

The Ombudsmen and social welfare

W. G. F. Napier*

This article examines the ombudsman's jurisdiction over complaints about the Department of Social Welfare and discusses the nature of the ombudsman's jurisdiction when a statutory right of appeal exists.

I. INTRODUCTION

The Office of the Ombudsman was imported into New Zealand in 1962 as a response to the inadequacy of political and legal controls over the activities of a bureaucracy which was seen as possessing wide powers susceptible to abuse.¹ The controls were sometimes rigid and limited in the range of situations they dealt with, in the procedures they adopted and in the remedies they gave.² The burden of this article is to show the ombudsman at work in one field and to determine whether his response to that inadequacy has been sufficiently flexible to make him effective in remedying administrative failings.

The social welfare field has been chosen for examination. Eighteen complaints to the Office of the Ombudsman in the year ended 31 December 1981 were selected for study.³ This field is appropriate for several reasons. First, the Department of Social Welfare is New Zealand's biggest spending government department and administered over one million benefits in the year to 31 March 1981.⁴ To examine

* Junior Lecturer, Faculty of Law, Victoria University of Wellington.

1 See e.g. authoritative accounts by Sir Guy Powles, New Zealand's first Ombudsman, in "Aspects of the Search For Administration Justice with Particular Reference to the New Zealand Ombudsman" (1966) 9 Can. Pub. Admin. 53, and "The Citizen's Rights Against the Modern State, and its Responsibilities to Him" (1964) 13 I.C.L.Q. 761; and by Larry B. Hill in the only book to date on the New Zealand Ombudsman, *The Model Ombudsman. Institutionalising New Zealand's Democratic Experiment* (Princeton University Press, 1976), Chapter 3.

2 See e.g. C. C. Aikman, "The New Zealand Ombudsman" (1964) 42 Can. Bar Rev. 399, 407 who identifies the rules of Crown privilege then operating as making it difficult for the courts to look at Crown documents and thereby hindering effective review of administrative decisions.

3 The writer wishes to thank the Chief Ombudsman, Mr G. R. Laking, for permission to read files and to publish the results of the research.

4 It spent \$2,417,209,442, and administered 1,030,314 benefits: see *Annual Report of the Department of Social Welfare*, 1981 App. J.H.R. E.12, 72.

the ombudsman's role in this area is therefore to examine his value in a significant amount of the nation's administrative activity. Secondly, social welfare beneficiaries are citizens who can, at first impression, be seen to benefit most from a cheap, expeditious and informal avenue of redress for wrongs done to them. Beneficiaries are society's underdogs; they need an effective and sympathetic advocate.⁵ Thirdly, a full range of institutions — the Social Security Commission, the Social Security Appeal Authority and the High Court — operate to redress grievances. A picture can be usefully presented of the ombudsman's place in such a range of existing bodies.

In 1962, the Ombudsman proceeded immediately to investigate specific complaints relating to, for example, the grant of family benefit and payment of age pensions during temporary absence from New Zealand,⁶ and he expressed concern generally that each social welfare discretion given be exercised on its merits, without rigid adherence to rules of practice.⁷ This article makes no attempt to provide a rounded coverage of the activities of the New Zealand ombudsman under his statute. That task has been performed before.⁸ Instead, it focuses solely on three aspects of his operation: first, the jurisdictional limitations imposed upon his activities by the existence of the Social Security Commission and the Social Security Appeal Authority; secondly, the type of procedure adopted specifically to deal with many social welfare complaints; and thirdly, his ability to remedy the welfare grievances brought to him.

II. JURISDICTIONAL PROBLEMS

An ombudsman must first decide whether he possesses the authority to look at a matter complained of. There are many confines upon his authority, the principal one limiting his investigations to actions "relating to a matter of administration":⁹ at base, the grievances should be ones relating to specific actions implementing government policies.¹⁰ Social welfare complaints always plainly fall inside that category. There are, however, specific limitations which, on the writer's understanding of the complaints studied, occur regularly in relation to social welfare matters.¹¹

5 The proposition may be put rather baldly; but arguments have frequently been presented for the protection of citizen's entitlement to benefits by a regime of legal remedies: see e.g. Charles Reich's trilogy of articles: "Midnight Welfare Searches and the Social Security Act" (1963) 72 Yale L.J. 1347; "The New Property" (1964) 73 Yale L.J. 733; and "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74 Yale L.J. 1245.

6 Cases 137, 167, 1963 *Annual Report* 10, 11.

7 See comments *ibid.* pp. 5-6; and case 326, p.12.

8 See L. B. Hill, *op.cit.* n.1; and a paper by the writer: Napier "Ombudsmania Revived: The Local Government Complaints" (LL.M. Research paper, V.U.W., 1979).

9 Ombudsmen Act 1975, s.13(1).

10 See for a detailed analyses of the term, K. J. Keith, "The Ombudsman's Jurisdiction: What is a Matter of Administration?" *Proceedings of the Conference of Australasian and Pacific Ombudsmen 19-22 November 1974, Wellington, New Zealand*, 13.

11 For a full coverage of the New Zealand ombudsman's jurisdictional limitations, see K. J. Keith, "The Ombudsman and 'Wrong' Decisions" (1971) 4 N.Z.U.L.R. 361; and by the writer, *op.cit.* n.8.

A. The Last Resort Clause

The New Zealand ombudsman has a general policy of acting as an institution to be resorted to by citizens when they have exhausted all other reasonable avenues. He has a discretion to refuse to investigate on the grounds that the complainant can seek or is contemporaneously seeking a remedy in law or administrative practice.¹² It is that ground which enables him, in complaints under study, to inform a complainant who is writing to the Ministers of Justice and Social Welfare and the Ombudsman at the same time, that he declines to investigate until the Ministers' enquiries have been completed, and to tell all complainants who can apply for review by the Social Security Commission to do so.¹³

There is an additional reflection of the last resort nature of the office which, in practice, plays a large part in circumscribing its handling of social welfare complaints. Section 13(7) (a) states, inter alia:

Nothing in this Act shall authorise an Ombudsman to investigate —

(a) Any decision, recommendation, act, or omission in respect of which there is, under the provisions of any Act or regulation, a right of appeal or objection, or a right to apply for a review, available to the complainant, on the merits of the case, to any Court, or to any tribunal constituted by or under any enactment, whether or not that right of appeal or objection or application has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired

The creation of the Social Security Appeal Authority in 1973 therefore seemed to bar the ombudsman from looking at all matters with which the Authority was able to deal.¹⁴ Under the Social Security Act 1964, appeals lie to the Authority against any "decision" or "determination" of the Social Security Commission under Part I of the Act, which includes most social welfare benefits.¹⁵ Nevertheless, in practice, there is some room for an ombudsman to investigate a matter which is not a "decision" or "determination" but which relates to one. The ombudsman is empowered to investigate "decisions, actions, recommendations or omissions".¹⁶ The Department and the Commission do not make "recommendations" under Part I of the Social Security Act 1964, and their substantive "decisions" or "actions" are obviously within the authority's jurisdiction. "Omissions" is left, and that cannot simply refer to failures to grant benefits — they would still be "decisions". An omission cannot be the refusal to grant a benefit. The procedure of the decision, the way in which it is made, will be covered. In Sir Guy Powles' terms, complainants must allege omissions ". . . in the administration of benefits".¹⁷ The

12 Ombudsmen Act 1975, s.17(1) (a).

13 The Commission is not a "Court" or "tribunal" within s.13(7) (a), and so the discretion providing for a remedy "in law" is used.

14 The Authority was intended to take over the ombudsman's existing function in the social welfare field: see the *Report of the Royal Commission on Social Security* (1972) App. J.H.R. H.58, chapter 29; and see generally A. J. Pirie, *The Old Despotism Renewed: Social Welfare in New Zealand* (LL.M., Administrative Law Research Paper, V.U.W. 1976, 47-52).

15 Social Security Act 1964, s.12J(1).

16 Ombudsmen Act 1975, s.13(1).

17 *1975 Annual Report* 7. The Ombudsmen Act 1975, s.13(1) limitation of jurisdiction to actions "relating to a matter of administration" may be interpreted in a wide sense — here, Sir Guy seems to be using it in a narrower procedural sense.

full range of possible omissions was once outlined by the current Chief Ombudsman in respect of local government complaints, and some are equally appropriate in this context. They are failures to¹⁸

- (2) . . . obtain accurate, complete and relevant information;
- (3) . . . consult affected parties;
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- (6) . . . inform affected parties of decisions accurately and adequately;
- (7) . . . act in appropriate time;
- (8) . . . be prepared to revise or reverse decisions or actions taken where circumstances warrant this course;
- (9) . . . act with appropriate courtesy.

So, the ombudsman will not deal with the merits of a Commission or departmental decision upon the domestic purposes benefit. Typically, he writes to beneficiaries who complain of reductions in, or terminations of, benefits:

You should be aware that if you believe your benefit has been incorrectly reduced, you have a right to apply to the Social Security Commission to review the local offices decision. Your application can be made by writing to the Commission [C/- District Office], Department of Social Welfare, or by completing forms available at any office of the Department. If your application is unsuccessful you then have a further right of appeal to the Social Security Appeal Authority.

Equally clearly, there are procedural matters which the Ombudsman will handle because the Appeal Authority will not: complaints of a payment sent to the wrong person; of recovery of overpayments; of delays in making payments; of failure to adjust deductions from benefits in line with increased rent demanded by the Housing Corporation; and delays in making review decisions.

The lines, it is submitted, begin to blur. The ombudsman can surely investigate an action such as a practice followed by the Department in obtaining information. Secondly, cases can be found in which he has helped beneficiaries in dire financial straits, regardless of jurisdictional limitations. Thirdly, there is a type of complaint which, on its face, may relate to procedure from the ombudsman's viewpoint but which, to the complainant, really concerns whether he or she will be able to keep or regain the benefit. One woman complained on behalf of her aunt about the termination of her aunt's benefit under section 63(b) of the Social Security Act 1964, the substance of her complaint being the aunt's denial that she was living in a de facto relationship. She also complained that the benefit had been cancelled without prior notice, without a written reason and without enquiries being made of the beneficiary herself. The Ombudsman responded:

[The] decision to cancel the benefit is not a matter I would normally investigate because of the existence of review and appeal rights The manner in which the Department terminated benefits payments . . . can be the subject of my investigation. If you believe that the Department omitted to make proper enquiries, including those directly of your aunt, before terminating the benefit and failed to give prior notice or any explanation for the decision, these are matters which I could examine.

The Ombudsman's letter to the Director-General of Social Welfare requesting a report continued the distinction: "This complaint concerns the manner in which . . .

18 G. R. Laking, *Speech to the Annual Conference of New Zealand Institute of Building Inspectors* March 1977 (unpublished), in L. J. Dally, "The Ombudsman and Local Government" [1977] N.Z.L.J. 270, 272.

[the] Domestic Purposes Benefit was recently terminated". But from this point on, the distinction is blurred. The Ombudsman also in this letter to the Department made a statement that "Mr [X] is her aunt's fiance but she denies that he is currently living with her." He then requested, quite simply, "a report on this complaint". That report was in part directed towards whether section 63(b) was satisfied — a question of substance:

The decision to suspend Mrs [X's] benefit payments on the basis that a de facto relationship existed at this time was an ill-considered one. Although Mrs [X] admitted that she had moved into her fiance's house on a renting basis and that Mr [X] stayed occasionally at weekends this on its own was not sufficient evidence to establish that circumstances required by section 63(b) existed.

Procedural errors were admitted by the Department. The result was that the benefit was resumed. Clearly, there was no need for the Department and the Ombudsman to dispute whether there existed here a situation which satisfied section 63(b), as the Department conceded that one did not exist. But the investigation of this complaint demonstrates that, when a complainant is in essence denying the validity of a substantive judgment made by the Commission, as here, grounds can be formulated in a way which satisfies both the restrictions imposed by the Social Security Act 1964 and the Ombudsmen Act 1975, and the complainant. To this complainant, therefore, there must have seemed little difference between alleging a failure to give proper reasons for the termination of a benefit — as phrased by the Ombudsman — and alleging that the benefit should not have been terminated under section 63(b) because the beneficiary and the alleged de facto spouse were not in fact living together — as she phrased the grievance.

B. The Section 13(7) Proviso

Notwithstanding the bar in section 13(7)(a) of the Ombudsmen Act 1975 of investigation if a statutory right of appeal or review on the merits exists, there is a proviso which states:

Provided that the Ombudsman may conduct an investigation . . . notwithstanding that the complainant has or had such right if by reason of special circumstances it would be unreasonable to expect him to resort or have resorted to it.¹⁹

The office is one of last resort. The primary rule must be that existing statutory rights should be used; the proviso is, of its nature, of only secondary importance. So, the Ombudsman wrote in response to a general enquiry from a regional consumer group:

It is impossible to lay down in any general way what might constitute special circumstances which would persuade me to take up a complaint. The point can be decided only by reference to the facts in a particular case. It is clear by the intention of the Legislature that this is the channel which should be used and for that reason I rarely feel justified in pre-empting that course.

19 Note also the s.17(1)(a) discretion to refuse to investigate where a remedy is available to which it would have been reasonable for the complainant to resort. This phrasing is in substance no different from that in the s.13(1)(a) proviso: see J. F. Richardson, *Proceedings of the Fifth Conference of Australasian and Pacific Ombudsmen* (Wellington, 1981) 706.

The ombudsman's practice, then, will be to inform the complainant of his review and appeal rights where relevant and to inquire whether such special circumstances exist. In none of the complaints under study where this inquiry was made did the complainants respond; they could be classified "declined".²⁰

The proviso can, however, provide a means for an ombudsman to assume jurisdiction in a small number of cases. An attempt may be made to isolate criteria which are relevant in the social welfare benefit context to its exercise. First, the importance of the benefit to a complainant — broadly, the nature of the issue involved — may dictate that avenues of appeal be by-passed in favour of a more expeditious remedy. Desperate financial need may constitute a special circumstance in which an ombudsman should intervene.

Secondly, and related to the first point, there is delay experienced when using a body such as the Social Security Commission or the Appeal Authority. Complaints under study alleging unreasonable delay by the Commission were sustained. To a complainant whose sole income is the domestic purposes benefit, for instance, a review and appeal process which takes months to complete, during which time a benefit may not be paid, is simply too long. If the review is delayed, the appeal will also be delayed; the appeal cannot be lodged until the review has been completed.²¹ The Ombudsman wrote to the Department in one case:

It seems to me that once the Commission has reviewed a departmental decision pursuant to section 10(6) of the Social Security Act 1964, the Commission's decision should be conveyed forthwith to the beneficiary so that advantage can be taken of the appeal procedures at the earliest possible juncture. It seems to me essential in cases such as this, where delays are likely to cause financial hardship, review decisions should be made as quickly as possible and conveyed to the interested parties immediately.

The appeal in this case was heard on 25 and 26 May of the year and a decision was given in November. The solicitor wrote on 27 October to the Ombudsman that his client had enquired about an emergency unemployment benefit before the appeal hearing and was told that the file was at Head Office and that her application for an emergency benefit could therefore not be considered.²² The solicitor's following statement illustrates the factual intricacies that made delay so important to his client:

What is relevant is that from early February 1977 right through to the present date no benefit of any kind has been paid and my client has been existing by receiving charitable donations amounting to some \$25 a week . . . and regular payments of maintenance from the husband amounting to \$33 a week and up until recently those payments were ensured by an attachment order on the husband's wages. The husband has since changed his employment and there is going to be some difficulty about getting a fresh attachment order although the husband had indicated that he will continue making payments on a voluntary basis.

At present my client has exercised her right to appeal on a point of law and the writer realises that the Appeal Authority, after hearing 100 pages of transcript evidence had to give the matter much careful thought to bring down a decision that would be fair to all parties.

20 Under Ombudsmen Act 1975, s.17(1)(a).

21 Social Security Act 1964, s.12J(3).

22 In fact, the domestic purposes benefit was cancelled on s.63(b) grounds and that ground for termination would also apply to any emergency benefit.

However, while the processes of the law have taken their course, my client's financial position has deteriorated quite drastically.

The Ombudsman will usually investigate the cause of any delay and attempt to have the matter expedited. It would be only where he cannot do so that the exercise of the proviso should be considered.

Thirdly, it is possible that going to review and appeal will cost too much for the complainant, or at least an amount disproportionate to the amount he stands to gain. Quite clearly, although this factor may be significant in the planning and local government context where tribunals and court hearings necessitate legal representation, review before the Commission and appeal to the Authority are much cheaper. Review costs nothing. Appeal does not require legal representation, although it may in some cases be useful. The procedures for lodging a review or appeal should not present an applicant with many difficulties. The practice of the New Zealand ombudsman in social welfare matters may not be to treat cost as a significant factor and instead to refer a complainant who requests legal assistance to the district Legal Aid Committee.

Fourthly, the nature of the benefit "contest" between the Department and the complainant may mean that the ombudsman's procedure is preferable to others. He normally acts in an investigatory rather than adversary manner. There will be a tactful enquiry into the facts which will not demean the complainant. At the same time, because he can seek any information he wants, he is not limited by the rules of evidence that may impede a judicial enquiry. His enquiry is thorough. He suffers only one disadvantage as against an adversary body: when put in the position of hearing irreconcilable evidence, cases under study showed that he finds it difficult to choose and prefers to avoid forming an opinion.

Finally, the nature of the statutory remedy will have to be taken into account. If it is seen as too cumbersome and formal for people who are not articulate, this may also be a factor to weigh. Certainly, the Ombudsman does not regard review by the Commission or proceedings before the Appeal Authority as cumbersome.

*C. One Important Discretion*²³

Section 17(2) (e) of the Ombudsmen Act 1975 gives the ombudsman a discretion to decline to conduct an investigation where he is of the opinion that the complainant does not have a "sufficient personal interest" in the subject-matter of the complaint.²⁴

There may be, under this provision, examples of a specific type of complaint seen only in the benefits area. The suspicion is sometimes that the complainant wishes to use the office as an avenue for seeking information about his spouse which the Department will not release to him. He may be disgruntled and wish to cause his ex-partner difficulties. The complainant in one case alleged that his ex-wife was receiving a domestic purposes benefit while living in a de facto relationship and

23 Other discretions exist (see, for coverage, *op.cit.* n.8), but the only other at issue in the files under study was the ban on review as a remedy in administrative practice or law (s.17(1)(a)).

24 See also s.13(1) under which the action complained of must be "affecting a person . . . in his . . . personal capacity."

that the Department only terminated the benefit a year after he, the complainant, had informed it of the existence of her de facto relationship. The Ombudsman required evidence of the complainant's personal interest in the matter and tactfully reminded him that the office was not to be used as an avenue for gaining information which the Department would not release:

I should also point out that in the event that I commence an investigation of the complaints you have made, I will be very limited in what I am able to report to you with respect to my findings. This is because the contents of the Department's files relating to [the] benefit are confidential and I am therefore not at liberty to pass on to you information from them. You may care to bear this in mind when replying to this letter.

The complainant's response as to his personal interest was two-fold. First, he stated that the Department's failure to act upon the information he gave it concerning the alleged de facto relationship between his wife and another man added to his liability for maintenance. The Ombudsman pointed out that his maintenance obligation would exist irrespective of whether his ex-wife was in receipt of a benefit. Secondly, he stated that his wife's attitude while drawing the benefit illegally had a detrimental affect on his relationship with his children. The Ombudsman responded that responsibility for that attitude could not be attributed to the Department. "This must surely lie with you and your wife". After further correspondence along the same lines with the complainant, the Ombudsman again stated:

in the event that I did commence enquiries, I would not be able to pass to you the information which I found on the Department's files. It therefore seems to me that in the end result my investigation would not provide you with the satisfaction you are seeking.

III. PROCEDURE: THE INFORMAL ARRANGEMENT

A. *The Foundation of a Special Procedure*

In the social welfare field, the ombudsman is being resorted to by citizens who are sometimes in desperate need and require immediate help. One letter, quoted at length, makes the point vividly:²⁵

I write to you as I am unable to contain my worry over what will become of my son and myself. I rang Social Welfare when I finished working and . . . was told that by working, Domestic Purposes Beneficiarys cut their own throat and I could not expect any help from their department.

I did not just decide that I was going to stop working, I enjoy working. I'm sure if you refer to my file it will show that I've always worked part time. It was only due to the fact that my job required someone to work full time because of an increase in workload and there was no opening at a near by branch for someone to work only Thursdays and Fridays. My son has to be taken for extra coaching as he has an eye sight problem on other week nights.

My benefit year is from mid August to mid August and as I have always worked I have received a reduced benefit. I now find it impossible to live on \$45 a week, as my rent alone is \$27 a week without taking into consideration normal outgoings like power, telephone, groceries, clothing, lawnmowing costs, hire purchase and the cost of coaching for my son's reading coaching. I'm at my wit's end as to what will become of us . . .

There is no way we can live on \$45 a week, what is to become of us, when our rent got so far behind and I can't pay the income bills? It seems so unfair when I've tried to help myself by working in the past and now I'm being penalised.

Please help us.

25 Spelling uncorrected.

The office responded immediately by arranging an interview for the complainant at the Department's District Office. The problem was speedily resolved, to the complainant's delight. It ignored the fact that the reduction due to earnings was an error appealable to the Authority. The section 17(1) (a) bar therefore operated, at first sight, but several arguments for allowing jurisdiction here can be forwarded. First, the section 17(1) (a) proviso allowing such investigations where special circumstances exist could apply here. The urgency of the complainant's need for assistance rendered review — a slow process — totally impractical. Secondly, the flexibility with which the office treats its jurisdictional provisions, the desire to help when needed being more important, seems appropriate. Thirdly, a procedural error, not appealable may have been located. The complainant may have been misinformed by counter staff at the Department's district office. Clearly the ombudsman would have jurisdiction here.

In particular, it is the way in which their situations have been handled by the Department of Social Welfare that leads complainants to go to the ombudsman. In one case, the Ombudsman expressed annoyance at an error in information given by the Department to him, which he had passed on to the complainant. The complainant had been led to expect a payment of over \$400 on a certain date. The complainant had in fact set considerable store by the payment which the Ombudsman had informed her she would receive: she was intending to pay \$200 air fare to fly her daughter back from Australia to look after her (the complainant). In another case, the procedure was obviously just as important as the substance. According to the casenote in the *Annual Report* for 1980,²⁶ the Department had failed to make proper inquiries, including ones directed at the beneficiary herself, before terminating her benefits, and it had failed to give notice or explanation of the delay. The Department's report to the Ombudsman on the complaint revealed further errors. Payment of the benefit should have been continued until the investigations were complete. A denial of a de facto relationship once the benefit was suspended should have prompted more investigation before continuing the suspension; the beneficiary did not receive written notification of the decision to suspend payment and the reason for it; and she was not informed of her right to apply for a review of the decision. That catalogue of mistakes showed, at base, an informational problem. As the Ombudsman stated in his casenote, the dependence of the beneficiary upon her benefit imposed a responsibility upon the Department to give that information:²⁷

Under the provisions of the Social Security Act 1964 every person who is in receipt of a benefit is required to advise the department without delay of any material change in his or her circumstances that may affect the rate of benefit payable. The reason for this provision is obvious and it seems to me that it imposes an equal obligation on the department to inform a beneficiary when it makes a decision to reduce the benefit which that person has been receiving. In many instances beneficiaries are totally reliant upon their benefit and, therefore, any decision to withdraw or reduce it can have a profound effect. Without any prior notice of such a decision a beneficiary has no opportunity to reorder his or her financial affairs to take account of the reduction in income.

B. The Arrangement

Most social welfare complaints are handled according to the office's usual pro-

26 *1980 Annual Report* 34.

27 *Idem.*

cedure. This involves, briefly,²⁸ submission of a complaint in writing to the office,²⁹ a request by the office to the body concerned to make a full written report on the matter,³⁰ and, where the complaint is not resolved during the investigation, a final opinion by the office. The party to whom the opinion is unfavourable will have first been given an opportunity to comment.³¹

The usual procedure is informal, confidential to the parties concerned³² and sufficiently flexible to allow each complaint to be dealt with in the most appropriate way. The ombudsman and the Department have agreed, however, that a minority of social welfare complaints can be dealt with even more informally. In direct response to the considerations outlined in Part IIIA of this article, the ombudsman's office operates what it terms an "informal arrangement." It is tailored to deal expeditiously with some social welfare complaints.³³ Where a complaint is made which at least on face value could be resolved quickly — typically, it seems, delay in the payment of a benefit or in replying to correspondence — the ombudsman's office will first telephone the director of the appropriate district office and give the relevant details as provided by the complainant. A week is then allowed for the district office to resolve the complaint and report back to the ombudsman. One complainant wrote to explain that his sister, a solo parent, had her benefit terminated without explanation. When she enquired as to the reason, she was told she was living in a de facto relationship. This was denied. The Ombudsman informed the district office of this by telephone and was told that the beneficiary and the alleged de facto spouse had had "an on-off relationship for some time". The alleged de facto spouse had acknowledged that he was living with the woman in a written statement on 29 May 1980. The benefit was then cancelled. On 15 June 1980, he moved out and the beneficiary requested its reinstatement. The Department informed the Ombudsman that the benefit would be restored as from 16 June 1980.

Once the district office has reported back, the ombudsman asks the complainant whether the complaint has been resolved to his or her satisfaction.³⁴ If he receives an affirmative answer, he advises the Director-General in writing of the complaint, the actions taken by the district office and of his decision to discontinue the investigation on the grounds that the complaint had been resolved and no further enquiries were therefore necessary.³⁵ If the district officer replies to the

28 For a fuller outline of ombudsman procedure — including the possibility of interviews and site visits — see by the writer "Ombudsmania Revived: The Local Government Complaints" (1980) 10 V.U.W.L.R. 413, 420.

29 Under the Ombudsmen Act 1975, s.16(1), every complaint must be in writing.

30 Ibid. s.19(1): The ombudsman can require to be furnished with any relevant information, documents or papers as in his opinion relate to the complaint.

31 Ibid. s.18(3): while no person has an absolute right to be heard by an Ombudsman, where an organisation or person may be adversely affected by a formal report or recommendation within s.22, that body or person must be heard.

32 Ibid. s.18(2).

33 It is also used in some immigration and inland revenue matters, 1981 *Annual Report* 4. See also Bowie in this issue.

34 The ombudsman must in any case inform the complainant of the opinion and the reason for it: Ombudsmen Act 1975, s.17(3).

35 It is discontinued under s.17(1)(b). In the *Office Manual*, Part IV, it is "s.17(1)(b)A: resolved in the course of investigation."

ombudsman that the complaint cannot be sustained or if the complainant is not satisfied with the outcome, the normal procedure of seeking a written report from the Department should be followed.³⁶

The informal procedure has undoubtedly worked very well. The Ombudsman has commented that “. . . as far as this office is concerned it has found . . . telephone enquiries to be most satisfactory . . .”. There are, however, some risks and disadvantages associated with this procedure. The first risk is of lack of thoroughness. The requirement that a deciding body give written reasons for a decision is likely to make the decision a more careful one; so also, dealing in writing with a complaint may make the Department more careful. The risk was illustrated in one case under review. A complainant informed the office of delay in a changeover in her benefit from a domestic purposes benefit to national superannuation and of a delay in making the adjusted payments. The Ombudsman telephoned the district office of the Department on 3 February 1981 and cleared the matter up. He was told over the telephone that the complainant would be sent \$139.32 that week and \$461.94 on 24 February of that year to cover all arrears from the date she qualified for national superannuation. The Ombudsman wrote to the complainant on 4 February explaining this and stating that as the Department appeared to be taking action to remedy the delay, no further enquiries by him would be necessary unless she wrote to him if she did not receive the payments. On 23 February, the Ombudsman wrote to the Department explaining the complaint and saying that as he had not heard further from the complainant, he assumed that the payments had been made. He discontinued his investigation. On 26 February, the complainant wrote again to the Ombudsman stating that the Department did not send her \$461.94 because it informed her, it had made a mistake; she would instead receive \$139.02 on 10 March. Clearly, the Ombudsman should have waited until the complainant had expressed satisfaction before he discontinued his investigation to ensure that the case was resolved. More importantly, the Department should have informed the Ombudsman of its error as soon as it was discovered. The Ombudsman wrote in exactly those terms to the Department on 11 March:

[I]n the event a similar situation arises in the future, it would be appreciated if the office concerned could get in touch with my office as soon as possible after the error is discovered.

The Department replied on 29 April that “Districts have been asked to communicate with your office as soon as possible when it is discovered that the original advice given to your office is incorrect.”

The second and third risks are possible disadvantages from the viewpoint of an ombudsman. If each complaint is dealt with over the telephone, it becomes isolated. It is harder for the office to see any pattern of defective administration which could be the subject of comment. In contrast, a series of thoroughly investigated matters, reports on which have been received from the Department, can be scrutinised separately and then placed together as part of an overall perspective.

36 See Ombudsmen Act 1975, s.18(1) under which the ombudsman must inform the Head of the Department of his intention to undertake an investigation.

The *1980 Annual Report*, for instance, was able to point out that the Department had terminated a benefit on several occasions without notice and to express the hope that the Department would recognise a general obligation to inform beneficiaries of proposed cancellation.³⁷ The office does however record fully each complaint dealt with by way of telephone enquiry. Similarities between complaints may still be easily identified. Should a pattern of defective administration become apparent, the office may then decide to request written reports or to conduct enquiries on its own motion.³⁸ Further, any widespread use of the informal arrangement would pose a threat to the perception of the office as an institution of last resort. The danger is that citizens will start to use the office simply as a way of placing pressure on the Department to expedite benefit and review applications and to reinforce and present new information — in effect, as a type of pressure group.

There are, obviously, complaints for which the informal arrangement is unsatisfactory. First, associated with the first drawback outlined above, some are simply too complex to resolve over the telephone. A departmental report will be required.

Secondly, some complaints may be of a type that can be resolved only by negotiations between an individual and the Department, assisted by an ombudsman where necessary. In one complaint, a beneficiary had his additional benefit reduced by \$16.00 as a result of changes to that benefit. The resulting financial difficulties forced him to send one of his two dependent daughters to live with his other married daughter. In 1980, his additional benefit was increased by \$2 — because of an increase in accommodation costs — and he was informed by the Department that a cheque for \$60.00 arrears due to him from this increase would be posted. In error, the Department posted the cheque to the married daughter who cashed and spent it. The Department stated that the daughter should repay the complainant, but the complainant refused to allow his daughter to be “penalised” for a departmental error. The Ombudsman would have been hard-pressed to resolve this issue on the telephone. Contact with both parties was necessary. Accordingly, he first wrote to the complainant agreeing to investigate but requiring answers to certain questions.

The Ombudsman wrote, secondly, to the Director-General of Social Welfare outlining the nature of the complaint and stating the complainant’s position that the Department should be responsible for remedying its own error. He sought a report. The departmental report stated:

Unfortunately when issuing the payment it was inadvertently sent to the daughter. The daughter . . . was contacted by phone and she agreed to refund the money to her father, but [he] was not satisfied with this arrangement and refused to discuss the matter with the [district] office.

A further call was made to [the daughter] . . . and she advised that she had paid \$30 to her father, and with his agreement, had retained the balance as repayment of monies he owed to her. In view of the fact that the matter seems to have been resolved between the father and his daughter, it is considered that no further action is warranted apart from instructing staff concerned to take more care in the issue of similar payments. This will be done.

37 *1980 Annual Report*, 33.

38 Section 13(3).

Obviously the complainant had made an arrangement with his daughter which effectively resolved the matter. The Department was clearly aware of its error. The Ombudsman could appropriately discontinue his investigation.

IV. IMPACT: RIGHTS AND ENFORCEABILITY

An ombudsman can form the opinion that the decision, recommendation, act or omission which was the subject matter of the investigation:³⁹

- (a) Appears to have been contrary to law; or
- (b) Was unreasonable, unjust, oppressive or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
- (c) Was based wholly or partly on a mistake of law or fact;
or
- (d) Was wrong.

He can also be of the opinion that

in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

In theory, an ombudsman may form one of these opinions after he has concluded his investigation into a complaint.⁴⁰ In practice, however, complaints under study were formulated either by the office or by the complainant in these terms before or during the investigation. The section provides a framework within which the essence of a complainant's allegation can be stated. Of the section 22 terminology, the complaints under study utilised only "unreasonable". The word is plainly a catch-all. It is remarkable that none of the other terms were used. Several comments can be made. First, the office must retain some flexibility in its use of section 22(1),⁴¹ for to be able to make a formal recommendation it must find some fault with the Department within the meaning of the subsection. The inherent width of "unreasonable" enables such fault to be expressed in section 22(1) language. Secondly, because of the existence of the informal arrangement, there is often little necessity for thought to be given to expressing the complaint in writing until it has been resolved, when the ombudsman will inform the Department of the complaint. Thirdly, other language is utilised. Complaints allege "failures" by the Department to enforce maintenance orders, to advise of entitlement to benefit, of appeal rights or of "delay" in change over from domestic purposes benefit to national superannuation. Even a complaint about an enquiry as to an amount owing on additional benefit is phrased simply as "a request for statement of benefit entitlement". Finally, there is an overlap between "unreasonable" and other section 22 terms. Five of the complaints under study used the term "unreasonable". Replies

39 Section 22(1).

40 Section 22(2).

41 Sir Guy Powles has stated "no firm rules have been developed with regard to these grounds and indeed it would probably be unwise to develop any": "The Citizen's Rights Against the Modern State and its Responsibilities to Him" (1964) 26 N.Z.J. Pub. Admin. 1, 16.

in two cases made references to the substantive decisions and directed the complainants to the review and appeal procedures. In the other three complaints, the allegations which were investigated utilised the terminology. So, to a complainant:

I understand that you consider the Department's requirement that you and [your alleged de facto spouse] provide statements to the effect that [the alleged de facto spouse] will not stay overnight at your home otherwise your domestic purposes benefit payments will be terminated is unreasonable.

And to a solicitor:

Your alleged continuing unreasonable delay by the Social Security Commission in notifying your clients of the outcome of their applications for the review of their entitlement to the additional benefit.

Outlines given above of the facts in these cases demonstrate that other section 22 terms such as "unjust", "oppressive" and "wrong" could equally be used. The act of requiring a beneficiary to make a statutory declaration that she will not have sexual intercourse with a male friend more than once a fortnight is an act in accordance with a practice that is unreasonable within section 22(1)(b); and the Department's decision to discontinue a benefit based on wrong information that the beneficiary is living in a de facto relationship is an action based wholly or partly on a mistake of fact within section 22(1)(c). On the other hand, limits in sections 13(7)(a) and 17(1)(a) to the ombudsman's jurisdiction plainly prevent him from using section 22(2) to scrutinise the merits of discretionary powers.

Under his statute, an ombudsman can form an opinion:⁴²

- (a) that the matter should be referred to the appropriate authority for further consideration; or
- (b) that the omission should be rectified; or
- (c) that any decision should be cancelled or varied; or
- (d) that any practice on which the decision, recommendation, act or omission was based should be altered; or
- (e) that any law on which the decision, recommendation, act or omission was based should be reconsidered; or
- (f) that reasons should have been given for the decision; or
- (g) that any other steps should be taken . . .

Thus an immediate assistance may be rendered — (a), (b), (c), (f) (g) — and a more general reform may be promoted — (d), (e), (g). Such complaints are termed the "sustained" complaints. As well, the ombudsman has a discretion to discontinue investigations "having regard to all the circumstances of the case" under section 17(1)(b). He utilises this, inter alia, where a complaint is rectified by the Department in the course of his investigation.⁴³ Of the files studied, six complaints were resolved. Two of the sustained cases concerned delay. One complainant's application for review remained unactioned at the district office from early April 1981 to 23 June 1981. The other complainant's file was submitted to Head Office for review without a detailed statement of the applicant's income and expenses. Without the statement, the Commission was unable to decide whether a grant under section 61G of the Social Security Act 1964 would have been suitable. In the third "sustained" case, the Department allegedly failed to make inquiries

42 Ombudsmen Act 1975, s.22(3).

43 See *Office Manual*, Part IV: s.17(1)(b)A.

of the beneficiary before cancelling her benefit on the ground that she was living in a relationship in the nature of marriage.

The three other complaints — resolved during investigation — all resulted from telephone inquiries. In one, the office was approached to deal with a complaint that the domestic purposes benefit had been terminated upon a wrong ground. An anonymous informant had informed the Department that a man was living in the beneficiary's house. The man had been living there for ten days, with the intention of affecting the beneficiary's entitlement, but he then moved out. The Department advised the Ombudsman that the complainant's benefit would be restored, that enquiries would be made to confirm the man's present address, and to obtain a declaration from him stating that he was no longer living with the complainant and that the complainant was correctly joined to the man's unemployment benefit for the period they lived together. The complainant advised the Ombudsman that she was satisfied that this would resolve the matter. The second complainant testified that the matter was completely resolved over the telephone. The complainant expressed concern at the delay in changing her benefit from domestic purposes benefit to national superannuation. The Department actioned the matter correctly as soon as the Ombudsman discussed the complaint. In the third such complaint, the Ombudsman's urgent request for an interview between the Department and the complainant was agreed to by the Department. Immediate assistance was given to the needy complainant who had been in the Ombudsman's words "unable to persuade [the] staff of her entitlement to the full benefit."

In 1972, the Royal Commission on Social Security reported that⁴⁴

Valuable though the Ombudsman's role is, he is not and should not be regarded as a social security appeal authority, having power to override the Commission or reverse discretionary decisions.

The Ombudsman does not have the power of decision-making. He merely expresses an opinion and at best can publish a report (with recommendations) or a summary of it.⁴⁶ He must send a copy of his report to the Minister responsible for the Department.⁴⁷ He can send a copy of a report and recommendations in central government complaints to the Prime Minister and can then report to Parliament as he thinks fit.⁴⁸ But he will always try to ensure that the complainant is satisfied, that the specific help needed has been given. It seems in the type of social welfare complaints handled by the office that formal recommendations will occur less frequently than in other areas. The complaint will be of delay or other error in the making of decisions for which a quick correction is the only action necessary. It was, it will be recalled, partly for this reason that the informal arrangement was instituted. As long as no inequitable general procedural practice or policy can be found which the Ombudsman has authority to scrutinise, the use of the power to recommend, it is suggested, will be minimal.⁴⁹ The Ombudsman wrote in two sustained cases on one file relating to delay:

44 *Op.cit.* n.11, p.316 (para. 24).

45 Under the authority of the Ombudsman's Rules 1962, S.R. 1962/208.

46 Ombudsmen Act 1975, s.23.

47 *Ibid.* 22(3)(g).

48 *Ibid.* s.22(4), cf. local government complaints where he cannot: s.22(6).

49 He may simply make a comment in his annual report: see *supra* n.27.

While I have formed the opinion that these two complaints can be sustained, I do not intend to make any recommendation pursuant to section 22(3) of the Ombudsmen Act. The delays which occurred seem to be specific to each. Furthermore, a decision has now been made in both cases and the beneficiaries notified of the outcome of their applications thereby remedying the continuing delay. In the circumstances, no recommendation on my part would appear to be necessary.

V. CONCLUSIONS

The office of the Ombudsman forms a valuable part of the machinery which controls the exercise of powers in the social welfare field. In practice, scrutiny of departmental procedure forms only a tenuous basis for a wider impact examination of policy. Flexibility in respect of jurisdiction and procedure, however, to cater for the requirements of social welfare beneficiaries is more apparent. A final example makes the point.⁵⁰ The complainant alleged that a senior officer of the Department omitted to investigate fully a complaint made by him against a departmental social worker. The social worker allegedly had sexual intercourse with the complainant's wife in the course of counselling her, in circumstances in which she was led to believe that the act formed part of the counselling. The Ombudsman found that there had been an omission to conduct such an investigation but that there was justification for the omission because the complaint was not sustained. However, the matter did not rest there. The Ombudsman recognised the significance of the allegation to the social worker and reacted flexibly by assuming authority to investigate further and tailoring his procedure accordingly. So:⁵¹

However, I did not consider that I could leave the matter there, because to do so would be to leave unresolved the question of whether or not there was any substance in the underlying allegation made against the conduct of the social worker, which, if not answered positively, would be extremely damaging to his future. I arranged therefore, to interview the complainant and his wife and also the social worker. As a result of these interviews I came to the firm conclusion that the allegation of sexual misconduct against the social worker was without foundation.

50 See *Compendium of Case Notes of the Ombudsman* (Wellington, 1981).

51 *Ibid.* p.20.