A REPORT BY JUSTICE

The CITIZEN and the ADMINISTRATION

The redress of grievances

DIRECTOR OF RESEARCH
SIR JOHN WHYATT

With a Foreword by
The Rt. Hon. Sir Oliver Franks,
G.C.M.G., K.C.B., C.B.E.

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TERMS OF REFERENCE

To inquire into the adequacy of the existing means for investigating complaints against administrative acts or decisions of Government Departments and other public bodies, where there is no tribunal or other statutory procedure available for dealing with the complaints; and to consider possible improvements to such means, with particular reference to the Scandinavian institution known as the Ombudsman.

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FOREWORD

The Rt. Hon. SIR OLIVER FRANKS

THIS is an interesting and important Report on an important subject. The struggle between liberty and authority which characterises all human societies is unending and it has attracted a great deal of concern and discussion in Britain during the past fifteen years. This report investigates and analyses a major part of this broad subject and explores how best the grievances of citizens may be redressed when they find themselves badly treated by those in authority. It is lucidly written and the style makes it good reading for laymen and lawyers alike.

It has been particularly interesting for me to read because of its connection with the work of the Committee on Administrative Tribunals and Enquiries (1955–57), of which I had the honour to be Chairman. This Committee, as we then explained, was limited by its terms of reference to those disputes between individual citizens and authority in which formal machinery for appeal or for review before final decision already existed: our function was to examine and suggest improvements in that machinery. At the outset, therefore, we felt it necessary to point out that no such machinery was provided in respect of a large part of the relationships between the individual and the State.

We said: "But over most of the field of public administration no formal procedure is provided for objecting or deciding on objections. . . . Of course the aggrieved individual can always complain to the appropriate administrative authority, to his Member of Parliament, to a representative organisation or to the Press. But there is no formal procedure on which he can insist."

And again: "It may be thought that in these cases the individual is less protected against unfair or wrong decision. But we are not asked to go into questions of maladministration which may arise in such cases."

We realised that here lay another and a formidable task. In this Report it has been undertaken and carried through: the gap has been filled: and a great debt is owed to those who have commissioned and carried out the present inquiry.

It reaches two broad sets of conclusions. In the first place, it comes to the view that there is substantial scope for subjecting a large number of administrative decisions involving discretion to some

kind of appeal. It shows that a good deal of progress has already been made in this direction, and it recommends that further developments should take place under the general surveillance of the Council on Tribunals.

The second group of recommendations concerns maladministration and takes us into different territory. There is a long and thorough examination of the institution of the Ombudsman in Scandinavian countries. This institution has existed in Sweden for more than 150 years: in Denmark an Ombudsman was first appointed six years ago, while in Norway a Bill setting up an Ombudsman on Danish lines is likely to come into operation this year. After all the talk there has been in Britain about the Scandinavian Ombudsman it is a pleasure to read this authoritative account of the nature and functions of the institution in these countries.

The report comes to the conclusion that a similar official should be appointed here. The British Ombudsman would be called "The Parliamentary Commissioner" and he would enjoy the same status as the Comptroller and Auditor-General. He would be answerable only to Parliament and would be irremovable except on the address of both Houses, being in this way independent of the executive. It is recommended that he be given wide powers to investigate and report upon cases of alleged maladministration, initially at the request of Members of Parliament, but that later members of the public should take their allegations and complaints straight to him.

These proposals are skilfully elaborated in the Report and deserve the consideration of a wide circle of readers. Many will argue that a sufficient case for these changes already exists and that early legislation on the suggested lines is highly desirable. There may be others who will hold, particularly in regard to the proposals concerning maladministration, that existing opportunities for redress are on the whole adequate and they may fear that any substantial change might to some extent detract from the responsibilities of Members of Parliament. The report provides a basis for informed debate and intelligent answers to these questions.

PREFACE

The Rt. Hon. LORD SHAWCROSS (CHAIRMAN OF JUSTICE)

THE study embodied in the Report which is here published may well form the basis of what could become a real Charter for the little man. In the ever growing complexity of the modern State, the interventions of central and local government into the lives and affairs of the ordinary citizen inevitably multiply. For the most part, no doubt, these interventions are for beneficent purposes and have beneficent results. But the nature of governmental and local governmental activity is now such that large areas of discretion are created in regard to all sorts of matters affecting the lives and rights of ordinary people in varying degrees. The general standards of administration in this country are high, probably indeed higher than in any other. But with the existence of a great bureaucracy there are inevitably occasions, not insignificant in number, when through error or indifference, injustice is done—or appears to be done. The man of substance can deal with these situations. He is near to the establishment; he enjoys the status or possesses the influence which will ensure him the ear of those in authority. He can afford to pursue such legal remedies as may be available. He knows his way around. But too often the little man, the ordinary humble citizen, is incapable of asserting himself. The little farmer with four acres and a cow would never have attempted to force the battlements of Crichel Down. The little man has become too used to being pushed around: it rarely occurs to him that there is any appeal from what "they" have decided. And as this Report shows, too often in fact there is not.

But to say that there always ought to be some appeal against administrative and executive decisions is of course an over simplification. What is suggested in this Report is a practical way in which a start could be made in dealing with perhaps the most obvious cases. The experience thus gained would, it is to be hoped, make possible the establishment of some system which would not only cover the whole field of central governmental action but that of local government as well. I have no doubt that in this field also the ordinary citizen is sometimes put upon in a way which needs redress.

The purpose of this preface is, however, not to canvass the whole problem but to pay tribute to those who in varying degrees have contributed to what I think should be recognised as a really important constitutional exercise.

The interest taken by JUSTICE in the problems involved dates from the end of 1957 when Professor F. H. Lawson, a member of the Council, sent the Secretary, Mr. Tom Sargant, a memorandum on the Swedish Ombudsman and suggested that this institution should be included in the list of subjects into which JUSTICE could conduct research.

The Council adopted this suggestion, and the following members of JUSTICE undertook to form a committee:

> Professor F. H. Lawson (Chairman), Mr. F. C. Anderson, Mr. Michael Carey, Mr. J. F. Garner, Mr. B. Fraser Harrison, Mr. Donald Haslam, Mr. C. C. Jenkins, Mr. J. A. Jolowicz, Mr. Godwin Sarre and Mr. John Shaw. Mr. Sargant acted as its Secretary.

This Committee held several meetings and gathered a considerable amount of information about the various Scandinavian institutions, but it became apparent that the extent of research necessary to assess the possibility of a similar institution being established in this country, and the precise fields it could usefully cover, was beyond the then limited resources of JUSTICE.

In the Summer of 1958, the International Commission of Jurists, of which JUSTICE is the United Kingdom Section, published in its Journal an article by Professor Stephan Hurwitz, the Danish Ombudsman, and in the following November JUSTICE invited him to come to England and arranged for him to give a series of lectures in London, Manchester, Oxford, Nottingham and Bristol. These important lectures unfortunately attracted little Press publicity but following them, in the Spring of 1959, Mr. L. J. Blom-Cooper, a member of JUSTICE, visited both the Danish and the Swedish Ombudsman and the series of articles he subsequently wrote in the *Observer* did arouse considerable interest and discussion. At the Annual Meeting of JUSTICE in June, 1959, I announced that JUSTICE proposed to undertake a full scale inquiry into the problem as soon as adequate funds could be obtained.

In the meantime, there had been further discussion in the Press and in Parliament, and in November, 1959, a question put to the Prime Minister by Dr. Donald Johnson, M.P., met with the answer that the Government proposed to await the result of the inquiry to be held by JUSTICE. It was not, however, until early in 1960 that the generosity of Mr. and Mrs. Neville Blond and the Isaac Wolfson Foundation made it possible to embark upon the actual inquiry.

With the funds thus generously placed at our disposal, we were particularly fortunate in securing the services of Sir John Whyatt, Q.C., whose great experience both as Attorney-General of Kenya and Chief Justice of Singapore, from which latter position he had just retired,

made him especially qualified to conduct a scholarly and, at the same time, practical study of the matter. He was appointed Director of Research and at the same time a small Committee was set up consisting of myself as Chairman, Mr. Norman Marsh as Deputy Chairman, Sir Sydney Caine and Dr. H. W. R. Wade. Subsequent developments, however, made it impossible for me to play any effective part in the work of the Committee and the burden of responsibility of chairmanship therefore fell upon Mr. Norman Marsh. This Committee kept in constant touch with Sir John Whyatt during his inquiry and were able to discuss with him the various questions of policy which arose from time to time. This Committee has concurred in the Report and the Council of JUSTICE has endorsed it, but the Report itself should be known as the Whyatt Report for it is essentially the work of Sir John Whyatt.

JUSTICE puts it out now for public discussion, governmental study and eventually Parliamentary action. As it was being sent to the printers, information was received that a Bill to appoint a Parliamentary Commissioner for Investigations had been introduced into the New Zealand Parliament. The text of the Bill was received too late for critical study and comment, but it has been included as an Appendix in the belief that it will provide further guidance and encouragement.

I venture to express the earnest hope that those concerned with these matters will give it early and favourable consideration and that before too long a time has elapsed we may see a Bill embodying the proposals made here on its way to the Statute Book, there helping to reconcile the needs of organised society with the rights, liberties and privileges of the ordinary individual.

PART I

CHAPTER 1

Introduction

1. Before this Inquiry was initiated, the problem which was pressing itself on the attention of JUSTICE was whether there was need for more effective machinery for dealing with citizens' complaints of misuse of administrative powers by the Executive. A very thorough examination of the existing system of tribunals and other statutory procedures for resolving disputes between the citizen and authority had been conducted by the Franks Committee in 1957 and had resulted in the establishment of the Council on Tribunals to supervise this sector of public administration. But unfortunately the terms of reference of the Franks Committee precluded them from inquiring into that large area of administration in which the acts and decisions of officials are not subject to any independent check other than that which is provided by Parliament. Consequently no consideration was given to the question whether any discretionary decisions which do not at present come under the tribunal system could, with advantage, be brought within it. Nor was any consideration given to what may be called acts of maladministration such as occurred in the *Crichel Down* case where officials showed bias and unfairness in their dealings with the public. As a result, complaints against discretionary decisions and complaints against acts of maladministration were not within the scope of the reforms which followed the Franks Committee recommendations and the position today is still that, over a large area of public administration, there is under our Constitution no formal machinery outside Parliament for dealing with these two categories of complaint.

2. This gap in the British Constitution has for some time been the subject of criticism in Parliament, the Press and amongst members of the public, but until recently the criticism has been general in character and few concrete proposals have been put forward for filling it. Lately, however, public attention has been focused on the Scandinavian institution known as the Ombudsman, whose primary function is to act as the agent of Parliament for the purpose of safeguarding citizens against abuse or misuse of administrative power by the Executive. The view has been widely expressed that if a similar institution, or at least if the principle which lies behind the Scandinavian institution, were adopted in this country, a solution would be

found to many of the difficulties which from time to time confront a citizen in his dealings with authority. The point was raised in a Parliamentary Question put to the Prime Minister on November 5, 1959, and in reply the Prime Minister said that he understood "that a group of lawyers is to undertake a serious and objective study of the matter, and I think it would be well to wait until the results of this study are known before coming to any final conclusion." The body of lawyers in question is JUSTICE and the present Report is the outcome of their study.

3. Although we have only been able to solicit information since we have no authority to demand it, we have nevertheless in the course of our Inquiry received a considerable body of evidence from Government Departments, local authorities, organisations and individuals in this country, and from officials and lawyers in other countries, particularly in Scandinavia. We are extremely grateful to all who have helped us. In particular we should like to express our sense of obligation to the Treasury for enlisting the co-operation of certain selected Government Departments and to the Permanent Secretaries of those Departments who supplied us with memoranda and statistical material. We wish also to record our appreciation of the interest which the Lord Chancellor's Department and the Treasury Solicitor have taken in our Inquiry and to express our indebtedness to Sir Oliver Franks and Lord Justice Devlin for their helpful advice. Finally, we wish to thank the Danish Ombudsman, Professor Hurwitz; the Swedish Ombudsman, Mr. Bexelius; the Emeritus Professor of Constitutional and Administrative Law of Stockholm University, Professor Herlitz; and the President of the Supreme Court of Norway, Mr. Terje Wold, for the assistance they have given us. We should, however, make it clear that the responsibility for the views expressed in our Report is entirely that of the Committee.

4. The scope of an inquiry conducted by a voluntary society such as JUSTICE must necessarily be limited. We nevertheless believe that we have been able to reach conclusions which point the way to a system of administration in which the interests of the citizen in his dealings with authority can be better safeguarded than at present without detriment to the efficiency of government. But our conclusions should be regarded only as providing a broad outline. The task of mapping this large area of public administration in detail is one for the Government. We venture to suggest however that our investigations demonstrate the need, and the justification, for the Government to undertake this task without delay in order to complete the constitutional and administrative reforms successfully initiated in 1958 as a result of the recommendations of the Franks Committee.

CHAPTER 2

Background

Post-war administration

5. The outstanding feature of public administration in this century has been the great extension of Government responsibility for the provision of social services and for the management of the economy. Before the war these services were generally not universal or comprehensive, but today, with the growth of the Welfare State and the enactment of a vast body of new legislation which made provision for insurance, health, pensions, family allowances and other social services on a nation-wide scale, every individual in the country has been brought within the scope of the social services. At the same time, the Government has assumed new responsibilities for the management of the economy. New planning legislation has been enacted regulating the development of land and buildings throughout the country in a most detailed manner and public transport and other public services such as coal-mining, gas and electricity have been brought under state control.

6. Thus there came into existence during the first decade after the war a large new area of public administration which directly affected the lives and property of the individual in a manner and on a scale not previously experienced in peacetime. In many fields such as hospital services and the operation of public utilities, governmental supervision or control was by no means a novelty, but the important new feature which emerged with the establishment of comprehensive state services was the almost complete disappearance of alternatives. The statutes which established these comprehensive state services often provided that disputes between the individual and authority as to his rights under the legislation should be decided not by the ordinary courts but by tribunals or by ministerial decision after a statutory inquiry. These methods of settling disputes were not new. They had been introduced before the First World War and although at first they were regarded in some quarters with apprehension as running counter to the rule of law as generally understood at that time, they received the approval, in some respects qualified, of the Committee on Ministers' Powers, generally known as the Donoughmore Committee, which reported in 1932.[1] But with the great increase in the use of these methods in the post-war years, the

[1] Cmd. 4060.

public disquiet which had led to the setting up of the Donoughmore Committee once again manifested itself and as a result the Franks Committee was appointed in 1955 to reconsider tribunals and inquiries in the light of the changed conditions of the post-war era.

7. The Report of the Franks Committee has been described as one of the great state papers of our time. It analyses the process of making administrative decisions with great lucidity and reaches conclusions of high constitutional importance for the future of public administration. First, it considers that as a result of the general social and economic changes of recent decades, tribunals are now essential to our society and have come to stay. Secondly, the Report prescribes three characteristics which should mark procedures for settling disputes between the individual and authority. They are openness, fairness and impartiality. It recognises that these characteristics cannot always be present in the same degree in every case but emphasises the need to apply them whenever possible. Thirdly, the Report lays down the proposition that tribunals are not appendages of Government but are machinery provided by Parliament for adjudication. Prior to the Franks Report there were two schools of thought on this subject. Many persons, among them senior Government officials, maintained that the purpose of establishing tribunals was to facilitate the tasks of the Administration, whereas others contended that the sole duty of tribunals was to adjudicate as objectively as possible upon the issues raised between the individual and the Government Department. Evidence in support of each school of thought was placed before the Franks Committee but the Committee reached the firm conclusion that the function of tribunals was adjudication. This view was subsequently adopted by the Government and endorsed in striking terms by Lord Denning in the debate in the House of Lords on the consideration of the Franks Report when he stated that " tribunals form as valuable and indispensable a part of our judicial system as justices of the peace." [2]

8. As a practical step to ensure that the principles of openness, fairness and impartiality are regularly applied, the Franks Committee recommended the establishment of an independent body to be known as the Council on Tribunals. This Council was set up in 1958 by the Tribunals and Inquiries Act, 1958, and during the two years it has been functioning, it has made steady progress in the direction of enforcing the observance of these three basic principles of good administration in the field of tribunals and statutory inquiries to which it is confined by the Act.

[2] *Hansard*, H. of L., Vol. 206, col. 549.

CHAPTER 3

The Scope of Our Inquiry

9. It is against the history briefly outlined in the previous chapter that our terms of reference are to be interpreted. Broadly speaking, it may be said that our Inquiry begins at the point where the Franks Committee, because of its limited terms of reference, left off. As the Committee stated in its Report:

> But over most of the field of public administration no formal procedure is provided for objecting or deciding on objections. For example, when foreign currency or a scarce commodity such as petrol or coal is rationed or allocated, there is no other body to which an individual applicant can appeal if the responsible administrative authority decides to allow him less than he has requested. Of course the aggrieved individual can always complain to the appropriate administrative authority, to his Member of Parliament, to a representative organisation or to the Press. But there is no formal procedure on which he can insist. . . . It may be thought that in these cases the individual is less protected against unfair or wrong decisions but we were not asked to go into questions of maladministration which may arise in such cases.[1]

10. In the early stages of our Inquiry, it became apparent that the complaints with which we are concerned fall into two categories. First, there are complaints against discretionary decisions where the citizen disagrees with the way in which an official has exercised his discretion but has no formal means of challenging it. The citizen's complaint in these cases is not that the official has abused his power but that the decision he has reached is not, in all the circumstances, appropriate. There may be no allegation of bias, negligence or incompetence but merely the charge that the decision is misguided. In essence this type of complaint is a complaint that there is no right of appeal to an independent body which can substitute its own discretionary decision for that of the official who made the original decision. Secondly, there are complaints against acts of maladministration. These are, broadly speaking, complaints aimed at official misconduct. In this type of complaint, it is a question, not of appealing from, but of making an accusation against, authority.

[1] Report of the Committee on Administrative Tribunals and Enquiries, 1957, Cmnd. 218, pp. 2–3, paras. 10 and 14.

§ 11 *The Scope of Our Inquiry*

11. The two types of complaint might, of course, be combined in some instances, but the distinction is nevertheless important, because our study has led us to the conclusion that different machinery is required for dealing with them. In Part II of our Report we deal with the first category, namely, complaints against discretionary decisions, and recommend that additional powers should be given to the Council on Tribunals to enable it to review areas of discretion where there are no formal procedures for deciding on objections and to make recommendations for extending to these areas the system of tribunals and inquiries in appropriate cases. We also recommend that a General Tribunal should be set up to deal with miscellaneous decisions which cannot conveniently be dealt with by specialised tribunals. In Part III, we consider the existing means for investigating complaints against acts of maladministration and the possibility of improving them. In this connection, we have analysed in some detail the Scandinavian Ombudsman system which has achieved a large measure of success in dealing with acts of maladministration in Sweden and Denmark. We also consider how far the functions of the Comptroller and Auditor-General, when acting as a check on financial maladministration, provide an analogy for dealing with maladministration in the non-financial field of administration. Our conclusion is that new machinery is required to deal with acts of maladministration and that this can best be provided by appointing an officer to investigate complaints of maladministration and report the results of his investigations to Parliament, but we recommend that at first his activities should be restricted to investigating complaints submitted by Members of Parliament.

12. Certain matters of a specialised character are not dealt with in our Report although they fall within the broad expressions used in our terms of reference. We have not, for instance, included in our Inquiry complaints against the police as this subject is being currently studied by a Royal Commission. Nor have we included complaints against nationalised industries as we feel this would be premature pending consideration of our proposals for dealing with complaints against the Government Departments which are constitutionally responsible for them. We have considered complaints against local government authorities, but in view of the vast area covered by local government administration, we have not felt able to carry our Inquiry to the stage where we could make specific recommendations. The material we have gathered under this head, however, appears to us to be valuable and as it is not readily accessible to the public, we have thought it helpful to present it as an Appendix to our Report.

Conseil d'Etat

13. It may be convenient to explain at this juncture why the consideration of other methods of controlling and supervising the Administration in Part III of our Report does not deal in detail with the functions of the Conseil d'Etat in France. The Conseil d'Etat is a remarkable institution which, for over a century and a half, has borne a deservedly high reputation as the guarantor of administrative justice. It exercises a general and exclusive supervisory jurisdiction over administrative decisions, partly by way of allowing appeal from, and partly by review (*cassation*) of, such decisions. It can further grant damages (by *recours de pleine juridiction*) in respect of illegal acts of the Executive at the suit of the individual who has suffered thereby, and it can annul such acts as constituting *excès* or *détournement de pouvoir*. It should also be borne in mind that the Conseil d'Etat, apart from its judicial function, is a general adviser of the Government on administrative matters and of the drafts of legislation submitted by Government Departments. M. Letourneur, Vice-President of the Conseil d'Etat, and Professor C. J. Hamson gave evidence to the Franks Committee on the control exercised by the Conseil d'Etat over administrative decisions.[2] The Franks Committee in their recommendations, however, did not propose any major reconstruction of the English system of administrative tribunals and of their relationship to the ordinary courts but concentrated rather on making suggestions for the improvement of the personnel and procedure of these tribunals and for the strengthening of the control exercised by the ordinary courts. This approach has been subsequently confirmed by Parliament in the measures taken in the Tribunals and Inquiries Act, 1958, to implement the Franks Committee Report. It seems, therefore, unprofitable to examine further the French system and this Report draws attention instead to Scandinavian experience which, although gaining considerable recent publicity, has been the object of less detailed study in this country.[3] We did, however, use the occasion of a joint meeting of the French and British Sections of the International Commission to have a full day's discussion with leading French lawyers, among whom was M. Manfried Simon, a member of the Conseil d'Etat.

14. It is true that the Franks Committee was studying the Conseil d'Etat in the context of its examination of English administrative tribunals and was not called upon to consider the function of that body in relation to what the Franks Committee, and this Report, following its example, has called "maladministration." The Conseil

[2] Committee on Administrative Tribunals and Enquiries, Minutes of Evidence, 27th day, February 21, 1957.

[3] See, however, the bibliography given on p. 45, *infra*, footnote.

d'Etat deals with maladministration in two ways: first, in its judicial capacity, by remedies, some of which are comparable although not necessarily identical with the remedies such as habeas corpus, actions for a declaration or injunction, the prerogative orders of mandamus, certiorari and prohibition, actions in tort or contract against the state, available in the ordinary English courts; secondly, in its advisory capacity, by the influence which it is able to exercise on the administration. As regards judicial remedies, it may well be that the French system may be profitably compared with the judicial remedies available in the English courts against administrative authorities, but, as is explained in paragraph 72, *infra*, this Report is not directly concerned with such remedies, but rather with measures for the investigation of complaints which may supplement and, in some fields, go beyond the types of redress available in, or likely to be appropriate to, a court of law. And in regard to both the judicial and the advisory functions of the Conseil d'Etat, it is important to bear in mind the fact, emphasised by a leading English authority [4] on the Conseil d'Etat, that its successful working depends on the corporate unity of its judicial and advisory sections, for which there is no real parallel in the English dichotomy of an Executive under Ministers responsible to Parliament on the one hand and an independent judiciary on the other.

[4] Professor C. J. Hamson, *Executive Discretion and Judicial Control* (1954), p. 94.

PART II

CHAPTER 4

Discretionary Decisions

General

15. This Part of our Report is concerned with those complaints where the individual is aggrieved as a result of some discretionary decision on the part of authority. In such cases, the official makes a decision, usually exercising a measure of personal judgment, and the individual wishes to contest it. There may be no allegation of bias, negligence or incompetence, but merely the charge that the decision is, in all the circumstances, misguided or inappropriate. For instance, if a Post Office official refuses an application for a new telephone on the ground that equipment is in short supply and the applicant's requirements do not justify giving him any priority, the applicant may feel aggrieved and may wish to object to the decision.

16. If a tribunal has been established to deal with the particular type of decision of which complaint is made, the individual has no difficulty in obtaining an impartial adjudication on the merits of the original decision. While it may happen, of course, that the impartial adjudication will merely confirm the official's decision, the individual will have the satisfaction of knowing that the administrative authority has not been judge in its own cause and that justice has been seen to be done openly, fairly and impartially. For example, a person who is dissatisfied with the amount of assistance granted by an officer of the National Assistance Board can appeal to a National Assistance Appeal Tribunal, but the result of the appeal may be merely to confirm the original award.

17. But if no statutory provision has been made for a tribunal to hear complaints in a particular field, the individual has no means of obtaining an impartial adjudication. He may try to induce the administrative authority to change its decision by bringing indirect pressure to bear upon it by means of a Parliamentary Question, through the Press, or with the assistance of some representative association. But in the great majority of cases, this is not a practicable method of securing a review of a purely discretionary decision, particularly if there is no allegation that the decision was tainted by bias or some other form of maladministration. In such cases,

therefore, the individual probably has no alternative but to accept the decision.

Scandinavian Ombudsman and discretionary decisions

18. We think we should interpolate at this point a brief examination of the Scandinavian Ombudsman's function in relation to discretionary decisions which, judging from the correspondence we have received, and some comments in the Press, appears to be much misunderstood in this country. The Ombudsman is not normally concerned with cases of discretion. He is not a super-administrator to whom an individual can appeal when he is dissatisfied with the discretionary decision of a public official in the hope that he may obtain a more favourable decision. His primary function, as is explained more fully in Part III of the Report, is to investigate allegations of maladministration. Only very exceptionally, if a discretionary decision is alleged to have been vitiated by some official misconduct or some other kind of maladministration, would he undertake an investigation. In the first five years that the Danish Ombudsman was functioning, he intervened in discretionary cases on only one or two occasions.

19. We should add that in Scandinavia provision is made for appeals from discretionary decisions to independent authorities which, although they have a different nomenclature and procedure, exercise functions similar to our tribunals. We deal in paragraph 65 with one particular Swedish tribunal which functions with a remarkable degree of flexibility and efficiency and provides, we think, an illustration of a procedure for appealing from discretionary decisions which might profitably be adopted in this country.

Areas of discretion

20. Why, it may be asked, does Parliament establish a tribunal in some instances to adjudicate upon discretionary decisions but not in others? Ideally it is always in the interests of the individual that there should be a tribunal which can give an impartial adjudication on discretionary decisions. Even where the decision must be dictated by Government policy, as, for example, in the compulsory acquisition of land, a right to an inquiry can be given. But even outside the more obvious fields of policy there are many areas of discretion which have not yet been made subject to the independent check of a tribunal. To mention a few: decisions recommending the remission of import duties, the allocation of new telephones, supply of certain medical benefits, and the choice of a school fall within these areas of discretion. The question with which we are specially concerned in

this Part of our Report is to inquire how far this unmapped territory of administrative discretion should be brought within a system of impartial adjudication and to suggest a procedure by which in appropriate cases this could be achieved.

21. The difficulty confronting anyone inquiring into discretionary decisions is to identify, amongst the great mass of administrative procedures, the specific areas of discretion within which the decisions are made. The discretions are not indexed or listed anywhere, and generally speaking the only persons who can readily identify them are the officials who are familiar with the day-to-day administration of the Government Departments concerned. The further inquiry as to whether an area of discretion is also an area of friction, in the sense that the decisions made within it give rise to a substantial number of complaints from the public, is one which can only be answered by the Department itself, since no statistical information relating to these matters is available to the public. Thus, although discretionary decisions are very important, since they may seriously affect the rights and interests of individuals, little information as to their impact on the public can be obtained except from the Departments themselves.

22. In our Inquiry we have been greatly assisted by the Permanent Secretaries of those Departments whose help we have sought and we would like to express our appreciation for their ready co-operation in furnishing us with material which might provide a basis for questioning existing procedures. We have received memoranda from seven Departments, describing in detail the principal areas of discretion within their administrative fields and, in some instances, giving an enumeration of the complaints received from the public against discretionary decisions within these areas. The seven Departments represent a cross-section of the Departments which make discretionary decisions affecting the individual. We have also received evidence of individual complaints against discretionary decisions from voluntary organisations, particularly the John Hilton Bureau, which illustrate the effect of these decisions on members of the public. This material is considered in the following chapter.

§ 23

CHAPTER 5

Particular Areas of Discretion

Introduction

23. We discuss in this chapter a number of areas of discretion which were described in the memoranda prepared for us by the following Departments: the Ministry of Agriculture, the Ministry of Education, the Home Office, the Ministry of Health, the War Office, the Board of Trade and the Post Office. It is in these areas that the Departments regularly make discretionary decisions in the ordinary course of administration which are not open to challenge except in Parliament. In some instances, however, the Departments have made administrative arrangements to enable persons aggrieved by their decisions to question them by means of an appeal to an independent body outside the Department or by means of a system of hierarchic appeals within the Department. We comment on these special procedures and give some statistics to indicate the extent to which they are successfully invoked by persons who complain of the original discretionary decisions. No statistics are, however, available of the number of complaints against discretionary decisions where no special procedures for questioning them are available. We should explain that some of the information in the departmental memoranda concerned complaints of maladministration rather than complaints against discretionary decisions. The two types of complaint may arise from the same set of circumstances, as we pointed out in paragraph 11, but for the purposes of the present chapter the emphasis is on complaints against discretionary decisions. We deal with complaints of maladministration in Part III.

Ministry of Agriculture

Subsidies

24. One of the most important functions of the Ministry of Agriculture is the distribution of approximately £200 million a year in subsidies to farmers for production grants and price guarantees for cereals and fatstock. In the administration of these subsidies, departmental officials exercise a discretion when deciding the amounts to be paid to individual farmers and injustice may be caused if a discretionary decision, though honestly made, is mistaken. The farmer has, however, no statutory right of appeal and as a matter of strict law is bound by the decision. This unsatisfactory position has been dealt with administratively by allowing an aggrieved farmer to

put his complaint before his County Agricultural Executive Committee and to appear before the Committee in person, if need be, to argue his case. The Committee is independent of the Ministry and its decisions may, therefore, be regarded as impartial; and in practice they are almost always accepted by the Ministry. In 1959 there were 474 appeals to Committees; of these 377 were rejected and 88 were successful in the sense that the Committees differed from the departmental view and prevailed upon officials to reverse or modify their decisions; the remaining 9 cases were referred to Ministers and of these, Ministers upheld the official view in 7 cases and the Committees' view in 2 cases. It is somewhat anomalous that this procedure which works so satisfactorily in England and Wales has not been extended to Scotland. There are no administrative arrangements for " appeals " to County Agricultural Executive Committees in Scotland.

Animal and plant health

25. In addition to making discretionary decisions in relation to subsidies, the Ministry of Agriculture makes important discretionary decisions in connection with animal and plant health which affect the rights and interests of citizens. For instance, the Ministry may order the slaughter of animals believed to be infected with foot-and-mouth disease or tuberculosis or some other scheduled disease. These orders are based upon scientific tests which are considered very reliable but it would, in any case, be difficult to arrange for any appeal procedure as action has to be taken very quickly. The number of occasions on which such decisions are challenged is very small. Disputes as to the amount of compensation to be paid are referred to an independent valuer appointed by the President of the Royal Institute of Chartered Surveyors. There are some further minor matters depending upon departmental discretion, such as orders to destroy rabbits, or to prevent the spread of weeds, but there are very few objections to such orders.

26. Discretionary decisions in this Department do not appear to cause much friction, because the Department has, particularly in one of the most important areas of discretion, namely the distribution of subsidies, very prudently established " built-in " machinery by administrative action for dealing impartially with objections to its decisions.

Ministry of Education

Choice of school

27. A very important area of discretion in the Ministry of Education is that concerned with parents' choice of school. If a child

is refused admission by a local education authority to the school selected by its parents, the latter may appeal to the Minister if they consider the grounds for the refusal are unreasonable. For example, if a local authority decided, contrary to the parents' wishes, that two brothers should go to separate schools because of overcrowding in one of those schools, the parents might appeal to the Ministry against the decision. When an appeal reaches the Ministry it is dealt with " on paper " by civil servants and the Ministry's decision is communicated in writing to the parents and the local education authority. There is probably a tendency to uphold the decision of the local education authority, if the correct procedure has been followed, on the ground that a local authority is more familiar with local problems. This procedure is applicable only in England and Wales and is in striking contrast to that which is followed in Scotland. There is in Scotland no question of an appeal to the Secretary of State comparable to this appeal to the Minister in England. On the other hand, a parent in Scotland aggrieved by a school attendance order requiring his child to attend a particular school may appeal to the Sheriff who may confirm, vary or annul the order. If he satisfies the Sheriff that he has good reason for being aggrieved by the order (for example, if he is able to satisfy the Sheriff that the school he has chosen provides courses suitable for the child and has accommodation for him and there are no reasons such as unjustifiable public expense why the child should not attend it), the Sheriff might vary the order by naming the school the parent wished the child to attend or he might annul the order, in which case the choice of school would be for consideration, *ab initio*, by the local education authority, taking the parent's wishes into account. We would point out that the Sheriff is a judicial officer with some knowledge of local conditions; he is independent of the local education authority and the Secretary of State and his decisions are, therefore, quite impartial.

Special schools for handicapped children

28. Similarly, in the case of handicapped children, parents in England and Wales may appeal to the Minister if they think the decision of the local education authority requiring attendance at a special school is not justified, but in Scotland they may appeal to the Sheriff. During 1959 in England and Wales there were 318 appeals to the Minister in respect of handicapped children of which 208 were rejected, 38 upheld and the remainder withdrawn or dealt with in some other way. Although 318 appeals is only a small proportion of the total of 64,000 handicapped children in special schools in England and Wales during 1959, it is nonetheless a significant number, and

as the issues involved are intensely personal in character, it is desirable that the appeal procedure should be as impartial as possible.

29. We think there is much to be said for the view that arrangements should be made for all appeals from decisions on the choice of school or the attendance by handicapped children at special schools to be decided by an independent tribunal outside the Department. The Scottish precedent is a good example of the application of the principle of impartial adjudication to disputes between the individual and authority; it should also be borne in mind that the Sheriff, in making his adjudication, has a background of local knowledge which is not available when appeals are centralised in the Ministry in London.

Grants and contributions to scholarships

30. In other areas of discretion, the Minister makes decisions, not on appeals from local education authorities, but directly in the first instance. For example, the award of a State scholarship [1] involves a discretionary decision as to the amount of the grant and the amount of the contribution to be made by the parent. Such questions as "Should a step-father contribute towards a step-child's education?" are decided administratively by civil servants in the Ministry. During 1959 there were 203 written complaints against the Ministry's decisions regarding the amount of parental contribution to State scholarships but there was no right of appeal against these decisions. This type of decision, however, does not differ in essence from decisions made by the National Assistance Appeal Tribunals when applying the means test and it might be in the interests of good administration to establish an independent tribunal to resolve disputes of this character between parents and the Department instead of leaving the decision to officials.

Other discretionary areas

31. In addition to the discretions mentioned above, the Ministry makes decisions in many other areas of discretion as, for example, where students have been refused admission to or expelled from teacher training colleges (about 25 cases a year); or where special qualifications, usually overseas qualifications, for qualified teacher status are rejected (about 90 to 100 cases a year); or in respect of the Teachers Superannuation Act (about 3,000 cases a year). In all these cases, the final decision rests with the Ministry and there is no right of appeal to an independent authority.

[1] State scholarships other than Mature State scholarships are to be abolished in 1962; awards to undergraduates from public funds will thereafter be made by local education authorities with the right of appeal to the Minister.

The Home Office

Deportation of aliens

32. Our attention has been drawn particularly to the discretion exercised by the Home Secretary in relation to the deportation of aliens, as the developments in this field in recent years highlight the need for impartial investigation of complaints against Executive decisions. Until 1956 an alien could be deported on the order of the Home Secretary, no matter how long he had resided in this country, without being given any opportunity of making representations to an independent authority before his expulsion. In that year, however, the United Kingdom became a party to the Convention between member countries of the Council of Europe on Establishment,[2] which provided that, except in cases involving national security, an alien belonging to one of the contracting states who had been residing more than two years in the territory of another contracting state should not be expelled without first being allowed to submit reasons against his expulsion and to appeal and be represented before a competent authority. The United Kingdom implemented its obligations under the Convention by arranging for the Chief Metropolitan Magistrate at Bow Street to hear the objections of any alien whom it was proposed to deport (other than on grounds of security or for certain other reasons) and, after examining the objections, to make a recommendation to the Home Secretary as to whether or not the proposed order should be made. The Home Secretary informed the House of Commons on November 20, 1958, that 41 aliens had been eligible to make representations to the Chief Metropolitan Magistrate and 23 had availed themselves of this right; 17 cases had actually been heard and in 14 the Chief Magistrate had concurred in the proposal to deport. In the remaining 3 cases in which he did not concur, deportation was not proceeded with.[3]

33. Although this procedure does not, strictly speaking, apply the principle of impartial adjudication since the Chief Magistrate's function is only advisory, it is nevertheless an important step towards protecting the individual against mistaken discretionary decisions, particularly as the Home Secretary has, in practice so far, followed the Chief Magistrate's advice. The interesting feature of the procedure, from the point of view of our Inquiry, is that it was introduced as a result of an International Convention and it seems likely that if there had not been outside pressure of this kind, this particular area of discretion would have continued to be administered as it had been for many years in the past, without an external check of any kind. It

[2] Misc. No. 1, 1957.
[3] *Hansard*, H. of C., Vol. 595, col. 1349.

may be there are other areas of discretion in Government Departments to which external checks should be applied but which continue to be administered without any change because there is no systematic procedure for examining their working and making recommendations to Parliament. The proposal outlined in Chapter 7 for extending the functions of the Council on Tribunals to carry out this function would, we think, overcome this deficiency.

Broadmoor patients

34. There appears, however, to be a growing trend towards introducing statutory checks of a limited character on the exercise of departmental discretion. A recent example of this trend is provided by the Mental Health Act, 1959. This statute sets up a Mental Health Review Tribunal from which the Home Secretary can seek advice before deciding whether to release Broadmoor patients (*i.e.*, persons found by a court to be insane on arraignment or guilty but insane) and in certain circumstances he will be obliged to consult the Tribunal, if the patient requests him to do so. The ultimate decision as regards discharge rests with the Home Secretary in view of his responsibility for the protection of the public, but the existence of the Tribunal, although its function is only advisory, is a valuable safeguard against mistaken and unjust decisions.

Other discretionary areas

35. Other discretionary areas administered by the Home Office are concerned with the prerogative of mercy, the admission of aliens, naturalisation, prison administration, approved schools, dangerous drugs, vivisection and other miscellaneous statutory powers which may affect the rights of individuals. At present decisions taken within these areas of discretion are not open to challenge except in Parliament and it is possible that a detailed examination of their working might show that it would be in the interests, both of the citizen and of good administration, to provide external checks in some of these areas as well as in those which have been mentioned above.

Ministry of Health

Marginal benefits

36. Although the Ministry of Health may be described as a highly "tribunalised" Department, there are still a number of areas of discretion in the Department in which decisions are made from which there is no right of appeal to an independent authority. One of the most important of these areas is that in which decisions are made in respect of what may be called marginal benefits under the

National Health Service. For example, the provision of mechanically-propelled invalid chairs for disabled persons is, in certain classes of case, a matter of administrative discretion and a person aggrieved by a refusal to provide such a benefit has no right of appeal. A similar type of marginal benefit depending upon discretion is illustrated by the following case:

> Mr. and Mrs. X, both elderly, were invalids. Mr. X had lost both legs and his wife was crippled with arthritis and could only move her hands. When Mr. X went into hospital for periodical treatment, his wife was sent to an institution for old folk and while she was there the nurses used a special type of hoist to get her in and out of bed. The National Health Service could have provided similar mechanical assistance but did not do so and Mr. X had to manage with a piece of wood on wheels and some ropes. Mr. X had no right of appeal against the refusal of this marginal benefit but after strong protests had been made on his behalf by a national newspaper which had taken up the case, the National Health Service provided a hoist.

The supply of certain kinds of medicine also falls within the category of marginal benefits. The following case illustrates the difficulties which may arise in this particular area of discretion:

> A doctor prescribed a special food preparation and distilled water for a child suffering from hypercalcaemia. The father of the child was a working man in the £9 per week class and the cost of the preparations was £9 per month. The doctor could have requested the Senior Administrative Medical Officer of the National Health Service for his Region to allow the preparations to be prescribed free of charge but he did not do so. There is no appeal from a doctor's decision in such a case.

Other instances of marginal benefits are the provision of certain types of hearing aids and surgical equipment. In none of these cases is there a right of appeal to a tribunal against the discretionary decisions of the doctor or the official, and it is possible that in a significant number of cases this may result in some injustice.

Hospital service

37. An important category of complaints are those concerned with the hospital service. Some of these are complaints against discretionary decisions, such as decisions on the allocation of beds where there is a waiting list for admission to a hospital, or decisions as to the amount of travelling expenses to be allowed. Other complaints appear to be concerned with maladministration rather than

discretion: for example, complaints of poor and inadequate treatment by doctors and nurses, bad conditions in hospitals and improper detention of psychiatric patients. There is at present no formal means of dealing with these various complaints, whether they be complaints against discretionary decisions or complaints of maladministration, but the Ministry has impliedly recognised the need for some new machinery for investigating them by suggesting to the responsible Hospital Boards and Management Committees that "Complaints Committees" should be set up administratively to handle them. As a result, most Hospital Boards have now established some form of complaints committee but it seems probable that in the interests of good administration more formal machinery should now be set up to which a citizen aggrieved by a discretionary decision could take his complaint as of right. It may be observed that there has always existed an adjudication system for dealing with complaints by patients against family practitioners and it seems anomalous that so far no similar system has been set up for dealing with complaints against the hospital services.

Medical profession and employing authorities

38. The British Medical Association has drawn our attention to certain types of complaint affecting the medical profession where it seems desirable that some additional machinery should be provided for adjudicating on disputes between members of the medical profession and the employing authority. For example, a medical officer employed by a Regional Hospital Board who is dismissed has no right of appeal outside his employing authority except at the discretion of the Minister or the Board. Or again, if a hospital authority makes a decision regarding its services which conflicts with responsible medical opinion at the hospital (*e.g.*, a decision to site a mental deficiency institution in the grounds of a mental hospital), there is no recognised machinery through which complaints can formally be made. Further, under the Terms and Conditions of Service of Hospital Medical and Dental Staff, the employing authorities make many discretionary decisions against which there is no appeal. Examples are the granting of leave for purposes of study, the counting of previous experience for the purpose of determining salary, abatement of residential charges when accommodation is unsatisfactory, and permission for a whole-time officer to be transferred to a maximum part-time basis. One consequence of not having any appeal is that there is lack of uniformity throughout the country in the way these discretionary powers are exercised.

39. There would appear to be considerable scope for extending the tribunal system to areas of discretion in the Ministry of Health for

the purpose of providing independent adjudications on claims to marginal benefits and in certain types of complaint against the hospital services and also with a view to introducing greater uniformity of practice in making discretionary decisions under the conditions of service of hospital medical and dental staff.

The War Office

40. The areas of discretion in a Service Department are naturally somewhat different in character from those in other Departments because of the special nature of their activities. In the War Office, they may be grouped under the following categories: military pensions, ex-gratia compensation payments and War Office lands.

Military pensions

41. Officers' retired pay, other ranks' service pensions, pensions for families of service personnel and certain disability pensions are issued under Royal Warrants the interpretation of which lies not with the courts or with some independent authority but with the Army Council.

Ex-gratia compensation payments

42. The War Office considers making ex-gratia payments in circumstances where it thinks it should assume some moral responsibility for loss or injury. For instance, a soldier is under no liability in tort for death or injury to another soldier if both were on duty, or if the deceased or injured soldier, though not on duty, was on land being used for the purposes of the Crown, and if the Ministry of Pensions certifies that his death or injury is pensionable. In very rare instances, ex-gratia payments are made in this type of case. A large number of claims are submitted but only two payments have been made since 1947. A different kind of claim for ex-gratia payment may arise when damage is caused to private property by blast or concussion of guns firing on War Department land. There is no remedy at law since the Department pleads the Prerogative in its defence and any payment is, therefore, ex-gratia and at administrative discretion.

War Office lands

43. The War Office is accorded a special position under the law where land is concerned and there are more than twenty different areas of discretion in which the Department may make decisions from which there is no appeal and no procedure for hearing objections. Included in these areas of discretion are such matters as the refusal to sell land to former owners where Treasury Circular No. 5

of 1956 (*i.e.*, the "Crichel Down" procedure) does not apply, the closure or diversion of footpaths and bridle paths, and the eviction of tenants from residential properties by claiming exemption from the Rent Acts. Many of these exceptional powers are no doubt required in the interests of security but it may be that provision could, without detriment to the public interest, be made for hearing the views of objectors before a decision is made.

Complaints by military personnel

44. Complaints by individuals whilst serving with the Forces present a problem of a very special character. At present there are two distinct procedures followed in the War Office, one for officers and one for other ranks. Any officer, from the rank of second-lieutenant upwards, may complain to the Army Council if he considers he has been "wronged." There is no limit to the kind of complaint he may make. Several hundred complaints are received each year and the Army Council is separated into three or four "divisions" to deal with them. Complaints by other ranks are made to the Colonel of the Regiment who exercises a wide jurisdiction which embraces every kind of grievance; in addition, a soldier may write to his Member of Parliament but this procedure is rarely adopted in practice. The complaints may be concerned with discretionary decisions, as for example, decisions on applications for leave and similar matters, or they may be concerned with acts of maladministration such as are considered in Part III of our Report. In Sweden, there is a Military Ombudsman to receive complaints from military personnel and recently the Bonn Government has established a Military Ombudsman to ensure that "conscripts are not rightless" and to provide soldiers with the means of making complaints without necessarily submitting them through their superior officers. There is, however, no Military Ombudsman in Denmark.

Board of Trade

Import licences

45. An important area of discretion in which the Board of Trade makes decisions affecting the public is the issue of import licences. Annual quotas are negotiated in bilateral trade agreements and licences are generally allocated under quotas in accordance with certain rules which are laid down as a matter of policy. For instance, it may be laid down that licences should be granted on a "first come, first served" basis until the quota is exhausted, or on the basis of past trading. In such cases, the issue of licences is virtually an automatic procedure and the official issuing the licence does not exercise discretion. In the case of imports where the issue of a licence

is determined by the case-by-case method, officials exercise their judgment and make decisions. The first decision is at junior executive level. If it is unfavourable and the applicant persists with his application, there is a series of hierarchic appeals within the Department up to senior executive and administrative level but there is no right of appeal to an independent authority.

Duty remission work

46. Certain classes of imports are exempt from duty if there are no similar goods procurable in the United Kingdom. The most important category of these imports is machinery and the amount of duty involved in such cases may be quite significant in the balance sheets of even large companies. Applications for exemption are considered in detail by Board of Trade officials who make extensive inquiries of United Kingdom manufacturers to check the applicant's claim that similar goods are not procurable. A British machine which can perform the same function is regarded as similar unless the foreign machine has a marked degree of technical superiority. There is obviously scope for difference of opinion on this point as is illustrated by the following case which was the subject of an Adjournment Debate:

> An application to import free of duty a highly specialised textile machine from Germany was refused on the ground that a suitable machine was made in the United Kingdom. Tests of the British machine were carried out under the supervision of the Board of Trade with a view to substantiating the British manufacturer's claim but they were alleged to be inconclusive. The Department nevertheless refused to grant a duty-free import permit and in the course of the Adjournment Debate, the Junior Minister of the Board of Trade said, " many occasions arise when the (British) makers and importers do not see eye to eye and it is the duty of the Board of Trade to adjudicate in these difficult questions. It is an unpleasant duty and one which I, for my part, would gladly shed." [4]

47. It may be observed that adjudications on issues of this character are frequently made by the courts and by tribunals and there seems to be no reason in principle why the Executive, rather than some independent authority, should undertake this task. The amount of money at stake may be very large and as the issue between the citizen and the Department is suitable for decision by an independent authority, it should, in our view, be determined by this method rather than by the Executive acting as judge in its own cause. Under the present

[4] *Hansard*, H. of C., Vol. 609, col. 1483.

method there were 872 hierarchic appeals with respect to the remission of duty on machinery for the year ended April 1960 of which 281 were successful.

Other discretionary areas

48. Among other adjudications of the Board of Trade are decisions refusing registration of a proposed company name because it is considered undesirable or too similar to that of an existing company, and decisions refusing applications by companies to be treated as " banking or discount companies." In 1959 there were 50 hierarchic appeals against refusals to register company names on the ground that the names were too like those of existing companies, and during the past three years the Board has refused 6 out of 12 applications to be treated as " banking or discount companies." In this class of case also, it would appear that the issues are suitable for adjudication by an independent authority.

The Post Office

49. The work of the Post Office closely affects members of the public and there is inevitably a large number of complaints. Tribunals have been established by statute to deal with certain types of cases; in other fields of work where there are no tribunals, the Post Office has set up an internal system of hierarchic appeals to deal with complaints.

Tribunals

50. The following is a summary of the more important types of case covered by tribunals:

(a) Disputes arising out of notices regarding electrical apparatus causing undue interference with wireless telegraphy;
(b) Suspension of authority to a person to operate a wireless telegraphy station or apparatus;
(c) Disputes concerning pension rights under regulations made under the Commonwealth Telegraphs Act, 1949;
(d) Disputes under certain Telegraph Acts relating to the placing of telegraphs on or under land.

Internal hierarchic appeals

51. The Post Office to a large extent devolves the responsibility for dealing with individual complaints to the local Head Postmaster and Telephone Managers. If the complainant is dissatisfied, he can appeal to the Regional Director, and if he is still dissatisfied, to the Postmaster-General. The following are a few examples of the kind of

discretionary decision which is dealt with by this internal system of hierarchic appeals.

Postal Services: Under this head are included complaints against Post Office decisions in redirection disputes where there are rival claims to correspondence and disputes about compensation for loss of or damage to postal packets (except inland registered packets for which the Post Office is legally liable). In 1959 there were 96,000 claims for loss and 56,000 claims for damage to unregistered parcels at local level; of these 35,000 and 23,000 respectively were rejected. The number of appeals to the Regional Director was 25 for loss and 400 for damage; only one or two of these claims reached Post Office Headquarters.

Telephone Service: Included under this head are complaints about delays in installing telephones or insistence on shared lines where there is a telephone waiting list, and complaints about the failure to provide kiosks.

It is estimated there are about 10,000 complaints a year to Telephone Managers at local level concerning delays in installing telephones or insistence on shared lines. From the decisions at local level, there are about 200 appeals a year to the Regional Director and Post Office Headquarters. In addition there are about 700 complaints a year to the Minister, either in correspondence or by way of Parliamentary Question, about the failure to provide telephone service. An illustration of the kind of complaint submitted through a Member of Parliament which may be typical of many is provided by the following case:

> A small tobacconist and newsagent tried for two years to get a telephone installed. Three of his competitors were equipped with telephones and farmers in the neighbourhood obtained new telephones apparently without difficulty. He wrote to his Member of Parliament who took up the matter on his behalf. The Post Office reply was that no equipment was available and it would be some considerable time before he could be provided with a telephone.

The assessment of priorities when allocating new telephones is made in accordance with certain " principles." For instance, an applicant who has been a subscriber elsewhere is treated as an old customer and given some preference on that account. Various other considerations are taken into account by the Post Office officials when deciding priorities, but the applicant is not generally aware what they are and he has no opportunity of arguing that they are not applicable to his case. It may be that this is an area of discretion which the Council on

Tribunals if it were given the powers which we propose in Chapter 7 would recommend should be brought within the tribunal system so that priorities could be assessed by an independent tribunal.

Wireless Telegraphy: Included under this head are complaints against the refusal or the termination of a licence or against a particular condition in a licence.

Summary of main features of administrative procedures in discretionary areas

52. The procedures which have been devolved by Departments in the course of administering areas of discretion have certain important features. First, the Departments have, in some instances, provided a right of appeal administratively where none exists as a matter of law. For instance, a farmer aggrieved by a certain type of decision of the Ministry of Agriculture may appeal to an Agricultural Executive Committee; an alien against whom the Home Office proposes to make a deportation order may, in certain circumstances, appeal to the Chief Magistrate at Bow Street; more recently, arrangements have been made administratively for patients dissatisfied with administrative decisions of Hospital Boards and Management Committees to appeal to a "Complaints Committee." Strictly speaking, such proceedings are not appeals against discretionary decisions because, as they lack statutory authority, the views of the independent body are not binding on the Departments. It is nonetheless significant and encouraging that these Departments of their own motion have made administrative arrangements for obtaining the views of an independent authority and generally speaking accept those views even when they differ from their own.

53. A second important feature of these procedures is the internal system of hierarchic appeals which has been established in some of the Departments, notably in the Post Office and the Board of Trade. Under this system, there is within the Department itself a recognised chain of appeal, from the local or junior level to the headquarters or highest administrative level, which provides valuable opportunities for reconsidering the original decision. The statistics furnished by the Departments suggest that the system is considerably used and is an important method of correcting mistaken discretionary decisions.

54. A third feature is the lack of uniformity in the departmental arrangements for dealing with complaints against discretionary decisions. For example, there are administrative arrangements for appeal in some Departments but not in others; in some instances

discretionary areas are brought within the administrative arrangements for appeal while others, equally suitable it would seem, remain outside their scope; in some Departments there is a system of hierarchic appeals but not in others; and some appellate arrangements apply in England but not in Scotland. Anomalies of this kind indicate the need to follow a consistent policy when deciding how complaints against discretionary decisions should be dealt with, and the importance of establishing suitable machinery to put it into effect. The tendency to breed anomalies is a natural phenomenon in any complicated administrative system. Just as the Franks Committee found many variations of constitution, practice and procedure amongst the numerous tribunals which Parliament had set up by many different statutes, so we believe that many variations are still to be found in the area where formal tribunals do not exist. Yet all these decisions ought to satisfy the citizen's demand for administrative justice.

CHAPTER 6

Principle of Impartial Adjudication

55. No doubt certain broad considerations have been kept in mind when deciding whether discretionary decisions should be subject to appeal to a tribunal or should be kept within ministerial control. Where individual decisions are likely to impinge on policy, as for example, decisions concerning the admission of aliens, no provision has been made for appeal to a tribunal since the Minister is responsible for policy and therefore must retain the final decision on such matters within his control. There are, however, other discretionary decisions to which such considerations do not appear to apply but which nevertheless have not been brought within the tribunal system; for example, decisions concerning marginal benefits in the National Health Service and decisions concerning parents' choice of school. These and other areas of discretion have been omitted from the tribunal system possibly for reasons of administrative convenience or because of some historical accident or perhaps on account of some oversight, but whatever the explanation may be, inconsistencies have grown up and areas of discretion have become, in some instances, areas of friction. We think this is a trend which is likely to increase in the future with the increase in government activity unless some consistent principle is applied when deciding whether disputes arising in areas of discretion should be entrusted to a tribunal or left to the Minister's decision.

56. We think that in deciding this question the guiding principle should be that the individual is entitled to have an impartial adjudication of his dispute with authority unless there are overriding considerations which make it necessary, in the public interest, that the Minister should retain responsibility for making the final decision. The application of this principle to discretionary areas will generally mean the extension of the jurisdiction of existing tribunals or the creation of new tribunals to adjudicate upon the disputes between the citizen and the Department. The provision of these additional facilities for impartial adjudication might give rise to practical difficulties if it were necessary to set up a separate tribunal to deal with every type of dispute which might arise in the discretionary areas, but we think these difficulties can be avoided if a General Tribunal, on the Swedish model as explained in paragraph 65, were established to deal with miscellaneous complaints against discretionary decisions where there is no specialised tribunal which can conveniently dispose of them.

§ 57 *Principle of Impartial Adjudication*

57. We have already stated that there may be overriding considerations which make it necessary in the public interest that the final decision in certain types of case should rest with the Minister. Although there cannot in such cases be an impartial adjudication, we think it may, nevertheless, be possible in some types of case to set up machinery to obtain an impartial opinion. The procedure followed in the case of the deportation of certain aliens when the Home Secretary seeks the advice of the Chief Magistrate at Bow Street before deciding to make a deportation order [1] is an illustration of the kind of machinery we have in mind. Similarly, it may happen that a decision which at one time was retained by the Minister within his control for reasons of policy might, owing to changed circumstances, be brought within the system of impartial adjudication. For example, the allocation of a foreign currency which in conditions of great scarcity was necessarily a matter for the Minister, might, if it becomes more freely available, be decided by an independent authority in the event of a dispute between the citizen and the Department.

58. We believe that if the principle of impartial adjudication were applied to areas of discretion on the lines we have suggested, it would do much to remove the sense of frustration and injustice felt by members of the public when faced with departmental decisions which they believe to be mistaken but which they have no effective means of challenging.

[1] See para. 32.

CHAPTER 7

New Machinery for Establishing Tribunals

Extension of powers of Council on Tribunals

59. We have stated our view that the application of the principle of impartial adjudication to areas of discretion will involve the establishment of new tribunals. At present the initiative for proposing new tribunals rests with the Executive. A Government Department, when preparing a new Bill, includes a provision for setting up a tribunal to decide disputes between the citizen and the Department if it considers it is appropriate to do so, and if Parliament approves the Bill in this form, a new tribunal is established. Subject to certain exigencies such as urgency and security, the Department, in accordance with a Treasury circular, seeks the advice of the Council on Tribunals on the proposed new tribunal; but the Council has no authority to propose a new tribunal of its own motion.

60. We think, however, that if the principle of impartial adjudication is to be applied uniformly and consistently, there should be a standing body which would keep this aspect of public administration under review, and make proposals for new tribunals in suitable cases. In our opinion the Council on Tribunals is well suited to perform these duties.

61. In the first place, the Council is an independent and non-political body and through its supervision of a large number of tribunals has gained considerable experience of their working. Moreover, the increasing flow of complaints from members of the public which the Council has received since it was set up nearly three years ago places it in a good position to make suggestions for the setting up of new tribunals. In performing its new duties, the Council should keep in touch with the many social service agencies which have experience of the difficulties of citizens in their dealings with authority. In this connection we think it appropriate to mention in particular the Citizens Advice Bureaux Service and the John Hilton Bureau from which we have received much valuable assistance in our Inquiry. The former comprises over 400 separate Bureaux established in nearly all the cities and many of the towns in the United Kingdom for the purpose of giving free information and advice to citizens. They are staffed, for the most part, by volunteers but they

usually have a panel of consultants from whom they can seek guidance on special subjects. In the course of advising citizens on their rights to social benefits and on the numerous facilities available to them in the Welfare State, the Bureaux obtain first-hand evidence of how administrative acts and decisions of Government Departments affect the man in the street, and not the least important of their functions is to maintain a close liaison with Government Departments through their National Committee and inform them when their actions cause friction or unfairness to the citizen. The John Hilton Bureau exists primarily to advise readers of a national newspaper on social and personal problems. Its headquarters are in Cambridge where it employs about forty persons, many of whom possess professional qualifications as barristers or solicitors or have had practical experience of sociological work as civil servants, army paymasters, trade union secretaries and so forth. The Bureau is consulted by approximately 200,000 persons a year on a large number of subjects covering such matters as pensions, insurance, housing, foster parents, education, taxation, police and prisons. As a result of its efforts to help inquirers the Bureau is in frequent contact with Government Departments and has acquired a large store of knowledge concerning the kind of administrative action which gives rise to problems in individual cases. The information which social service agencies of this character could furnish to the Council would ensure that any areas of discretion in need of attention were brought to light. We think a close working arrangement between the Council, the Government and social service agencies on these lines would result in the principle of impartial adjudication being applied consistently and future extensions of the tribunal system would be carried out more methodically and efficiently than in the past.

62. We have so far dealt only with new tribunals but we think the Council should also have authority to propose new procedures of inquiry similar to the planning and other special statutory inquiries which at present come under its supervision. Inquiries would usually be more appropriate than tribunals when the decision involved considerations of policy and there may well be cases, not at present provided for, where an inquiry is the best way to deal with complaints against discretionary decisions. For example, objections to the decision in the Crichel Down case to retain for farming purposes land compulsorily acquired for Air Force purposes, instead of returning it to its former owners, could have been dealt with by an inquiry before the decision was made if this procedure had been available at that time.

63. The Council, when performing its new functions, should report, as it does at present, to the Lord Chancellor and the Secretary of State for Scotland who should be responsible for the statutory action to give effect to its recommendations. In the ordinary way, the statutory action required to establish a new tribunal or special inquiry procedure or to extend the jurisdiction of an existing tribunal is the enactment of an amending Act of Parliament. There may be practical difficulties in taking action of this kind if the Government already has a heavy legislative programme to dispose of and we think consideration should be given to developing a simpler and more expeditious procedure for giving effect to the Council's recommendations. This might take the form of an Enabling Act authorising the Lord Chancellor to establish new tribunals and inquiries and to amend existing procedures by means of statutory orders. If this procedure were used, new machinery could be set up easily and quickly and improvements could be made to existing machinery without the delay involved in passing amending Acts of Parliament. It would of course be necessary to ensure that Parliament had full opportunity of debating the merits of these measures, particularly if the new machinery was designed to set up a tribunal with power to adjudicate on the matters for which a Minister had previously been answerable to Parliament. We think that this could be achieved by making provision in the Enabling Act that the statutory orders should be laid in draft before Parliament and should not become effective until approved by resolutions of both Houses.

New tribunals

64. One special aspect of the tribunal system should be considered in relation to our proposal that provision should be made for new tribunals to resolve disputes arising in the discretionary areas. To set up a separate tribunal to deal with each area of discretion might mean a great increase in the number of tribunals. In any event the number of appeals from certain types of discretionary decision might not be sufficiently regular to make it worth while establishing a new tribunal, as for instance appeals against discretionary decisions refusing permits for vivisection. On the other hand, we think it would be unfair to deny a citizen the right to challenge a discretionary decision because it happens to be one of a group in which decisions are made infrequently. In our view, a solution to this practical difficulty should be sought which will avoid a proliferation of tribunals but will nevertheless provide the means for a citizen to obtain an impartial adjudication, always excepting, of course, those discretionary decisions which must, in the public interest, be kept wholly within the control of the Minister.

The Swedish "General Tribunal"

65. It is interesting to consider how a similar problem has been successfully solved in Sweden. In 1909, the Swedish Parliament passed a statute setting up a body the title of which is sometimes translated as the Supreme Administrative Court and sometimes as Government Court, but which Professor Herlitz, Emeritus Professor of Constitutional and Administrative Law at the University of Stockholm, considers would be given the name "Tribunal" by lawyers in this country. We will so refer to it in the following paragraphs.

66. The method of defining the competence of the Tribunal is unusual. The Statute which established it enumerated the types of appeal from discretionary decisions which should be dealt with by the Tribunal and authorised it to substitute its own discretionary decision for the original decision. Each year the Swedish Department of Justice sends a circular to all Government Departments requesting them to submit amendments to the list of subjects which come within the Tribunal's competence. The departments then examine the cases which have arisen during the course of the year and make their suggestions to the Department of Justice. On the basis of this annual survey, the enumeration of the matters falling within the jurisdiction of the Tribunal is continually revised and brought up to date.

67. It is said that this Tribunal possessing these two special characteristics, namely, the definition of its jurisdiction by an enumeration which is revised annually and the authority to substitute its own discretionary decision for the original decision, has no equivalent in any other country. The Swedish authorities consider that the appeal facilities provided by this Tribunal are one of the reasons for the comparatively small number of complaints submitted to the Ombudsman since persons aggrieved by a discretionary decision on the ground of maladministration frequently prefer to seek their remedy before this Tribunal than to make a complaint to the Ombudsman.

68. We suggest that a General Tribunal should be established to deal with miscellaneous appeals from discretionary decisions. The types of discretionary decision which could be brought before it should be enumerated by a statutory order made by the Lord Chancellor under a general enabling Act after consultation with the Council on Tribunals and the Departments concerned. At stated intervals, possibly each year, the Lord Chancellor's Department would send a circular to all Government Departments and to the Council on Tribunals requesting them to submit proposals for additions or deletions to the existing list of subjects in the light of their experiences

of the previous year. Amending orders, bringing the list up to date, would be made on the basis of these proposals. The composition of the Tribunal would be somewhat different from those of specialised tribunals since the members would be required to have a wider and more general experience of administration than members of a tribunal dealing with a limited class of appeals, but we do not think it should be difficult to find suitably qualified persons. It might also be practicable to enlarge the Tribunal by arranging for additional members with specialised experience to sit with the regular members of the Tribunal when appeals dealing with matters calling for specialised knowledge were brought before the Tribunal. Although the procedure of the General Tribunal would no doubt be a matter on which the Council on Tribunals would advise, it is perhaps worth noting that the proceedings of the Swedish Tribunal are for the most part in writing and only exceptionally is there an oral hearing. The procedure is, in fact, similar to that followed when an appeal is made to a superior administrative authority, but with the important difference that the Tribunal enjoys the same kind of independence as a court of law.

69. If a General Tribunal dealing with miscellaneous complaints were added to a tribunal system expanded in the manner proposed earlier in this part of our Report, we think the principle of impartial adjudication in the field of public administration would, as far as Government Departments are concerned, have been applied as extensively as it is possible to apply it; only in those cases where it was necessary in the public interest for the Minister to keep the matter within his control would the citizen be without the means of appealing against a discretionary decision. A comprehensive system of impartial adjudication on these lines would, we think, go far towards providing every citizen with a means of redress in the field of administrative law as complete and effective as he has, for centuries, enjoyed in the realm of the common law.

PART III

CHAPTER 8

Complaints of Maladministration

Nature of the problem

70. In this part of our Report we consider the means for investigating complaints of maladministration. The term maladministration is not one of precise meaning and it would appear from the communications which we have received during the course of our Inquiry that there is considerable confusion as to what matters fall within its scope. We think it may help to clarify the subject to state at the outset what is not included within the scope of complaints of maladministration before attempting to define those matters which do come within it.

71. Our Inquiry is not concerned with complaints against administrative acts merely because they give effect to laws which are considered objectionable or in some way undesirable. Such complaints are not in fact complaints against bad administration but against bad laws. Similarly, complaints against administrative acts merely because they implement what is considered to be wrong policy are not our concern since policy is the responsibility of the Minister and not of the administrator. Nor are complaints against discretionary decisions which are lawful in themselves but unwelcome to the complainant within the scope of the complaints with which we are concerned. The remedy for such complaints (if deserving of remedy) is, and to an increasing extent should be—as we have suggested in Part II of our Report—by way of an appeal to a tribunal.

72. The complaints with which we deal are complaints of official misconduct in the sense that the administrative authority responsible for the act or decision complained of has failed to observe proper standards of conduct and behaviour when exercising his administrative powers. This may take a great variety of different forms. It may take the form of an abuse of power by an administrative authority as, for example, when a public official behaves oppressively towards a person who has been lawfully placed in his custody. Or it may happen that an administrative authority misuses its powers; for instance, a public official may show an unfair preference when allocating a Government contract. Or again, official misconduct may

cause loss or damage to a citizen through inefficiency, negligence or error on the part of the official handling his rights or interests. More rarely perhaps, official misconduct may consist in a decision so harsh and unreasonable as to offend a sense of justice. These are merely illustrations of the kind of complaints of maladministration with which we are concerned in this part of our Inquiry. It is clear that the circumstances which may give rise to complaints of this kind may be of infinite variety and it seems to us unprofitable to go further by way of definition than to say that complaints of maladministration are complaints that an administrative authority has failed to discharge the duties of its office in accordance with proper standards of administrative conduct.

73. Some types of maladministration may be remedied by judicial methods of redress. Maladministration of a criminal character is in our opinion already sufficiently defined by law and is so exceptional in practice that we do not think it necessary to discuss it further in the present context. Other judicial remedies are limited in scope and where available present peculiar uncertainties and difficulties. It does not lie within our terms of reference to examine these remedies in detail.[1] Of the uncertainties which surround judicial remedies we refer only by way of example to the highly technical complications of the prerogative orders of mandamus, certiorari and prohibition and the somewhat doubtful scope of the more flexible action for a declaration. It is however the difficulties of seeking a remedy in the ordinary courts which is most relevant to our present Inquiry. Chief among these must be the expense of litigation for the litigant (not qualifying for legal aid) when faced with the limitless resources of the State which if necessary may take the case to the House of Lords. We should welcome, although we do not feel called upon to undertake, an inquiry into the scope and effectiveness of judicial remedies for maladministration, but we consider that any practicable measures of reform in this respect would leave a wide field of maladministration outside the jurisdiction of the courts for which other methods of redress must be found.

74. There is one characteristic which is common to all complaints of maladministration. They are accusatory in the sense that the individual is accusing a Department of committing some fault in the exercise of its administrative powers. This is fundamentally different from complaints against discretionary decisions discussed in Part II of our Report, where the complaint is in the nature of an appeal in

[1] See generally, S. A. de Smith, *Judicial Review of Administrative Action*, and also H. Street, *Governmental Liability*, and J. D. B. Mitchell, *The Contracts of Public Authorities*.

which the complainant seeks to have a new discretionary decision substituted for the one to which he objects. It should, however, be noted that a complaint of maladministration may be accusatory and at the same time provide a ground of appeal against a discretionary decision, in which case the complainant may prefer to obtain a new discretionary decision rather than pursue his accusation of maladministration against the Department. For example, if a citizen considers a national assistance officer has shown bias in dealing with his case, he may make a complaint of maladministration against the Department or he may appeal to the local appeal tribunal against the officer's decision on the ground that it was biased. But of course there are many cases where no appeal procedure is available and the only course open to a person aggrieved by an act of maladministration is to make a complaint against the Department.

75. The accusatory character of complaints of maladministration has a special significance in relation to the machinery of investigation. As the Department is the object of the accusation, it follows that if the investigation is to be impartial, it should be conducted by some outside authority free from the real or apparent influence of the Department. It is important, however, that the outside authority should not disturb the normal administrative processes of the Department more than is necessary for the purpose of investigating the particular complaint and therefore it should conduct its investigation as informally as possible. Impartiality and informality therefore should be indispensable characteristics of any machinery for investigating complaints of maladministration.

Extent of the problem

76. There is no easy method of assessing the extent of maladministration since Government Departments very naturally do not record and often do not perceive their own errors, and the paucity of information from other sources provides little assistance in estimating the volume of this type of complaint. Some indication of the flow of complaints which are dealt with by way of Parliamentary Question or in Adjournment Debates is given by *Hansard* Reports. It is estimated that in an average session there are between 200 and 300 Parliamentary Questions and 15 to 20 Adjournment Debates dealing with complaints of an administrative character. We have received some information from Members of Parliament, the Press and representative organisations and individuals on this topic, but it has been of a general rather than of a statistical character and not always consistent.

77. It has not been possible, therefore, to do more than form a general impression of the extent to which there is maladministration

in Government Departments. In our view, the administration of Government Departments is, generally speaking, of a high standard and the occasions on which major mistakes are made are few. On the other hand, there appears to be a continuous flow of relatively minor complaints, not sufficient in themselves to attract public interest but nevertheless of great importance to the individuals concerned, which give rise to feelings of frustration and resentment because of the inadequacy of the existing means of seeking redress. It should, also, be emphasised, as we have already pointed out in paragraph 5, that there has been a vast increase in Government activity since the war, particularly in the social and economic fields, and this, in itself, has greatly increased both the risk of maladministration and the need for better protection against the injustice which maladministration may cause. The question, therefore, which we have to consider is whether, and if so, what, new machinery is required; but before doing so, we think it will be helpful first to review the existing machinery for investigating complaints of maladministration and afterwards to examine in some detail the Scandinavian Ombudsman system which has achieved remarkable success in dealing with similar problems in Sweden and Denmark.

§ 78

CHAPTER 9

Existing Machinery for Investigating Complaints of Maladministration

78. In any consideration of existing means of redress, it is essential to begin by emphasising the powerful and indispensable part played by the Press in drawing the attention of the public to important and sometimes seemingly trivial cases of administrative injustice. However, apart from one notable exception, there is no specialised machinery in our constitution as there is, for instance, in the constitutions of France and the Scandinavian countries, for investigating complaints against acts of maladministration. The exception is the Comptroller and Auditor-General, an office constituted in 1866 to investigate and check acts of maladministration in the financial field, which we discuss later in Chapter 13 of our Report. But for the remaining areas of public administration—in which, of course, acts of maladministration no less serious than those in the financial field may occur—there is no specialised formal machinery for investigating complaints. In such cases, the complainants are dependent upon Parliamentary procedures intended for general purposes but made to serve also the particular purpose of investigating individual complaints of maladministration. These procedures may be listed as follows: the Parliamentary Question procedure, the Adjournment Debate, and the *ad hoc* Inquiry.

Parliamentary Question procedure

79. When Parliament is sitting, one hour is set aside every day except Fridays for questioning Ministers. The number of questions on the Order Paper each day is about 90, but only 40 or 50 questions are dealt with orally during the hour, the remainder being either withdrawn, deferred or answered later in writing. In many instances, there is a preliminary stage before the Parliamentary Question is reached. A Member of Parliament may decide, before putting down a Question, to make representations by letter to the Minister, setting out the grounds of his complaint and seeking an explanation. Such letters are given special attention in the Departments because it is realised that if the Member is dissatisfied with the answer he receives, he can always ask a Question. There is some justification, therefore, for regarding correspondence of this nature between Members of Parliament and Ministers as an informal extension of the Parliamentary Question procedure. It is a method which is used on

a considerable scale and some Members probably rely upon it more than on formal Questions. Moreover, it is not unusual for it to achieve its purpose of providing the Member with a satisfactory explanation without the necessity of a Question, at all events in those cases where the complaint is due to misunderstanding or to inaccurate information. Where, however, the correspondence raises issues of a controversial character, the preliminary stage is usually inconclusive and is followed by the formal procedure of the Parliamentary Question.

80. Perhaps the most striking feature of the Parliamentary Question procedure is the wide field of complaints which it covers, ranging from matters of high policy to matters of minor and even trivial detail. Included in this vast range of subjects, of course, is maladministration and as indicated in paragraph 76 the number of Parliamentary Questions dealing with such matters which are asked each session is substantial.

81. Probably the number of complaints raised by way of Parliamentary Questions is only a small proportion of the whole. It would not, however, be possible to increase the use of the Parliamentary Question procedure for dealing with complaints of maladministration, even if this was considered to be desirable, since this Parliamentary machinery is already heavily overloaded and under a recent rule [1] the number of Questions which a Member may set down for oral answer on any one day has been reduced from three to two.

82. Although framed as an interrogatory for the purpose of Parliamentary procedure, a Parliamentary Question which raises a complaint of maladministration is not so much a request for information as an accusation against a Government Department that it has failed to discharge its duties properly. A Parliamentary Question of this character is therefore a matter of serious concern to the Department since its reputation and prestige, to a greater or less extent depending on the particular circumstances of the complaint, are involved and it is natural and proper that a great deal of time and trouble should be taken by officers of the Department in investigating the complaint and preparing the answer to be given by the Minister in the House of Commons so as to ensure that it is as full and complete as possible. But no matter how thorough the work of the Department may be in preparing the answer, the process contains two inherent weaknesses: first, the investigation is carried out by the Department whose conduct is impugned, and secondly, it is based upon documents which are not available to the complainant or indeed to anyone other than the Department. The investigation, therefore, is not impartial

[1] *Hansard*, H. of C. Deb., Vol. 617, col. 245.

in the sense that it is conducted by an independent authority having access to all relevant documents and it is inevitable in these circumstances that the complainant should feel that the Department has been judge in its own cause and for that reason, if for no other, should feel dissatisfied with the process. We think it is essential that any system of investigation of complaints of maladministration, if it is to have the confidence of the complainant and the public at large, should be impartial and in our view the absence of this characteristic in the Parliamentary Question procedure makes it an unsuitable process for dealing with complaints of maladministration if they raise controversial issues.

83. Quite apart from this objection in principle, we do not think that the House of Commons is a suitable forum for investigation, by means of question and answer, of allegations of maladministration except in the simplest type of case. Controversial matters of detail cannot be discussed satisfactorily in the short space of a single answer and any attempt to prove the issues by means of supplementary questions rarely resolves the dispute and frequently heightens the atmosphere of controversy.

84. We think, therefore, the Parliamentary Question procedure is inadequate as a means of investigating complaints of maladministration. But at the same time we recognise that it imposes a powerful restraint on any tendency on the part of Departments to take actions which might render them liable to public criticism and as such it is a valuable safeguard against maladministration and should be retained. It is also a valuable means of enforcing ministerial responsibility. There should, however, be some supplementary machinery to enable a Member of Parliament to secure an impartial investigation of complaints of this character if he so wishes.

Adjournment Debates

85. If a Member of Parliament is dissatisfied with the answer to a Parliamentary Question, he may seek to raise the matter on the adjournment if he wishes to pursue it. This means that in the course of the next two or three weeks approximately half an hour of Parliamentary time will be set aside to enable the issues raised by the Parliamentary Question and the Minister's answer to be debated in the House. Usually there are only two speakers, the Member of Parliament who asked the Question and the Junior Minister of the Department concerned, and the half-hour period is taken up by the speakers deploying the facts or arguments, outlined at the time of the original question, in rather more detail than on the first occasion. There are 150 to 170 Adjournment Debates each Session. It is,

however, by no means certain that a Member of Parliament will succeed in his efforts to raise a matter on the adjournment, as the selection of topics for Adjournment Debates is made partly by the Speaker and partly by ballot, and such is the zeal of Members of Parliament that there are invariably more applications for these half-hours than can possibly be granted.

86. The procedure succeeds to a remarkable extent in bringing the matters in dispute to public notice and this may be of great value if the issues are of the kind which are likely to attract the interest of the Press and the public. But where the complaint is one which is of no great importance except to the individual whose grievance is being debated, it is by no means clear that the debate brings any advantage or relief to him as the lateness of the hour may reduce attendance in the House and Press publicity to a minimum. Usually the Member of Parliament who initiates the debate presents a convincing case of apparent hardship or inefficiency and the Government spokesman on the other hand shows in convincing fashion that in all the circumstances the Administration acted correctly. The proceedings which began as an investigation have turned into a contest in which the spokesman on each side identifies himself with his cause and, consequently, it is rare for either side to give any ground; moreover, it is often an uneven contest in the sense that the Minister has access to documents and information which are denied to his opponent. An illustration of the inflexible character of the contest when the dispute reaches the stage of an Adjournment Debate is provided by a summary of the following case reported in *Hansard*:

> A prisoner serving a 12-year sentence in Parkhurst Prison, Isle of Wight, petitioned the Home Secretary for a temporary transfer to Bedford Prison so that he could be visited by his mother, aged 84, whose eyesight was failing. "It would certainly give her a little happiness and myself peace of mind if you could kindly allow me to go to Bedford Prison with the usual monthly draft so that we could both have the pleasure of meeting again before it is too late. If you require further confirmation that this is a genuine case you have only to ask Dr. —— to confirm this." A reply to the petition was received within seven days of its dispatch stating that the petition had been carefully considered but that there were "no grounds for a transfer." The matter was taken up by the prisoner's M.P., and after an interval of five weeks the Home Secretary confirmed the original refusal. In the subsequent Adjournment Debate, the M.P. inquired what steps had been taken to investigate the petition before it was refused in the first instance after an interval of only seven days.

> He mentioned that he had made his own investigations by visiting the mother and making inquiries of the doctor referred to in the petition; and he maintained that if the prisoner's request were refused, it would mean almost inevitably that the mother, because of the inexorable deterioration of her eyesight, would never see her son again. The Joint Under-Secretary of State for the Home Department admitted that the mother could not travel to Parkhurst to visit her son, and that, although not totally blind, her vision was undoubtedly poor and there was some genuine hardship. He added, however, that " even if the circumstances had justified the expense and inconvenience of transferring the man to Bedford . . . she could not have visited him more than twice during the time he stayed there even if all the visits due to him were allowed. The conclusion, therefore, was reached by the prison authorities that compassionate circumstances at the time of the application did not justify the exceptional treatment which I have mentioned." [1]

It would seem that in the debate the prisoner's M.P. succeeded in establishing satisfactorily the matters relied upon in the prisoner's petition and was able to show that it was a case of genuine hardship; but the Minister nevertheless adhered firmly to the view reached by the prison authorities a few days after the petition was lodged that " there were no grounds for a transfer."

87. It is clear that an Adjournment Debate falls far short of an impartial investigation and seldom brings any benefit to the complainant. If there is to be a debate on the issues raised by a complaint of maladministration, it would probably be more productive if there were an impartial investigation and an objective report on the circumstances of the case before it took place.

Ad hoc Inquiries

88. From time to time *ad hoc* Inquiries are ordered by the Government when it is considered that a complaint of maladministration raises issues of such importance as to require a public inquiry. These *ad hoc* Inquiries are of two kinds: Inquiries under the Tribunals of Inquiry (Evidence) Act, 1921, and Departmental Inquiries ordered by a Minister. The former are set up by resolution of both Houses of Parliament and have powers to compel the attendance of witnesses and the production of documents similar to the powers of the High Court. They are usually presided over by a High Court judge assisted by two or more persons having qualifications suitable to the subject-matter of the complaint. Departmental Inquiries do not possess the

[1] *Hansard*, H. of C., Vol. 590, col. 1041.

statutory powers of Tribunals set up under the 1921 Act but they nevertheless have considerable status and prestige; when investigating complaints of maladministration, a Queen's Counsel is usually appointed to conduct the Inquiry and the proceedings are held in public. The selection of the particular kind of inquiry is largely a matter for the Government to decide. The John Waters Inquiry, for example, was held under the Tribunals of Inquiry (Evidence) Act, 1921, but the Crichel Down case was a Departmental Inquiry.

89. There is no doubt that investigations carried out by the procedure of an *ad hoc* Inquiry are conducted impartially and with thoroughness and fairness. The proceedings are in public and their reports are usually accepted by Parliament, the Press and the public without controversy. As a means of investigating a particular complaint of maladministration, therefore, an *ad hoc* Inquiry is a satisfactory procedure; it bears the characteristics of impartiality and openness which ensure public confidence in the proceedings.

90. But an *ad hoc* Inquiry is an elaborate and expensive proceeding designed to deal with major scandals and is inappropriate for the investigation of minor matters which may be of frequent occurrence. During the forty years which have elapsed since the passing of the Tribunals of Inquiry (Evidence) Act, 1921, there have been only fourteen Inquiries in all and of these only nine have been concerned with maladministration. The John Waters Inquiry held in 1959 illustrates the resistance which has sometimes to be overcome before the Government agrees to set up an *ad hoc* Inquiry. After the matter was first raised in the House of Commons by Mr. Waters' Member of Parliament, seven months elapsed before the Government introduced the necessary motion for setting up an inquiry under the 1921 Act and one of the chief reasons for doing so was a petition signed by 150 Members of Parliament requesting that a public inquiry be held. It would seem that *ad hoc* Inquiries into allegations of maladministration are not likely to be started unless there are strong pressures from political quarters or from the Press and the public. Such pressures do not always provide a sure ground for deciding whether an inquiry should be held and it may well happen that an inquiry set up as a result of public clamour may prove to have been unnecessary. It is generally agreed that the Waters Inquiry failed to justify the trouble and expense of the proceedings, part of the cost of which fell on the local authority and caused a slight increase in the rates to cover the expenditure. It is possible that if the issues had been investigated informally at an earlier stage by an independent authority, in whom the public and the Press had confidence, this Inquiry need never have been started.

§ 91 *Existing Machinery for Investigating Complaints*

91. The *ad hoc* Inquiry procedure is doubtless an instrument which the Government may wish to have available to use in cases of major public importance where the investigation is likely to be difficult and complicated but it clearly does not provide any solution to the problem of providing a ready means of dealing with complaints of maladministration of less importance but more frequent occurrence.

CHAPTER 10

The Swedish Ombudsman [1]

92. Although more prominence has been given to the Danish than to the Swedish Ombudsman in discussions in this country on the Scandinavian Ombudsman systems, we begin our consideration of this subject with the Swedish institution, partly because it is old and well-established, having been instituted in 1809, whereas the Danish institution was founded only six years ago, and partly because there are important differences between the two systems which cannot easily be understood without first studying the Swedish model. It is also noteworthy that the Swedish institution has recently attracted a great deal of attention in countries other than the United Kingdom and visitors from countries as widely separated as Greece and Canada have made inquiries as to the working of the Swedish system. This sudden interest in an institution which has been functioning for the past 150 years in much the same way as it functions today is somewhat surprising but it doubtless reflects a growing concern to discover the means for more effective protection of individual rights in an age when civil servants are everywhere exercising an increasing influence on the interests of the private citizen.

93. The word "Ombudsman" is one in common daily use in Sweden today and means, literally, an attorney or representative. Many of the large commercial firms in Sweden have an ombudsman who acts as the firm's representative in business negotiations and every trade union has an ombudsman whose duties are similar to those of the general secretary of a British trade union. In Denmark and in Norway, where the word is not so commonly used, it has a rather different meaning. It connotes a person who has had a public duty imposed upon him which he must discharge. A juror is usually given as an example of this kind of ombudsman. However, in the context of the Danish Ombudsman, the word is used in its Swedish sense of attorney or representative since the title, as well as the institution, was borrowed from Sweden when the office was established in Denmark

[1] *Note*: On the subject-matter of this and the succeeding Chapters 11 and 12, reference may be made to the following material in English: Hurwitz, *Journal of the International Commission of Jurists*, Vol. I, No. 2 (1959), p. 224, *Public Law* (1958) p. 258, the Legal Correspondent of the *Observer*, May 31 and June 7, 1959; Pederson, *Public Law* (1959), p. 115; B. Chapman, *The Profession of Government*, 1959; Wold, *Journal of the International Commission of Jurists*, Vol. II, No. 2 (1960), p. 21; L. J. Blom-Cooper, *Public Law* (1960), p. 145; T. E. Utley, *Occasion for Ombudsman* (Christopher Johnson, 1961).

in 1954. The expression "Riksdagens Justitieombudsman" has been translated in English-language publications, if not with complete at least with sufficient accuracy, as Parliamentary Commissioner for Civil Administration.

Historical

94. In 1713 Charles XII of Sweden appointed one of his councillors to be "koningen högsta Ombudsman" (the King's highest Ombudsman) and charged him with the duty of prosecuting government officers and others who contravened the law. In 1719 the designation "koningen högsta Ombudsman" was changed to Justitiekanslern (translated by Professor Herlitz as Attorney-General) but his duties remained the same. At the beginning of the 19th century, when a new constitution for Sweden was under discussion, the Swedish Parliament proposed that they should have their own officer to prosecute government officers who contravened the law instead of leaving the duty entirely to the Justitiekanslern who was himself a government officer, and accordingly in the Constitution of 1809 provision was made for the appointment of a Justitieombudsmannen "to supervise the observance of statutes and regulations by the courts and by public officials and employees."

95. Since that date up to the present time there has been an Ombudsman in Sweden. He is appointed for a period of four years (which may be renewed for further periods of four years) by a Board of 48 persons elected by Parliament and he is responsible only to Parliament. He is selected from among jurists of high reputation and holders of the office have generally enjoyed great esteem for their integrity and capacity. He receives the same salary as a judge of the Supreme Court. Every year at the opening of Parliament he submits a report to Parliament, giving a general account of his work during the previous twelve months and a detailed account of the more important cases he has dealt with during that period. His staff remains quite small, consisting of only five lawyers and a small office staff.

Functions of the Swedish Ombudsman

96. In 1809 when the first Swedish Ombudsman was appointed, civil servants were not subject to the control of Ministers, nor are they today. Swedish Ministers are more correctly described as Councillors of State whose function is to deal with matters of policy; they are not, either collectively or individually, responsible for the administration of Government Departments or the acts of civil servants. There are no Government Departments in the ordinary sense

in Sweden. The machinery of administration consists of numerous Boards under the control of Directors-General, Councils and similar agencies which operate as independent commands and are subject only to the law. The civil servants employed by the Boards and agencies are likewise only answerable to the law of which the most important provision in this connection is a rule in the Penal Code which states:

> If a civil servant, through neglect, imprudence or want of skill, disregards his duties according to statutes, instructions or other regulations or to special instructions, or to the nature of his office; he shall be condemned to a fine or to suspension for neglecting his duty.

The words "disregards his duties . . . according to the nature of his office" are important since they extend the meaning of the rule so as to make a civil servant responsible for shortcomings which would not fall under the other specified faults mentioned in this section.

97. The Public Officer responsible for instituting proceedings is the Ombudsman, and although in practice he does so in less than 1 per cent. of the cases which he investigates, his functions are anchored historically to the power to institute proceedings against a civil servant who has misused his power or who has been guilty of negligence or inefficiency or who disregards his duties "according to the nature of his office."

98. The fundamental concept, therefore, of the Swedish Ombudsman is that he is an officer of Parliament whose duty is to ensure that civil servants carry out their administrative duties according to law and to institute proceedings if they fail to do so. If the Ombudsman were not charged with this duty, Parliament would have no means of doing so through Ministers as the civil servants are not subject to ministerial control. It is also important to note that there is no Parliamentary Question procedure comparable to the United Kingdom procedure by which indirect control can be exercised over the Administration. The total number of questions asked for information purposes in the Swedish Parliament was 86 in 1957, 80 in 1958 and 61 in 1959; moreover, it is not the custom to deal with particular cases by this procedure.

99. In addition to investigating allegations of maladministration against civil servants, the Ombudsman may intervene to persuade the Government to rectify an injustice if it appears, after an investigation, that it cannot be remedied by any legal process. An illustration of this function is provided by a recent case in which an innocent bystander was knocked down and injured by police during a chase.

Investigations were conducted by the Chief of Police at the request of the Ombudsman with a view to identifying the individual policeman who caused the injuries, but after intensive inquiries, the Chief of Police failed to establish any identification and the injured man was left without any legal remedy. The Ombudsman represented to the Government that they should pay reasonable compensation and this was agreed. Yet another function exercised by the Ombudsman is to make recommendations for amendments to the law when the results of his investigations indicate these are desirable. This function is well illustrated by the following case:

> A man murdered his wife. It was alleged that the wife had asked for her husband to be put under restraint as an alcoholic but the police had refused. The Ombudsman investigated the allegation and ascertained that the wife had made such a request four days before she was murdered but the police had refused because in the limited time which they could keep the husband under observation, namely, one day, there was insufficient evidence to show that he was an alcoholic. The Ombudsman recommended that the law should be altered to allow the police to detain a person for four days in such circumstances.

Publicity

100. Although the ultimate sanction of the Ombudsman is the power to institute proceedings against civil servants, this power is now rarely used as is shown by the fact that in 1959 there were only 5 prosecutions out of 1,003 cases. In practice, the real sanction is the publicity which is given to the Ombudsman's criticisms of the Administration in his annual reports to Parliament but more especially in the daily Press. Every day at 11 a.m. a representative of the Swedish Press Bureau calls at the Ombudsman's office to examine the complaints and the decisions of the previous day. The files are laid out on a table ready for the Pressman's inspection and contain all the inward and outward correspondence and any reports relating to the particular complaint or decision. The Pressman selects those cases which are of general interest and circulates the information to the national newspapers; if a case is of merely local interest, he sends the information only to the provincial newspapers circulating in the locality concerned. Almost every day, the Pressman has something to report. On some occasions, the Press report contains criticisms of the Ombudsman's handling of a case if there appears to have been unnecessary delay in his office. The wide and continuous publicity resulting from this system of daily visits by a representative of the Press Bureau in many ways provides a more effective weapon

than prosecution and is much feared and respected by the civil servants.

Competence of the Swedish Ombudsman

101. The Ombudsman's competence covers not only complaints against civil servants but also complaints against judges and clergy of the Lutheran Church. In exercising his powers, the Ombudsman has regard to the distinction between complaints against decisions and complaints against the conduct of persons who come within his jurisdiction. For instance, the Ombudsman does not concern himself with judicial decisions, whether given in the ordinary courts or in the administrative courts, since if there are objections they can be remedied by the ordinary process of appeal. But he will investigate a complaint about the conduct of a judge and although this is an extremely rare occurrence in the case of a Supreme Court judge, it does sometimes occur in the case of the subordinate judiciary. For instance, he recently investigated a complaint that a district judge had undertaken legal work for third parties outside his judicial duties.

102. The clergy of the Lutheran Church come within the Ombudsman's jurisdiction because the Lutheran Church is the Established Church and its clergy are regarded as civil servants. A recent example of the Ombudsman's intervention in this field is provided by the case of a Bishop who disapproved of a recent law allowing women to be ordained and therefore advised his clergy not to co-operate with them. The Ombudsman pointed out to the Bishop that he was inciting the clergy to break the law and requested an explanation. The Bishop's reply was forwarded by the Ombudsman to the Archbishop with a view to reaching a satisfactory settlement of the dispute.

103. But, of course, the largest and most important field of the Ombudsman's jurisdiction is that which is concerned with complaints against civil servants. Originally only civil servants of the central government came within his jurisdiction but in recent years his authority has been extended to cover certain classes of local government officials and employees of local Boards who perform functions on behalf of the central Government. The Ombudsman's jurisdiction to investigate complaints against the decisions of civil servants is in practice subject to one very important exception: he will not take up cases complaining of the way in which a civil servant has exercised his discretion unless it appears the discretion has been so abused as not to amount to an exercise of a discretion at all. This exception excludes from the Ombudsman's competence a large area of Government administration which it is generally believed in this country is

subject to his investigation and criticism. In particular it should be noted that the "particular areas of discretion" identified and described in Part II would fall outside the competence of a Public Officer exercising in this country similar powers to the Swedish Ombudsman, unless the complaint indicated prima facie that the discretion had been abused.

Practice and procedure of the Swedish Ombudsman

104. Any citizen who is aggrieved by an administrative decision or by the conduct of an official whom he considers has been guilty of some act of maladministration may make a complaint to the Ombudsman. Complaints are usually submitted in writing and they must be accompanied by all relevant documents. If the Ombudsman is satisfied that the complaint is one of substance, he will commence an investigation. He will request the official concerned to give his explanation and will at the same time ask the Department to produce the relevant departmental file. A departmental file in this context means the outward and inward correspondence (including correspondence with other Departments and outside bodies) and any reports relating to the subject-matter of the complaint but not the documents recording the internal discussions in the Department. If the Ombudsman requires any further information, he may request any Government agency who he thinks may be able to assist to produce it for him, and the Government agency is bound, as a matter of law, to give all the assistance it can. After completing his investigations, the Ombudsman may institute proceedings and it will then be for the courts to decide if the complaint is well founded. Alternatively, the Ombudsman may merely administer a reprimand and include the case in his report to Parliament. Or he may decide to take no further action.

105. The Ombudsman not only acts on complaints received from citizens but also on his own initiative as a result of information which he acquires from inspections. These are undertaken periodically in outlying parts of the country and a typical inspection would be on the following lines. The Ombudsman, accompanied by a small staff, will arrive, after giving forty-eight hours' notice, at a District Government Headquarters where about 100 officials are employed. He will discuss with the Governor of the District any particularly troublesome administrative problems and will later pick out twenty to thirty files at random for examination. (As explained in the previous paragraph, a file comprises all inward and outward correspondence and reports but does not include internal minutes.) The Ombudsman will look through the files to see whether complaints have been thoroughly investigated, whether officials have given reasons for their decisions

and whether the decisions are lawful. The Ombudsman lays great stress on the importance of officials giving citizens reasons for their decisions. For instance, if it appears from an examination of a file that a gun licence has been refused because the applicant had previously threatened someone with a gun, the Ombudsman would insist that the applicant should be informed of this reason if this has not been done when the licensing authority communicated the refusal. After completing his examination of the files, the Ombudsman will inspect prisons, asylums, children's homes and other state institutions in the locality, and if he finds evidence of maladministration, he will take action against the persons responsible in the same way as when he receives complaints of maladministration from members of the public.

106. During 1959 the Ombudsman received 780 complaints and initiated 223 himself, making a total of 1,003. Of the cases which were submitted to the Ombudsman during this period, 184 were considered to be without foundation, 619 were investigated but no action was taken, 247 resulted in admonitions to officials, and five resulted in prosecutions against officials. The Swedish authorities consider that for a population of 7½ million, 1,000 cases a year is not very high but state that the reason is that a citizen aggrieved by an administrative decision, even a decision involving a discretion, has a wide range of appeal to independent authorities and is usually satisfied to let matters rest after exhausting his rights of appeal. The complaints which come to the Ombudsman are therefore, for the most part, limited to acts of maladministration where there is no right of appeal to an independent authority and, as these form a relatively small proportion of the total of the citizens' complaints against the Administration, the number of complaints received by the Ombudsman remains of manageable size and he is able to give most of them his personal attention. The result is that the prestige of the Ombudsman is very high and the institution commands the respect and confidence of Parliament and the public.

107. A few examples will illustrate the wide variety of cases of maladministration investigated by the Ombudsman and the different ways in which he deals with them:

(a) A man wished to export an Old Master but was forbidden to do so by the director of a museum. A complaint was made to the Ombudsman who pointed out to the director that he had no authority to issue such a prohibition and the picture was duly exported.

(b) Police recorded an incoming telephone conversation without the knowledge of the caller but with the permission of the other party. A complaint was subsequently made to the Ombudsman who instituted proceedings against the police. The court did not convict,

as the police had not contravened any law, but expressed disapproval of their conduct.

(c) A man was sent to a workhouse (*i.e.*, a place where he is compelled to work) because he had failed to maintain his family. The Ombudsman, while inspecting the workhouse during one of his visits, noticed the man and considered he was an alcoholic and therefore required special treatment. He recommended that new regulations should be made to deal with such cases.

(d) Prison authorities issued an order that a certain magazine should cease to be circulated in the prison. A complaint was made to the Ombudsman who discovered that the reason for the prohibition was that the magazine had criticised the prison authorities. As a result of the Ombudsman's intervention the circulation of the magazine in the prison was restored.

Main characteristics of the Swedish Ombudsman system

108. Although there are many features in the Swedish Ombudsman system which are special to that country, in particular the absence of ministerial control of civil servants, there are certain characteristics of the institution which we think can be studied with advantage. First, there is the principle of impartial investigation. If a citizen makes a complaint against the conduct of a civil servant, the matter is investigated and reported upon by the Ombudsman, who is an impartial authority entirely independent of the Administration. Secondly, the impartial authority acts on behalf of Parliament although he is also protecting the interests of the individual complainant. Thirdly, the investigation is conducted openly. All the documents are made available to the Press and wide publicity is given to the investigation in all its stages. Fourthly, the method of submitting complaints and the investigation of complaints is very informal. It is generally agreed that the application of these characteristics in the Swedish Ombudsman system has provided the citizens of Sweden with an effective means of checking misuse of power by civil servants and has promoted a high standard of administration in that country.

CHAPTER 11

The Danish Ombudsman

Historical

109. During the discussions which took place after the war on the framing of a new constitution for Denmark, a great deal of consideration was given to the question of providing greater safeguards for the citizen against maladministration by public officials. The powers of civil servants had been greatly extended in the post-war years and there was a feeling that the checks against mistakes or arbitrary behaviour were inadequate. There were already several important safeguards in existence. The courts had a wide jurisdiction to pronounce upon the legality of administrative decisions and there were about 100 administrative tribunals with authority to review administrative decisions. But notwithstanding these safeguards, the framers of the new constitution put forward proposals for providing additional protection for the citizen.

110. Among the new proposals was a suggestion that an institution on the model of the Swedish Ombudsman should be set up. This proposal was the subject of considerable discussion. It was pointed out that the constitutional structure of Sweden was very different from that of Denmark as there was no ministerial control of civil servants in Sweden and therefore an Ombudsman was necessary to ensure that civil servants performed their duties properly and according to law. In Denmark, on the other hand, where there was full ministerial responsibility for the administrative acts and decisions of civil servants, there was no such necessity and in theory, at least, the appointment of an Ombudsman was superfluous. The protagonists of the Ombudsman proposal conceded the force of this argument but nevertheless maintained that the Ombudsman system should be introduced into Denmark for psychological reasons so that citizens could feel that there was an independent check on the acts and decisions of civil servants.

111. This view eventually prevailed and provision was made in the new Constitution of 1953 and by the Ombudsman Act of 1954 for setting up a Danish Ombudsman who was to be elected by Parliament after each general election. Professor Hurwitz, formerly Professor of Criminal Law at Copenhagen University, was appointed in 1955 and still holds the office. His staff consists of one legal assistant, four secretaries and a small office staff.

Functions of the Ombudsman

112. The legislation setting up the Danish Ombudsman was drafted in wide and general terms so as to provide a broad framework within which the institution could develop and grow. The more important provisions read as follows:

> (The Ombudsman) shall keep himself informed as to whether (ministers, civil servants and all other persons acting in the service of the State except judges) commit mistakes or acts of negligence in the performance of their duties.
>
> (Act of 1954, section 5)

> The Ombudsman shall keep himself informed as to whether any person comprised in his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties.
>
> (Directive, Article 3)

Within the broad terms of these provisions, the first Danish Ombudsman, Professor Hurwitz, has, during the past six years, established the practical limits of his authority and developed a smooth method of working. It is widely recognised that the very great measure of success which the institution has achieved during this initial period is due to the sound judgment and tact of Professor Hurwitz.

Illegal administrative decisions

113. The range of the Ombudsman's activities as developed by Professor Hurwitz may be considered, first, in relation to complaints of unlawful decisions by civil servants. The work of the Ombudsman in this field is supplementary to that of the ordinary courts. In Denmark the courts have a wide jurisdiction to control the legality of administrative decisions, and anyone aggrieved by an administrative decision, whether on a question of law or of fact, may test the matter in court. Alternatively, he may lodge a complaint with the Ombudsman who, if he considers after investigation that the Administration has acted illegally, will give his opinion to that effect and may recommend that the complainant should be provided with legal aid so that he may contest the decision in court. The following example illustrates how this procedure works in practice.

> A Chief of Police ordered a taxi driver not to use a hackney-carriage stand for one month. The reason for the decision was that there had been trouble among the taxi drivers and the Chief of Police thought this particular taxi driver was the cause of it. The taxi driver complained to the Ombudsman who decided to investigate the case and came to the conclusion that probably

the order of the Chief of Police was illegal. He so informed the taxi driver and at the same time recommended he should be granted legal aid to enable him to bring proceedings. The taxi driver subsequently brought an action against the Chief of Police and recovered 1,500 kroner as damages.

As he could have proceeded against the Chief of Police in the first instance without lodging a complaint with the Ombudsman, it may be said that the Ombudsman's intervention was unnecessary, but it is nevertheless considered a great advantage for the ordinary citizen that he can invoke the assistance of the Ombudsman when his interests are affected by an illegal administrative decision.

114. Most of the complaints against unlawful administrative decisions with which the Ombudsman has to deal turn upon the correct interpretation of the Administration's powers but they may raise questions of fact, in which case the Ombudsman is entitled to call for the Departmental file to assist him in the investigation of the facts. In Denmark, as in Sweden, a Departmental file consists of the inward and outward correspondence and reports, but not the records of internal discussion and minutes.

115. It is, however, important to note that, where the administrative decisions involve the exercise of discretion, the Ombudsman will not investigate complaints that the discretion has been exercised in an unsuitable manner or, to put the matter another way, he will not take up a complaint against administrative discretions merely because he would or might have exercised the discretion differently if he had been sitting in the administrator's chair. In the exceptional case where there has been an abuse of discretionary power, he may intervene by virtue of Article 3 of the Directions which requires him to keep himself informed when any person comprised in his jurisdiction " takes any arbitrary or unreasonable decisions," an expression which the Ombudsman has interpreted to mean that there has been an abuse of power so that the discretion has lost its real character. He has intervened only once or twice in discretionary cases since he began to function in 1955. As has already been pointed out in Chapter 10 when discussing the functions of the Swedish Ombudsman, this means that a large area of public administration which is popularly supposed in this country to fall within the jurisdiction of the Ombudsman does not in fact do so.

Acts of maladministration by public officials

116. In addition to investigating complaints of illegality, the Ombudsman is responsible for supervising the administrative acts of

public officials and investigating complaints of official misbehaviour, inefficiency and negligence. The scope of this function is very wide indeed and covers the whole range of Government administration. It is, in a sense, supplementary to the supervision exercised by Ministers who are responsible, as already mentioned, for the proper administration of their departments as are Ministers in the United Kingdom, and to the supervision exercised by Parliament through the Parliamentary Question procedure. The latter, like the Parliamentary Question procedure in Sweden, is very limited in its scope compared with United Kingdom procedure; questions are asked only on one day a week and those dealing with administrative matters average about sixty a year.

117. Some indication of the type of case which is dealt with by the Ombudsman when exercising this function is provided by the following examples:

(a) The managing director of the State Railways when negotiating the take-over of a private bus service, wrote a letter to the owner of the bus service promising him employment as adviser to the State Railways after the take-over. The letter had not been approved by the concessionary authority before dispatch. After investigation and report by the Ombudsman, followed by a debate in Parliament, the Minister of Public Works expressed his regret for the action of the managing director.

(b) A high official in the Foreign Ministry was found to be a spy. The Ombudsman investigated the previous attitude of the Ministry towards this official and criticised the Permanent Head of the Ministry and others for showing too much leniency towards him over a period of years when the official was in embarrassing financial circumstances.

(c) A complaint was made that the head of a certain educational institution had used his influence improperly in connection with the submission of a relative's thesis and the award of scholarships. The Ombudsman investigated the matter and made a critical report.

(d) A director of a museum, after having received permission to purchase one of the museum's exhibits, failed to draw attention to the fact that the exhibit he selected was a particularly fine piece of work and worth rather more than the amount which he paid for it. The Ombudsman investigated the matter and made a critical report.

118. In addition to cases of general interest, like the above, the Ombudsman deals with many minor cases of maladministration which, though not of interest to the general public, are important to the individuals concerned. For example:

(a) The Accident Insurance Directorate had not replied to a matter raised by an injured person concerning the payment of an additional daily allowance. The Directorate apologised for the error.

(b) The motor inspector in Roskilde had no right to demand that a hire car should be examined by the Technological Institute before he inspected it.

(c) A Chief Constable should not have refused a request for the removal of photographs, etc., from the police register after a criminal case had ended with an acquittal and the charge had been dismissed.

(d) The Tax Court should have notified a taxpayer that his case was awaiting the outcome of a lawsuit between another taxpayer and the Ministry of Finance.

(e) An application for a permit under the Accident Insurance Law to issue a writ in connection with an accident had been mislaid in the Ministry of Social Affairs for more than a year. It was a matter for severe criticism that the applicant's case had neither been answered nor been registered when it was received in the office.

119. In all these cases of maladministration, the sanction applied by the Ombudsman when he finds the complaint is well founded is a report criticising the administrative authority concerned. The publicity given to such reports by the daily Press and in Parliament is very effective. The Danish Ombudsman has never yet ordered proceedings to be instituted against a civil servant and he considers his power to do so it not likely to be of practical importance.

Additional functions of the Ombudsman

120. A function of a different kind is vested in the Ombudsman by section 11 of the Ombudsman Act, 1954, which provides that where the Ombudsman " becomes aware of any defects in the existing law or administrative regulations, he shall inform Parliament and the Minister concerned about them." An illustration of the exercise of this function is provided by an investigation undertaken by the Ombudsman into the time taken to deal with cases in the Taxation Court; this resulted in a recommendation by the Ombudsman that in drawing up new rules of procedure for the Taxation Court attention should be given to every possible means of cutting down the time involved in dealing with cases.

121. An additional function which is developing slowly is that of negotiating with Ministers or Heads of Departments on behalf of the citizen where a serious injustice seems to have occurred but the law does not provide any redress. For example, compensation may be refused by the Administration to a man who has suffered a serious accident in circumstances which indicate that the Administration has

a certain responsibility in the matter. If the Ombudsman, after investigating the case, is of the opinion that the refusal, though not illegal, was harsh, he will take up the matter with the Minister and endeavour to persuade him to revise the decision. The Ombudsman exercises this particular function sparingly and only after a careful, impartial investigation of all the circumstances, including, if necessary, an examination of the departmental files.

Competence of the Danish Ombudsman

122. The competence of the Danish Ombudsman is not as wide as that of the Swedish Ombudsman. Judges, whether of the Supreme Court or subsidiary courts, are entirely outside his jurisdiction. Civil servants of the Established Church do not come within his jurisdiction in regard to matters directly or indirectly involving the tenets or preachings of the Church. Apart from these exceptions, the Danish Ombudsman's jurisdiction comprises ministers, civil servants and all other persons acting in the service of the state. Local government officers, however, were not covered by the Ombudsman Act but this was found unsatisfactory in practice as the state and local government administrations frequently dealt with similar types of work. For instance, the Ombudsman has jurisdiction to investigate a complaint against a state hospital but not an entirely similar complaint against a local government hospital. Local government authorities resisted the extension of the Ombudsman's jurisdiction on the ground that it might be an attack on local autonomy but as a result of further negotiations, it has now been decided to extend the Ombudsman system to those local government officers who carry out the same kind of duties as public officials employed in the service of the state.

Practice and procedure of the Danish Ombudsman

123. In some respects the practice and procedure of the Danish Ombudsman is different from that of the Swedish Ombudsman owing to the difference in ministerial responsibility for the acts of civil servants in the two countries. The Danish Ombudsman may, in theory, order a public prosecutor to institute proceedings against a civil servant for maladministration but a civil servant may, at any stage of an investigation, demand that the matter be referred to a committee under the Civil Service Act and thereupon the Ombudsman must discontinue his investigation. In Sweden, on the other hand, the Ombudsman has for 150 years exercised the right to institute proceedings against civil servants, and although he has adapted his methods of working to suit modern developments, his jurisdiction is still fundamentally based on this right. This different background may explain what appears to be a rather different approach by the two institutions

to their problems. The Swedish Ombudsman's approach is, to use his own words, " like that of a judge," that is to say, he applies a set of objective standards to the problems with which he has to deal. The Danish Ombudsman, on the other hand, adopts a more flexible approach to his intervention which sometimes takes the form of a persuasive opinion rather than a critical report.

124. Although there are these important differences, it is nevertheless true to say that, by and large, the practice and procedure of the two systems are the same. Every citizen aggrieved by an administrative decision or by the conduct of an official may lodge a complaint with the Danish Ombudsman. But by a recent amendment to the Ombudsman Act, 1954, made at the suggestion of the Ombudsman, if the subject-matter of the complaint can be referred to a higher administrative authority, the complainant must adopt that course before submitting his complaint to the Ombudsman. Thus a complaint against a decision of a Chief of Police must be referred to the Ministry of Justice in the first instance and only after the Ministry has pronounced upon the matter may the complaint be lodged with the Ombudsman. This amendment was made with the object of preventing complaints being lodged with the Ombudsman prematurely as has sometimes happened in the past.

125. The investigation of complaints by examining departmental files and calling upon government agencies to give reports follows the Swedish pattern. After completion of the investigation, the Danish Ombudsman may make a critical report to Parliament or he may decide to take no further action. If the criticism concerns a matter of major importance, he communicates his report to Parliament as soon as possible; otherwise he includes it in his annual report. In order to facilitate the communications between Parliament and the Ombudsman, Parliament has appointed a special Committee to receive his reports and as a rule the Committee invites the Ombudsman to attend its meetings.

126. In 1955 (April to December), when the Danish Ombudsman first began to function, the number of complaints was 565; in 1956 the number rose to 869 and in subsequent years the number has remained at about 1,000 complaints a year. Of this number, only 50 per cent. were actually investigated, no action being taken as regards the remainder. In only 10 per cent. of the cases which were investigated has the Ombudsman found it necessary to criticise or to put forward recommendations to the authority concerned. The Danish authorities do not consider the total number of complaints, namely

1,000 a year to be out of line with what may be expected from a population of 4½ million.

Main characteristics of the Danish Ombudsman system

127. Although many Danish citizens are somewhat vague about the kind of case which the Ombudsman can deal with, they nevertheless regard him as a *tribunus plebis* who is independent and will investigate fairly any complaints against the administration which come within his jurisdiction. The same features which characterised the Swedish Ombudsman system are to be found in the Danish system: the investigation is impartial and it is conducted openly and informally by an officer of Parliament. There is no doubt that the reputation of the Danish Ombudsman, after five years of working, stands high not only in Denmark and among the Danish public but in neighbouring countries. He has even been receiving complaints in recent months from persons in this country of maladministration in the United Kingdom.

CHAPTER 12

The Norwegian Ombudsman

128. In 1945 the Norwegian Government appointed a Committee on Administrative Procedure. By its terms of reference this Committee was required to report on the guarantees and safeguards which are observed where administrative authorities make decisions affecting the rights and interests of citizens and to recommend what measures were needed to strengthen the security of the citizen in his dealings with administrative authorities. The Committee, under the chairmanship of the President of the Supreme Court, made an extensive examination not only of Norwegian administrative law but also of British, American and Continental administrative procedures and in 1958 made a report which recommended that a Norwegian Ombudsman should be set up on the lines of the Danish institution.

129. The constitutional background to the Norwegian Ombudsman is similar to that in Denmark. The Norwegian courts have a wide jurisdiction to review decisions of administrative authorities both on law and fact, and there are a number of administrative tribunals, mostly in the social insurance field. Ministers are responsible for the actions of civil servants and there is also a Parliamentary Question procedure introduced from the United Kingdom after the war though it has not been much developed. The Committee expressed the view that the Norwegian Administration and the safeguards and guarantees afforded to citizens would bear comparison with the administrative system of any other country. Nevertheless, they recommended the additional safeguard of the Ombudsman because of the great increase in the powers conferred on the administrative authorities consequent upon the growth of the Welfare State.

130. A Bill giving effect to the Committee's proposal was before the Storting in 1960 and is expected to become operative during 1961. The main provision of the Bill reads as follows:

> It is the duty of the Ombudsman, as the delegate of the Storting and in the manner stipulated in this Act and in the rules issued by the Storting, to endeavour to ensure that the public administration does not commit any injustice against any citizen. . . . Any person who considers that public administrative authorities have treated him unjustly may appeal to the Ombudsman.

131. The Bill gives the Ombudsman the same right to demand information and the production of records as the Ombudsman has in Denmark and Sweden but on the important matter of instituting proceedings against a civil servant there is a significant difference. The Norwegian Ombudsman has no power to order proceedings to be instituted as in Denmark, still less to institute proceedings himself as in Sweden; he may only " call attention to the fact that an error has been made or negligence shown by . . . an official and if he finds sufficient grounds for doing so, he may inform the Public Prosecuting Authority . . . what steps he considers should be taken against the official."

132. The jurisdiction of the Ombudsman extends only to the state administration as it was considered better, until more experience was gained, not to include local administration. He has the same right to demand information and records as the Ombudsman has in Denmark and Sweden. On the important matter of discretionary decisions, the Committee, although they had grave doubts, recommended that the Ombudsman should have authority to deal with such cases. The Government, however, refused to accept this recommendation and consequently the Norwegian Ombudsman, like his counterparts in Denmark and Sweden, has no power to deal with complaints against discretionary decisions unless it appears that the discretion has been so abused as not to amount to a genuine exercise of discretion.

133. It is significant that the Norwegian Committee recommended the adoption of the Ombudsman system not so much because they found the existing safeguards for the citizen deficient but because they considered the great increase in the powers conferred on administrative authorities by the Welfare State required that the further safeguard of the Ombudsman should be introduced. It is also significant that the Committee recommended the establishment of the Ombudsman after making a lengthy and extensive study not only of the administrative law of the Scandinavian countries but of a number of other countries including France, Britain and the United States.

CHAPTER 13

Comptroller and Auditor-General

134. The existing machinery for investigating complaints which we discussed in Chapter 9, namely, the Parliamentary Question procedure, Adjournment Debates and *ad hoc* Inquiries, is concerned with complaints of maladministration in the general field as distinct from the financial field of public administration. We have commented on the fact that apart from the *ad hoc* Inquiry procedure, which is only occasionally invoked, the other procedures lack the characteristic of impartiality which we think so important. But remarkable as it may seem, this characteristic of impartiality is to be found firmly embodied in the procedures for dealing with maladministration in the financial field. It has been so since 1866 when the office of Comptroller and Auditor-General was established by the Exchequer and Audit Act, 1866, and we think it will be helpful to consider how this principle of impartial investigation is applied in the financial field.

135. In 1857 a Select Committee of the House of Commons recommended that the system of Appropriation Accounts should be extended to the Civil and Revenue Departments and that the whole of the resulting accounts should be " annually submitted to the revision Committee of the House of Commons." Following upon this recommendation, a Standing Order (now No. 74) was passed which instituted the Public Accounts Committee and in 1866 the Exchequer and Audit Act was enacted constituting the office of the Comptroller and Auditor-General. This officer is appointed by Letters Patent and is responsible only to the House of Commons. He enjoys an independent status similar to that of a High Court judge, his salary is charged on the Consolidated Fund and he cannot be removed from office except on the address of both Houses.

136. The Comptroller and Auditor-General's primary function is to audit the accounts of Government Departments and certify them as correct or otherwise. In theory he is responsible for checking every item of expenditure to see whether it has been duly authorised by Parliament but for the most part he relies upon a " test audit," with occasionally a 100 per cent. audit in a particular field. He employs a staff of about 500 most of whom are located, not in the Comptroller and Auditor-General's office, but in the offices of the

Departments where they carry out a continuous audit, covering the whole range of the financial activities of the Departments.

137. During the course of this continuous audit, the Comptroller and Auditor-General examines the accounts not only from the point of view of checking the correctness of the figures but also to see whether they disclose "waste or weakness of system." For instance, if the original estimate for a new missile project has been greatly exceeded, the Comptroller and Auditor-General will investigate the matter in detail to see whether there has been any waste due to some weakness in the departmental system of financial control. In making such investigations for "waste and weakness of system," he acts on his own initiative as a result of facts and figures brought to light during the course of the audit, and not as a result of complaints received from third parties. It is a continuous process, like the audit itself, carried out by the Comptroller and Auditor-General as part of the duties entrusted to him by Parliament. A certain amount of personal judgment is involved in selecting particular matters for investigation but the discretion which the Comptroller and Auditor-General exercises in making a selection is his own and is not dependent upon representations or complaints from Members of Parliament or members of the public.

138. If, as a result of his examination, the Comptroller and Auditor-General is of the opinion that there has been "waste or weakness of system," or, as we may call it in this context, financial maladministration, he makes a "positive" report which is placed before the Public Accounts Committee. His report does not single out individual officers for criticism but directs attention to facts and figures which appear to indicate waste due to weakness in the system of financial control. For the purpose of carrying on this function the Comptroller and Auditor-General has access to all relevant departmental files including internal minutes and his reports to the Public Accounts Committee are reports to Parliament.

139. It is noteworthy that this system which was introduced in 1866 to enable Parliament to exercise more effective control in this particular field of public administration has some points of similarity with those which we have mentioned earlier as belonging to the Scandinavian Ombudsman system. The Comptroller and Auditor-General, like the Ombudsman, is an officer of Parliament; he has access to departmental files; he investigates maladministration and he reports the results of his investigations to Parliament. There are, however, points of dissimilarity. The Comptroller and Auditor-General investigates only financial maladministration whereas the

Ombudsman investigates maladministration of all kinds. Further, the Comptroller and Auditor-General's investigations are made on his own initiative as a result of facts disclosed in the course of carrying out his function as auditor and not as a result of complaints made to him by members of the public. The Ombudsman, on the other hand, initiates investigations for the most part as a result of individual complaints received from the public and only to a limited extent on his own initiative as a result of information acquired during his inspections.

140. There is no doubt that the Public Accounts Committee and the Comptroller and Auditor-General provide one of Parliament's most valuable safeguards against maladministration in the financial field. The system has now been functioning for nearly a hundred years and is regarded with awe by civil servants. In the words of Mr. Morrison (now Lord Morrison), " The Public Accounts Committee is a real factor in putting the fear of Parliament into Whitehall—which is a good thing." [1]

141. It is perhaps surprising that the principle underlying the functions of the Comptroller and Auditor-General has not been extended to other areas of public administration. The reason may be partly historical. Traditionally the House of Commons has always been closely concerned with the expenditure of public funds and it was, therefore, natural when the system of preparing the accounts of the public service was completely reorganised in the nineteenth century, that the Public Accounts Committee and the Office of the Comptroller and Auditor-General should be established as part of the great scheme of reform to secure for the House of Commons an effective machine to check possible financial maladministration by the Executive. But at that time the general administration of Government Departments had not developed so as to affect the interests of the private citizen to any great extent and evidently no special machinery was thought to be necessary for dealing with this aspect of public administration. It was not until recent years, when the activities of Government were extended into the social and economic fields and the actions of civil servants began to affect the daily lives of individuals on a large scale, that the general administration of a Government Department became as important, perhaps in some ways more important, than the financial administration of the Department.

142. In spite of this, no attempt appears to have been made to consider whether the principle underlying the Public Accounts Committee and the Comptroller and Auditor-General system could

[1] H.C. 189–1 of 1946, para. 3227.

with advantage be applied in the field of general administration. Many people thought that after the Crichel Down case there would be a detailed inquiry into the question of providing machinery to deal with acts of maladministration, and this might have included consideration of the analogy of the Comptroller and Auditor-General's functions, but these matters were excluded from the terms of reference of the Franks Committee because, as the Lord Chancellor explained in the debate in the House of Lords on the Committee's Report, the scope of the inquiry, even with its limited terms of reference, was a very heavy commitment.[2] But other speakers in the debate emphasised the need to deal with the problem as a matter of urgency. As Lord Denning put it:

> Then what about the third group of cases, which may be described as the Crichel Down cases, where there is no tribunal and no inquiry, and the question raised is the abuse or misuse of power in the interests of the Department at the expense of the individual? . . . How are they to be met? . . . I suggest that the question of misuse or abuse of procedure and maladministration is a matter which cannot wait too long: it is the third chapter of this new Bill of Rights.[3]

143. It is clear, therefore, that there is a growing consciousness that a point has been reached in the development of public administration in this country when some machinery should be devised which will enable Parliament to exercise supervision and control over the general administration of Government Departments as effectively as the House of Commons does through the Public Accounts Committee and the Comptroller and Auditor-General in the financial field. We share this view and in the following chapter we make proposals for establishing new machinery which will, we think, achieve this object by translating certain features of the Scandinavian Ombudsman system into the English idiom and combining them with the principle underlying the system of the Public Accounts Committee and the Comptroller and Auditor-General.

[2] *Hansard*, H. of L., Vol. 206, col. 575.
[3] *Hansard*, H. of L., Vol. 208, col. 605.

Chapter 14

New Machinery for Investigating Complaints of Maladministration

Introduction

144. In this chapter we outline our proposals for establishing new machinery to investigate complaints of maladministration against Government Departments. We would emphasise that it would be supplementary to the existing machinery for dealing with complaints of this character. Parliament would continue to be, as historically it has always been, the most important channel for making representations to the Executive about grievances. The Parliamentary Question procedure would remain unchanged, the Adjournment Debates procedure likewise would continue as at present and it would still be open to the Government, in cases of major importance or complexity, to arrange for *ad hoc* Inquiries into allegations of maladministration. These parliamentary procedures are sanctioned by long usage and in our opinion are valuable safeguards against misuse of power and should be preserved. The new machinery which we propose would not compete with any of these procedures. It would be supplementary and would, in our view, make them more effective by providing a ready and comparatively simple means of obtaining an impartial investigation of complaints of maladministration by an officer of Parliament who is independent and enjoys the same status and prestige as the Comptroller and Auditor-General.

145. In the following paragraphs we consider certain of the more important features of the new machinery, in particular the characteristics of impartiality and informality, which we regard as of special importance if the new procedure is to have the confidence of the public and at the same time work smoothly alongside the ordinary administration of Government Departments. We also explain our reasons for making the investigation of a complaint subject to the veto of the Minister of the Department concerned and for imposing certain restrictions on the channels for communicating complaints. We have not made detailed or precise recommendations concerning all the procedures to be followed by the new officer of Parliament because we think it is in tune with British constitutional tradition for such matters to be left for the decision of the Government and Parliament.

Parliamentary Commissioner

146. We consider that a permanent office to be known as the Office of the Parliamentary Commissioner (or by some other suitable name) should be established to receive and investigate complaints of maladministration against Government Departments. The Parliamentary Commissioner should have the same status as the Comptroller and Auditor-General, that is to say, he should be appointed by Letters Patent and should be irremovable except on the address of both Houses. He should be answerable only to Parliament. In the beginning the Parliamentary Commissioner should receive complaints only from Members of both Houses of Parliament, but at a later stage when his jurisdiction is established and well understood, consideration should be given to the question of his receiving complaints direct from the public. The Parliamentary Commissioner should notify the Minister before commencing an investigation of a complaint against his Department. The Minister would be entitled to veto the proposed investigation but we hope that a convention would be established that he would not do so save in exceptional circumstances. For the purposes of his investigation the Parliamentary Commissioner would have access to Departmental files and he would report his findings to a Select Committee of either or both Houses of Parliament. His Reports would follow the model of the Comptroller and Auditor-General's Reports in the sense that any criticisms would be confined to the Department and would not mention civil servants by name.

Impartiality

147. One of the most important features of the new machinery which we propose is its independence of the Executive. We regard this as essential since the Parliamentary Commissioner will be investigating complaints, or accusations as they may be called in this context, against Government Departments and therefore should be independent of the Executive in order that complainants and members of the public may have confidence that his investigations are impartial. The Parliamentary Commissioner's independence of the Executive would be achieved by a method which is traditional in this country in most cases where it is thought necessary to establish an Office free from the real or apparent influence of the Government. The appointment is made permanent in the sense that the holder of the Office cannot be removed except on the address of both Houses; he therefore has no misgivings that if his actions or decisions are not welcome to the Government his appointment may be terminated or, if it is for a limited period, may not be renewed. This procedure, which has long been followed in the case of High Court judges, was adopted when the Office of Comptroller and Auditor-General was constituted by the

Exchequer and Audit Act, 1866. As the Comptroller and Auditor-General's duties required him to criticise acts of financial maladministration committed by the Executive, it was thought necessary to provide him with security of tenure. Similarly, the duties of the Parliamentary Commissioner will make it necessary for him to criticise the acts of the Executive from time to time when there has been some maladministration, and, therefore, by analogy with the Comptroller and Auditor-General, he should be given security of tenure. It would in any case be anomalous if the Parliamentary Commissioner did not have the same status as the Comptroller and Auditor-General, since it would mean that the Officer investigating complaints of maladministration in the general field of administration was less secure in the tenure of his Office, and to that extent less independent of the Executive, than the Officer who was investigating maladministration in the financial field. We do not think there is any valid basis for such a distinction.

Informality

148. We recognise it as of the greatest importance that the investigations of the Parliamentary Commissioner should not impede or slow down unduly the normal administrative process in a Department. If that were likely to occur it might be necessary to say that the balance of public advantage required that no machinery of the kind we propose should be established. We believe, however, that there would be no serious interference with the ordinary working of a Department if the investigations of the Parliamentary Commissioner were conducted informally. We think that he should be given access to Departmental files, and that ordinarily he would follow the same kind of informal procedure as would be adopted by a Head of a Department inquiring into a complaint against a Junior Officer in his Department but with the very important difference that he would be entirely independent of the Department and his findings would, in consequence, have enhanced value in the eyes of the public. Such an informal procedure should not slow down the normal working of the Department any more than happens at present when an investigation has to be made for the purpose of preparing an answer to a Parliamentary Question. On the contrary, it might well cause less disturbance to the ordinary Departmental work as the Parliamentary Commissioner's Office would maintain close contact with Departmental officers throughout his investigation and would thus be able by personal discussion to dispose expeditiously of queries which arose in the course of his investigation. In Denmark great stress is laid upon the informality of the methods employed by the Ombudsman when investigating complaints and it is claimed that as a result a

smooth method of working has developed which has created a spirit of mutual confidence between the Ombudsman and the civil service. We believe that if the Parliamentary Commissioner adopted similar informal methods in conducting his investigations, he would likewise quickly gain the support and confidence of the civil service.

Access to Departmental files

149. It is necessary, if the Parliamentary Commissioner's investigation is to be impartial and at the same time informal, that he should be given access to the relevant Departmental papers. These are often described compendiously as Departmental files but this description lacks precision. In the Scandinavian countries, as has already been pointed out in paragraphs 104 and 125, a Departmental file consists of the inward and outward correspondence (including correspondence with other Departments and outside bodies) and any reports on the file obtained from officials (*e.g.*, police reports), but it does not include internal minutes and documents recording discussions within the Department. The Ombudsman has access only to Departmental files in this restricted sense for the purpose of his investigations. The Comptroller and Auditor-General's rights of access to Departmental papers are more widely drawn. His rights, as defined by statute (Exchequer and Audit Departments Act, 1866, s. 28), are that he "shall have free access, at all convenient times, to the books of account and other documents relating to the accounts of such Department." It follows that he and his officers operating inside spending Departments are entitled to inspect, as documents relating to the spending transactions they are examining, the internal minutes in the full file as it normally exists in a British Government Department. The distinction is important as it raises the question whether minutes recording internal discussions between Departmental officials should be treated as confidential. There is a strong case for the view that they should be so treated in order that officials may be able to express their opinions freely and without the caution and restraint which would be required if the minutes were likely to be made public. It should also be borne in mind that if it were necessary to draft minutes with a view to defending them against public criticism, the administrative process would be slowed down considerably.

150. On the whole we think it is in the interests of good administration that internal minutes should be regarded as confidential and that unless it can be said that the Parliamentary Commissioner would be unable to carry out his duties efficiently without access to internal minutes, he should not be entitled to see them. It is difficult to suppose that this would be the case in view of the fact that the

Scandinavian Ombudsman is able to discharge his duties satisfactorily without inspecting internal minutes. The practice of the Comptroller and Auditor-General is, in our view, distinguishable because he is under a statutory duty to ensure that every penny has been properly spent in accordance with Parliamentary authority, and in order to discharge this duty it is necessary for him to have a continuous right of access to all relevant Departmental papers, including internal minutes.

151. However, these considerations do not apply in the general field of administration, and we therefore think that the Scandinavian practice should be followed and that the Parliamentary Commissioner should have access to outward and inward correspondence and reports (including correspondence with other Departments). In our opinion, these documents will be sufficient for his purpose in the vast majority of cases. In the exceptional case where he feels that because of this limitation he is not able to investigate a complaint satisfactorily and to reach a fair conclusion, we would hope that the Head of the Department would offer to make the internal minutes available to him. If, however, it proved impossible to reach a satisfactory solution on these lines, it would, of course, always be open to him to draw attention to this fact in his report to the Select Committee of Parliament and it would ultimately be for Parliament itself to decide, after considering the report, whether the circumstances were such as to justify a departure from the ordinary rule. But apart from exceptional cases of this kind, we think that the Parliamentary Commissioner in this country, like the Ombudsman in Sweden and Denmark, would be able to discharge his duties satisfactorily without the statutory right of access to the internal minutes of Government Departments.

152. We realise that in proposing that the Parliamentary Commissioner should have access to Departmental files even to the limited extent indicated in the previous paragraph, we are suggesting a procedure which marks a further departure from the established practice of the civil service in this country which traditionally favours secrecy and anonymity in its activities. But we do not think that this in itself affords a ground for objecting to it. On the contrary it appears to us that the trend in recent years has rightly been towards more openness and less secrecy in administration in order to meet the reasonable demands of the public for more information as to how Government Departments conduct their business. A striking example of this trend, which has benefited the public without apparently in any way detracting from departmental efficiency, is the practice introduced on the recommendation of the Franks Committee of publishing the reports made by Inspectors in planning appeals. It

should not, however, be assumed that the advantages of greater publicity in administration are only on the side of the public. In the Scandinavian countries, experience has shown that in the majority of cases the result of the Ombudsman's investigation is to vindicate the conduct of the Administration. We see no reason to anticipate any different result if a Parliamentary Commissioner were appointed in this country and we think that the increase in public confidence in the civil service which would follow from such a result would more than justify a change of attitude towards the traditional secrecy of departmental administration.

Reports

153. The Parliamentary Commissioner would submit an annual Report to the Select Committee of Parliament, mentioning the more important cases which he had dealt with during the course of the year and in addition he would submit special reports on any cases of particular interest as and when they occurred. We think that when submitting his reports, he should, in one important respect, follow the practice adopted by the Comptroller and Auditor-General who criticises the Department but does not mention any individual civil servant by name. We consider this is a sound practice and that the question of taking disciplinary or other appropriate action against particular civil servants should properly be left to the higher authorities in the civil service. In addition to submitting special and annual reports to the Select Committee, the Parliamentary Commissioner would, of course, keep the Member informed, as a matter of ordinary practice, of the action he had taken on the complaint and the progress he had made in dealing with it; and the Member would no doubt in turn inform the complainant. The Parliamentary Commissioner's reports to the Select Committee would be available to the Press in the same way as the Comptroller and Auditor-General's reports to the Public Accounts Committee are available to them under existing Parliamentary practice.

154. We expect that in addition to establishing the facts and making such criticisms as seem to be appropriate, the Parliamentary Commissioner would draw attention in his Report to any deficiencies in the law which had been discovered in the course of the investigation as we have mentioned is done by the Ombudsman in Denmark. It may be expected that the Parliamentary Commissioner will also from time to time perform the function which has in recent years developed in the Scandinavian system, where the Ombudsman has assumed the role of negotiator on behalf of the citizen when a serious injustice seems to have occurred as a result of some action of the

Administration for which the law does not provide any redress. Examples of the exercise of this function by the Swedish and Danish Ombudsman have been given in paragraphs 99 and 121. Cases of injustice caused by administrative action for which there is no legal redress also occur in this country from time to time. The following case reported to us during our Inquiry may be regarded as illustrating this type of case:

> In 1946 X entered the employment of a Borough Council Electricity Department as a meter repairer and two years later, as a result of the nationalisation of the electricity industry, became an employee of an Area Electricity Board. Towards the end of 1948 his health began to deteriorate and as his condition failed to respond to treatment, he went in 1952 to a specialist at a London hospital for examination. The specialist diagnosed chronic mercury poisoning which he found had been caused by X's work of "collecting, filtering, washing and distilling mercury." X was absent from work for long periods and eventually in 1954 the Electricity Board terminated his employment "on account of (his) unfortunate ill health." On April 29, 1954, he issued a writ against the Board alleging that he had contracted mercury poisoning in 1951 owing to the Board's negligence and claiming £1,200 for loss of earnings and general damages. The Board agreed that the figure of £1,200 for loss of earnings was correct but denied liability.
>
> At the trial the specialist stated in evidence that the mercury poisoning, in his opinion, had been contracted as long ago as 1949. X amended his pleading by substituting 1949 for 1951 as the date when he contracted the disease. The Board thereupon amended their defence by pleading the Statute of Limitations, contending that as the cause of action arose in 1949, more than three years before X issued his writ in 1954, the claim was statute-barred. The judge found that X's ill health was directly attributable to the Board's negligence but upheld the plea based on the Statute of Limitations. He gave judgment for the Board but made no order as to costs.
>
> Subsequently X applied for a gratuity under s. 11 of the Local Government Act, 1937 (which provides for the payment of a gratuity to an employee of a local authority who ceases to be employed owing to a permanent incapacity caused by injury sustained in the discharge of his duty), and was offered £750 then and later "something under £2,000." X refused it as inadequate, pointing out that £1,200 had been agreed by the Board as the correct figure for loss of earnings and that he continued to suffer

considerable pain, and was suffering from a permanent disability and unable to earn a livelihood and that his total weekly income was only 13s. 6d. disability allowance and he had no assets. Representations were made to the Minister of Fuel and Power who stated, "I do not think this is a matter in which I should intervene." Subsequently the matter was brought to the attention of the Prime Minister who stated that he had read with sympathy the circumstances of the case but he felt he must support the view of the Minister and added that "further correspondence would serve no useful purpose."

We feel it would be helpful to the Administration as well as to the citizen if the Parliamentary Commissioner could investigate cases of this character and state his views impartially for the benefit of both parties.

Ministerial responsibility

155. Under our constitution, a Minister is responsible for the efficient administration of his Department and it might well be said that he would find it difficult, if not impossible, to discharge this duty if an independent body could, as of right, enter his Department and investigate allegations of maladministration without his permission. In Sweden, no such difficulty arises since, as we have already explained, Ministers are not responsible for the actions of civil servants. In Denmark, on the other hand, Ministers are responsible for the acts of civil servants but the Ombudsman nevertheless is entitled to investigate complaints of maladministration against a Department without a Minister's permission. We hesitate, however, to cite this as a precedent for adopting a similar practice in this country. The ministerial system in Denmark was introduced in the new Constitution in 1953 and certain aspects of ministerial responsibility are still under discussion. We doubt, therefore, whether ministerial responsibility, as understood in Denmark, can be equated with ministerial responsibility in this country where it has its roots deep in our history. It is a principle of such fundamental importance in our constitution that we think it would be wrong to make any proposal which might seem to qualify it and therefore we have suggested that a Minister should have the power to veto any proposed investigation by the Parliamentary Commissioner of a complaint against his Department. We would expect, however, that as so often has happened in our constitutional history, a convention would grow up that the Minister would not exercise his power of veto unreasonably. If an investigation was vetoed, this fact would, of course, be recorded by the Parliamentary Commissioner in his Report to the Select

Committee and the Minister would have to be prepared to defend his action in Parliament. But if a convention such as we envisage should be established, we think the work of the Parliamentary Commissioner would proceed smoothly without detriment to this important principle of our constitution.

Relationship to Members of Parliament

156. As already indicated, one of the most firmly established traditional channels for complaint against the action of the Executive is through Parliament, and individual Members do a very great deal of work in relation to complaints received from their constituents. We have made clear that we feel that the methods of pursuing complaints open to Members of Parliament are not entirely satisfactory. Most are dealt with, at least initially, by correspondence with the Departments concerned, but this is necessarily a one-sided procedure and Members have no machinery for more intimate and detailed investigation ready to hand. Some cases, either with or without preliminary correspondence with the Department, form the basis of Parliamentary Questions or, much more rarely, of motions on the adjournment, but at that stage there is increasing danger of the intrusion of political feelings and considerations and, as we hope we have shown, no opportunity of impartial investigation. Nonetheless, it seems to us very important that any additional procedure should not disturb the basic position of Parliament as a channel for complaint against the Executive and should not even appear to interfere with the relations between individual Members and their constituents. We conceive of the proposed new machinery, and it is implicit in the title of Parliamentary Commissioner, that it will supplement and strengthen existing procedures rather than undermine them. With these considerations in mind we believe that it would help to get the new procedure established if, during an initial and testing period, a rule was adopted by which complaints would be considered by the Commissioner only on a reference from a Member of either House of Parliament. We should expect that Members would commonly address a first inquiry, on receiving the complaint, to the Department concerned and that in many cases the reply would dispose of the matter: where, however, there appeared to be need for further investigation we should hope that the practice would quickly develop of referring the matter to the Commissioner for impartial investigation without, at that stage, introducing the tensions arising from the political atmosphere of proceedings in Parliament. Once the matter had reached the Commissioner, he should be free to conduct his investigation in any way he thought fit, including personal interviews or correspondence with the complainant or his representative.

157. As soon as enough experience had been gained of the new procedure, perhaps after five years, the Commissioner should be empowered to receive complaints direct from members of the public. The great majority of grievances would then be settled without further reference to Parliament than in the Commissioner's periodical reports. We would emphasise that the ultimate object should be to establish a channel by which the investigation of administrative grievances should take place initially outside the political sphere. Parliament would, however, always be able to take up grievances in the last resort if the Commissioner's investigation failed to procure justice.

Volume of complaints

158. One of the most difficult problems which arises in connection with our proposal is to assess the volume of complaints with which the Parliamentary Commissioner would have to deal and the practical difficulties involved in disposing of them expeditiously. In Sweden, with a population of 7½ million, the number of complaints dealt with each year is about 1,000. In Denmark, with a population of 4½ million, the numbers are approximately the same. In both countries, the Ombudsman discharges his duties efficiently with a small staff and there are no serious arrears.

159. It must, of course, be a matter of conjecture what the volume of complaints will be in this country with its population of 53 million and its complex social and economic structure. It might be suggested that the number would be so great as to make it impossible for a body such as we suggest to deal with them. But if this view were accepted, it would lead to the ironical result that as there were too many complaints, the attempt to provide means for investigating them should be abandoned. It should, however, be remembered, when attempting to assess the number of complaints which the Parliamentary Commissioner would have to handle, that discretionary decisions and all decisions which come within the purview of the tribunal system and the system of special statutory inquiries which are supervised by the Council on Tribunals would be excluded, leaving only complaints of maladministration in the limited sense we have described in paragraph 72. The number of such complaints might not, therefore, be as great as is sometimes supposed. Moreover, the numbers would be closely related to the conduct of civil servants, and in view of the high standards which we believe prevail generally throughout the civil service, we think it improbable that the number of complaints would be greater than the Parliamentary Commissioner, assisted by a small staff, would be able to handle.

160. One way of making sure that the organisation was adequate to deal with any possible volume of complaints would, of course, be to appoint several Commissioners, each dealing perhaps with a group of Departments. It may well be that it would be thought desirable in any event to make some separate provision for Scotland, in view of its separate administrative establishment, but otherwise it seems to us that it would be a mistake to establish at the beginning a possibly over-elaborate and over-expensive organisation.

161. There are, however, several factors which, however heavy the load of work on the Commissioner, ought to ease it considerably. First, as already mentioned, the Council on Tribunals already handles complaints about the numerous statutory tribunals, which correspond to a considerable part of the Danish Commissioner's work. Secondly, if Members of Parliament are to remain the channel for receiving all complaints during a trial period, as we have proposed, there will be many cases where, after initial reference by the Member to a Government Department, the Member has received an obviously satisfactory answer. The Commissioner's office will, therefore, not be troubled with this class of case, at least until the working of the system has been reviewed. The residue of cases which really demand investigation by the Commissioner ought not, we think, to be too formidable in number. It is plain that the Scandinavian Commissioners work successfully with a very small staff, sifting and handling some 1,000 complaints a year. We do not think that the necessary machinery for Britain need be very elaborate, or that it should be unduly costly in relation to the resources of the country and the real needs of the situation.

Relations of the Commissioner and the Civil Service

162. It would be wrong to regard the Parliamentary Commissioner as performing only a negative function of restraint and report in relation to the activities of the Civil Service. On the contrary, the experience of the Scandinavian Ombudsman suggests that he may come to be regarded by the Civil Service as a valuable and impartial defence against unjustified attacks to which the individual civil servant cannot himself respond. The Parliamentary Commissioner should, in fact, be regarded neither as simply the "watchdog" of the public nor the apologist of the administration, but as the independent upholder of the highest standards of efficient and fair administration.

A practicable solution

163. We think that if an institution on the lines we have proposed is established, it will provide Parliament and the citizens of this

country for the first time with an efficient machine to investigate complaints of maladministration in Government Departments. The principle of impartial investigation which underlies the institution is not new. It is basically the same as that of the Comptroller and Auditor-General which has now been part of our constitution for nearly a century. In the adaptation of this basic principle to meet the difficulties of handling individual complaints, we have been assisted by a study of the methods employed in Scandinavia where the Ombudsman institution has been successful in dealing with similar problems and our proposals make what we believe are the necessary modifications in the scope and procedure of the institution to enable it to overcome these difficulties. We consider that a new institution, modified in the way we suggest, could be assimilated into our constitution and would be an important step forward in restoring the balance between the individual and the State which, in this particular sphere of public administration, is still seriously disturbed.

CHAPTER 15

Summary of Conclusions

General

164. We have stated that the complaints which come within our terms of reference fall into two categories, namely, complaints against discretionary decisions and complaints of maladministration, and we have pointed out that because of their different character it is necessary to provide different machinery for dealing with them.

165. We have suggested that the machinery for dealing with complaints against discretionary decisions should embody the principle of impartial adjudication and that this should be achieved by providing persons who are aggrieved by discretionary decisions with a right of appeal to an independent authority unless there are overriding considerations which make it necessary, in the public interest, for the final decision to be left with the Executive. We have pointed out that this principle has already been widely applied to disputes between the individual and the Executive in those areas of discretion which fall within the tribunal system and that the Council on Tribunals, since its establishment in 1959, has kept the working of tribunals under review to ensure the consistent application of this basic principle. We have therefore suggested that the powers of the Council on Tribunals should be extended to enable it to survey those areas of discretion where decisions are made which are not at present subject to appeal and to make proposals for bringing such areas within the tribunal system wherever it is appropriate to do so. We think the Council should also have authority to propose new procedures of inquiry similar to the planning procedures which at present come under its supervision.

166. Our conclusion regarding complaints of maladministration is that Parliament is and must remain the most important channel for making representations to the Executive about grievances. We think the existing Parliamentary procedures, in particular the Parliamentary Question procedure and the Adjournment Debates, provide a valuable means for dealing with complaints of maladministration raised by Members of Parliament but that they would be more effective if they were supplemented by machinery which would enable such complaints to be investigated by an impartial authority if the Member requested it. We have therefore proposed that an officer, to be called the Parliamentary Commissioner (or by some other suitable title), with a status

similar to that of the Comptroller and Auditor-General, should be appointed and, subject to certain conditions, should investigate complaints of maladministration against Government Departments received from Members of Parliament.

Particular conclusions

167. *Discretionary decisions*

(i) The Council on Tribunals, when performing its new functions, should report to the Lord Chancellor and the Secretary of State for Scotland (para. 63).

(ii) Consideration should be given to developing a more expeditious Parliamentary procedure for establishing new tribunals and statutory inquiries. This might take the form of statutory orders to be laid before Parliament in draft and to come into force on being approved by resolutions of both Houses (para. 63).

(iii) A General Tribunal should be established to deal with appeals from miscellaneous discretionary decisions which cannot suitably be allocated to specialised tribunals. The types of discretionary decision coming within the competence of the General Tribunal should be enumerated in a statutory order made by the Lord Chancellor under an enabling General Act after consultation with the Council on Tribunals and the Departments concerned, and the list of subjects should be revised and brought up to date at regular intervals in the light of the experience of the Council and the Departments (para. 68).

168. *Complaints of maladministration*

(i) A permanent body to be known as the Office of the Parliamentary Commissioner (or by some other suitable title) should be established, having a status similar to the Comptroller and Auditor-General, to receive and investigate complaints of maladministration against Government Departments (para. 146).

(ii) The Parliamentary Commissioner should at first receive complaints only from Members of both Houses of Parliament, but at a later stage, when his jurisdiction is well-established and understood, consideration should be given to extending his powers to enable him to receive complaints direct from the public (para. 146).

(iii) Before commencing an investigation of a complaint against a Department, the Parliamentary Commissioner should notify the Minister concerned, who should be entitled to veto the proposed investigation (para. 146).

(iv) The Parliamentary Commissioner should have access to departmental files when conducting his investigations, but for this

purpose departmental files should not include internal minutes (paras. 149–151).

(v) The Parliamentary Commissioner's investigations should be conducted as informally as possible to cause the minimum interference with the ordinary work of the departments (para. 148).

(vi) The Parliamentary Commissioner should submit an Annual Report to Parliament on the more important cases which he has investigated and special reports from time to time on cases of particular interest. His reports should be modelled on the Comptroller and Auditor-General's reports in the sense that any criticisms should be confined to the Department and should not mention civil servants by name (para. 153).

169. *Acknowledgments*

We wish to express our gratitude to our Secretary, Miss Corinne Lyman, for the most valuable work she has done for us in the course of this Inquiry, to our research assistants, Mr. Philip Allott, Mr. Michael de la Bastide and Miss Susan McCorquodale for their great assistance in collecting material and in the drafting of a Report, and to Mr. Roy Duffeli and Mr. Anders Hald for translating Scandinavian documents.

Appendix A

Complaints against Administrative Acts and Decisions of Local Government Authorities

1. As it was not practicable, with our limited resources, to make a complete survey of local government administration for the purposes of our Inquiry, we decided to focus our attention on a small number of county boroughs situated in different parts of the country with populations ranging from 100,000 to 700,000. We considered that these county boroughs would provide us with a representative sample of local government administration and give an accurate indication of the problems with which we are concerned. To assist us in our study, the Town Clerks of the county boroughs furnished us with memoranda describing local government administration in some detail and outlining the methods by which complaints against administrative acts and decisions are dealt with under the existing system. We should like to express our appreciation of their co-operation and our indebtedness to them for furnishing us with this valuable material.

2. It is interesting to observe that the administrative processes in local government follow a similar pattern to those in the central government. A large number of discretionary decisions are made by officials affecting the rights and interests of individuals. In some instances the individual, if he objects to a decision, can appeal to an independent authority or to the Minister; in other instances he has no right of appeal and must accept the decision unless he can by some informal means induce the local authority to change it. Furthermore, as in the case of the central government administration, there is no formal machinery for dealing with complaints of maladministration. Thus the broad division of complaints into two categories, namely complaints against discretionary decisions and complaints against acts of maladministration, which we made for the purpose of our study of central government administration, holds good for local administration and we propose to follow it in the following paragraphs.

Discretionary Decisions

Discretionary decisions subject to appeal

3. (a) *Licences and registrations*

Local authorities possess discretionary powers to grant licences or registration for a large number of different purposes. The following

is an abbreviated list of the purposes for which licences are issued or registers kept: hackney carriages, cinemas, dancing and music, nursing homes, old people's homes, street traders, hawkers, pedlars, potted meat manufacturers, ice-cream manufacturers, refreshment houses, massage establishments, marine store dealers, scrap merchants. In every case there is a right of appeal to the courts against a decision to refuse or to attach conditions or to rescind a licence or registration. The only instance where there was a discretion without a right of appeal was the licensing of cinemas but this was remedied by the Cinematograph Act, 1952, which conferred a right of appeal against an adverse decision of a local authority.

(b) *Building consents*

Persons wishing to erect buildings require the consent of the local authority under various statutes but there is always a right of appeal. For instance, there is an appeal under building bye-laws to a magistrates' court and under the Town Planning and Clear Air Acts to the Minister of Housing and Local Government.

(c) *Public Health and Housing Acts*

Under these Acts, local authorities have extensive powers in relation to unfit houses and unsanitary premises but it is general throughout the legislation to give a right of appeal either to a magistrates' court or the county court.

(d) *Compulsory purchase and slum clearance orders*

Orders made by local authorities for compulsory purchase or slum clearance have to be confirmed by the Minister who is required by statute to consider objections before giving effect to the local authority's order.

(e) *Road traffic orders*

Orders prohibiting through traffic, restricting overtaking or limiting speeds are subject to the approval of the Minister.

(f) *Police and fire services*

The disciplinary codes of the police and fire service confer rights of appeal to the Home Secretary against the more serious penalties which may be imposed upon officers.

(g) *Child care*

A decision by a local authority to receive a child into its care can be the subject of an appeal to the Juvenile Court.

(h) *Education*

The allocation of a child to a particular school is subject to appeal to a Minister.

Discretionary decisions not subject to appeal

4. It is difficult to make a complete classification of the areas of discretion in local government where decisions are made which cannot be challenged by way of appeal as the field of administration is so wide and varied; but an attempt has been made to classify the more important of them in the following list.

(a) *Allocation of houses*

Local authorities own large numbers of dwelling-houses which they administer under the Housing Acts. For instance, one of the county boroughs included in our survey owns and manages over 16,000 houses which means that 40 per cent. of the residents of the borough are tenants of the Council. Local authorities have, in theory, an absolute discretion as to who is granted a house but in practice methods of allocation have been evolved to deal with long waiting-lists. Allocations are generally based on a points system but this can do no more than produce a short list, leaving the final selection to the Housing Management Committee. Occasional cases of corruption are reported in this connection. As the waiting-lists have been reduced, some local authorities have changed to a date-order system, dependent on the time the applicant had been on the waiting-list. From time to time, a local authority finds it necessary to make exceptions to overcome cases of hardship, as, for instance, where a member of the applicant's family is prone to tuberculosis, and these may give rise to misunderstanding. One of the county boroughs in our survey decided in 1945 to admit the Press to all the meetings at which houses are allocated. They reported details of applications granted on grounds of hardship but without mentioning names and kept the normal system of allocation well before the public, and as a result, there has been very little friction about the allocation of tenancies in this particular county borough. Another point of friction is the enforcement of tenancy conditions. For instance, there may be conditions prohibiting the keeping of pets in flats or poultry in the back garden or concerning the cultivation of gardens. Notices to quit are sometimes served as a means of ensuring compliance with such tenancy conditions but only occasionally is action taken to obtain possession of the premises and even then the Town Clerk seeks the express instructions of the Housing Management Committee before enforcing the court order.

(b) *Allocation of other types of property*

In addition to houses, local authorities allocate other types of property such as public halls, allotment gardens, market stalls, housing estate shops, and sports club pitches. Various procedures are followed in making the allocations. For instance, a local authority owning and

administering a public hall usually keeps a booking-office where anyone can, on payment of a reservation fee, book the hall on a free day for a public meeting, debate, concert, dance, boxing match or some such purpose. A letting for a public meeting usually includes a condition permitting the Council to cancel it if some politically independent person (*e.g.*, the Chief Constable) certifies that he apprehends a breach of the peace if the meeting takes place. Allotment gardens and market stalls are usually granted to applicants in date order, although in the case of favoured sites for market stalls, the excess demand may call for the exercise of discretion by the Clerk of the Markets. If he cannot reach a satisfactory solution with competing applicants he refers the matter to the Committee for decision. Shops are sometimes let on tender to the highest bidder but at other times the Council endeavours to choose tenants whom it thinks will give a good service. Sports pitches are allocated by the Parks Superintendent and serious complaints are referred to the Parks Committee of the Council. In none of these cases is there any procedure to enable a citizen to appeal against the discretionary decision of the local authority.

(c) *Allocation of accommodation for old people*

Local authorities are required, under the National Assistance Act, to provide residential accommodation for old and infirm people who are no longer capable of looking after themselves. If there is a waiting-list, difficult questions of priority arise. The welfare officers endeavour to persuade disappointed applicants to be patient but cases of serious dissatisfaction are referred to the Committee. There is, however, no appeal from the Committee's decision to refuse accommodation.

(d) *Education*

In the field of education, local authorities can take decisions which have far-reaching consequences for the persons concerned but which are not subject to a further check. For instance, there is no appeal about the allocation of children to places of higher education at the age of eleven and no way of challenging a decision whether a child is to have a grammar school or a secondary modern school education. A local authority has an absolute discretion as to the amount of the grants awarded to university students; they have a similar discretion with regard to grants towards sending a child to a boarding-school. A local authority cannot expel a boy or girl from a school if he or she is of compulsory school age but if the boy or girl is over compulsory school age, he or she may be expelled and there is no appeal from the decision of the local authority.

(e) *Road traffic orders*

Under the Road Traffic Act, 1960, local authorities have power to make orders for one-way streets, no-waiting and limited waiting. Such orders may adversely affect the trade of frontagers but their only right of objection is to the local authority which must take the objections into consideration before finally making an order. In addition, local authorities have power to order a road to be closed because it is dangerous or to restrict the use of highways during times of public rejoicing or for the purpose of public processions. There is no appeal against such orders.

(f) *Sewage and water mains*

Under the Public Health Act, 1936, a local authority has the right to construct sewers and water mains through private land after giving reasonable notice to the owner and occupier. There is no appeal against a decision to do so but compensation is payable for any injury to the land.

(g) *Housing loans and grants*

Under the Small Dwellings Acquisition and Housing Acts, a local authority is empowered to make loans for the purchase or improvement of houses. The local authority takes into account the applicant's income and employment and decides in its discretion whether to make a loan and, if so, for what amount. There is no appeal against an adverse decision. Similar considerations govern the issue of improvement grants although the issue of a "standard grant" is obligatory if certain conditions are fulfilled.

(h) *Local authority contracts*

A local authority's patronage to trades-people and contractors may amount to very large sums. In the case of one of the county boroughs included in our survey it exceeds £2 million in total each year. This includes contracts for building houses and schools, laying sewers and water mains, the maintenance of roads and the purchase of supplies for schools and institutions. A local authority's standing orders provide that tenders shall be invited by public advertisement for major contracts and quotations obtained for less important contracts. The normal procedure is to accept the lowest tender and strong reasons must exist for departing from this practice.

(i) *Local authorities as employers*

A local authority is often the largest employer of labour in the city or borough. The national conditions of service for local authority staffs provide that before a member of the staff is dismissed or relegated, he must be given an opportunity of appearing before an appeals tribunal. The tribunal consists of members of the staff as well as

members of the local authority. Its power is, however, only advisory and the final decision rests with the local authority.

Maladministration

5. We stated in Part III of our Report when dealing with maladministration in central government departments that the circumstances which give rise to complaints of maladministration are of unlimited variety. This is equally true of maladministration in local government. For example, a member of a Council Committee may have an interest in the subject-matter of a decision, an official may be biased, the district nurse may fail to call, the police constable may be overbearing in manner; these are merely illustrations of the kind of maladministration which may arise in local government administration.

6. We were not able to obtain any information of a statistical character to indicate the volume of complaints of maladministration against local authorities but the opinion was expressed by several persons of experience in public affairs whose responsibility and judgment in these matters command respect, that there was probably a serious amount of maladministration in local government, and certainly considerably more than in the central government departments. It is impossible to say how far these opinions are justified but the fact that they are held by responsible people is, in itself, of some significance.

Existing machinery for dealing with complaints against discretionary decisions

7. It has been pointed out in paragraph 4 that there are large and important groups of discretionary decisions which are not subject to appeal, either to an independent authority or to a Minister. For the most part, these decisions are made not by officials but by committees of the Council of the local authority after considering the advice of their professional staff and the discretion which is exercised is therefore the discretion of the elected representatives rather than of the officials of the local authority. If a citizen is aggrieved by such a discretionary decision on the ground that it is mistaken or for some reason unsuitable, his only remedy is to make representations to the elected representatives with a view to persuading them to change it. He may try to enlist the support of the Councillors of his ward and of the Press and public opinion generally, and his chances of obtaining a review of the decision will, no doubt, depend a great deal on his ability to gain support in these quarters. The influence of the Press in these situations appears to be very considerable. In one of the county boroughs covered by our survey, it is the practice to admit

the Press to all meetings of the Council and practically all the meetings of its Committees, and as a result, it would seem there is a well-informed public opinion which helps to prevent wrong decisions and to remedy them when they occur. But there is no formal machinery which an aggrieved citizen can invoke in order to obtain a review of a discretionary decision by an independent authority.

8. It may be that a closer study of these discretionary areas would indicate that some of them could suitably be made subject to appeal to tribunals. For instance, it might be preferable that the assessment of priorities for the purpose of allocating houses in the event of disagreement should be made by an independent body rather than by a committee of elected representatives, particularly as it is in this field that occasionally cases of corruption have been reported. The number of instances when it would be useful to make provision for appeal to an independent body must depend, of course, upon the results of a more detailed survey than we have been able to make but we think that it would be in the interests of good administration as well as of the citizen to make such provision wherever practicable.

Existing machinery for dealing with complaints of maladministration

9. The remedy available to a citizen aggrieved by an act of maladministration is the same as that available to a citizen aggrieved by a discretionary decision; it is to complain to the elected representatives of the Council and try to persuade them to redress his grievance. This method of seeking redress presents serious difficulties since complaints of maladministration in local government are, in effect, complaints against a Committee of the elected representatives, rather than officials, because of the close, direct control which elected representatives exercise over the administrative processes of local government. The elected representatives are, therefore, judges in their own cause and the only external checks are public criticism and the ballot-box at the next election. These sanctions are no doubt appropriate to an elected body in relation to the policy matters for which it is responsible but it is open to question how far democratic processes of this kind are suitable for investigating accusations of maladministration. A view is held in some quarters that it is desirable to supplement the democratic processes by appointing a "complaints officer" whose duty it would be to receive and investigate complaints of maladministration impartially on behalf of the Council. It is claimed that a supplementary process of this kind, which is in essence the same as the Scandinavian Ombudsman concept, is necessary at all events in some instances to increase the confidence of the ratepayers in the integrity and impartiality of their local government. We do not feel

able to assess the extent to which this view is held or the need for such additional machinery in view of our limited survey of local government administration. We think, however, the evidence is sufficiently cogent to justify local authorities undertaking further study of this suggestion and perhaps introducing new procedures with a view to discovering, by practical experience, how far they provide a solution to the problem of protecting the citizen from maladministration in the field of local government.

APPENDIX B

The following is the text of the Bill to appoint a Parliamentary Commissioner for Investigations which was introduced into the New Zealand Parliament in August of this year:

Short title

1. This Act may be cited as the Parliamentary Commissioner for Investigations Act, 1961.

Parliamentary Commissioner for Investigations

Parliamentary Commissioner for Investigations

2.—(1) There shall be an officer of Parliament to be called the Parliamentary Commissioner for Investigations.

(2) Subject to the provisions of section 6 of this Act, the Commissioner shall be appointed by the Governor-General on the recommendation of the House of Representatives.

(3) No person shall be deemed to be employed in the service of Her Majesty for the purposes of the Public Service Act, 1912, or the Superannuation Act, 1956, by reason of his appointment as Commissioner.

Commissioner to hold no other office

3. The Commissioner shall not be capable of being a member of Parliament, and shall not, without the approval of the Prime Minister in each particular case, hold any office of trust or profit, other than his office as Commissioner, or engage in any occupation for reward outside the duties of his office.

Term of office of Commissioner

4.—(1) The recommendation for the appointment of the Commissioner shall be made in the first or second session of every Parliament.

(2) The first such recommendation shall be made in the session of Parliament which commenced on the twentieth day of June, nineteen hundred and sixty-one.

(3) Unless his office sooner becomes vacant, every person appointed as Commissioner shall hold office until his successor is appointed. Every such person may from time to time be reappointed.

(4) The Commissioner may at any time resign his office by writing addressed to the Speaker of the House of Representatives, or to

the Prime Minister if there is no Speaker or the Speaker is absent from New Zealand.

(5) The Commissioner shall retire on attaining the age of seventy-two years.

Removal or suspension from office

5.—(1) The Commissioner may at any time be removed or suspended from his office by the Governor-General, upon an address from the House of Representatives, for disability, bankruptcy, neglect of duty, or misconduct.

(2) At any time when Parliament is not in session, the Commissioner may be suspended from his office by the Governor-General in Council for disability, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General; but any such suspension shall not continue in force beyond the end of the next ensuing session of Parliament.

Filling of vacancy

6.—(1) If the Commissioner dies, or retires, or resigns, or is removed from office, the vacancy thereby created shall be filled in accordance with this section.

(2) If any vacancy in the office of Commissioner occurs at any time while Parliament is in session, it shall be filled by the appointment of a Commissioner by the Governor-General on the recommendation of the House of Representatives:

Provided that if the vacancy occurs less than two months before the close of that session and no such recommendation is made in that session, the provisions of subsection (3) of this section shall apply as if the vacancy had occurred while Parliament was not in session.

(3) If any such vacancy occurs at any time while Parliament is not in session, the following provisions shall apply:

(*a*) The Governor-General in Council may appoint a Commissioner to fill the vacancy, and the person so appointed shall, unless his office sooner becomes vacant, hold office until his appointment is confirmed by the House of Representatives:

(*b*) If the appointment is not so confirmed within two months after the commencement of the next ensuing session, the appointment shall lapse and there shall be deemed to be a further vacancy in the office of Commissioner.

Salary and allowances of Commissioner

7.—(1) Subject to the provisions of subsection (2) of this section, there shall be paid to the Commissioner out of the Consolidated Fund,

without further appropriation than this section, a salary at the rate of three thousand five hundred pounds a year.

(2) Whenever a Royal Commission is appointed to make recommendations for the purposes of section 27 of the Civil List Act, 1950 (which relates to the fixing of salaries and allowances payable under Parts II, III and IV of that Act), that Commission shall also inquire into and report upon the salary of the Commissioner under this Act, and may make such recommendation as it thinks fit thereon. On any such recommendation, the Governor-General may from time to time, by Order in Council, fix the salary of the Commissioner, but so that the salary shall be at a rate not less than that of three thousand five hundred pounds a year. The provisions of subsection (2) of the said section 27 shall apply to any such Order in Council; and while the Order in Council is in force the salary so fixed shall be paid in accordance with subsection (1) of this section instead of the salary provided for in that subsection.

(3) There shall be paid to the Commissioner, in respect of time spent in travelling in the exercise of his functions, travelling allowances and expenses in accordance with the Fees and Travelling Allowances Act, 1951, and the provisions of that Act shall apply accordingly as if the Commissioner were a member of a statutory Board and the travelling were in the service of a statutory Board.

Oath to be taken by Commissioner

8.—(1) Before entering upon the exercise of the duties of his office the Commissioner shall take an oath that he will faithfully and impartially perform the duties of his office, and that he will not, except in accordance with section 17 of this Act, divulge any information received by him under this Act.

(2) The oath shall be administered by the Speaker or the Clerk of the House of Representatives.

Staff of Commissioner

9.—(1) Subject to the provisions of this section, the Commissioner may appoint such officers and employees as may be necessary for the efficient carrying out of his functions under this Act.

(2) The number of persons that may be appointed under this section, whether generally or in respect of any specified duties or class of duties, shall from time to time be determined by the Prime Minister.

(3) The salaries of persons appointed under this section, and the terms and conditions of their appointments, shall be such as are approved by the Minister of Finance.

(4) No person shall be deemed to be employed in the service of Her Majesty for the purposes of the Public Service Act, 1912, or the Superannuation Act, 1956, by reason of his appointment under this section.

Superannuation or retiring allowances of Commissioner and staff

10. There may from time to time be paid sums by way of contributions or subsidies to the National Provident Fund or any Fund or scheme approved by the Governor-General in Council for the purpose of providing superannuation or retiring allowances for the Commissioner and any assistant, officer, or employee appointed under this Act.

Functions of Commissioner

Functions of Commissioner

11.—(1) The principal function of the Commissioner shall be to investigate, either on a complaint made to him or of his own motion, any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organisations named in the Schedule to this Act, or by any officer, employee, or member thereof in his capacity as such officer, employee, or member.

(2) Without limiting the provisions of subsection (1) of this section, it is hereby declared that any Committee of the House of Representatives may at any time refer to the Commissioner, for investigation and report by him, any petition that is before that Committee for consideration, or any matter to which the petition relates. In any such case, the Commissioner shall, subject to any special directions of the Committee, investigate the matters so referred to him, so far as they are within his jurisdiction, and make such report to the Committee as he thinks fit. Nothing in section 14 or section 18 or section 19 of this Act shall apply in respect of any investigation or report made under this subsection.

(3) The powers conferred on the Commissioner by this Act may be exercised notwithstanding any provision in any enactment to the effect that any such decision, recommendation, act, or omission shall be final, or that no appeal shall lie in respect thereof, or that no proceeding or decision of the person or organisation whose decision, recommendation, act, or omission it is shall be challenged, reviewed, quashed, or called in question.

(4) Nothing in this Act shall authorise the Commissioner to investigate—

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

(*b*) Any decision, recommendation, act, or omission of any person in his capacity as a trustee within the meaning of the Trustee Act, 1956:

(*c*) Any decision, recommendation, act, or omission of any person acting as legal adviser to the Crown pursuant to the rules for the time being approved by the Government for the conduct of Crown legal business, or acting as counsel for the Crown in relation to any proceedings.

(5) Nothing in this Act shall authorise the Commissioner to investigate any matter relating to any person who is or was a member of or provisional entrant to the New Zealand Naval Forces, the New Zealand Army, or the Royal New Zealand Air Force, so far as the matter relates to—

(*a*) The terms and conditions of his service as such member or entrant; or

(*b*) Any order, command, decision, penalty, or punishment given to or affecting him in his capacity as such member or entrant.

(6) If any question arises whether the Commissioner 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 in accordance with the Declaratory Judgments Act, 1908, and the provisions of that Act shall extend and apply accordingly.

House of Representatives may make rules for guidance of Commissioner

12. The House of Representatives may from time to time, if it thinks fit, make general rules for the guidance of the Commissioner in the exercise of his functions, and may at any time in like manner revoke or vary any such rules.

Mode of complaint

13.—(1) Every complaint to the Commissioner shall be made in writing.

(2) Notwithstanding any provision in any enactment, where any letter written by any person in custody on a charge or after conviction of any offence, or by any inmate of any institution within the meaning of the Mental Health Act, 1911, is addressed to the Commissioner it shall be immediately forwarded, unopened, to the Commissioner by the person for the time being in charge of the place or institution where the writer of the letter is detained or of which he is an inmate.

(3) On every complaint to the Commissioner there shall be paid to the Commissioner, on behalf of the Crown, a fee of one pound, unless, having regard to any special circumstances, the Commissioner directs that no fee shall be payable.

(4) The Commissioner shall cause all fees paid to him under this section to be paid into the Public Account.

Commissioner may refuse to investigate complaint

14.—(1) If in the course of the investigation of any complaint within his jurisdiction it appears to the Commissioner—

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

(*b*) That, having regard to all the circumstances of the case, any further investigation is unnecessary—

he may in his discretion refuse to investigate the matter further.

(2) Without limiting the generality of the powers conferred on the Commissioner by this Act, it is hereby declared that the Commissioner may in his discretion decide not to investigate, or, as the case may require, not to further investigate, any complaint if it relates to any decision, recommendation, act, or omission of which the complainant has had knowledge for more than twelve months before the complaint is received by the Commissioner, or if in his opinion—

(*a*) The subject-matter of the complaint is trivial; or

(*b*) The complaint is frivolous or vexatious or is not made in good faith; or

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

(3) In any case where the Commissioner decides not to investigate or further investigate a complaint he shall inform the complainant of that decision, and may if he thinks fit state his reason therefor, and may also, if he thinks fit, direct that the fee paid by the complainant under this Act be refunded to him.

Proceedings of Commissioner

15.—(1) Before investigating any matter under this Act, the Commissioner shall inform the Permanent Head of the Department affected, or, as the case may require, the organisation affected, of his intention to make the investigation.

(2) Every investigation by the Commissioner under this Act shall be conducted in private.

(3) The Commissioner may hear or obtain information from such persons as he thinks fit, and may make such inquiries as he thinks fit. It shall not be necessary for the Commissioner to hold any hearing, and no person shall be entitled as of right to be heard by the Commissioner:

Provided that if at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds for his making any report or recommendation that may adversely affect any Department or organisation or person, he shall give to that Department or organisation or person an opportunity to be heard.

(4) If, during or after any investigation, the Commissioner is of opinion that there is evidence of any breach of duty or misconduct on the part of any officer or employee of any Department or organisation, he shall refer the matter to the appropriate authority.

(5) Subject to the provisions of this Act and of any rules made for the guidance of the Commissioner by the House of Representatives and for the time being in force, the Commissioner may regulate his procedure in such manner as he thinks fit.

Evidence

16.—(1) Subject to the provisions of this section, the Commissioner may from time to time require any person who in his opinion is able to give any information relating to any matter that is being investigated by the Commissioner to furnish to him any such information, and to produce any documents or papers or things which in the Commissioner's opinion relate to any such matter as aforesaid and which may be in the possession or under the control of that person. This subsection shall apply whether or not the person is an officer, employee, or member of any Department or organisation, and whether or not such documents, papers, or things are in the custody or under the control of any Department or organisation.

(2) The Commissioner may summon any such person before him and examine the person on oath, and for that purpose may administer an oath; and in any such case the proceedings of the Commissioner shall be deemed to be judicial proceedings within the meaning of section 130 of the Crimes Act, 1908 (which relates to perjury):

Provided that the Commissioner shall not, without the prior approval of the Attorney-General in each case, summon before him under this subsection any person who is not an officer or employee or member of a Department or organisation named in the Schedule to this Act.

(3) Subject to the provisions of subsection (4) of this section, no person who is bound by the provisions of any enactment, other than the Public Service Act, 1912, and the Official Secrets Act, 1951, to maintain secrecy in relation to, or not to disclose, any matter shall be required to supply any information to or answer any question put by the Commissioner in relation to that matter, or to produce to the Commissioner any document or paper or thing relating to it, if compliance with that requirement would be in breach of the obligation of secrecy or non-disclosure.

(4) With the previous consent in writing of any complainant, any person to whom subsection (3) of this section applies may be required by the Commissioner to supply information or answer any question or produce any document or paper or thing relating only to the complainant, and it shall be the duty of the person to comply with that requirement.

(5) Every person shall have the same privileges in relation to the giving of information, the answering of questions, and the production of documents and papers and things as witnesses have in any Court.

(6) Without limiting the generality of the provisions of subsection (5) of this section, it is hereby declared that where the Attorney-General certifies that the giving of any information or the answering of any question or the production of any document or paper or thing might prejudice the security, defence, or international relations of New Zealand (including New Zealand's relations with the Government of any other country or with any international organisation), or the investigation or detection of offences, the Commissioner shall not require the information or answer to be given or, as the case may be, the document or paper or thing to be produced.

(7) Except on the trial of any person for perjury within the meaning of the Crimes Act, 1908, in respect of his sworn testimony, no statement made or answer given by that or any other person in the course of any inquiry by or any proceedings before the Commissioner shall be admissible in evidence against any person in any Court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

(8) No person shall be liable to prosecution for an offence against the Official Secrets Act, 1951, or any enactment, other than this Act,

by reason of his compliance with any requirement of the Commissioner under this section.

(9) Where any person is required by the Commissioner to attend before him for the purposes of this section, the person shall be entitled to the same fees, allowances, and expenses as if he were a witness in a Court, and the provisions of the Witnesses and Interpreters Fees Regulations, 1959, shall apply accordingly. For the purposes of this subsection the Commissioner shall have the powers of a Court under those regulations to fix or disallow, in whole or in part, or increase the amounts payable thereunder.

Commissioner and staff to maintain secrecy

17.—(1) The Commissioner and every person holding any office or appointment under him shall be deemed for the purposes of the Official Secrets Act, 1951, to be persons holding office under Her Majesty.

(2) The Commissioner and every such person as aforesaid shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions.

(3) Every person holding any office or appointment under the Commissioner shall, before he begins to perform any official duty under this Act, take an oath, to be administered by the Commissioner, that he will not divulge any information received by him under this Act except for the purpose of giving effect to this Act.

(4) Notwithstanding anything in the foregoing provisions of this section, the Commissioner may disclose in any report made by him under this Act such matters as in his opinion ought to be disclosed in order to establish grounds for his conclusions and recommendations. The power conferred by this subsection shall not extend to any matter that might prejudice the security, defence, or international relations of New Zealand (including New Zealand's relations with the Government of any other country or with any international organisation) or the investigation or detection of offences.

Procedure after investigation

18.—(1) The provisions of this section shall apply in every case where, after making any investigation under this Act, the Commissioner is of opinion that the decision, recommendation, act, or omission which was the subject-matter of the investigation—

(*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 enactment 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.

(2) The provisions of this section shall also apply in any case where the Commissioner is of 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.

(3) If in any case to which this section applies the Commissioner is of opinion—

(*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 the 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—

the Commissioner shall report his opinion, and his reasons therefor, to the appropriate Department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the Department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Commissioner shall also send a copy of his report and recommendations to the Minister concerned.

(4) If within a reasonable time after the report is made no action is taken which seems to the Commissioner to be adequate and appropriate, the Commissioner, in his discretion, after considering the comments (if any) made by or on behalf of any Department or organisation affected, may send a copy of the report and recommendations to the Prime Minister, and may thereafter make such report to Parliament on the matter as he thinks fit.

(5) The Commissioner shall attach to every report sent or made under subsection (4) of this section a copy of any comments made by or on behalf of the Department or organisation affected.

(6) Notwithstanding anything in this section, the Commissioner shall not, in any report made under this Act, make any comment that is adverse to any person unless the person has been given an opportunity to be heard.

Complainant to be informed of result of investigation

19.—(1) Where, on any investigation following a complaint, the Commissioner makes a recommendation under subsection (3) of section 18 of this Act, and no action which seems to the Commissioner to be adequate and appropriate is taken thereon within a reasonable time, the Commissioner shall inform the complainant of his recommendation, and may make such comments on the matter as he thinks fit.

(2) The Commissioner shall in any case inform the complainant, in such manner and at such time as he thinks proper, of the result of the investigation.

Proceedings not to be questioned or to be subject to review

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

Proceedings privileged

21.—(1) Except in the case of proceedings for an offence against the Official Secrets Act, 1951,—

(*a*) No proceedings, civil or criminal, shall lie against the Commissioner, or against any person holding any office or appointment under the Commissioner, for anything he may do or report or say in the course of the exercise or intended exercise of his functions under this Act, unless it is shown that he acted in bad faith:

(*b*) The Commissioner, and any such person as aforesaid, shall not be called to give evidence in any Court in respect of anything coming to his knowledge in the exercise of his functions.

(2) Anything said or any information supplied or any document, paper, or thing produced by any person in the course of any inquiry by or proceedings before the Commissioner under this Act shall be privileged in the same manner as if the inquiry or proceedings were proceedings in a Court.

(3) Any report made by the Commissioner under this Act shall be privileged in the same manner as if it were the report of proceedings in a Court.

Miscellaneous Provisions

Power of entry on premises

22.—(1) For the purposes of this Act, but subject to the provisions of this section, the Commissioner may at any time enter upon any

premises occupied by any of the Departments or organisations named in the Schedule to this Act and inspect the premises and, subject to the provisions of section 16 of this Act, carry out therein any investigation that is within his jurisdiction.

(2) Before entering upon any such premises the Commissioner shall notify the Permanent Head of the Department or, as the case may require, the organisation by which the premises are occupied.

(3) The Attorney-General may from time to time by notice to the Commissioner exclude the application of subsection (1) of this section to any specified premises or class of premises, if he is satisfied that the exercise of the power conferred by this section might prejudice the security, defence, or international relations of New Zealand, including New Zealand's relations with the Government of any other country or with any international organisation.

Delegation of powers by Commissioner

23.—(1) With the prior approval in each case of the Prime Minister, the Commissioner may from time to time, by writing under his hand, delegate to any person holding any office under him any of his powers under this Act, except this power of delegation and the power to make any report under this Act.

(2) Any delegation under this section may be made to a specified person or to the holder for the time being of a specified office or to the holders of offices of a specified class.

(3) Every delegation under this section shall be revocable at will, and no such delegation shall prevent the exercise of any power by the Commissioner.

(4) Any such delegation may be made subject to such restrictions and conditions as the Commissioner thinks fit, and may be made either generally or in relation to any particular case or class of cases.

(5) Until any such delegation is revoked, it shall continue in force according to its tenor. In the event of the Commissioner by whom it was made ceasing to hold office, it shall continue to have effect as if made by his successor.

(6) Any person purporting to exercise any power of the Commissioner by virtue of a delegation under this section shall, when required to do so, produce evidence of his authority to exercise the power.

Annual report

24. Without limiting his right to report at any other time, but subject to the provisions of subsection (6) of section 18 of this Act and to any rules for the guidance of the Commissioner made by the

House of Representatives and for the time being in force, the Commissioner shall in each year make a report to Parliament on the exercise of his functions under this Act.

Offences

25. Every person commits an offence against this Act and is liable on summary conviction to a fine not exceeding fifty pounds who—

(*a*) Without lawful justification or excuse, wilfully obstructs, hinders, or resists the Commissioner or any other person in the exercise of his powers under this Act:

(*b*) Without lawful justification or excuse, refuses or wilfully fails to comply with any lawful requirement of the Commissioner or any other person under this Act:

(*c*) Wilfully makes any false statement to or misleads or attempts to mislead the Commissioner or any other person in the exercise of his powers under this Act.

Money to be appropriated by Parliament for purposes of this Act

26. Except as otherwise provided in this Act, all salaries and allowances and other expenditure payable or incurred under or in the administration of this Act shall be payable out of money to be appropriated by Parliament for the purpose.

Power to amend Schedule by Order in Council on abolition or creation of Department, etc.

27. Where any Department or organisation named in the Schedule to this Act is abolished, or its name is altered, or where any new Department of State is created, the Governor-General may by Order in Council make such amendments to the said Schedule as may be necessary to give effect to the abolition or alteration, or to include the name of the new Department therein.

Savings

28. The provisions of this Act are in addition to the provisions of any other enactment or any rule of law under which any remedy or right of appeal or objection is provided for any person or any procedure is provided for the inquiry into or investigation of any matter, and nothing in this Act shall limit or affect any such remedy or right of appeal or objection or procedure as aforesaid.

Section 11 (1) **SCHEDULE**

DEPARTMENTS AND ORGANISATIONS TO WHICH THIS ACT APPLIES

Part I—Government Departments

The Air Department.
The Army Department.
The Audit Department.
The Crown Law Office.
The Customs Department.
The Department of Agriculture.
The Department of Education.
The Department of External Affairs.
The Department of Health.
The Department of Industries and Commerce.
The Department of Internal Affairs.
The Department of Island Territories.
The Department of Justice.
The Department of Labour.
The Department of Lands and Survey.
The Department of Maori Affairs.
The Department of Scientific and Industrial Research.
The Department of Statistics.
The Government Life Insurance Office.
The Inland Revenue Department.
The Law Drafting Office.
The Legislative Department.
The Maori Trust Office.
The Marine Department.
The Mines Department.
The Ministry of Works.
The Navy Department.
The New Zealand Broadcasting Service.
The New Zealand Electricity Department.
The New Zealand Forest Service.
The New Zealand Government Railways Department.
The Office of the Public Service Commission.
The Police Department.
The Post Office.
The Prime Minister's Department.
The Printing and Stationery Department.
The Public Trust Office.
The Social Security Department.
The State Advances Corporation of New Zealand.
The State Fire and Accident Insurance Office.
The Tourist and Publicity Department.
The Transport Department.
The Treasury.
The Valuation Department.

Appendix B

DEPARTMENTS AND ORGANISATIONS TO WHICH THIS ACT APPLIES—*continued*

Part II—Other Organisations

The Air Board.
The Army Board.
The Board of Management of the State Advances Corporation of New Zealand.
The Board of Maori Affairs.
The Board of Trade.
The Earthquake and War Damage Commission.
The Government Stores Board.
The Government Superannuation Board.
The Land Settlement Board.
The Maori Purposes Fund Board.
The National Parks Authority.
The National Provident Fund Board.
The National Roads Board.
The New Zealand Naval Board.
The New Zealand Army.
The New Zealand Naval Forces.
The Police.
The Public Service Commission.
The Rehabilitation Board.
The Royal New Zealand Air Force.
The Social Security Commission.
The Soil Conservation and Rivers Control Council.
The State Fire Insurance Board.

JUSTICE

British Section of the International Commission of Jurists

JUSTICE is an all-party association of lawyers concerned, in the words of its constitution, " to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible: in particular, to assist in the maintenance of the highest standards of the administration of justice and in the preservation of the fundamental liberties of the individual." It is also concerned to assist the International Commission of Jurists in its efforts to promote observance of the Rule of Law throughout the world.

JUSTICE was founded in the Spring of 1957 following a joint effort of leading lawyers of the three political parties to secure fair trials for those accused of treason in Hungary and South Africa. From this co-operation arose the will to found a permanent organisation. A preamble to the constitution lays down that there must be a fair representation of the three political parties on the governing Council, which is composed of barristers, solicitors and teachers of law.

In the four years of its existence, JUSTICE has become the focal point of a growing public concern for the fair administration of justice and the protection of individual rights and freedom. It has made reports and recommendations on a number of legal problems (see below), and matters now under review include the suitability of magistrates' courts for matrimonial proceedings, compensation for victims of crimes of violence, the working of the criminal appeal system, and certain aspects of the law relating to trade unions and trade associations. In our overseas territories JUSTICE has played an active part in the effort to safeguard human rights in multi-racial communities, both before and after independence; and has made special studies of legal aid provisions and of detention without trial.

Membership of JUSTICE is open to both lawyers and non-lawyers and inquiries should be addressed to the Secretary at 1 Mitre Court Buildings, Temple, London, E.C.4. Tel. CENtral 9428.

Reports previously published in this series (by Stevens & Sons, Ltd.):

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Legal Penalties: the Need for Revaluation (3s. 6d.).
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