Judicial control of the Ombudsmen?

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Over the past twelve years, courts in Australia, Canada, and the United Kingdom have decided disputes about the powers of ombudsmen. Ken Keith reviews those judgments and the related legislation. He concludes that if the legislation is well prepared the courts have in general almost no role to play in this area, and that when the courts do impose limits on the broad powers of the ombudsmen the limits are likely to be inappropriate and to have insufficient regard to the legislation, its purpose, and the governmental system in which it operates.

This article concerns the powers of the courts to control the exercise of authority by the ombudsmen: who can invoke the courts' controlling and reviewing powers, by what procedures, in respect of what issues, and to what effect? The article is not concerned with other aspects of the relationship between the courts and the ombudsmen, such as the latter's obligation to defer to rights of appeal to the courts, nor with comparisons between the work of the two institutions in reviewing administrative action, for instance in terms of the procedures, grounds for intervention, and remedies. Others, including some contributors to this Review, have addressed those issues.[1] The paper is also not directly concerned with the other external controls and influences on the work of the ombudsmen.[2] That wider context is, however, relevant to the present study. The courts are not the only, nor in general an important, agency of control or influence in this area.

I shall consider in turn

(1) The legislative indications of the possible role of the courts;

(2) The range and nature of the cases in which courts in Australia, Canada, and England have discussed the powers of the ombudsmen;[3] and

(3) The reasoning used in some of the judgments and its possible consequences.

The concluding part will attempt to draw some lessons.

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1 On the former, see for example the articles by Maskill and Napier, in this issue, and on the latter Crawshaw, *The Ombudsman and the Courts* (LL.M. Research Paper, V.U.W. 1977).

2 E.g. Hill "The New Zealand Ombudsman's Authority System" (September 1968) 20 Pol. Sc. 40 revised and reprinted in Robinson and Cleveland (eds.), *Readings in New Zealand Government* (Reed, Wellington, 1972) 163.

3 The cases are listed in Appendix II.

I. THE LEGISLATION

The ombudsman legislation[4] in Australia, Canada and the United Kingdom is based in large measure on the pioneering New Zealand statute of 1962, the Parliamentary Commissioner (Ombudsman) Act. That contained three principal provisions bearing directly on the role of the courts. All have been carried forward, substantially unchanged, into the Ombudsmen Act 1975. Such provisions are to be found in most of the statutes under study.

The first concerns access to the courts:[5]

> If any question arises whether an Ombudsman has jurisdiction to investigate any case or class of cases under this Act, he may, if he thinks fit, apply to the Supreme Court for a declaratory order determining the question . . . .

Almost all of the Canadian statutes are to the same effect.[6] They raise the question, which is considered later,[7] whether those affected by an ombudsman's inquiry might seek relief from the courts under their general jurisdiction. The Australian state provisions widen the group of potential applicants to include the public authority whose action is questioned[8] and, in some cases, the complainant or other person having an interest as well.[9] The federal Australian statute has a provision for getting judicial advice of a distinct type. The ombudsman can require the department to seek an advisory opinion from the Administrative Appeal Tribunal on questions relating to the exercise of a discretionary power.[10]

Some of the statutes make no provision for access to the courts.[11] Again there is a question whether those affected by an ombudsman inquiry commenced under those statutes might be able to invoke the general range of judicial remedies; it too is considered later.[12]

The second set of provisions is designed to impede, not to facilitate, access to the courts:[13]

> No proceeding of an Ombudsman shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of an Ombudsman shall be liable to be challenged, reviewed, quashed, or called in question in any Court.

4 See Appendix I for the legislation discussed in this article. As indicated there, it is referred to in later notes by geographic abbreviations.
5 N.Z. s. 13(9); see s. 11(7) of the 1962 Act.
6 Alb. s. 12(2); B.C. s. 8(3); Man. s. 20; Nfdld. s. 15(2); N.S. s. 11(3); Ont. s. 15(5); Sask. s. 16 (cf. s. 15(2)).
7 Part II.B. infra.
8 Vic. s. 27; W.A. s. 29.
9 Qd. s. 28; S.A. s. 28; Tas. s. 32. The Commonwealth Ombudsman who has no such power has proposed its creation, *Second Annual Report 1979,* 54; *Third Annual Report 1980,* 39; *Fourth Annual Report 1981,* 11.
10 Aus. s. 11. For the only example to date see *Re ref. under Ombudsman Act s. 11* (1979) 2 A.L.D. 86, Brennan J. For discussions of the provision and suggested changes see Commonwealth Ombudsman, *Second Annual Report 1979,* 18-19; *Third Annual Report 1980,* 49; and *Fourth Annual Report 1981,* 11-12. The very existence of the Administrative Appeals Tribunal with rights to hear appeals on the merits (along with the Federal Court with powers of judicial review) creates a more complex set of relationships e.g. Taylor "New Administrative Law" (1977) 51 A.L.J. 804.
11 See especially the United Kingdom statutes.
12 Part II.B. infra.
13 N.Z. s. 25; see s. 21 of the 1962 Act.

All of the Canadian provisions are to the same effect.[14] Three Australian provisions preclude writs which would compel the ombudsman to investigate or which would restrain him from investigating.[15] Another precludes only the writ which compels.[16] One limitation in the coverage of these provisions is that they do not apply once the ombudsman has completed the investigation and report. Several statutes, including more recent ones, contain no such ouster provisions.[17] Whether such provisions make any difference is considered later.[18]

The third set of provisions is, like the second, protective, but this time protective of the ombudsmen and their staff rather than of their processes. In general, those officials are protected against civil and criminal proceedings: things said and information produced in their inquiries are privileged, and they cannot be called to give evidence in respect of things coming to their knowledge in the course of their functions.[19] The first protection is subject to a good faith limit in all cases, and, in some Australian statutes, to a negligence limit as well. In some jurisdictions, the leave of a High Court Judge is required before proceedings can be brought. Not all the statutes contain all these protections.

What general significance is to be given to these sections providing for access and protection? It is submitted that they show — particularly in the New Zealand-Canadian form — a wariness of judicial review. The intention appears to be that only the ombudsman would take a matter to court, only issues of jurisdiction would be raised,[20] and the participants themselves would be protected from liability for damages or penalties. This view is enhanced — and indeed the need for the express protections questioned — by a brief consideration of some of the key provisions conferring power on the ombudsman. The extent of judicial review is determined, after all, not just by the provisions which directly protect; it is determined even more by the drafting of the provisions which confer power. The basic grant of power is in respect of an "administrative action", or "action taken in the exercise of administrative functions", or an act "relating to a matter of administration". It is difficult to find satisfactory, sharp jurisdictional limits in that broad language.[21] The lack of real fetters is to be seen as well in the provisions regulating

14 Alb. s. 23; B.C. s. 24; Man. s. 39; Nfdld. s. 25; N.B. s. 23; N.S. s. 22; Ont. s. 24; Que. s. 31 (a different formulation using the standard Quebec privative clause); Sask. s. 27.

15 Qd. s. 29(3); Tas. s. 33(3); Vic. s. 29(3).

16 W.A. s. 30(3).

17 U.K., Aus., and N.S.W. See also e.g. Human Rights Commission Act 1977 and the Official Information Bill 1981.

18 Infra n. 20 and Part II.C.

19 N.Z. s. 26 (1962, s. 22); Aus. s. 33(1); N.S.W. s. 40; Qd. s. 29; S.A. s. 30; Tas. s. 33; Vic. s. 29; W.A. s. 30; Alb. s. 24; B.C. s. 25; Man. ss. 40, 41; Nfdld. s. 26; N.B. s. 24; N.S. s. 23; Ont. s. 25; Que. ss. 30, 34 and 35; Sask. s. 28.

20 In 1962 the prevailing view was that a significant area of reviewable errors (patent errors of law) did not go to jurisdiction and would be protected by a privative clause e.g. *Hami Paihana* v. *Tokerau District Maori Land Board* [1955] N.Z.L.R. 314. The area is now smaller but still exists e.g. *South East Asia Fire Bricks Sdn Bhd* v. *Non Metallic Mineral Products Manufacturing Employees Union* [1981] A.C. 363 (J.C.).

21 See Part III infra.

the investigation. The United Kingdom Ombudsman statute, one which does not have explicit protective provisions of the kind already described, provides:[22]

> In determining whether to initiate, continue or discontinue an investigation under this Act, the Commissioner shall, subject to the foregoing provisions of this section, act in accordance with his own discretion; and any question whether a complaint is duly made under this Act shall be determined by the Commissioner.

Further, subject to his obligation to allow the department and the individual who allegedly took the action in question to comment on the allegations[23]

> the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case; . . . [he] may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit . . . .

II. THE CASES

The cases to date help answer the questions: (1) who brings the cases to court, (2) using what court remedies and procedures, (3) raising what types of arguments, (4) at which point in the ombudsman's proceedings, (5) with what results (both in the specific case and more generally for the institution)?

A. The Litigants

The legislation reviewed above indicates the potential range. In practice the bulk of the cases have been brought under that legislation — by the ombudsman in all of the listed Canadian cases (except one)[24] and by the departments involved in all the Victorian cases. In 6 cases, the applicants have sought one of the general remedies, in 2 cases because they did not qualify under the specific statutory reference power and in 4 because there was no such power. A Saskatchewan agency subject to investigation sought prohibition.[25] Only the Ombudsman had the statutory reference power. In a Western Australian case third parties who claimed that they were affected by an investigation also sought prohibition.[26] They too fell outside the scope of the statutory power. The official affected by the reopening of a New South Wales Ombudsman inquiry sought a declaration that the Ombudsman was acting unlawfully.[27] Two of the 3 United Kingdom cases (where, as in New South Wales, there is no statutory reference power) were brought by local authorities — to set aside the commissioner's subpoena in one case, and for a declaration that the commissioner was acting unlawfully in taking up certain complaints in the other. The remaining case was that of a disgruntled complainant who sought mandamus to compel the commissioner to investigate.[28] That case and the Western Australian case were the only cases brought by anyone other than the Ombudsman or the department (or its members). In all the other 18 cases one or the other has referred their jurisdictional differences to the court.

22 U.K. s. 5(5). The "foregoing provisions" set out the matters subject to investigation and the exceptions to that grant.
23 Ibid. s. 7(2).
24 *Re Board of Police Commissioners of Saskatoon and Ticknell* (1979) 95 D.L.R. (3d) 473, Sask. Q.B.
25 Idem.
26 *R.* v. *Dixon ex parte Prince and Oliver* [1979] W.A.R. 116.
27 *Boyd* v. *The Ombudsman* [1981] 2 N.S.W.L.R. 308.
28 See Appendix II.

B. The Remedies and Procedures

As indicated, most cases are referred to the courts under the specific statutory powers. The Ontario Court of Appeal has said that the relevant provision[29]

> should not be given a narrow or restrictive construction or application. Answers given by the Court in response to an application made under s.15(5) [the reference power] should be designed to be helpful. The analogy between the ordinary powers of the Court to grant declaratory relief and its power to give advice by way of declaration under s.15(5) is by no means complete, and at least some different considerations apply to applications made under s.15(5).

It made these comments in rejecting an argument that it should not answer the Ombudsman's request for a declaration. The respondent argued that the matter was hypothetical (the Ombudsman had not yet decided to act), that facts were in dispute, and that it was the courts' practice to refuse declaratory relief for both reasons. While the court thought that the reasons had not in fact been made out, it stressed, as the quoted passage also shows, that the statutory procedure was to be distinguished from judicial review.

That is not to say, however, that the court will not be willing to grant review in a proper case, and to do so even where there is a specific reference power. So a Saskatchewan court has rejected an argument that prohibition cannot be sought to prevent the Ombudsman examining certain persons nor making an order questioning the relevant subpoenas.[30] The argument against the availability of the remedies was that the Ombudsman's functions were strictly administrative: he could only investigate, recommend and report; he could not impose sanctions. The Court pointed to the fact that what was in issue there was the compulsion of witnesses to testify; that examination was deemed by the Ombudsman Act to be a judicial proceeding for the purposes of perjury.[31]

But what if the challenge is merely to the investigation, reporting or recommending functions and not to the coercive powers (which in practice are rarely

29 *Re Ombudsman of Ontario and the Queen in Right of Ontario* (1980) 117 D.L.R. (3 d) 613, 616. See the somewhat similar approach adopted by Brennan J. in the matter referred by the Australian Ombudsman for an advisory opinion, supra n. 10; it was not clear in that case that the matter had been properly referred.

30 *Re Board of Police Commissioners of Saskatoon and Ticknell* (1979) 95 D.L.R. (3 d) 473, 475-476. No argument appears to have been made that the statutory reference procedure was exclusive and that the ordinary review powers of the court were not available. Such an argument would be difficult to make for a specific reason — the privative clause contemplates review for jurisdictional error (text at n.13 supra) — and for a general one — the courts require a very clear indication that their review powers have been excluded and the creation of a new remedy is not usually seen as excluding existing ones e.g. *Ealing L.B.C.* v. *Race Relations Board* [1972] A.C. 342, affirming [1971] 1 Q.B. 309 where this question was more fully considered.

31 This case shows that the procedural and remedial problems about to be discussed can be avoided prior to the report being completed, by those who deny the jurisdiction challenging, in the course of enforcement proceedings or prosecution for non compliance with a subpoena as well as directly, any coercive action of the ombudsman.

used)? The answer to that question may depend in part on the grounds pleaded.[32] They are considered in the next section. There can also be a procedural or remedial question — is there a relevant available procedure? An applicant who can take advantage of the statutory reference power has, of course, the positive answer. Otherwise, in New Zealand, the applicant will have to turn to the general remedies — an application for review under the Judicature Amendment Act 1972, a declaration, or prohibition or certiorari (if the 1972 Act is not available).

The 1972 Act provides for remedies in respect of the exercise of statutory powers and statutory powers of decision.[33] The Court of Appeal held that, as originally defined, those terms did not extend to powers of recommendation, in that case the powers of the Racing Authority to make recommendations to the Minister of Internal Affairs about race meetings to be held by a jockey club: the powers did not involve deciding on or prescribing the club's eligibility; the power of decision was the Minister's.[34] The legislature responded to this decision by widening the definition of "statutory power" to include a power "To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person."[35] Most ombudsman inquiries could probably be brought within this provision. As a matter of the availability of a remedy it would probably not matter whether they could or could not, for the 1972 Act makes it clear that the existing remedies — in this case prohibition or certiorari (depending on the time of the application), and the declaration — remain available if the statutory application cannot be sought.[36] The real issue remains: is the process of investigating, reporting and recommending itself reviewable?

Australian courts have considered that question in relation to Royal Commissions. They have held that both their processes and their reports are not reviewable.[37]

32 There may be a question of standing: have the applicants the right to bring the application? That was raised in respect of third parties who claimed they were affected by the investigation in the Western Australian case, supra n.26, and, in a related context (of the right to appeal from the decision of the original review court), in one of the Ontario cases: Re *Ombudsman of Ontario and the Queen in Right of Ontario* (1980) 117 D.L.R. (3 d) 613, Ont. C.A. The first court did not decide the matter (holding that in any event the applicants had not made out their case of procedural unfairness); the second held in favour of the third parties, 117 D.L.R. (3 d) 613, 615. That would appear to be correct: the legislation confers procedural rights on those in respect of whom there may be sufficient grounds for making a report or recommendation that might adversely affect them e.g. Ont. s. 19(3). Those claiming those rights seem to have a sufficient interest in the investigation to launch a court challenge.

33 Judicature Amendment Act 1972, ss.3,4.

34 *Thames Jockey Club* v. *N.Z. Racing Authority* [1974] 2 N.Z.L.R. 609; [1975] 2 N.Z.L.R. 768 note.

35 Judicature Amendment Act 1977, s. 10(2).

36 Judicature Amendment Act 1972, ss. 6 and 7. The purpose of the 1972 reform was to reduce procedural complexity e.g. *Ng* v. *Minister of Immigration* [1981] 1 N.Z.L.R. 235, 237, C.A. It would be unfortunate if the legislation were interpreted so as to introduce a further area for technical debate which has no bearing on the basic review questions.

37 *R.* v. *Collins, ex parte ACTU-Solo Enterprises Pty. Ltd.* (1976) 50 A.L.J.R. 471, 475; 8 A.L.R. 691 (Stephen J.); see also the cases he cites at 473. See similarly *Guay* v. *Lafleur* (1964) 47 D.L.R. (2 d) 226 and the discussion of it by the Commonwealth Ombudsman *Fourth Annual Report 1980-81,* 80-82.

> Whatever may be the tenor of the Commission's report, it will not legally affect the rights of the applicant; with or without such a report, and even, no doubt, in direct opposition to any recommendations in it, the Minister might, in his absolute discretion, take action affecting the applicant's . . . entitlements, or might decide to take no action at all. Accordingly the nature of the Commission's report neither directly affects nor in any way subjects to a new hazard the rights of the applicant . . . nor is [the report] a condition precedent to the affecting of them.

New Zealand authority, some of it very recent, is to the effect that commissions can be controlled prior to the completion of their reports by prohibition, declaration, or the application for review.[38] It also tends in the direction of saying that completed reports can be reviewed.[39]

> The effect on the reputation of persons found guilty of the misconduct described in the [Erebus] Report was likely to be devastating. At common law every citizen has a right not to be defamed without justification. Severe criticism by a public officer made after a public inquiry and inevitably accompanied by the widest publicity affects that right especially when the officer has judicial status and none the less because he has judicial immunity.

The courts which have considered the question in relation to ombudsmen have not answered it. In the Western Australian and New South Wales cases they expressly reserved it, referring to the Australian case quoted above, and, as noted, the Saskatchewan court had a narrower ground for intervention.

C. The Grounds

The cases have concerned three main arguments: (1) the agency in question is not subject to the ombudsman's powers;[40] (2) the ombudsman is not following a lawful procedure;[41] and (3) the Ombudsman cannot investigate or report on the complaint or the issues raised by it (principally because it does not involve an "administrative action").[42] All these arguments go to jurisdiction.[43] Accordingly, they could be presented by way of the statutory reference procedures (if available) and, if not, by way of an application for review, notwithstanding the privative clauses mentioned earlier.

D. The Timing

All but one of the cases related to ongoing or proposed investigations.[44] In none was there an attack on a completed report. To return to the point touched on in

38 E.g. *Re Erebus Royal Commission; Air New Zealand Ltd* v. *Mahon (No. 2)* [1981] 1 N.Z.L.R. 618 (C.A.) and the cases reviewed there. The Privy Council appeal in that case and the Court of Appeal proceedings in the Thomas case (for the High Court phase see *Re Royal Commission on the Thomas case* [1980] 1 N.Z.L.R. 602) should cast further light on this question.

39 *Re Erebus Royal Commission (No. 2)* [1981] 1 N.Z.L.R. 618, 627.

40 All the Canadian cases except the second Ontario and third Saskatchewan cases.

41 The Western Australian and Liverpool cases; and the two cases concerning the power to reopen an inquiry (the New South Wales and second Ontario cases).

42 All the remaining cases except *Re Fletcher's Application (Note)* [1970] 2 All E.R. 527. In that case the complainant argued that the Ombudsman had illegally refused to investigate his complaint.

43 E.g. de Smith, *Judicial Review of Administrative Action* (4th ed., Stevens, London, 1980) ch. 3.

44 The exception was the *Fletcher* case, see supra n. 42.

sub-Part B above, a court may be more willing to rule whether a power to investigate and report can be exercised and, if so, how, than it would be to rule on a completed investigation and report.[45] The report could, of course, be questioned in defamation proceedings, but the various statutory protections referred to earlier make that unlikely.

E. The Results

Roughly half the cases have been decided in favour and half against the position taken by the ombudsmen. The results can be summarised under the grounds referred to in sub-Part C above:

(1) In 4 cases the ombudsman was held to have jurisdiction over the body in question;[46] in 3 the ruling was against him.[47] The first set of rulings means that Ombudsmen have jurisdiction over certain planning and disciplinary bodies. As a result of the second set of rulings, the R.C.M.P. when acting as the police of a province are not subject to the Ombudsman of that province;[48] the Newfoundland Ombudsman has no power over the province's mental hospital; and the Nova Scotia office has no power over the Sydney Steel Corporation, a Crown corporation and major employer in Halifax.

(2) In the Western Australian case the Ombudsman was held to have complied with the statutory procedures; on the other hand the local authority resisting the English local commissioner's demand for documents relating to a complaint succeeded.[49] Courts in Ontario and New South Wales have held, in cases that could also be grouped under the next heading, that the Ombudsman can reopen an inquiry in respect of which a final report has been completed.[50]

(3) Of the 9 cases concerning the extent of the Ombudsman's powers over issues raised by the complainant, 4 were decided in his favour[51] and 5 against him or substantially so.[52] These decisions have consequences of a particular kind — for instance that the trial related activities of government lawyers are excluded — and of a wider potential — for instance that issues or acts which can be characterised as "judicial" or "legislative" can not be investigated. Both consequences are touched on later.

III. THE REASONS

The cases present the judges with questions of interpretation: What do the disputed provisions of the ombudsman legislation mean? And how do they apply to the facts? In this part I consider some of the reasons given by the judges for their answers, especially for the light the reasons cast on the interpretation of

45 We shall see, infra, that the nature of the ombudsman's processes is such that an application to the court might be too early in the sense that the real issues have not yet been isolated.

46 The Alberta, Manitoba, first Ontario and second Saskatchewan cases.

47 The Newfoundland, Nova Scotia and first Saskatchewan cases.

48 The first Saskatchewan case.

49 The Liverpool case.

50 The second Ontario and New South Wales cases.

51 The first and fifth Victorian, second Saskatchewan and third English cases.

52 The second, third, fourth and sixth Victorian and the third Saskatchewan cases.

statutes. The reasons and judgments are also relevant to the broader question, taken up in the final part, about the appropriate role of the courts in resolving disputes about the powers and processes of the ombudsmen.

The ombudsmen have power in respect of acts "relating to a matter of administration" or done in "the course of the administration" of an agency, "administrative functions", or "administrative acts".[53] The Ontario legislation makes the word "administration" relevant in a further sense for, instead of listing the agencies subject to the legislation, it refers generally to governmental organisations which include "administrative units of the Government".[54] Most of the cases have concerned the word "administration" and its variants.[55]

An approach based on the dictionary might suggest that only management actions are covered, and accordingly individual unauthorised actions excluded. Or the structure of the political system might exclude "policy" from "administration", the latter being concerned solely with the implementation of the former. If that view were taken, would calls for the expenditure of money for governmental purposes be excluded from the ombudsman's examination? Constitutional law and the doctrine of the separation of powers might suggest a third limit: would "judicial" functions (possibly including the work of planning and disciplinary bodies) as a consequence be excluded? Would a complaint that might lead to a change in the law?

In broad terms the Victorian courts have answered "yes" to the questions asked in the last paragraph, reading the power narrowly. By contrast, the Canadian courts have in general answered "no", upholding the breadth of the ombudsman's powers. How have they reached their differing positions? Can the judgments be reconciled or distinguished? The first of these two questions can be considered under the following headings: (a) the word; (b) the statute; and (c) the purpose.

A. The Word

The Victorian Supreme Court has, in 3 cases, interpreted "administration" as being limited to the executive functions of government and as excluding the judicial or legislative functions.[56] The principal statement of reasons appears in the first of

53 E.g. Aus. s. 5(1)(a); N.S.W. s. 5(1); Qd. s. 13(1); Tas. s. 12(1); Vic. s. 13(1); W.A. s. 14(1); Alb. s. 11(1); B.C. s. 7(1); Man. s. 15; Nfdld s. 14(1); Qu. s. 13; N.Z. s. 13(1).

54 Ont. s. 1(a).

55 Accordingly most of the discussion in this Part relates to these cases. Some of the others — those on the power of the ombudsman to reopen an inquiry (supra n. 50), on delegation by a body subject to jurisdiction to one which is generally not (the second Saskatchewan case), on the ombudsman's powers when he acts on his own motion (the third Saskatchewan case), and on the ability of the ombudsman to act on an incomplete complaint and to require information (the second and third English cases) — are considered as well.

56 *Glenister* v. *Dillon* [1976] V.R. 550, 558, 564; *Booth* v. *Dillon (No 3)* [1977] V.R. 143, 144-145; and *Glenister* v. *Dillon (No. 2)* [1977] V.R. 151, 153.

those cases. In it the Full Court held that the Ombudsman could not deal with complaints about failures by the Crown Law Department to bring matters to trial or to answer related letters. According to Gillard J., the word "administration"[57] —

> . . .in the context of this Act, . . . means the executive part of government. In the United Kingdom and the United States of America, it is apparently common practice to refer to "the Executive" as "the administration". As an illustration, I take what Professor Dicey wrote last century in *Law of the Constitution,* 8th ed. p. 484, *viz*: 'The merits and demerits of a non-parliamentary executive are the exact opposite of the merits and defects of a parliamentary executive. Each form of administration is strong where the other is weak, and weak where the other is strong. The strong point of a non-parliamentary executive is its comparative independence. Wherever representative government exists, the head of the administration, be he an Emperor or a President, of course prefers to be on good terms with and to have the support of the legislative body'.
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> Another ready example of the use of the word 'administration' as synonymous with executive action is also afforded by the terms of Article II of the mandate given to the Commonwealth of Australia over the former German New Guinea on 17 December 1920 as follows: 'The mandatory shall have full power of administration and legislation over the Territory, etc.' (See *Mainka* v. *Custodian of Expropriated Property* (1924), 34 C.L.R. 297, at p. 300).
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> The nature of the executive function and its relationship to the other traditional functions is aptly described by Isaacs, J., in *N.S.W.* v. *Commonwealth* (1915), 20 C.L.R. 54, at p. 90, where he cited Marshall, C.J., in *Wayman* v. *Southard,* 10 Wheat. 1, at p. 46: 'The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law'. In my view, the word 'administration' in this definition denotes the performance of the executive function of government referred to in such dictum and was never intended to comprehend any activity (or inactivity) in the areas of the performance of the judicial or legislative functions of government. This view finds support from the statement of the principal function of the Ombudsman to investigate actions in government departments as set out above and also the provisions of s.16 of the Act: see *infra.*

With respect, this reasoning is not persuasive. It is not persuasive even in its own terms. So Dicey does not indicate that "the executive" or "the administration" could not exercise legislative or judicial power. Indeed elsewhere in the same edition he expresses some concern about the fact that judicial or quasi-judicial powers were being conferred on officials.[58] The text of the mandate establishes, if anything, the point opposite to that for which it is used: because the mandate does not expressly confer judicial power, that power must have been vested in Australia as part of its "full power of administration".[59] The two other cases relate to the

57 *Glenister* v. *Dillon* [1976] V.R. 500, 557-558. At 556 Gillard J. also uses Holdsworth in support of his position; for comment see Keith "A Lawyer looks at Parliament" in Sir John Marshall (ed.) *The Reform of Parliament* (N.Z. Institute of Public Administration, Wellington, 1978) 26.

58 *Introduction to the study of the Law of the Constitution* (8th ed., Macmillan and Co., London, 1915) xxxviii-xxxix, xliii, 384, 385.

59 The mandate system and its later development provide yet further evidence of the tendency to use the word "administration" in a comprehensive rather than a restrictive way: So (1) article 22 of the Covenant of the League of Nations under which the mandates were established uses "administration" as a comprehensive term (paragraphs 4, 5 and 6); and (2) under the United Nations trusteeship system which replaced the mandatory scheme "Administering Powers" took over the responsibility, and the relevant provisions of the Charter use "administration" in a wide sense, articles 75, 77(1)(c), 81 and 84.

allocation of power in constitutions which exclusively confer "judicial power" on the "courts" established under the constitutions.[60] It is clear that the narrow definition for that purpose is not the only one; indeed if it were, the power in issue in the Victorian case has either been accorded unconstitutionally (since the Crown Law Department is not a "court" and cannot exercise judicial power) or it is not judicial (and is accordingly "administrative"?)[61]

A second difficulty with the reasoning is that it appears to assume that the only possible approach to the word is a separation of powers one. The Ontario Court of Appeal shows that this is not so:[62]

> To base the jurisdiction of the Ombudsman on the distinctions between executive, administrative, judicial and *quasi*-judicial powers is to build it upon quicksand. [The Court then briefly referred to the difficulties caused by classification in the judicial review of administrative action and continued:]
> Much has been done in Ontario by the *Judicial Review Procedure Act,* 1971 (Ont.), c. 48, to minimise the harmful consequences flowing from these difficulties of classification in the field of judicial review of administrative action and I think that it is unreasonable to approach the *Ombudsman Act, 1975* with this type of conceptual thinking in mind.

This passage reminds us that classification arguments based on the separation of powers have been found in administrative law as well as in interpreting constitutions. The significance of that classification of powers approach has been reduced not just by legislation like that mentioned but also by the courts.[63]

Two of the general reasons for that reduction in significance might be brought together here. They bear on any suggestion that such classification might be used in interpreting ombudsmen legislation. The first reason is that the proposed meanings of the concepts vary greatly.[64] The second point (which relates to the next sections of the paper), is that the definitions should relate to, and vary by reference to, the purpose: some powers are judicial for some purposes (e.g. in terms of the obligation to comply with natural justice), but not for others (e.g. for the constitutional requirement that judicial powers be exercised only by courts, or for the purpose of the protection of the body by the law of contempt).[65]

60 See also the cases discussed in the Privy Council judgment referred to infra n. 65.

61 Section 16, referred to in the final sentence of the reasons, is discussed in the next section.

62 *Re Ombudsman and Health Disciplines Board of Ontario* (1979) 104 D.L.R. (3 d) 597, 614. The Judicature Amendment Act 1972 (N.Z.) is based on the 1971 Act. There is similar legislation in British Columbia and the United Kingdom.

63 See e.g. Keith "The Courts and the Administration" (1977) 7 N.Z.U.L.R. 325. It is interesting that the Canadian courts which have been much afflicted in administrative law (largely through their own efforts) by classification have felt able to reject it in the ombudsmen cases, cf. e.g. Reid and David *Administrative Law and Practice* (2nd ed., Butterworths, Toronto, 1978) ch. 4.

64 This article provides some evidence, but for fuller argument, see de Smith, op. cit. supra n. 43, ch. 2 and the article cited in n. 63.

65 E.g. *Ranaweera* v. *Wickramasinghe* [1970] A.C. 951, J.C. (tax commissioner obliged to act judicially in determining objections, but not a holder of a judicial office under the Constitution), and *Attorney-General* v. *B.B.C.* [1981] A.C. 303 (local valuation court obliged to act judicially, but not a court of law protected by the law of contempt).

The Ontario Court of Appeal provides not just the warning about the dangers of conceptualism. It provides as well a constructive contribution to the meaning of "administration". Following a review of part of the wider context (discussed under sub-Parts B and C below), it adopted as a proper approach some words of de Smith:[66]

> "administrative" is "capable of . . . a wide range of meanings" and . . . in such phrases as "administrative law", "administrative tribunal" and "judicial review of administrative action", "it refers to broad areas of governmental activity in which the repositories of power may exercise every class of . . . function".

The Victorian and Ontario courts have also produced conflicting answers to the question: is "policy" within the scope of "administration"? Dunn J., in the former court, having quoted some of the relevant provisions, asserted "some general conclusions", the first of which was that[67]

> the matter to be investigated must relate to administration; a matter of policy is outside the scope of the Ombudsman's jurisdiction.

As a result he ruled that the Ombudsman could not investigate whether young prisoners should be required to sleep in dormitories or be locked in individual cells. The provision of funds for particular purposes was also outside jurisdiction.[68] By contrast the Ontario Court of Appeal referred to "one of the most common meanings of [administration]":[69]

> a power of decision where the paramount considerations are *matters of policy,* as opposed to a power where the decision is to be arrived at in accordance with governing rules of law . . . .

The court did not in fact act on the second part of this statement, but the passage is nevertheless valuable in illustrating yet another of the possible meanings of "administration".

The position in Victoria may not be as restrictive as the above decisions would indicate. The "judicial" classification is not necessarily fatal to the ombudsman's powers. The formula in the statutes is not just a "matter of administration". It is "any action *relating to*" such a matter.[70] The point has been made that the introduction of the emphasised words gives a wide connotation to the expression; any action which might be regarded as reasonably incidental to the performance of an executive or administrative function would be included.[71] Accordingly, the ombudsman has been held to have jurisdiction in respect of the judicial functions of discipline exercisable by a prison governor: they were incidental to the exercise of his administrative responsibility for due order, management and discipline.[72] This liberalising gloss at the same time adds a further complexity to the task of determining whether the ombudsman has jurisdiction.

66 *Re Ombudsman and Health Disciplines Board of Ontario* (1979) 104 D.L.R. (3 d) 597, 608-609 quoting p. 60 of the third edition of de Smith, op. cit. n. 43.
67 *Booth* v. *Dillon (No. 2)* [1976] V.R. 434, 435.
68 Ibid. 439.
69 *Re Ombudsman and Health Disciplines Board of Ontario* (1979) 104 D.L.R. (3 d) 597, 614-615 (emphasis added).
71 Gillard J. in *Glenister* v. *Dillon* [1976] V.R. 550, 558.
72 *Booth* v. *Dillon (No. 3)* [1977] V.R. 143.

B. The Statute

So far I have been principally concerned with just the word "administration" and its variants. But the word must be read in its context. That context includes the other provisions of the Ombudsman Act in issue. Again the Victorian and Canadian courts have made varying uses of them. The Victorian statute contains the following two provisions which were seen as relevant in the case concerning the Crown Law Department discussed in part above:[73]

> Nothing in this Act shall authorise the Ombudsman to investigate any administrative action taken —
>
> . . .
>
> (b) by a person acting as legal adviser to the Crown or as counsel for the Crown in any proceedings;
>
> . . .
>
> At any time — [various legislative bodies] may refer to the Ombudsman for investigation and report any matter, other than a matter concerning a judicial proceeding, which that [body] considers should be investigated by him.

What is to be made of these provisions? It will be recalled that the court in the Victorian Crown Law Department case considered that the lawyers' actions relating to a trial were not "administrative actions". But does not the first provision expressly state that such actions are "administrative actions" — and are to be specifically removed from jurisdiction? Not so said the court: these provisions were included out of an abundance of caution.[74] That would be a more persuasive argument had the introductory phrase not included the words "administrative action".

What then of the second provision? Again, if judicial matters are already excluded from the basic grant, why must they be excluded again?

Further, what is to be made here of the differential treatment of legislation? Is the inference that legislation is within power? The answer to the first question might be that the authority here is in respect of "any matter" referred by the legislative body rather than an administrative matter (or action). But Menhennitt J. took different ground. The provision, he said, strongly supported the conceptual division and had a double significance:[75]

> In the first place, it impliedly assumes that a matter of administration does not comprehend any aspect of legislative action and therefore it expressly requires the Ombudsman to investigate and report upon any matter referred to him by either arm of the legislature or committees thereof. In the second place, there is expressly excluded from the matters which may be so referred a matter concerning a judicial proceeding, thereby confirming the concept that a matter of administration is a matter that relates to the executive arm of government but not the judicial arm.

The first point seems to proceed on the basis that any matter referred from the legislature would have a legislative character. But why should it? It is not much

73 Vic. ss. 13(3) and 16(1).
74 *Glenister* v. *Dillon* [1976] V.R. 550, 559, 564.
75 Ibid. 564.

more likely that it would involve a petition to the legislature about alleged administrative error?[76] The second argument again must imply the abundance of caution argument.

The Ontario Court of Appeal in holding that a disciplinary body exercising judicial powers is subject to the power of the Ombudsman, has referred to three other provisions (which are also to be found in the Victorian Act) which refer to rights of appeal, objection, hearing and review in respect of the decision. While not conclusive they provided some assistance for they[77]

> would all seem to have substantial relevance to decisions of administrative tribunals made on a judicial or *quasi*-judicial basis and they create an atmosphere inconsistent with the view that the Act applies solely to purely executive or administrative decisions.

Other provisions in the legislation — not mentioned in the relevant Victorian cases — appear to deny as well the proposition that legislative and policy matters cannot be considered by the Ombudsman. If he comes to the opinion that the administrative action investigated

> was in accordance with a rule of law or a provision of an enactment or practice that is or may be unreasonable unjust oppressive or improperly discriminatory

he can reach the opinion

> that any practice in accordance with which the action was taken should be varied; [or] that any law in accordance with which or on the basis of which the action was taken should be reconsidered

and make appropriate recommendations.[78]

These provisions do not look directly to the "administrative action" investigated. The grounds they list may obviously, however, be inextricably entwined with it. They also suggest something of the evolution of an investigation. They call to mind a provision of the legislation which challenges, in this context, the usual concept of jurisdiction as involving decisive determination at a preliminary stage:[79]

> The Ombudsman may entertain a complaint even if on the face of it the complainant does not refer to an administrative action by an authority to which this Act applies if in his opinion there is a likelihood that the cause for complaint arose from such an action.

Statements that "the Ombudsman must be able at any time to justify an investigation as being within his powers"[80] and that he "would have no authority what-

76 Consider the traditional constitutional role of Parliament in reviewing petitions, but cf. *Standing Orders of the [New Zealand] House of Representatives* (1979) s.o. 411(a).

77 *Re Ombudsman and Health Disciplines Board of Ontario* (1979) 104 D.L.R. (3 d) 597, 615.

78 Vic. s. 23(1)(c) and (2)(c) and (d).

79 Vic. s. 14(5). See similarly e.g. Qd. s. 15(2); Tas. s. 14(5); W.A. s. 16(2); Alb. s. 11(2); Newfdld. s. 14(2); Sask. s. 12(2); and N.Z. s. 13(3).

80 *Booth* v. *Dillon (No. 1)* [1976] V.R. 291, 295.

ever even to commence an investigation" into an action if the action, as it turned out, had been taken by a person or body excluded from the Act's coverage,[81] appear to ignore this provision.

The practical importance of this preliminary power to determine whether in fact there is a matter which can be properly investigated even although the complainant has not identified it is emphasised in a case concerning the English local commissioners. The relevant legislation requires the complainant to specify "the action alleged to constitute maladministration".[82] The High Court held that the complaint must allege not only that the complainant suffered injustice but also that it was due to maladministration which must be specified expressly or by necessary inference. The importance of this requirement appears to be enhanced by the absence of such a requirement in the Parliamentary Commissioner legislation. The Court of Appeal nevertheless reversed, Lord Denning arguing as follows:[83]

> In order to give sense to the provision, I think that the word "action" there refers to the same "action" as is mentioned earlier in section 26(1). Expanded fully, section 26(2)(a) should read "specifying the action taken by or on behalf of the authority in connection with which the complainant complains there was maladministration." I realise that this means departing from the literal words: but I would justify it on the ground that it will "promote the general legislative purpose" underlying the provision: see *Nothman* v. *Barnet London Borough Council* [1978] 1 W.L.R. 220, 228. It cannot have been intended by Parliament that a complainant (who of necessity cannot know what took place in the council offices) should have to specify any particular piece of maladministration. Suffice it that he specifies the action of the local authority in connection with which he complains there was maladministration.

This passage reminds us of basic justifications for the ombudsman: ease of access

81 *Glenister* v. *Dillon* [1976] V.R. 550, 554. Deborah Shelton has called attention to two other provisions which the Victorian court in *Booth* v. *Dillon (No. 2)* [1976] V.R. 434 appears to have ignored in holding that the alleged action of an officer in making an unauthorised statement was outside jurisdiction because of the breach of a statutory duty; the Act permits the Ombudsman to reach a conclusion that the action "appeared to have taken contrary to law" (s. 23(1)(a)) and it requires him to report to higher authority where there is evidence of a breach of duty or misconduct by an official (s. 17(16)): (1977) 7 N.Z.U.L.R. 269, 273.
The Saskatchewan court has rejected an attempt by the Ombudsman to read one provision of the Act — that authorising him to act on his own motion — in isolation from the basic grant provision, thereby releasing himself from the restraint imposed by the phrase "relating to a matter of administration": *Re Ombudsman for Saskatchewan and Minister of Social Services* (1979) 103 D.L.R. (3 d) 695. This result appears clearly to be correct: the own motion provision relates to the initiation of investigations rather than their scope and subject matter. However, the implication in the judgment that individual unauthorised actions by a public servant might be outside jurisdiction is not accepted by ombudsmen in practice nor by the provisions just mentioned (the Sask. equivalents are ss. 20(5) and 24(1)(a)).

82 Local Government Act 1974 (U.K.), s. 26(2)(a).

83 *R.* v. *Local Commissioner for Administration, ex parte Bradford Metropolitan City Council* [1979] Q.B. 287, 313. See similarly Eveleigh L.J. at 315, but cf. Sir David Cairns at 318.

to files and informality of process, especially as compared with the litigant restrained by public interest immunity and relatively inflexible pleadings.[84] It also leads into the next section.

C. The Purpose

So far we have been concerned with the meaning of the word "administration", and its meaning in the context of the ombudsmen statutes. General approaches to interpretation and the approaches adopted in some of the cases being considered go beyond those two matters: the wider context and purpose of the legislation are to be drawn on. Two of the Ontario judges[85] have expressly used that province's equivalent of s.5(j) of the Acts Interpretation Act 1924:[86]

> Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

The first Canadian judgment — that from Alberta — on the powers of the ombudsman adopted a similar approach, based in this instance on the case law about interpretation rather than on the Interpretation Act:[87]

> . . . in considering the jurisdiction conferred by the *Ombudsman Act,* we must start with a conception of its purpose and then construe it in order to achieve such purpose. . . . The real meaning to be attached to the words must be arrived at by consideration of the mischief that the statute was intended to remedy and the provisions of the statute as a whole, in addition to the particular language of the section in question.

A common response to such legislative and judicial statements is to say that they are all very well in principle but to stress the difficulty of discerning the mischief and purpose, especially given the restrictions on access to legislative

84 For an early recognition of this see Aikman, "New Zealand Ombudsman" (1964) 42 Can. B. Rev. 399, 407. See also Shelton and Bowie in this issue.

85 *Re Ombudsman and Health Disciplines Board* (1978) 95 D.L.R. (3 d) 716, 721 (H.C.), and *Re Ombudsman of Ontario and Minister of Housing* (1979) 103 D.L.R. (3 d) 117, 135 (H.C.).

86 Interpretation Act, R.S.O., c. 225, s. 10. Federal and provincial statutes contain identical or similar provisions. They appear to have been neglected, but for evidence of a recent resurgence in the Ontario Court of Appeal, see e.g. *Re Xerox and Regional Assessment Commissioner* (1980) 115 D.L.R. (3 d) 428, 432-433; cf. 433-436 and 449; and *R.* v. *Budget Car Rentals (Toronto) Ltd* (1981) 121 D.L.R. (3 d) 111, 115, 117-118.

87 Milvain C.J.T.D. in *Re Alberta Ombudsman Act* (1970) 10 D.L.R. (3 d) 47, 51 quoting Smith J. in *Glenn and Babb* v. *Schofield* [1928] S.C.R. 208, 210; he went on to quote the well known statement by Lord Denning in *Escoigne Properties* v. *Inland Revenue Commissioners* [1958] A.C. 549, 565-566, which refers in turn to major statements of the purposive/intention approach made by Lord Blackburn and the Earl of Halsbury. Bayda J. refers to the same cases in *Re Ombudsman Act* [1974] 5 W.W.R. 176, 178. For the relevant legislative direction in Alberta see now Interpretation Act 1980, s. 10.

history.[88] The Albertan judge had no such difficulty. He reviewed, in a general way, the recent growth in administrative power and the related boards and tribunals, and he pointed to the inevitability of resulting clashes, injustices and imperfections:[89]

> I am sure our ombudsman came into being because of an apparent necessity that the vast body of administrative laws and those who administer them in their complete matrix be subject to scrutiny and report to the Legislature which created them.

To substantiate this view he then quoted at length from the report of a committee established by the legislature to advise on the need for a tribunal to which persons aggrieved by an administrative scheme might take their complaints. That committee proposed the establishment of the Office of Ombudsman. Having justified his reference to the report, the judge summarised as follows:[90]

> I am satisfied that the basic purpose of an ombudsman is provision of a "watch-dog" designed to look into the entire workings of administrative laws. I am sure this must involve scrutiny of the work done by the various tribunals which form a necessary part of administrative laws.

Later in the judgment, having mentioned the Ombudsman's reporting powers, the judge changed his metaphor:[91]

> [H]e can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good.

The specific issue in that case was whether the Provincial Planning Board was an "agency". (The Ombudsman has jurisdiction over departments and agencies.) "Agency [according to the Act] means an agency of the Government of Alberta and includes the Workman's Compensation Board." The judge was not impressed by the inference that might be drawn from the specific reference to one Board. The legislative purpose, he believed, would not be carried out by applying any refined or technical concept of the term "agency".[92]

88 This is not the place for an examination of that question, but for recent instances of references to Hansard see e.g.
(1) Lord Denning in the *Bradford* case quoting the "Crossman Catalogue", a reference which he considered he was able to make, notwithstanding *Davis* v. *Johnson* [1979] A.C. 264, since the catalogue had been quoted in articles and text books, [1979] Q.B. 287, 311.
(2) Mason J. used the British Hansard in the High Court of Australia in *Wacando* v. *Commonwealth* (1981) 37 A.L.R. 317, 335-336; see also Gibbs C.J. at 328-329.
(3) The Western Australian Ombudsman has justified his refusal to consider complaints against the Police Force by reference to the Act's legislative history: *Conference of Australasian and Pacific Ombudsmen,* Wellington, New Zealand 19-22 November 1974, 42.
(4) The Australian Ombudsman has used Hansard to establish his powers over recommendations to Ministers (their own actions are expressly excluded), Commonwealth Ombudsman *First Annual Report 1978,* 43.
For a valuable discussion see Brazil "Legislative History, Statute and Construction" (1961) 4 U.Q.L.J. 1.

89 10 D.L.R. (3 d) 47, 53.

90 Ibid. 58.

91 Ibid. 61.

92 Ibid. 59.

The Ontario Court of Appeal has similarly drawn on a general view of the structure of modern day government in deciding that the Health Disciplinary Board is a board of the Government of Ontario and, as such subject to the power of the Ombudsman.[93]

> It is . . . a well-known fact that a significant part of governmental responsibility is carried on by a host of bodies, often called boards and commissions, which are not part of departmental structures but generally do report to the Lieutenant Governor in Council through a designated Minister. These boards provide an organisational method of executing the Government's . . . responsibilities . . . , which is an alternative one to that of the departmental organisation.

The more specific reasons for the finding were that the Board was established by a provincial statute, the government appointed its members, and it discharged a provincially-assumed regulatory responsibility in the course of which it was required to apply provincial law.

This emphasis on governmental responsibilities might raise the question — what is the proper range of these responsibilities? This in a sense was in issue in the case in which the Sydney Steel Corporation, a Nova Scotia Crown Corporation, was held not to be subject to the Ombudsman of that province.[94] The corporation came within the statutory definition of a department but was it engaged in "the administration . . . of any law of the Province"? The court thought not. The Act is concerned with the supervision of the performance of governmental functions in the broadest sense; however —[95]

> The corporation's function is not governmental but entirely industrial and commercial — to make and sell steel. It is distinguishable from any private manufacturing company only in that it is owned and financed by the Province . . . . It is not a public utility which may be charged with a public interest and thus performs a public function. It cannot be said to be administering in any governmental sense its Act of incorporation . . . .

This reasoning requires courts to make judgments essentially of a political and economic kind: what is the range of governmental responsibilities? What is the court to make of the fact that the government has decided to be the owner and operator of the steel mill — a major employer in the Province? What if it decides to operate railways or provide an air service? Is it for the court to say that such are not governmental responsibilities? Many governments are, of course, heavily involved in such commercial and industrial activity. Should that fact narrow the apparent scope of the ombudsman's powers?[96]

The Ontario Court of Appeal in the Health Board Discipline case referred as well to the nature of the Ombudsman Office, but then cautioned as to the value

93 *Re Ombudsman and Health Disciplines Board of Ontario* (1979) 104 D.L.R. (3 d) 597, 607. See the range of reports and studies on which the court draws at 607-608.

94 *Ombudsman of Nova Scotia* v. *Sydney Steel Corporation* (1976) 17 N.S.R. (2 d) 361.

95 Ibid. 367-368.

96 Some ombudsman legislation expressly excludes certain commercial activity from its scope e.g. U.K., schedule 3, paragraph 9. But a complaint about a non-commercial case — as in the Nova Scotia case by a former employee about his dismissal — would still be covered.

that can be gained from such general ideas:[97]

> Immediately before addressing myself to the issues to be resolved I think that it would also be helpful to make a general statement of my approach to the legislation. The office of the first modern ombudsman, it would appear, was created in 1809 in Sweden (the *Justitieombudsman*). Since that time similar offices have been created in several other countries and jurisdictions. Undoubtedly, these developments and a substantial amount of literature on the subject of ombudsmen have created popular notions of what the office of an ombudsman is all about. The core running through these popular notions is that an ombudsman is a representative appointed by a democratically-elected Legislature to inquire into and report upon governmental abuses affecting members of the public. I do not think that anyone would dispute this — but all these general understandings are of no real assistance in determining the exact reach of the Ombudsman's jurisdiction in Ontario. On this particular matter the legislators in this Province have passed a statute which contains expressions which are not the duplicate of those in the legislation of any other jurisdiction which has come to my attention. It is the meaning of *these* particular expressions which requires determination in this proceeding — and not a distillation of popular notions or of the principles running through judicial decisions in other jurisdictions.

The purpose of the legislation was relevant in a further Canadian case in which the administrative power in question was exercised by a delegate. In the normal course the delegator was subject to the Ombudsman, but the delegate was not. Could the Ombudsman's powers be avoided in that way? No, said the court. It used the Alberta case to show the purpose of the legislation. That intention[98]

> could be defeated by placing a restrictive interpretation on those sections of the statute where no restrictions are specifically mentioned.
>
> . . .
>
> The purpose of the *Ombudsman Act* cannot be frustrated by "an agency of the government" delegating its responsibility to a body which, in ordinary circumstances, is beyond the investigatory scope of the Ombudsman.

The ombudsman is however a creature of statute. As such he has only the powers conferred by the statute. The purpose cannot be allowed to outrun the legislation. The passage from the health disciplines board case as quoted above makes that point. So too does the unsuccessful attempt by the English Local Commission to extract relevant documents from the Liverpool City Council.[99] The legislation conferred powers on the Commissioner to require the production of information. But it continued:[100]

> A Minister of the Crown or any of the authorities [including the City here] may give notice in writing . . . with respect to any document or information . . . or any class of documents or information . . . , that in the opinion of the Minister, or . . . the authority, the disclosure . . . would be contrary to the public interest; and where such a notice is given nothing in this Part of this Act shall be construed as authorising or requiring any person to communicate to any other person . . . any document or information . . . : Provided that a notice given . . . by any authority may be discharged by the Secretary of State.

97 104 D.L.R. (3 d) 597, 602. For a similar general statement (which appears to have little if any effect on the rest of the judgment) see *Glenister* v. *Dillon* [1976] V.R. 550, 551-552.

98 *Re Board of Commissioners of Saskatoon and Tickell* (1979) 95 D.L.R. (3 d) 473, 479.

99 *In Re Liverpool City Council* [1977] 1 W.L.R. 995 (D.C.).

100 Local Government Act 1974 ss.29 and 32(3).

The city argued that the words were plain. The Commissioner responded that it could not be so:

> So to construe the Act would be to emasculate the powers of the local commissioner and would be totally contrary to the intention of the Parliament when this legislation was before it.

Using the parallel provisions of the Parliamentary Commissioner Act 1967, he argued that the provision was not concerned with the flow of information to the Commissioner but rather with the use that he made of it. The court's answer was simple: The local commissioner statute did not say so. It was concerned with all transmission of information. The court was not able to use the "certain tolerance" in construing legislation which was not wholly clear.[101] In this case only Parliament could give proper effect to its original intent — by amending the statute.[102]

Another possible gap in ombudsmen legislation made apparent by litigation is the power to reinvestigate. Can the ombudsman take up a matter on which a final report has been made? A literal approach and one emphasising that a statutory creation has only the powers conferred by the statute, suggest a negative answer. So would an approach that compared the ombudsman to a tribunal: concepts such as res judicata and functus officio would support that. The Ontario and New South Wales courts have nevertheless given a positive answer.[103] In the Ontario High Court the Chief Justice begins with the broad, remedial, purposive approach required by the Interpretation Act, stressed in the Health Disciplines Board case. The final admonition in the quote meant that the court could not bestow powers which in its opinion are reasonable. The positive pursuit of interest and purpose can, however, carry with it the implication of powers:[104]

> [The] Ombudsman implicitly has a continuous function and has the power further to investigate subject to certain restrictions . . . . I have been driven to this conclusion by the nature of his function, the broad discretionary powers to investigate and to report and the freedom . . . to act of his own motion.

He saw the office as unique. He did not think that the court should approach the powers in the same way as it approaches the powers of the executive branch. He did, however, suggest, on the analogy of tribunal law, that the power to investigate again might be limited to evidence not previously known to the ombudsman. The Court of Appeal, in upholding his ruling (on this point almost without reasons), was not even willing to have that restriction as a matter of law.[105] (It might be a matter for the ombudsman's discretion.)[106] The New South Wales court took a similar line: "There is no res judicata or issue estoppel of any kind created by a decision of the Ombudsman." More positively, the court should be slow to construe

101 [1977] 1 W.L.R. 995, 1002-1003.
102 As it did: Local Government, Planning and Land Act 1980, s. 184.
103 *Re Ombudsman of Ontario and the Queen in Right of Ontario* (1980) 117 D.L.R. (3 d) 613, affirming 103 D.L.R. (3 d) 117; and *Boyd* v. *The Ombudsman* [1981] 2 N.S.W.L.R. 308.
104 103 D.L.R. (3 d) 117, 139.
105 117 D.L.R. (3 d) 613, 620.
106 For comment on that discretion see the British Ombudsman, *Proceedings of the Fifth Conference of Australasian and Pacific Ombudsmen* (Issued by the Office of the Ombudsman, Wellington, 1981) 87-88.

the Act in such a way that the powers of full and proper investigation are circumscribed.[107]

The Ontario Court of Appeal also showed considerable reluctance to make general, definitive rulings:[108]

> the questions [about reopening a case] cannot be determined in the abstract but must be answered against the factual background of the case. It would not be appropriate . . . to lay down in definitive terms when the Ombudsman can and when he cannot investigate further a matter . . . .

The last statement provides an interesting contrast with the willingness of other judges, particularly in Victoria, to make such rulings. So in an early case in that jurisdiction, a judge without reasons and on the basis of an incomplete selection from the legislation drew some "general conclusions", including the one about policy.[109] Two of his colleagues, a short time later, drew the very broad conclusions based on the three functions of government which we have already considered. Those two judges opted for a broader judicial task in another way. They had available a relatively narrow ground for decision (that the actions complained about fell within the specific exception about legal advisers) but they took the broad (and difficult) one as well.[110]

IV. THE LESSONS

What can we learn from these cases? The lessons might be for those who draft the legislation, for those who administer it and are subject to it (and might consider referring disputed issues to court), and for the courts if asked to interpret the legislation.

A. The Legislators

At the 1974 Conference of Australasian and Pacific Ombudsmen an official from Papua New Guinea, referring to the fact that his country was considering establishing an ombudsman, asked whether they should use the phrase "a matter of administration". Mr Dixon, the Western Australian Ombudsman, who had already had his difficulties with the phrase, was prompt and clear with his answer: "I would advise against it".[111] We have seen too that the phrase or variants of it have been at the centre of the major disputes which have gone to court.

Might the phrase not be replaced by a different form of words? That question can be answered in two parts — and in the present context mainly on the basis of the incomplete information provided by the cases. The question might have specific legislative answers: for example in respect of commercial activities,[112] questions,[113]

107 [1981] 2 N.S.W.L.R. 308, 313.

108 117 D.L.R. (3 d) 613, 617. See similarly the caution of the New South Wales court on the question of reviewability (Part II B supra) [1981] 2 N.S.W.L.R. 308, 312 G, and of Lush J. in the first Victorian case; he should not attempt to define "relating to a matter of administration": *Booth* v. *Dillon (No. 1)* [1976] V.R. 291, 296.

109 *Booth* v. *Dillon (No. 2)* [1976] V.R. 434, discussed in text at nn. 67-68.

110 *Glenister v. Dillon* [1976] V.R. 550, discussed in text at nn. 56-65.

111 Conference proceedings, op. cit. n. 88, at 42. The makers of the Independence Constitution did not act on Mr. Dixon's advice: s. 219(1) and (8).

112 E.g. U.K. schedule 3, paragraph 9.

or police staff complaints.[114] Such legislation has in fact sometimes been enacted (and see also the related point made in the next paragraph). But what of the general grant — the phrase "matter of administration" or its variants? The Australian cases show that the phrase can cause real problems, but the Canadian cases and much practice (including Australian practice)[115] show that that need not necessarily be so. Certainly there is no form of words obviously contending to displace the standard phrases.[116]

As we have seen, a second (often related) major area of litigation concerns the question whether a particular agency is subject to the ombudsman. These cases have arisen only in Canada and they have arisen because in this respect (as in few others) the Canadian draftsmen (unlike some of the Australian ones) departed from the New Zealand model which listed the bodies rather than merely defining them in a general formula. Listing appears the preferable approach: it creates certainty in an area where that is obtainable; and it facilitates proper scrutiny of the legislation when it is being considered and enacted: the extent of the application of a new remedy in terms of the bodies affected should be the subject of political decision. So, to take one example, the question whether the police should be covered should surely be the subject of explicit legislative consideration and decision. Further, the Australian and New Zealand experience suggests that the practical problems with such lists are small.[117]

B. The Ombudsmen and Other Potential Litigants

If there is a dispute about whether a body is subject to the legislation or not it is difficult to see how litigation can be avoided (unless by legislation). The question is a precise one and in general it must and can be answered at the outset of an investigation. But what about a dispute about the meaning and the application of the basic grant, in New Zealand, "an act . . . relating to a matter of administration"? It is submitted that the question will often not be a precise one nor will it be capable in many instances of resolution at the outset of an inquiry. Consider in the first place the unwillingness of some courts to give the phrase clear limits (an unwillingness which I generally support). Consider further some aspects of the ombudsman's processes: the ombudsman can act on a complaint even if it does not disclose a matter over which he has authority. A second and related point is his power to act on his own motion and to alter the shape of a complaint. Thirdly, he has wide discretions not to continue an investigation. And fourthly in the course of considering the complaint he may have wide choices about the

113 E.g. ibid. paragraph 10.
114 E.g. N.Z. s. 13(7)(d).
115 For the Australian Ombudsman's rejection of the conceptual approach adopted in the Victorian cases see Commonwealth Ombudsman *First Annual Report 1978* 20, and *Fourth Annual Report 1980-81* 63-64; see also Administrative Review Council, *Jurisdiction of the Ombudsman 1980,* paragraph 122. For a review of early practices in several jurisdictions which also largely rejected the conceptual approach see Keith "What is a 'matter of administration'?" in Conference proceedings, op. cit. n. 88, 13, 17-22.
116 See Administrative Review Council, op. cit. n. 115, paragraph 122.
117 Conference proceedings, op. cit. n. 106, 181-182.

issues he raises: he might be concerned with the adequacy of the departmental procedures (e.g., has all relevant information been weighed?), or with the correctness of the factual findings, or with the application of a policy to the facts, or with the policy itself . . . . Sometimes he might do no more than raise the issues; other times he might pursue them. Many examples might be given of these features of his powers and procedures. Some appear in this review.[118] Just one from Victoria helps make the point.[119] Several inmates in a prison complained about conditions there. Some of the complaints involved funds for additional or improved facilities. But the Ombudsman did not take the "policy" point (nor, to its credit, did the department) and did not stop at that stage. Rather his deputy inspected the prison, interviewed the complainants and made a number of observations to which the department responded. This indicated that a new building was being completed and other changes made. The Ombudsman concluded:[120]

> In the light of the action taken by the Department to remedy some of the matters complained of and in view of the fact that the rectification of the balance of the matters is largely a question of the availability of funds, which is a matter of Government Policy, the Ombudsman considered that he was unable to take any further action other than to report to Parliament by way of this Case Note, his view that a number of the facilities at Fairlea are most unsatisfactory.

The criticism might still be made that policy as such is not excluded from the ombudsman's jurisdiction. But that would be carping — he has in fact investigated the complaints, recorded some improvements and given publicity (through Parliament) to the remaining problems. The limit which he recognises relates not to his right to investigate or even to report but rather to the kinds of recommendations he makes and to his willingness to continue to press the matter.

The ombudsman then is different from a court or tribunal with "jurisdiction" — the word usually meaning a power to decide (which the ombudsman lacks) and suggesting disputes about jurisdiction which can be resolved at the outset. Louis Marceau, the first Quebec Public Protector, has developed the contrast:[121]

> A court whose sessions are public and decisions final cannot proceed without strict receivability conditions or fairly elaborate norms of procedure. It cannot give up all rules of evidence nor free itself from basic formalism, any more than it can in principle, do without the auxiliary role of attorneys. Nor can it formulate conclusions exceeding the specific cases it handles. In contrast, because he has no coercive power and can only render opinions which he hopes will be shared by the authorities, and because his investigations are informal, direct and private, the Ombudsman can easily be more available, eliminate all formalities, complete files on his own, discuss solutions freely and, finally, go beyond specific cases if necessary to influence administrative policy or even the regulation or legal text concerned. The Ombudsman has certainly not the powers of a court since his action is more or less comparable to that of a conscience but in a way he can go further and, in any case, he does not seek to fill the same need.

A further, more subjective, reason for an ombudsman's opposition to judicial resolution is that the decision might be restrictive: the Victorian cases have been.

118 E.g. the papers by Shelton, Maskill and Napier in this issue.
119 *March 1981 Quarterly Report of the Ombudsman (Victoria)* 26.
120 Ibid. 26.
121 *1973 Report* (Quebec) 66.

The British Ombudsman, the first non-public servant and lawyer to hold the position, has said that he avoids "taking a question of jurisdiction to the Courts if possible because there is a tendency for the Courts to take jurisdiction unto themselves and to take it away from others".[122] Such a reference might also cause delays.

C. The Courts

And yet . . . the growing willingness of the courts to reassert and widen their traditional authority to control public power has been widely — if not unanimously[123] — welcomed: the insistence on procedural fairness,[124] on allowing litigants access to official information relevant to their litigation,[125] on the lawful use of discretions by Ministers[126] and local authorities,[127] and on lawmakers[128] and tribunals[129] staying within the law. Why should the ombudsmen be seen differently? It is not really suggested that they should be. If they fail to comply with the fair procedures laid down in their Acts[130] or if they attempt to exercise their powers over bodies which are not subject to their authority, the court should be able to intervene. But there are several important features of the law relating to the ombudsmen that suggest judicial caution. One is that they can, in the end, "do no more than recommend or comment".[131] A second is that they are control agencies rather than themselves the direct wielders of public power. A third is that the statutes confer the powers in broad, non technical terms, with flexible procedures to match.

Those features suggest doubts about courts going beyond an insistence on the statutory procedures and the protection of authorities not subject to the legislation. When they are invited to go further, experience to date suggests that they will do one of two things: either they will give weight to what they see as the broad language and discretions of the statutes and leave the ombudsmen free to act, or they will impose conceptual or similar limits. It is submitted that the former approach to interpretation is a correct one: it recognises that the word "administrative" does not carry a single correct meaning and here carries a broad one, that

122 Conference proceedings, op. cit. n. 106, 135.
123 For a powerful dissenting voice see Griffith *The Politics of the Judiciary* (Fontana, London, 1977).
124 E.g. *Ridge* v. *Baldwin* [1964] A.C. 40.
125 E.g. *Conway* v. *Rimmer* [1968] A.C. 910.
126 E.g. *Padfield* v. *Minister of Agriculture and Fisheries* [1968] A.C. 997.
127 E.g. *Bromley London Borough Council* v. *Greater London Council* [1982] 2 W.L.R. 62 (H.L.).
128 E.g. *Auckland City* v. *Taylor* [1977] 2 N.Z.L.R. 413.
129 E.g. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.
130 There appears to be little, if any, room for reading additional procedural protections into the Acts: they expressly provide some important procedural protections and for the rest emphasise the ombudsmen's discretion e.g. text at nn. 22 to 23; see also the Western Australian and *Fletcher* cases, nn. 26 and 42.
131 The phrase is from a judgment of the Court of Appeal justifying broad reading of the powers of the Securities Commission. It continued: "The safeguards are the standing and sense of responsibility of the Commission, the rules of natural justice, and the duty to act with reasonable care" *City Realties Ltd* v. *Securities Commission* (unreported, C.A. 179/82 11 June 1982).

the statute is to be read as a whole, that it is to be interpreted in the wide governmental context in which the office operates, and that the purpose of the legislation is relevant to the interpreter's task. More specifically such an approach recognises the open textured and broad discretionary character of the Act. To borrow from Lord Wilberforce, this is a case where the legislature is prepared to concede a wide area to the authority it establishes; it is not a case in which Parliament is itself directly and closely concerned with the definition and determination of certain matters of comparative detail and has marked by its language the intention that they shall accurately be observed.[132] This approach to the interpretation of the Act also recognises the inappropriateness here of the usual notion of jurisdiction.

But if the courts are rarely asked to rule on the ombudsmen's powers, and, when they are, they interpret them broadly, are the ombudsmen then essentially above the law and not subject to control? This is, of course, much too simple a view. It assumes that officials comply with the law only if it is enforced by the courts. It also ignores other external controls and influences. The ombudsmen's powers are subject to the influences exercised by the departments with which they deal and to wider political processes. Those influences are based in large part on the fact that an ombudsman cannot order and must persuade.

APPENDIX I: OMBUDSMEN STATUTES[133]

Australia
Commonwealth: Ombudsman Act 1976 (Aus.)
New South Wales: Ombudsman Act 1974 (N.S.W.)
Queensland: Parliamentary Commissioner Act 1974 (Qd)
South Australia: Ombudsman Act 1972 (S.A.)
Tasmania: Ombudsman Act 1978 (Tas.)
Victoria: Ombudsman Act 1973 (Vic.)
Western Australia: Parliamentary Commissioner Act 1971 (W.A.)

Canada
Alberta: Ombudsman Act 1970 (Alb.)
British Columbia: Ombudsman Act 1977 (B.C.)
Manitoba: Ombudsman Act 1970 (Man.)
New Brunswick: Ombudsman Act 1970 (N.B.)
Newfoundland: Parliamentary Commissioner (Ombudsmen) Act 1970 (Nfld)
Nova Scotia: Ombudsman Act 1970 (N.S.)
Ontario: Ombudsman Act 1975 (Ont.)
Quebec: Public Protector Act 1968 (Que.)
Saskatchewan: Ombudsman Act 1972 (Sask.)

New Zealand
Ombudsmen Act 1975 (N.Z.)

United Kingdom
Parliamentary Commissioner Act 1967 (U.K.)

132 *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 209-210.
133 The abbreviation in the brackets after each statute is used in the footnotes. For a fuller list, see Commonwealth Secretariat, *Ombudsmen in the Commonwealth, A Survey Prepared for the Commonwealth Secretariat by the International Ombudsman Institute* (1980) 9-12.

APPENDIX II: OMBUDSMEN CASES REFERRED TO IN THE TEXT[134]

AUSTRALIA

New South Wales
Boyd v. *The Ombudsman* [1981] 2 N.S.W.L.R. 308 (an appeal has been lodged).
Victoria
Booth v. *Dillon (No. 1)* [1976] V.R. 291.
Booth v. *Dillon (No. 2)* [1976] V.R. 434 (since two cases stated were put to the court and were separately decided this is dealt with as two cases in the article).
Glenister v. *Dillon* [1976] V.R. 550, F.C.
Booth v. Dillon (No. 3) [1977] V.R. 143.
Glenister v. *Dillon (No. 2)* [1977] V.R. 151.
Western Australia
R. v. *Dixon ex parte Prince and Oliver* [1979] W.A.R. 116, F.C.

CANADA

Alberta
Re Alberta Ombudsman Act (1970) 10 D.L.R. (3d) 47, Alb. S.C.
Manitoba
In the matter of section 20 of the Ombudsman Act, Man. Q.B., 20 November 1974, unreported.
Newfoundland
Parliamentary Commissioner v. *Waterford Hospital Board* (1976) 13 Nfdld and P.E.I. R. 519.
Nova Scotia
Ombudsman of Nova Scotia v. *Sydney Steel Corporation* (1976) 17 N.S.R. (2d) 361, C.A.
Ontario
Re Ombudsman and Health Disciplines Board of Ontario (1979) 104 D.L.R. (3d) 597, C.A. affirming 95 D.L.R. (3d) 716.
Re Ombudsman of Ontario and the Queen in Right of Ontario (1980) 117 D.L.R. (3d) 613, Ont. C.A. affirming 103 D.L.R. (3d) 117.
Saskatchewan
Re Ombudsman for Saskatchewan (1974) 46 D.L.R. (3d) 452, Sask, Q.B.
Re Board of Police Commissioners of Saskatoon and Tickell (1979) 95 D.L.R. (3d) 473, Sask. Q.B.
Re Ombudsman for Saskatchewan and Minister of Social Services (1979) 103 D.L.R. (3d) 695, Sask. Q.B.

UNITED KINGDOM

Re Fletcher's Application (Note) [1970] 2 All E.R. 527, C.A. (see also D.C., unreported, 27 January 1970).
In re a Complaint Against Liverpool City Council [1977] 1 W.L.R. 995, D.C.
R. v. *Local Commissioner for Administration, ex parte Bradford Metropolitan City Council* [1979] Q.B. 287, H.C. and C.A.

134 For a somewhat longer list see International Ombudsman Institute, *Court Cases of Special Interest to the Ombudsman Institution October* 1981. Litigation is pending in British Columbia: *1981 Annual Report of the Ombudsman* 9.