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LA THÈSE A ÉTÉ
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THE OMBUDSMAN SYSTEM
in
THE COMMONWEALTH CARIBBEAN
with
PARTICULAR REFERENCE TO BARBADOS

A Thesis Submitted to the School of Graduate Studies

of

THE UNIVERSITY OF OTTAWA

in

Partial Fulfilment of the Requirements

for

The Degree of Master of Laws (Legislation)

by

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OTTAWA

RÉSUMÉ

Over the past decade and a half, most of the independent States of the Commonwealth Caribbean region have accepted the principle of the Ombudsman institution.

These States have all provided for the establishment of the office of Ombudsman by way of legislative enactment. The legislative provisions are embodied in some States' Constitutions; in others, the provisions are contained in an ordinary Act of Parliament. Among those so far adopting the latter approach are Jamaica and Barbados.

This trend in the Caribbean region towards the Ombudsman principle has not been without question from some segment of the Caribbean community. For example, the need for the establishment of the office in Barbados has been questioned.

Some take the view that the existing machinery in Barbados is sufficiently adequate to respond to the grievances of the individual citizen against the State, and that the establishment of the office is therefore unnecessary.

The Ombudsman scheme itself providing for the establishment of the office in Barbados has been the subject of some criticisms. Although it has been acknowledged that the scheme embodies some positive features, yet the view is taken that the jurisdiction ascribed to the Ombudsman is such as could make the operations of the office ineffective. Indeed, this jurisdiction is perceived as being too wide in some areas and too restrictive in others.

It is the purpose of the thesis that follows to examine the Barbados scheme with a view to assessing whether there is any validity in these observations, or whether the Barbados model in its adoption of the principal features of the Ombudsman system has devised a legislative scheme that would enhance the likelihood of an effective operation of the system in Barbados.

The method by which it is hoped to achieve this purpose is set out in the introduction to the thesis.

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- D. The Barbados Ombudsman Act, 1980.

PREFACE

A look back over the past decade and a half clearly reveals that there is sufficient evidence to support the view that the institution of the Ombudsman is now a feature of the Commonwealth Caribbean region.

So far most of the independent English-speaking States in the region have provided for the establishment of the institution either by a constitutional provision or by provision in an ordinary Act of Parliament.

Whatever the reaction may be from members of the community to the adoption of the institution by these States as they each grapple with the demands and complexities of nationhood, and with the ways and means of establishing a just society, the potential of the institution for protecting citizens' rights¹ within a Caribbean environment would seem to be sufficiently important to warrant as much study as possible.²

The thesis which follows has been prepared to fulfil certain requirements of the School of Graduate Studies and Research of the University of Ottawa, and it is hoped that the views expressed on the matters raised are such as would inspire further research into the operations of the institution in the emerging States of the Commonwealth Caribbean.

In any event, it is my sincere hope that the research which has been conducted for the purposes of the thesis will assist in some way towards putting the nascent institution on a strong footing in Barbados.

Many persons have assisted in one way or another in making the research for this thesis possible, and I wish to acknowledge my indebtedness to each of them, and to thank them all.

In so doing, I wish to express my gratitude to Mr. Justice P. Telford Georges, former Dean of the Faculty of Law, University of the West Indies, for inspiring my interest in the Ombudsman system, and to the Judicial and Legal Service Commission of the Government of Barbados for granting me the necessary leave of absence from my official duties to undertake the research in this area.

The gathering of my research materials has been an exercise in which many have participated. Among these are: Mrs. Velma Newton, Librarian, Faculty of Law, University of the West Indies; Mr. E. L. Thomas, Parliamentary Counsel and Ms. Annette Connell, both of the Ministry of the Attorney-General, Barbados; Mr. Brynmore Pollard, Legal Consultant, Caricom Secretariat, Guyana; and the holders of the office of Ombudsman in the Caribbean.

Those in Canada who have also assisted in this exercise include Mme. Jeanne Proulx of the Quebec Bar, and M. Dubé and staff of the office of Public Protector in Quebec; Mrs. Carol Boxil of the New Brunswick Bar; Ms. Priscilla Kennedy, Assistant to the Executive Director of the International Ombudsman Institute; Mr. Richard Delph, Legislative Counsel with the Department of Justice, Ottawa; Mrs. Ursula Schultz of the National Library and Mr. Chin Shih Tang and members of the staff of the libraries of the University of Ottawa.

I wish to express my gratitude also to Mrs. Inger Hansen, Privacy Commissioner, for taking time off from her busy schedule to comment on some of my early drafts and to my Supervisor for his comments and useful suggestions on the draft thesis as a whole.

I am extremely grateful to Ms. Hyrol Springer for typing my first drafts from what were at times very difficult manuscripts, and to Mrs. Lenore Dewan for final processing of the draft thesis at very short notice.

During my stay in Ottawa, certain courtesies were extended to me. In this connection I would like to thank the High Commissioners and members of staff of the Guyana, Jamaica, and Trinidad and Tobago Missions in Ottawa. I am indebted for similar courtesies extended to me by the present and former Barbados High Commissioner to Canada and members of their staff, and to the President and members of the Barbados (Ottawa) Association.

Special thanks are also due to Ms. Hazel Anatol, Audit Director with the Trinidad and Tobago Government, who at very short notice readily agreed to direct her "audit eye" to the task of proofreading the final drafts of the thesis.

Finally, my thanks are also due to my family and friends in Barbados for their constant encouragement and moral support during my stay in Ottawa.

Errol DaCosta Chase
Ottawa, August, 1982.

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1. For discussion on the many meanings that may be given to the notion of citizens' rights, see A. W. Bradley, "The Role of the Ombudsman in Relation to the Protection of Citizens' Rights", in the Cambridge Law Journal, Nov. 1980, pp. 304-32.
 2. There are some articles on the institution in the Caribbean, see for example, Harold A. Lutchman, "The Office of Ombudsman in Guyana", in Caribbean Studies, Vol. 13, No. 1, pp. 62-77; M. De Merieux, "The Ombudsman in the Commonwealth Caribbean", Faculty of Law: University of the West Indies, 1978.

INTRODUCTION

The independent States of the Commonwealth Caribbean, like many other States in the democratic world, have not escaped the tentacles of the Ombudsman institution.

Since the institution was adopted by Guyana on the South American mainland, it has continued over a period of approximately a decade and a half on an upward journey to several of the other States in the English-speaking Carribbean.

Trinidad and Tobago, Dominica, St. Lucia, as well as Antigua and Barbuda have each provided for the establishment of the institution in their Constitutions. Jamaica and Barbados have each established it by an ordinary Act of Parliament.

The response to this Caribbean trend has not been all favourable. Indeed, certain statements made in connection with the recent adoption of the Ombudsman concept by Barbados would seem to suggest that the trend is perceived as merely a desire to follow the pattern set elsewhere outside the Caribbean-region,¹ rather than to provide for an effective mechanism to deal with the complaints of the citizen against the State.

This lack of enthusiasm towards the adoption of the Ombudsman concept particularly in Barbados is again reflected in other statements made during the debate of the Barbados Bill in the Upper House. Declaring his

agreement with the principle behind the establishment of an Ombudsman, one Senator asserted as follows:

I know that there is some very educated opinion in the country that thinks the establishment of an Ombudsman to be unnecessary, and this opinion to which I refer is not all politically partisan. Some persons are persuaded that enough machinery already exists in the country for persons who feel that they are aggrieved to set in motion to have their grievances looked into and remedied.²

Apart from this general reaction, certain observations made particularly with reference to the Barbados scheme seem to suggest that the principles of the Ombudsman concept as adapted for Barbados might prove to be ineffective because the jurisdiction prescribed by the scheme for the Ombudsman was perceived as being too wide in some areas, and too restrictive in others.

The purpose of this thesis therefore is to examine the Barbados model with a view to assessing whether there is any validity in these observations, or whether the model in its adaptation of the principles of the Ombudsman system has adopted a legislative scheme that would enhance the likelihood of an effective operation of the system in Barbados.

Methodology and scope

In analysing the features of the Barbados model, comparisons will be made with relevant features appearing in models elsewhere. This comparative analysis, however, will be confined more particularly to the Commonwealth Caribbean models mentioned earlier; although at times, references will be made to precedents in Scandinavia, New Zealand, United Kingdom, and in some of the Canadian Provinces.

The thesis is divided into ten chapters.

The first chapter focuses on the origin and growth of the institution outside the Caribbean; whereas the second deals with its arrival and spread within the Commonwealth Caribbean region.

The third chapter analyses the appointment procedure contemplated by the Barbados scheme for the appointment of its Ombudsman, and compares that procedure with others elsewhere.

The fourth chapter acknowledges that the notion of independence is essential to the proper functioning of the office of Ombudsman, and examines the mechanisms imported into the Barbados scheme for protecting and maintaining this notion.

In the fifth chapter, the jurisdictional formula employed by the scheme is subjected to a detailed analysis to determine the extent of the jurisdiction prescribed for the Barbados Ombudsman. In this process the formulations adopted by other schemes to define the jurisdictional limits of their respective Ombudsmen will also be considered.

The sixth chapter deals with the government agencies that are subject to the Ombudsman's jurisdiction. An evaluation of the criticisms made in this connection will also be made and some conclusions will be drawn.

In the seventh chapter a few observations will be made with respect to some of the matters excluded from the Ombudsman's jurisdiction. In addition, some suggestions will be made respecting the administrative functions of the court system, and the position of the Auditor-General in relation to the Ombudsman.

Chapters eight and nine will note the Ombudsman's investigatory procedure and accountability respectively.

Finally, the tenth chapter will present the conclusions that may be drawn from the overall analysis of the Barbados scheme.

1. Early in the debate in the Barbados House of Assembly on the Bill to provide for the establishment of the office of Ombudsman in Barbados, the following statements were made:

It seems . . . that once again we in Barbados, like other Caribbean territories, will be sticking true to form in that once it has been applied somewhere else, we feel we should have it too. No one can contest the office of Ombudsman; the difficulty in pronunciation is an indication that the concept is foreign to this system.

....
If we are not tackling the Minister, then all we are doing, if you will pardon the expression, is "follow pattern or following pattern".

Taitt, M.P., Barbados House of Assembly Debates (Official Report) Second Session 1976-81, Tuesday, 4th November, 1980 (hereinafter referred to as "B.H.A. Deb."), pp. 4492 and 4494.

2. Senator Connell, Barbados Senate Debates (Nov. 26, 1980), p. 1474.

CHAPTER I

ORIGIN, GROWTH AND SPREAD OF THE INSTITUTION OUTSIDE THE CARIBBEAN REGION

No serious examination of the Ombudsman system can be conducted without some reference to its Scandinavian roots. To provide a contextual framework for this thesis, therefore, the origin and growth of the institution before its arrival in the Caribbean region will be briefly noted.

Development in Scandinavia

The literature¹ on the subject of Ombudsmanship points to the Swedish Constitution of 1809 as creating the office of Justitieombudsman as a representative of Parliament "to supervise the observance of statutes and regulations by the courts and by public officials and employees", and to investigate complaints from citizens. There are suggestions, however, that a system similar to that of the Ombudsman had existed elsewhere.²

In 1919 Finland adopted the office in its Constitution; Denmark did likewise in 1953. In 1962, Norway passed an Act for the establishment of an "Ombudsmann" for civil affairs,³ thereby setting the scene for what is now regarded as principally a Scandinavian institution.

It should at once be noted that during the process of evolution and transfer of the institution within Scandinavia itself certain variations occurred. Indeed, Professor Gellhorn states that "[while] not wholly ignoring 'the Swedish prototype', the Danish Parliament improved upon rather than slavishly copied what had previously existed in Sweden and Finland".⁴

Some of the most significant variations⁵ are as follows:

- (a) Whereas the original Swedish and Finnish models had empowered their respective Ombudsmen to supervise and even prosecute Judges, under the Danish and Norwegian models, the Ombudsmen were prohibited from supervising the judges, and by implication to prosecute them.⁶
- (b) Under the Swedish and Finnish systems, administrative documents were open to inspection not only by the parties concerned, but also by the public and the press. In contrast, under the Danish and Norwegian models, confidentiality of investigations was to be maintained.⁷

Because of the Danish adaptation of the Swedish model, it is widely acknowledged that the institution became capable of reception elsewhere outside Scandinavia. Indeed, Professor S. A. de Smith asserted as follows:

... the well-known and long-established Swedish model is manifestly inappropriate for export to a Commonwealth country; the pattern of public administration and the status of civil servants are peculiarly Swedish, and the relationships between Ministers and Parliament are materially different from those obtaining in the Westminster system. The Danish model (introduced in 1953) offers a more fruitful line of approach, for in Denmark the constitutional structure bears a fairly close resemblance to the British type.⁸

However, before noting some of the Commonwealth countries that have adopted the system as developed in Denmark, its essential characteristics should be noticed at this stage.

Professor Donald C. Rowat has asserted that these are as follows:

- (1) The Ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the constitution, who supervises the administration;
- (2) he deals with specific complaints from the public against administrative injustice and maladministration; and
- (3) he has the power to investigate, criticize and publicize, but not to reverse administrative action.⁹

Another feature which would seem to be characteristic of the system, and one which is not emphasised by Professor Rowat, is the power of the Scandinavian Ombudsmen to initiate investigations on their own motion. This feature sharply distinguishes the Ombudsman system from that of the ordinary court system, in that the courts are not empowered to investigate cases on their own motion. However, the feature is captured by the following definition offered by the International Bar Association:

An office provided for by the constitution or by action of the Legislature or Parliament and headed by an independent, high-level public official who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts as his own motion, and who has the power to investigate, recommend corrective action, and issue reports.¹⁰

This definition, except for its specific reference to the Ombudsman's power to act on his own motion, is in accord with Professor Rowat's "essential features".

These therefore constitute the basic characteristics of the Ombudsman system.

System adopted outside Scandinavia

It is now common knowledge that the first Anglo-Saxon country to adopt the principles of the Ombudsman concept was New Zealand in 1962. Other countries in the wider Commonwealth to follow the New Zealand example include the United Kingdom, and all the Canadian Provinces, except Prince Edward Island, and at the Canadian federal level, specialised offices have been established to deal with languages, prisons and privacy matters.

In terms of influence, just as the New Zealand model was greatly influenced by the Danish adaptation of the "Swedish prototype", so also the Canadian models have been greatly influenced by the New Zealand adaptation of the concept. The United Kingdom precedent, on the other hand, although influenced by the Scandinavian concept, was tailored to fit into "the principle underlying the system of the Public Accounts Committee and the Comptroller and Auditor-General".¹¹ Indeed, as Professor de Smith has pointed out, "An Ombudsman cannot be bought off the peg; he must be made to measure."¹²

It is not intended to examine how these countries adapted the concept to harmonise with their existing institutions. This is adequately dealt with elsewhere.¹³ What is intended, however, is to examine the circumstances contributing to the reception of the system in the Commonwealth Caribbean. This will be the subject of the next chapter.

1. Donald C. Rowat's two books, The Ombudsman: Citizen's Defender, 2nd ed. (Toronto: University of Toronto Press, 1968), p. 24; The Ombudsman Plan: Essays on the Worldwide Spread of an Idea (Toronto: McClelland and Stewart Ltd., 1973), p. 2; Walter Gellhorn, Ombudsmen and Others: citizens' protectors in nine countries (Cambridge, Mass.: Harvard University Press, 1966), p. 194; Frank A. Stacey, Ombudsmen Compared (Oxford: Clarendon Press, 1978), p. 1. See also Report by Justice, "The Citizen and the Administration: The Redress of Grievances" (London: Stevens & Sons Limited, 1961), p. 46.
2. Gellhorn, supra note 1, p. 194, n. 1; Stanley V. Anderson, "The Scandinavian Ombudsman", in The American-Scandinavian Review, 52 No. 4 (Dec. 1964), pp. 403-09; rpt. in Stanley V. Anderson, Ombudsman Readings (Edmonton, Alberta, Canada: International Ombudsman Institute, 1980), p. 20.
3. Norway had an Ombudsman for Defence from as early as 1952. See Stanley Anderson "The Scandinavian Ombudsman", in The American-Scandinavian Review, rpt. in Ombudsman Readings, p. 21.
4. Gellhorn, supra note 1, pp. 7-8.
5. Rowat, supra note 1, The Ombudsman Plan, pp. 26-27.
6. For instances of prosecutions, see Gellhorn, supra note 1, pp. 59-62, 238-39, and Rowat, supra note 1, Citizen's Defender, 2nd., pp. 26-27.
7. Rowat, supra note 1, The Ombudsman Plan, pp. 26-27.
8. The Report of the British Guiana Commission of Inquiry: "Racial Problems in the Civil Service" (Geneva: International Commission of Jurists, Oct., 1965), para. 39 of Appendix VIII, at p. 196. See also H. W. R. Wade, Administrative Law, 4th ed. (Oxford: Clarendon Press, 1977), pp. 75-77.
9. Preface to the Second Edititon, in Rowat, ed., The Ombudsman: Citizen's Defender, p. xxiv.
10. Cited by Sir Guy Powles in his address to the First International Ombudsman Conference. See "The Jurisdiction of the Ombudsman", in the Report of the Proceedings, First International Ombudsman Conference (Edmonton, Alberta: International Ombudsman Institute, 1976), p. 11.
11. Report by Justice, supra note 1, p. 66.
12. The Report of the British Guiana Commission of Inquiry, supra note 8, p. 196.
13. For example, see generally Frank Stacey, Ombudmen Compared, supra note 1.

CHAPTER II

ADOPTION OF THE INSTITUTION IN THE COMMONWEALTH CARIBBEAN

The circumstances leading up to the adoption of the Ombudsman system by the first Caribbean State are distinctly different from those prevailing at the time of its reception by other States in the region. Therefore to reflect the scene before the arrival of the institution in the Caribbean, it is necessary to recall the relevant circumstances briefly.

Guyana

Following incidents of racial disharmony in British Guiana (as it then was prior to its independence in 1966) leading to "widespread racial violence" in 1964,¹ the International Commission of Jurists was invited by the Government to appoint a Commission of Inquiry to examine certain aspects of public life in that country, and to make recommendations.²

The problems which the Commission had to investigate related to complaints that there was a racial imbalance in the security forces and public services in favour of persons of African extraction to the disadvantage of those of Indian origin.³

At the conclusion of their investigation, the Commission made a number of observations and recommendations. Amongst these was that the focus of the Inquiry was "... primarily concerned with the part played by race in the public services", and that it was not "possible to separate this problem from the larger one of the part played by race in the community as a whole".⁴

The Commission took the view that the fundamental rights provisions reflected in the then existing pre-independence Constitution provided "an excellent constitutional basis for a legal polity designed to outlaw racial discrimination".⁵ Yet, these provisions had not been invoked in connection with the many complaints of racial discrimination.

The Commission's observations were expressed in these terms:

It is a surprise to learn that, despite the many complaints of racial discrimination that have been made, no proceedings have been instituted in the Supreme Court to have any law or executive or administrative action struck down on the ground that it contravened, or was likely to contravene, the provisions of Article 11, which prohibits the imposition of disabilities or restrictions or the granting of any privilege or advantage on the grounds of race. Articles 11 and 13 constitute a mighty weapon against racial discrimination in the public service. Every effort should be made to encourage recourse to them in appropriate cases.⁶

The Commission also suggested that if the power given by the Constitution to the Supreme Court to make orders, issue writs and give directions for the purpose of enforcing or securing the enforcement of any of the fundamental rights provisions was considered to be inadequate, then the law

should be amended "so as to ensure that the assertion of the constitutional provisions against racial discrimination and other fundamental rights [would] not be thwarted by procedural or other difficulties."⁷

These observations are significant. They seem to acknowledge that no matter how perfectly a legislative provision may be designed to protect some right or to confer some social or economic benefit, it may nonetheless be made nugatory by procedural or other administrative difficulties. In the result, an otherwise well conceived and perfectly designed provision would constitute no more than a dead letter on the Statute book.

Observing further that there would be cases of alleged racial discrimination where recourse to the courts to invoke the provisions of the Constitution as a means of redress would not be desirable or reasonably practicable, the Commission considered that "it would be desirable to have a simple, swift and inexpensive procedure for investigating such cases."⁸

Since the racial problems in Guyana were perceived as similar to those that had existed in Mauritius, the Commission suggested that the proposals made by Professor de Smith for the establishment of an Ombudsman for Mauritius should be studied. The Commission noted, however, that there was little experience in the operation of the office in terms of investigating allegations of racial discrimination in a multi-racial society such as Guyana. It therefore considered that a wide degree of agreement on the constitutional standing and jurisdiction of the Ombudsman was necessary before the office was established.⁹

The Commission also pointed out that "the success of the Ombudsman must ultimately depend on the acceptability, fairness and skill of the holder of the office", and that since it may become impossible to find an individual who

would be assured the necessary degree of acceptability, they had considered the establishment of a "suitably constituted committee instead of an individual Ombudsman". Yet, they could make no specific recommendation until the matter was fully considered and the views of interested parties were known.¹⁰

It is against this background that Guyana established the office in its 1966 independence Constitution electing for an individual Ombudsman instead of a Committee. Thus, the institution arrived in the Caribbean, and began its operations on the 26th May, 1966 when the first Ombudsman, a former Director of Public Prosecutions, assumed office.¹¹ Its operations since that date will be noticed at a later stage.

Jamaica

Indications are that Jamaica showed an interest in the institution as early as 1966 when a motion for its establishment was defeated in the Jamaica Senate.¹²

In 1967, the Secretary-General of the International Commission of Jurists, during a visit to Jamaica, invited Justice Jamaica to prepare a report on "the feasibility of the institution of the Ombudsman in Jamaica as a means of ensuring the more effective protection of civil and political rights."¹³

The report of Justice Jamaica supported the introduction of the institution in Jamaica, and observed in its conclusions that "the existing remedies for safeguarding and/or enforcing fundamental rights and freedoms are often expensive, onerous, involved, intricate, hazardous and perplexing for the little man."¹⁴

It would seem that no action was taken on the Justice Jamaica Report, until a change of administration occurred in 1972, when the Government

appointed a Working Party in July 1972 to consider the functions and operation of the institution "in the light of the decision of the Government that the Ombudsman System should be introduced in Jamaica."¹⁵

The unanimous report of the Working Party was submitted in August 1973 and dealt with all the relevant aspects of the institution. The Report even proposed that "in due course, Government might consider it appropriate to introduce legislation to make the appointment of an Ombudsman a constitutional requirement."¹⁶

The institution finally took root in Jamaica on the 17th November, 1978 when the Ombudsman Act came into force.

Jamaica's first Ombudsman, a former Resident Magistrate, finally took office on the 18th December, 1978.

Trinidad and Tobago

This country's first attempt at adopting the institution would seem to have been in 1970, when a Bill was introduced into the Trinidad and Tobago Parliament for the establishment of the office of Ombudsman.¹⁷ However, consideration of the Bill was deferred at the request of the Constitution Commission who considered that the question of establishing the office came within its terms of reference.¹⁸

In addressing itself to the matter, the Commission put forward these questions:

Should Trinidad and Tobago have an Ombudsman at all?

Should the office be filled by one person or by a Commission of more than one?

How should he (or they) be appointed?

What should be his (or their) powers and authorities?

What should be the limits set upon any such powers and authorities?

To whom should he (or they) report?¹⁹

In January 1974, the Commission presented its Report in which it recommended the adoption of the institution,²⁰ and that there should be one Ombudsman.²¹ In making its recommendation, the Commission noted that "there was overwhelming support from all sections of the public for the creation of the office of Ombudsman."²² But, the Commission observed that the arguments in support indicated some misconceptions of the nature and scope of the officer's authority. For example, many persons perceived the officer as a "general inquisitor" investigating a "wrong of any kind" and dealing with "any alleged grievance whether arising within the public administration or in the public sector or whether falling within the scope of maladministration or not."²³

It is in these circumstances, however, that the 1976 Constitution of the Republic of Trinidad and Tobago provided for the establishment of the office of Ombudsman in that country.²⁴

The Ombudsman, a former judge of the Appellate Division of the Supreme Court of Trinidad and Tobago, took office on the 6th December, 1977.

Barbados

Barbados' interest in the institution became apparent in 1976 with a proposal by the Government to establish the office.²⁵

In December 1977 a Commission was appointed to review the Constitution and to inquire into certain aspects of public life in Barbados and to

make recommendations.²⁶

During its inquiry, the Commission received written and oral submissions suggesting that the office should be established in Barbados.²⁷

Having considered not only the need for the establishment of the office in the light of the existing appellate machinery in Barbados, but also the possible alternatives for achieving the objectives of the office, the Commission in 1979 recommended, among other things, that "any decision to create an office of Ombudsman should not be included or enshrined in the Constitution, but that such an office could be created by local Act of Parliament."²⁸ The Commission further recommended the introduction of an extended legal aid scheme. It considered that such a scheme "would go a long way towards meeting the need for an Ombudsman."²⁹

It is significant to note that the way in which the Commission couched its decision on the matter cannot be interpreted as a specific recommendation for the creation of the office. Therefore, the basic question whether or not there should be an Ombudsman for Barbados remained open for the Government to decide.

That decision was reflected by the introduction and passage of a Bill through the Barbados Parliament in 1980 for the establishment of the office.

Other independent States

At present no evidence is available to indicate when the respective Governments of Dominica, St. Lucia, and Antigua and Barbuda evinced a commitment to the Ombudsman principle.

However, the incorporation of a provision in their respective Constitutions for the establishment of the office clearly reflects that

acceptance of the principle was sometime during the process of their evolution to independence.

Whatever the peculiar circumstances, it may perhaps be reasonable, nonetheless, to suggest that during the years intervening the grant of independence to Jamaica and Trinidad and Tobago in 1962, and the attainment of independence by those other States in 1978, 1979 and 1981, it became apparent that an institution embodying the Ombudsman principle was an indispensable supplement to the traditional constitutional institutions of a democracy adhering to the Westminster model operating under a written Constitution containing fundamental rights and freedoms provisions.

This line of thought would seem to be implicit in the observations made in relation to the Guyana situation by the International Commission of Jurists suggesting that there would be cases of alleged racial discrimination where it would "not be desirable or reasonably practicable to invoke the Constitution in the courts as a means of redress", and that "it would be desirable to have a simple, swift and inexpensive procedure for investigating such cases."³⁰

This theme would also seem to be implicit in observations made in the Report of the Special Committee of Justice Jamaica on the feasibility of establishing the office in Jamaica. The relevant part of the Report states as follows:

The Hon. Victor B. Grant, in the introduction to the paper prepared for the Seminar... records that since Jamaica became an independent sovereign state there have been very few judicial decisions relating to civil or political rights, and mentioned three important cases. Does this state of things indicate that there have been few violations of fundamental rights and freedoms in the past 5 years, or might it not demonstrate that the remedies available are too expensive, onerous,

involved, intricate, hazardous, and perplexing for the ordinary citizen to invoke? The question may well be asked, "Is the remedy provided by section 25 of Chapter 111 of the constitution (sic) anything more to the ordinary man than a sterile shadow — taunting and unreal?"³¹

The operation of the system

Since the establishment of the office in Guyana in 1962, indications are that reports on its operation have not been published since 1969. Indeed, there has been no Ombudsman, as such, in Guyana from 1978 to September 1981. However, on October 1, 1981, an Ombudsman was appointed.³²

No reasons for this state of affairs can be suggested since there is presently no documentary information available from which they may be drawn.

The 1969 report does reflect, however, that 150 complaints were received in that year. These, in addition to 11 brought over from the previous year, were dealt with. However, 89 complaints were outside the Ombudsman's jurisdiction, and 61 were fully investigated. Twenty-four of the 61 were found to be justified.

If the available information accurately portrays the situation in Guyana, then the overall track record of the office in that country would seem not to be an impressive one considering its seniority particularly in the Commonwealth Caribbean. Perhaps, this lends support to those who consider that the institution is not relevant to the Caribbean.

However, the question may perhaps be asked "to what extent, if any, did the decision to constitute the office with an individual instead of a suitably constituted committee in the particular circumstances of Guyana contribute to this state of affairs?"

The first annual report of the Trinidad and Tobago Ombudsman for the period December 6, 1977 to December 5, 1978, reveals that 1,098 complaints were received in that period. Of this number, 846 or 77 per cent were within the Ombudsman's jurisdiction. At the end of the period, 438 or 40 per cent were fully concluded. In the second annual report for 1978-1979, the net complaints dealt with were 1,185 of which 620 were fully investigated. According to the report, the average number of complaints received per month was 81.

It would seem from these figures that the citizens of this country are making full use of their institution.

Jamaica has also published two reports since the office became operational. The figures reflected in the 1979 report show that 518 complaints were disposed of during that year. The 1980 report on the other hand shows that 1,225 complaints were received up to the end of December, 1980 of which 884 were investigated.

Again it would seem that the institution is satisfying a need in this country.

As regards the operation of the offices in the other States, other than Barbados, the exact position is not known at this stage.

Barbados' position will be seen as the analysis of its Ombudsman scheme is conducted in the following chapters.

However, on the basis of the foregoing review it would seem reasonable to suggest that more than a little thought was given to the matter before the institution was adopted by the Governments of the Commonwealth Caribbean.

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1. The Report of the British Guiana Commission of Inquiry, p. 29.
 2. Ibid., p. 15.
 3. Ibid., p. 29.
 4. Ibid., p. 117.
 5. Ibid., p. 118.
 6. Ibid.
 7. Ibid., p. 119.
 8. Ibid.
 9. Ibid.
 10. Ibid.
 11. See Report of the Guyana Ombudsman for the period 26th May, 1977 to 31st December, 1966, at p. 3.
 12. Report of the Ombudsman Working Party (Jamaica, 1973), p. 2.
 13. Report of a Special Committee of Justice Jamaica (Jamaican Section of the International Commission of Jurists), "On the Feasibility of Instituting the Office of Ombudsman in Jamaica", in the Philippine Law Journal, [Vol. 42], 1967, pp. 544-53.
 14. Ibid., p. 553.
 15. Report of the Ombudsman Working Party, supra note 12. See also the First Annual Report of the Parliamentary Ombudsman for Jamaica, 1979, pp. 7-13.
 16. Report of the Ombudsman Working Party, supra note 12, p. 18; and First Annual Report, supra note 15, p. 13.
 17. The Constitution Commission of Trinidad and Tobago, Thinking Things Through (Trinidad: Government Printery, 1972), p. 93.
 18. Ibid.
 19. Ibid.

20. Report of the Constitution Commission of Trinidad and Tobago, 1974, p. 93.
21. Ibid., p. 91.
22. Ibid., p. 89.
23. Ibid.
24. Constitution of the Republic of Trinidad and Tobago, section 91.
25. B.H.A. Deb. (Nov. 4, 1980), p. 4489.
26. Report of the Commission appointed to Review the Constitution (Barbados: Government Printer, 1979), pp. 1-2.
27. Ibid., p. 55.
28. Ibid., p. 61.
29. Ibid.
30. "Racial Problems in the Public Service", supra note 1, p. 119.
31. Report of a Special Committee of Justice Jamaica, p. 551.
32. Information gathered from an exchange of correspondence between the newly appointed Guyana Ombudsman and author of the thesis.

CHAPTER III

THE OFFICE OF OMBUDSMAN IN BARBADOS

The office of Ombudsman for Barbados was established by the Barbados Ombudsman Act, 1980 which received the Governor-General's Assent on 4th December, 1980. The Act came into operation on 5th January, 1981, but no appointment has yet been made to the office. Indications are that an appointment before 1st January, 1983 is unlikely.¹

In adapting the Ombudsman concept to meet the needs of the citizens, the Barbados Ombudsman scheme has adopted certain features which would seem to be unparalleled in the Commonwealth Caribbean.

It is therefore necessary to analyse the scheme to determine how closely these features approximate with those of the classical Ombudsman.

The *raison d'être* for the establishment of the office in Barbados is to empower the Ombudsman to "investigate and report upon allegations of improper, unreasonable or inadequate administrative conduct".² In discharging these functions, the Ombudsman is to act according to his or her "own independent judgment", but will generally be responsible to Parliament.³

This stipulation for the Ombudsman's general responsibility to Parliament is significant, since the Barbados model, unlike others in the

Commonwealth Caribbean, does not specifically state that the Ombudsman is "an officer of Parliament".⁴

This silence on the part of the Barbados model is not without its implications. It seems, on the one hand, that the model has left open the perimeters to be applied to the notion of the independence of the Ombudsman, thereby providing for the widest possible interpretation of this notion; and on the other, that by making the Ombudsman responsible to Parliament, the notions of the independence of, and of accountability to, Parliament⁵ have been distinguished. However, before these two notions are considered, it is necessary to focus attention on the kind of procedure that the model adopts for the appointment of its Ombudsman. The appointment procedure in any country adopting the Ombudsman concept is considered to be central to the notion of the Ombudsman's independence and to the Ombudsman system as a whole.

Appointment process

The Barbados Ombudsman is appointable by the Head of the State, i.e., the Governor-General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.⁶ This is the appointment procedure traditionally followed in Barbados for the appointment of members of the Higher Judiciary and of the three Services Commissions.⁷

A significant modification has, however, been introduced into this procedure as it relates to the appointment of the Ombudsman. Before the Head of State acts on the Prime Minister's recommendation, he must obtain Parliamentary approval for the proposed appointment.⁸ Not only is this feature novel to Barbados, but it is unprecedented in the Commonwealth Caribbean. In fact, its novelty to Barbados was acknowledged by a member of the House of

Assembly during his contribution to the Parliamentary debate. He expressed his views on this aspect of the scheme in these terms:

... there are certain positive aspects to this Bill, to which I would like to give some acknowledgement. First of all, I refer to the manner in which the Ombudsman is to be appointed and I am referring specifically, not only to the proposal that the appointment will be on the recommendation of the Rt. Hon. Prime Minister, after consultation with the Leader of the Opposition, but that the Governor-General, before appointing a person to be Ombudsman, shall submit the proposed appointment to each Honourable House of Parliament for approval. Now, I think ... that this is a breath of fresh air, in terms of major national appointments in this country ... I believe it is an innovation because I do not remember any major public officer appointed in this particular way.⁹

In Dominica, Guyana, St. Lucia and Trinidad and Tobago, the Ombudsman is appointable by the Head of State after consultation, except in Guyana, with the Prime Minister and the Leader of the Opposition.¹⁰ In Guyana, the Head of State consults only with the "Minority Leader".¹¹ By contrast, in Jamaica, the appointment is made by the Head of State on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.¹² In this respect, the Barbados model follows the Jamaica precedent, but goes further by legislating for Parliamentary approval.¹³

Antigua and Barbuda, on the other hand, presents an interesting variation in its appointment procedure which brings it into sharp contrast with the other Caribbean models. The relevant provision states that the "Ombudsman shall be appointed by resolutions of each House of Parliament for such terms as may be prescribed therein."¹⁴

This provision seems to imply that under the Constitution of Antigua and Barbuda, the Ombudsman's tenure of office may be so fixed as to coincide with the life of Parliament. The implications of any such appointment are clear.

An Ombudsman whose appointment did not meet with the unanimous approval of Parliament might conceivably not be considered for re-appointment purely on the grounds of partisan politics when a change of government takes place. However, it is felt that this kind of appointment procedure has its advantages in that it affords Parliament the opportunity of signifying whether or not an Ombudsman still enjoys its confidence.¹⁵ To this extent, the Antigua and Barbuda Constitution allows such a principle to evolve.

This principle has been practised with success in some of the developed countries, notably Denmark and New Zealand, where the nominees for the office were acceptable to Parliament as a whole. Yet, it is acknowledged that an appointment procedure that allows such a principle to evolve may be criticised on the ground that "... it may lead to 'political' appointments, because the Government of the day would always be able to ensure parliamentary support for its nominee."¹⁶ In short, the practice has the potential to politicise the office of Ombudsman.

In Barbados, the impact of any such criticism would, perhaps, be potentially more damaging to the notion of the independence of the Ombudsman, because of the size of the country and of its population,¹⁷ than it would be in one of the larger and more developed States of the wider Commonwealth. Justification for this view rests on a perceived tendency in some sections of the Caribbean community to regard certain appointments purely in terms of partisan politics, rather than in terms of the selection of the person best able to make a contribution for the public good in a particular office.

Indeed, certain statements made during the debate on the Barbados Ombudsman Bill would seem to suggest that the member of Parliament had also

perceived this tendency even on the part of governments, i.e., the party in power. His sentiments were expressed in these terms:

... The important thing in the creation of the office of Ombudsman is that the man who is appointed should care little about the Barbados Labour Party or about the Democratic Labour Party, but should care a lot about justice and the people who complain... I think it is very important that we do not create just another position for a Barbados Labour Party supporter when we are in office and a Democratic Labour Party supporter when they are in office. This person must genuinely care little about these two great parties as such, not to be afraid to embarrass the Government of the day, if necessary a dozen times in one year... I earnestly hope that this will not be regarded as a job for any yardfowl, to use an expression which is very current and which I think has gained some respectability in the language.¹⁸

It is suggested that those sentiments not only capture the nonpartisan feature of the Ombudsman office, but also reflect how the office ought not to be perceived. As one Danish Ombudsman has stated:

... I think it is of enormous importance for the function of the Ombudsman that there should never be any kind of suspicion that he has any specific link to one of the political parties.¹⁹

Although the Antigua and Barbuda model comes closer to the principle of the Barbados model that Parliament should perform a role in the appointment of the Ombudsman, it yet fails to provide specifically for a period of tenure that would sufficiently insulate the nonpartisan feature of the Ombudsman concept and protect the independence of the office.

For these reasons, the Antigua and Barbuda appointment procedure would seem not only open to the criticisms alluded to, but also to the criticism that in the absence of any specific period of tenure enshrined in its Constitution, an incumbent might be faced with the temptation of discharging the functions of the office with the possibilities of a re-appointment foremost in mind.

It would seem that these criticisms must be avoided if public confidence in the office of the Ombudsman is not to be impeded.

It would further seem that where the procedure contemplates Parliamentary approval of the appointment, the selection process ought to employ some safety device to ensure that the appointee would have the unanimous approval of Parliament.

The Barbados model provides for such a device by requiring "consultation with the Leader of the Opposition"²⁰ before a recommendation is made to the Head of State.

How this device is utilised would seem to have a significant impact on whether or not the proposed appointment obtains the unanimous approval of Parliament. This view rests on the fact that the provisions requiring the Prime Minister to consult with the Leader of the Opposition prior to making a recommendation to the Head of State do not prescribe any criteria by which the minimum requirements for consultation may be determined.

In the absence of any such desirable criteria, it is necessary to establish and maintain some administrative procedure to ensure that consultation is not given an interpretation that would support the giving of a mere notification of a proposed appointment to the Leader of the Opposition. The reasons are obvious. Any such interpretation would minimise the likelihood of the appointment obtaining the unanimous approval of Parliament. This type of approval is seen as a necessary ingredient for achieving an appointment which is effectively made by Parliament and for enhancing public confidence in the independence of the Ombudsman.

Apart from the need to formulate and maintain a procedure that would enhance the likelihood of a consensus resulting from the consultation

process, the Barbados appointment procedure appears to be an improvement on the other procedures that have been noted. It also brings the Barbados Ombudsman within the category of the Legislative or Parliamentary Ombudsman, and provides a base on which all aspects of the notion of the independence of the office may firmly take root.

The mechanisms employed by the scheme to protect this notion will be considered in the next chapter:

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1. The Barbados Daily Nation, Wednesday, March 24th, 1982.
 2. The Ombudsman Act, 1980 (Act 1980-68), section 2(1); (Hereinafter referred to as the Act).
 3. Section 2(2) of the Act.
 4. For example, see the Constitution of Antigua and Barbuda, Dominica, St. Lucia and Trinidad and Tobago where those words appear. Jamaica alone establishes "a commission of Parliament to be known as the Ombudsman; section 3(1) of the Jamaica Ombudsman Act, 1978 (Act 23 of 1978). Unlike the Guyana Ombudsman, these Ombudsmen therefore come within the category of the Legislative Ombudsman. The Barbados Ombudsman will be classified at a later stage.
 5. Professor Stanley Anderson also draws this distinction in the case of the independence of judges. He maintains that "independence does not mean that there is no accountability". See Report of First International Ombudsman Conference, 1976 (Edmonton, Alberta), p. 36. See also Stanley Anderson, "Judicial Accountability: Scandinavia, California and the U.S.A.", in Ombudsman Readings, pp. 252-81.
 6. Section 3(1) of the Act.
 7. The Constitution of Barbados, section 89(2) (Judicial and Legal Services Commission); section 90(1) (Public Service Commission); and section 91(1) (Police Service Commission).
 8. Section 3(2) of the Act.
 9. Sandiford, M.P., B.H.A. Deb. (Nov. 4, 1980), p. 4498.

10. The Constitutional provisions of the respective States are: Dominica, section 108(2); St. Lucia, section 110(2); and Trinidad and Tobago, section 91(2).
11. Constitution of Guyana, section 191(1).
12. Jamaica Ombudsman Act, section 3(2).
13. Section 3(2) of the Act.
14. Constitution of Antigua and Barbuda, section 66(2).
15. See J. L. Robson, New Zealand: The Development of its Laws and Constitution 2nd ed. (London: Stevens, 1967), p. 145; also Leroy Jackson, "Ombudsman for Caribbean Government — with particular reference to Guyana", Journal of Administration Overseas (Oct. 1974), p. 536; at pp. 541-42.
16. Robson, supra note 15, p. 145.
17. At the 1960 census, the population of Barbados was 248,983. [Density: 15,000 approx. per sq. mile; area: 166 sq. miles]. Source: Barbados High Commission, Ottawa — Document compiled by the Ministry of Foreign Affairs, Barbados, 1982.
18. Cheltenham, M.P., B.H.A. Deb. (Nov. 4, 1980), p. 4496. As to the term "yardfowl", this is a local reference to a person who is an ardent supporter of one of the political parties in Barbados.
19. Nordskov Nielsen, Report of the First International Ombudsman Conference, supra note 5, p. 8.
20. Section 3(1) of the Act.

CHAPTER IV

MECHANISMS FOR PROTECTING INDEPENDENCE OF OMBUDSMAN

The notion of independence is as central to the impartial discharge of the functions of an Ombudsman as it is to the discharge of judicial functions. Therefore, no adaptation of the Ombudsman concept to suit the needs of a receiving State should be considered as genuine if the operation of this fundamental principle is restricted by the legislative provisions proposed by that State for the establishment of the office of Ombudsman.

Before examining what mechanisms the Barbados model adopts to provide for and protect the independence of the Ombudsman, it is necessary to note the features that are present in the notion of independence as it relates to the judges.

The tradition followed in the United Kingdom in the appointment of judges is that their tenure is protected by law. They hold office during good behaviour and are removeable only by addresses of both Houses of Parliament. No one is entitled to instruct or exercise influence on them in the discharge of their functions. Their offices and salaries are also protected by law from abolition and alteration by way of a reduction while they hold office.

The Barbados Constitution makes adequate provision for these principles. Judges in Barbados hold office initially until the mandatory retirement age of 65 years. A judge may, however, be permitted to continue in office until the age of 67 years.¹ Removal from office is only on the ground of inability to discharge the functions of the office or for misbehaviour.² Removal is also subject to a defined investigatory procedure that requires the question of removal to be referred to Her Majesty for the decision of the Judicial Committee of the Privy Council,³ the final Court of Appeal for Barbados.

It should be noted that the provision requiring the question of removal to be referred for a decision of the Privy Council reflects the principle that a judge in Barbados is one of Her Majesty's judges.

Barbadian judges therefore enjoy the fullest security of tenure which is protected by the constitutional device of entrenchment.⁴ Their independence of the Executive is therefore unquestionable.

In attempting to provide for the most satisfactory period of tenure for the Ombudsman, the Barbados model has drawn substantially on the principal features that apply to the judges in Barbados.

Tenure of office

Unlike most of the other Caribbean models, the Barbados model does not provide the Ombudsman with a fixed period of tenure. Instead, it requires the Ombudsman in the first instance to vacate office on attaining the age of 65 years.⁵

In this respect the Ombudsman's period of tenure follows that of the Barbadian judge, but varies from it in some ways. In the case of the Ombudsman, a re-appointment is possible for one further period not to exceed 5

years,⁶ whereas, a judge may in effect continue in office for a further period not to exceed 2 years.⁷

It is therefore clear that from all the available models, Barbados has chosen to provide the Ombudsman with a tenure that is permanent, subject only to removal in accordance with a set procedure.

Removal process

The circumstances under which the Ombudsman may be removed from office are the same as those indicated earlier in respect of the judges, i.e., on the ground of inability to discharge the functions of the office or for misbehaviour, and the procedure to be followed is somewhat similar. The relevant provision states that:

The Ombudsman may be removed from office in accordance with the provisions of section 105 of the Constitution which shall apply to his office as if enacted by this Act and the prescribed authority for that purpose shall be the Prime Minister acting after consultation with the Leader of the Opposition.⁸

This provision provides an excellent example of the judicious use by the Barbados scheme of the drafting technique of legislation by incorporation, and its effect must be considered with reference to the provisions thereby incorporated.

Section 105(1) of the Barbados Constitution provides that:

Where it is provided in this Chapter that this section shall apply to any office, a person holding such office (in this section referred to as "the officer") shall not be removed therefrom or suspended from the exercise of the functions thereof except in accordance with the provisions of this section; and the prescribed authority for the purposes of subsection (4) or subsection (6) shall, in relation to any office, be the authority prescribed for that purpose by the provision of this Chapter by which this section is applied to that office.

The other provisions of this section define both the grounds and procedures for removal.⁹

As is clearly indicated from section 105(1), the original intention for which these provisions were designed was to protect the tenure of certain offices referred to in the Constitution. The offices are those of the Director of Public Prosecutions, the Auditor-General and of members of the Judicial and Legal Service Commission, Public Service Commission and Police Service Commission.

Perhaps the full effect of the provisions on these offices would be more clearly illustrated by noting their application to the office of Director of Public Prosecutions.

The provision applying to that office states as follows;

The provisions of section 105 (which relate to removal from office) shall apply to the office of the Director, and the prescribed authority for the purposes of subsections (4) and (6) of that section shall be the Judicial and Legal Service Commission.¹⁰

The effect of the application of this provision on the office of Director of Public Prosecutions in its simplest terms is that the question of removing that officer has to be raised by the Judicial and Legal Service Commission, the prescribed authority, which advises the Head of State that the question of removal ought to be investigated. The Head of State then appoints a tribunal on the advice of the Chief Justice from among a certain category of persons. Following its investigations, the tribunal reports its finding to the Head of State who then removes the officer if the tribunal has so advised.

It should be noted that this procedure differs from that relating to the judges. The decision that any of the officers to which section 105 is made to apply for the purposes of the Constitution is taken by the tribunal, and the Head of State acts on the advice of that tribunal; whereas in the case of the judges,

the Head of State acts on the advice of the Judicial Committee of the Privy Council.¹¹

By employing the drafting technique of legislation by incorporation, the Barbados model effectively subsumes this elaborate procedure into the process for removing the Ombudsman and thereby protects the tenure of the Ombudsman.

In practical terms this means that the Ombudsman may only be removed from office where the Prime Minister (the prescribed authority), after consultation with the Leader of the Opposition, advises the Head of State that the question of removing the Ombudsman has arisen for investigation.

The Head of State then follows the procedure outlined earlier, and if the tribunal's findings are adverse, the Head of State exercises his power to remove the Ombudsman.

When seen in practical terms, the removal process appears to depart significantly in principle from that of the appointment process. As noticed earlier, the appointment process adopts the principle that before the Head of State may exercise his power to appoint the Ombudsman, he has to submit the proposed appointment for the approval of both Houses of Parliament. As already noted, this principle has been seen as an innovation since it ensures that Parliament has an effective role in the appointment of the Ombudsman.

The question therefore that seems to emerge from the incorporation of section 105 of the Constitution, without more, is whether or not Parliament ought to be accorded a similar role in the removal of the Ombudsman?

In principle, it would appear that the answer ought to be in the affirmative, since the exercise by the Head of State of his power of removal should be parallel to the exercise of his power of appointment.

If this view is maintainable, it would indicate that an early amendment to an otherwise excellent removal provision is needed not only to achieve uniformity in the exercise by the Head of State of his function to appoint and remove, but also in the consultative process as it relates to the Ombudsman.

Having noted the mechanisms adopted by the Barbados model for the appointment (including the tenure) and removal of the Ombudsman, it may reasonably be inferred that the Barbados model intends to confer on the Ombudsman a status and dignity that are the same as, or at least similar to, those of the Barbadian judge. But how can this position be achieved in practice?

For the achievement of this prestigious position, it would appear that other considerations are necessary. These relate to questions of qualifications, remuneration, pensions and gratuities.

Nowhere in the Barbados model have the principles of these matters been reflected. Perhaps, they have been classified as matters of administrative detail. However, models elsewhere¹² have incorporated provisions that in some way indicate their significance to the office of Ombudsman.

Qualifications

Like most of the available models, the Barbados model does not prescribe any qualifications for appointment to the office. It prescribes disqualifications, however, for appointment which is a feature common to most models.¹³ The Ombudsman may not be a member of either House of Parliament, and is restricted from holding any other office of emolument or engaging in other remunerative duties.¹⁴

During the debate of the Bill in the Barbados Senate it was suggested that the absence of a provision indicating the "qualifications, training and experience" for appointment was a "significant omission".¹⁵ To support this suggestion, reference was made to section 101(2) of the Constitution which deals with the office of Director of Public Prosecutions. It provides that: "A person shall not be qualified to hold or to act in the office of Director unless he is qualified for appointment as a Judge."

The prescribed qualification for appointment of a Barbadian judge is a period "of not less than ten years' standing"¹⁶ at the Bar. Clearly, this prescription must be seen as no more than a "threshold requirement" so to speak, since other considerations must undoubtedly apply. For example, not only would wide experience in the law be contemplated, but experience in other areas of social activities would, perhaps, be an added advantage. Additionally, the interplay of personal attributes that would reasonably suggest a judicial temperament seems also to be a relevant factor. However, it was contended that even if specific qualifications in terms of academic training were not indicated, the Bill should nonetheless indicate the experience that is necessary for appointment to the office.¹⁷

In view of the trend in Commonwealth jurisdictions not to prescribe any specific qualifications for appointment to the office, as for example, legal training, as in Sweden and Denmark,¹⁸ it would appear that the Barbados model is attempting to follow that trend. However, no definite conclusion can be drawn from the fact that the model is silent on this matter.

In Barbados, the practice of establishing an office and providing, as a matter of policy, for the necessary qualifications by an order made under the Civil Establishment Act is not unknown. Indeed, an illustration is provided in the

Constitution by section 113(1) which states that "There shall be an Auditor-General, whose office shall be a public office." Yet, the Constitution does not address the question of qualifications for appointment to the office of Auditor-General. Consequently, the suggestion that the absence of prescribed qualifications in the scheme itself is a "significant omission" would seem to be without force.

Nevertheless it must be emphasised that the conception of the office of Ombudsman is such as to demand that the appointee be a person of sufficient standing and experience as to be acceptable to the Barbadian community. For example, it is suggested that a person who holds or has held a high administrative office in a reputable organisation, and who has exhibited good judgment and common sense in that office should be eligible for appointment, notwithstanding the absence of specific training in the law.

The trend so far in the other Commonwealth Caribbean States has been to appoint persons who have had legal careers in government.¹⁹ It perhaps derives more particularly from trends in Sweden and Denmark where the first Ombudsmen were lawyers. In the United Kingdom, on the other hand, the persons appointed to the office of Parliamentary Commission have had varied career patterns in the civil service.²⁰ Indeed, the fact that none of these persons has had legal training is considered to be a feature peculiar to the United Kingdom.²¹

However, since the functions of an Ombudsman necessarily involves legal considerations, it would seem to be an added advantage in setting up the Ombudsman's office in Barbados to have a person with legal expertise on the staff.²² Where such expertise is absent, experience has shown that legal difficulties in the discharge of the functions of the office are inevitable.²³

Indeed, Professor Wade in rationalising the initial difficulties of the United Kingdom office stated that the "...rather shaky start which the institution made in Britain may well [have been] due to the fact that, unlike all other countries which have it, [Britain] set it up in the form of a civil service department rather than as a legal office."²⁴

No doubt Barbados will be guided by the experience of these other jurisdictions in selecting a person suitably qualified for the dignity, status and challenges of the office.

Remuneration, pensions and gratuities

Concomitant with qualifications is the question of remuneration and other payments attaching to the office of Ombudsman.

Generally, it is felt that a salary equivalent to that of the highest paid officers in the governmental organisation is essential to the establishment of the office of Ombudsman.²⁵ This principle has been reflected in the provisions of some of the earlier models in the Commonwealth. For example, the New Brunswick model provides that the Ombudsman is to receive "the same salary and pension as a judge of the Court of Queen's Bench of New Brunswick."²⁶ Whereas, in Jamaica the principle is stated that

...an Ombudsman shall receive such emoluments... as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives, such emoluments being not less than the emoluments which may... be payable to a Puisne Judge.²⁷

The Jamaica model also provides that the emoluments and conditions of service are not to be altered to the Ombudsman's disadvantage during the period of his appointment or re-appointment.²⁸

In these models the language explicitly relates the emoluments of the Ombudsman to those of a judge, and as such seems to meet the requirement contained in the American Bar Association resolution for "a high salary equivalent to that of a designated top officer".²⁹

The adoption of this principle seems reasonable in view of the monetary restrictions placed on the person holding the office of Ombudsman and the dignity to be maintained by that person if the office is not to be brought into disrepute. Similar considerations would seem also to justify the contemplation of pensions and gratuities.

The question of the Ombudsman's remuneration, pensions and gratuities has not been addressed in the Barbados model. Presumably, this question, like that of qualifications, is considered to be a matter of administrative detail that would finally be embodied in a Ministerial order.

However, since the significance of the mechanisms for appointing and removing the Ombudsman is seen as an attempt to place the office on the same footing as that of a judge, it would seem to follow that the question of the level of remuneration, pensions and gratuities payable to the Ombudsman ought to be so determined as to make these payments no less favourable than those payable to a Barbadian judge.

An adoption of this principle would not only follow the trend elsewhere, but would also enhance the prestige and growth of the office. If adopted, however, this principle will most likely be reflected in a Ministerial order already contemplated. But in view of the inherent susceptibility of such an order to easy alteration, this legislative device is open to the criticism that it is not an efficient mechanism for protecting the Ombudsman's salary from reduction, and, therefore, that some further device is needed.

Although it is conceded that a protective formula such as that applying to the judges' salaries is desirable, for all practical purposes, the absence of such a formula does not seem, however, to present any immediate threat to the Ombudsman's position, since there is no known instance of a reduction in the salary payable to any person while serving in a public office in Barbados.

Ultimately, however, the prestige of the office would seem to demand the incorporation of a clause in the principal legislation making the remuneration, pensions and gratuities of the Ombudsman chargeable on the Consolidated Fund.³⁰

Appointment of Ombudsman staff

The freedom of the Ombudsman to appoint his or her own staff is considered desirable to the independence of the office of Ombudsman.³¹ The rationale appears to be that where the members of staff are otherwise appointed, e.g. by a Minister of Government, there is the inherent danger that public confidence in the office as an independent investigating agency is likely to be impaired.

In the United Kingdom, the practice has been for the Parliamentary Commissioner to choose all his staff on secondment from departments in the civil service. This practice has met with criticism that where the "... staff are all civil servants, they will be thought by complainants to be biased towards the side of the Civil Service".³² An independent service with its own legal adviser was therefore advocated in substitution for this practice.³³

In some models, the appointment of officers has been expressly provided for by conferring power on the Ombudsman to appoint such officers as

are necessary for the discharge of the functions of the office.³⁴ The terms and conditions of service of these officers are, however, predetermined by some other governmental authority, for example, the Prime Minister and Minister of Finance as in New Zealand,³⁵ and a Commission constituted for the purpose as in Jamaica.³⁶

The Barbados model does not adopt this principle. Instead it provides that the "officers of the Ombudsman shall be public officers appointed in accordance with section 94 of the Constitution."³⁷ Section 94 provides that

... power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General, acting in accordance with the advice of the Public Service Commission.³⁸

Clearly, these provisions contemplate the establishment of new posts within the Barbados Public Service to accommodate the office of Ombudsman. Since the persons selected to fill these posts will, as clearly stated in the language of the model, become "public officers", the implication is that the Ombudsman office as a whole will most likely be seen by the public as another department of government.

In view of the criticisms observed earlier in connection with the United Kingdom practice, the question that emerges for consideration is whether this feature is significantly undesirable within the context of Barbados? In order to respond meaningfully to this question, it is necessary to appreciate how the relevant machinery for making appointments to the public service operates in Barbados.

As already observed, the Constitution confers powers of appointment, discipline and removal of public officers on the Head of State acting on the advice of the Public Service Commission. The members of this Commission are

appointed by the Head of State, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.³⁹

Since the Constitution does not require the Head of State, as does the Ombudsman Act, to submit the proposed appointments for the approval of each House of Parliament, it can reasonably be suggested that a Prime Minister effectively appoints the members of the Public Service Commission. However, after appointment their tenure is protected, since removal from office must follow the same procedure contemplated by section 105 of the Constitution for the removal of the Director of Public Prosecutions and Auditor-General. Similarly, their salaries and allowances cannot be altered by way of reduction during their tenure which generally expires after three years from appointment.⁴⁰

Consequently, if their appointments are indeed perceived as initially political, the Constitution does provide these mechanisms that are designed to insulate the Commission as far as possible from political pressure in the discharge of its recruitment and other functions. Therefore, one of the distinctive features of the Barbados Public Service is that its recruitment process is free from political patronage.

It is on this basis that the selection of staff is made for such offices as the Director of Public Prosecutions, the Magistrates, and Auditor-General. These offices follow the tradition of being independent of the Executive, but constitute, and are seen as, an integral part of the Barbados Public Service. Yet, there appears no evidence to suggest that this feature has created a growing concern among the Barbadian public as to the day-to-day functioning of these departments independently of the Executive.

There seems therefore to be no reason for assuming that since the model adopts a similar appointment procedure for staffing the Ombudsman's office, public perception of the office as an independent and impartial investigating agency would be adversely affected.

This view is not to be construed, however, as suggesting that the selection of staff should proceed without consultation with the Ombudsman. Indeed, there is nothing in the model to prohibit such an administrative arrangement. In this way, the Ombudsman will be afforded an opportunity to indicate the level of training and experience the persons should have to qualify for appointments.

Size of staff

The size of the Ombudsman's staff must not be too small if the office is not to be frustrated in giving effect to its mandate. Too large a staff, on the other hand, is to be avoided as this is likely to convert the office into another bureaucratic organisation with all its inherent dangers.

Delegation of functions

The model provides that any of the functions of the office "may be performed by any officer . . . authorised" by the Ombudsman for the purpose.⁴¹ This provision is particularly essential in terms of the investigating functions of the Ombudsman. Unlike other precedents, however, such as New Zealand, New Brunswick and Quebec, for example, the Barbados model does not circumscribe the limits of the power of delegation; nor does it stipulate the method by which the Ombudsman may signify the exercise of that power.

In the case of New Zealand, the power is exercisable in writing with the prior approval of the Prime Minister. It is further restricted by excluding the power to delegate the power of delegation and of making reports.⁴² This latter restriction is also reflected in the New Brunswick and Quebec models.⁴³

On this aspect of the scheme, the Barbados model would seem to be following the United Kingdom precedent.⁴⁴ Nonetheless it is suggested that the Ombudsman should adopt certain self-imposed restraints in the exercise of the power of delegation. For example, any delegation of functions that would effectively remove the Ombudsman from personal contact with complainants should be avoided.

Lack of personal contact with decision-makers is one of the factors that has contributed to the need for the Ombudsman. Where the size and population of a country are as small as Barbados, and therefore ready access to the Ombudsman is possible, there would seem to be no logical basis for not utilising every opportunity that may be presented by these natural characteristics for establishing and maintaining personal contact between the Ombudsman and complainant until the matter is resolved.

Again, it would seem desirable for the Ombudsman to adopt the practice of signifying in writing any authority delegated to the officers, even if this requirement is not reflected in the regulations contemplated by the model.

It has already been noted that in some models the power of the Ombudsman to delegate the power of delegation and the power to make reports are specifically excepted from the Ombudsman's over-all power of delegation. That is, these provisions are quite explicit in restricting the exercise of these functions to the Ombudsman personally.

In the absence of any such provisions in the Barbados model, it seems that an appointee to the office would nonetheless be well advised to interpret the power conferred as silently excluding the power to delegate these functions to any officer.

In the next chapter, the extent of the Ombudsman's jurisdiction under the scheme will be considered.

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1. Constitution of Barbados, the proviso to section 84(1).
 2. Ibid., section 84(3).
 3. Ibid., section 84(4).
 4. Ibid., section 49(2) which provides the amending formula for certain provisions of the Constitution. In the case of the judges, the amendment must be supported by not less than two-thirds of all of the members in each House.
 5. Section 3(4) of the Act.
 6. Ibid.
 7. Constitution of Barbados, the proviso to section 84(1).
 8. Section 3(3) of the Act.
 9. Constitution of Barbados, subsections 105(2)-(6).
 10. Constitution of Barbados, section 101(5).
 11. Constitution of Barbados, section 84(4).
 12. For instances, see the New Brunswick Ombudsman Act, section 2(4), and Jamaica Ombudsman Act, section 8(1).
 13. See, for example, the Quebec Public Protector Act, section 6; New Brunswick Ombudsman Act, section 5; Constitution of Antigua and Barbuda, section 66(1); and Jamaica Ombudsman Act, sections 5 and 6.
 14. Section 2(4) of the Act.

15. Senator Connell, Barbados Senate Debates (Nov. 26, 1980), p. 1475.
16. Section 4 of the Supreme Court of Judicature Act, Chap. 117 of the Laws of Barbados.
17. Barbados Senate Debates (Nov. 26, 1980), supra note 15, p. 1475.
18. Frank Stacey, Ombudsmen Compared, pp. 11 and 23.
19. Guyana's first Ombudsman was formerly a Director of Public Prosecutions; Jamaica's a magistrate; and Trinidad and Tobago's, a judge. The trend in Canada is more varied, yet persons with legal training seem to dominate. See Frank Stacey, Ombudsmen Compared, supra note 18, p. 90.
20. Stacey, supra note 18, p. 149.
21. H.W.R. Wade, "The British Ombudsman: A Lawyer's View" (1972), 24 Admin. Law Review, p. 142; see also Stacey, supra note 18, p. 142.
22. In an interview in Quebec City with the assistant to the Public Protector it was suggested that if the Ombudsman had no legal training, then the assistant should be legally trained. The assistant M. Dubé, who is not legally trained, referred to instances where the Public Protector, a trained lawyer, had to contradict opinions given by lawyers of the Provincial Government. During a visit to Trinidad and Tobago, the Ombudsman, a former Judge of Appeal, also referred to a similar experience.
23. Wade, "The British Ombudsman", supra note 21, pp. 142-46.
24. Ibid., p. 145. See also the second report of the New Brunswick Ombudsman, Dr. Ross Flemington, where he discusses the implications of his lack of legal training, p. 7.
25. Report of the First International Ombudsman Conference, pp. 10-11.
26. New Brunswick Ombudsman Act, supra note 12, section 2(4).
27. Jamaica Ombudsman Act, supra note 12, section 8(1).
28. Ibid., section 8(2).
29. Report of the First International Ombudsman Conference, supra note 25, p. 10.
30. This principle is reflected in the Barbados Constitution, section 112(2) in respect of the Judges, Director of Public Prosecutions, Auditor-General and members of the Services Commissions. It is also adopted by the United Kingdom and Jamaica models.
31. Report of the First International Ombudsman Conference, supra note 25, p. 10.

32. Stacey, supra note 18, p. 165.
33. Ibid., pp. 169-70.
34. For example, see the New Brunswick Act, supra note 12, section 8(1); Quebec Public Protector Act, section 11; Jamaica Ombudsman Act, supra note 12, section 10; the United Kingdom Parliamentary Commission Act, section 3(1).
35. New Zealand Act, section 11.
36. This Commission consists of the Speaker, as Chairman, the President of the Senate, Leader of Government business in the House of Representatives, Leader of the Opposition business in the House and the Minister responsible for the Public Service. The Jamaica Ombudsman Act, supra note 12, section 10(2).
37. Section 4(2) of the Act.
38. It is to be noted that where a public office requires legal qualifications for appointment, the Governor-General acts in accordance with the advice of the Judicial and Legal Service Commission, section 93 of the Constitution of Barbados.
- 39.. Constitution of Barbados, section 90(1).
40. Ibid., sections 90(3) and 112(3).
41. Section 4(1) of the Act.
42. New Zealand Act, supra note 35, section 28.
43. Sections 9(1) and 12 of the New Brunswick and Quebec Acts, respectively.
44. Section 3(2) of the Parliamentary Commissioner Act, 1967.

CHAPTER V

EXTENT OF OMBUDSMAN'S JURISDICTION

The jurisdiction conferred on the Ombudsman by earlier models in the Commonwealth, as in New Zealand and the United Kingdom, for example, has excited the minds of political scientists, lawyers and ombudsmen alike. Much literature has resulted from their analyses of the scope and limitations of the jurisdictional formulae adopted by one or other of these countries in attempting to capture and adapt the Ombudsman concept to suit its particular environment.

The penetrating analyses of these commentators have afforded valuable insights into the strengths, and sometimes weaknesses, of the earlier models, and have therefore offered choices for adaptation. Indeed, the New Zealand model has had a greater influence on the Canadian provinces than that of the United Kingdom, whereas, certain features in the Commonwealth Caribbean models indicate a more varied influence in their adaptation of an appropriate jurisdictional formula. For example, the formula adopted by most of the models preceding the Barbados model is that the Ombudsman shall

... investigate any decision or recommendation made, including any advice given or recommendation made to a Minister, or any act done or omitted by any department of Government or any other authority to which this section applies, or by officers or members of

such a department or authority, being action taken in exercise of the administrative functions of that department or authority.¹

The circumstances which these models contemplate as necessary for an investigation are described as arising,

- (a) where a complaint is duly made ... alleging that the complainant has sustained an injustice as a result of a fault in administration;
- (b) where a member of the House of Representatives requests the Ombudsman to investigate the matter on the ground that a person or body of persons specified in the request has or may have sustained such injustice;
- (c) in any other circumstances in which the Ombudsman considers that he ought to investigate the matter on the ground that some person or body of persons has or may have sustained such injustice.²

It is at once noticeable that although these models avoid the use of the term "maladministration" appearing in the United Kingdom model, the language adopted by the provisions cited, nonetheless bears a marked similarity with the principal ingredients incorporated into section 5(1) of that model, i.e., to "...investigate any action...being action taken in the exercise of administrative functions...", in circumstances "where...a member of the public...claims to have sustained injustice in consequence of maladministration...."

Another noticeable feature also connected to the formulation to "...investigate any decision or recommendation made, including any advice given or recommendation made to a Minister..." appearing in these earlier models is that the formulation seems to have been drawn from one of the main provisions of the New Zealand model.³ It reflects the attempt by that precedent to formulate a mechanism to preserve the concept of ministerial responsibility

or accountability to Parliament by restricting an investigation into any decision taken personally by a Minister.⁴ However, this restrictive mechanism has not been adopted by the Guyana and Jamaica models. It should also be noted that not only is this restrictive mechanism not followed in Jamaica, but the basic jurisdictional formula giving rise to an investigation there is in terms of

... injustice as a result of any action taken by an authority or an officer or member of such authority, being action taken in the exercise of the administrative functions of that authority. . . .⁵

In the case of the Barbados scheme, a marked departure from these earlier precedents, at least in terms of the wording adopted for its jurisdictional formula, is noticeable. The elements of this formula will now be considered to ascertain its scope and limitations.

Jurisdictional formula

The operative section of the Barbados model declares the main purpose of the Act in these terms:

The purpose of an investigation by the Ombudsman shall be to ascertain whether injustice has been caused by improper, unreasonable or inadequate administrative conduct on the part of a government ministry, department or other authority subject to this Act.⁶

The section further enjoins that:

The Ombudsman may investigate any course of conduct and anything done or omitted by any person in the exercise of the administrative functions of the government ministries, departments and other authorities. . . .⁷

When this clause was debated in the House of Assembly, some Members of Parliament questioned the significance of the use of the formulation "improper, unreasonable or inadequate administrative conduct". It was argued

that the formulation was "very widely drawn", and that the Bill offered no "specific guidelines" as to what was contemplated by its constituent elements.⁸ Others argued in support of an amendment that would either adopt the so-called Crossman Catalogue, on the one hand, or the New Zealand formula, particularly the element of "wrongness", on the other. It was therefore suggested that the clause should be amended to reflect the wording "improper, unreasonable, inadequate or wrong administrative conduct".⁹

Central to these arguments, however, would seem to be a genuine concern as to whether the formulation was open to the clear interpretation that the merits of an administrative decision could be called in question, since it was contended that the procedural aspects of a decision and the quality of the decision itself had been distinguished by Ombudsmen. To support these contentions, reference was made to the restrictive interpretation which the United Kingdom Parliamentary Commissioner in the early stages of the office had given to his functions in this area.¹⁰ In the result, he had denied himself jurisdiction to question the quality of administrative decisions.

Indeed, other suggestions made during the debate confirm the view that there was some doubt as to whether the formulation specifically contemplated an investigation and criticism by the Barbados Ombudsman of administrative decisions. For example, the following statement appears in the debates:

...I think that we ought to specify decisions and perverse decisions because a perverse decision is a good ground of appeal from any Court because if a decision is perverse, therefore, it cannot be supported and we ought not to be misled by the errors that have been made in the so-called Mothers of Parliament as long ago as 14 or 15 years...and try to perpetuate that kind of error here in Barbados.¹¹

In response to these arguments and suggestions, the Attorney-General argued that if something is wrong then it is improper. He adverted to the ordinary and natural meaning of the word "improper" given in the Oxford Dictionary, as "not proper, the opposite to proper, not strictly belonging to the thing under consideration, not in accordance with truth, fact, reason and rule, abnormal, incorrect, wrong".¹²

As to the suggestion that "perverse decisions" should be specified in the clause, the Attorney-General argued that a decision or conduct which is perverse is one which is grossly unreasonable and would come within the scope of "unreasonable and improper".¹³ He therefore refused to accept the proposed amendment.

As mentioned earlier, the main thrust of the debate on this clause would seem to have been aimed at the Ombudsman's power to investigate the merits of a decision. It is therefore of interest to note that earlier in the debate it was also asserted that:

The Ombudsman . . . cannot question a Minister. According to our Act [sic] . . . he may require the Minister to send information but he cannot question the Minister on the basis on which he, the Minister, or she, the Minister, arrived at a particular decision.¹⁴

Significantly enough, the clause was finally passed unamended and without a division. Perhaps, the Attorney-General won the support of the House by adverting to the ordinary plain meaning of the words used in the formulation. Yet, the question may be asked whether there were any other elements present in the Bill upon which the Attorney-General could have relied? Indeed there were. But their presence would seem not to have caught the attention of the House.

Section 5(1) of the Act stipulates the main purpose of an investigation by the Ombudsman, whereas section 5(2) (in reality the key provision of the section) states that:

The Ombudsman may investigate any course of conduct and anything done or omitted by any person in the exercise of the administrative functions of the government ministries, departments and other authorities. . . .

- It would seem that this section was formulated in contemplation of the situations envisaged by Members of Parliament and since its significance appears not to have fully engaged their attention, it is necessary to consider the scope and effect of the section.

"any course of conduct"

The effect of this phrase is clear. The Ombudsman is empowered to examine the way in which any matter, the subject of a complaint under the Act, has been dealt with by the official concerned in the discharge of his or her functions. This also means that all aspects of an official's attitude in the process of discharging those functions are susceptible to examination, and are to be judged within the context of the particular circumstances.

It would seem that a reasonable interpretation of the clause as a whole would therefore demand that the scope of this phrase be limited to an examination of the procedure followed in arriving at an administrative discretionary decision.

The course of conduct which would constitute "improper, unreasonable or inadequate administrative conduct" will be considered at a later stage.

"anything done or omitted by any person"

This phrase must be considered within the context of "functions". Under the Barbados Interpretation Act, the term "functions" is expressed to include jurisdictions, powers and duties.¹⁵ Therefore, it must be presumed that the Barbados Ombudsman Act was drafted with this interpretation in mind.

The administrative functions that devolve upon a Minister in Barbados invariably include the power to legislate for the detailed implementation of some policy embodied in an Act of Parliament, as for example, a national insurance and social security scheme. In addition, the Minister has the power and duty to administer the department to which he or she is assigned.¹⁶

Because of the differences in these functions and the principle of Ministerial responsibility or of accountability to Parliament, some Ombudsman models, for example, New Zealand and some others following that precedent, have sought to insulate Ministerial functions from the purview of the Ombudsman's jurisdiction. Indeed, one of the criticisms noted during the debate on the Barbados model was that Ministers could not be questioned.

Before examining the validity of this criticism, it is worth considering briefly whether the functions of a Minister ought to be inquired into by an Ombudsman as a matter of principle. According to Professor Wade:

There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading. There are some obvious general differences. But the idea that a clean division can be made (as it can be more readily in the case of the judicial power) is a legacy from an older era of political theory.¹⁷

Wade further points out "that legislative power is the power to lay down the law for people in general, whereas administrative power is the power to

lay down the law for them, or apply the laws to them, in some particular situation.¹⁸

Since these powers are conferred with a view to the efficient implementation of some legislative policy, such as the granting of licences for the purpose of regulating some trade or business (to give another example), Parliament necessarily provides for the exercise by the Minister of reasonable discretion in the implementation of that policy, not only by way of administrative decisions, but also by the exercise of legislative functions. Thus, the underlying principle is that these discretionary powers must be exercised freely from abuse whether pursuant to the legislative or administrative aspect of the Minister's functions.

In principle, therefore, there seems to be no good reason for excluding the decisions of Ministers from investigations by, and if necessary criticisms of, the Ombudsman in the interests of efficient public administration.

Indeed, the Sachsenhausen case¹⁹ clearly illustrates that decisions taken by Ministers may in principle be properly criticised.

The question now for consideration is whether there is any validity in the criticism that the Barbados Ombudsman is not empowered to question "the basis on which...the Minister arrived at a particular decision", or the ministerial decision itself.

It seems that the words the "Ombudsman may investigate any course of conduct and anything done or omitted by any person...." cannot (even in the face of the most restricted interpretation possible) conceivably be given any other interpretation but one that would result in the scope of the emphasised

words being extended not only to the way in which officials and Ministers reached their decisions, but also to the decisions taken by them.

This theme will be developed further when the Ombudsman's power to require attendance "for examination" for the purpose of an investigation is examined.

"in the exercise of the administrative functions of the government ministries. . ."

As noted earlier, "administrative functions" necessarily involves administrative legislative powers which must be exercised properly.

The question that emerges at this stage is whether the Barbados Ombudsman is empowered to question the merits of the policy, i.e., the principle embodied in a rule, order, regulation, or law, whether enacted or otherwise? Put differently, is there anything in the Barbados model that may reasonably be interpreted as requiring the Barbados Ombudsman to adopt a position similar to that taken by the United Kingdom Parliamentary Commissioner in the Sachsenhausen case? There, the Commissioner took the view that he was not authorised to question the merits of a policy embodied in a departmental rule.²⁰

This view derives from the Commissioner's interpretation of a provision in the United Kingdom model declaring that

...nothing in this Act authorises or requires the Commissioner to question the merits of a decision taken without maladministration by a government department or other authority in the exercise of a discretion vested in that department or authority.²¹

This provision, however, has been seen as being designed "to make it clear that it was not the function of the Commissioner to substitute his decision for that of the government."²²

The Trinidad and Tobago, Dominica and St.-Lucia precedents also limit the power of the Ombudsman to question the "policy" against which a decision is taken as follows:

In investigating any matter leading to, resulting from or connected with the decision of a Minister, the Ombudsman shall not inquire into or question the policy of the Minister in accordance with which the decision was made.²³

The Barbados Ombudsman scheme does not reflect similar provisions.

What it does reflect in unambiguous terms, however, is an intention to subject Ministers as well as officials to questioning by the Ombudsman. The operative provision states that

...the Ombudsman may, for the purpose of an investigation, require any Minister, officer or member of the department or authority concerned or any other person (including the complainant) to...attend for examination...²⁴

It seems clear from this provision that in seeking to discharge the investigatory functions of the office, the Barbados Ombudsman would most likely have to inquire into or question the policy of the department, ministry or other agency in order to ascertain the root causes of an injustice sustained in a particular case.

There seems therefore to be no validity in the criticism that the Barbados Ombudsman is not authorised to investigate, question and criticise discretionary ministerial decisions, and the policy informing those decisions. Indeed, any suggestion that the provisions reviewed so far should be so interpreted would seem to fly in the face of reason and the declared purpose of an investigation by the Ombudsman, in the language of the Act, "to ascertain whether injustice has been caused by improper, unreasonable or inadequate administrative conduct".

How would this objective be achieved if the basic procedures, i.e., of questioning and getting answers, explanations or reasons, available to any investigating agency are denied the Ombudsman? In the absence of these facilities, would the Ombudsman be able to properly determine whether the injustice was sustained as contemplated by Parliament?

It is suggested that the Ombudsman's effectiveness would most definitely be impaired if such a restrictive interpretation were to be given to these provisions.

"injustice . . . caused by improper, unreasonable or inadequate administrative conduct"

At the outset, it should be observed that this formulation comprehends two notions, i.e., the notion of "injustice", and that of "administrative misconduct".

The notion of "injustice" as it relates to the functions of the Ombudsman provoked very little direct comment from the Members of Parliament during the debate on the Ombudsman's jurisdictional formula. As already noted, attention was focused particularly on the element of "improper, unreasonable or inadequate administrative conduct". Indeed, the only direct reference to the term "injustice" as an element in itself appears to have been made by the Attorney-General when he characterised "injustice" as "a wide term".²⁵ He also suggested that it was impossible for the Bill to prescribe for every fact-situation that would come within the scope of the term.²⁶

This suggestion seems rational, judging from the position taken by earlier models. For example, it has previously been noted that in Jamaica the Ombudsman's jurisdiction rests simply on "injustice". Whereas, the United

Kingdom scheme provides for "injustice in consequence of maladministration". Yet, in neither of these schemes is there any attempt to prescribe a definition for the term "injustice". In the result, the limits of the term "injustice" under these precedents have had to be determined in accordance with the Ombudsman's own judgment.

Although the Barbados scheme has adopted a similar position, it appears necessary to consider whether there are any external guidelines which would assist the Barbados Ombudsman's approach in formulating a conception of the term. In this regard, the reasons for adopting the Ombudsman concept would at least seem to provide some sort of guidance.

One such reason is the need to widen the area for redressing citizen's grievances against the State, and to provide for remedies not otherwise available within the existing system of justice.

The achievement of this objective necessarily implies that the notion of injustice must therefore be given a scope that extends beyond the bounds traditionally applied by the ordinary courts.

The courts are fundamentally concerned with remedying an injustice resulting from an illegality. For example, an injustice which results from official misinformation to a member of the public would not be remedied in the ordinary courts unless an element of illegality is shown. In fact, this kind of situation was adverted to by the Attorney-General when outlining the extent of the Ombudsman's powers to investigate and report to Parliament on citizen's complaints against the State.

The Attorney-General stated in part as follows:

... nor indeed, does the Ombudsman have any power to reverse a decision, once taken by a Government. But, the power which he does have is the power of enquiry,

the power of reporting and the power of persuasion, as well as, the power of exposing any act of Government which may amount to not necessarily a constitutional, or legal infringement of the rights of the individual citizen, but which might amount to, in some way, an injustice, or an act which can be considered unfair, although not necessarily illegal.²⁷

While delivering the feature address at the First Human Rights seminar held recently in Barbados, the same member of Parliament, in his capacity as former Attorney-General, also referred to instances within his own personal knowledge where he perceived that the Ombudsman has a potential role to play in the protection of human rights. He identified some of those instances as involving "bungling in administration" which resulted in the delay of payment of terminal benefits to a retired civil servant for at least 3 years, and "victimisation of a stealthy sort" leading to a termination of a person's service with the Government. In each case, he perceived that there was clearly "no breach of the law, but a breach of justice" calling for the intervention of the Ombudsman.²⁸

Injustice therefore is intended to extend not only to such obvious instances as those involving financial loss resulting directly from administrative misconduct, but also to instances where the aggrieved person experiences "a sense of outrage or indignation" at the way in which his or her affairs had been conducted.²⁹

Admittedly, these instances imply an element of subjectivity on the part of the aggrieved person. But this would seem to be inevitable since it is unlikely that aggrieved persons generally would be in a position always to point specifically to the administrative action that gave rise to the injustice. Indeed, the following statements made in R. v. Local Commissioner for Administration

for the North and East Area of England, ex parte Bradford Metropolitan City

Council would seem to support this view:

In the nature of things a complainant only knows or feels that he has suffered injustice. He cannot know what was the cause of the injustice. It may have been due to an erroneous decision on the merits or it may have been due to maladministration somewhere along the line leading to decision. If the commissioner looking at the case, with all his experience, can say: 'It looks to me as if there was maladministration somewhere along the line, and not merely an erroneous decision', then he is entitled to investigate it. It would be putting too heavy a burden on the complainant to make him specify the maladministration: since he has no knowledge of what took place behind the closed doors of the administrators' offices.³⁰

The selected case summaries contained in the Jamaica Ombudsman's first annual report provides an illustration of what has been characterised as a case of injustice resulting from the non-payment of gratuity to a pensioner. This case would seem to give some indication to the scope that may be ascribed to the notion of injustice. The facts are these:

On February 17th, 1978, the Accountant-General was authorised to pay the complainant, a former employee of the Post and Telegraphs Department, then resident in England, a gratuity of \$4,150. On April 19th, 1978, the Accountant-General informed the complainant of the proposed payment and advised her as to the procedures to be followed to obtain payment. The complainant responded first by a letter dated May 3rd, 1978, followed by letters of September 11th, 1978 and January 25th, 1979. These letters duly reached the Accountant-General's office, but were not acknowledged.

On June 16th, 1979, the complainant wrote to the Ombudsman "in frustration and disgust"³¹ about the matter..

Reporting on the results of his inquiries, the Ombudsman stated,

Our investigations confirmed the unacceptable discourtesy meted out to the complainant. They established that had the request contained in the

complainant's letter of 11th of September, 1978 ("that the sum of \$4,150 be lodged to my bank account in Jamaica . . . A/C 113079, Jamaica Citizens Bank . . . ") been complied with, the money would, at the then current rates, have earned interest amounting to \$145.16 between the 1st of October, 1978 and the 1st of April, 1979 when (unknown to the complainant) it at last reached the bank.³²

The Ombudsman continued that there was little difficulty in reaching the conclusion that the complainant had suffered injustice as a result of action taken in the exercise of the administrative functions of the Accountant-General. In the result, the Ombudsman recommended that a letter of apology be sent to the complainant for the discourtesy shown to her, and that compensation in the sum of \$145.16 be also paid.³³

On the basis of the foregoing, it is suggested that the approach to be taken by the Barbados Ombudsman to the notion of "injustice" would indeed seem to require that the scope of the term be delimited as and when the peculiar facts of each allegation of injustice are investigated and determined. However, the notion seems also to demand the application of some initial tests by the Ombudsman as, for example, "is it fair in the particular circumstances of this complaint for the complainant to have sustained such consequences as those resulting directly from the alleged administrative misconduct?"

If the answer is prima facie one that suggest unfairness, then the Ombudsman must focus attention on the conduct itself to determine whether the resulting unfairness was due to "improper, unreasonable or inadequate administrative conduct".

During the debate of the Bill, it was argued that these terms left too much to be determined by the Ombudsman. This was so, the argument suggests, because the Bill also prescribed that he must carry out the functions

"independent of any advice".³⁴ Presumably, the reference to "independent of any advice" was aimed at a provision of the Bill stating that the Ombudsman must perform his functions "in accordance with his Town independent judgment".³⁵

If indeed the argument relies on this phrase to suggest that the jurisdictional formula prescribes for a wide area of subjectivity on the part of the Ombudsman, then it seems to overlook the significance of the notions incorporated in the formula.

By adopting the notions of impropriety, inadequacy and unreasonableness, the Barbados model, unlike earlier precedents that have used terms unknown to the law, as for example, "maladministration" and "fault in administration", has imported into the formula notions that are familiar to the law, as for example, "unreasonableness".

Yet, it is significant to note that during the debate, one of the members of Parliament queried "at which point is a decision unreasonable?" He contended that "decisions dealing with unreasonableness run all the way from two weeks to two years, depending on the kind of issue that is involved. . . ."³⁶

Before an answer is suggested to the above question, it is necessary to note briefly the courts' attitude to the exercise of administrative discretionary powers, and the standard by which the proper exercise of those powers may be determined.

In Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation,³⁷ Lord Green, M.R. expressed the view that when "...an executive discretion is entrusted by Parliament to a body such as the local authority . . . , what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case." He further pointed out that when such a discretion is granted, "the law recognizes certain principles

upon which that discretion must be exercised, but within the four corners of those principles the discretion . . . is an absolute one and cannot be questioned in a court of law."³⁸

Referring to what those principles were, he stated as follows:

They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.³⁹

In short, the scope of discretionary powers must initially be determined on a true construction of the statute conferring the discretionary power. Other statutes may also be relevant in limiting the power further.⁴⁰

Lord Green further considered whether the grounds upon which the exercise of an authority's discretion may be challenged could not be defined "under a single head". For example, he asserted that such grounds as:

Bad faith, dishonesty — these, of course, stand by themselves — unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question.⁴¹

If these grounds could not be defined under a single head, then in his view, there was a measure of "overlap".

Focusing his attention on the term "unreasonable", he stated as follows:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers

familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.⁴²

These final remarks have provoked the comment that the notion of "unreasonableness" covers a multitude of sins.⁴³

The notion of reasonableness therefore implies that the person exercising a discretionary power must, on the one hand, consider the policy embodied in the Act conferring the discretionary power, the legislative devices employed for the implementation of that policy, all relevant laws, rules or regulations, and the practices and procedures of the Ministry or Department concerned. On the other hand, that person should disregard all irrelevant matters. When this is done, the perimeters of reasonableness within which the administrative discretionary power may properly be exercised can then be drawn.

Consequently, any course of conduct, or any decision taken within the confines of these perimeters cannot be questioned in any court of law on the grounds of unreasonableness:

It therefore follows that the Ombudsman, like a court of law which cannot substitute its own decision for that of an administrative authority, will not be able to impugn any course of conduct, or decision simply because he or she personally disagrees with that conduct or decision. The formula seems rather to contemplate that the Ombudsman should first subject that conduct or decision to a test of reasonableness based on elements of objectivity; some of which will undoubtedly be found within the framework of the constituent Act. Viewed in this light, it seems rational therefore to suggest that the scope of the Ombudsman's power to criticise any administrative act or decision is circumscribed by the notions embodied in the jurisdictional formula. That is, the formula contemplates an objective test.

It is only after this approach is adopted that the Ombudsman can properly exercise his judgment in determining whether the conduct in question is improper, inadequate or unreasonable by reference to the standards considered acceptable for the efficient discharge of administrative functions.

As already observed, such standards clearly demand that the person exercising the administrative discretionary power must direct himself, or herself, properly in the law, take into consideration all relevant matters, and disregard extraneous matters. But, it should also be noted that the proper discharge of administrative functions requires something more than a strict adherence to these legal concepts; it also demands "a high standard of integrity, efficiency, honesty and candour" on the part of the administrator.⁴⁴

By reference to this set of objective standards, the Barbados Ombudsman would be better able to determine whether the administrative act or decision is one which no reasonable official would have taken in the particular circumstances.

On the basis of this analysis, there appears therefore to be no merit in the arguments that the terms imported into the formula are so "widely drawn" or "unspecific" as to present difficulties in determining at which point a decision is unreasonable. In fact, the scheme would seem to have adopted a formula that is more definitive than any of those noted in earlier models, and to this extent, to have presented an improvement on those models.

As to the question, at which point is a decision unreasonable? Or to put the question differently, when is an administrative decision or act (including inaction), improper, inadequate or unreasonable? The answer clearly depends on the application of the set of standards mentioned above, and on whether or not the administrative act or decision fails to meet those standards. If they are not met, then it is at this stage that the Ombudsman may properly say that the conduct or decision is improper, inadequate or unreasonable. For example, it would seem that any reasonable person would take the view that the failure by a government agency to answer three letters, as in the Jamaican example, is unreasonable, and that such failure is some evidence of administrative misconduct upon which an investigation may be conducted by the Ombudsman. However, a determination of the extent of the injustice sustained in each case will undoubtedly depend on the peculiar circumstances of the allegation of injustice.

Allegations of injustice

So far, attention has been focused particularly on the scope and significance of the jurisdictional formula devised for the Barbados scheme. In this connection, suggestions have been made as to the approach which is considered appropriate for the Ombudsman to adopt in applying this formula to

allegations of injustice arising out of administrative conduct. No particular attention, however, has been directed to what would reasonably be considered as amounting to a situation of injustice for the purpose of conducting an investigation under the scheme. A few examples of situations which have been considered sufficient to amount to cases of injustice for the purpose of the Ombudsman system will now be noted.

As already observed "injustice" has been considered as extending to a situation — albeit subjective — where the aggrieved person experienced a sense of "outrage or indignation", or of "frustration and disgust", as is illustrated in the Jamaican case of non-payment of gratuity to a retired civil servant. In this latter instance, the Jamaica Ombudsman considered that the injustice sustained by the aggrieved person also resulted in financial loss.

Some further guidance may also be derived from the Sachsenhausen affair.⁴⁵ This case provides, among others, an illustration of a form of injustice arising out of damage to reputation as a result of the attitude of the British Foreign Office to the complainants' claims to compensation under the Anglo-German Agreement. Other instances of injustice not amounting to a case of financial loss may take the form of a loss of opportunity or privilege.

An example of a loss of opportunity would seem to have been provided by the Attorney-General during the debate of the Bill. He instanced a case within his knowledge, where an application was made to the relevant Department/Ministry in Barbados for the award of a scholarship that was offered by an overseas institution, and through "dilatoriness" or "negligence" on the part of that Department/Ministry the application was not processed in time for the applicant to be considered for the award.⁴⁶ Although the individual may not be considered as having suffered any financial loss, as such, he or she would certainly

have lost an opportunity for self-improvement on account of the failings of that administrative department or ministry.

The Trinidad and Tobago Ombudsman's case summaries appearing in the First Annual Report also provide a comparable situation. The case is presented in the Report in the following terms:

A distraught father got in touch with me by telephone about the delay in the release of the results of the National Examination for Vocational and Technical Education. He complained that his son had written the examination in July and had been promised the results by the end of August, 1977. Based on this assurance the son was granted provisional acceptance to a school in the United Kingdom, but the results were not available at the end of August. Acting on a further promise that the results would be published in a week's time the father and son proceeded overseas. They suffered great embarrassment when, on the 26th September, 1977, the school re-opened and the results were still not available.

The school authorities permitted him to attend classes on the assumption that the results would be favourable to him. However, the British Immigration Authorities were not prepared to grant him an indefinite stay on the basis of a provisional entry to a school.⁴⁷

Continuing, the Trinidad and Tobago Ombudsman stated that he communicated with the "Ministry of Education who admitted there had been a delay and agreed to let the complainant have his son's results."⁴⁸ The son was fully admitted to the school to undergo his course of study.

This case clearly illustrates that if there were no Ombudsman to intervene in this matter on behalf of the complainant and his son, they would not only have suffered gross inconvenience by the failings of the Ministry of Education, but the son, like the applicant for the award of the scholarship in the Barbados situation, might also have lost that opportunity for self-improvement.

A loss of privilege amounting to an injustice has been considered as having occurred where a person had been wrongly classified by prison authorities as a convicted person, and so treated, instead of being treated as a prisoner on remand pending trial.⁴⁹

A different form of injustice is again portrayed by the Trinidad and Tobago Ombudsman in his Second Annual Report. The case appears under the caption "Police Negligence", and the facts briefly summarised are these:

Proceedings were instituted in the Magistrate's Court by the Police at the instance of the aggrieved person on an allegation of assault. When the matter came on for hearing, the police officer who investigated the matter failed to appear, and the Court Prosecutor was unable to offer any reasonable excuse for his non-appearance. Accordingly, the Magistrate saw it fit to dismiss the case.

The Ombudsman's investigations revealed that the Commissioner of Police had sought the advice of the Director of Public Prosecutions to have the matter restored. He was, however, advised that in the circumstances no further police action could be undertaken.⁵⁰

Reporting on the results of his investigations, the Ombudsman made the following significant comments:

... it is clear that justice was denied a citizen through the negligence and indifference of a police officer and nothing has been done to remedy the situation. If no good reason is advanced as to why a police officer (the complainant in a matter) does not attend Court and the prosecution is not pursued, then citizens may lose confidence in the administration of justice.⁵¹

The Ombudsman further commented that his jurisdiction did not permit him to enquire into the discretion of the Director of Public Prosecutions. Presumably, this is a reference to the exercise by that officer of his discretion whether or not to institute or discontinue proceedings in any criminal matter.

By implication, the comment on the Ombudsman's inability to question the exercise of discretion by the Director of Public Prosecutions raises the interesting distinction between the exercise of an administrative discretionary power, and that of a judicial discretionary power within the context of an Ombudsman system that excludes judicial functions from the jurisdiction of the Ombudsman. Perhaps, the acknowledgement of this distinction accounts for the absence of any comment by the Ombudsman on the effect which the exercise of the magisterial discretion to dismiss the complaint in those circumstances had on the matter as a whole.

Nevertheless, the case clearly illustrates another form of injustice. The non-appearance of the police officer at the court hearing contributed to the aggrieved person being deprived of her right to have her day in court. But, was the non-appearance of the police officer the only contributing factor? Can it be said, in any event, that the observations made by the Ombudsman are sufficient to avoid a re-occurrence of such an unhappy state of affairs with the possible consequences envisaged, or should some further action be taken? Suggestions in this regard will be made at a later stage.

It is of significance to note that these examples have all identified instances of administrative failings on the part of the department concerned. But assuming an investigation under the Barbados scheme reveals that an injustice has been sustained otherwise than by any administrative failings, what course of action is open to the Ombudsman?

In order to suggest a suitable answer, a further examination of the provisions of the scheme is necessary.

The scheme provides that when an investigation into an allegation of injustice is completed, the Ombudsman must state in his report on the

investigation,

... whether he finds that injustice has been sustained by reason of improper, unreasonable or inadequate conduct on the part of any person, government ministry or department or other authority subject to investigation under this Act and, in any case where he so finds, what action, if any, he recommends by way of remedy or compensation for the injustice.⁵²

These provisions comprise two specific directions to the Ombudsman. Firstly, he or she must state whether (and by necessary implication) "or not" injustice has been sustained. It follows therefore that if no injustice has been sustained, then that would obviously be the end of the matter. On the other hand, if injustice has indeed been sustained, the Ombudsman must then determine whether or not it arose out of administrative misconduct. If the Ombudsman finds that it arose out of administrative misconduct, then the second direction requires the Ombudsman to state "in any case where he so finds, what action, if any, he recommends by way of remedy or compensation for the injustice".

The second direction seems to raise two interesting questions. One, as to the significance of the words "...what action, if any, he recommends ...", and the other as to the scope and effect of the words "...by way of remedy or compensation for the injustice".

An examination of the comparable provisions appearing in other Caribbean precedents reveals that they generally speak in such terms as the Ombudsman "shall make such recommendations [for action] ... as he thinks fit".⁵³

This formulation seems to link the exercise of the Ombudsman's discretion to the choice or kind of action which in the circumstances he considers appropriate for remedying the injustice. In other words, it seems to

contemplate that whenever injustice is sustained, the Ombudsman should always be in a position to recommend the taking of some action to remedy the injustice. Indeed, the circumstances may be such that a mere letter of apology would be a sufficient remedy. By contrast, however, the Barbados formulation would seem at first sight to suggest that although an injustice may have been sustained, the Ombudsman need not recommend the taking of any action to remedy the injustice. That the formulation seems open to such an interpretation derives from the effect of the words "... what action, if any, ..." appearing as they do after the words "... and in any case where he so finds, ...". Bearing in mind the use of the word "so", it is suggested that these words may reasonably be read as,

and in any case where he finds that injustice has been sustained by reason of improper, unreasonable or inadequate administrative conduct, he shall state what action, (if he considers any action should be taken at all) he recommends by way of a remedy or compensation for the injustice.

What would be the significance of such a reading of the provision? Would it mean that the Barbados Ombudsman could take the position that these provisions, unlike those adopted by the other Caribbean precedents, do not anticipate the taking of some action by a government department in every case where there is a situation of injustice?

Since the *raison d'être* for adopting the Ombudsman concept is to provide a remedy for any injustice suffered in consequence of bad administration, it seems that such an interpretation would lead to a manifest absurdity, and therefore, could not have been within the contemplation of the Barbados Parliament, or indeed within that of the Parliamentary Counsel. Consequently, if this absurdity is to be avoided, it must be assumed that the

provisions contemplate some type of situation where a recommended action is unnecessary because the injustice had been sufficiently remedied, on the one hand, or on the other, that the injustice was so insignificant as not to warrant the recommendation of a remedy at all.

Reflections of some such situations would seem to be provided by some of the case summaries reported by the Trinidad and Tobago Ombudsman. These summaries reveal instances where the Ombudsman's request for information on a complaint against a government department has resulted in that department acknowledging its failing in the matter and indicating that appropriate measures had been taken to remove the grounds for the complaint. One such instance is the case of the delayed examination results noted earlier.⁵⁴ In those instances, it was clearly unnecessary for the Ombudsman to recommend the taking of any action to remedy the injustice; and indeed, he did not.

Instances of such injustices may, perhaps, be characterised as being of a temporary nature, and for which a suitable remedy had been provided by the department concerned without the necessity of a recommendation by the Ombudsman.

The words "...what action, if any..." appearing in the Barbados formulation would seem therefore to contemplate this type of situation and should be so construed.

Since it is the view that these provisions anticipate the taking of some action (whether on the initiative of the department concerned or on the recommendation of the Ombudsman) to remedy the injustice sustained, the kinds of remedies contemplated by the words "what action... by way of remedy or compensation for the injustice" may now be considered.

That it was the clear intention to give the Barbados Ombudsman a wide discretion in recommending an appropriate remedy for the injustice suffered is undoubted from the generality of the wording of this formula. Therefore, the only limitation on the scope of these general words would seem to depend on the form and extent of the injustice sustained.

It therefore follows that the Barbados Ombudsman, like other Caribbean Ombudsmen, is afforded some flexibility in choosing an appropriate remedy to meet the injustice.

From an examination of the reports of Ombudsmen, it is suggested that the remedies which fall readily within the scope of these words would include an apology, a review of the matter if in the nature of a decision, or a financial payment. Further, where the injustice results from a decision or other conduct that is so unreasonable as to import elements of corruption, the remedy could conceivably take the form of recommending that the matter be referred to the appropriate authorities for further investigation with a view to instituting criminal proceedings.

Perhaps, it is of interest to note that the Jamaica scheme in addition to giving its Ombudsman a wide discretion to recommend a suitable remedy, also prescribes,⁵⁵ among other things, that he may recommend "that the action which was the subject-matter of the complaint be reviewed", and "that compensation be made to the complainant". It is suggested that even if these remedies were not specifically provided for, they would naturally come within the scope of the general provisions of the Jamaica scheme. Presumably, the Barbados provision was formulated on the basis of this reasoning. Indeed, the United Kingdom experience points to the fact that such remedies have been recommended in the absence of any specific provisions to the effect.⁵⁶

On the basis of this analysis, the answer to the question, what course of action is open to the Barbados Ombudsman where the investigation reveals that an injustice has been sustained otherwise than by any administrative failings, seems to be outside the scope of these provisions. However, before the scheme is examined to see whether or not it embodies provisions that would indeed answer this question, it is appropriate to notice briefly the circumstances that might give rise to the significance of the question.

An investigation under the Barbados scheme into any course of conduct, or into anything done or omitted by any person in the discharge of his or her administrative functions could conceivably reveal that such course of conduct was exemplary; i.e., that there was no "administrative bad manners", inconsiderate treatment, bad faith, dishonesty, excessive delay, incompetence, negligence, or impropriety of any sort; and in the case of a complaint against a decision, whether discretionary or otherwise, that it took into consideration all relevant matters, and excluded those that were irrelevant. In short, that it did not constitute a decision which no reasonable official could have taken in the particular circumstances.

That there is justification for this general concept is exemplified by one of the cases investigated by the Jamaica Ombudsman. His comments on the case are expressed in such graphic terms that they are worthy of substantial recall.

The case appears under the rubric "The law's an ass", and the facts briefly summarised are these:

A putative father was ordered by a Family Court in Jamaica to pay the complainant \$10 weekly for the maintenance of their child until that individual attained the age of 16 years.

The father was delinquent in maintaining these weekly payments and was further ordered by the court to pay off the accumulated arrears of \$220; or in default, to serve a prison term of 10 days. The delinquent father elected to serve the prison term.

At the time of the subsequent order, the state of the Jamaica Affiliation and Maintenance Laws was such that an election to serve a term of imprisonment effectively discharged all arrears due and owing under a maintenance order.⁵⁷

Commenting on the election by the putative father, the Jamaica Ombudsman expressed himself in these terms:

This act of his did not serve to alleviate for one moment, however, the plight of the hapless child, whose hunger pangs did not diminish one whit, for all the prison sentences that her putative father had served. The serving of the term of imprisonment did not lessen by one jot, the burden of the hard-pressed mother. Picture her dismay, therefore, when on seeking to have process issue for the recovery of the unpaid two hundred and twenty dollars (\$220), she was told by the Clerk of the Family Court that the debt had been digested in the bowels of the prison, so to speak, and the arrears discharged.⁵⁸

It was on the basis of this information that the complainant sought the assistance of the Jamaica Ombudsman. But before observing how this case was resolved, it would seem that it presents some interesting questions which are worthy of consideration.

To begin with, the question may be raised as to whose action was the Ombudsman investigating? Clearly, he was not directing his investigation at the judicial action of the Family Court to order a prison term in default of payment of the accumulated arrears. The only other official actor identifiable at the time of the complaint would seem to be the Clerk of the Family Court. But what action did that Clerk take in the exercise of the administrative functions of the Ministry of Justice? Was it the refusal to issue the process requested by the

complainant; or was it the information offered by the Clerk as to the effect of the prison term on the payment of the accumulated arrears?

Whatever the distinct nature of the action, presumably, it was on the basis of the Clerk's interaction with the complainant or the mere allegation of injustice that the Jamaica Ombudsman was able to exercise his jurisdiction to investigate the action taken. But what did the facts reveal? Was it a case of wrong or misleading information given by the Clerk of the Family Court, or was it a failure to issue process for the arrears?

The facts clearly revealed that the alleged injustice was not sustained, in the words of the Jamaica Act, "as a result of any action taken by an authority or an officer or member of [an] authority . . . being action taken in the exercise of the administrative functions of that authority".⁵⁹ Put differently, there was no direct linkage between the injustice and an act or inaction of any identifiable public official. The cause of the injustice was rooted in the state of the Jamaica law, i.e., the principle or policy embodied in the particular law.

Turning his attention to the grounds of the complaint, the Ombudsman stated as follows:

Contending that imprisonment . . . does not operate to discharge the defendant from his liability to pay the sum in respect of which the warrant to commit the father to prison had issued, the complainant complained to us that injustice had been meted out to her.

With all the learning at our disposal, with all the industry at our command we began a frenzied effort to disprove the time worn adage "the law's an ass". To no avail! Not all the sagacity we employed, not all the sweat we oozed, could help us discover one local statutory enactment on the point. Neither could we locate one local case in point. We were forced to the conclusion that the position in Jamaica is as it obtained in England prior to the enactment there of the 1958 Maintenance Orders Act, that is to say, that where a

putative father is imprisoned for non-payment of amounts due under an Affiliation Order, the arrears in question are discharged by such imprisonment.⁶⁰

The Ombudsman considered that the law as it stood permitted a putative father to "evade forever and a day" the payment of arrears by electing to serve a prison term. It was therefore clear that the principles embodied in that law were questionable, since they operated to frustrate the main objective of the enactment, i.e., to provide for the maintenance and support of children. But could the Ombudsman question those principles, or inferentially, the policy of the Ministry for maintaining such a law on the Statute Book? Could he be met by the suggestion that his jurisdiction did not extend to questions of this nature?

The Jamaica scheme has placed no such limitation on its Ombudsman's jurisdiction. Indeed, the scheme empowers the Ombudsman to recommend "that an enactment, rule or regulation which causes or may cause injustice be altered".⁶¹ These provisions clearly nullify any suggestion that his jurisdiction does not comprehend the questioning of the principles embodied in, or the policy underlying, an enactment, rule or regulation that causes an injustice such as occurred in the case under consideration.

It is not surprising therefore to note that the Ombudsman recommended that legislative action be taken to amend and reform the law. It is perhaps appropriate at this stage also to observe that this case, if no other, eloquently justifies the reasons for adopting the Ombudsman system by a Caribbean State. Such an observation also brings to mind the question as to how many other instances of injustice, whether similar or dissimilar, were experienced and passed unnoticed by the administrative State, not only in Jamaica but elsewhere in the Commonwealth Caribbean, because of the unavailability of an Ombudsman type institution for the redress of individual

grievances, or where such an institution was available, because its powers of investigation, criticism and reporting were perceived as being restrictive?⁶² However, this feature in the Jamaica scheme of empowering the Ombudsman to recommend changes in the law is specifically reflected in the Barbados model, but not elsewhere in the Commonwealth Caribbean.

The model prescribes that the Ombudsman may prepare for tabling in each House of Parliament such other reports⁶³ as he or she thinks fit, including

- (a) a report on the inequitable or unreasonable nature or operation of any enactment or rule of law; and
- (b) a report on any case where in his opinion injustice has been sustained as aforesaid and the injustice has not been or will not be remedied or compensated.⁶⁴

This formulation, worded as it is to capture the principle embodied in the Jamaica scheme, would seem to confer on the Barbados Ombudsman a power even wider in scope than that enjoyed by his or her Jamaican counterpart.

As already noted, in addition to conferring general powers of recommendation on the Ombudsman, the Jamaica formula also confers power to recommend "that an enactment, rule or regulation which causes or may cause injustice be altered".⁶⁵ What would be the position therefore under the Jamaica scheme if an injustice instead of being caused by "an enactment, rule or regulation", had resulted from the operation of an unenacted law, i.e., a common law rule? Would an attempt by the Ombudsman to recommend under this provision an alteration of a common law rule be met by the application of the expressio unius est exclusio alterius rule of interpretation, i.e., the rule that if a statute expressly refers to "railway companies", then steamship companies are excluded?⁶⁶ Or would the view be taken that the incorporation of the words "without prejudice to the generality of the foregoing" into the Jamaica formula

is intended to preserve the integrity of the general words in the provision from the operation of that rule of interpretation?

It therefore seems that if the situation as conceived did arise in Jamaica, there is the likelihood that the Jamaica Ombudsman would experience difficulties in determining whether his power contemplates recommendations on the operation of the common law, as distinct from recommendations on the enacted law. By contrast, the likelihood of such difficulties confronting the Barbados Ombudsman seems remote in view of the words used to capture the Jamaica principle.

In Barbados, the term "enactment" comprehends the whole body of the statute law and its derivatives, i.e., orders, rules and regulations, but excludes the common law. Therefore by using the words "or rule of law" in the Barbados formulation, it is put beyond doubt that the Ombudsman should not only exercise a power similar to that conferred on his or her Jamaican counterpart, but also that the power should extend over the whole spectrum of the Barbadian law as administered by the departments, ministries and other authorities subject to the jurisdiction of the Ombudsman.

Another feature of the Barbados adaptation of the Jamaica principle is that whereas the Jamaica scheme specifically prescribes that the Ombudsman "may recommend" an alteration of the enactment, rule or regulation giving rise to the injustice, the Barbados adaptation on the other hand only stipulates that the "Ombudsman may, from time to time, prepare for laying before each House of Parliament such other reports as he may think fit. . . ."

What is the significance of this choice of language? Does it mean that since the Barbados model does not use the term "recommend", the Ombudsman's role is therefore restricted to calling the attention of Parliament

merely to the root causes of an injustice, i.e., whether resulting from the misworkings of enacted law, administrative legislation or from the operation of some common law rule, without making any specific recommendations for remedial action?

In other words, should the Barbados Ombudsman adopt the approach of his or her Trinidad and Tobago counterpart where in the case of the non-appearance of the police officer, he commented on the resulting injustice without making any specific recommendation that might avoid future occurrences? For example, could the Trinidad and Tobago Ombudsman not have recommended a change in the law that would ensure a restoration of a charge dismissed in those circumstances?

To suggest the adoption of that approach by the Barbados Ombudsman would seem, in effect, to place too restrictive an interpretation on the scope of the power to report on the inequitable or unreasonable nature or operation of any enactment or rule of law. Consequently, it is suggested that this aspect of the power of reporting under the Barbados scheme may be seen as one which is likely to facilitate the role that the Barbados Ombudsman can play not only as an agency for monitoring the operation or implementation of the laws,⁶⁷ but also as an agency for making law reform recommendations for the consideration of the relevant authority.

Therefore, despite the absence of the word "recommend" from the Barbados adaptation, it would seem more reasonable to interpret the power to "report on the inequitable or unreasonable nature or operation of any enactment or rule of law" as importing a power to make recommendations also for the removal of the causes of the injustice which are identified as being inherent in the operation of the law.

If this approach were to be adopted, not only would the Jamaica principle be achieved in Barbados, but some improvement would have been made on that principle by the clear incorporation of a power of reporting that extends to the common law.

Thus, in relation to the question: "what course of action is open to the Ombudsman where the investigation reveals that an injustice has been sustained otherwise than by any 'administrative failings", the Barbados Ombudsman would be in a position to recommend reforms in the principle, or policy, embodied in the law in cases where injustices are sustained without administrative misconduct.

The focus so far has been on the extent of the Barbados Ombudsman's powers of reporting where he or she finds instances of injustice whether arising out of some administrative failing in a department, ministry or other agency of government or as a result of an inherent defect in the law administered by any such governmental organisation.

In each case it was suggested that the scheme contemplates that the Barbados Ombudsman would make suitable recommendations to remedy the injustice sustained, or for the reform of the law in appropriate cases. One further comment should, however, be made in connection with the power to report on any case where the Ombudsman finds that "injustice has been sustained as aforesaid", and it has not or will not be remedied or compensated.⁶⁸

It would seem that the phrase "sustained as aforesaid" points to the situation where the injustice results from an administrative failing, as in the Trinidad case of the non-appearance of the police officer, that cannot be remedied to the satisfaction of the aggrieved person. Under the Barbados scheme, however, future occurrences could possibly be avoided by recommending

that the appropriate authority should consider making changes in the law, as the Jamaica case under the rubric "the law's an ass" clearly illustrates.⁶⁹

This power also seems to contemplate a situation where there is the absence of any remedy at all to restore the "status quo". For example, where an error by Passport Authorities facilitates the abduction of a child by one of the parties to a former marriage.⁷⁰

In this type of case the Barbados Ombudsman can only call Parliament's attention to the injustice that has been sustained and would not be remedied even by way of an apology from the department, ministry or other authority subject to the Ombudsman's jurisdiction.

These governmental organisations, such as they are, will be considered in the next chapter.

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1. The Constitutions of Trinidad & Tobago, section 93(1); Dominica, section 110(1); St. Lucia, section 112(1); Guyana, section 192(1). It should be noted that in the case of Guyana the wording expressly extends to the President and Ministers, thereby making them amenable to the Ombudsman's jurisdiction.
 2. Ibid., section 93(2); section 110(3); section 112(3); and section 192(2).
 3. Section 13(1) and (2) of the New Zealand Act.
 4. For discussion on the concept of ministerial responsibility, see Sir K. C. Wheare, Maladministration and its Remedies (London: Stevens & Sons, 1973), pp. 49-78.
 5. The Jamaica Ombudsman Act, section 12(1).
 6. Section 5(1) of the Act.
 7. Ibid., section 5(2).
 8. B.H.A. Deb. (Nov. 4, 1980), pp. 4499 and 4506.

9. Ibid., pp. 4509-4510.
10. Ibid., p. 4511.
11. Rt. Hon. E. W. Barrow, Leader of the Opposition, ibid., p. 4512.
12. Ibid., p. 4510.
13. Ibid., p. 4513.
14. Ibid., p. 4493.
15. Section 46 of Cap. 1 of the Laws of Barbados.
16. Constitution of Barbados, section 72(1).
17. H.W.R. Wade, Administrative Law, p. 695.
18. Ibid., pp. 695-96.
19. Third Report of the Parliamentary Commissioner for Administration Session 1967-68 (London: H.M.S. Office), pp. 3-20. For discussion on this case, see Roy Gregory and Peter Hutchesson, The Parliamentary Ombudsman: A Study in the Control of Administrative Action (London: Allen & Unwin Ltd., 1975), chap. 11.
20. Gregory and Hutchesson, The Parliamentary Ombudsman, supra note 19, p. 476. See also Wade, "The British Ombudsman: A Lawyer's View", pp. 148-49.
21. Parliamentary Commissioner Act, 1967, section 12(3).
22. Gregory and Hutchesson, The Parliamentary Ombudsman, supra note 19, p. 315. See also Wade, Administrative Law, supra note 17, p. 83, where he considers the provision "to be a tautology".
23. Constitutions of Trinidad and Tobago, section 94(1); Dominica, section 111(1); and St. Lucia, section 113(1). In Dominica and St. Lucia, the Ombudsman is referred to as the Parliamentary Commissioner.
24. Section 10(1) of the Act.
25. B.H.A. Deb. (Nov. 4, 1980), p. 4505.
26. Ibid.
27. Ibid., p. 4489.
28. Radio Broadcast in December, 1981 of the First Human Rights Seminar held in Barbados in 1981 by Amnesty International (C.B.C. Radio Barbados).

29. David Williams, Maladministration: Remedies for Injustice (London: Oyez Publishing Ltd., 1976), p. 43.
30. Per Denning L.J., [1979] 2 All E.R. 881, at p. 899.
31. First Annual Report of the Parliamentary Ombudsman for Jamaica, 1979, p. 20.
32. Ibid.
33. At the time of the report, the payment of compensation was still pending.
34. B.H.A. Deb. (Nov. 4, 1980), p. 4510.
35. Section 2(2) of the Act.
36. B.H.A. Deb. (Nov. 4, 1980), p. 4510.
37. [1948] 1 K.B., p. 223.
38. Ibid., at p. 228.
39. Ibid.
40. For example, in Barbados a statute may confer power on a Minister to make regulations for certain purposes, and to impose fines without specifying the monetary limits of those fines. However, the Interpretation Act imposes such limits whenever the constituent Act is silent.
41. Lord Green, M.R., supra note 37, at p. 229.
42. Ibid.
43. Wade, Administrative Law, supra note 17, p. 349.
44. Williams, Maladministration: Remedies for Injustice, supra note 29, p. 40.
45. Supra note 19.
46. B.H.A. Deb. (Nov. 4, 1980), p. 4501.
47. The Ombudsman First Annual Report, 1978, case OMB: 78/63, pp. 32-33.
48. Ibid., p. 33.
49. Gregory and Hutchesson, The Parliamentary Ombudsman, supra note 19, pp. 330-331.
50. The Ombudsman Second Annual Report, 1979, case OMB: 78/595, pp. 70-71.
51. Ibid., p. 71.

52. Section 13(3) of the Act.
53. Constitutions of Trinidad and Tobago, section 96(2); Dominica, section 113(2); St. Lucia, section 115(2); and Guyana, section 194(1).
54. Supra notes 47 and 48.
55. Jamaica Ombudsman Act, supra note 5, section 21(5)(a) and (c).
56. For examples extracted from the Parliamentary Commissioner's Reports, see Wade, Administrative Law, supra note 17, pp. 86-87; and Gregory and Hutchesson, The Parliamentary Ombudsman, supra note 19, pp. 339-356.
57. First Annual Report of the Parliamentary Ombudsman for Jamaica, 1979, p. 23.
58. Ibid.
59. Jamaica Ombudsman Act, supra note 5, section 12(1).
60. Report 1979, supra note 57, p. 23.
61. Jamaica Ombudsman Act, supra note 5, section 21(5)(b).
62. For example, in a typescript report prepared by the Guyana Ombudsman the following statement appears:

I concede that in a democratic State, every member of the public is free to criticise the conduct of a Minister, indeed of the Government. But in relation to the scope of my authority the distinction must at all times be borne in mind between injustices that arise out of faults in the Administration on the one hand, and those that arise from what I may call, purely for the sake of convenience, faults in Government's policy.

The Ombudsman has the authority to entertain complaints arising out of faults in the Administration, but not the faults arising out of Government's policy.

See typescript Report on the complaint made by Eusi Kwayana against Hon. Hamilton Green, Minister of Works, Hydraulics and Supply. (Office of the Ombudsman, Georgetown, Guyana), p. 16.

63. Section 13(6) of the Act provides that the Ombudsman shall in each calendar year, prepare for laying before each House of Parliament "a general report" on his functions under the Act.
64. Section 13(7)(a) and (b) of the Act.
65. Jamaica Ombudsman Act, supra note 5, section 21(5)(b).

66. For examples of the application of this principle, see Elmer A. Driedger, The Construction of Statutes (Toronto: Butterworth & Co. (Canada) Ltd., 1974), pp. 95-102.
67. For discussion on the machinery available to Parliaments for this purpose, see minutes of the debate held in Prague on Wednesday, 18th April, 1979 on "Monitoring by Parliaments of the Implementation of Laws", in Constitutional and Parliamentary Information, No. 120, 4th Quarter, 1979 (Paris: Association of Secretaries General of Parliaments), pp. 92-112. See also the Editorial on "Monitoring the Implementation of Laws" in the Statute Law Review, Summer 1981 (London: Sweet & Maxwell, 1981), pp. 65-68.
68. Section 13(7)(b) of the Act.
69. Supra note 60.
70. See discussion by Gregory and Hutchesson, The Parliamentary Ombudsman, supra note 19, pp. 357-60.

CHAPTER VI

AUTHORITIES SUBJECT TO OMBUDSMAN'S JURISDICTION

The Barbados model, unlike the Canadian and other Commonwealth Caribbean models, has followed the New Zealand and United Kingdom examples in scheduling the government ministries, departments and other authorities that are subject to the Ombudsman's investigatory powers. These government authorities are set out in the Second Schedule to the Act, and will hereinafter be referred to as the "scheduled authorities".

The adoption by the Barbados model of the drafting technique of scheduling specifically to delimit the Ombudsman's jurisdiction over the principal organs of the central Government, rather than to define that jurisdiction in terms of a generally devised formula is significant.

For example, experience in some of the Canadian provinces indicates that attempts to define in general terms references¹ to the terms "department or agency" of the government, or to "governmental organization" have presented some difficulties in determining whether the Ombudsman has jurisdiction to investigate certain governmental organisations in Canada. These difficulties have had to be determined by a declaratory order of the court² made pursuant to provisions in the constituent Acts basically structured as follows:

If any question arises as to whether the Ombudsman has jurisdiction to investigate any case or class of cases under this Act, he may, if he thinks fit, apply to the Supreme Court . . . for a declaratory order determining the question.³

Similar provisions are also embodied in the Barbados scheme.⁴

However, in the light of the scheduling technique already noted, it is suggested that recourse to the Barbados provisions, at least in relation to questions of the Ombudsman's jurisdiction over any particular governmental organisation would not be frequent, if at all. To this extent, therefore, it would seem that the scheduling technique adopted by the Barbados scheme provides a framework within which the Barbados Ombudsman may operate with greater certainty as to the organisations falling within his or her jurisdiction.

Criticisms

However, during the debate of the Bill in the Barbados House of Assembly, the efficacy of this drafting device was overshadowed by what was perceived to be significant omissions from the list of scheduled authorities.

Some Members of Parliament called for the inclusion of the police, "para-state" organisations or statutory corporations, the personnel department, and the law courts, in so far as they gave rise to questions relating to delays in the administration of justice.⁵

It was argued by way of criticism that the omissions of these agencies and matters from the scheme had the effect of removing from the scope of the Ombudsman's investigatory powers a wide area of activity where friction between the individual citizen and governmental agencies such as the police and statutory corporations was inevitable.⁶

Before assessing the merits of these criticisms, it is necessary to recall those provisions which the scheme employs to bring the principal organs of government within the scope of the Ombudsman's powers.

As already noted, the Barbados Ombudsman is empowered on an allegation of injustice to investigate anything done or omitted by

any person in the exercise of the administrative functions of the government ministries, departments and other authorities specified in the Second Schedule, not being functions concerned with a matter specified in the Third Schedule.⁷

The scheme further provides that the organisations and matters "specified in the Second and Third Schedules shall be defined in accordance with any restrictions or notes therein contained".⁸ Also embodied in the scheme is a mechanism empowering the Head of State to amend by order the Second and Third Schedules.⁹ Clearly, the scheme contemplates that this power will be exercised to add to and/or delete from the existing list of scheduled authorities as circumstances arise. For example, where new organisations are added as a matter of policy, there is a merger of two or more existing organisations, or a name change occurs. In such a case, the amending order is subject to the negative resolution process.¹⁰

It is with these mechanisms in mind that the criticisms of the omissions and calls for further inclusions may now be considered.

Evaluation of criticisms

An examination of the Second Schedule will reveal that, except for the Services Commissions and the Cabinet office, both of which will be considered at a later stage, the agencies appearing in the list of scheduled authorities fully represent the existing ministries, departments, divisions and

offices of the central Government.¹¹ By the same token, it will be noticed, however, that the scheme makes no attempt to reflect in the Second Schedule any of the existing para-state or statutory agencies in Barbados.

For example, such relatively independent agencies as the Central Bank of Barbados, Mortgage Finance Company, National Bank, Development Bank, Insurance Corporation, and other statutory corporations as the Industrial Development Corporation, National Housing Corporation, and such other agencies as the National Assistance Board and Child Care Board¹² are not included. To a greater or lesser degree, each of these agencies is charged with the responsibility of implementing the policies and decisions of the central Government.

It would seem reasonable therefore to assume that in discharging their responsibilities, such agencies would necessarily have to interact with the individual citizen and, depending on the extent of that interaction, conflicts would arise.

To this extent, therefore, the criticisms against the non-inclusion of these agencies as a class of governmental organisation would seem justifiable. Indeed, the merits of the criticisms would seem to have been acknowledged by the Attorney-General who at one stage of the debate responded in these terms:

...I believe that the points made by hon. members have been valuable points, some of substance. I regret that at the moment statutory bodies are not fully brought under the Bill, but we do have a clause which makes it easy for the Governor-General to add a list of bodies, and I will undertake to take up that point with the Cabinet at the earliest opportunity.¹³

Before noticing the significance of these statements, it is necessary to observe how the scheme, in adopting the scheduling technique, has manipulated not only the principal agencies of the central Government, but also

the subject areas administered by those agencies by using the words "... not being functions concerned with a matter specified in the Third Schedule".

This formulation contains the key ingredients for the exclusion of specific areas of administrative activity from the investigatory powers of the Ombudsman, although that activity is performed by a scheduled authority. These areas are reflected in the Third Schedule and, as such, will be noted more particularly at a later stage. Yet, the point must be made that the basis of their specific exclusion would appear initially to be one of deliberate policy.

On the other hand, the basis for the non-inclusion of the statutory agencies seems to be distinguishable in the light of the Attorney-General's statements. What these statements seem to be suggesting is that, unlike the matters appearing in the Third Schedule, hereinafter referred to as the "Third Schedule matters", the non-inclusion of those agencies was not determined on the basis of any definitive policy. Indeed, other statements¹⁴ made in response to the criticisms indicate that prior consultation with the various agencies in Barbados is contemplated in order to identify those that would readily be amenable to the Ombudsman's jurisdiction.

There seems to be some merit in this approach. It not only allows for a detailed examination of the extent of the interaction of these agencies with the citizen, but it also affords an opportunity for drawing on experiences elsewhere in the treatment of similar agencies.

For example, the question will undoubtedly arise as to whether or not the Central Bank of Barbados ought to be subject to the Ombudsman's jurisdiction. An initial response to this question could conceivably be that such an institution should not be brought within the scope of the Ombudsman's powers.

Justification for taking this position would, perhaps, be based on the contention that this institution, unlike any ministry or department of government, was created with some degree of autonomy, and that this autonomy in itself makes the institution unsuitable for investigation by the Ombudsman.

On the other hand, it may be argued that notwithstanding the independent status of the institution, some of its functions, for example, those relating to exchange control, are such as to impact directly on the citizen, and that this direct contact with members of the public provides an area of possible conflict which should not be excluded from investigation.

These arguments would seem to raise further questions. For example, should the question of inclusion or exclusion be determined arbitrarily,¹⁵ or on the basis of some kind of objective analysis which would facilitate a determination of the statutory bodies that ought to be included?

As to the choice between these alternatives, it seems reasonable to suggest that the better strategy would be to choose the second alternative. However, this choice would seem to raise at least one other basic question, i.e., what are the factors to be taken into account in determining which statutory bodies should be included or excluded?

A reasonable answer seems to be that the degree of contact which any statutory body has with members of the public is the most important factor to be taken into account. Clearly, some bodies by the very nature of their functions would come more directly into contact with members of the public than would others. For example, the Central Bank, in its role as Exchange Control Authority, and the National Housing Corporation would seem to come more into contact with members of the public than would the Barbados Broadcasting Authority and the Caribbean Broadcasting Corporation.

Professor Larry Hill in his analysis of the complaints made to the New Zealand Ombudsman against the governmental organisations in that country suggests that organisations established for the benefit of the citizen under a welfare system of government may be classified as "client-serving", "client-attending" and "non-client-oriented". Professor Hill distinguishes these three types of organisations as follows:

- (a) ... client-serving agencies ... have as their mission the furthering of the public interest through aiding individuals, who are perceived as objects of concern in themselves.
- (b) ... client-attending organizations have as their primary mission the achievement of some public goal, but what is distinctive about them is that in performing this mission they necessarily come into direct contact with large numbers of individual citizens. Clients tend not to be valued personally but to be attended to as customers (Post Office, Railways, Tourist and Publicity) or as appellants (Inland Revenue, Justice, Police). Often they have become clients involuntarily, and they may regard themselves as victims rather than beneficiaries. In other cases the contact usually may be nonaversive (Labor, Lands and Survey, Agriculture and Fisheries), but helping individuals is an incidental by-product of pursuing a broader public purpose.
- (c) ... non-client-oriented agencies seldom come into direct contact with the general public. Their primary mission usually is to produce goods or services. Often these products, such as a new highway or sewerage plan, are not ordinarily consumed by individual citizens but by the public as a whole or some aggregate segment of it. Also the products may be intermediary ones, such as statistics or legislation, destined to be consumed by other government agencies.¹⁶

A significant feature of this classification is that it focuses not only on central Government departments, but also on other agencies in the governmental structure. Assuming therefore that it is relevant to the

governmental authorities in Barbados, it would seem to provide some guidance in determining whether to include certain statutory bodies among the existing list of scheduled authorities or to exclude some of the authorities already listed.

In terms of guidance, Professor Hill's classification seems to suggest that because of their functions, "client-serving agencies" and "client-attending organizations" are more susceptible to the jurisdiction of an Ombudsman system than would "non-client-oriented agencies".

On the basis of this classification, the position of the Barbados Central Bank may now be more closely examined.

As intimated earlier, one of the functions of the Bank is to perform the role of Exchange Control Authority. However, it is of significance to notice the source from which it derives its role functions.

In Barbados, the Minister of Finance is declared to be the Exchange Control Authority, and is charged with the responsibility of administering the Exchange Control Act. It therefore follows that since the Ministry of Finance is a scheduled authority, the administration of exchange control procedures would logically have come within the Ombudsman's jurisdiction. However, the Exchange Control Act further prescribes that:

The Minister may by order delegate the performance of any of his functions as Exchange Control Authority... to the Central Bank of Barbados....¹⁷

It therefore follows that in performing the role of Exchange Control Authority, the Bank in effect acts as the agent of the Minister of Finance by virtue of his statutory power of delegation.

It must, however, be emphasised that the Central Bank agency status in relation to the Minister of Finance came into existence prior to the

introduction of the Ombudsman system in Barbados. Nonetheless, it would seem that this aspect of the Bank's operations brings the whole question of the Bank's susceptibility to the Ombudsman's jurisdiction more sharply into focus.

The matter now seems to turn on the following questions:

- (a) whether the agency status of the Central Bank is sufficient in itself to bring the institution within the scope of the Ombudsman's investigatory powers? and
- (b) whether the performance by the Bank of the functions of Exchange Control Authority is such as to bring the institution within the scope of one of Professor Hill's classifications?

As to the first question, it seems that some guidance may be derived from an examination of the decision of the Saskatchewan court in Re Board of Police Commissioners for the City of Saskatoon et al.¹⁸

In this matter, the issue turned essentially on whether the Saskatchewan Ombudsman was empowered to investigate the activities of the Saskatoon Board, a municipality in Saskatchewan. To put the matter in proper perspective, it is necessary to recall the following facts as summarised by Halvorson, J.:

One Raymond Quarg complained to the Saskatchewan Police Commission ("The Saskatchewan Commission") that the Saskatoon Police Department had not provided medical attention to him while he was incarcerated.

The Saskatchewan Commission referred the complaint to the applicant, the Board of the Police Commissioners for the City of Saskatoon ("The Saskatoon Board"), for investigation.

An investigation was conducted and a report provided to the Saskatchewan Commission.

Quarg, being dissatisfied with the manner in which the Saskatchewan Commission handled the matter, lodged a complaint with the Ombudsman.¹⁹

The Ombudsman being "unable to conclude whether or not an adequate investigation of Raymond Quarg's complaint to the Saskatchewan Police Commission had been conducted"²⁰ decided to investigate certain personnel of the Saskatoon Board which had conducted the investigation on behalf of the Saskatchewan Commission. It was, however, contended that the Ombudsman had no jurisdiction to inquire into the functioning of the Saskatoon Board.

The Ombudsman, on the other hand, pointed out that he had no intention to investigate the merits of the complaint against the Police Department. Rather, what he proposed to investigate was the manner in which the inquiry was conducted by the Saskatoon Board. This argument was accepted by the court on the basis of a provision in the Saskatchewan Ombudsman Act prescribing, in part, that:

Nothing in this Act authorizes the Ombudsman to investigate:

(g) any decision...of any...agency of the government...in relation to any matter arising between the...agency...and...a municipality
....²¹

It was also conceded that the Saskatchewan Commission was an "agency of the government", and therefore came within the scope of the Ombudsman's investigatory powers.²²

In accepting the argument that the Ombudsman did not propose to investigate the decision of the Saskatoon Board, the court drew a distinction²³ between investigating "the Saskatchewan Commission to assess the methods which it used in carrying out its inquiry", and an investigation into "any matter

arising between" the Commission, as an agency of government, and a municipality, such as the Saskatoon Board, which was specifically excluded from the Ombudsman's jurisdiction.

Interestingly enough, the specific exclusion of a municipality such as the Saskatoon Board from the Ombudsman's jurisdiction was not perceived as the end of the matter. It was contended on behalf of the Ombudsman that since the Saskatchewan Commission had delegated to the Saskatoon Board the function of inquiring into Quarg's complaint, the Board became an agent of the Commission, and as such, was susceptible to the Ombudsman's jurisdiction.²⁴

Referring to the relevant provisions of the Saskatchewan Police Act, 1974, and related regulations, the court found that the legislation conferred a power of delegation on the Commission, and that the Commission often requested a local police board, such as the Saskatoon Board, to conduct the initial investigation of a complaint on its behalf.²⁵

In seeking a resolution of the difficulty, the court not only drew on these factors, but also on what was perceived to be the essential purpose of the Saskatchewan Legislature for introducing the Ombudsman Act. The court took the view that the intention was "to bring before the Legislature, Minister or other responsible party, all injustices that the Ombudsman was authorized to investigate",²⁶ and that that intention could be frustrated "by placing a restrictive interpretation on those sections of the statute where no restrictions [were] specifically mentioned".²⁷ The court concluded as follows:

Considering together the fact that the Legislature has authorized the Ombudsman in the Ombudsman Act, to investigate decisions of the Saskatoon Commission (sic), and the fact that the Legislature in the Police Act, 1974 and Regulations thereunder, has chosen to permit the Saskatchewan Commission to delegate certain of its powers and functions, I am compelled to

conclude that it was never the intention of the Legislature to prevent the Ombudsman from investigating a persona designata such as the Saskatoon Board in relation to the execution of those delegated powers and functions. The purpose of the Ombudsman Act cannot be frustrated by an "agency of the government" delegating its responsibility to a body which, in ordinary circumstances, is beyond the investigatory scope of the Ombudsman.²⁸

It is significant to notice two factors which seem to dominate the court's mind in arriving at this conclusion. One, that the legislative purpose of the Act was to focus on "all injustices that the Ombudsman was authorized to investigate", and the other, that the exercise by an "agency of the government" of its power of delegating its functions to some other body not normally within the scope of the Ombudsman's jurisdiction should not be allowed to frustrate that purpose.

It is clear therefore that the Saskatoon Board's position as a persona designata or agent of the Saskatchewan Commission greatly influenced the court's conclusion.

Since it may be said that the relationship that existed between the Saskatchewan Commission and the Saskatoon Board is parallel to the relationship that exists between the Minister of Finance and the Central Bank in Barbados, would it be reasonable to suggest that the line of thought exhibited by the Saskatchewan court can be applied to the position of the Central Bank so as to answer the question whether the agency status of that institution is in itself sufficient to bring the institution, or at least those functions which it performs as the delegate of the Minister of Finance, within the Ombudsman's powers?

In this connection, it must be emphasised that nowhere in this aspect of the Barbados scheme is there any reference, as in the Saskatchewan Act, and in Acts elsewhere, to any such formulation as "agency of the government",

"department or agency", "on behalf of a government department or other authority", or some similar form of words that would import the agency concept.

Since no such formulation appears in the Barbados model, it seems reasonable to suggest that the importation of the agency concept into the scheme as an aid to define the Ombudsman's jurisdiction was not intended.

Therefore, any attempt to rely on the agency status of the Central Bank to determine its susceptibility to the Ombudsman's jurisdiction according to the reasoning of the Saskatchewan court would fail.

This result would seem to be eminently consistent with the logic of the Barbados scheme in the light of its adoption of the scheduling technique, without more, to delimit the Ombudsman's jurisdiction.

However, although it has been suggested that this technique provides a framework within which the Barbados Ombudsman may operate with greater certainty as to the authorities falling within the scope of his or her investigatory powers, the restrictive nature of the drafting device in this context must at once be acknowledged. Clearly, it could reasonably be argued that the specific mention of certain authorities in the schedule was intended to signify the exclusion of all others.

It would seem therefore that if the Barbados scheme had employed a form of words that would admit of the agency concept to define the Ombudsman's jurisdiction while listing the primary objects of that jurisdiction in a schedule, the combined effect of these two drafting techniques could conceivably be such as to produce unexpected results, rather than the degree of certainty intended.

Interestingly enough, the United Kingdom precedent provides a focus on the possible unexpected results that may arise from a combination of these

two drafting techniques. Like the Barbados scheme, that precedent specifies in a schedule the government departments and other authorities that may be investigated by the Parliamentary Commissioner.

Unlike the Barbados scheme, however, it speaks in terms of "action taken by or on behalf of a government department or other authority"²⁹ listed in the schedule.

On the basis of earlier observations, it is suggested that these terms would admit of the agency concept, and that, given the Saskatoon Board's situation, bodies not specifically mentioned in the schedule could conceivably be made amenable to the Parliamentary Commissioner's jurisdiction. Indeed, the position of the Bank of England, an institution analogous to the Barbados Central Bank, is a case in point.

Gregory and Hutchesson, in their review of the United Kingdom scheme, have stated as follows:

... one authority not listed in Schedule 2 which has several times been investigated by the Commissioner in the capacity of agent for a government department is the Bank of England acting on behalf of the Treasury.

On occasions, when complainants (or their Members) have argued that authorities not included in Schedule 2 nevertheless act as the agents or officers of government departments, the object, patently enough, has been to draw the Commissioner into areas from which the authors of the scheme clearly intended to exclude him. The position of magistrates is a case in point. It was suggested to the first Commissioner that because they are appointed by the Lord Chancellor, during the exercise of at least some of their functions, magistrates are therefore acting as agents or officers. And since the Lord Chancellor's Department is subject to investigation (it was argued) the Commissioner is entitled to inquire into complaints against magistrates.³⁰

Although, these statements do not allude to the situation which gave rise to these arguments, they nonetheless clearly support the suggestion that where drafting or legislative mechanisms, such as the ones jointly employed by the United Kingdom scheme, but partially adopted by the Barbados scheme, are not skilfully utilised, they not only give rise to surprising arguments, but at times can produced unexpected results.

As to the second question, it seems clear that the prohibitive and restrictive nature of Exchange Control procedures is such as to bring the administering agency directly into contact with members of the public. Since the primary role of the administrative agency in this area of financial activity is to regulate monetary dealings within the country, the members of the public can be perceived as "victims rather than beneficiaries" of this regulatory procedure. Consequently, it would seem that this aspect of the Bank's operations provides the basis on which Professor Hill's classification may be applied. It is therefore suggested that under this classification, the Central Bank of Barbados would be characterised as a "client-attending-organization".

Conclusions

What are the conclusions therefore that may be drawn from this analysis? These appear to be as follows:

Firstly, that the scheme does not admit of the agency concept. Therefore, any statutory body which acts as an agent of any of the scheduled authorities cannot on that basis alone be subjected to an investigation by the Ombudsman. A prime exemplar is the Barbados Central Bank.

Secondly, that a "rule of thumb" basis should not be adopted in determining which organisations are most likely to come into direct contact with members of the public, but that some classification based on their functions should be the determining factor. Professor Hill's classification would seem to offer significant guidance in this area.

Thirdly, that since the purpose of the Ombudsman concept is to identify and report on injustices, those organisations which are most likely to come into direct contact with members of the public ought to be brought within the scope of the Ombudsman's powers.

Finally, these conclusions seem to suggest that the selection of the statutory bodies most suitable to the Ombudsman's jurisdiction involves much administrative detail, and that the decision to undertake that exercise after the passing of the Act was taken advisedly.

The subject-matters excluded from the Ombudsman's jurisdiction will be examined to some extent in the following chapter.

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1. For references to "department or agency", see Ombudsman Act, (New Brunswick, section 1), (Alberta, section 2(a) and (b)), and to "governmental organization" see Ontario Ombudsman Act, section 1(a).
 2. For example, see Re Alberta Ombudsman Act, [1970] 10 D.L.R. (3d), p. 47; Re Ombudsman of Ontario et al., [1979] 95 D.L.R. (3d), p. 716; Re Board of Police Commissioners for the City of Saskatoon et al., [1979] 95 D.L.R. (3d), p. 473.

3. For example, see section 12(2) of the Ombudsman Act, 1967 (Alberta).
4. Section 5(6) of the Act.
5. B.H.A. Deb. (Nov. 4, 1980), pp. 4496, 4498-99, 4500, 4512-13, 4516-17.
6. Ibid.
7. Section 5(2) of the Act.
8. Section 5(3) of the Act.
9. Ibid., section 5(4).
10. Ibid.
11. For details, see the Index extracted from the Barbados Public Service Staff List, revised to 31st December, 1980, and reproduced in Appendix A.
12. This enumeration is not exhaustive; for further details see Appendix A.
13. B.H.A. Deb. (Nov. 4, 1980), p. 4505.
14. At another stage the Attorney-General stated, "... the point raised by the Hon. Member means that I would have to consult with the various Statutory Bodies and examine more carefully, to see which ones ought, or ought not at this present stage, to come under the functioning of the Ombudsman... and we will be consulting with the Statutory Boards about their various areas to see which... could come to the Ombudsman." B.H.A. Deb. (Nov. 11, 1980), p. 4533.
15. At the First International Ombudsman Conference, in Alberta, Sir Guy Powles who was then the Chief Ombudsman for New Zealand stated that "... the initial decision as to what state organizations were to be included within the Ombudsman's jurisdiction in New Zealand and what were to be left out was made by the Attorney-General at the time on what [the Attorney-General] frankly admitted was a rule of thumb basis. The result [was] that some institutions which might have been included were left out and others which might have been left out were put in." See Report of Proceedings, Sept., 1976, p. 15.
16. The Model Ombudsman: Institutionalizing New Zealand's Democratic Experiment (Princeton, New Jersey, Princeton University Press, 1976) at p. 90. See generally, discussion at pp. 87-93.
17. Barbados Exchange Control Act, section 3(2), Cap. 71 of the Laws of Barbados.
18. [1979] 95 D.L.R. (3d), pp. 473-80.
19. Ibid., at p. 474.

20. Ibid.
21. Section 15(1) of the Ombudsman Act (Saskatchewan).
22. [1979] 95 D.L.R. (3d), p. 477.
23. Ibid., at pp. 476-77.
24. Ibid., at p. 477.
25. Ibid., at p. 478.
26. Ibid., at p. 479.
27. Ibid.
28. Ibid.
29. Section 5(1) of the United Kingdom Act.
30. The Parliamentary Ombudsman, p. 188.

CHAPTER VII

MATTERS EXCLUDED FROM JURISDICTION

As already noted, the Barbados scheme provides for specific exclusions from the Ombudsman's investigatory powers. These exclusions occupy a field of government activity which the conventional wisdom of earlier models¹ has considered it fit to remove from the reach of the Ombudsman's jurisdiction.

Since the decision to remove similar areas of activity in Barbados from the Ombudsman's reach must therefore be seen as one based on definitive policy, it is not intended to question the wisdom of the Barbados scheme in adopting the practice established by those models.

To complete the analysis of the Ombudsman's powers, or lack of powers, however, in this area of the scheme, it would, perhaps, be useful to offer some brief comments on certain aspects of these exclusions in the light of observations made during the debate of the Bill and on a few other matters that seem significant enough to warrant some comment.

During the debate, the police, personnel department, law courts and commercial contracts were referred to specifically as being matters which ought not to have been excluded from the Ombudsman's jurisdiction.²

It should be observed, however, that except for personnel matters, all these areas of government activity being specifically mentioned in the Third Schedule would come within the general description of the term "scheduled matters" devised earlier for ease of reference.

Personnel matters, on the other hand, in so far as they relate to the functioning of the Services Commissions are not mentioned in the Third Schedule, and may therefore be said to have been silently or impliedly excluded from the scheme. With this distinction in mind, all these matters will nonetheless be considered in the general way in which they were made the subject of the debate.

The Police Department

The Police, as a department of government, are listed among the scheduled authorities. Therefore, the suggestion³ that the Police are excluded from investigation by the Ombudsman must necessarily be interpreted as being directed to that area of police activity in respect of which the scheme prescribes as follows:

Action taken by or with the authority of the Attorney General or any other Minister of the Crown, the Director of Public Prosecutions or Commissioner of Police for the purposes of investigating crime or protecting the security of Barbados, including action taken with respect to passports.⁴

To begin with, it should be mentioned that although there is an obvious attempt to structure this clause in the light of the constitutional position in Barbados as it relates to the authorities involved in police activities,⁵ its provisions are similar to those appearing in the United Kingdom model.⁶ Nonetheless, the basic thrust of this clause is aimed at the investigation of crime

and matters relating to the security of the State. Admittedly, these matters constitute sensitive areas of activity in the total administration of any State and, as such, would seem to demand special treatment by countries whose constitutional pattern as it relates to these activities has crystallised before the introduction of the Ombudsman system.

In Barbados, indications are that the investigation of crime and the exercise of any discretion resulting from such investigation are matters over which the Commissioner of Police has absolute authority.⁷ The scheme would therefore seem to have acknowledged the perceived constitutional position of the Commissioner of Police as the central authority for investigating crime and for dealing with related matters.

Recognition of this position seems therefore to be the rationale behind the bifurcation of police activities into those that would readily come under the general classification of administrative functions of the police department, and those that relate essentially to the investigatory functions of the department. Thus, the sensitive area of police activities alone is removed from the purview of the Ombudsman by the device of the Third Schedule; whereas action taken in the exercise of the administrative functions of the department such as, issuing driving licences or other licences, certificates of character and like matters, would be within the Ombudsman's jurisdiction.

This manipulation seems desirable, if a conflict between these two investigating institutions is to be avoided.

Sir Guy Powles, while addressing the First International Ombudsman Conference in Alberta, made certain remarks which seem to have a significant bearing on the desirability of insulating the Ombudsman's jurisdiction, wherever

possible, from clashes with that enjoyed by other functionaries. In his address Sir Guy stated that

... the institution of Ombudsman is not operating solely or indeed substantially in a vacuum. At least in the English-speaking countries, the Ombudsman was introduced at a very late stage in the development of the constitutional framework of the countries concerned, so that in considering its appropriate jurisdiction, one has also to consider the jurisdiction of other bodies both actual and potential which might themselves be charged with performing functions which either directly conflict with those of an Ombudsman or are very similar to those of an Ombudsman. Direct conflict is obviously detrimental to the proper functioning of constitutional institutions, and so also is too close a degree of similarity since that leads to an overlapping of functions, and ultimately to institutional rivalry and conflict, and public confusion and dissatisfaction.⁸

To the extent therefore that suitable mechanisms are desirable for dealing with possible complaints against action taken by the Police Force in the discharge of its functions of preventing and investigating crime, it seems that the better option would be to see whether any such mechanisms could be incorporated into the existing complaint procedures.⁹

Apart from this area of police activity, experience in the Caribbean points to other areas in which the Ombudsman performs an effective role. For example, in Trinidad and Tobago, the area of exclusion is similar to that of Barbados, except that it does not extend to "action taken with respect to passports".¹⁰ Yet, the Ombudsman has been able to interpret his functions in such a way as to enable him to investigate a complaint against the Police that had to do with the investigation of a crime. Indeed, the Ombudsman considered the complaint to be based on "police inaction".

The complaint to the Ombudsman resulted from the refusal of the Police to take action on an allegation made by the complainant against a man

with whom she had once had a husband and wife relationship. The gravamen of the complaint was that he had assaulted her, stolen her money, clothes and shoes.

On investigation, the Ombudsman found that the Police considered the facts insufficient to secure a conviction and, in his view, "quite rightly did not proceed". The Police, however, advised the complainant to see the Clerk of Peace.

What was a matter of some concern to the Ombudsman, however, was the fact that "the Police were unable to trace a medical report at the General Hospital of a citizen who had been assaulted by another". In commenting on the action of the Police in this matter, the Ombudsman added,

Further, not even a lawful husband has any right to assault his wife. The Police are there to protect citizens. The Clerk of the Peace has as one of his functions advising persons who wish to make a complaint in the Magistrate's Court. The complainant sought protection of the Police and it seems strange that in the particular circumstances of this matter she should have been referred to the Clerk of the Peace.¹¹

Another case reported on by the Trinidad and Tobago Ombudsman relates to the non-compliance by the Police with a Court Order.¹²

The complaint against the Police was that a motor car which was seized by the Police as an exhibit in a matter had not been restored to the complainant following the dismissal of the matter, a subsequent Court Order for its return, and several requests made to the Police. Following an investigation by the Ombudsman which resulted in correspondence with the Commissioner of Police, Minister for Legal Affairs and the Director of Public Prosecutions, the car was returned to the complainant.

Although these cases provide practical illustrations of instances where the Ombudsman may legitimately intervene in police activities, it does not seem unreasonable to suggest that the distinguishing line of demarcation between police functions that are primarily administrative in nature on the one hand, and those that are investigatory on the other, will not be readily discernible in every case. It is, perhaps, in such cases that the Barbados Ombudsman may find that the facility provided by the scheme for seeking a declaratory order of the Court as to the extent of his or her jurisdiction under the scheme will have its greatest utility.

Personnel matters

The question relating to the omission of personnel matters from the scheme would seem from the tenor of the debate to have been limited to the employer-employee relationship in the Public Service. For example, references were made to public servants as being a category of person who would wish to complain to the Ombudsman.¹³ That this was the limited sense in which the reference to personnel matters was perceived is indeed reflected in the responses made by the Attorney-General.

The Minister explained that there was adequate machinery available to the public servant for the ventilation of any grievances resulting from personnel relations. The machinery for review, he pointed out, derived from the Constitution and other related regulations; and he further explained that there was an appeal procedure in disciplinary matters to the Governor-General's Privy Council.¹⁴

In addition to these constitutional mechanisms, the Minister argued that there were unions in Barbados sufficiently equipped to protect the interests

of government employees as a whole. It was therefore in the light of these alternative channels for the ventilation of grievances that personnel matters were excluded from the scheme.

It is of interest, perhaps, to note that whereas the Barbados scheme is silent on the whole question of personnel administration as it relates to the functions of the Services Commissions, other Caribbean models have sought to a greater or lesser extent to bring this area of activity within the scope of the Ombudsman's powers.

An examination of some of these models reveals that although this area of activity has been treated differently by each individual scheme, the achievement of similar objectives would seem to be the intention.

The Jamaica model, for example, empowers the Ombudsman to conduct an investigation into any reports made to a Service Commission in respect of "the appointment, removal, promotion, disciplinary control or other personnel matters. . .".¹⁵ In conducting any such investigation, the Ombudsman is, however, debarred from investigating "any decision or action of a Service Commission relating to the appointment, removal and disciplinary control of any person". This area of activity is specifically excluded from the Jamaica scheme by the use of a Schedule.¹⁶

The Jamaica effect is unequivocal. Certain aspects of personnel administration as they relate to the functions of a Service Commission in Jamaica are susceptible to the Ombudsman's jurisdiction. This would appear to be the position also in Trinidad and Tobago, Dominica and St. Lucia, except that the exclusionary formula appearing in those models seems to be wider in scope.¹⁷ Another notable variation in those models is that, unlike Jamaica, no specific reference is made to the Service Commissions.

Since the Constitutions of these States, like that of Barbados, contemplate that the functions of a Service Commission may not be inquired into in any court,¹⁸ the purpose of the manipulations in this area of personnel administration is seen as an attempt by the Jamaica and other Caribbean models to maintain a delicate balance between the constitutional positions of their respective Services Commissions and the jurisdictional powers of the Ombudsman.

Perhaps, it could be said in favour of the Barbados approach that by not attempting to prescribe for personnel matters, the scheme avoids the strains and stresses that are likely to be experienced by an Ombudsman in maintaining the balance of jurisdiction intended. For example, as in the case of the Police Department, he or she would have to be reasonably cautious not to be drawn into an investigation that might result in a clash of jurisdictions.

However, in the process of this manoeuvre, the omission of a potential area of complaint seems to have escaped the attention not only of the Barbados scheme, but also that of Members of Parliament.

As already suggested, the debate on this aspect of the Bill was focused on the employer-employee relationship in the Public Service. In addition, it was noted that explanations for the omission of personnel matters from the scheme were also based on this premise. But no concerns were expressed as to the lack of provisions to facilitate those persons who were in the category of prospective employees of the Government. Put differently, should the Barbados scheme not have provided for the person who, for example, files an application with the Chief Personnel Officer for entrance into the Public Service and for the situation where there is unreasonable delay in receiving a reply to that application, if at all?

Is this not an area which ought to have come within the reach of the Barbados Ombudsman? It would appear to be, since the reasoning for the exclusion of personnel matters as a whole seems to be limited to an employer-employee relationship and, as such, would have no application to such individuals in search of job opportunities in the Government Service.

To this extent, therefore, there would seem to be a need to devise some formula whereby this category of person could be fitted into the scheme while preserving the constitutional integrity of the Barbados Services Commissions.

Some consideration could, perhaps, be given therefore to scheduling the Chief Personnel Division, as distinct from the Services Commissions, in the same way that the Establishment Division is listed. This latter division by the very nature of its functions, i.e., establishing public offices, determining the terms and conditions of service, and dealing with related matters, would seem to come less into direct contact with the ordinary members of the public than would the Personnel Division that discharges the day-to-day recruitment functions of the Services Commissions in Barbados.

Matters relating to court proceedings

The exclusion of matters relating to the commencement or conduct of proceedings before the law courts provoked some debate. It was suggested that delays were experienced in having matters brought before and settled by the courts, and that this area ought not to have been removed from investigation by the Barbados Ombudsman.¹⁹ There was no attempt, however, to suggest that the Judiciary, as such, should be brought within the Ombudsman's jurisdiction.

Admitting that in all Commonwealth countries, there were various reasons for delays in the courts,²⁰ the Attorney-General recalled that at a conference in Jamaica in 1980, the problem of delays in the administration of justice was considered. At that conference, the participants included members of the Judiciary in the Commonwealth Caribbean States and the United Kingdom. Giving some indication as to the outcome of their deliberations, the Minister stated that "Barbados' record was the most outstanding, both on the civil side and the criminal side, in relation to the speed at which matters were adjudicated fully in the courts . . .",²¹ in the Commonwealth Caribbean and the United Kingdom. He suggested that more often than not certain delays in Barbados were caused not by the courts, but by applications for adjournments at the instance of the counsel concerned.²²

The Minister then explained the reasons for the exclusion of the courts from the scrutiny of the Ombudsman by alluding to the constitutional position of the Judiciary in Barbados, and to the principle of excluding the Judiciary adopted by other countries, including some in Scandinavia.²³

This reference to Scandinavia was undoubtedly intended to recall the fact that, although the practice of subjecting the law courts to the supervision of the Ombudsman had its origin in Sweden, and was followed by Finland, other Scandinavian countries, notably Denmark and Norway, had departed from that practice.²⁴

In terms of delays arising out of the administration of the courts, however, the Attorney-General indicated that if any case of an "inordinate delay" were brought to his attention, he would be prepared to refer the matter to the Judiciary for attention.²⁵

The issue whether or not an Ombudsman should be empowered to investigate the administrative functions of the courts is clearly one that does not admit of a resolution which is readily acceptable to divergent points of view. At least, this appears to be the case generally in common law countries that adhere to the notion of judicial independence.²⁶

There would also seem to be inherent difficulties in determining what would properly constitute administrative functions, on the one hand, and judicial functions on the other. In terms of delays, for example, how would a delay in the preparation of a court list, the assignment of cases for hearing, the hearing of cases, or a delay in the preparation and delivery of written judgments be classified?

These would appear to be some of the questions that would have to be addressed before a suitable formula could be devised for the purpose.

Assuming, however, that a reasonable classification could be determined, would an attempt to devise a suitable formula empowering the Ombudsman to investigate the administrative functions of the court not in itself arouse suspicions in the minds of some segments of the community? For example, would a suggestion that the intention was to interfere with or to erode the independence of the Judiciary not conceivably prove more attractive to certain segments of the community, than a suggestion that the intention was to provide a mechanism to relieve perceived injustices in terms of delays in the administration of justice?

The Barbados scheme, therefore, like many of its antecedents, has not attempted to bring this area of activity directly within the reach of the Ombudsman's jurisdiction.

What are the implications therefore to be drawn from this analysis? They would seem to point to the conclusion that the problem which appears to exist in the administration of the court system is a continuing one. Interestingly enough, this view would seem to be reflected in the assertion that "... the precedents in other countries, including going back to some of the Scandinavian countries, have shown that it is better to have to put up with some of the difficulties that arise in the administration of justice than to have an Ombudsman or anyone investigating judicial conduct".²⁷ Nonetheless, it is suggested that recent developments in Barbados would seem to offer the possibility of an early resolution of this problem.

The Office of Court Administrator.

The recently enacted Supreme Court of Judicature Act makes provision for the establishment in Barbados of a new office of Court Administrator. The Act declares that

The Court Administrator is an officer of the Supreme Court and is responsible under the general supervision of the Registrar for the administration and organisation of the business of the Supreme Court, the magistrates' courts and the several departments of the Registration Office.²⁸

Another innovative feature of this Act in terms of the administration of the courts is that it also establishes a Judicial Council. Quite apart from having a general responsibility for the administration of the courts, this body has as one of its specific functions the formulation of policy relating to all matters affecting the performance of the courts.²⁹

The composition of the Council will include, among other, the Judges, a Magistrate, some members of the Barbados Bar Association, and "two persons

appointed by the Governor-General from among persons who in his opinion are capable of representing the interest of the community".³⁰ Clearly the incorporation of these latter persons is intended to provide for the independent representation of the public interest.

The Council is required to forward an annual report on all matters relating to the administration of justice to the Attorney-General for tabling in Parliament; and the report is to reflect the "progress made and any problems anticipated" in the administration of justice.³¹

A few observations on certain characteristics of these provisions are necessary. For example, the Act speaks of "the administration and organisation of the business" of the courts and its related departments, and assigns this responsibility to the Court Administrator acting under the general supervision of the Registrar whose Registration Department is listed among the scheduled authorities.

From the use of the emphasised words, it would seem to be the clear intention of the Act that the Court Administrator, except for acting under the general supervision of the Registrar, is responsible simpliciter for that administrative component of the business of the courts which is necessarily associated with the administration of justice. Consequently, the duties that are allocated to this officer will undoubtedly give some definition to what can safely be said to constitute, in the broadest sense, the "administrative functions" of the courts.

For example, allocation to the Court Administrator of the functions of fixing the dates and the assignment of cases for hearing by the courts would put beyond doubt (if a doubt on the classification of these matters could reasonably be maintained at all) that these matters are considered not to be

properly within the notion of judicial functions. Indeed, there is some suggestion that there are at present some such matters that do engage more judicial attention than is considered desirable.

The Right Honourable Sir William Douglas, Chief Justice of Barbados, in his address to the 1980 Meeting of Commonwealth Law Ministers held in Barbados, directed some remarks to the problem facing the courts in the present upsurge of litigation. Suggesting possible manoeuvres to combat the problem, Sir William stated as follows:

I do not believe that increasing the number of judges proportionately to the increase in the volume of litigation affords any answer to the problem I think the answer is to relieve the Judges of those matters in which judicial expertise is not absolutely necessary, and to widen the area in which their expertise can be effectively applied by providing for support services in the form of full-time or part-time commissioners, research personnel and experienced administrative officers.

Judicial time could be better utilised, too, by the intelligent use of mechanical devices, including computers, to schedule and assign cases for hearing and to maintain proper records of pending and completed litigation.³²

The judicial attitude reflected in those statements should not only be acknowledged, but would seem to merit adoption.

It is therefore suggested that the office of Court Administrator should be utilised for the allocation of those matters that are not strictly judicial in nature. The implications of this suggestion are, perhaps, clear. Not only would such an approach remove matters which are inappropriate for judicial attention, but would also serve to bring those matters effectively within the reach of the Ombudsman since the office of Court Administrator is an integral part of the Registration Department.

As regards those aspects in the administration of justice which are undoubtedly judicial in nature, it would seem that the Judicial Council is admirably suited, because of the very nature of its composition and statutory responsibility, to deal with whatever the perceived difficulties are in this area.

From the tenor of the debate, these difficulties seem to relate not to the quality of any judicial decision, but rather to delays in rendering the decision itself. Consequently, the problem would seem to be one of a procedural nature, and to that extent, would, it is suggested, come within the competence of the Judicial Council.

As already noted, the Judicial Council is mandated to "formulate policy in relation to all matters affecting the performance of the courts".³³ Surely, it would be within the scope of this mandate if the Council were to examine the question whether or not there is indeed a need to establish machinery for investigating complaints based on procedural difficulties in the administration of justice.

If any such investigation were undertaken, the results could, perhaps, be reflected in one of the Council's reports to Parliament and thereby form the basis on which a suitable policy may be formulated with respect to this area of activity.

With these possible approaches in mind, the difficulties contemplated in establishing mechanisms to enhance the administrative efficiency of the court system would seem not to be as insurmountable as appeared at first sight. Indeed, these approaches would seem to argue that suitable provisions can be made so as to enable the Barbados Ombudsman to play an effective role, like other Caribbean Ombudsmen,³⁴ in the administration of justice.

Commercial transactions

The commercial activity of the Government has been expressly excluded from the Ombudsman's jurisdiction in these terms:

Action taken in matters relating to contractual or other commercial transactions, being transactions of a department of government not being transactions relating to

- (a) the acquisition of land compulsorily or in circumstances in which it could be acquired compulsorily;
- (b) the disposal of surplus land acquired compulsorily or in circumstances in which it could be acquired compulsorily.³⁵

By adopting these provisions, the Barbados scheme again follows the trend set by earlier models, notably the United Kingdom and some of the other Caribbean States.³⁶ Nonetheless, the exclusion of this area of government activity was seen, on the one hand, as one which should not be adopted, and on the other, that there were indeed certain considerations which dictate that such activity ought to be excluded from the Ombudsman's jurisdiction.³⁷

Since the overriding principle in the determination of this issue seems to rest more particularly on the deliberate policy of a government, than on any logical requirement, it is not intended to evaluate the weight of the arguments for the incorporation or exclusion of these matters from the scheme.

What is intended, however, is to call attention to certain words appearing in the above clause and to examine their significance.

Initially, it should be observed that the clause as a whole contemplates two situations. One, the general exclusion of governmental commercial activity from the Ombudsman's scrutiny, and the other would seem to be the exemption from that exclusion of a transaction of the kind that gave

rise to the Crichton Down affair.³⁸ Therefore, if a Crichton Down type situation were to occur in Barbados it is contemplated that it would be susceptible to the Ombudsman's investigatory powers.

It would seem, however, that the structure of the clause might initially present some difficulties in the achievement of this objective. This view derives from the use of the phrase "...being transactions of a department of government...", and the noticeable absence from this phrase of any modifiers that would indicate the intended scope of the words "department of government". For example, the intended scope that would be indicated by some such formulation as "a department of government specified in the Second Schedule".

The absence of any such modifiers is significant when viewed in the light of the overall structure of the governmental machinery in Barbados. For example, Ministries, Departments and Statutory Corporations constitute for the most part the total Government administrative machine. Indeed, the Barbados Ombudsman scheme acknowledges this organisation as reflected in its substantive provisions by references to "a government ministry, department or other authority subject to this Act", and to "the government ministries, departments and other authorities specified in the Second Schedule".³⁹

The de facto position, therefore, is that Departments and Statutory Corporations are assigned to relevant Ministries. Thus in terms of organisational structure a "Department" does not comprehend a "Ministry".

Consequently, the question that immediately arises for consideration relates to the effect of the words "department of government" appearing as they do in the clause. Given the situation where a complaint is made against the commercial activities of a Ministry, could these words be possibly open to interpretation that would result in exempting, for example, the Ministry of

Housing, Lands and the Environment from the exclusionary provisions of the scheme, and thereby bring the full range of commercial activities of that Ministry within the investigatory powers of the Ombudsman on the basis that the Ministry is a scheduled authority?

It could be argued, on the one hand, that whereas the words in themselves are capable of importing the notion of any agency by which the government implements its policies and decisions and, as such, would therefore comprehend a Ministry; nonetheless, that on a reading of the scheme as a whole, it is clear that the scheme draws a distinction between these agencies of government. Therefore, in as much as a "department" of government is mentioned specifically in the clause, the intention is clearly to exclude all others from that clause. Further, that since the issue turns on an allegation of injustice resulting from the commercial activity of the Ministry, justice would demand that a restrictive interpretation be given to the words so as to bring the Ministry within the scope of the Ombudsman's powers.

On the other hand, it could be contended that the words "department of government" are intended to be a general description comprehending all agencies of government and should therefore be given the widest possible meaning so as to achieve the legislative objective of the clause, i.e., the exclusion of all commercial activity of the government from the scrutiny of the Ombudsman.

Perhaps, the argument might be developed even further to suggest that a reference could be made to Hansard so as to establish the legislative intent embodied in the clause.

What approach therefore would a Barbadian court be likely to take to resolve the difficulty if indeed it were confronted with such a situation?

Before suggesting a likely approach, it must be recalled that whenever references were made in the substantive provisions of the scheme to the governmental agencies in Barbados, such terms as "Ministries", "Departments" or "other authorities" have been employed. It is therefore significant to note that the departure in the use of such terms in a reference to these agencies occurs only in the Third Schedule to the Act.

On the basis of this observation, it is likely that the court would perceive the issue for determination as one arising out of an inconsistency in the use of the terms in the substantive provisions of the Act and those in the Third Schedule, or, perhaps, as one of a casus omissus occurring in that Schedule.

Based on this perception, the court would probably take the view that the intention as derived from the substantive provisions of the Act must override that suggested by the language of the Third Schedule.⁴⁰ In the result, the words "department of government" would most likely be given the widest possible meaning so as to achieve the legislative purposes of the scheme, i.e., to exclude, except for the Crichton Down type situation, the contractual or other commercial activities of the Government.

It is significant to note also that in seeking to ascertain the legislative purpose of the scheme in this area of government activity, a Barbadian court would probably refuse the invitation to refer to Hansard. Indeed, it would most likely take a position similar to that of the English courts which "... regard Hansard as a closed book to which ... judges must not refer to at all, not even as an aid to the construction of statutes".⁴¹

On the basis of this reasoning, Ministries of Government could therefore be brought within the exclusionary provisions of the Third Schedule. But would a similar line of reasoning apply to Statutory Corporations and other

authorities that are ultimately to be brought within the ambit of the scheme?

To suggest that the words "department of government" could be so enlarged to bring these bodies within the ambit of those words would seem not only to apply too great a stress on the words, but also to ignore the realities of the organisational structure of the government agencies in Barbados.

The situation therefore seems to argue for an early amendment to the Act to put the matter beyond doubt.

There is one further matter which, although it does not relate strictly to what may be described as a statutory exclusion may, nonetheless, be appropriately dealt with at this stage. It relates not to an exclusion, but to the inclusion of the Audit Department among the scheduled authorities.

The Audit Department — should it be included or excluded?

The administrative head of this department is the Auditor-General, and the constitutional independence of this officer has already been briefly noticed.⁴² It is, however, necessary to note further his constitutional responsibilities and duties in the role of the government's fiscal auditor.

His constitutional responsibilities extend to auditing the accounts of all the central organs of government including those, for example, of the Supreme Court, the Senate, House of Assembly, Cabinet Office, Privy Council and Services Commissions.⁴³

The Auditor-General is under a duty to audit these accounts at least once in every year,⁴⁴ and to submit his reports on the results of that audit to the Speaker of the House of Assembly.⁴⁵ He is not subject to the direction or control of any other person in the exercise of his duties.⁴⁶ There is, however, a Public Accounts Committee which deals with the reports of the Auditor-General.

One other feature of the Auditor-General's department is that whereas at one stage in its history the department proceeded under a pre-audit system, it now discharges its duties under a post-audit system.

This is significant in terms of its contact with the ordinary members of the public in that under the current system there is little or no direct contact with the public. To this extent, therefore, on the basis of Professor Hill's classification, the Barbados Audit Department could be characterised as a "non-client-oriented" department.

This classification would further suggest that complaints against the department might be unlikely due to the nature of its functions. Indeed, in evaluating his research data in support of his hypothesis "that non-client-oriented agencies rarely would offend the public", Professor Hill concluded that "few complaints were lodged against non-client-oriented departments — even though that classification contained more departments, . . . than either of the others".⁴⁷

These observations would seem therefore to suggest that the Auditor-General's Department ought to be excluded from the scope of the Ombudsman's powers on the following basis:

- (a) Not only is the Auditor-General accorded a similar constitutional independence as the Judges, Director of Public Prosecutions, and Commissioner of Police, but he is also, like the Ombudsman, responsible only to Parliament, and reports to the House on the discharge of his functions; and
- (b) At the bottom line, his functions like those of the Cabinet Office, are not such as to bring him directly into contact with the ordinary members of the public.

It must be emphasised, however, that in some other jurisdictions, notably New Zealand, the Audit Department has been included in the

Ombudsman's jurisdiction. But it has been acknowledged that New Zealand's selection of the organisations that should be amenable to its Ombudsman's jurisdiction was made on a "rule of thumb basis".⁴⁸ In the United Kingdom, on the other hand, the Exchequer and Audit Department is not included.⁴⁹

The procedures to be applied in the investigation of those agencies and matters over which the Ombudsman has jurisdiction will be the subject of the next chapter.

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1. For example, see the New Zealand Act, United Kingdom Parliamentary Commissioner Act, and the legislation of the other Caribbean States.
 2. B.H.A. Deb. (Nov. 4, 1980), pp. 4496, 4498 and 4512-13.
 3. Ibid., p. 4496.
 4. Paragraph 4 of the Third Schedule to the Act.
 5. Under the Barbados Constitution, the Attorney-General has a limited responsibility in respect of certain criminal offences. Subject to that qualification, the Director of Public Prosecutions is responsible for criminal procedures. See sections 79 and 79A of the Constitution.
 6. Para. 5 of Schedule 3 of the Parliamentary Commissioner Act, 1967.
 7. For statements which bring the position of the Barbados Commission of police into focus, see article by Henry de B. Forde and S. Osborne, "The Office and Functions of the Attorney-General in Barbados", [1981] W.I.L.J.1, pp. 13-15. For discussion on the Police, see Wade, Administrative Law, ch. 5.
 8. Address on "The Jurisdiction of the Ombudsman" in the Report of Proceedings, p. 10, at p. 12.
 9. It is interesting to note how St. Lucia has sought to deal with complaints against the police in its Parliamentary Commissioner Bill 1982. The Bill proposes that:

(1) Where a complaint made to the Parliamentary Commissioner concerns a member of the Royal St.

Lucia Police Force the Parliamentary Commissioner shall forward such complaint to the Commissioner of Police for investigation and report.

(2) On receipt of a complaint from the Parliamentary Commissioner, the Commissioner of Police shall either investigate the complaint himself or cause an investigation to be carried out by an investigating officer and may take or cause to be taken such action in relation thereto as he considers appropriate.

(3) On completion of an investigation requested by the Commissioner, under this section, the Commissioner of Police shall forward a report to the Commissioner indicating therein any action which has been taken in the matter.

(4) On receipt of a report from the Commissioner of Police, the Commissioner may —

- (a) where action has been taken in relation to the matter which was investigated, decide that the action taken was appropriate in the circumstances; or
- (b) where no action has been taken or where the Commissioner is of the opinion that the action taken was inappropriate to the circumstances of the investigation he may carry out an investigation himself and at the close thereof indicate to the Commissioner of Police such remedial action as he considers appropriate.

10. The Trinidad provision reads "Action taken for the purposes of investigating crime or of protecting the security of the State." Para. 4 of the Third Schedule to the Trinidad and Tobago Constitution.

In this connection, it is also suggested that the words "action taken with respect to passports" appearing in the Barbados scheme ought not to be interpreted as excluding all administrative action relating to the issuing or otherwise of passports. Clearly, the exclusion only contemplates action taken for the purposes of investigating crime or protecting the security of Barbados. Perhaps, an amendment to the Barbados clause so that it would read "action so taken with respect to passports" would put the matter beyond doubt, and would also correspond with the relevant United Kingdom provision at paragraph 5 of Schedule 3 of the 1967 Act.

- 11. The Ombudsman, First Annual Report, 1978, case OMB: 78/955, p. 38.
- 12. Ibid., case OMB: 78/16, p. 30.
- 13. B.H.A. Deb. (Nov. 4, 1980), p. 4499.
- 14. Ibid., p. 4518-19.

15. Jamaica Ombudsman Act, section 12(3)(b).
16. Ibid., para. 4 of the Third Schedule to the Jamaica Act.
17. For example, the Trinidad and Tobago provision which is also followed by Dominica and St. Lucia provides in para. 8 of the Third Schedule to the Constitution for "Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters in relation to service in any office or employment in the public service or under any authority as may be prescribed."
18. See, for example, Trinidad and Tobago Constitution, section 129(3); Barbados Constitution, section 106.
19. B.H.A. Deb. (Nov. 4, 1980), pp. 4495-96, 4512-13.
20. Ibid., p. 4513.
21. Ibid.
22. Ibid.
23. Ibid., p. 4514.
24. Supra note 6, p. 6.
25. B.H.A. Deb. (Nov. 4, 1980), p. 4514.
26. For some observations on "Judicial Independence", see the address of the Rt. Hon. Bora Laskin, Chief Justice of Canada, to the Meeting of Commonwealth Law Ministers, Winnipeg, August 1977, in Minutes of Meeting (London: Commonwealth Secretariat), pp. 5-9.
27. B.H.A. Deb. (Nov. 4, 1980), p. 4514.
28. Supreme Court of Judicature Act, 1981 (Act 1981-27), section 76(2).
29. Ibid., section 93(1)(a).
30. Ibid., para. 1 of the Third Schedule to the Act.
31. Ibid., section 93(4).
32. Minutes of the 1980 Meeting of Commonwealth Law Ministers (London: Commonwealth Secretariat), p. 3-6, at p. 5.
33. Supra note 29.
34. The Second Annual Report of the Trinidad and Tobago Ombudsman reflects that a number of complaints against the Judiciary have been entertained,

and appropriately dealt with, by the Ombudsman: see, for example, Table 4 "Subjects of Complaints — Judiciary", pp. 23-26.

An interesting illustration of the Ombudsman's potential in the administration of justice is also provided in the 1980 report of the Jamaica Ombudsman. (See extract from the Report on the matter in Appendix B).

35. Para. 7 of the Third Schedule to the Act.
36. For example, Trinidad and Tobago, Dominica and St. Lucia, but not Jamaica.
37. B.H.A. Deb. (Nov. 4, 1980), p. 4519.
38. Wade, Administrative Law, supra note 7, p. 62. See also J. F. Garner, Administrative Law, 4th ed., (London: Butterworths, 1974), p. 24, note 13.
39. Section 5(1), (2) and (3) of the Act.
40. The point has been made that Schedules must be carefully drafted since they are referred to on the interpretation of an Act. Consequently, if there is any variance "between the body of the Act and the Schedule, the former prevails". See Sir Alison Russell, Legislative Drafting and Forms, 4th ed., (London: Butterworth and Co. Ltd., 1938), p. 52, and see generally, Elmer A. Driedger, The Construction of Statutes, pp. 117-119, supra note 66, page 80.
41. Per Denning L.J., R. v. Local Commissioner for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council, [1979] 2 All E.R. 881, at p. 898.
42. Supra pp. 36-37.
43. Constitution of Barbados, section 113(2).
44. Ibid.
45. Ibid., section 113(3).
46. Ibid., section 113(4).
47. Hill, The Model Ombudsman, p. 91 and see also Table 4-3 at p. 92.
48. Supra note 15, p. 105.
49. See omission from the departments and authorities listed in Schedule 2 of the 1967 Act.

CHAPTER VIII

INVESTIGATORY PROCEDURE

The procedures to be followed in conducting an investigation under the Barbados scheme are basically similar to those adopted by earlier Caribbean precedents and others elsewhere.¹

Mechanisms for initiation

The scheme maintains the complaint orientation of the Ombudsman system by prescribing that the Barbados Ombudsman "shall not make an investigation without first receiving a written complaint in accordance with [the] Act...".²

This basic requirement for invoking the Ombudsman's jurisdiction is somewhat modified by a provision in the scheme to the effect that an investigation may be initiated in circumstances where the Ombudsman "is of opinion or either House of Parliament resolves that there are reasons of special importance... " that demand an investigation "in the public interest".³

It is significant to note that these modifying provisions present features that are again peculiar in terms of a Caribbean context to the Barbados

scheme.⁴ For example, the comparable provisions⁵ in other Caribbean schemes, except in Jamaica, speak generally in terms of:

where a member of the House...requests the Ombudsman to investigate the matter on the ground that a person or body of persons specified in the request has or may have sustained . . . injustice;

in any other circumstances in which the Ombudsman considers that he ought to investigate the matter on the ground that some person or body of persons has or may have sustained . . . injustice.

These provisions would seem to have been designed with two basic principles in mind. One to reflect the principle that an elected member of Parliament has a right to take up the grievances of the individual, and the other, that the Caribbean Ombudsmen, like their Scandinavian and New Zealand forebears, should be accorded the power to initiate investigations on their own motion.

In terms of principle, it is perhaps desirable in the light of the constitutional background of the English-speaking Caribbean States that the right of a member of Parliament to take up grievances on behalf of the citizen be recognised in the Ombudsman schemes. In terms of reality, however, this principle, reflected as it is by the wording adopted by these schemes, would seem to leave the Ombudsman open to the danger of being drawn into a matter which is likely to be based more particularly on political considerations than on the desire to have the grievance of the individual redressed.⁶

In such a case, the Ombudsman might possibly wish to consider whether the matter is one in respect of which he or she ought to exercise a discretion not to investigate. Nonetheless, whatever the decision, it would undoubtedly be a delicate one.

As to the Ombudsman's power to initiate investigations on his or her own motion, these provisions reflect no guidance as to the circumstances under which this power should be exercised. It therefore follows that the question whether or not to conduct an investigation in the absence of a complaint or request by a member of Parliament is again one to be determined in accordance with the Ombudsman's own discretion.

However, if some guidance is to be derived from experience elsewhere,⁷ it indicates that this power has been exercised effectively as a result of press reports suggesting the occurrence of some kind of administrative inefficiency in the particular country.

The Barbados scheme has clearly sought to reflect the basic principles embodied in the foregoing provisions. In addition, it would also seem to have sought to improve on the adaptation of those principles by importing a further test to define the circumstances within which they are to be applied.

Under the other schemes, an investigation whether at the instance of a member of Parliament or on the Ombudsman's own motion, is to be based on "the ground that a person or body of persons . . . has or may have sustained" an injustice. These provisions would seem to imply that the considerations which they contemplate are to be limited primarily to the interests of the persons concerned. Put differently, the test to be applied in any given case under those provisions would seem to depend largely on an element of subjectivity.

On the other hand, the Barbados formulation is to the effect that in the absence of a written complaint, the Ombudsman may initiate an investigation if "he is of opinion or either House of Parliament resolves that there are reasons of special importance which make investigation . . . desirable in the public interest". These provisions seem not only to contemplate the interests of the

person concerned, but also those of the community at large. Therefore, before an investigation is undertaken by the Barbados Ombudsman under this procedure, an additional test based on an element of objectivity (i.e., by reference to the "public interest") must be satisfied.

The reference to the public interest seems therefore to be a clear statement to the Ombudsman and members of Parliament that this procedure should not be applied to the kind of injustice which may perhaps be described as being sustained in the ordinary circumstances of the administrative process, as for example, delays in that process which may be taken up on a written complaint.

If indeed this is the aim of the Barbados adaptation, it would seem that in terms of a reference from members of Parliament, the scheme is deliberately attempting to insulate the Ombudsman from the likely dangers alluded to earlier. Consequently, a member of Parliament who wishes to exercise his right to take up the grievance of an individual citizen must ventilate that grievance on the floor of the House and show that the extent of the injustice is such as would give rise to public disquiet.

However, it is only where the member wins the support of the House, that the matter will be referred to the Ombudsman for investigation.

This procedure clearly has the potential to minimise the likelihood of the Ombudsman being drawn into an investigation which could conceivably arise out of some political controversy, and to that extent, it would seem to provide a further mechanism for maintaining the independence of the Ombudsman. Indeed, the emphasis which the Barbados scheme places on this notion is clearly reflected in the following provision:

In deciding whether to make, continue or discontinue an investigation authorised by this Act the Ombudsman shall in all cases act in accordance with his own discretion which shall not be questioned. . . .⁸

In the face of such unequivocal language, i.e., "in all cases", it is clear that even where either of the Houses of Parliament in Barbados resolves that a matter should be investigated by the Ombudsman, he or she may refuse to investigate the matter that is so referred. Even the New Zealand model does not go that far.⁹

As to what instances would justify the application of this procedure in the public interest, it is suggested that these would be akin to those giving rise, for example, to the Crichton Down affair, or to the recent occurrences at the Barbados prison resulting from complaints alleging "poor food, inadequate living conditions and a lack of exercise".¹⁰

It must, however, be emphasised that even where an Ombudsman scheme does not specifically import the "public interest test", it would seem that in practice the public interest will nonetheless become a determining factor.

This view derives from observations made by the New Zealand Chief Ombudsman. Noting that in New Zealand, an investigation may be made on a complaint or on the Ombudsman's own motion, the Ombudsman observed that the New Zealand scheme does not provide any guidance as to the circumstances in which an Ombudsman should take up an investigation on his own motion, and that the Ombudsman therefore "...is left to rely on his own judgment". Commenting further on the matter, he added:

It has always seemed to me a good working rule that if public allegations of impropriety are made against an organisation within the Ombudsman's jurisdiction he should give serious thought to investigating them in the interests of the public and of the organisation concerned. If they are not promptly

and satisfactorily rebutted, if it seems that they might be substance, and if they provoke sustained public controversy, there is, in my view, a strong case for investigation. Only if it turns out that some other form of independent inquiry is to be undertaken, should the Ombudsman be dissuaded from intervention.¹¹

These statements seem particularly significant to the Barbados approach to this aspect of the Ombudsman system. They would seem to suggest that by prescribing specifically for a reference to the public interest, the guidance provided to the Barbados Ombudsman in the application of the "own motion" procedure is undoubtedly more certain. Consequently, the suggestion that the scheme has improved on these principles in the Ombudsman system would seem to be reasonably maintainable. However, the practical effect of this improvement as it relates to references from Parliamentarians remains to be seen in the light of an amendment which was conceded during the passage of the Bill. That amendment and its significance will be considered at a later stage.

Complaint requirements

A citizen or resident; or any person who had been in Barbados at the time of the alleged injustice, is competent to complain to the Barbados Ombudsman. This eligibility extends to a "body of persons whether incorporated or not". But, as elsewhere, government bodies are not competent to complain.¹²

The period within which a complaint may be made is twelve months from the day on which the complainant first becomes aware of the facts giving rise to the complaint. The Ombudsman has a discretion, however, to extend this period in the peculiar circumstances of any complaint.¹³

The scheme further stipulates that the complaint may be made by the "person aggrieved or his duly authorised agent". However, where the aggrieved

person has died before the complaint is taken up, it may be made by the personal representative or such other suitable person as the Ombudsman determines.¹⁴

It is worth noticing that as originally drafted, the scheme had provided for the complaint to be made by the "person aggrieved himself, except that where he had died or is for any reason unable to act for himself, the complaint may be made on his behalf by his personal representative or by such other suitable person as the Ombudsman determines".¹⁵

During the early stages of the debate, some concern was expressed as to the possible impact of the legislation on the role of the member of Parliament as an agency for taking up the grievances of his or her constituent.¹⁶ Referring to the relevant clause of the Bill,¹⁷ the Attorney-General argued that the complainant was accorded the right to approach the Ombudsman directly, and where the complainant was unable to do so, he or she could complain through anyone including his member of Parliament. That member of Parliament, he contended, could then bring the matter before Parliament and have it resolved that it was a matter that ought to be referred to the Ombudsman for investigation.¹⁸

In the light of observations already made in relation to the mechanisms for initiating an investigation under the scheme, it is suggested that there was merit in these arguments.

Interestingly enough, however, when the above draft clause was finally called, certain members of Parliament took the view that the wording was too restrictive. Indeed, it had been argued that the wording had imported an "incapacity" before anyone could act on the aggrieved person's behalf. Ultimately, it was suggested that the draft provision should be amended to permit a complaint to be made by the aggrieved person "or by his agent".¹⁹ The

insertion of these latter words was perceived as permitting a "Parliamentarian on behalf of his constituent to make a complaint".²⁰

Notwithstanding his earlier views on the matter, the Attorney-General agreed in principle to the amendment. The clause as finally approved by Parliament prescribes that

A complaint may be made by the person aggrieved or his duly authorised agent; and when the aggrieved person has died, the complaint may be made on his behalf by his personal representative or by such other suitable person as the Ombudsman determines.²¹

On the basis of earlier observations, it is suggested that in principle this provision adds little to advance the position of the member of Parliament beyond that already secured by earlier provisions. Under those provisions the member is entitled to ventilate the particular grievance on the floor of the House. On the other hand, if the essential purpose of the amendment is to secure not only the right of the member of Parliament to process a complaint on behalf of the aggrieved person (which would seem never to have been in doubt), but also that member's right to represent the person's interest before the Ombudsman, then any such right of representation would seem to be more apparent than real, in that the Ombudsman is empowered to determine whether any person should be represented in an investigation by an "Attorney-at-law or otherwise".²²

Nothing would seem therefore to have been achieved by the amendment in terms of improving the original conception of the scheme in this area. Nonetheless, its practical implications on the earlier provisions, which it is suggested have the potential of minimising the likelihood of the Ombudsman's involvement in political controversy, remain to be seen.

Discretionary power to investigate

As noted earlier, the scheme imposes no restrictions on the Ombudsman's discretion in deciding whether or not to initiate, continue or discontinue an investigation into a complaint within his or her jurisdiction.²³ It particularly prescribes that the Ombudsman may also refuse to investigate any matter that is trivial, where the complaint is frivolous, vexatious, or not made in good faith, or where the complainant does not have a sufficient interest in the complaint.²⁴

The Ombudsman is, however, restricted to some extent from investigating any matter where the complainant would at any time have had a remedy or right of appeal in a court of law tribunal or similar body.²⁵ But the Ombudsman may investigate where there are special circumstances which suggest that the complainant could not "fairly" be expected to have had recourse to that remedy or right of appeal.²⁶

Refusal to conduct an investigation into any allegation is not questionable.²⁷ On the other hand, a decision to investigate is not affected by a privative clause in any law in Barbados, except the Constitution, respecting the review of a decision in any matter.²⁸

Although these provisions generally reflect the principles embodied in other schemes, there is one variation which would seem to be worthy of at least a brief comment.

A common feature in all the schemes that have already been referred to is the provision that prohibits the Ombudsman from investigating any matter in respect of which there is a remedy or right of appeal available to the complainant before any court, tribunal or like body. This provision is evidently designed to avoid, as far as practicable, an overlap or conflict between the

Ombudsman system and the legal system. It is, however, considered that some degree of overlap is unavoidable.²⁹

Consequently, in all cases, there is an overriding provision that permits the Ombudsman to conduct an investigation if satisfied that in the peculiar fact-situation, it was not "reasonable" to expect the complainant to have resorted to the remedy.³⁰

These provisions as they appear in the United Kingdom scheme have provoked the comment that "[they] must be particularly difficult for the non-lawyer to operate". The commentator further asserted that the overriding "... subsection certainly bristles with problems"; and he gave his reasons as follows:

In the first place, it requires a comprehensive knowledge of administrative law to know in a borderline case whether a legal remedy exists — and this may often be a question of doubt and difficulty. In the second place, considerable legal knowledge will be needed in many situations to decide whether it is reasonable (emphasis added) to expect the legal remedy to be used.³¹

That these perceived difficulties are not illusory is borne out by the experience of the Jamaica Ombudsman as reflected in his letter to the Editor of the Jamaica Daily Gleaner. In that letter, the Jamaica Ombudsman was responding to a question raised by that newspaper relative to the exercise of his jurisdiction to investigate a complaint based on the arrest and detention of a fifteen year old boy.

After dealing with the issue as raised in detail, the Ombudsman pointed out that his office was confronted with a problem more difficult than the one raised by the editorial. He stated his experience in these terms:

... a more difficult question for our resolution was the possibility of contravening the provisions of Section

12(2)(a) of the Ombudsman Act which precludes us from investigating any action for which the complainant has or had a remedy by way of proceedings in any court or any tribunal set up by or under an Act of Parliament. While it is true that in this case . . . (sic) may well have had remedies in Court by way of habeas corpus proceedings or an action for false imprisonment (to name but two examples), Section 12(3)(a) of the Act provides that even where there is or was a remedy by way of court proceedings, the Ombudsman may still investigate the matter if he is satisfied that in the particular circumstances it is not reasonable (emphasis added) to expect the complainant to take or have taken such proceedings. We satisfied ourselves that in . . . 's circumstances it would have been unreasonable to expect him to have taken and to take these proceedings (at any rate with the alacrity the matter required) and acted accordingly.³²

It is significant to note that the traditional pattern of all these schemes has been to import the notion of "reasonableness" as the factor which would indicate whether the Ombudsman should exercise the discretion to investigate in the particular circumstances of the complainant. In strict legal terms, it is clear that the burden of establishing an inability to make use of the review machinery otherwise available would technically be on the complainant. Therefore in circumstances which are not as dramatic as those that confronted the Jamaica Ombudsman, that burden could conceivably prove to be very difficult for the complainant to discharge.

In devising its corresponding overriding provision, the Barbados scheme has departed from the traditional use of the word "reasonable". Instead, it has chosen to use the word "fairly".³³ What therefore is the significance of this choice or movement away from the traditional trend?

Barbados' movement away from the traditional notion of "reasonableness" in this aspect of the Ombudsman system to one of "fairness" would seem to be a deliberate attempt to minimise the difficulties perceived,

and indeed experienced, in the administration of the provision in the earlier precedents.

It is therefore suggested that the notion of fairness would enable the Barbados Ombudsman to intervene more readily despite the existence of a legal remedy in any given case on the ground of what could perhaps be described as the application of a "new equity". For example, should the Barbados Ombudsman be confronted with a situation similar to that presented to the Jamaica Ombudsman, it would seem that he or she would experience less difficulty in coming to the conclusion that a hardship would result if the complainant were required to exhaust his available legal remedies to ensure his early attendance before a court to answer the charges brought against him. The implication here is perhaps clear. The burden of satisfying the requirements of the Barbados provision would seem to be less onerous for the complainant.

Conducting the investigation

Before conducting an investigation under the scheme, the Barbados Ombudsman, like others elsewhere, is required to grant the principal officer of the scheduled authority concerned an opportunity to comment on the allegation which is the subject of the complaint. This requirement also extends to any other person against whom the allegation is specifically made.³⁴

Consequently, the scheme ensures that the person whose conduct is impugned is given the earliest possible opportunity to correct or contradict the allegation. Such an opportunity might even dispense with the need for an investigation if the explanations are satisfactory to the Ombudsman. In some other schemes, for example, in New Zealand and some other Caribbean States, the stress for maintaining this obvious principle of natural justice would seem to

be focused more particularly at the reporting stage, i.e., where the Ombudsman as a result of the investigation intends to make an adverse comment or recommendation. On the other hand, if these schemes contemplate that the opportunity should be given before an investigation is initiated, then the language is not as direct as that of Barbados.³⁵

However, by specifically requiring the opportunity to be given "before making an investigation",³⁶ the Barbados scheme would seem to be attempting to apply the principle of procedural justice³⁷ to the Ombudsman's investigatory (as distinct from reporting) powers. This requirement must therefore be seen as one aimed at fairness in the investigatory process and, to that extent, it is suggested that the scheme has again adopted a most desirable feature. In this regard, it is worth noticing also that the United Kingdom precedent would seem to reflect a similar feature, but the language employed is not as explicit as that of Barbados.³⁸

In other respects, the Barbados scheme adopts provisions that correspond to those relating to the conduct of an investigation elsewhere. For example, the investigation must be conducted in private and inquiries may be made of any person in accordance with whatever procedure the Ombudsman considers appropriate. The scheme further prescribes that no one is entitled as of right to be consulted or heard in the process of investigation, except in the manner prescribed by the Act. Indeed, as already observed, the Ombudsman is empowered to determine whether or not any person should be represented legally or otherwise in an investigation.³⁹

Access to information and premises

Except for some restrictions which may be applied, the Ombudsman in order to facilitate an investigation may require any Minister, officer or member of a scheduled authority or any other person including the complainant to supply information, produce documents, attend before the Ombudsman for questioning, or to allow access to the premises of a scheduled authority.⁴⁰

These are very wide powers and their adoption is evidently indispensable to any Ombudsman scheme. Indeed, the power to gather information and of access to premises could, perhaps, be described as the very essence of the Ombudsman's effectiveness as an investigatory agency. It is significant to note that in the exercise of the powers to gather information, the Barbados Ombudsman has the same powers as the High Court; and he may not only question the officials of the scheduled authority concerned, but also the Minister. In this regard, of all the schemes noted, Barbados alone follows the more radical approach exhibited by the United Kingdom precedent in this area.⁴¹ Thus, in questioning a Minister, the Barbados Ombudsman may clearly elicit from that Minister the reasons for or the policy of a decision.

As to the restrictions applying to the exercise of the powers of access, these take effect only where the Attorney-General certifies that the access to the information or premises should be denied on certain specific grounds; for example, that access might involve the disclosure of Cabinet deliberations or might be prejudicial to the security of Barbados.⁴² On the whole, the specific grounds follow those applying elsewhere.

Where these restrictions are not applied, access to information cannot be denied the Ombudsman on the ground that its disclosure would be contrary to the public interest.⁴³ In other words, the plea of Crown Privilege

cannot be raised to frustrate an investigation, but requirements for secrecy generally apply.⁴⁴

To support these extensive powers to obtain information, the Barbados model has adapted the provisions appearing in the United Kingdom precedent that contemplate contempt proceedings.⁴⁵ Where a person unlawfully obstructs an investigation or fails to act according to a lawful request by the Ombudsman, the matter may be certified by the Ombudsman for the attention of the High Court which, after hearing any person that ought to be heard, may punish the person concerned "in the same manner as for contempt of court".⁴⁶ Thus, contempt powers remain with the court where they belong. Elsewhere, the obstruction or failure is treated as a summary offence.⁴⁷

How the Ombudsman is to account for his or her functions will be noticed in the next chapter.

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1. See, for example, the New Zealand, New Brunswick and Quebec schemes.
 2. Section 6(1) of the Act.
 3. Ibid.
 4. It should be noted that the New Zealand model provides for a reference from a Committee of the House of Representatives and that such Committee may give the Ombudsman "special directions". It appears that the Ombudsman cannot refuse to investigate the matter referred. See section 13 of the New Zealand Act. This principle has also been reflected in Canada. See, for example, the New Brunswick Act, section 13.
 5. See, for example, the Constitutions of Trinidad and Tobago, Dominica and of St. Lucia, sections 93(2)(b) and (c); 110(3)(b) and (c); and 112(3)(b) and (c) respectively. Whereas, the Jamaica Act provides for an investigation "... by an Ombudsman on his own initiative or on a complaint..."; see section 13.

6. For an expression of a similar view, see Frank Stacey, The British Ombudsman, (Oxford: Clarendon Press), pp. 109-10.
7. For example, in Sweden and Denmark; see Frank Stacey, Ombudsmen Compared, pp. 6, 7 and 23.
8. Section 6(2) of the Act.
9. Section 13(4) of the New Zealand Act provides:-

Without limiting the foregoing provisions of this section, it is hereby declared that any Committee of the House of Representatives may at any time refer to an Ombudsman, for investigation and report by an Ombudsman, any petition that is before that Committee for consideration, or any matter to which the petition relates. In any such case, an Ombudsman shall, subject to any special directions of the Committee, investigate the matter so referred, so far as they are within his jurisdiction. . . .

10. See the editorial, "Probing the Prison" in the Barbados Sunday Advocate-News of May 16, 1982. According to this article, the Barbados Attorney-General has appointed an investigator to look into the conditions at the prison institution and to report to him on the matter.
11. See extract from the New Zealand Ombudsman's Report for 1981, in the Commonwealth Law Bulletin, January, 1982, under the rubric "Own Motion Investigations", at pp. 309-10.
12. Section 8(1) of the Act.
13. Ibid., section 8(5).
14. Ibid., section 8(2).
15. B.H.A. Deb. (Nov. 4, 1980), p. 4502.
16. Ibid., p.4500.
17. Now section 6 of the Act.
18. B.H.A. Deb. (Nov. 4, 1980), p. 4503.
19. Ibid., p. 4526.
20. Ibid., p. 4527.
21. Section 8(2) of the Act.

22. Ibid., section 9(3).
23. Supra note 8.
24. Section 6(2) of the Act.
25. Ibid., section 7(1).
26. Ibid., section 7(2).
27. Ibid., section 6(2).
28. Ibid., section 5(5).
29. Wade, Administrative Law, p. 85.
30. For example, see the proviso to section 5(2) of the United Kingdom Act.
31. Wade, "The British Ombudsman: A Lawyer's View", p. 150.
32. Second Annual Report of the Parliamentary Ombudsman for Jamaica, 1980, at pp. 96-97. See generally letter reproduced in its entirety in Appendix C, and also Appendix B in this connection.
33. Section 7(2) of the Act.
34. Ibid., section 9(4).
35. The New Zealand Act, section 22(7) states, "... an Ombudsman shall not, in any report made under this Act, make any comment that is adverse to any person unless that person has been given an opportunity to be heard". This provision has been followed basically by Guyana and Trinidad and Tobago. See section 3(1) in each of the respective Ombudsman Acts.
36. Section 9(4) of the Act.
37. See discussion in Wade, Administrative Law, supra note 29, chs. 13 and 15.
38. See section 7(1) of the United Kingdom Act. The comparable Jamaica provision is similar in structure. See sections 17(1) and (5) of the Jamaica Act.
39. Supra note 22.
40. Section 10(1) of the Act.
41. See section 8(1) of the United Kingdom Act.
42. Section 10(3) of the Act.
43. Ibid., section 10(4).

44. Ibid., section 11.
45. Ibid., section 12; see also section 9 of the United Kingdom Act.
46. Section 12 of the Act.
47. For example, in New Zealand, Guyana, Trinidad and Tobago, and Jamaica.

CHAPTER IX

THE OMBUDSMAN'S ACCOUNTABILITY

After conducting an investigation, the Barbados Ombudsman is required to follow a set procedure in terms of the results of the investigation, and of his or her responsibility to Parliament for the general discharge of the functioning of the office.

Reporting results on written complaints or otherwise

In the case of an investigation initiated on the basis of a written complaint, the Ombudsman must report the result of the investigation to the complainant.¹ A copy of the report must also be despatched to the principal officer of the scheduled authority concerned, and to such other persons as the Ombudsman thinks the circumstances warrant.² It is also a procedural requirement that an opportunity be given to the scheduled authority or any person whose conduct will be the subject of an adverse comment to be heard in that connection before the report is made.³ This provision is clearly designed to observe the principles of natural justice at the reporting stage.

In the event that a decision is taken not to investigate, or to discontinue an investigation, the Ombudsman is also required to report to the

complainant his or her reasons for that decision.⁴ Clearly this affords the opportunity to gauge whether the discretion was judicially exercised.

On the other hand, where an investigation was initiated at the instance of the Ombudsman, or of a resolution of either House of Parliament, a report must be sent to Parliament or to either House, as the circumstances demand.⁵

It should, however, be noted that the scheme does not prescribe for the likely event of the Ombudsman refusing to investigate a matter referred by resolution of either House of Parliament, or deciding to discontinue an investigation initiated on the basis of such a referral, or on the Ombudsman's own motion.

Nevertheless, it is suggested that the Ombudsman would be under an implied duty to report the reasons for any such refusal or discontinuance to the relevant House. In the case of a discontinuance of an investigation on the Ombudsman's own motion, it is further suggested that a similar duty would apply with respect to a report to each House of Parliament.

As to the circumstances that would suggest the discontinuance of an own motion investigation, these might perhaps be more clearly illustrated by reference to a factual situation reflected in the 1981 report of the Chief Ombudsman for New Zealand. There, the Ombudsman states as follows:

In June 1980 allegations of impropriety were made against Ministers of the Crown and the Marginal Lands Board by a member of that body who felt obliged to resign because of his concern over the issues he had raised. His allegations provoked public discussion as well as debate in the Legislature. While ministers of the Crown are not subject to my jurisdiction, the Marginal Lands Board is named in the Schedule to the Ombudsman Act and, in the absence of any indication that the allegations against the board were to be the subject of any other inquiry, I decided to investigate

those matters which fell within my jurisdiction. I notified the board and the Minister of Lands accordingly. Shortly thereafter the Government announced its intention to set up a Commission of Inquiry into the affair but without at that stage stating its terms of reference. Accordingly I raised with the Prime Minister the question whether those terms would be wide enough to embrace the matters within my jurisdiction and, having satisfied myself that they would, I discontinued my investigation.⁶

Contents of reports

As already observed,⁷ the Ombudsman must state in the report whether or not there was an injustice as alleged, and if there was, whether the injustice was sustained as a result of administrative misconduct. If indeed it was so sustained, then the Ombudsman may recommend a suitable remedy, which, as earlier suggested,⁸ could in the ordinary case include a mere apology, a review of the decision taken, a financial remedy, or even a recommendation for no remedy at all; as for example, where the agency concerned had taken action to the satisfaction of the complainant before the reporting stage. Exceptionally, the report could conceivably include a recommendation for the conduct of further investigations in a particular case with a view to the institution of criminal proceedings, as will be seen later.

Annual reports

The Barbados Ombudsman's accountability to Parliament is rendered in each calendar year by a general report on the performance of his or her functions.⁹ The scheme further prescribes that the "... Ombudsman may, from time to time, prepare ... such other reports" for tabling in Parliament as the Ombudsman thinks fit.¹⁰

It is to be noted that the scheme unlike others elsewhere, makes no mention of a "special report", the purpose for which, as derived from the relevant provisions, is to invite "the special attention of Parliament" to a particular case.¹¹

The Jamaica Ombudsman's Special Report to Parliament on the arrest and detention of the fifteen year old boy is a case in point. But, it is suggested that there is nothing in the Barbados scheme to prohibit the Ombudsman in those "other reports" which may perhaps be described as "interim reports" from calling Parliament's attention to a matter of an exceptional nature. Indeed, quite apart from empowering the Ombudsman to prepare the interim report for tabling in Parliament, the scheme specifies that the Ombudsman may include reports on "the inequitable or unreasonable nature or operation of any enactment or rule of law", and on any injustice that has been sustained and has not been or will not be remedied or compensated.¹²

The Ombudsman also has a discretion whether or not to "name or refrain from naming any person" in the report;¹³ and all reports must be submitted to the Speaker of the House of Assembly and to the President of the Senate who shall each cause them to be tabled in the respective Houses of Parliament.¹⁴

This channel of communication with Parliament is the result of an amendment conceded during the debate;¹⁵ and it appears to be a most desirable feature to have in the scheme in view of the Ombudsman's responsibility to Parliament. Indeed, it follows the existing procedure applicable to the Barbados Auditor-General in his reporting functions to the House of Assembly.¹⁶

It is worth noticing also that during the latter stages of the debate, a question was raised as to the "final disposition of findings by the

Ombudsman".¹⁷ In this regard, the observation was made that the scheme did not empower the Ombudsman "to prosecute"¹⁸ on the basis of his or her findings; and that the Bill gave "no undertaking that after a report [had] reached Parliament that anything else must happen".¹⁹ The Attorney-General was therefore asked to rationalise these features, or lack of features, in the scheme.

In response, the Attorney-General explained that

...if the Ombudsman's Report [disclosed] that a criminal offence has been created, obviously, his Report would not only be laid in Parliament but the Director of Public Prosecutions would take notice of it. The relevant Minister under whose Portfolio the Ombudsman comes would have a duty as well as the Attorney-General, for that matter, to draw the Report to the attention of the Director of Public Prosecutions.²⁰

It is suggested that, subject to an observation to be made at a later stage, these statements seem to describe the approach which the Ombudsman as a responsible investigating agency would be expected to adopt. Clearly, the logic of the scheme must imply that where the Ombudsman finds that an injustice had been sustained as a result of administrative misconduct which is so unreasonable as to be corrupt, the Ombudsman would be expected as a matter of duty to incorporate that finding in a report to Parliament for the attention of the appropriate authority.

Is this not the approach which a Director of Audit or an Auditor-General would take in a case of a finding of misappropriation of government finances? Yet, no suggestion is heard, at least in Barbados, that the Auditor-General should be empowered to prosecute in such circumstances.

However, since questions of this kind and of the Ombudsman's lack of power to investigate corruption²¹ have been raised to detract from the Ombudsman's potential as an effective mechanism for vindicating the rights of

the individual citizen against the State, it is perhaps appropriate at this stage to recall what the Constitution Commission of Trinidad and Tobago had to say about investing the Ombudsman with power to investigate corruption. The Report on this matter states as follows:

A further issue is raised whether an Ombudsman or Commission with the same powers should be authorised to investigate allegations of corruption in public office. It is recognised that to do so would be a departure from the ordinary concept of the institution as it has developed thus far. It is something new. But it is worth examining.

The argument for giving the suggested authority may be summed up as follows. In an increasing number of countries there is a fairly widespread feeling that many public officials are corrupt. The popular term used here for describing such corruption is "bobol". Usually, it is difficult to get the person aggrieved or otherwise concerned to report the matters to the police since either they are themselves involved or they fear victimisation in the future. Apprehension of widespread corruption breeds a lack of respect for authority and a cynicism which inhibit the drive for community development. Hence, if allegations of corruption, whether made by persons aggrieved or not, can be vigorously pursued by an able and dedicated official with wide powers of investigation, they will either be established or disproved. If established, legal proceedings can be taken against offenders. In either case, the air is cleared and proper standards can be set for the conduct of persons in public life to the enduring benefit of the society.

However, critics of this argument maintain that such an innovation would be dangerous. As in the case of any other criminal offence, the investigation of corruption in public office is a matter for the police. No one other than they should therefore be authorised to investigate officially any complaint likely to lead to a criminal charge. An Ombudsman who ventures into this area could find himself an object of such bitter controversy that he would be quite unable to perform his more usual functions. Besides, the effectiveness of his investigations has been shown from experience to depend in large measure on the keeping as secret and confidential all documents produced, all disclosures made and all information given to him and his staff in

the execution of the functions assigned to him. Hence, to alter that practice would be to impair the very foundations of the office.²²

It is interesting to note that whereas the Barbados scheme reflects the approach advocated by the Commission, the Trinidad and Tobago precedent on the other hand attempts to take the Ombudsman, albeit to a limited extent, into this field by prescribing that:

The Ombudsman shall have power to investigate complaints of administrative injustice . . . notwithstanding that such complaints raise questions as to the integrity or corruption of the public service or any department or office of the public service, and may investigate any conditions resulting from, or calculated to facilitate or encourage corruption in the public service, but he shall not undertake any investigation into specific charges of corruption against individuals.²³

The precedent further provides that where in an investigation "there is evidence of any corrupt act by any public officer or by any person in connection with the public service", the Ombudsman shall report the matter to the appropriate authority with his recommendation as to such further investigation as he considers proper.²⁴

It is not intended to consider the efficacy of these provisions to determine whether the power conferred is merely ostensible or otherwise. The point is not relevant at this stage. What is relevant, however, is the fact that whatever the extent of that power, the Ombudsman is required to "report" the matter for the attention of the appropriate authority with recommendations for further investigation. It is suggested that even in the absence (as is the position in Barbados) of this legislative directive, the Trinidad and Tobago Ombudsman would be under an inherent duty to adopt a similar course of action. Consequently, the existence of the Trinidad and Tobago provision would seem to

provide no discernible advantage, in effect, over the Barbados scheme in this area of concern, except perhaps, in terms of the channel of communication, i.e., the Trinidad and Tobago provision requires the Ombudsman to report the matter to the appropriate authority, and there is nothing in the provision to suggest that the reference to "appropriate authority" is limited to the Trinidad and Tobago Parliament.

In the result, the position seems to be that if the Trinidad Ombudsman as a result of an investigation (not being an investigation into a specific charge against an individual) finds that there is evidence which points to corruption in the public service, he can report the matter directly to the Commissioner of Police, or perhaps to the appropriate Service Commission for investigation. The Barbados Ombudsman, on the other hand, would have to bring the matter to the attention of Parliament via the Speaker and the President.

Nevertheless, the question still remains, how would the matter reach the appropriate authority under the Barbados scheme?

In seeking to give some guidance on this matter, the Attorney-General had suggested that the "relevant Minister under whose Portfolio the Ombudsman comes would have a duty as well as the Attorney-General, for that matter, to draw the report to the attention of the Director of Public Prosecutions".²⁵

In so far as these remarks suggest the existence of ministerial responsibility for the Ombudsman, they must be acknowledged as no more than an over-statement made, perhaps, in the heat of the debate.

Early in this analysis, it was observed that, unlike the other Caribbean Ombudsmen, the Barbados Ombudsman is not an officer of Parliament, but is accountable to Parliament. Indeed, the suggestion was made

that the scheme may be considered as drawing a clear distinction between independence and accountability in that it states quite unequivocally that the "Ombudsman shall perform his functions in accordance with his own independent judgment but shall be responsible to Parliament for the general discharge of his duties".²⁶ Consequently, not only is the Ombudsman independent of Parliament, but also independent of the Executive. There is therefore no ministerial responsibility for the Ombudsman. Thus, the Ombudsman reports directly to Parliament.

This feature undoubtedly can give rise to some interesting questions such as who speaks to or for the Ombudsman.

However, before a possible answer is attempted, it should be emphasised that the suggestion by the Attorney-General that the responsibility for bringing a report recommending the institution of criminal proceedings against some individual should rest with the office of the Attorney-General would seem to offer a more valid approach in the circumstances.

Publication of reports

The Ombudsman's reports are deemed for the purposes of the law of defamation to be authorised to be published by both Houses of Parliament. The scheme therefore provides protection by way of privilege to the Ombudsman for any statements made in the reports. Protection is also given to other communications made to or by the Ombudsman in connection with an investigation or the functions of the office.²⁷

Who speaks for or to the Ombudsman?

It has already been suggested that the Barbados Ombudsman is not only independent of Parliament, but also has no Minister to whom he or she is answerable. That this position is not unprecedented in Barbados, or elsewhere, is exemplified by the position of the Judges and of the Director of Public Prosecutions who are traditionally independent of the Executive. Although in their case, there is no accountability at least in the sense applying to the Ombudsman.

The question who speaks to or for the Ombudsman in the absence of the existence of a degree of Ministerial responsibility therefore becomes most significant when the Ombudsman experiences difficulties (as indeed is evident from the reports of Caribbean Ombudsmen²⁸) of one kind or another in discharging the functions of the office, or in having certain recommendations implemented by the government agency concerned.

In the case of the non-implementation of a recommendation, the difficulty can be met by the submission of a "Special Report" to Parliament calling attention to the situation. But even in such a case, there is at present no machinery in any of the Caribbean States similar to that of the United Kingdom Select Committee on the Parliamentary Commissioner for Administration to ensure that any such report gets the Parliamentary attention it deserves.

Is the establishment of a Select Committee desirable?

That the existence of such a Committee is likely to enhance the effectiveness of the Ombudsman is at once evident from the United Kingdom experience. There, the Select Committee has been able to secure the implementation of recommendations made by the Parliamentary Commissioner.

One such instance relates to the practice previously adopted by the United Kingdom Department of Inland Revenue of not paying interest to compensate for any inordinate delay in refunding an amount of income tax overpaid.

This practice, according to Frank Stacey, "...was in the Committee's view unjustifiable particularly since the Inland Revenue requires the payment of interest by the taxpayer on tax under-paid and not paid promptly on demand".²⁹ Stacey further indicates that following the continued dissatisfaction shown by the Parliamentary Commissioner and the Select Committee with respect to the practice maintained by that Department, the Government introduced legislation providing for the payment of interest by the Department of Inland Revenue on delays in repayment of income tax and estate duty.³⁰

From the Special Report to the Jamaica Parliament which is reproduced in the First Annual Report of the Ombudsman, 1979³¹ under the rubric "Equity and Income Tax are strangers", it is clear that the tax administration in Jamaica on the question of the payment of interest on income tax overpaid follows the practice once adopted by the United Kingdom. Consequently, the difficulty that confronted the Jamaica Ombudsman in the case reported can therefore be described as similar to that experienced by the Parliamentary Commissioner. Recounting the efforts taken to ensure implementation of the recommendation that interest be paid to redress an amount improperly deducted from the complainant's salary, the Jamaica Ombudsman commented as follows:

The Commissioner of Income Tax remained unmoved.

Citing passages from two cases, both of which were decided some few decades before the advent, in Great Britain, of the Ombudsman institution and in neither of which the point at issue bears any relevance to the matter under consideration, the Commissioner of Income Tax maintained that "Equity and Income Tax are strangers". If that be so then I can think of few better reasons for the establishment of the office of Ombudsman.³²

The Ombudsman then suggested that the Income Tax Commissioner's difficulty, perhaps, derived from the lack of a "proper source from which to pay the compensation which justice [seemed] so clearly to demand". He therefore suggested that if that was indeed the case, then Parliament ought to consider setting up a specific fund to meet any compensatory payments recommended by the Ombudsman.³³

No evidence is available to indicate the reaction of the Jamaica Parliament to this report. Indeed, a note to the report indicates that at the time of printing the report, the Ombudsman had no information as to "any action taken or contemplated by Parliament".³⁴ However, the situation does seem to argue forcefully for the establishment in the respective Caribbean States of a body similar to the United Kingdom Select Committee to maintain, if not enhance, the effectiveness of the Ombudsman.

That there is a growing need for the establishment of some such machinery in Parliament has also been derived from an interview with one of the Caribbean Ombudsmen.³⁵ The Ombudsman hinted at the likelihood of a proposed recommendation for the establishment of a Parliamentary Committee to deal with his reports.

These indicators would therefore seem to suggest that Barbados would be well advised to consider the establishment of similar machinery when the office becomes operational.

1. Section 13(1) of the Act.
2. Ibid., section 13(5).
3. Ibid., section 13(4).
4. Ibid., section 13(1).
5. Ibid., section 13(2).
6. Extract from the 1981 Report in the Commonwealth Law Bulletin, (London: Commonwealth Secretariat), (Jan. 1982), 309-10.
7. Supra p. 72.
8. Supra p. 75.
9. Section 13(6) of the Act.
10. Ibid., section 13(7).
11. For example, see the Jamaica Ombudsman Act, section 28(2).
12. Section 13(7)(a) and (b) of the Act.
13. Ibid., section 13(8).
14. Ibid., section 13(9).
15. B.H.A. Deb. (Nov. 11, 1980), p. 4532.
16. Constitution of Barbados, section 113(3).
17. Taitt, M.P., B.H.A. Deb. (Nov. 11, 1980), p. 4532.
18. Ibid.
19. Ibid.
20. Ibid.
21. B.H.A. Deb. (Nov. 4, 1980), pp. 4494-95.
22. The Constitution Commission of Trinidad and Tobago, Thinking Things Through, (Trinidad: Government Printery, 1972), p. 97.
23. Constitution of Trinidad and Tobago, section 94(2).

24. Ibid., section 94(3).
25. Supra note 20.
26. Section 2(2) of the Act.
27. Ibid., section 14.
28. For example, the following statement appears in the First Annual Report of the Trinidad and Tobago Ombudsman:

It is now my experience that although some agencies respond within a reasonable time to requests made of them for information there are others that are dilatory, and in some cases my office is not even favoured with an acknowledgement.

If the Ombudsman in pursuing complaints requests certain information from a government Ministry/Department or Agency and is not treated with the courtesy of a prompt reply, the effectiveness of the office would be undermined.

Report at p. 14.

29. Ombudsmen Compared, p. 155.
30. Ibid.
31. First Annual Report, 1979, pp. 17-19.
32. Ibid., p. 19.
33. Ibid.
34. See footnote to the 1979 Report at p. 17.
35. The interview was with the author of this thesis.

CHAPTER X

CONCLUSIONS

Sufficient has been said about the Ombudsman system and its adoption by some of the independent States of the Commonwealth Caribbean region from which some conclusions may now be drawn.

General

It is clear from the review conducted in Chapter II that not an insignificant amount of time elapsed between the date of the introduction of the Ombudsman system in Guyana in 1966 and its adoption by other States in the region:

It took approximately ten years to reach Trinidad and Tobago, twelve in Jamaica, fourteen in Barbados, and twelve and fifteen years in the other independent States.

During the intervening years, the review shows that in all the States mentioned specifically in the foregoing paragraph thoughtful consideration was given to the potential of the system in a Caribbean environment as evidenced by the various bodies that examined the concept of the system and made recommendations as to its acceptability for adoption.

Except in the case of Barbados, these bodies all made specific recommendations in favour of adoption. The Barbados Commission, on the other hand, while not specifically recommending adoption, yet recommended that any decision to establish the office should be accomplished by an ordinary Act of Parliament.

This approach by the Barbados Commission would seem therefore to suggest that the Commission had no strong reasons to reject outright any proposals for the establishment of the office in Barbados.

Consequently, any criticisms which tend to suggest that the adoption of the system by Barbados was unnecessary would seem to be unjustified. The Jamaica experience clearly illustrates that certain grievances or injustices are of such a nature that recourse to the remedies provided by the traditional constitutional machinery as a means of redress may not be readily available to the aggrieved person, as the case of the detention of the fifteen year old boy shows. Indeed, it is acknowledged that the available remedies which may be mobilised to vindicate the grievances of the individual against the State are often bewildering to the ordinary citizen. It is suggested that this would even be the case where there is in existence a regime for legal aid which, more often than not, would require a means test to be satisfied before legal aid is granted.

It seems therefore that the system has a potential as an indispensable aid to the remedies provided by the conventional constitutional institutions.

Again, if the lack of enthusiasm in some segments of the Barbados community derives from the operation of the system in Guyana, then it would seem that Guyana's peculiar circumstances have not been taken into account in assessing the likelihood of a successful operation of the system in Barbados. In

that case, any criticisms directed at the potential of the system based on the Guyana experience would be unfair and unjustified.

Evaluation of the Barbados model

The analysis of the Barbados scheme seems to suggest that from all the existing schemes, the model has adapted those provisions that appear suitable to the Barbados position. In some instances, improvements in the provisions have been made. The appointment procedure for the Barbados Ombudsman is one such instance.

In terms of the Ombudsman's independence, the model has provided a legislative foundation for the widest possible interpretation of this notion. This is reflected in the scheme by providing for no fixed period of tenure.

As to the Ombudsman's jurisdiction, the model displays a significant departure from those formulations appearing elsewhere, and the analysis of the Barbados jurisdictional formula would seem to rebut the suggestion that it is "widely drawn" or "unspecific". Indeed, it would appear to be more restrictive than formulations appearing elsewhere, as for example, in New Zealand and in those inspired by that model.

In some models, notably, New Zealand, and those following that pattern, the Ombudsman is prohibited from questioning the decision of a Minister, but may investigate a recommendation made to a Minister. The Barbados provision on this point is more direct in that it allows the Ombudsman to question a Minister, and any suggestion to the contrary would seem to be unjustified.

The analysis further reveals that the principal objects of the Ombudsman's jurisdiction are reflected in a Schedule to the Act, and that it

would be in keeping with principle if those government agencies that come into direct contact with members of the public are incorporated in the Schedule on the basis of a defined classification.

As to the matters excluded from the Ombudsman's jurisdiction, it has been noticed that those correspond with matters similarly excluded elsewhere, and that the model adopts other features that are characteristic of the system, for example, the power to initiate an investigation on the motion of the Ombudsman, to make recommendations for remedial actions, and to issue reports.

The Barbados model does not confer any power on the Ombudsman to change or reverse any administrative decision, or to enforce any decision by way of court proceedings or to prosecute any person whose conduct is so unreasonable as to be corrupt. These are not normally the powers contemplated by the adaptation of the Ombudsman concept for countries adhering to the Westminster system of Government. It therefore seems that the powers which the model confers on the Barbados Ombudsman are no less than, and are consistent with those of the classical Ombudsman. In other words, the Barbados model would seem to have captured all the essential characteristics of the Ombudsman system.

Trinidad and Tobago's experience, as well as Jamaica's, shows that the citizens there are making use of the institution, and, as seen from the analysis, that there are clear instances in both countries to justify the establishment of the institution.

Since Barbados has drawn heavily not only on these precedents, but also on those in the United Kingdom and New Zealand, improving wherever possible on their adaptation to suit the Barbados position, it would seem

reasonable to conclude that the legislative scheme adopted by the model has a potential for an effective operation of the system in Barbados, notwithstanding those areas where suggestions have been made for refinements in the scheme. This view, however, is subject to other determining factors, for example, the selection of a suitable person for the office, and the adequacy of the staff to carry out the functions of the office.

The personality factor

As earlier suggested, no matter how well conceived and perfectly designed any legislative provisions may be, they can be made nugatory by other forces.

This is no less true where the legislative scheme is one designed to reflect the principles of the Ombudsman system. No amount of drafting techniques, or the application of legislative devices reflected in any Ombudsman scheme can by themselves ensure a successful operation of the system. In the final analysis, the success of the system will depend on the good judgment, common sense and tact of the person appointed to the office. It is therefore of the greatest importance that the person to be appointed to the office in Barbados should be selected with the greatest care possible. His or her honesty, integrity and independent character should be beyond question.

If these considerations are made to apply in the selection process, and adequate staff is provided to support the Ombudsman in his or her functions, then judging from the successful operation of the system elsewhere, it seems likely that the system will operate effectively in Barbados.

Desirability for a constitutional status?

It will be recalled that the Barbados Constitution Review Commission took the view that "any decision to create an office of Ombudsman should not be included or enshrined in the Constitution, but that such an office could be created by local Act of Parliament". No reason was given for this line of thought by the Commission. Presumably, it was based on reasons of expediency only in that it would indeed seem to have been inappropriate for the Commission to recommend at that time that the office be created by way of a constitutional amendment. However, the importance and dignity of the office of Ombudsman as prescribed for under the Barbados scheme seem to be such as to qualify the office for a constitutional status. Therefore, it would seem desirable that consideration be given to incorporating the office in the Constitution if at any time proposals are being made to amend the Constitution of Barbados.

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- with the Trinidad & Tobago Ombudsman in Port-of-Spain.

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APPENDIX A.

BARBADOS



PUBLIC SERVICE STAFF LIST

(Formerly Civil List)

Revised to 31st December, 1980

1980

Prepared by: Services Commissions Department,
"Maxwelton",
Collymore Rock,
St. Michael,
Barbados, W.I.

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*"It might be months, or years, or days.
I kept no count, I took no note.
I had no hope"*

On the 7th of July, 1980 and in the manner which presently appears I submitted to Parliament the second special report in accordance with the Ombudsman Act*. The report follows verbatim.

The Ombudsman — Special Report to Parliament

In accordance with the provisions of Section 21(2) of the Ombudsman Act, Law 23 of 1978, I have the honour to lay before Parliament the second special report.

Writing to me from the South Camp Rehabilitation Centre by a letter which reached me on the 21st of April, 1980 a young man complained that he had been:

- i. *arrested on the 25th of August, 1978;*
 - ii. *remanded at Central Police Station for one day;*
 - iii. *taken to the Stony Hill Remand Centre and there detained for three months;*
 - iv. *taken to the Gun Court on the 1st of December, 1978.*
- and*
- v. *remanded at the South Camp Rehabilitation Centre from the 1st of December, 1978 until the date of his letter (April 10, 1980) without ever having been taken before a Court.*

I felt sure that the complaint was labouring under some misapprehension and set about with anxious care to uncover the true facts.

Much to my amazement, as the evidence fell into place, the following story emerged:

A boy of about fifteen summers old was admitted to the Kingston Public Hospital on the 21st of August, 1978, suffering from gun shot wounds to the abdomen, reportedly sustained during the commission of a crime.

There is some discrepancy as to the time of arrest but there is little doubt that he was arrested by a Detective Corporal of Central Police Station and charged with:

- a. *Shopbreaking with intent,*
- b. *Illegal Possession of a Firearm,*
- c. *Illegal Possession of Ammunition.*

He remained in hospital until the 10th of October, 1978 when he was discharged.

According to the complainant, on his discharge from hospital he was taken to the Central Police Station where he spent one night before being taken to the Stony Hill Remand Centre. There is a document, however, which purports to be an "Interim Order" made under the Juveniles Act, which suggests that he was taken before the Family Court on the 13th October, 1978 and remanded in custody at the 'Remand Centre', until the 30th of November, 1978. Be that as it may, there is no evidence of his having been taken before the Family Court on the 30th November, 1978 in obedience to that Order, or at all.

Instead he was taken on the 1st of December, 1978 to the 'Rehabilitation Centre and Gun Court Remand', at South Camp Road in Kingston. There he remained until the 1st of March, 1979 when he was escorted from the Rehabilitation Centre to the precincts of the Gun Court by a Constable.

There is no evidence that he was placed before that Court or any other Court on that or any other

subsequent day, but the records disclose his re-admission to the Rehabilitation Centre on that same day (1st March, 1979).

From that day and until his letter of complaint above referred to, there is no evidence to suggest that the complainant ever left the Rehabilitation Centre for any place whatever.

Preliminary investigations into the matter were concluded on Thursday, the 22nd of May, 1980, when the Director of Investigations filed his report.

On that very day and in a telephone conversation I apprised the Permanent Secretary, the Ministry of Justice, of the facts and asked that he take immediate steps to have the complainant placed before the appropriate court at the earliest possible moment of time.

I next spoke with the Permanent Secretary, the Ministry of Justice, about the matter on the 26th of May, 1980 at which time he assured me that all was being done to comply with my request to have the boy placed immediately before the Court.

On the 19th of June, 1980 I transmitted my findings to the Permanent Secretary, the Ministry of Justice, and wrote to him *inter alia*:

"Whatever the outcome of the case, however, there is no gainsaying the fact that during the period from the 30th of November, 1978 (perhaps the 10th of October, 1978) and until the date when, in compliance with my request, he was placed before the Court (assuming him to have been so brought), the complainant remained in custody without due process of law.

"It seems inevitably to follow that grave injustice has been done to the young citizen.

"The Constitution of Jamaica under the heading 'Fundamental Rights and Freedoms', provides in section 15(3) that:

— 'Any person who is arrested or detained —

a. for the purpose of bringing him before a court in execution of the order of a court; or

b. upon reasonable suspicion of his having committed or being about to commit a criminal offence,

and who is not released, shall be brought without delay before a court'.

and in clear, unequivocal terms section 15(4) declares:

'Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person'.

In all the circumstances of this particular case, therefore, I recommend that:

- 1. in the unlikely event that the complainant has not yet been placed before the appropriate court, steps be taken to bring him immediately before such court;*
- 2. appropriate compensation be paid to the complainant without undue delay.*

Please be kind enough to advise me within a reasonable time of the action taken to remedy the injustice".

Despite my several telephone conversations, however, and notwithstanding my letter of the 19th of June, 1980 (delivered by hand to the Permanent Secretary, the Ministry of Justice), a visit by a team of Investigators from this institution to the South Camp Rehabilitation Centre on the 30th of June, 1980, elicited the disturbing news that the juvenile had not even then been taken before a Court in compliance with clear constitutional requirements. Convinced that the matter could brook no further delay, I tried without success, on the 1st of July, 1980 to contact the Commissioner of Police by telephone or by radio.

On the 2nd of July, 1980 (in a letter delivered by hand), I wrote to the Commissioner of Police in these terms:

"The attached copy of my letter to the Permanent Secretary, the Ministry of Justice, speaks volumes for itself.

The Permanent Secretary, the Ministry of Justice, has informed me that in a letter dated the 28th of May, 1980 he requested you to have the above-named complainant placed before the appropriate Court without further delay.

Despite that request, however, if today's information from the Gun Court is correct, and if I am correct in my view that the Gun Court is the appropriate Court, then the youthful prisoner has still not been taken before the Court.

I have little doubt that you will share my view that it is unfortunate that the boy remained in custody, in contravention of the provisions of the Constitution, for upwards of eighteen (18) months (apparently by inadvertence) until his plight was brought to light by the officers of this institution.

What is unforgivable, however, is that he has been allowed to remain in custody for so long after the grave injustice which has been meted out to him has been brought to the attention of those who are sworn to uphold the provisions of our Constitution.

If the above-named complainant is not placed before the next sitting of the Gun Court, I will be obliged to bring the matter to the attention of the Parliament and the Nation".

Nevertheless and unbelievably, when my officers visited the South Camp Rehabilitation Centre this morning, the boy remained incarcerated in total defiance of the Constitution and in utter contempt for the Rule of Law.

I now deem it my clear duty to bring the matter to the attention of the Parliament for appropriate action.

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THE OMBUDSMAN AND THE LAW

by E. G. Green

Parliamentary Ombudsman in a Letter to the Editor of September 9, 1980.

We are writing in response to the legal opinion expressed in your Editorial of the Daily Gleaner published on Friday, August 1, 1980 on the question of our jurisdiction to investigate the case of a certain complainant.

We acknowledge that, with respect to a given matter, the opinions of the most erudite and thorough of legal scholars often vary. This is not only because man is fallible, but also because there are certain cases called hard cases in legal literature which do not lend themselves to clear-cut and easy determination.

For our part, while we feel sure that we accommodate a fair amount of learning (legal and otherwise) within the walls of our institution and indeed, try our best to be careful and thorough in our deliberations, we are the first to admit that we are only human and, therefore, fallible. This, we would like to feel, makes us more tolerant of human failings and genuine error.

With all this, however, we have to admit to being somewhat surprised, Mr. Editor, that you should state as fact what is clearly your opinion and withal an opinion which we hold to be misconceived.

You are, in our view, absolutely correct in saying that Section 12(2)(b) of the Ombudsman Act in conjunction with paragraph one of the Third Schedule to the Act debars an Ombudsman from investigating "the commencement or conduct of civil and criminal proceedings in any court of law in Jamaica or before any international court or tribunal". However, it seems to us that you are none the less incorrect in saying that "it appears that under the Act the Ombudsman has no jurisdiction to investigate cases like . . . 's since it would be an investigation into the commencement of criminal proceedings in a court of law". Indeed, the gravamen of our concern was the fact that criminal proceedings in the proper court were not being allowed to commence.

Further, when you go on to state quite unequivocally "while cases like . . . 's are shocking, investigations by the Ombudsman into them are in excess of jurisdiction and in breach of the Act. It may be that it is time Parliament re-examines the jurisdiction of the Ombudsman with a view to enlarging it to cover cases like . . . 's. Until then, the Ombudsman should keep within the limits of his jurisdiction as defined in the Act", — you are (we think) offering (quite unjustifiably as it seems to us) a statement of your opinion as a statement of fact.

We feel that the challenge to our jurisdiction (let alone the unequivocal terms in which it is posed) is unjustified because it is clear to us that our jurisdiction to investigate the . . . case was founded on the fact that he was being falsely or wrongfully and indeed unconstitutionally imprisoned. In other words, he was being detained in certain circumstances that make the detention wrongful and unconstitutional. In the same way that a false imprisonment may be founded, to take one example, on the fact that an arresting officer without a warrant does not inform the arrested person of the act that gives rise to his arrest or the true ground of his arrest, so it may be founded on the failure to bring an arrested person before the Courts within a certain period of time. Just as in our example the failure, in the process of arrest, to give certain information is a mere ingredient of the injustice, the core of which is the detention, so the failure to bring an arrested person before the Court within a reasonable time of that person's arrest is just an ingredient of the offence or injustice which is the detention of the arrested person for an unreasonably long time before that person is brought before the court to answer the charges against him or her. In our view, we derive our right to investigate the . . . case from the fact of his being held in custody for an unreasonably long period of time before being placed before the Court and this is an entirely different question from the investigation of the commencement and conduct of court proceedings. In the . . . case, our jurisdiction was in relation to . . . 's detention in certain circumstances and not in relation to the commencement of Court proceedings in certain circumstances.

I have taken pains to explain and clarify this matter, not only because the case is an important one, but because we share the view that we have a duty to keep within the limits of our jurisdiction. In fact, in terms of the question of determining whether we had jurisdiction in this case, it may be germane to point out that a more difficult question for our resolution was the possibility of contravening the provisions of Section 12(2)(a) of the Ombudsman Act which precludes us from investigating any action for which the complainant has or had a remedy by way of proceedings in any court or any tribunal set up by or under an Act of Parliament. While it is true that in this case . . . may well have had remedies in Court by way of habeas corpus proceedings or an action for false imprisonment (to name but two examples), Section 12(3)(a) of the Act provides that even where there is or was a remedy by way of court proceedings, the Ombudsman may still investigate the matter if he is satisfied that in the particular circumstances it is not reasonable to expect the complainant

to take or have taken such proceedings. We satisfied ourselves that in . . . 's circumstances it would have been unreasonable to expect him to have taken and to take these proceedings (at any rate with the alacrity the matter required) and acted accordingly.

I crave your indulgence while I make two further points. The first is that, one of our recommendations in the matter (that the complainant be brought speedily before the Court), was made in an effort to remove one of the bases of the ongoing injustice. We avoided the other alternative (that of recommending his release) because we feel that justice to the community and the rule of law demands that persons charged with serious crime should be tried in the ordinary courts of the land. To take care of the injustice that he had already suffered by virtue of being unjustifiably detained for so long, we recommended that he be paid a certain sum in compensation.

The second point is that we think it our duty not only to operate within the bounds of our jurisdiction but also to assist if possible all complainants in whatever way we can. While we appreciate all genuine and thoughtful efforts to help us walk the inevitable tightrope of trying to achieve both these ends, we sincerely hope that we will not be forced into dissipating much valuable time and energy in dealing with unfounded criticisms.

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APPENDIX D.

Supplement to Official Gazette dated 11th December, 1980.

OMBUDSMAN ACT, 1980 – 68

Arrangement of Sections

Section

1. Short title.
2. The Ombudsman.
3. Appointment and removal.
4. Administrative provisions.
5. Powers of investigation.
6. Conditions of investigation.
7. Legal remedies.
8. Complaints.
9. Procedure of investigation.
10. Power to obtain information.
11. Secrecy of information.
12. Obstruction and contempt.
13. Reports.
14. Communications privileged.
15. Regulations.
16. Expenses.
17. Commencement.

FIRST SCHEDULE.

SECOND SCHEDULE.

THIRD SCHEDULE.

BARBADOS

I assent,
D. H. L. WARD
Governor-General
4th December, 1980.

1980 - 68

An Act to provide for the establishment of the office of Ombudsman.

1981 - 01 - 03

(By Proclamation) Commencement.

ENACTED by the Parliament of Barbados as follows:

1. This Act may be cited as the Short title.
Ombudsman Act, 1980.

The Ombudsman.

2. (1) There shall be an Ombudsman for Barbados who shall, in accordance with this Act, investigate and report upon allegations of improper, unreasonable or inadequate administrative conduct.

(2) The Ombudsman shall perform his functions in accordance with his own independent judgment but shall be responsible to Parliament for the general discharge of his duties.

First Schedule.

(3) The Ombudsman shall not enter upon the duties of his office until he has taken and subscribed the oath of office in the form set out in the First Schedule.

(4) The Ombudsman shall not be a member of the Senate or of the House of Assembly and shall not hold any other office of emolument or engage in any other occupation for reward.

Appointment and removal.

3. (1) Subject to subsection (2), the Ombudsman shall be appointed by the Governor-General, by instrument under the Public Seal, on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.

(2) The Governor-General shall before appointing a person to be the Ombudsman, submit the proposed appointment to each House of Parliament for approval.

(3) The Ombudsman may be removed from office in accordance with the provisions of section 105 of the *Constitution* which shall apply to his office as if enacted by this Act and the prescribed authority for that purpose shall be the Prime Minister acting after consultation with the Leader of the Opposition.

(4) The Ombudsman shall vacate office on attaining the age of sixty-five years but may be re-appointed by the Governor-General in the same manner as under subsection (1) for one further period not exceeding 5 years.

(5) The Ombudsman may resign office at any time by written notice to the Governor-General.

4. (1) Any function of the Ombudsman under this Act may be performed by any officer of the Ombudsman authorised by him for that purpose. Administrative provisions.

(2) The officers of the Ombudsman shall be public officers appointed in accordance with section 94 of the *Constitution*.

(3) The Ombudsman may charge such fees in connection with his functions in such amounts and subject to such conditions as the Governor-General may prescribe.

(4) All fees received by the Ombudsman pursuant to subsection (3) shall be paid to the Accountant General.

5. (1) The purpose of an investigation by the Ombudsman shall be to ascertain whether injustice has been caused by improper, unreasonable or inadequate Powers of investigation.

administrative conduct on the part of a government ministry, department or other authority subject to this Act.

Second
Schedule.

Third
Schedule.

(2) The Ombudsman may investigate any course of conduct and anything done or omitted by any person in the exercise of the administrative functions of the government ministries, departments and other authorities specified in the Second Schedule, not being functions concerned with a matter specified in the Third Schedule.

(3) The government ministries, departments, authorities and matters specified in the Second and Third Schedules shall be defined in accordance with any restrictions or notes therein contained.

(4) The Governor-General may, by order, amend the Second or Third Schedule; but an amendment of the Third Schedule shall be subject to negative resolution.

(5) An investigation by the Ombudsman shall not be prevented by any provision in any enactment, other than the *Constitution*, to the effect (howsoever expressed) that any matter or thing shall be final or conclusive or shall not be disputed, reviewed or called in question.

(6) If any question arises whether the Ombudsman is empowered to make an investigation or to exercise any power under this Act, it shall be

thinks fit, apply to the High Court which may determine the question by declaratory order.

6. (1) The Ombudsman shall not make an investigation without first receiving a written complaint in accordance with this Act, unless he is of opinion or either House of Parliament resolves that there are reasons of special importance which make investigation by the Ombudsman desirable in the public interest. Conditions of investigation.

(2) In deciding whether to make, continue or discontinue an investigation authorised by this Act the Ombudsman shall in all cases act in accordance with his own discretion which shall not be questioned; and in particular he may refuse to investigate any matter on the ground that it is trivial or that the complaint is frivolous or vexatious or not made in good faith, or that the complainant has not a sufficient interest therein.

7. (1) Subject to subsection (2), the Ombudsman shall not investigate any case where, in his opinion, the complainant would at any time have had a remedy or right of appeal in a court of law, tribunal or similar body established by the *Constitution* or by or under any enactment or by or on behalf of Her Majesty. Legal remedies.

(2) Notwithstanding subsection (1), the Ombudsman may investigate such a case if he is satisfied that for special reasons the complainant could not

fairly be expected to have had recourse to such remedy or right of appeal.

Complaints.

8. (1) A complaint under this Act may be made by any person or body of persons, whether incorporated or not, other than a government department, public authority or body constituted for purposes of the public service or for managing any industry or undertaking in public ownership.

(2) A complaint may be made by the person aggrieved or his duly authorised agent; and where the aggrieved person has died, the complaint may be made on his behalf by his personal representative or by such other suitable person as the Ombudsman determines.

(3) A complainant shall be a citizen or a resident of Barbados (or shall have been such at the time of his death) or shall have been in Barbados or on a ship or aircraft or installation registered in or belonging to Barbados at the time of the act or omission of which he complains.

(4) A complainant who is no longer in Barbados shall, if the Ombudsman so directs, be permitted to re-enter and remain in Barbados, subject to such conditions as the Minister responsible for immigration may direct, for the purposes of the investigation.

(5) A complaint may not be made later than 12 months from the day on which the complainant first knew of the facts giving rise to his complaint; but the Ombudsman may extend this time if in his opinion there are special circumstances which justify such extension.

(6) The Ombudsman shall determine any question whether a complaint is duly made to him.

9. (1) The procedure of an investigation by the Ombudsman shall, subject to this Act, be such as he shall determine. Procedure of investigation.

(2) An investigation by the Ombudsman shall be held in private and he may make such inquiries from such persons and in such manner as he may think fit.

(3) The Ombudsman may determine whether any person may be represented by an attorney-at-law or otherwise in an investigation.

(4) The Ombudsman shall, before making an investigation give to the principal officer of the department or authority concerned, and to any other person against whom the complaint is made, an opportunity to comment upon the complaint.

(5) No person shall be entitled, as of right, to be consulted or heard by the Ombudsman, except in the manner provided by this Act.

(6) The Ombudsman may, in the manner prescribed, reimburse the complainant and any other person who assists in an investigation for expenses incurred and time lost.

Power to
obtain in-
formation.

10. (1) Subject to subsection (3), the Ombudsman may, for the purpose of an investigation, require any Minister, officer or member of the department or authority concerned or any other person (including the complainant) to supply any information, produce any document or thing, attend for examination, or allow access by the Ombudsman to any premises of the department or authority.

(2) The Ombudsman shall, for such purposes, have the same powers as the High Court (including the power to administer oaths and affirmations) but subject to the same rules relating to immunity and privilege from disclosure as apply in the High Court and subject also to the following provisions of this section.

(3) Where the Attorney General certifies that the giving of any information or the answering of any question or the production of any document or thing or the allowing of access to any premises

(a) might prejudice the security, defence or international relations of Barbados or the investigation or detection of offences;

- (b) might involve the disclosure of deliberations of the Cabinet; or
- (c) might involve the disclosure or proceedings of the Cabinet or of any committee of the Cabinet relating to matters of a secret or confidential nature and would be injurious to the public interest,

the Ombudsman shall not require the information or answer to be given or the document or thing to be produced or access to the premises to be allowed.

(4) Subject to subsection (3), no information, answer, document or thing shall be withheld from the Ombudsman on the ground that its disclosure would be contrary to the public interest.

11. (1) Information obtained by or on behalf of the Ombudsman in the course of an investigation shall not be disclosed in legal proceedings or otherwise except

Secrecy of
informa-
tion.

- (a) for the purposes of the investigation and any report thereon under this Act;
- (b) for the purposes of proceedings (or possible proceedings) for an offence of perjury connected with an investigation under this Act; or

(c) for the purposes of proceedings under section 12.

(2) The Attorney General may give written notice to the Ombudsman that disclosure by the Ombudsman of any specified information or document, or of any class of information or document, would, in his opinion, be prejudicial to the safety of Barbados or otherwise contrary to the public interest; and in that case the Ombudsman and his officers shall not communicate such information or document to any person or in any manner.

Obstruction
and con-
tempt.

12. (1) If any person without lawful excuse obstructs the Ombudsman or any officer of his in the performance of his functions under this Act or fails to act as lawfully required by the Ombudsman, the Ombudsman may certify the offence to the High Court.

(2) Where an offence is so certified the High Court may, after hearing any person properly desiring to be heard, punish the offender in the same manner as for contempt of court.

Reports.

13. (1) The Ombudsman shall make a report to each complainant explaining the result of his investigation, or his reasons for not investigating or partially investigating the complaint.

(2) Where the Ombudsman makes an investigation on his own initiative or pursuant to a resolution of either House of Parliament he shall make a report thereupon to that House of Parliament.

(3) In the case of a completed investigation the report of the Ombudsman shall state whether he finds that injustice has been sustained by reason of improper, unreasonable or inadequate conduct on the part of any person, government ministry or department or other authority subject to investigation under this Act and, in any case where he so finds, what action, if any, he recommends by way of remedy or compensation for the injustice.

(4) The Ombudsman shall, before making any report, afford an opportunity to be heard to any person, government ministry or department or other authority upon whose conduct he proposes to make adverse comment.

(5) A copy of each report made by the Ombudsman on a particular case shall be sent by him to the principal officer of the relevant government ministry or department or authority and also, if the Ombudsman thinks fit, to any other person whose conduct is the subject of the complaint or of comment in the report.

(6) The Ombudsman shall, in each calendar year, prepare for laying before each House of Parliament a general report on his functions under this act.

(7) The Ombudsman may, from time to time, prepare for laying before each House of Parliament such other reports as he may think fit, including

(a) a report on the inequitable or unreasonable nature or operation of any enactment or rule of law, and

(b) a report on any case where in his opinion injustice has been sustained as aforesaid and the injustice has not been or will not be remedied or compensated.

(8) In making any report the Ombudsman may name or refrain from naming any person as he may think fit.

(9) The Ombudsman shall submit his reports made under subsections (6) and (7) to the Speaker of the House of Assembly and to the President of the Senate (or, if the office of Speaker or President is vacant or the Speaker or President, as the case may be, is for any reason unable to perform the functions of his office, to the Deputy Speaker or Deputy President) who shall cause them to be laid before the House of Assembly and the Senate respectively.

Communica-
tions priv-
ileged.

14. For the purposes of the law of
defamation

- (a) any communication made by or to the Ombudsman for the purposes of a complaint or investigation shall be privileged in the same manner as if it were made in the course of proceedings in the High Court;
- (b) any report of the Ombudsman under this Act shall be deemed to be authorised to be published by both Houses of Parliament;
- (c) any communication between the Ombudsman and a member of either House of Parliament for the purposes of the Ombudsman's functions shall be deemed to be a proceeding in Parliament.

15. (1) The Governor-General may make Regulations, regulations generally for the administration of this Act and, in particular, for prescribing any thing required to be prescribed under this Act.

(2) Regulations made under this Act shall be subject to affirmative resolution.

16. All expenses incurred by the Ombudsman in connection with his functions under this Act or the regulations shall be defrayed out of moneys voted for the purpose by Parliament. Expenses.

17. This Act comes into operation on a date to be fixed by proclamation. Commence-
ment.

FIRST SCHEDULE

Section 2(3)

OATH FOR THE DUE EXECUTION OF THE OFFICE OF OMBUDSMAN

I, _____, appointed Ombudsman of Barbados in accordance with the Ombudsman Act, 1980, do swear that I will faithfully and impartially perform the duties of my office.

SECOND SCHEDULE

Section 5(2)

MINISTRIES, DEPARTMENTS AND AUTHORITIES SUBJECT TO INVESTIGATION

1. The Government Ministries specified in paragraph 2 and the departments and authorities specified in paragraph 3, responsibility for which is assigned from time to time to the Prime Minister or any other Minister under section 72 of the Constitution:
2. The following Ministries:
 - Ministry of Agriculture, Food and Consumer Affairs
 - Ministry of the Attorney General
 - Ministry of Communications and Works
 - Ministry of Education and Culture
 - Ministry of External Affairs
 - Ministry of Finance and Planning
 - Ministry of Health and National Insurance
 - Ministry of Housing, Lands and the Environment
 - Ministry of Information
 - Ministry of Labour and Community Services
 - Ministry of Trade, Tourism and Industry
 - Prime Minister's Office
3. The following departments and authorities:
 - Archives Department
 - Audio Visual Aids Department
 - Audit Department
 - Central Purchasing Department
 - Civil Aviation and Tourism Division
 - Customs Department
 - Defence and Security Division
 - Department of Inland Revenue

SECOND SCHEDULE - *Cont'd.*

Department of Labour
Educational Institutions operated by the Government
Electoral Department
Electrical Engineering Department
Establishment Division
Department of Statistical Services
Fire Service Department
Hospitals and Health Centres operated by the Government
Land Registry
Lands and Surveys Department
Land Valuation Division
National Insurance Department
National Nutrition Department
Police Department
Post Office
Price Control Division
Prisons Department
Printing Department
Probation Office
Rates and Taxes Department
Registration Department
Schools Meals Department
Town Planning Department
Treasury Department
Waterworks Department
Welfare Department

THIRD SCHEDULE

Section 5(2)

Matters not subject to Investigation -

1. Action taken in matters certified by the Minister responsible for External Affairs or other Minister of the Crown to affect relations or dealings between the Government of Barbados and any other Government or any international organisation of States or Governments.

2. Action taken, in any country or territory outside Barbados, by or on behalf of any officer representing or acting under the authority of Her Majesty in respect of Barbados or any other public officer of the Government of Barbados.

3. Action taken by the Attorney General under the *Extradition Act, 1979*.

Act 1979-
21.

4. Action taken by or with the authority of the Attorney General or any other Minister of the Crown, the Director of Public Prosecutions or Commissioner of Police for the purposes of investigating crime or protecting the security of Barbados, including action taken with respect to passports.

5. The commencement or conduct of civil or criminal proceeding before any court of law in Barbados or proceedings under the *Defence Act, 1979*.

Act 1979-
25.

THIRD SCHEDULE - *Cont'd*

6. Action taken in connection with the exercise or possible exercise of the prerogative of mercy under the *Constitution* or otherwise.

7. Action taken in matters relating to contractual or other commercial transactions, being transactions of a department of government not being transactions relating to

- (a) the acquisition of land compulsorily or in circumstances in which it could be acquired compulsorily;
- (b) the disposal of surplus land acquired compulsorily or in circumstances in which it could be acquired compulsorily.

8. Any action or advice of a qualified medical practitioner or consultant involving the exercise of professional or clinical judgement.

9. Any matter relating to any person who is or was a member of the armed or police forces of Barbados in so far as the matter relates to

- (a) the terms and conditions of service of such member; or
- (b) any order, command, penalty or punishment given to or affecting him in his capacity as such member.

THIRD SCHEDULE - *Concl'd.*

10. Any action which by virtue of any provision of the *Constitution* may not be enquired into by any court.

11. The grant of honours or awards.