His Honour held that the second decision, however, was vitiated by the failure to observe the principles of natural justice. Those principles required that the applicant be informed of the allegations against him and be given the opportunity to answer them before the matter was referred to a committee for inquiry.

Health: acute care certificates

Murray v Griffin, Campbell v Griffin, and Pillenger v Secretary to the Department of Community Services and Health (6 February 1990) were applications for review of decisions to revoke 'acute care' certificates issued under the Health Insurance Act 1973. The certificates had been revoked on the grounds that the applicants' medical treatment was designed only to maintain their present medical condition, not to improve it, in reliance on comments by Justice Northrop in a previous case. Justice Davies, however, said that while those comments were valuable, they were not intended to be, and should not be treated as, a definition of the term 'acute care'. Each case was to be considered on its own facts, having regard to the circumstance that, as a matter of law, a patient may be in need of 'acute care' notwithstanding that no improvement in the patient's condition is expected. Reliance on Justice Northrop's earlier comments as being decisive of the issue represented an error of law.

Commonwealth Ombudsman

Child care fee relief: failure to follow court decision

In December 1988 the Department of Social Security (DSS) took over the responsibility from the Department of Community Services and Health (DCSH) for assessing eligibility of children for grants for child care fee relief. It was the DSS intention that the definition of income which applied to pensions and benefits under the Social Security Act should henceforth apply to assessment of eligibility under the Child Care Fee Relief scheme.

In May 1989 the Federal Court in Garvey's case decided that a previous interpretation by the AAT and the Department of Social Security of the term 'income' was incorrect. The issue was whether losses from one source of income could be offset against profit from another source to arrive at the true income of the person in question. Previously losses from one source could not be so offset where the two sources were unrelated. The Federal Court took the view that the term 'income' as defined in the Social Security Act meant net income, and that rental losses could properly be taken into account. Neither DSS nor DCSH was prepared to adopt the court's reasoning in Garvey and DSS appealed to the Full Court of the Federal Court. The Full Court upheld the appeal on 7 December 1989 and reversed the decision of the trial judge.

The Ombudsman's complainant was a businessman who derived income from two business ventures, and had losses from a third. In assessing the eligibility of his child for fee relief, DSS declined to offset the loss from one of his business ventures against the profits from the other and held

that the child was not eligible. The issue is whether it is appropriate and proper for a department to decline to follow a judgment of the Federal Court pending an appeal to the Full Court against that judgment. The Department of Social Security has sought advice on this question from the Attorney-General's Department.

In addition, the question arose of the validity of the grants in general. In June 1988, the Attorney-General's Department had advised DCSH that guidelines required by the Child Care Act 1972 as a precondition for grants of fee relief did not exist. In November 1989 the DCSH informed the Ombudsman that this deficiency still had not been rectified. The Ombudsman was concerned that grants of child care fee relief made under the Child Care Act since June 1988, and possibly before that, may not have been validly made. The Minister issed new guidelines early in 1990.

Failure to follow AAT decision

The income of a TEAS recipient towards the end of 1986 exceeded the amount allowed under the regulations. She was required by the Department of Employment, Education and Training (DEET) to refund to it the moneys she had received under the TEAS scheme notwithstanding that, at the time of receipt, her income was negligible and certainly below the prescribed limits.

DEET's interpretation of the regulations, based on a 1980 legal opinion from the Attorney-General's Department, was to the effect that if a recipient remains a full-time student for the entire academic year, the whole of that calendar year is treated as the 'relevant period' for the purposes of ascertaining income and overall eligibility to the TEAS allowance.

DEET followed this interpretation from 1980 to at least June 1989, when the AAT upheld a Student Assistance Review Tribunal (SART) decision. The SART had determined that where TEAS (or Austudy) allowance was paid to a student during the period of eligibility (ie the period in which the student was not in receipt of income above the prescribed limits) this money was not refundable to the Commonwealth solely because the student subsequently received income in that same calendar year in excess of the limits for the whole year.

DEET did not exercise its right of appeal to the Federal Court on the AAT decision. Instead, it declined to follow the AAT, presenting reasons based on the Attorney-General's 1980 legal advice. At least one SART has agreed with DEET's stance. The Ombudsman is looking at the question whether it is reasonable for a department, if not prepared to appeal an adverse decision from the AAT to the Federal Court, subsequently to decline to adopt the AAT's enunciation of legal principle in cases involving the same piece of legislation.

Delay in appointment to the Public Service

An ex-Army officer complained to the Ombudsman that taking sick leave after he had joined the Australian Archives had cost him about $400, because of the delay between leaving the Army and being appointed to the Public Service.

The Public Service Act 1922 provides for a maximum break of 2 months in continuity of eligible employment for transfer of sick-leave credits. The notification required by the Army for an officer to resign is such that unless the officer is given timely notification of an offer of employment in the Public Service, he or she may not be able to meet the relevant carry-over provisions.

The Ombudsman identified two factors contributing to the complainant's detriment: the recruitment process was flawed and the law was too restrictive. He reported to both the Department of Industrial Relations (DIR), which was responsible for the legislation, and to the Secretary of the Department of Administrative Services (DAS), responsible for the Australian Archives.

DIR, after referring the matter to the Joint Council of the Australian Public Service, drafted appropriate amendments to the Public Service Act for submission to Parliament. DAS referred the case to the Minister of Finance for consideration of an act of grace payment, but the Minister declined to approve it. The Minister was doubtful that defective administration had led to the delay in appointment and also argued that a time-frame which accommodated one applicant could disadvantage another. Further, departments were under no obligation to expedite selection processes to meet individual needs.

In the Ombudsman's view these arguments, although not without merit, did not take sufficient account of the specific instances of defective administration which DAS previously had acknowledged. In addition, the deficiency in the legislation had contributed to the complainant's detriment. As a result of a report by the Ombudsman to the Prime Minister on these lines, DIR authorised DAS to make payment under the Public Service Act. DAS at that stage denied any defective administration, but agreed to pay to avoid further unnecessary administrative costs.

Australian Customs Service and penalty notices

The Ombudsman has received several complaints alleging that the Australian Customs Service (ACS) has acted unreasonably in issuing penalty notices.

ACS's policy is to impose penalties every time it detects an error in the amount of duty payable shown on the relevant form, even though the legislation provides for a discretion. Moreover the guidelines for the imposition of a penalty do not have any provision for deferment of the issue of a penalty notice when the applicant has requested an opportunity to explain the circumstances of the case.

ACS argues that the penalty is always imposed because, as the customs system is now based on self-assessment by the importer and over 90 per cent of cargo is cleared by ACS on the basis of documentation supplied by the importer, an effective disincentive is needed to discourage importers from trying to cheat the system. The Customs Act 1901, however, allows for remission of penalty and defines the basis on which such remission may be granted. The Ombudsman is pursuing with ACS the reasonableness of its current practice.

Defence Service Homes Scheme: second loan policy

The Ombudsman has received numerous complaints about the current policy of the Defence Service Homes (DSH) Scheme which, except in special circumstances, refuses second and subsequent loans to borrowers who took out loans before December 1987. In contrast, general portability applies to DSH loans taken out since that date.

In 1985 and on several subsequent occasions the Ombudsman has been advised that the second assistance policy was to be reviewed. Due to lack of progress, however, the Ombudsman submitted a draft report in December 1989 to the Secretary to the Department of Veterans' Affairs, to the effect that the current policy was improperly discriminatory and should be amended. The Secretary replied in January 1990 that work had resumed on the policy review and an outcome was expected in the next 2 months.

The Ombudsman therefore proceeded to a formal recommendation that the Defence Service Homes Act 1918 be amended to enable portability to be extended to loans granted before December 1987. During the 1990 Federal Election campaign, the Prime Minister announced that the Government would move to provide loads portability to people who had loans in December 1987.

Remission of FOI charges in the public interest

Following representations from a Canberra-based journalist, the Ombudsman took up with the Attorney-General's Department the approach to be adopted when journalists seek remission of FOI charges on the ground that the release of the documents concerned is in the public interest. This induced the Department to inquire of other agencies whether they were granting remission of fees to journalists.

The inquiries indicated that in most cases the agencies considered that the journalists who approached them had not made out an adequate case, and therefore very few exemptions were granted. The responses, however, persuaded the Attorney-General's Department that it needed to expand its FOI memorandum on the subject, to give agencies a clearer indication of the circumstances in which it is appropriate for charges to be remitted in the public interest.

Neither the Ombudsman nor the Attorney-General's Department consider that an automatic exemption from the fee should apply for journalists. On the other hand, the fact that a journalist proposes to base an article on the information sought does not disqualify him or her from being given an exemption. That a commercial advantage might be gained from publication of the information does not mean that its release cannot properly be described as 'in the public interest'. The draft expanded memorandum makes this point. The Ombudsman has asked the Department to keep him informed about developments with the draft memorandum.

Arrears of family allowance

Claim forms issued by the Department of Social Security for family allowance indicated that the claims should be made as soon as practicable after the birth of an applicant's child.

The Social Security Act 1947 provides that family allowance will be paid from the date of the birth of the child if the claim is lodged within 28 days. If it is not lodged within that time, the allowance is payable only from the date of the application.

The Ombudsman received several complaints where the persons concerned claimed that they had been misled by the information contained in the form, in that while they applied as soon as they perceived it practicable to do so, this had not been within the 28-day period specified in the Act.

As a result of the Ombudsman's intervention, the Department has altered the form. It has also agreed to pay the persons affected allowance from the date of birth of the child, where it is clear that the delay in the application resulted from reliance upon the information in the old form, rather than from inaction on the part of the applicant.

A D M I N I S T R A T I V E L A W W A T C H

Report upon freedom of information in Victoria

The Report to Parliament upon Freedom of Information in Victoria (Thirty-eighth Report to the Parliament) by the Legal and Constitutional Committee of the Victorian Parliament was released in November 1989.

The Committee made several recommendations for expansion of the coverage of the Freedom of Information Act 1982, in particular to include local government, school councils, incorporated companies and associations established by government to pursue public purposes.

Among its other recommendations were the recommendations that:

- there be no exemptions by agency from the FOI Act;
- the Public Service Board in association with the Department of Management and Budget develop standard procedures for calculating and recording the costs of FOI, that can be applied on a uniform basis by all agencies subject to the FOI Act; and that in doing so care should be taken to ensure that costs are not inflated by including expenditure which would have been incurred regardless of FOI's existence or by debiting to FOI costs which are not properly attributable to it;
- provision be made for the annual indexation of statutory charges in accordance with a formula which reflects movements in the Consumer Price Index;
- no application fee apply and the charge for supervision of access be reduced to $12.50 per hour;
- provision be made for the Ombudsman to mediate in disputes over voluminous requests and to review within 28 days complaints about refusals to process voluminous requests;