every rejection of a Committee recommendation; they acknowledged, however, that they had not advocated that step when they themselves had been Cabinet members. Others felt that the Committee, while useful as a "last resort tribunal" to deal with unusual episodes (not long ago, for example, a "most favourable recommendation" was made in a matter that had been pending since the 1930's), had little value in reducing the frictions of

\textsuperscript{14} J. R. Hanan, \textit{Any Complaints?}, The Australian, Nov. 26, 1964.

\textsuperscript{15} Northey, \textit{supra} note 4, at 49. See also Northey, \textit{supra} note 5, at 128-29.
day-to-day government. This view is supported by available statistics,\textsuperscript{16} as it is by the experience of legislative committees elsewhere.\textsuperscript{17}

\textbf{D. The Judiciary and Its Relation to Administration}

The tradition of an independent judiciary is solidly entrenched in New Zealand. Judges, appointed permanently until reaching the compulsory retirement age of seventy-two, can be removed only by the House of Representatives.\textsuperscript{18} The Court of Appeal (three judges) hears appeals from the Supreme Court. Thirty-six stipendiary magistrates conduct both civil and criminal trials of lesser importance. Honorary justices of the peace may try certain minor offenses in rural areas and, particularly on Saturday mornings, in the cities. In addition, specially appointed judges preside over, respectively, the Court of Arbitration (in labor relations matters), the Compensation Court (in workmen's compensation cases), the Land Valuation Court, and the Maori Land Court.

Quite apart from the judiciary, more than sixty administrative tribunals and authorities pass upon individual cases at both the trial and appellate levels.\textsuperscript{19} While some of the matters committed to tribunals may be regarded as petty, their decisions almost surely dispose of more money and property each year than do the judgments of the supreme court.\textsuperscript{20}

Moreover, the tide has run strongly and rather uncritically in the direction of committing fresh duties to tribunals instead of courts. In 1963, for example, an Indecent Publications Tribunal was created partly

\textsuperscript{16} Committee recommendations "For Consideration" or "For Favourable Consideration" are regarded as gentle equivalents of rejection. During the years 1950-1956, only 47 out of 303 petitions were recommended "For Most Favourable Consideration." Of those involving money claims, compensation was received in only a fourth of the "most favourable" group. During the five years preceding 1964, only 17 out of 253 petitions were recommended "For Most Favourable Consideration." Six of these recommendations were substantially accepted by the Government, four were partly approved, and seven were rejected. See Powles, supra note 12, at 766-67.

\textsuperscript{17} Compare W. Gellhorn & L. Lauer, Congressional Settlement of Torts Claims against the United States, 55 Colum. L. Rev. 1 (1955).

\textsuperscript{18} Informal pressures initiated by the Bar did, however, cause the resignation of an ill-tempered judge in 1921, while two magistrates have in more recent years been nudged into retirement earlier than they had planned, because of complaints concerning their conduct. No formal procedures for discipline or admonition exist, other than the ultimate (and unused) sanction of removal from office.

\textsuperscript{19} An admirable report on New Zealand's administrative tribunals was published in 1965 by the Department of Justice under the title The Citizen and Power: Administrative Tribunals. It brings together data concerning the tribunals' membership, relationship to other organs, procedure before, during, and after hearing, and amenability to judicial review. An earlier work by the present Secretary for Justice (that is, the Permanent Head of the Department of Justice) provides valuable background material. See J. L. Robson, New Zealand: The Development of Its Laws and Constitution (1954).

\textsuperscript{20} See G. S. Orr, Administrative Justice in New Zealand 81 (1964).
to assure consistent decisions and partly on the probably mistaken assumption that identification of obscenity is a task within the competence of "experts" though not of jurists. In 1964, when New Zealand commenced the important social step of awarding compensation to persons injured by physical crimes, the task of determining the facts was committed not to courts, which are certainly used to dealing with crimes and compensation, but to a Crimes Compensation Tribunal. The astute Solicitor General of New Zealand has sardonically observed a "reluctance on the part of Parliament to bother the courts with small issues and an unwillingness to trust them with large."

The shunting aside of the courts is perhaps explicable in part by the incapacity of judges in other days to keep in tune with the times. Believing that modern judges do not share their predecessors' deficiencies, many New Zealand lawyers, for whom the Solicitor General is the most prominent spokesman, now urge that additional adjudicatory responsibilities should be carried by the courts in the first instance. "If a policy admits of expression with sufficient certainty to enable principles to be stated by the draftsman or extracted by the judge," he contends, "then the courts ought to be trusted to apply it. If not, then the politicians should give the task to a tribunal or, preferably, think again. The need for trained and experienced detachment in decision must be weighed

21 Cf. W. Gellhorn, Individual Freedom and Governmental Restraints 21 (1956): "Administrators who make decisions concerning such abstractions as 'obscenity' . . . are not experts, though they may sometimes be specialists. No well defined educational process or routinized training has equipped them, as distinct from judges and jurors, to determine the delicate issues of philosophy, aesthetics, psychology . . . . It is precisely here that administrative judgment is most subject to miscalculations, distortions, and delusions." And compare the conclusion, after exhaustive study, stated by W. B. Lockhart & R. C. McClure, Literature, The Law of Obscenity and the Constitution, 38 MINN. L. REV. 295, 320 (1954): "No one seems to know what obscenity is. Many writers have discussed the obscene, but few can agree upon even its essential nature." See also M. L. Ernst & A. U. Schwartz, Censorship: A Search for the Obscene (1964).


24 Compare Wild, op. cit. supra note 23, at 5: "The insistence of some judges on the letter rather than the object of legislation has encouraged the tribunal system . . . ." But compare Orr, op. cit. supra note 20, at 79: "In so far as any tendency can be discerned, it is to create a special appeal authority where the number of appeals is thought to justify this course, but otherwise to assign the task to either the Magistrate's Court or the Supreme Court. However, a special authority may be constituted in cases where, despite the limited number of appeals, special qualifications are deemed necessary."
against the desirability of special knowledge or lay participation in the area of dispute.\textsuperscript{25}

As yet, this opinion has not gained the ascendancy. On the contrary, the courts have not only been precluded from applying new policies directly, but have been narrowly limited in their power to review the decisions of the newer tribunals that do apply them. In many instances an appeal from a tribunal lies not to a court, but to an "authority"—often a single person—who may review and revise without restraint, and whose judgment is, as a practical matter, unreviewable elsewhere either as to the law or the facts.\textsuperscript{26} In a lesser number of cases judicial review is provided as to questions of law or, very rarely, as to the merits of the administrative decision.\textsuperscript{27} No clear pattern emerges; one is inclined to think that the availability and scope of judicial review have been determined by accident fully as often as by design.\textsuperscript{28}

Whatever may be the true explanation, the courts in fact rarely have the experience of dealing with administrative decisions; the reported cases over a recent ten-year span include only fifty-six significant reported

\textsuperscript{25} WILD, \textit{op. cit. supra} note 23, at 7.

\textsuperscript{26} As to the limited effectiveness of "prerogative writs" as a means of surveillance over the exercise of statutory powers, see Orr, \textit{op. cit. supra} note 20, at 107. But see Waterside Workers’ Fed’n v. Frazer, 1924 N.Z.L.R. 689, 701-703; \textit{Re Otago Clerical Workers’ Award}, 1937 N.Z.L.R. 578.

\textsuperscript{27} Even when statutes have empowered them to engage in “full review,” New Zealand judges have been reluctant to pass upon the merits of determinations made by others who are presumed to have specialized knowledge. For examples, see Orr, \textit{op. cit. supra} note 20, at 80. WILD, \textit{op. cit. supra} note 23, at 5, commenting on cases of this type, remarks that the legal profession as a whole has very shortsightedly "shown too little readiness to tackle the problem of adapting legal institutions to modern requirements. This curious policy of self-denial on the part of many lawyers is matched by occasional examples of judicial restraint amounting almost to abdication of function in the field of administrative law." He cites a judge’s refusal to review the discretion of a licensing agency because “none of the regular courts of the country can have that special knowledge” which the judge attributed to the licensing appeal authority—one lawyer. And see also C. C. Aikman, \textit{Some Developments in Administrative Law} (1959), 22 N.Z.J. PUB. ADMIN. 59-62 (1960).

\textsuperscript{28} Solicitor General Wild remarked recently, for example, that if the Trade Practices Commission were to command an economically important business to terminate relationships the Commission regarded as unduly restrictive, an appeal would lie only to a one-man Appeal Authority and no farther. If the Motor Spirits Licensing Authority were to suspend a gasoline filling station’s license, the suspension order could, by contrast, be appealed first to the Appeal Authority (again, one man) and thence to the Supreme Court and yet again to the Court of Appeal.

And see G. S. Orr, \textit{Administrative Justice}, 1965 N.Z.L.J. 83, 85: “An aggrieved litigant in the Magistrate’s Court, if the matter in dispute is of the value of £50 or more, may appeal as of right to the Supreme Court. Compare this situation with that of a company which earlier this year sought from the Price Tribunal a price increase amounting to £150,000 per annum. The decision when issued simply stated the increase granted (it was considerably less than that sought); \textit{no reasons were given. There is no right of appeal.}”
court proceedings that involved administrators or tribunals. Less than a third of these attempts to rectify grievances related to Departments or Ministers, the balance having to do with ad hoc tribunals and special bodies.

The situation is not, however, as bad as this discussion may make it seem. The caseloads in most of the tribunals and appeal authorities are small. The person who conducts a hearing can himself consider and formulate the decision. The appeal authorities are in many instances magistrates or judges of one of the special courts, and are thus presumably dispassionate and well trained. They may serve in several different bodies, deftly changing their "expertness" to fit the needs of the day; the late Sir Francis Frazer, a prominent lawyer trained also as an economist, was at one stage of his career the Transport Appeal Authority, the Industrial Efficiency Appeal Authority, and the Sea-Fisheries Appeal Authority, and occupied his remaining idle moments by being also the chairman of the Goods Services Charges Tribunal and the chairman of the War Pensions Appeal Board.

The state of administrative justice nevertheless causes considerable concern in New Zealand. A decade ago one of the country's most highly regarded public servants recognized that administrative tribunals gain strength from continuing contact with a special field and, being unencumbered by pompous traditions, can adopt cheap and speedy procedures. But, he asserted, "administrative tribunals tend in practice to be less independent than the ordinary courts and display a lower standard of objectivity and impartiality." This opinion is widely shared, though supporting evidence has rarely been adduced. Because of uneasiness concerning the largely untrammeled power of administrative adjudicators, lively professional discussion has occurred concerning possible improvements and protections.

20 Powles, supra note 12, at 769, 772. The grievants gained some measure of relief in 40% of the cases that were taken to court.

20 So, for example, the Police Appeal Board, presided over by a stipendiary magistrate, sat during only five days in the fiscal year 1964-1965, considering the grievances of seven appellants from disciplinary or other personnel decisions. Report to the House of Representa-

31 See Northey, supra note 5, at 130.

32 Rosson, op. cit. supra note 19, at 127.

31 Id. at 126.

34 A significant beginning was made by R. B. Cooke, The Changing Face of Adminis-
trative Law, 1960 N.Z.L.J. 128, proposing an administrative court which could not only review the legality of administrative determinations but also revise decisions it deemed unwise. A scholarly work by G. S. Orr, cited in note 20 supra, further stimulated discussion of the administrative court idea and also put forward proposals for an administrative procedure act. See also the same author's article cited in note 28 supra. For criticism of the Orr thesis, see Aikman & Clark, supra note 11, at 64-69.
While focussed at first chiefly on the more obviously adjudicatory bodies, the discussion helped set the stage for a more general consideration of the citizen's relationships with officials. In 1960, for example, a former Minister of Justice reacted negatively to advocacy of an administrative court, but at the same time declared his belief that “the further one gets away from the point where policy is made to the point where it is administered over the counter in the district offices all over the country, the greater is the need for some method of review to ensure that the citizen is getting a fair deal.”

What was really needed, he asserted, was not a new court or more judicialization. What was needed was an independent administrative means of reviewing exercises of power.

Thus was the curtain raised on political developments that led to New Zealand's adopting the ombudsman concept.

II

THE CREATION OF THE OMBUDSMAN

In November 1960 the National Party, then the Opposition and about to contest a general election, issued a statement of policy embodying the former Minister’s view. Good government, the Party’s election statement said, “requires the co-operation of the people in accepting as fair and reasonable the decisions of the administration. To ensure that members of the public in dealing with Departments of State have the right and opportunity to obtain an independent review of administrative decisions, the National Party proposes to establish an appeal authority. Any person concerned in an administrative decision may have the decision reviewed. The procedure will be simple . . . . The appeal authority will be an independent person or persons responsible not to Government but to Parliament.”

The National Party having been returned to power at the end of 1960, the newly designated Minister of Justice, J. R. Hanan, became responsible for putting flesh on the bones of this campaign promise. To the Department of Justice and its Permanent Head, the Secretary of Justice, fell the task of advising the Minister and his colleagues in the Cabinet. By great good fortune, the Secretary for Justice, energetic and scholarly J. L. Robson, was already well informed concerning the Scandinavian ombudsman institution, especially as it had been developed in Denmark.86

85 1960 N.Z.L.J. 137, quoted in Aikman, supra note 13, at 400.
86 Dr. Robson, then Deputy-Secretary for Justice, had attended a United Nations seminar in Ceylon in 1959, along with then Minister of Justice Mason. At that seminar a paper prepared by the Danish Ombudsman was read and discussed, though its author was not present. Brief references to the discussion were subsequently made in New Zealand by Mr. Mason and Dr. Robson; see 1959 N.Z.L.J. 221; 22 N.Z.J. PUB. ADMIN. 79 (1960). But these gentlemen were not proselytizing. It is plain, moreover, that the National Party had adopted the “appeal authority” idea before rather than after assuming office. Hence one cannot accept
Hence the policy choices the Cabinet would face could be quickly sketched. As early as February 1961 the Minister of Justice had declared again the Government's resolve to create a New Zealand institution akin to the ombudsman—"not of course merely copying the idea from other countries but adapting it to conditions here."7

Remarkably little external interest or pressure pushed the Government in that direction. A single questioner in the House of Representatives asked in August of 1961 whether the Government still meant to introduce a bill along the lines the Minister had indicated. He was answered affirmatively. So far as can now be ascertained, nobody else seemed to care.

Meanwhile, however, the Department of Justice proceeded with its work. A detailed draft was circulated among the various departments for comment, and the views of two professors were sought. A further draft, incorporating the suggestions received, came before the Legislation Committee of Cabinet, was searchingly examined and somewhat revised there, and was submitted to the House of Representatives at the end of August 1961. Neither the House nor the press gave it a warm reception, partly because the revised bill seemed somewhat anemic. No action was taken at that Session of the House.

Before the House met in 1962, the Department of Justice had pressed successfully for Cabinet reconsideration of various limitations upon the proposed ombudsman's authority. A fresh bill, clearly reflecting the Government's desire to provide the ombudsman adequate power to accomplish his mission, was introduced early in the 1962 session. At a committee hearing on the bill the Public Service Association (the main organization of public servants) attacked the proposal in principle and in detail. The Law Society, the Constitutional Society, and an individual attorney suggested changes, but were generally favorable. That was the extent of expressed public reaction.

During discussion in the House, a few Opposition members scoffed at the notion that an administrative investigator would be useful, but

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the suggestion put forward by a New Zealand author: "When the National Party defeated the Labour Party at the polls and took office at the end of 1960, the previous Attorney-General, a highly respected but elderly lawyer, was replaced by an equally highly respected but much younger man whose ear the Secretary for Justice would appear to have gained." A. G. Davis, The Ombudsman in New Zealand, 4 J. Int. Comm. Jur. 51, 52 (1962). Similarly, the available evidence does not support the assertion of Sawer, op. cit. supra note 5, at 25, that "the idea of having such an officer at this time was due largely to personal contacts and enthu-
asms" of Messrs. Mason and Robson. The present Minister of Justice disputes Prof. Sawer's opinion concerning the origin of the idea, but adds: "Dr. Robson's familiarity with the institution, however, had important consequences at the drafting stage of the legislation." Hanan, supra note 14.

7Quoted in Aikman, supra note 13, at 401.
debate was in a markedly low key. In the end, the House made only one change in the bill. The Government had proposed that the new statute be cited as "the Parliamentary Commissioner Act 1962"; and section 2 provided that "There shall be appointed, as an officer of Parliament, a Commissioner for investigations, to be called the Commissioner." The House amended: The Act as finally passed on September 7, 1962, is to be cited as "the Parliamentary Commissioner (Ombudsman) Act 1962" and it creates "a Commissioner for investigations, to be called the Ombudsman." While the Act never again uses the word Ombudsman, but consistently refers to "the Commissioner," the Scandinavian designation is the one that has prevailed in common usage. New Zealand acquired an addition to its vocabulary as well as a new official.

This is rather unspectacular legislative history. It has been recounted here because its very calmness reveals how little the Ombudsman was a response to excited clamor. No scandals had shaken confidence in public administration. No example of maladministration was cited in the House or elsewhere to show the need for a new safeguard. No festering abuses were thought to necessitate drastic surgery. The Ombudsman was created not to clean up a mess, but, rather, simply to provide insurance against future messes.

III

THE OMBUDSMAN STATUTE AND SOME QUESTIONS IT HAS RAISED

A. Appointment, Tenure, and Perquisites

The Ombudsman is, in theory, to be "Parliament's man" and not an agent of the executive. The statute provides that the Governor-General is to appoint him upon each Parliament's recommendation; this means that his normal term is three years (the life of a Parliament), though of course he may then be reappointed; in any case, he is to remain in office until a successor has been appointed. The Parliament may choose anyone it wishes, for the statute sets forth no qualifications for the office other than that the appointee must not be a member of Parliament.

The method of appointment is unusual in New Zealand and may, in fact, be unprecedented. Cynics say that since the Government controls the votes of its partisan supporters, it can in fact dictate the choice of the Ombudsman. The form of election seems, however, to reflect a genuine resolve to stress the Ombudsman’s detachment from the ordinary

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38 Parliamentary Commissioner (Ombudsman) Act [hereinafter cited as Act], Act No. 10 of 1962, § 4. Removal or suspension from office is possible only "upon an address [to the Governor-General] from the House of Representatives, for disability, bankruptcy, neglect of duty, or misconduct." Act § 5. The provision is the same as that pertaining to Supreme Court judges.
NEW ZEALAND OMBUDSMAN

processes of political appointment. At the same time, the Ombudsman's limited term of office causes some New Zealanders to see a threat to his independence. Experience in Denmark, which has the same pattern as New Zealand, should reassure them somewhat. A notably independent Danish Ombudsman has held office continuously since 1954, having been reelected by successive parliaments quite without reference to partisan considerations.

Unlike the Scandinavian countries, which have set their ombudsman's salaries at the topmost salary level of the public service, New Zealand chose to pay its Ombudsman somewhat less than judges and a very few Department heads. The choice, once having been made, is probably irreversible; personal sensibilities would be bruised if the Ombudsman were now to be elevated still further in the governmental hierarchy. This is unfortunate because the Ombudsman's salary does to some extent serve as a status symbol; the higher his status, the more likely his success. Furthermore, a higher-salaried judge or public servant might be unwilling to become the Ombudsman, were a future Parliament to decide that he would be its first choice.

Once in office, the Ombudsman is largely independent. His salary cannot be diminished. He is not subject to the superintendence of the House or any of its committees. For "housekeeping purposes" he is attached to the Legislative Department, whose Permanent Head is the Clerk of the House of Representatives. He is not, however, in any degree an element of that department in the sense of being directed by its officials; the Department, on the contrary, is subject to being investigated by him, like any other Department of State. The only discernible controls over him lie with the Prime Minister (who determines the number of staff members the Ombudsman may appoint) and the Minister of Finance (who approves their salaries and the terms and conditions of their appointments).

When this topic was discussed in New Zealand in 1965, a number of persons called attention to a remark by Minister of Justice Hanan when presenting the original version of the ombudsman bill in 1961: "His position comes up for review every three years, so that in effect it is easier to get rid of him than it would be to get rid of the Comptroller and Auditor General or a Judge. He will be in a very powerful position to criticize Government administration, and our Government might appoint a man who was not the concept of what an Ombudsman should be for, say, a Socialist Government which might want a quite different type of individual." N.Z. Hansard, 29 Aug. 1961, p. 1806. The Minister himself adheres to the view that the best way to disarm suspicion of the Ombudsman is to make impossible any Government's choosing somebody for the purpose of embarrassing a successor Government. The fact that no political advantage can be gained by, as it were, leaving a spy behind enemy lines will in his opinion encourage selection of persons who can command the confidence of all, thus making for stability rather than frequent changes.
B. Matters within the Ombudsman's Jurisdiction

The Ombudsman's principal function, section 11 of the Act declares, is "to investigate any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity . . . ." A schedule annexed to the Act lists the Departments and other public organs whose affairs may properly concern the Ombudsman. The list is lengthy, but it notably omits administrative tribunals and appeal authorities; it includes, as one of the draftsmen of the law put it, "all the bodies we thought the public regarded as part of the country's day-to-day administration."

1. Acts of Ministers

The authority to investigate recommendations made to Ministers deserves special note. During Cabinet discussions, considerable difference of opinion arose as to whether the Ombudsman should be empowered to review decisions made by Ministers themselves. To allow him to do so, some said, would be to undermine the principle of accountability to Parliament. On the other hand, if all actions taken by Ministers were to be exempt from later examination by the Ombudsman, a scheming or timid administrator could immunize himself against investigation simply by obtaining his Minister's approval of every debatable action. The compromise solution was to put a Minister's decision beyond the Ombudsman's reach, but to allow him to inquire into the departmental recommendations upon the basis of which the Minister had presumably acted. Thus the possibility of an official's using a Minister as a screen or shield was overcome, while at the same time the parliamentary purists were content to observe that ministerial responsibility to the House had been unimpaired.40

40 Minister of Justice Hanan, who was not among those perturbed by the possibility of the Ombudsman's looking at a Minister's decision, has discussed ministerial responsibility as follows: "It means that a department is subject to the direction of its minister, and that the minister is accountable to Parliament not only for his personal acts or decisions but also for the acts or decisions of his department.

"By 'accountable' is not meant 'personally responsible for' but 'subject to examination.'

"Why then should it impair the principle of ministerial responsibility if the Ombudsman discloses that the act complained of was the act of the department and not that of the minister? The recognition of the right of the minister to direct his department remains unimpaired, as does the accountability of a minister to Parliament." Hanan, supra note 14.

During the debate on the bill that became the Ombudsman Act, Mr. Hanan, commenting on the provision relating to departmental recommendations, had said: "If the Minister follows that recommendation, then criticism of the recommendation will in effect be criticism of the decision. If he does not follow the recommendation, then that fact will doubtless be stated by the Commissioner. In either event the Minister in the light of the
The differentiation seems to have worked out comfortably enough in practice thus far, though by any realistic analysis the Ombudsman expresses an opinion concerning the soundness of a decision when he evaluates the soundness of the advice on which it rests. In 1964, for example, he acted upon the complaint of two British schoolteachers who had been induced to come to New Zealand for service. Part of the inducement had been the promise of low rent in state-owned houses; but soon afterward the Cabinet had raised the rent. "The original decision to raise the rents of Public Service pool houses," the Ombudsman wrote, "was taken by Government and was thus not within my jurisdiction to investigate—nor were the subsequent decisions of Government on this matter. I was, however, bound to investigate the recommendations made by the Department of Education which formed the basis of the Minister of Education's submissions to Cabinet." Those recommendations, he found, had been put forward in good faith, but were nonetheless defective.4

The risk of too sharp a clash between the Ombudsman and the Cabinet is somewhat lessened by section 15(5) of the Act, which provides in part that a Minister may request a conference in relation to any matter the Ombudsman is investigating and, further, that whenever an investigation relates to any recommendation made to a Minister, the Ombudsman must consult that Minister "after making the investigation and before forming a final opinion . . . ."

A Cabinet member, asked recently whether he thought that the Ombudsman's power to inquire into departmental recommendations had discernibly affected him or any of the Departments for which he had responsibility, answered: "Yes, in two ways. At first I thought that more things might be passed up to me for initial decision, without the Department's taking responsibility. That has not happened, as a matter of fact. Many of the recommendations that do come to me, though, seem to me to be better worked out, more carefully considered than they used to be; and this is partly because they can now be scrutinized elsewhere. The second change is that when I am myself interested in a matter—for example, because of representations by members—I am likely to have a number of conversations with my people before they make any recommendation at

Commissioner's findings will eventually be called upon to justify his action in Parliament and that is where the Minister should be called upon to account for his administrative acts." Quoted in Powles, supra note 12, at 765-66.

41 Case No. 752, OMBUDSMAN'S REPORT 1964, at 29. This or a similar case may have occasioned the following remark by the Assistant Director of Education, quoted in Aikman & Clark, supra note 11, at 50: "[I]f [the Ombudsman] . . . found it necessary to explore the confidential territory that lay between a permanent head and his Minister and to disclose to his complainants the recommendations of Departments to Government, that in time would destroy the confidence between Minister and Department that was essential in a democracy."
all. I’m not disposed to have recommendations made that may later force me to justify having disregarded them. So I sometimes persuade the Department to give me the advice I want to accept.”

2. “A Matter of Administration”

The Ombudsman is to investigate acts relating to a matter of administration, as distinct from a matter of policy. The Ombudsman himself refers to this as a “notoriously difficult distinction” and acknowledges that he has not been able to “construct any guiding principles,” being forced “merely to decide, upon common sense grounds, each case as it arises.”

Agreement upon what is commonsensical is just about as rare as agreement upon what is a matter of administration. Some of the Ombudsman’s decisions have been strongly criticized because, in the critics’ view, they dealt with matters that should have been left to political controls.

Cases Number 10 and 334, for example, grew out of complaints that the Department of Health had too actively sought to influence voters in a local referendum on whether the public water supply should be fluoridated. The matter of fluoridation having been left to local option, the Ombudsman concluded that “direct active campaigning by a Government Department in the local referendum was wrong.” The Department’s activities, though undertaken conscientiously, “exceeded the proper functions of furnishing information or of pursuing normal health education activities.” The Ombudsman advised the Department to refrain from similar activism in the future, unless otherwise specifically directed by the Minister of Health. Obviously the Ombudsman regarded the cases as involving “administration.” Others thought that they had to do with general direction of the Department’s affairs and were therefore within the realm of “policy” for which the Minister was responsible. A confident conclusion concerning this disagreement is not easy, because the Ombudsman’s report of the case necessarily omits certain Cabinet documents which he perused but was not free to publish.

Case Number 719 necessitated another difficult choice. Several citizens had expressed belief that the Department of Internal Affairs had failed to effectuate the provisions of the Civil Defence Act. The Ombudsman pressed for information, taking the view that a “matter of administration” must include a “failure to administer.” Conversations between the Ombudsman and cognizant officials explored the Department’s plans for informing the public, developing regional and local activities, and so on. Not content with progress after the elapse of several months, the Ombuds-

42 Powles, supra note 12, at 775.
43 OMBUDSMAN’S REPORT 1964, at 32-33.
man wrote the Director of Civil Defence that "by now sections 10-13 of the Civil Defence Act should be put into active administration and execution"; the Department was under a duty to administer the Act and, if it needed more staff or funds, "it was the duty of the Director to make the appropriate representation to his Minister." Soon afterward "a firm start was made in administering the relevant sections of the Act." A year later the Ombudsman took another look at the situation and "became satisfied that the Department had the matter of central administration of civil defence well in hand."

The Minister of Justice, a strong supporter of the Ombudsman, has doubted whether the jurisdictional boundary had been observed in the cases just summarized. The Ombudsman's comments, he remarked, "seem to indicate that he is assuming a general supervision over Government administration which was not really intended when the office was set up."

A similar observation might perhaps be made concerning Cases Number 883 and 910, in which the Ombudsman considered whether the Prisons Administration had improperly sold prison-made furniture to non-governmental purchasers. His report notes: "[T]he Department reviewed the sales policy in the light of the information gathered in connection with the investigation and, with the approval of the Minister of Justice, it was determined that sales should in future be restricted to: .... As this policy appeared to me to be fair and reasonable and would mean an end to the sales most objected to by the complainants, I made no formal recommendation."

Cases of this type have a significance beyond their particular facts because they have engendered fear in some quarters that the Ombudsman's solitary judgment has begun to shoulder aside the more traditional political processes. The fear is no doubt overblown, because, as will be shown, the Ombudsman can never do more than express an opinion, having no power at all to issue commands. Overblown or not, concern does exist and has been strongly expressed by thoughtful persons, not all of whom are officials.

Perhaps a "policy" is transmuted into a "matter of administration" when a general principle is administratively applied to a specific "person

45 Hanan, supra note 14. The Civil Defense decision was also criticized in House debate and by academic writers. See Aikman & Clark, supra note 11, at 51; Aikman, supra note 13, at 419.
46 OMBUDSMAN'S REPORT 1964, at 38-39. These cases differ somewhat from those just discussed in that the original complainants did have a personal interest in their outcome. In one instance, the complaint alleged a misuse of the complainant's designs; the complainants also asserted that the Prisons Administration had engaged in unfair competition with them. The Ombudsman seems, however, to have gone beyond the specific in order to deal with the general. His report discusses "sales policy" in the broad.
or body of persons in his or its personal capacity” (in the words of section 11 of the Ombudsman Act). When, however, an issue is of concern to the public at large, as distinct from identifiable individuals upon whom it particularly focuses, then possibly it should be left to political controls rather than to the Ombudsman's evaluation. Were that test to be utilized in New Zealand, matters like those now discussed—departmental campaigning in a local referendum, languid civil defense administration, entry of prison-made products into the channels of commerce—would be deemed beyond the Ombudsman’s concern because they affect society as a whole, not a person or body of persons.

The cases just considered may be contrasted with Case Number 666, involving the purchaser of a state-owned house. The purchase agreement provided that the purchaser would himself occupy the dwelling and, if he desired to sell within seven years, would offer it first to the state agency from which he had bought the property. Subsequently the purchaser was transferred to a job in another area. He obtained permission to lease the premises for three years. When he applied for an extension of that permission, he was told that the extension would be granted, but that the seven year period affecting resale of the property would be extended correspondingly. Since the original agreement contained no such provision, the purchaser complained to the Ombudsman. Upon receiving the Ombudsman’s representations, the state agency “reviewed its policy covering the pre-emption period of letting and decided to discontinue this requirement.”

Here, unlike the cases previously discussed, action by public officials did have an individualized impact. An identified person’s contractual obligations had been redefined. His interest in the redefinition was wholly distinct from the citizenry’s collective interest in housing regulations, a fact that cannot be obscured by the opaque word, “policy.”

3. Matters Reviewable Elsewhere

Section 11(5) of the Act says that the Ombudsman cannot investigate an administrative act which could be reviewed “on the merits of the case” by any court or administrative tribunal. This puts beyond his jurisdiction many matters that a litigant might wish to turn over to him.

47 OMBUDSMAN’S REPORT 1964, at 65.
48 The exclusion of jurisdiction in respect of this kind of case is to be contrasted with the discretion granted the Ombudsman by § 14(1) to refuse to investigate a complaint if he finds that the complainant has an adequate remedy or right of appeal, under law or administrative practice. This refers, for example, to the possibility of a complainant's seeking review by an official within the administrative hierarchy itself, rather than by an independent body like a court or tribunal. It may also refer to review procedures that do not involve "the merits of the case," but would nevertheless suffice to deal with the particular matters complained of.
in preference to bearing the expense and other burdens of pursuing appellate remedies.

The theory behind the exclusion seems defensible enough: If the citizen's disagreement with officials can be reviewed "on the merits" by somebody who is independent of the officials and empowered to overrule them, the citizen has protection enough. No need exists for yet another reviewer in the person of the Ombudsman, and not much can be said in favor of "cheapened justice" (so the theory runs).49

If the sole issue to be considered is the substantive soundness of a decision affecting a private interest, and if that issue can be fully examined by a specially experienced or qualified organ designated by the legislature, then indeed the issue should ordinarily go to that organ rather than to the Ombudsman. But if the citizen's grievance pertains to the procedures or behavior of the administrators whose decision has affected him, the matter has a different cast. The experienced and qualified organ may have special insights into the technicalities of the subject involved, but its assumed expertness relates to decisional content only. Problems of public administration in the large come before the Ombudsman more frequently than before any tribunal or appeal authority. As to those problems, he is the expert, not they. In theory he may not be precluded from looking at matters of that type while appellate channels remain open, but in practice he stands aside.

Moreover, as a practical matter, use of statutory remedies after the administrative process has been completed is sometimes impracticable. The expense of going to an external tribunal or court may be prohibitive, so that an aggrieved citizen may abandon a contest even when still believing his cause to be just.50 Why should such a person be barred from reporting his grievance to the Ombudsman, taking the risk that the Ombudsman might not pursue the matter at all or might pursue it differently from the way the affected party would himself have chosen? Surely a distinction can be drawn between cheaper justice and cheapened justice.

49 Cf. OMBUDSMAN'S REPORT 1963, at 6: "I doubt whether Parliament intended the Ombudsman to be a cheap alternative method of pursuing lawful claims against the Crown, and I have advised several complainants accordingly."

50 The Ombudsman's reports themselves illustrate this likelihood. See, e.g., Case No. 760, OMBUDSMAN'S REPORT 1964, at 51-52 (remission of income tax was granted by the Commissioner of Inland Revenue; the applicant, a necessitous widow, could probably have achieved the same result by proceedings in the probate court to vary the terms of her late husband's will, "but was in such straitened circumstances that she could not afford the necessary costs"); and see also Case No. 607, OMBUDSMAN'S REPORT 1964, at 37-38 (a "land agent and a farmer in a small way of business" incurred out-of-pocket expenses of £2,229 "to fend off an unjustified tax demand of £2,409" and he recovered only £378 of these costs in the end).

As best can be determined, thirty to forty persons a year are trying to take their cases to the Ombudsman instead of to a court or tribunal.
No other country that has adopted the ombudsman system has insisted as unqualifiedly as has New Zealand that judicial remedies be pursued to the end, no matter what the cost or the nature of the issue.

Some, but not many, doubts have begun to stir about the wisdom of placing appealable matters altogether outside the Ombudsman's jurisdiction. The present Commissioner of Inland Revenue, for example, discourages his subordinates from insisting that every debatable issue be tested out in formal appellate proceedings. The opportunity to litigate is of course meant for the taxpayer's protection, but the Commissioner correctly perceives that the protection is sometimes illusory. He therefore directs his staff not to contest small matters, instead of taking a tough position that will force the taxpayer to choose between surrender or a disproportionately costly war. One gathers the strong impression that the Commissioner would not oppose extending the Ombudsman's jurisdiction beyond its present limits. He is, however, a far from ordinary tax administrator. 51

The small revolution that has occurred in recent years in the Inland Revenue Department is itself interesting enough to justify a brief digression.

On May 28, 1964, the Commissioner wrote to every staff member a personal memorandum emphasizing the Department's objectives. A few quotations will give its flavor:

When I joined the staff of this Department as a cadet, it was impressed on me, as it was on all officers, that, firstly, I was a Revenue Officer and, secondly, that it was a breach of duty on the part of a Revenue Officer to make assumptions in favour of the taxpayer. The ideal of service was not really brought to our notice. . . .

A moment's reflection should be enough to convince all that those earlier objectives are now completely untenable. . . .

So we will have Service with Human Understanding and Effectiveness in carrying out our function of administering the Taxes Statutes. You will notice that the word "efficiency" has not been used. This is done advisedly because it is effectiveness we want with its implication of understanding rather than the narrowness of pure technical efficiency. . . .

Study Groups in some eight of our branches . . . have examined the implications and effect of errors and complaints, the reactions of the public to these, and ways and means of remedying them.

Another staff communication, October 2, 1964, said in part:

**TAXPAYERS ARE PEOPLE**

We are trying to help people -
by removing the mysteries of taxation;
by giving an information service to aid them in their dealings with us, and in understanding taxation;
by liberalising our rulings and procedures.

We are making -
a planned, sustained and determined effort to do away with unreasonable and petty small-minded interpretations of both the law and our instructions.

We want you -
to handle cases with speed, with reasonableness and with every possible courtesy and consideration. You must not strain the law purely in order to protect the revenue.

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to handle cases with speed, with reasonableness and with every possible courtesy and consideration. You must not strain the law purely in order to protect the revenue.
Not only are fully appealable matters beyond the Ombudsman’s grasp, but so also are the tribunals and appeal authorities themselves. Their procedures and conduct cannot be made the object of complaint to him because these bodies are not upon the statutory list of public organs within his jurisdiction. A recent report of the Department of Justice, after noting that the tribunals’ procedures are various and inconsistent, nevertheless doubted that New Zealand should emulate the United Kingdom in creating a Council on Tribunals to better the functioning of these adjudicatory agencies.\textsuperscript{52} “It would be preferable,” the Department wrote, “to charge the Ombudsman with the task of examining the working of our tribunals. This is not to suggest that he be given jurisdiction over the actual decisions of the tribunals or to act as a sort of appellate authority but simply to suggest that the Ombudsman be given power to investigate the procedure of any tribunal and to make recommendations for improvements. In our view this would be a natural and legitimate extension of his present function.”\textsuperscript{52}

4. The Military

The Danish and Finnish ombudsmen can receive complaints concerning military as well as civilian officials; in Sweden, Norway, and West Germany special ombudsmen have been appointed to deal with military affairs. Section 11(6) of the New Zealand statute forbids the Ombudsman to investigate any matter relating to a member of the armed forces if it involves “the terms and conditions of his service” or any “order, command, decision, penalty, or punishment given to or affecting him.”

A stream of information bulletins has brought taxpayers information concerning their rights as well as obligations. Believing that statutory “tax incentives” are really meant to influence social conduct, the Commissioner has issued special bulletins and announcements about ways in which tax credits can be earned. Small taxpayers are told about new developments through prominent advertisements in newspapers—like this one on Aug. 7, 1965, in the N. Z. Herald (Auckland), p. 11, cols. 7-8: “SPECIAL TAX REBATE FOR SOME SALARY AND WAGE EARNERS—If in the year ended 31/3/65 your total income was ... and you had ... and your ..., you may be entitled to a special tax rebate. If you consider that you qualify under the above headings, application should be made in person or by writing to your local tax office.”


53 N.Z. DEPT OF JUSTICE, THE CITIZEN AND POWER: ADMINISTRATIVE TRIBUNALS 15 (1965). The great variety of procedures among tribunals and appeal authorities is disclosed in some detail by the same report at xxvi-xlvi. The Report also notes that some tribunals act on evidence not disclosed to the affected parties, adding: “We are not in a position to say whether such a procedure is justified in the circumstances and we can only suggest that the procedure should be looked at afresh.” One, op. cit. supra note 20, at 100-06 shows that the right to be heard is not now solidly entrenched in New Zealand administrative law.
The Ombudsman reported in 1965 that this had prevented his dealing with twenty-eight cases, most of which, had they arisen in some other Department, would have been within his jurisdiction. He noted that about a fifth of the complaints he had received from civilian employees of the State had been found to be justified, and he saw no reason why the same proportion of well-grounded complaints might not be anticipated also in the armed services.\(^{54}\)

Labour Party spokesmen, who in the beginning had been dubious about having an ombudsman at all, have more recently been urging that the Ombudsman’s jurisdiction should embrace the military. Defense Department officials with whom the matter was discussed seemed unperturbed by the thought that the Ombudsman’s power to deal with servicemen’s grievances may be broadened. Meanwhile, perhaps stimulated by cases the Ombudsman has forwarded, the Department is reviewing and revising existing procedures for investigating complaints and redressing wrongs; the procedures vary, without apparent reason, among the three military services.

5. Local Authorities

Local bodies are entirely outside the Ombudsman’s jurisdiction. As an officer of Parliament, he investigates officials and organs answerable to it. Local authorities are neither responsible nor accountable to the national legislature.

While the structural differentiation between national and local administration is plain, a strong current is running in the direction of empowering the Ombudsman to deal with at least some classes of local affairs. Local administration, which often affects citizens more sharply than does most national governmental activity, has already occasioned many complaints the Ombudsman has had to ignore.\(^{55}\) Private organizations and public officials freely state the opinion that fewer controls, lesser judicial review, and more frequent crudities are to be found in local than in State administration, and that the need for the Ombudsman’s services is therefore all the greater.

A number of mayors and local councillors with whom this topic was

\(^{54}\) OMBUDSMAN’S REPORT 1965, at 8.

\(^{55}\) OMBUDSMAN’S REPORT 1965, at 74, shows that nearly a fifth of all complaints made to the Ombudsman between October 1, 1962, and March 31, 1965, pertained to “unscheduled organisations,” that is, administrative bodies outside his jurisdiction. A large share of these were local authorities. In an address in 1964 the Ombudsman declared that in cases involving “a conflict between public interest and private right”—such as land ownership, water rights, flood damage through public works, and so on—“I have received a greater number of complaints of this kind against local bodies, that were outside my jurisdiction, than against agencies of central Government.” Powles, supra note 12, at 785.
discussed readily conceded that citizens’ grievances could advantageously be sent to the Ombudsman. One mayor hotly dissented, saying: “In my community, I am the Ombudsman and nobody else is needed.” His opinion was challenged by the mayor of a larger city, who contended that members of local councils (municipal legislatures)—often, according to him, “untrained, unperceptive, irresponsible, and uninformed”—are poor mechanisms for dealing with grievances; “personalities, influences, animosities, and ambitions infect local much more than central decisions.”

Even if so harsh a judgment were to be rejected, a strong case could be made for extending the Ombudsman’s jurisdiction. Hundreds of special purpose bodies, many of them elected, function independently of municipal governments and with little national control. Some of them, an experienced observer commented, “act like a law unto themselves.” Though salaries at the local level often exceed those for posts of at least equal responsibility in the central administration, the repute of national public servants is undoubtedly the higher. “If anyone needs policing,” said the executive head of a nationwide organization, “it is not the people here in Wellington, but the local and regional officials who deal with citizens in their day-to-day affairs—and who don’t have the same degree of professionalism we have come to take rather for granted in the major Departments.”

Some counter-current exists, too. First among the contributors to it is, of course, the amalgam of parochialism and fear that makes for strong political opposition to any possible lessening of local autonomy.

Second is the belief in some quarters that the Ombudsman would be overburdened were local as well as national problems to flow to him. “We would need several ombudsmen, not one, to deal with grievances involving local authorities,” one Department Head thinks, “because the areas of contact with the individual citizen are so much more numerous and so much broader at the local level.” A highly influential journalist agrees; while local authorities should be made amenable to somebody’s observation, “we must be sure not to overload the Ombudsman. There will be no gain for anyone if his office becomes computerized.” A Cabinet member, who had on one occasion advocated extending the Ombudsman’s power, now takes a different view because, as he put it, “this simply must remain a one man job if it is to be wholly effective and I’m not sure that the Ombudsman could handle more cases than he already has on his plate.” The Ombudsman does not share this particular concern. He has reported that “a single personal Ombudsman could, with a larger staff than I have

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56 In 1965 New Zealand was said to have 918 local authorities, roughly two-thirds of them having “non-territorial functions” such as electric power distribution, drainage, education, and hospitals. The Dominion (Wellington), July 16, 1965, p. 2, col. 1.
but still reasonably small, effectively handle more cases than are now dealt with by the New Zealand Office. More specifically, he recently expressed belief that his caseload could be multiplied by four, to a total of about 3,000 per year, if suitable staff assistants were provided to handle details and to undertake necessary legal research.

Even if localism and fear of overwork were to be overcome, delicate thinking would still be needed to fit the Ombudsman into the pattern of local control. Reports to Parliament about municipal disagreements would be inappropriate. Denmark has met a similar problem by directing its Ombudsman not to concern himself with the acts of locally elected legislative bodies as such, even when they have a strongly administrative flavor, but to report to those bodies any criticisms he sees fit to make concerning officials within their respective territorial jurisdictions.

A beginning may be made in New Zealand by enlarging the Ombudsman's ability to deal with the administrative activities of authorities whose local operations are financed by the national treasury. Education Boards and Hospital Boards are the most prominent examples. Their decisions, as a high official of the Department of Education acknowledged not long ago, "can be quite as oppressive as any other, and fully as hurtful in their effects upon individuals as those made by State agencies." Since many persons regard these boards as "paying agents of the State" even though their members are locally chosen, political opposition to bringing them into the ombudsman system may be weak.

Moreover, while the boards make day-to-day decisions independently, they are already amenable to guidance by central administration through generalized rules and policy directives. This occasionally enables the Ombudsman to make his influence felt obliquely. Case Number 829, for example, was initiated by a permanent employee of an education board, who complained that he had been dismissed for misconduct without being afforded a fair hearing. The Ombudsman could not take up the case because the acts of education boards are outside his jurisdiction. But, upon reading the existing regulations, he concluded that the nonteaching staff of education boards were inadequately protected against unjustified disciplinary action. "I recommended to the Director of Education," he later wrote, "that the regulations governing the employment of such staff should be amended to provide . . . for a written charge . . . and for a right

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57 OMBUDSMAN'S REPORT 1965, at 9. The Ombudsman's staff in mid-1965 consisted of three professional employees (a lawyer, an administrator, and an investigating officer) and two clerical employees. He also utilized the part-time services of another lawyer and another typist. Section 24 of the Act empowers him, with the Prime Minister's prior approval, to "delegate to any person holding any office under him any of his powers under this Act, except this power of delegation and the power to make any report under this Act." No such delegation had in fact occurred as of December 1965.
to a hearing before a responsible and impartial investigator. I have been informed by the Director of Education that the proposal has been welcomed, and that action is being taken with a view to drafting amendments that will meet with the approval of the employing authorities and the employee organisations." The Ombudsman's ingenuity in addressing himself to the Director of Education while ignoring the education board no doubt failed to solace the original complainant; but it did lead to future safeguards for education board employees whose problems are supposedly not among his worries.

C. What the Ombudsman Can Do

The Ombudsman recently asserted that a full quarter of his effective working hours must be devoted to resolving his own doubts about jurisdiction. That fact alone shows how ticklish are some of the problems suggested by previous sections of this paper.

In the cases he finds to be within his jurisdiction and that he does investigate, the Ombudsman is free to consider whether the administrative action in question was: (1) contrary to law; (2) unreasonable, unjust, oppressive, or improperly discriminatory, or was based on a law or practice that could be characterized in that way; (3) based wholly or partly on mistake of law or fact; or (4) just plain "wrong," to use the unadorned word in the statute. He can also examine the propriety of the purposes and grounds underlying an exercise of discretion.

This is indeed a broad scope of inquiry, far broader than that typical of the Scandinavian countries, where the ombudsmen concern themselves with the permissibility of administrative acts—with maladministration, in short; they rarely reappraise the evidence or suggest revised exercises of discretion.

New Zealanders, learning that their Ombudsman has deemed approximately sixteen per cent of the investigated complaints to be well founded, have expressed surprise that their public servants are so frequently at fault. They had heard, when the proposal to create an ombudsman was being debated, that only about ten per cent of the Scandinavian complaints had been held justified. New Zealand has no cause to be alarmed. The Scandinavian statistic indicates the percentage of justified complaints among the whole number of complaints received; the New Zealand

59 Even after that time expenditure, he does not always persuade everyone else that his jurisdictional analysis is sound. See Ombudsman's Report 1965, at 8, 30, 35, 37. The statute contains two references to possible court proceedings to determine jurisdictional boundaries, §§ 11(7) and 21, but they have never been used and, if a foreigner's analysis of New Zealand law has any validity at all, they are useless, as a practical matter.
60 Ombudsman Act §§ 19(1), (2).
statistic shows the percentage of justified complaints among those that were actively investigated. Actually, fewer than nine per cent of total complaints received in New Zealand are upheld (as is shown in Table I, below). Since the New Zealand Ombudsman's power to express personal preferences is somewhat greater than his Scandinavian counterparts', the statistical evidence is by no means discreditable to New Zealand public servants. Precise statistical comparison is, in any event, quite impossible because the various ombudsmen have differing jurisdictional limitations as well as differing standards of judgment.

The record of the Ombudsman's first two and a half years of work can be summarized as follows:61

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Total received</td>
<td>1,843</td>
<td>100.0</td>
</tr>
<tr>
<td>Declined—no jurisdiction</td>
<td>672</td>
<td>36.5</td>
</tr>
<tr>
<td>Declined—Section 14(2)62</td>
<td>31</td>
<td>1.7</td>
</tr>
<tr>
<td>Discontinued—Section 14(1)63</td>
<td>94</td>
<td>5.0</td>
</tr>
<tr>
<td>Withdrawn by complainant</td>
<td>105</td>
<td>5.7</td>
</tr>
<tr>
<td>Investigated and rejected</td>
<td>706</td>
<td>38.3</td>
</tr>
<tr>
<td>Investigated and upheld</td>
<td>161</td>
<td>8.7</td>
</tr>
<tr>
<td>Still under investigation</td>
<td>74</td>
<td>4.0</td>
</tr>
</tbody>
</table>

Table I indicates that fewer than ten out of a hundred complaints are finally deemed to be meritorious. Those are the ones in which section 19(3) of the statute authorizes the Ombudsman to recommend: (1) further consideration; (2) rectifying an omission; (3) cancelling or varying the decision; (4) altering any practice upon which the administrative action was based; (5) reconsidering any law upon which it was based; (6) giving reasons for the decision; or (7) taking "any other steps" he thinks fit. He sends his report and recommendations—not his commands, for he has no power to command—to the administrative body concerned, with a copy to the appropriate Minister. Then, if the administrative body does not act to his satisfaction within a reasonable time, the Ombudsman "in his discretion, after considering the comments (if any) made by or on behalf of any Department or organisation affected, may send a copy of

61 The material in this table is largely derived from Ombudsman's Report 1965, at 73-74.
62 Section 14(2) of the Act permits the Ombudsman to decline to act on complaints that relate to matters older than a year, or that relate to matters he regards as trivial, or that are frivolous or vexatious or not made in good faith, or that involve matters in which the complainant has little personal interest. So far as can be ascertained, almost all the declinations under this section have thus far been on the last stated ground.
63 Section 14(1) authorizes the Ombudsman to discontinue an investigation if he thinks the complainant should pursue some other remedy or if he concludes that, "having regard to all the circumstances of the case, any further investigation is unnecessary."
the report and recommendations to the Prime Minister, and may there-
after make such report to Parliament on the matter as he thinks fit.\textsuperscript{64}

That is the extent of the weaponry at the Ombudsman's disposal. He
cannot revise what has been done administratively. He cannot direct that
an omitted step now be taken. He cannot prosecute or discipline offenders
against good order.\textsuperscript{65} He can only write and persuade.

The power of the pen appears to have been adequate. In only one case
has his recommendation been directly rejected. He advised the National
Roads Board to pay forty pounds to the owner of a motor car damaged
because notices had not been suitably posted to warn of a known defect
in the highway; the Board refused to go higher than twenty-five pounds
and there the matter rested.\textsuperscript{66}

It would be incorrect, however, to suppose that the Ombudsman's
views are always swallowed without a murmur. Unlike Jove, he does not
hurl thunderbolts from on high. Administrative authorities have some-
times stuck by their guns, and the Ombudsman has then concluded that
they were right after all, thus averting a clash.\textsuperscript{67} Sometimes, too, the
Ombudsman can perceive that he and a Minister are on a collision course,
and he chooses to avoid the collision.\textsuperscript{68} An outspoken opponent in the
House of Representatives sneered recently, "The Ombudsman talks a
lot about not being flouted, but he is canny about 'discovering' some
reason not to push along when somebody is likely to challenge him. He
knows how not to get into battle." A more kindly disposed Department
Head, commenting on matters of this type, remarked: "The Ombudsman
had military experience, you know. He has enough sense to try to pick
favorable terrain for a fight. You can call it maneuvering if you like it,
or running away from a wrestling match if you don't like it. I call it,

\textsuperscript{64} Ombudsman Act § 19(4).
\textsuperscript{65} Section 15(6) of the Act provides that if the Ombudsman, during one of his investi-
gations, believes "there is evidence of any breach of duty or misconduct on the part of any
officer or employee of any Department or organisation, he shall refer the matter to the
appropriate authority."
\textsuperscript{67} E.g., Case No. 9, Ombudsman's Report 1963, at 13; with which compare the same
case, Ombudsman's Report 1964, at 68.
\textsuperscript{68} E.g., Case No. 1760, Ombudsman's Report 1965, at 17: An importer complained that
he had been refused permission to transfer his import license from one make of motor car to a
more popular make. From the papers at hand, the Ombudsman perceived that "the decision
complained of was that of the Minister of Customs himself, made after having before him
all relevant submissions by the applicant (which were put to him directly) as well as by the
Department, and in addition the Minister had also heard the complainant in person."
Concluding that the complainant had already had adequate consideration by the Minister,
the Ombudsman "determined not to proceed with an investigation into the acts or recom-
mendations of the Customs Department in the matter."
simply, recognition of the old saw about discretion being the better part of valor.”

More important, as a matter of normal operations, is the Ombudsman’s prudent awareness that he may be mistaken. Administrative reactions to tentatively formulated recommendations can enlighten his judgment and save him from error. Hence, before he makes his final pronouncement, he often consults those to whom the pronouncement will be addressed, thus obtaining a preview of its acceptability. A number of administrators spoke warmly of this practice, saying that it made them feel less the objects of censoriousness and more the Ombudsman’s partners in correcting defects. The Ombudsman, on his side, readily acknowledges that preliminary discussions have frequently influenced the tone and content of recommendations. In one recent instance he had prepared a series of four admonitions to an administrative agency. As to the first, he learned that remedial steps had previously been taken; as to the second, the practice had been different from what he had supposed and was in any event in the process of change; as to the third, he became convinced that the criticism he had had in mind was unjust; and as to the fourth, a proposal similar to the one he had drafted was already under active study. Naturally, his final recommendations were reshaped in the light of this information; and, as reshaped, they were entirely acceptable though a different outcome would have been likely had they been announced in their original form.

D. Procedure

I. How Matters Reach the Ombudsman

Section 13 of the Act provides that anyone, including persons in custody and patients in mental hospitals (whose letters must be forwarded unopened), may complain to the Ombudsman in writing. A filing fee of one pound ($2.80) is required “unless, having regard to any special circumstances, the Commissioner directs that no fees shall be payable.”

While the sources of complaints have not been categorized for purposes of precise statistics, surprisingly many of the cases included in the Ombudsman’s several reports were initiated by substantial businessmen, lawyers, and accountants. On the other hand, few complaints have been

69 Section 11(2) of the Act also authorizes the Ombudsman to investigate upon his own initiative. This authority is rarely and, at least thus far, insignificantly used. During the fiscal year 1964-1965, the Ombudsman took up only three matters on his own motion, two as a result of newspaper stories and one because he had personally observed what he regarded as inadequacies in the form to be filled in by a person wishing to license his motor vehicle. Cases No. 1267, 1563, 1245, OMBUDSMAN’S REPORT 1965, at 26, 27, 38.

70 E.g., Cases No. 927 (manufacturer of agricultural chemicals), 954 (commercial aviation company), 1166 (importer of textiles), 1216 (timber importers), OMBUDSMAN’S REPORT
filed by inmates of mental institutions and virtually none by persons in prisons or other places of detention. This is noteworthy because these two groups bulk large in the caseloads of all the Scandinavian ombudsmen.

A prison administrator, asked to explain why New Zealand prisoners were so uncomplaining, answered frankly: "They haven't yet learned about taking their grievances to the Ombudsman. And we haven't been eager to educate them." Another possible explanation is that New Zealanders, unlike Scandinavians, must pay for the privilege of writing to the Ombudsman. This requirement probably weighs heavily on prisoners and other impecunious persons.71

From the very first, the proponents of the ombudsman institution in New Zealand have insisted that, as the National Party's election policy declared in 1960, "To avoid frivolous appeals, a reasonable fee should be charged." Frivolous appeals have certainly been made to the Scandinavian ombudsmen, whose services are gratuitous. Notwithstanding the filing fee, they have been made in New Zealand, too. Perverse and empty complaints, however, can usually be identified quickly. They can then be disposed of without greatly burdening the Ombudsman or anyone else.72 If a nation is to have a grievance commissioner at all, much is to be said for allowing complaints, whether "frivolous" or not, to flow to him freely. Channelizing grievances is more socially valuable than discouraging them by a price tag. The New Zealand Ombudsman, replying to a direct question, recently said that he perceived neither need for nor advantage in the present filing fee requirement.

Public servants, who have been among the Scandinavian ombudsmen's best customers, have begun to bring a substantial number of problems to the New Zealand Ombudsman. These have pertained chiefly to retirement pay, appointments, and termination of employment during the probationary period. Disciplinary matters involving officials are thoroughly reviewable elsewhere by well understood procedures and have played no part in the Ombudsman's workload. Local and national officers of the Public Service Association, having overcome their initial hostility to the

1965, at 13–15. Cases No. 666, OMBUDSMAN'S REPORT 1964, at 65, and 815, OMBUDSMAN'S REPORT 1964, at 66, are good examples of attorneys' successful use of the Ombudsman after other remedial efforts had failed.

71 But cf. J. F. Northey, New Zealand's Parliamentary Commissioner, in THE OMBUDSMAN 135, 138 (D. C. Rowat ed., 1965): The "modest fee ... will, it is expected, be sufficient to discourage the frivolous and the crank, but not be so high that genuine complaints will be inhibited."

72 Section 14(2) of the New Zealand statute states: "[T]he Commissioner may in his discretion decide not to investigate ... any complaint ... if in his opinion—a) The subject matter of the complaint is trivial; or b) The complaint is frivolous or vexatious or is not made in good faith; or c) The complainant has not a sufficient personal interest in the subject-matter of the complaint."
Ombudsman, have actually suggested that individual members take their cases to him, but the Association has not as yet represented them in these matters. The Railway Officers Institute, which is the collective bargaining agent of the national railways' salaried staff and office workers, has adopted a somewhat more prickly attitude. It has criticized the Ombudsman for receiving a complaint filed by a railway employee, asserting that the Institute alone should decide how and where to press its members' unresolved grievances.

Most interestingly, some alert officials have considered whether the Ombudsman might not be able to help them climb over hurdles. One Department Head, for example, commented not long ago on the misfortune of retired public servants whose pensions have remained stationary while living costs have risen. "Former staff members have been complaining very vigorously," he said, "and I really sympathize with them. But I haven't any means of making the adjustments they have requested. One of the men was especially insistent a few days ago that I did have discretionary authority. I disagreed, but I finally suggested to him that he go to the Ombudsman, to see if the Ombudsman can find a power I haven't discovered. I hope he does."

2. How the Ombudsman Proceeds

If the matter complained of seems to lie within the Ombudsman's jurisdiction and if he chooses to investigate, his invariable first step is to communicate the complaint to the head of the public organ involved. The head is requested to comment or to provide pertinent information. In the beginning the Ombudsman never writes directly to the officer involved.

Section 15 of the Act gives the Ombudsman scant procedural direction. His investigation is to be conducted in private; he may obtain information and make inquiries as he thinks fit, without holding any hearing, except that before making a report which "may adversely affect any Department or organisation or person," he must give the affected body or person a chance to appear before him.

In general, the Ombudsman moves ahead by correspondence with the complainant, the governmental agency involved, and others who may have knowledge of the matters involved. Occasionally he makes on-site inspections, somewhat like a jury's taking a view, but the Act does not require him to make inspections routinely. He interviews witnesses in

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73 The Norwegian and New Zealand ombudsmen are not duty-bound to make inspections; the Swedish, Finnish, and Danish ombudsmen must periodically examine the premises of governmental agencies and institutions. Both the Norwegian and New Zealand ombudsmen have expressed gratification at not being compelled to make physical inspections unrelated to matters already being investigated.

Section 23 of the New Zealand statute authorizes, but does not command, the Ombuds-
his office and elsewhere, but informality is certainly the keynote throughout. Moreover, the Ombudsman varies his investigatory technique as circumstances may suggest. So, for example, when a complainant alleged that the Department of Education had been less generous to him than to other similarly situated graduate students, the Ombudsman requested the students named by the complainant to complete a questionnaire providing sufficient information to permit a valid comparison between their situations and that of the complainant; their answers showed that the complaint was unsound.74

Until now, the Ombudsman has never employed a procedure akin to that of a trial.75 This, he asserts, has been no loss. His reports show, however, that avoidance of confrontation and cross-examination does sometimes prevent his making a confident finding concerning alleged wrongdoing.76

3. Power To Obtain Evidence

The Ombudsman’s power to obtain documentary evidence is what sets him apart from other inquirers into administrative acts in New Zealand. “Crown privilege,” which permits officials to withhold information whose disclosure might harm the public interest, has often forestalled judicial review and, even, effective review by administrative appeal authorities. Moreover, as previous pages have shown, questioning by

74 Case No. 1120, Ombudsman’s Report 1965, at 17, 18: “All the students cooperated, and in the event I found that there were valid and essential distinctions between the positions or awards of the students who had obtained suspension, and the position of the complainant, and these justified the different treatment accorded by the Department.”

75 Section 15(3) of the Act explicitly states that the Ombudsman may inquire as he sees fit and need not “hold any hearing, and no person shall be entitled as of right to be heard. . . .” At the same time, his power to conduct a hearing if he wishes seems clear. Section 16 of the Act authorizes him, among other things, to “summon before him and examine on oath” any official and any complainant and, with the Attorney General’s prior approval, any other person. A person required to attend before the Ombudsman is entitled to the same fees and expenses as a witness in court; fees and expenses have in fact been paid on five occasions, when the Ombudsman requested persons other than governmental employees to come to his office in Wellington so that he might interview them.

76 See, e.g., Case No. 802, Ombudsman’s Report 1964, at 54: A public contract had been awarded to someone other than the lowest bidder, who reported an oral explanation allegedly given him by a named official; the complainant suspected that improper influence had deprived him of the contract. Investigation satisfied the Ombudsman that “there was no evidence whatsoever of dishonesty or bad faith on the part of anyone concerned in the matter” and that the official contracting agencies had “acted prudently and correctly in all respects.” The report notes, nevertheless, that the named official “denied making the observation attributed to him by the complainant, and it was impossible to determine the truth of this particular allegation.”
members of the House loses force because the questioners do not have access to the files. A prominent legal scholar has expressed belief that the Ombudsman’s ability to get at evidence others cannot reach is, indeed, the “main justification” for creating his office.\textsuperscript{7}

As for the Ombudsman, his reach is very long indeed. Under section 16 of the Act he may require “any person” to produce any relevant “documents or papers or things . . . which may be in the possession or under the control of that person.” Section 17 says that the Attorney General (who, for many years past, has been the same person as the Minister of Justice) may certify that information should not be given because it might prejudice security, foreign relations, or the investigation of a crime, or because it might expose Cabinet deliberations or Cabinet proceedings that need to be kept secret. If he does so certify, then the Ombudsman is not to press for that information. Otherwise, “the rule of law which authorises or requires the withholding of any document or paper, or the refusal to answer any question, on the ground that the disclosure of the document or paper and the answering of the question would be injurious to the public interest shall not apply in respect of any investigation by or proceedings before the Commissioner.”

As a consequence, the Ombudsman can and does regularly request that the entire official file be turned over to him to assist his investigation. Granting so unrestricted a power to delve into departmental records was stubbornly opposed by officials and Ministers during the drafting of the Act; the issue was not settled finally until a party caucus made the choice, largely on the ground that the Ombudsman would not command public confidence if Crown privilege were to remain as an impenetrable screen. Sharing the hoary faith of the British civil service, many public servants continued to feel that any outsider’s examination of files, including “internal working papers” and “minutes,” would gravely impair staff efficiency and candor; officials would become overly cautious and formal in communicating with one another, they asserted, if their every comment might later be scrutinized by alien eyes.

In 1965 an effort was made to ascertain whether experience had confirmed or disproved these views. Without exception the interviewed public agencies maintained that the Ombudsman’s access to informal staff notes and other working papers had not had the feared adverse effects.

One Department Head said: “I do detect a shade more caution and restraint than in the past. But this really does not have any functional significance. We have had men who sometimes became a bit too free with their remarks— ‘We should hit this fellow and hit him hard’— that sort of thing. Well, that is discouraged now, I’m sure. But omitting a few colorful

phrases here and there does not change the content of the recommendations the superior receives. If anything, getting rid of the loose language makes the recommender think a bit more clearly about what he means to say, and that is a distinct gain."

Another Department, far from skeletonizing its records, took steps to add to them after the Ombudsman came into being. In modern offices many decisions are made over the telephone or the lunch table instead of after an exchange of correspondence. A perceptive Department Head wrote his chief aides:

I want you to give thought to the question whether our methods and systems are adequate in the event of a complaint being made to the Ombudsman about any action or inaction of ours. I think it really gets down to a question whether our system of recording is adequate.

It would be wrong to introduce methods and systems simply because we now have an Ombudsman. The test really is this: What are the demands of good administration? . . . .

A lot of our policy work is transacted orally and it seems to me that the major question is whether more of this work should not be recorded in minutes. Too much recording would be an almost insufferable burden, but I am inclined to think that we ought to do more than we do. Would one of our files read, say, five years from now yield an intelligible, coherent story without too much effort on the reader's part?

Rather extensive inquiry among administrators uncovered no indications at all that the Ombudsman's examination of official papers had had disadvantageous side effects. Perhaps discussion of the topic may be fittingly closed by the Ombudsman's own response when he was asked whether he was aware of any problem in this respect. "I have heard it said," he answered, "that expression of opinion may be inhibited. But why should a man write a silly thing for inclusion in a file? If silliness has been discouraged, what's the loss?"

IV
THE OMBUDSMAN'S DECISIONS AND SOME QUESTIONS THEY HAVE RAISED

A. Facts and Judgment

His office, the Ombudsman has briskly declared, was "established for the purpose, not only of checking administrative abuses and of righting of wrongs, but also of actually reviewing administrative decisions—of securing the making of changes." How far, as a practical matter, can a generalist safely tamper with specialists' judgments about the conclusions to be drawn from the facts? How feasible is it for one man to repeat the time-consuming processes of evidential appraisal other officials, pre-

sumably competent, have previously completed? The Ombudsman is free to answer those questions as he may wish, for, as the Minister of Justice has said, it is “for him to decide whether he is in a position to disagree on the merits.”

The Ombudsman seems not to have been greatly frightened by the responsibility thus thrust upon him. His reports are full of cases that show his duplicating the work of others and arriving at independent conclusions (sometimes different from, sometimes in accord with those of the cognizant officials).

Case Number 228 is illustrative. A home had been damaged by flood waters. The Earthquake and War Damage Commission acknowledged that the householders’ loss was “extraordinary disaster damage” within the meaning of the statute it administers. The Commission paid an amount the claimants regarded as inadequately compensatory. In the course of time, the issue of damages was inquired into by an independent loss assessor, an architect, an arbitrator, and the Commission itself, one after another; then a Minister was unsuccessfully asked to intervene. After all that effort had left the claimants still dissatisfied, the matter came to the Ombudsman. The main factual question was whether the house had been habitable and in good repair before the flood or whether, instead, its uninhabitability after the flood was attributable to its having been in a poor state for a long time. “After a prolonged and careful study of all the relevant facts,” the Ombudsman finally concluded that the Commission’s judgment could not be criticized. He added: “As a consequence of further representations made to me by the complainant and his solicitor, and because I could not escape the suspicion that the complainant’s parents had in fact suffered an injustice, I undertook a complete review of the case on two separate occasions and, despite the most anxious consideration, I was unable to find that there existed any justification for departing from the conclusion I had originally reached.”

In Case Number 327 the complainant was an historian who had edited

79 J. R. Hanan, Any Complaints?, The Australian, Nov. 26, 1964: “Naturally in many fields he cannot be expected to substitute his own view of the merits of the case for that of the department concerned. For instance, he cannot be expected to come to an independent view on a difficult engineering problem or a public health problem even though they impinge upon an individual citizen’s rights or interest.

“In those cases his concern is to ensure that the proper procedure has been adopted; that the citizen’s interests have been taken into account; that all the facts have been before the department; that precedents have not been too inflexibly applied, and so on.

“He can nevertheless ask the department to justify its decision if he chooses, and it is a matter for him to decide whether he is in a position to disagree on the merits.”

80 OMBUDSMAN’S REPORT 1965, at 57-58.
a volume—The Richmond-Atkinson Papers—published by the Government Printing Office. A thousand copies were printed at a cost of nearly 30,000 dollars. At a retail price of about twenty dollars, the Government Printer doubted that the book would appeal to general readers or be gobbled up by the lending libraries. He therefore restricted the number of review copies to two, much to the indignation of the learned editor. No author in the history of man has been wholly satisfied with his publisher’s promotional efforts, but this is probably the only time a high government functionary was petitioned to weigh the validity of the publisher’s judgment. The Ombudsman, when asked, confidently concluded that “having regard to the nature of the work, the time, money, and labour which had been expended on this publication, and the likely appeal of the work to the serious reader, as well as the historian,” the Government Printer should have been more energetic and generous in drawing attention to the book.  

Case Number 916 involved a rural mail carrier who asked the Post Office to pay him forty pounds above the agreed contract price because protracted road construction work had exposed his delivery vehicle to abnormal wear and tear. When his application was rejected, the contractor brought his unhappiness to the Ombudsman. He prompted the Post Office to reconsider the matter and to make an ex gratia payment of the amount sought.

Cases like the trio just discussed are entirely different from those in which the Ombudsman finds that administrative misconstruction of a statute has distorted factual analysis, or in which he can perceive that facts have not been adequately explored and should therefore be investigated further by the administrator, or in which he must investigate

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81 Ombudsman's Report 1964, at 35.
82 Id. at 57.
83 E.g., Case No. 754, Ombudsman's Report 1964, at 30: An educational subvention was refused a student of architecture because he had previously failed to complete courses in engineering for which a different grant had been given him. The Department said that provisions of the legislation then in force precluded any further financial aid. The Ombudsman, having studied the relevant legislation, concluded that its terms did not support the decision. The Department considered his views and agreed that no adequate statutory authority supported the ruling it had made.
84 E.g., Case No. 36, Ombudsman's Report 1963, at 8: A horticulturist had developed a new type of plum he hoped to introduce into Australia. The Department of Agriculture sent a report to Australia that the complainant alleged was misleading. The Ombudsman was satisfied by the evidence that the report “had contained an assessment that was not warranted by the Department's experience up to the time the report was sent.” He therefore recommended that the Department make a reassessment and prepare a further report. The Department did reassess the plum and a more favorable report was then sent to Australia.
allegations that an inequitable result has been reached, or in which the motives of the decider are called into question.

This second cluster of cases, like the first, involves highly particularized inquiries, relating to the special facts and circumstances of each complaint. The Ombudsman is not, however, looking at the same issue that the administrator has decided, to see whether he entirely agrees with the decision. Rather, he seeks answers to wholly distinct questions—is the administrative decision vitiated by incorrect analysis of applicable law, or by slipshod work that means the job remains only half done, or by improper motivation?

While the Ombudsman’s recommendations in the area of fact-finding and choice between one result or another seem well considered, friendly writers have remarked that some “raise matters in which there is clear room for difference of opinion as to which is the correct decision having regard to the conflict of public and private interest that is involved. Sooner or later disagreement on such an issue will bring the Ombudsman up against a determined Department or Minister”—and when that happens, questions will begin to arise about the scope of his power.

This has, in fact, already occurred. The State Services Commission, [87] Case No. 135, OMBUDSMAN’S REPORT 1965, at 22-23: The widow of a founder of “what is now a very large industry” was left in desperate financial circumstances by her husband’s untimely death. She thought she should have some monetary compensation because the Forest Service, Ministers, and others had fought her husband’s effort to establish and nurture an infant industry. The Ombudsman’s “investigation was prolonged because of the complexity of the issues involved and the consequential necessity to marshal a substantial amount of background material.” In the end, he said, “I concluded that the Forest Service, in opposing the establishment and development of the industry, did so on the basis of genuinely held and at the time defensible opinions, and I found no evidence that it had been motivated by less worthy considerations. As a consequence, I was unable to make any recommendation.”

[85] E.g., Case No. 1687, OMBUDSMAN’S REPORT 1965, at 22: A foreign student in a New Zealand university complained that the Department of External Affairs had ended his financial support. He had failed in six out of ten subjects, but the complainant said the failures had been caused by personal problems that no longer existed. He thought that his problems should have been more sympathetically considered by those who had examined him, and that their disappearance had not been taken adequately into account by those who passed upon his request to be given a second chance. He thought other foreign students had been treated more kindly. The Ombudsman investigated to make certain that the factors relied upon by the complainant had been known to and weighed by the departmental committee when it decided to terminate the complainant’s award. Upon satisfying himself that the committee “had good grounds for so deciding,” the Ombudsman held the complaint to be unjustified.

[86] C. C. Aikman & R. S. Clark, Some Developments in Administrative Law (1964), 27 N.Z.J. PUB. ADMN. 45, 52 (1965). But cf. G. Sawyer, OMBUDSMEN 9 (1964): The Scandinavian ombudsmen (unlike New Zealand’s) “are not empowered to criticize the exercise of discretion where there is no question of excess or abuse. This comes as a surprise to many British Commonwealth observers because . . . many of our complaints against bureaucracy concern unwise use of lawful powers rather than abuse of discretion.”
which controls appointment, classification, and compensation of public servants much more fully than does the United States Civil Service Commission, has twice proposed that the Ombudsman should be excluded from handling complaints about salaries, grading of employees' performance, and ranking of public service jobs. "We have to see each of these problems in relation to many others," a member of the Commission observed recently, "while the Ombudsman sees a complaint in isolation. If he were to deal with the proper evaluation of a public servant's position for purposes of fixing suitable compensation, or with the relationship of one occupational category to another, he would need the assistance of an entire personnel agency—and he would then be doing the precise work entrusted to this commission, which has more experience than he does and just as much detachment and independence."

Conflict has not, however, come to a head. The Government has not yet responded to the State Services Commission's advice. The Ombudsman has thus far not supplanted the Commission's judgment about the merits of any matter, but has confined himself to inquiring into the soundness of its underlying procedures.

B. The Man of Compassion

One of the most endearing qualities of the Ombudsman is his sympathetic attitude toward persons perplexed by life rather than victimized by officialdom. He once referred to himself as the "Auditor-General of human relations accounts," and has said that he attempts to provide the individual attention larger organizations must subordinate to considerations of speed and efficiency.

An elderly and necessitous New Zealand lady who resided in South Africa complained, in Case Number 856, that Treasury regulations prevented her receiving adequate remittances from the estate of a mentally incompetent brother upon whom she depended for support. The Ombudsman found that her problems were not, as she had alleged, caused by the Treasury, but by the circumstances of the incompetent's estate. He could quite properly have stopped there, but he did not. "It seemed clear to me," he wrote later, "that if this lady could take appropriate proceedings in the New Zealand Courts she would have a reasonable case for an order to be made under the provisions of the mental health legislation and she might well be granted more money than she was now receiving. I asked the Law Society of the district concerned to nominate a solicitor to act for her... and I placed this solicitor in direct contact with the lady concerned. Proceedings... are reported to be making steady progress."

This kind of service with a smile shines through many cases. In Case

88 OMBUDSMAN'S REPORT 1965, at 45.
Number 1573, for example, he helped obtain a new electric blanket and supplementary assistance grant of ten shillings a week for a chronic invalid and was able to advise about the possibility of making home repairs with the aid of public funds.\textsuperscript{89}

A tax statute provides a "housekeeper's exemption" when a widowed, divorced, or unmarried breadwinner must engage a housekeeper to look after his family. The Ombudsman, receiving complaints from harassed taxpayers who needed housekeepers but were not covered by the statute, found the Commissioner of Inland Revenue sympathetically inclined to grant equivalent relief on hardship grounds.\textsuperscript{90}

A complainant wished to bring his family to New Zealand from England, but could not obtain a permit entry for his mentally retarded stepson. Under New Zealand's well established policy, denial of the permit was entirely proper, though the care and maintenance of the stepson in New Zealand had been suitably assured. The Ombudsman, despite the policy whose validity and application he did not question, requested "a further serious review in the light of the special circumstances of this particular case," and the Minister finally approved the stepson's entry "on condition that the case should not be treated as a precedent."\textsuperscript{91}

The Ombudsman, acting as a mediator, helped a farmer obtain an adjoining property that had been acquired by a Department whose "conduct of negotiations for the purchase had been quite proper."\textsuperscript{92} A foreign teacher found his way through the meshes of currency regulations after the Ombudsman communicated the problem "personally and unofficially" to the Governor of the Reserve Bank, who is not within the Ombudsman's jurisdiction.\textsuperscript{93} He cleared the path for re-entry of a former resident whose own carelessness rather than official obtuseness had been the cause of difficulty; the complainant wrote, afterward, that "the extreme courtesy and kindness attending on my requests have further encouraged my return to New Zealand."\textsuperscript{94} He responded to the wail of a complainant who had been baffled by the procedures for obtaining a sickness benefit; "every-time I apply," he said, "I get another form to fill in."\textsuperscript{95} He sided with

\textsuperscript{89} Id. at 41.

\textsuperscript{90} See Cases No. 569, 581, OMBUDSMAN'S REPORT 1964, at 50, 51 (complainant, legally separated but not divorced, had custody of three small children; complainant, deserted by his wife, employed housekeeper to look after his family of five children); Case No. 1085, OMBUDSMAN'S REPORT 1965, at 30 (complainant's wife had been hospitalized for several years, while housekeeper cared for two small children).

\textsuperscript{91} Case No. 79, OMBUDSMAN'S REPORT 1964, at 39.

\textsuperscript{92} Case No. 300, OMBUDSMAN'S REPORT 1964, at 25-26.

\textsuperscript{93} Case No. 1675, OMBUDSMAN'S REPORT 1965, at 21.

\textsuperscript{94} Case No. 1660, OMBUDSMAN'S REPORT 1965, at 34.

\textsuperscript{95} Case No. 378, OMBUDSMAN'S REPORT 1964, at 60.
swimmers who were indignant because their safety had been too little regarded when the Marine Department approved a water-ski lane in a certain harbor. He aided a public servant to overcome the stigma of a long-past and seemingly unfair dismissal on “security” grounds.

These episodes might well be characterized as social casework, and a tenable argument could be made that the Ombudsman is too high (and too highly paid) a dignitary to be a caseworker. But the cases are only incidental to his main work. They do not preoccupy him. His humane response to offbeat problems serves not only to contribute to his “clients’” contentment, but also to remind other public administrators, en masse, that human happiness is the objective of government.

C. Principles and Guidelines

In the end, however, the Ombudsman’s more important contributions to good government are made in cases that generate new principles, new procedures, new policies rather than merely new results in the odd instance—though, needless to say, the “odd instance” may sometimes generate a decisional principle for the future, too. His proposals are rarely dramatic. New Zealanders have not been oppressed by bad government from which only a good knight can rescue them. The Ombudsman’s job is to tidy up and improve an already commendable administration of the public’s affairs.

So, for example, in Case Number 29 he found no substantiation of various complaints about treatment in public hospitals. But, while investigating, he discovered that “patients were not always aware of the full extent and likely consequences of certain types of serious gynaecological operations,” and he therefore proposed a brushing up of methods for giving full information to patients beforehand. For the future protection of both doctors and patients he also recommended a revision of the form

97 Case No. 986, Ombudsman’s Report 1965, at 70.
98 See, e.g., Case No. 987, Ombudsman’s Report 1965, at 42: A purchaser of a newly-constructed house owned by the state subsequently discovered structural defects. The State agency refused to pay the cost of remedying the conditions, saying that the house had been purchased “as is” and without any warranty as to its condition. Having investigated the purchaser’s complaint, the Ombudsman thought that “any person who purchased a new house, which had been built to the specifications of, and under the supervision of, a Government Department, should be entitled to expect that such a house would be constructed in accordance with good building practice, that any defects in construction should have been discovered by inspection and remedied prior to the house being taken over by the Corporation from the builder . . . .” This view finally prevailed, and the defects were made good without cost to the complainant. While no new policy was announced, one can scarcely doubt that action in this case created an equitable principle that will be applied consistently in future cases of the same kind, should they arise.
of consent to undergo a surgical operation; the form then in use, he thought, was too widely expressed.\textsuperscript{9}

Similarly, he has urged specific clarification of informational circulars and instructions whose obscurity may have misled affected persons; and he has done so even when finding no basis to criticize decisions that had evoked complaints to him.\textsuperscript{100} The need to give adequate and accurate information has, in fact, been a major theme in the Ombudsman's reports to Parliament.\textsuperscript{101} The message perhaps needs to be received in that august body even more than in administrative agencies. If New Zealand's experience resembles America's, the funds appropriated for what some unsympathetic legislators persistently regard as "publicity agents" and "useless publications" are rarely adequate to support well designed public education activities.

Sometimes the Ombudsman has urged administrations to free themselves from self-imposed chains, when generally sound regulations and procedures have prevented the exercise of intelligence.\textsuperscript{102} Sometimes, on

\textsuperscript{9} OMBUDSMAN'S REPORT 1963, at 9.

\textsuperscript{100} E.g., Case No. 137, OMBUDSMAN'S REPORT 1963, at 10-11 (information to old age pensioners concerning suspension of benefits during absences abroad); Case No. 879, OMBUDSMAN'S REPORT 1964, at 41-42 (elimination of ambiguity in registration form for conscientious objectors to military service); Case No. 167, OMBUDSMAN'S REPORT 1963, at 11 (adding precise information in publicity materials concerning commencing date of family benefits).

\textsuperscript{101} OMBUDSMAN'S REPORT, 1964, at 11: "A significant number of complaints would never have arisen except for defective or inadequate publicity or lack of notification by Departments relating to the rights or obligations of citizens. This is a matter that calls for unremitting attention and care by Departments, and particularly by those Departments dealing directly with members of the public generally who cannot be expected to have a detailed knowledge of their rights and duties or to employ experts to advise them. . . .

"Most Departments are reasonably 'publicity conscious' and attempt to disseminate widely useful information about their requirements . . . and what they can offer . . . . However, I have found that there is a tendency to allow pamphlets to become obsolete and not to withdraw, replace, or amend them—to the discomfiture of the public. I have also found too many cases where ambiguous or misleading statements have been incorporated in pamphlets designed to guide members of the public."

\textsuperscript{102} Case No. 622, OMBUDSMAN'S REPORT 1964, at 62, is illustrative. Persons in receipt of certain social welfare benefits had until recently been allowed to collect their "order books" at any time up to seven days in advance of the date on which payment of the first "order" (a cash voucher) was due. The Social Security Commission changed this rule because some welfare recipients cashed the orders in advance and, in thousands of other cases, the recipients' circumstances changed before the orders became cashable. So it issued a regulation that order books should be issued only on the date when payment was due. A mother of four young children called one afternoon at the appropriate office to collect her order book for the family benefit. She was told she would have to return the next morning, the date on which the first order was due for payment. She thought this unreasonable and complained to the Ombudsman, writing: "I left the office feeling near to tears and knowing that these Civil Servants regarded me as a nuisance for daring to question departmental red tape. Goodness knows life is frustrating enough trying to bring up four youngsters to be decent citizens without these petty restrictions—no wonder so many mothers give up trying!"
the other hand, he has proposed the forging of new or stronger chains.\(^{103}\) Sometimes he has found that even though a particular decision could be sustained, the Department had relied on an imprecise statutory interpretation that would cause future wrong if uncorrected.\(^{104}\) Sometimes he has found that too narrowly drawn a regulation has caused individual hardship offset by no social gain, and he has then proposed appropriate revision for the benefit of persons not yet affected.\(^{105}\)

Because procedural norms are not firmly established in New Zealand, the Ombudsman has had opportunity to contribute to development of the right to be heard.\(^{106}\) He has also addressed himself to problems of bias

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\(^{103}\) E.g., Case No. 330, OMBUDSMAN'S REPORT 1964, at 71 (gossip by payroll clerks concerning the circumstances of other public employees; notice published in Public Service Official Circular calling attention to regulations governing disclosure of information and threatening severe disciplinary action); Case No. 695, OMBUDSMAN'S REPORT 1964, at 41 (the passport of a foreigner who had been denied a N.Z. entry permit had been passed by a N.Z. official, without the owner's knowledge or consent, to an Australian consulate, which had then cancelled a previously granted Australian visa. While co-operation of New Zealand and Australian consulates is desirable in the interest of the passport owner, the Ombudsman thought that where transferring a passport was contrary to the owner's interest, "different considerations ought to apply and, without impairment of other aspects of collaboration, the transfer should not normally be made without the consent of the owner." The Secretary of External Affairs concurred, and instructed N.Z. overseas posts accordingly); Cases No. 224 and 274, OMBUDSMAN'S REPORT 1964, at 55 (new practice instituted of giving information to unsuccessful bidders on government supply contracts); Case No. 183, OMBUDSMAN'S REPORT 1963, at 11-12 (necessity of investigating allegations made to one Department concerning improprieties in another).

\(^{104}\) Case No. 460, OMBUDSMAN'S REPORT 1964, at 61: Recipient of a weekly family benefit applied for its capitalization (that is, for a lump sum payment instead) in order to add to the family dwelling house. The application was denied because the applicant's husband's income was adequate and because the dwelling in question was situated on the husband's farm. The Ombudsman upheld the denial on the first ground, and so informed the complainant. He concluded, however, that "there existed no adequate statutory authority to decline an application on the ground that the property was situated on a farm and that the complainant derived his livelihood from that farm." After considering the matter, the administrators agreed with this conclusion.

\(^{105}\) E.g., Case No. 63, OMBUDSMAN'S REPORT 1963, at 8-9: Financial support was given, under a valid regulation, to students who passed from New Zealand secondary schools into one of the universities. Complainant's daughter, however, had spent her final school year at a reputable Australian institution and was therefore deemed ineligible to receive a grant. The regulations recognized overseas schooling only if the student's parent had been transferred overseas in the course of employment. The Ombudsman thought that "the regulation should be based not on the exigencies of the father's employment, but on the standard of education received by the student." The Director of Education substantially agreed and undertook to seek a change in the regulation accordingly.

\(^{106}\) E.g., Case No. 1163, OMBUDSMAN'S REPORT 1965, at 32 (contested registration of trade names and trademarks). Compare N.Z. DEPT OF JUSTICE, THE CITIZEN AND POWER: ADMINISTRATIVE TRIBUNALS (1963) 13, where the Department of Justice wrote that the
and to the need of giving reasons for results reached. Like every other ombudsman, he has said that complainants come to him simply because they do not understand the official action concerning them. Many, when the matter had been clarified by the Ombudsman, expressed appreciation and acknowledged that they had no cause to complain. Hence the Ombudsman, echoing his fellows in other countries, has adjured administrators to explicate themselves—not only, he has added, because doing so will lessen the discontent of affected parties, but also because it will aid review and, in a more subtle way, will provide "an incentive to the authority to found its decision on reasons which will stand up to criticism."

So far as has been observed, administrators have not wholeheartedly followed this advice in any country where an ombudsman has tendered it. The negative result probably reflects a well founded fear that explanation of every decision would either prove an intolerably burdensome task for already overworked staffs or would become so routinized as to be meaningless. A middle course might be worth considering. Perhaps the administrative authority should be directed to explain a decision when specifically requested to do so by an adversely affected party; and, reasons having been stated, the authority should stand upon them and not others were the decision subsequently to be attacked. A requirement of this type would probably not produce an unmanageable workload. Yet it would eliminate whatever genuine uncertainties or misunderstandings might exist and would force administrators to act on grounds that "will stand up to criticism." This possibility remains to be explored in New Zealand and elsewhere.

The most perplexing and maybe the most important single problem with which the Ombudsman has thus far grappled is how to reconcile the competing desiderata of uniformity and efficiency on the one hand and flexible judgment on the other.

Administrators' susceptibility to what John Stuart Mill called "the despotism of custom" has troubled the Ombudsman almost from the beginning of his office. "Our laws contain many provisions empowering Departments or organisations to exercise discretion in individual cases," he wrote in 1963, "but I have found that sometimes the Department or organisation concerned follows a firm rule of practice. I am concerned to lack of a defined procedure "has become much less important now that we have an Ombudsman. . . . In the light of his experience he would be fitted to indicate areas where a right to a hearing could be given. Experience is essential since it does not seem possible to designate a priori the situations where a right to a hearing is called for."

107 As to bias, see Cases No. 365, 641, OMBUDSMAN'S REPORT 1964, at 9-10, 74.
108 See OMBUDSMAN'S REPORT 1963, at 4; OMBUDSMAN'S REPORT 1964, at 4, 76.
see that this discretion is genuinely exercised on the merits, as Parliament
must have intended when it passed the law in question, although in a large
Department delegation is necessary, and this creates problems.\textsuperscript{110}

Discretion, he said on another occasion, “must not become submerged
in convenient rules of practice tending to reduce administration to rou-
tine”—though at the same time he had to recognize that when thousands
of individual decisions are to be made, “there must be rules and direc-
tives” to assure consistent results.\textsuperscript{111}

His 1964 report to Parliament returns to the problem. Exercising
discretion is not hard, the Ombudsman thought, when the same person
or group can make every decision. “The real difficulties arise,” he said,
“when so many decisions must be made that the power to make them has
to be delegated, and the more widely the power is delegated, the greater
the difficulties become. If the discretion is wide, there is clearly the danger
that varying decisions might be given by different delegates even where
the facts are similar, and this would cause justifiable dissatisfaction on
the part of the public. On the other hand, if the authority that delegates
lays down too many rules of practice or defines too closely the standards
of judgment to be used by the delegates in making decisions, these deci-
sions may in effect cease to be truly discretionary”—for then decisions
must be made “according to the book” instead of “according to con-
science.” The Ombudsman found no easy solution that he could embody
in a rule of his own devising. He could only “highlight the problem, so
that both delegating authorities and delegates may realise the dangers
and weigh them before the former lay down rules, and the latter make, in
accordance with rules, decisions in cases having special features distin-
guishing them from the general run of cases that the rules were laid
down to cover.”\textsuperscript{112}

The administration of social security laws, necessitating thousands of
determinations by officials throughout the nation, has been a prime ex-
ample of the perceived difficulties. The Ombudsman has acknowledged
that rules of practice are necessary to achieve administrative uniformity,
whose absence would cause the collapse of public confidence in the Social
Security Commission and its staff; further, inconsistent results in similar
cases might be regarded by the Ombudsman as “discriminatory” within
the meaning of his Act and therefore subject to criticism by him. And yet,
he has insisted, administrative rules must be understood to be rules of
guidance only, not mandatory directives that abrogate “the duty to exer-

\textsuperscript{110} \textsc{Ombudsman’s Report} 1963, at 5-6. See also Case No. 326, \textit{id.} at 12; Case No. 96, \textit{id.} at 14.

\textsuperscript{111} Powles, \textit{supra} note 78, at 782.

\textsuperscript{112} \textsc{Ombudsman’s Report} 1964, at 5-6.
cise discretion in individual cases.” Being an honest man, the Ombudsman added: “I fully realize that the question of when to make an exception to an established rule—of when the circumstances are such as to warrant such an exception—can give rise to the old question of uniformity, and we are in danger of going round the circle again.” He thought, however, that the appropriateness of exceptions could be determined by reasonable methods of administration, and that the opportunity to make them must be preserved.¹¹³

These balancings of imponderable values are at least as difficult in the United States as in New Zealand, and probably even more so because of the greater number of determinations that have to be made.¹¹⁴

D. Legislative Recommendations

Since 1937 a Law Revision Committee has sought to aid Parliament to identify problems, discover legislative solutions, and modernize existing statutes. The Committee, though unsalaried and unstaffed, has accomplished much good work; but it meets only twice annually and is incapable of keeping close watch over the daily operation of every statute in the books. Were it not that the Department of Justice, the Solicitor General, and the Law Draftsman aid its labors, the Law Revision Committee would be much less effective than it is.¹¹⁵

The Ombudsman Act, section 19, adds the Ombudsman to the ranks of available legislative advisers, for it directs him to call attention to the desirability of reconsidering any law he believes has produced “unreasonable, unjust, oppressive, or improperly discriminatory results.” The Ombudsman, as he himself has noted, “can never therefore wholly answer a complaint by stating that what has been done has been done in accordance with the law; he is required to go further and satisfy himself that the law itself is fair and just.”¹¹⁶

In one of his reports the Ombudsman has written about his general approach to legislation. A statute or legal rule or practice, he asserted,

¹¹³ Id. at 76. The Chairman of the Social Security Commission, to whom these remarks had been addressed, replied that the Commission had “always reserved the right to treat a case on its individual merits in spite of any general policy rule” and had been conscious that a general rule may have no merit in “particular circumstances.” Id. at 77.


¹¹⁵ The Committee consists at present of the Minister of Justice as chairman, four representatives of the New Zealand Law Society, a member of each of the four New Zealand law faculties, a nominee of the Opposition, the chairman of the Statutes Revision Committee of the House, two lawyers especially qualified by past experience, the Solicitor General, the Law Draftsman, and the Secretary for Justice. Its work has been illuminatingly described in a pamphlet published by Minister of Justice Hanan in 1965, entitled The Law in a Changing Society. Most of its activity has in fact been in the so-called “private law” area.

¹¹⁶ Powles, supra note 78, at 778.
must be shown to operate oppressively or invidiously against a class or category and not merely against an individual, before he would be justified in recommending an amendment.\textsuperscript{117} The proposition is easier to state as a generality than to apply when specific problems arise, for the Ombudsman has undoubtedly furthered new legislation to deal with instances of seemingly isolated hardship.\textsuperscript{118} Ad hoc statutory amendments would probably occur even more frequently than now were it not for the fact that New Zealand's high-ranking public servants possess the capacity and will to be guided by conscience in unusual cases.\textsuperscript{119}

When broader changes seem feasible, the Ombudsman is unlikely to have access to all the policy considerations that shape legislative choice, nor are all interests affected by a general statute likely to be involved in the particular matter he has been investigating. These practical limita-

\textsuperscript{117} Ombudsman's Report 1965, at 70.

\textsuperscript{118} E.g., Case No. 1211, Id. at 18: The complainant was a teacher in a school that had been down-graded (for salary classification purposes) when enrollment dropped below a certain level. The relevant legislation, which had been in force for more than thirty years, allowed a teacher to retain his former salary for two years after down-grading, during which time he could seek a new post in a school with the same grading as before. The complainant was actively in the market for such a job, but no suitable vacancies occurred during the two years of grace. When that period had elapsed, his salary was substantially reduced, as the applicable statute undoubtedly required. The affected teacher deemed this an unreasonable result that Parliament could not have envisaged. When the Ombudsman presented the case to the Director of Education, "he agreed that the complainant's contention was sound, and undertook to promote legislation giving the Director discretion to extend the two-year period of grace in such circumstances. The special legislation was later enacted, and the complainant's former salary was retrospectively restored." While the report of Case No. 1211 does not suggest that any similar cases were pending, several comparable situations had recently come to the attention of the Department of Education; Case No. 1211 was therefore regarded as a sort of test case. Still, the matter before the Ombudsman was a one-man hardship problem.

\textsuperscript{119} E.g., Case No. 507, Ombudsman's Report 1964, at 37: The complainant, a low-paid hospital worker, was subpoenaed by the accused in a criminal case. He attended court on two consecutive days, but was not called. He lost two days' pay, a hardship for him. The applicable statute provides that witness fees and expenses are to be paid by the party who called the witness, unless the party is a legal aid recipient (which was not the case here). The defendant who had subpoenaed the complainant had been convicted and was now imprisoned, penniless. The complainant asked the Ombudsman "if you could assist me with this problem or suggest who I could apply to for compensation for loss of wages for which I would be very thankful?" The Ombudsman simply transmitted the complaint to the Secretary for Justice, asking for a report and "the benefit of your comments so that I may determine whether or not the matter is one which I ought to investigate." The Secretary for Justice inquired into the facts and the law, which clearly contemplated no payment of public funds to persons in the complainant's situation. Without any prodding by the Ombudsman, the Secretary nevertheless thought it unfair that the complainant should be out of pocket. He therefore sought the Finance Minister's authorization (which was given) to pay the complainant £4, the sum he would have received had the accused obtained legal aid. The Ombudsman, upon being informed, wrote the Secretary that this decision "seems in full conformity with equity and conscience"—and thus the matter was closed, with satisfaction to the complainant and without statutory change.
tions upon his theoretical power have been noted by the Ombudsman himself.\(^1\) Nonetheless, he has sometimes almost too boldly leapt to conclusions about proper statutory objectives or about the need for minor changes to close what he regarded as legislative gaps.\(^2\) Occasionally his reports have half-suggested that legislative stimulus has been provided by a complaint forwarded by him, though other influences may perhaps in fact have been more significantly operative.\(^3\)

The New Zealand office is still too young to permit a firm appraisal of its legislative utility. Conversations with Cabinet and House members as well as public servants create the impression that thus far the Ombudsman has been uninfluential as a lawmakers’ guide. If this be the fact, his experience parallels that of the Scandinavian ombudsmen, who have undoubtedly enjoyed their greatest successes when dealing with specific cases while achieving little when proposing new laws.

V

THE IMPACT OF THE OMBUDSMAN’S WORK

A. Public Attitudes

The very first thing to be said about the impact of the Ombudsman’s work is that it has been discernible outside the public service as well as within it. An ombudsman’s achievement cannot be measured solely by the frequency with which he criticizes administrators. He serves equally well

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\(^{1}\) See Case No. 800, OMBUDSMAN’S REPORT 1965, at 23–25, involving an attack upon an allegedly discriminatory and unjust statute that limited to three years the appointment of hospital consultants. The complainant was the New Zealand Association of Part-time Hospital Staff, which said that the livelihood of consultants was placed in jeopardy every three years in a manner unlike that applicable to any other group. The Ombudsman “studied a great deal of material . . . , but I could not be satisfied that in this case I had been able to undertake a sufficiently careful inquiry . . . . Furthermore, the case had been presented to me by the association—just one group of the medical profession—whereas I strongly suspected that the substance of the case had implications which affected the medical profession throughout New Zealand. For these reasons I did not consider it appropriate for me to continue the investigation or attempt to form any opinion thereon.”

\(^{2}\) See, e.g., Case No. 1000, OMBUDSMAN’S REPORT 1964, at 52 (expressed opinion that provision of Income Tax Law allowing a tax deduction in respect of fees paid to a non-profit educational institution while providing no similar deduction for fees paid to a school carried on for private pecuniary profit, seemed objectionable); Case No. 1101, OMBUDSMAN’S REPORT 1965, at 31 (indicated a need to remedy what, on first impression, he regarded as a defect in Motor-Vehicle Dealers Act, to extend the classes of creditors protected by a required dealer’s fidelity bond).

\(^{3}\) Case No. 772, OMBUDSMAN’S REPORT 1965, at 31, may be illustrative. The matter arose under a rather technical section of the Bankruptcy Act. The Ombudsman was led “to ask the Secretary for Justice whether there might be a gap in the law that needed closing.” The Secretary replied after a time that the problem of the supposed gap and what, if anything, should be done about it was to be considered in the course of a review of the bankruptcy legislation, then already in progress.
when he dampens hostile suspicions and helps create the public confidence upon which democratic government must be based. The Ombudsman has done much to reinforce that base.

Those who sponsored an ombudsman’s office in New Zealand never regarded it as an offset against an implacable and corrupt bureaucracy. Nor has the Ombudsman’s operations exposed implacability or corruption hitherto unsuspected. His first year’s efforts revealed no evidence of moral obliquity in the public service—“mistakes, carelessness, delay, rigidity, and perhaps heartlessness, but nothing really sinful.” His third report brought the record up to date. “Again it is pleasing to note,” he wrote, “that no complaint of actual malpractice has been found justified.”

The Ombudsman has, in sum, protected the public service, not merely attacked it. He has found it “necessary to advise a few complainants, in quite forceful terms, that they should cease groundless attacks on Departments or officials.” Among them have been the obsessively suspicious and the chronically querulous, whose burdensomeness is greater than their numbers; their turning to the Ombudsman has been a boon to the administrators against whom they have complained. “Most of our hardy perennials have left us to go to the Ombudsman,” commented one Department Head who is not among the Ombudsman’s adorers, “and I’ll say this for the man: he has ticked off some of them in a way we never would have dared do ourselves.” Said another senior administrator: “The Ombudsman doesn’t set out on witch hunts. We don’t believe he has taken sides against us. If he thinks a complainant is just trying to get at the Department, he gives him no encouragement. What’s more, he has helped to quiet a few cranks, though he has told them just what we had been telling them before.”

The “quieting” reflects the complainants’ awareness that their allegations have been investigated thoroughly and independently. The Ombudsman’s communications to complainants are lengthy—exceptionally detailed, patient, and explanatory. They seem calculated to persuade, not merely to announce. Apparently they have had the desired effect, for persons whose complaints have been rejected have often expressed appreciation of the Ombudsman’s activity in their behalf. This is all the

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123 Powles, supra note 78, at 773.
124 OMBUDSMAN’S REPORT 1965, at 5. OMBUDSMAN’S REPORT 1964, at 8: “Although a few complaints have alleged malpractice, investigation has cleared the officers or Departments concerned, and recommendations have been confined to matters of administration.” Cf. Case No. 157, OMBUDSMAN’S REPORT 1964, at 44-45, finding an allegation of malice on the part of a revenue agent to be unfounded, but nevertheless making constructive recommendations concerning the conduct of future investigations.
125 Id. at 5.
126 OMBUDSMAN’S REPORT 1963, at 3-4; OMBUDSMAN’S REPORT 1964, at 4.
more remarkable because many complainants exhibit the human tendency to lay on any shoulders but their own the blame for disappointments they have suffered.\textsuperscript{127}

Apart from his utterances in individual cases, the Ombudsman has also found occasion to say cordial things about particular administrative agencies whose proceedings frequently come to his notice.\textsuperscript{128} He is not an apologist, glossing over administrative imperfections. Rather, he expresses what is too often ignored, namely, that most public servants do in fact serve the public well most of the time and deserve to be thanked for performing hard jobs faithfully.\textsuperscript{129}

None of this is calculated to help bureaucrats win popularity contests, nor is that its purpose. The Ombudsman's favorable reports may, however, nurture respect for public service, thus facilitating the future recruitment of able personnel and the retention of high morale by those already employed. His reports may also help teach the public at large that fallibility in law administration is not necessarily, though of course it may be, a mark of dishonor or incompetence in the law administrator—whether the fallible law administrator be dubbed judge or bureaucrat.

**B. Changes in Administrative Methods or Attitudes**

The effect of the Ombudsman upon administrative organs cannot be summarized in a word. Some establishments appear to be virtually un-

\textsuperscript{127} See, e.g., Cases No. 7 and 474, OMBUDSMAN'S REPORT 1964, at 18-19.
\textsuperscript{128} See, e.g., OMBUDSMAN'S REPORT 1965, at 6: "By far the greatest number of complaints related to social security. This is only to be expected as social security touches the lives of the majority of citizens and the decisions made sometimes govern, and always affect, people's standard of life. Moreover, there is no special right of appeal against the decisions of the Social Security Commission. It is, I think, greatly to the credit of the Social Security administration that, of the 82 complaints that were investigated during the year, only three were found to be justified, and, of these, two were rectified and the remaining one did not warrant any recommendation. . . ."

"The Department of Inland Revenue is, of course, a tempting target . . . The Department has made outstanding efforts during the year to modify its procedures and to improve its public image, and I am glad to see the justification of the forecast I made in my last annual report that the proportion of the complaints in respect of this Department would show a substantial fall."

\textsuperscript{129} But cf. Aikman & Clark, supra note 87, at 53: "Compared with the enormous number of decisions actually made during the period on which the Ombudsman has reported, the actual figure of justified complaints is insignificant . . . . It is difficult, however, to resist the feeling that the Ombudsman in his publicity has placed a little too much stress on his victories rather than on the cases where the Department or organization had acted perfectly properly. . . . The hope may be expressed that as the Ombudsman becomes more established he will find it more possible to publicise those cases in which the Public Service was not at fault."

Compare, however, the State Services Commission's annual report to Parliament for the year ending March 31, 1965: "The reports of the Ombudsman have also shown, and done much to bring home to the general public, that a sense of responsibility and fair play exists among public servants."
conscious of his existence. In others, superior officers have used him as a bogeyman, to frighten their subordinates. A few, as the Ombudsman has asserted, may have become "pervasively 'Ombudsman conscious.'" In any event it is probably fair to say, in the words of a veteran professional observer of Wellington officialdom: "The Ombudsman has gingered up the public service even when no formal changes have occurred."

Here, for example, is the full text of a memorandum sent by a Permanent Head of a Department to all his Section chiefs, on the subject of "The Making of Decisions":

1. Several months ago the Ombudsman spoke in public about the "cold, impartial and often implacable application of the rules."

2. Thinking of the public service generally and of this department in particular I believe that there are some grounds for this comment. I wish to ensure that in future we as a department do not offend in this respect.

3. When you are making decisions or submitting recommendations will you please place yourself under scrutiny from this angle. You can do this without running the risk of becoming flabby.

Assuredly such a communication is not wholly inconsequential, even though its consequences are not measurable.

Another Department Head, already deeply committed to simplifying and perfecting his departmental procedures, remarked that he sought to convey to the staff his own awareness of the Ombudsman's concern with similar matters. "The Ombudsman," he acknowledged, "gives me added leverage. Big organizations do not move evenly in all their parts. Some parts need more shoving and hauling than others, and I can use the Ombudsman's cases to help me when I have to shove. Last week, for instance, I wrote a district office that during the past six months five of the seven complaints involving the Department had come from that branch. I told the local director that he had better get busy to review his office's procedures."

One may fairly suppose, too, that superior officers who have been embarrassed by underlings' inefficiency will act vigorously to prevent its recurrence. This is not a matter of new methods or new policies, but simply of keeping subordinates up to a mark already well defined. A

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Confirmation came from the Permanent Head of one of the largest Departments, who said that he had personally heard, during staff conferences concerning pending matters, such expressions as, "Oh, I wouldn't do that—you'll have the Ombudsman on you."
number of complaints to the Ombudsman have indicated, for example, unwarranted delay in completing staff action on pending matters. Upon learning of the complaints, high officials have felt called upon to apologize handsomely, though they themselves had not previously been involved in the episodes. Not desiring to eat humble pie as a steady diet, they probably instituted internal controls to forestall tardiness in future cases.

The Ombudsman has publicly claimed that his decisions have encouraged "departmental officers to take great care in the exercise of discretionary powers which, before the Office of Ombudsman was instituted, were final and not open to challenge or redress." Most officials, when asked to comment, denied behaving differently because the Ombudsman might later examine their judgment. Since knowing oneself and recognizing one's own motivations are among the most difficult of all feats, these subjective responses may be somewhat discounted though not wholly ignored. An official of high rank thought that his conduct had been unmodified, but that his subordinates had been impressed by the Ombudsman; some of his subordinates thought conversely that the Ombudsman had made no difference to them, but that their chief had been beneficially influenced. Against one Department Head's explosive "Work methods and attitudes haven't been affected a jot!" can be set another's milder "In this Department we think we always were sensitive to private rights and interests; but our people are busy, and there's a temptation to brush aside the troublesome case that interferes with seemingly more important matters. The staff really does take a bit more care now." A district office director, responsible for supervising action on thousands of cases each year, asserted unequivocally: "The Ombudsman hasn't made an ounce of difference. We never ask ourselves, What would the Ombudsman think about this case?" His superior, responsible for reviewing the district office decisions, said equally distinctly: "Yes, the Ombudsman has affected what we do. We refer many more cases than before to our legal counsel. This has slowed up our operation. We haven't been as ready as we used to be to act on the equitable side, you might say. We are being more legal, but that isn't always favorable to the citizen, you know. We are becoming somewhat more formal, less quick to do rough justice, and I think the Ombudsman is the reason. But whether he has influenced us for the better or the worse is a different question."

In a meaty though somewhat tendentiously phrased remark concern-

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131 E.g., Case No. 140, OMBUDSMAN'S REPORT 1963, at 10 (Department of Labour); Case No. 281, OMBUDSMAN'S REPORT 1964, at 46 (Department of Inland Revenue); Case No. 1061, OMBUDSMAN'S REPORT 1965, at 53 (Department of Works).

132 The assertion was made in an address delivered at Christchurch, April 27, 1964, reproduced as an appendix to G. Powles, The Citizen's Rights Against the Modern State, and its Responsibilities to Him, 13 INT. & COMP. L.Q. 761, 785 (1964).
ing public administration, the Ombudsman has summarized a main justification of the work he has been doing. Repeated review within an administrative agency, he asserted in 1964, is no guarantor of the final decision's fairness and wisdom. The first decision, even if made at a relatively low official level, "tends to generate its own defences within a Department .... The official bias is towards the maintenance of the original decision, and accordingly an objector must generally bear the onus of demonstrating manifest error if he is to secure the reversal of a decision within the Department that made it." Many of the cases which had been rectified after the Ombudsman had received a complaint but before completing investigation had been considered inside the administrative agency several times previously without result. But when he presented the case anew to the same agency, "a genuine review" occurred. Rationalizing a determination made by a staff member and forcing affected persons to prove its unsoundness are among "the inevitable concomitants of any extensive administrative system with its accompanying hierarchies and rules. The conclusion is therefore that some form of responsible and independent representation in proper cases is not only desirable but necessary if the private citizen is to receive proper consideration at the highest levels within Departments." Elsewhere, the Ombudsman has praised top officials for having in general "shown a broad-minded and high-principled willingness to do justice to the cases of individuals regardless of prior decisions which may have been taken by lower echelons in their Departments"; the matters coming to his office showed, he thought, that "in the lower ranks of a large Department things can happen which are regarded as questionable when brought to the attention of the head of the Department concerned."

The conclusions thus declared can be amply supported by reported cases. Without suggesting naughtiness or using emotive words like bias, one can safely generalize that most people—including administrators—

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134 Powles, supra note 132, at 780.
135 See, e.g., Case No. 1027, Ombudsman's Report 1964, at 57: Claim for accrued annual leave was denied, and denial was sustained successively by departmental representatives in local and central offices; reexamination after Ombudsman investigated showed that a clerical error had been made, and the complainant was then paid, with apologies. See also Case No. 241, Ombudsman's Report 1964, at 66-68: The Government Superannuation Board rejected a request by a former school teacher. Complainant asked her member in the House of Representatives to intercede first with the Minister of Education, then with the Minister of Finance (who was also chairman of the Superannuation Board); the complainant herself saw the Minister of Finance and the Superintendent of the Board—all to no avail. The Ombudsman, after lengthily investigating her complaint, reported in detail to the Minister of Finance (as Board chairman), criticizing both the Board and the Department of Education. After considering this report, the Board accepted the Ombudsman's recommendation that the rejection be rescinded.
avoid the extremely hard work of critical thinking if they can. One easy way to avoid it, when deciding cases, is to match up one case with another that has gone before, noting superficial similarities and ignoring subsurface differences. That is what has caused the difficulties in some of the matters about which complaint has been made to the Ombudsman.

In at least some administrative agencies the Ombudsman’s letters have made the highest officials aware of matters that would not otherwise have come to their notice at all. One of these officials, recognized in Wellington as an especially conscientious and hardworking administrator, remarked, however, “There’s another side to that coin that has to be looked at. I am now giving personal attention to cases I used to see rarely, because they involve no policy problems, but only the proper application of old policies that the staff supposedly understands. The only reason I see them now is that they have been forwarded here by the Ombudsman after complaint to him, and I have directed that all correspondence from or to the Ombudsman must go through me personally. That is all well and good; I have agreed with a few complainants that their problems had not been handled by the Department as they should have been, and I have given satisfaction in those cases. But of course the time I devote to these matters is taken away from something else. Since I haven’t limitless energy or hours at my disposal, a judgment has to be made in the end as to whether I should be doing one kind of work or another.”

Some Departments rather resent the Ombudsman’s contention that results are fairer when cases proceed through his office instead of through normal administrative channels. One Permanent Head, somewhat vexed because the Ombudsman’s report had listed six valid complaints about his Department, declared: “Not one of those six had ever previously been submitted for review by the Department’s central offices. If we had had an opportunity to pass on them, they would have been decided just as they were when they came to us as complaints via the Ombudsman. They

Compare Case No. 952, OMBUDSMAN’S REPORT 1964, at 24-25: Complainant had sought unsuccessfully for three years to obtain the Customs Department’s review of denial of an importer’s license; upon reexamining the case after an inquiry by the Ombudsman, the Comptroller of Customs made a fresh decision that the complainant and the Ombudsman regarded as “doing substantial justice.” And see Case No. 829, OMBUDSMAN’S REPORT 1964, at 30, involving the desirability of procedural regulations to protect Education Board officials against summary dismissal; while the problem had been noted by some staff members of the Department of Education, they had neither done anything about it nor brought it to the attention of superior officers, who did not even know of its existence until informed by the Ombudsman.

Possibly still another course remains open: The top administrator should be able to find someone besides himself in his large Department who could review complaint cases scrupulously and intelligently, leaving the Head free to deal with issues of broader significance.
appear as black marks in the record solely because the bloke chose to write to the Ombudsman instead of to us.” Another Permanent Head bitterly resented the Ombudsman’s saying that complaints had been “rectified” or “justified” when in fact the action complained of had been correct in the light of the information the complainant himself had supplied. “When additional information came to hand through the subsequent complaint to the Ombudsman, we granted the relief sought—just as we would have done if the complainant had approached us directly. We would have done right without the Ombudsman. He makes us look bad in order to make himself look good, as preserver of the citizen against the bureaucrat,” the official sourly concluded.

C. Education for the Future

The immediately preceding discussion has dealt chiefly with repairing errors and omissions. The most valuable work the Ombudsman can do lies in the field of prevention. If his views are to have a maximum educational influence upon the conduct of the public’s business, they must reach those whom they seek to guide.

Occasionally this occurs indirectly but forcefully through instructions to subordinates from a superior officer who has adopted the Ombudsman’s opinion as his own. More often, unfortunately, knowledge of the Ombudsman’s ideas is narrowly disseminated. A middle-level officer in a major Department complained recently: “I am told that the Ombudsman’s reports are eye-openers. They haven’t opened my eyes. I never see them. We don’t know about his cases even when they involve this Department. I understand he does a lot of good cerebration on principles, but his messages don’t reach me. Either he is in an ivory tower or I am.” A number of officials in field offices were asked whether they had received reports or circulars or instructions that reflected the Ombudsman’s judgments. They recalled none, though acknowledging that new instructions from the head office might have been influenced by the Ombudsman without acknowledging the fact.

The Ombudsman’s powers to publicize his work and his conclusions are ample. Section 25 of the Ombudsman Act directs him to make an annual report to Parliament, “without limiting his right to report at any other time.” Rules the House of Representatives adopted for his guidance in 1962 say that he “may from time to time in the public interest . . . publish reports relating generally to the exercise of his functions under the Act or to a particular case or cases investigated by him, whether or

137 E.g., Case No. 1165, Ombudsman’s Report 1965, at 67 (Police Commissioner circulated an instruction to the national Police Force of 2700 men, embodying Ombudsman’s view concerning proper conduct of certain investigations).
not the matters to be dealt with in such a report may have been the subject of a report to Parliament.”

As yet, not enough copies of the annual report have been printed to allow for general circulation among public servants. Only 1385 copies of the 1965 report were published; 1600 copies have been authorized for the future. A single copy has gone routinely to each of the Departments and other organizations to which the Ombudsman’s jurisdiction attaches. While additional copies could have been obtained through the Government Printing Office, no great effort seems to have been made anywhere to see that field offices and lesser officials were exposed to the Ombudsman’s thinking.

He himself has sought to widen the circle of acquaintanceship by holding semi-annual press conferences and by accepting speaking engagements when possible. He has also participated in current training courses organized by the State Services Commission for the benefit of senior officers. He must at present walk a tightrope between too great silence and too much speech. Some of his supporters urge chary utterance because they believe publicity is most effective if sparingly used; others are impatient because the public is still inadequately informed about his availability and because his recommendations usually reach only the officials immediately involved, thus limiting their educational force. His detractors, too, push in different directions. On the one hand they say he speaks too often, “acts as though he were a sort of messiah,” “turns up to give talks at ladies’ societies and school graduations like a blooming junior politician”; and on the other hand some anti-administrationists blame him for not stimulating the citizenry to complain more frequently than it does.

Whether or not the Ombudsman’s public relations are ideally balanced, more might advantageously be done in the future than in the past to bring his work to the appropriate notice of civil servants in a broad range.

D. Implications for Parliament

Section 11(3) of the Act declares that a committee of the House of Representatives may at any time refer to the Ombudsman, for his investigation and report, any petition or related matter before the committee, so far as it lies within his jurisdiction. Only three such referrals had occurred until mid-1965. Two of these remained inactive because they pertained to subjects outside the Ombudsman’s statutory powers.

139 Aspects of public relations work are discussed in OMBUDSMAN’S REPORT 1964, at 16; OMBUDSMAN’S REPORT 1965, at 9-10. See also C. C. Alkman, The New Zealand Ombudsman, 42 CAN. B. REV. 399, 417 (1964).
Still, a parliamentary committee without an investigating staff of its own and having no power to peer at the files should be able to make good use of the Ombudsman as time goes on.140

In addition to the trio just mentioned, the Ombudsman says he has also received a "trickle of cases" from individual members of the House, usually in situations calling for extensive research or for examination of many documents. Apart from these, numerous others must have been referred in fact though not in form by members who diverted constituents from their own offices to the Ombudsman's. The Social Security administration, among others, has noted a very marked reduction in the number of inquiries and representations addressed to it by members of the House. Ministers have also remarked that in recent sessions members have questioned them less frequently concerning particular cases, apparently because constituents have chosen to complain to the Ombudsman instead of to the legislators. At least two members of the Cabinet, and probably others, have sometimes urged members to present grievances to the Ombudsman, after they themselves had been unable to reach an accord.

Many members of Parliament, according to some of their leaders, have gladly abandoned the role of "constituents' grievance man." "Why shouldn't we use the Ombudsman for this work, since he is an official chosen by Parliament and we have given him the capability of getting at all the facts?" a prominent member asked. "Passing complaints to him leaves us free to do our primary job, a job nobody else has power to do," another said.

Other members, however, believe they gain popular esteem by handling complaints themselves. "When I take care of a local resident's problem," one member candidly states, "I show him how diligent I am, and he tells his friends. If I ask a Minister a few sharp questions that the press gallery picks up, I impress my constituency. I'd be a fool to let the Ombudsman have all the glory instead."

Whether or not the fact be welcomed by the members of the House, the volume of grievances addressed to them seems to be diminishing. Nothing, of course, prevents a complainant's going to his member or petitioning Parliament after the Ombudsman has rejected a complaint or has not dealt with it to the complainant's satisfaction. In all probability the grievance business will pass more and more into the Ombudsman's

140 Cf. J. F. Northey, New Zealand's Parliamentary Commissioner, in THE OMBUDSMAN 135, 140 (D. C. Rowat ed., 1965): "This is a useful power in that the Commissioner can be expected to make a more detailed and possibly more intelligent investigation of the complaint, but it may, if it were to be used extensively, weaken parliamentary supervision of the administration and the member's sense of responsibility to the citizen. The power to send complaints or petitions on to the Commissioner might be treated by some members as an easy method of disposing of an awkward problem."
hands in the first instance, with Parliament still able and willing to be, as traditionally it has been, the last resort for the disappointed. Legislators, thus freed from spending endless hours on constituents’ errands, may in the long run gain greater capacity to influence larger public policies.  

CONCLUDING OBSERVATIONS

New Zealand’s Ombudsman has been a striking personal success. True, he has not won over all unbelievers, among whom are a few powerful figures in the House of Representatives; but, on the other hand, some previously skeptical members have more recently suggested that his power should be extended. Both the Prime Minister and the Leader of the Opposition have supported him strongly, and he is distinctly not a partisan issue.

Among administrators, a few describe him in biting language. At least two Department chiefs actively desire to be excluded from his jurisdiction. Many more of the Departments, however, appear genuinely to admire the Ombudsman’s accomplishments. While almost all were perturbed by his having occasionally concerned himself with general administration as distinct from particularized grievances, they thought his judgments on the whole had been balanced and constructive. Temperamental differences have created irritations felt in some quarters and not in others. “Our work would be faster, cheaper, and better all around if we could keep that fellow out of our hair,” grumbled one chief official. “Some Heads think the Ombudsman is a nuisance because he makes them justify themselves all the time. What’s wrong with that? It’s a good idea to keep us on our toes,” another Permanent Head cheerily remarked. “The man is an empire builder, and his empire isn’t really worth building. He repeats work that has already been done carefully or, if a complaint does involve something new, the complaint that went to him should have come to us,” said a hostile official. “When the Ombudsman began, we wondered whether he was going to be a blasted thorn in our side; but now we are glad to have him,” said a friendly official. “For one thing, people will complain to him when for one reason or another they won’t complain to me, and this gives me an added opportunity to police my own Department. And for another thing, when he goes over something we have done and says he finds nothing wrong, he takes the wind out of the sails of the Doubting Thomases.”

Conversations with representatives of various nongovernmental organ-

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141 The present state of members’ power to shape legislation is well discussed in R. N. Keison, The Private Member of Parliament and the Formation of Public Policy: A New Zealand Case Study (1964).
142 See supra pp. 1170-72.
izations create the strong impression that the Ombudsman has been well received by various economic and community groups. In general, those who were consulted knew little about the details of what the Ombudsman had done. They simply thought it a good idea to have someone at hand who could inquire into exercises of administrative authority, in view of the broad scope of governmental activity in New Zealand.

A nonresident whose opportunities to observe were necessarily limited cannot offer a confident conclusion of his own. But he can report and endorse the appraisal of Sir Ronald Algie, a former law teacher who is now the respected Speaker of the House: “The ombudsman system probably would not work well everywhere. It works well in New Zealand because we have a fine public service. Corruption is so rare as to be deemed virtually non-existent. Officials generally seek to serve rather than to defeat citizens. They give cases careful consideration, though of course that doesn’t mean they invariably reach the best possible result. Our Ombudsman may stimulate officials to be even a little bit better than they have been. But the ombudsman system is succeeding here precisely because, really, there isn’t a staggering lot for it to do.”