The Ombudsman's experience with local government

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Mr Castle, a former President of the New Zealand Law Society, took up his duties as an ombudsman in April 1977. He was then allocated specific responsibility in the field of local government complaints. In this paper he reflects on that area of the ombudsman's work.

At the time the jurisdiction of the ombudsman was extended to encompass territorial local authorities and other local government organisations, it was estimated that the number of complaints generated in these sectors would correspond broadly with the volume of complaints levelled annually at central government ministries, departments and agencies. The experience of the six years since such extension has not borne out that prognosis, principally, I believe, because there are more opportunities for citizens to air and seek redress for their grievances at the local level or on the spot than with central government departments, the ultimate control of which is more remote physically, and in the minds of some complainants, figuratively as well. The open door policies followed by many mayors, chairmen, members and chief executives go a considerable distance in ensuring personal attention, clarification, explanation and in many cases resolution of complaints made by the local citizenry.

Since the inception of the office, mention has often been made of the art of communication or the lack of it. Experience suggests that this art is developed to a higher degree in counties (although sparsely settled over wide areas) and smaller boroughs where the communities are close knit and councillors and officers are known within the district. The opportunities of pursuing avenues of redress through the elected representatives and officers of the council are thus seemingly more readily available to the citizen and exact less tension on the complainant than might otherwise be the case if the officers and councillors are not known to or known of by the complainant and thus give the semblance of being remote and inaccessible. This is not to say that the officers and elected representatives of larger boroughs and cities are inaccessible or remote. Indeed many, if not all, have impressed with long-established procedures for the airing of grievances by citizens

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and ratepayers. Nevertheless, statistics show that the majority of complaints originate from the larger metropolitan areas whose councillors and officers are frequently not known personally to the complainants. The very size of these corporations with their multiplicity of departments and responsibilities tends to confuse complainants notwithstanding the best intentions of officers and staff. Communication, consultation and courtesy clearly count in capacious corporations.

It is important for the ombudsman, therefore, to ensure as nearly as he can that it is reasonable for a complainant to resort to these adequate avenues of redress before undertaking an investigation. Thus, to decline to undertake an investigation when those avenues have not been explored by the complainant is quite in keeping with the spirit and intent of the ombudsman's legislation. Those avenues constitute administrative practices in terms of section 17(1)(a) of the Ombudsmen Act 1975 thereby entitling the ombudsman to exercise his discretion in terms of that section.

Because the anticipated volume of complaints did not materialise, my involvement with complaints involving local government has grown in five years from initial jurisdiction over South Island authorities, thence to include the lower half of the North Island, and ultimately to all local government organisations from the North Cape to Bluff. Throughout that period, visits to as many local organisations as possible have been made to discuss the method of operation and the nature and the jurisdiction of the office. Those visits of a public relations nature have, I believe, allayed at least in part the initial adverse reaction to the extension of jurisdiction which some felt constituted an unwarranted intrusion into local affairs. In addition to these opportunities for discussion, it is important that all those who are involved with the ombudsman have the chance to "recognise the face behind the signature". Every opportunity to address gatherings of local body officers has also been taken.

By these various means, the initial antipathy on the part of some local authorities to the extension of the jurisdiction in 1976 has been dissipated. It is presumed that this follows from an acceptance of the impartial nature of the investigation, the provision of draft reports for comments, dialogues in the course of investigations, and consultations with the mayors and chairmen. Moreover, the use of the collective defence mechanism — justification at all costs of the decision made — is seemingly rare and has been replaced where appropriate by an acknowledgement of error or omission and conscious effort on the part of the local authority to find an acceptable solution.

This "acceptance" of the ombudsman as an independent, impartial and necessary influence on the machinery of local government, along with the courts, audit and specialist tribunals, has prompted many organisations to make greater efforts to settle grievances locally. The co-operative attitude thus displayed by officers of the local authority is not only helpful in itself, it also enables the ombudsman to discontinue his investigation on the grounds that the complaint has been resolved during its course if he is satisfied that the proposed resolution is reasonable. He thus acts as a catalyst. This is not to say that the use of the recommendatory powers has been thereby usurped or abandoned. Almost all recommendations have been

accepted and when denied the local interest generated by the ombudsman's report taken in open meeting by the council has been covered by the media, on two occasions to such an extent that there was no call to utilise the powers of publication under the Ombudsman's Rules 1962 even had one been so minded. There will probably always be the occasions when the local elected representatives will consider they are better able to adjudicate on the merits (notwithstanding that they are in part at least judges in their own cause), than is the ombudsman who is seen as unable to comprehend the local knowledge and background, no matter how irrelevant. As further evidence of this "dissipation" many local authority members and officials actively encourage recalcitrant complainants to take their grievances to the ombudsman. A good many mayors and county chairmen were glad to pass over the perennial complainants after the introduction of the legislation and still appear so to be. It can also be said with justification that the very existence of the ombudsman has had an effect (perhaps subconsciously) on the decision-making process and on the exercise of a discretion.

It is quite fundamental that the office should be seen as readily accessible to all citizens. To this end a programme of visits by staff members has been arranged each year to provincial towns and cities preceded by appropriate publicity, thereby enabling people in the district to discuss complaints which they have involving not only local authorities within the district but also departments of government and government organisations. Many persons seem somewhat reluctant to resort to written complaints, preferring an opportunity first to discuss their grievances in person with an officer who can advise and if necessary assist them in formulating a complaint succinctly. These programmes have not been designed to solicit complaints — the simple objective is to improve accessibility for those who do not live in or near the three main centres of Auckland, Wellington or Christchurch where offices have been established.

It is clear that an ombudsman may not investigate a complaint where the complainant has available to him a statutory right of appeal or review in respect of decisions or recommendations in question unless special circumstances exist which would make it unreasonable for the complainant to have resorted to that right.[1] This section has limited relevance in local authority complaints because there is no jurisdiction over council decisions, because jurisdiction is limited to the investigation of decisions and recommendations, acts and omissions of officers, committees and subcommittees of a council, and because, so far as I know, there are no rights of appeal to a court or to a statutory tribunal from such decisions or recommendations, acts or omissions. It follows that the provisional exclusion of jurisdiction which is provided for in section 13(7)(a) of the Act does not normally operate with regard to complaints against local government. Any investigation of this nature will normally be on an ex post facto basis because the decisions and recommendations will have subsequently become council decisions. Results of such enquiries have been improvements in procedures.

1 Section 13(7)(a) of the Ombudsmen Act 1975.

Section 17(1)(a), to which reference has already been made, is of greater import in local authority complaints. The complainant may well have under the law or existing administrative practice an adequate remedy or right of appeal to which it would have been reasonable for the complainant to resort. The responsibility of the ombudsman is to form a judgment as to the adequacy or otherwise of the right of appeal or the remedy available to the complainant and also to determine whether or not it is reasonable that the complainant should have resorted to it. Where the ombudsman forms a view that the right of appeal or remedy is adequate and decides that it would be reasonable for the complainant to have taken advantage of it, then he will invoke the discretion given to him by the section and will decline to embark upon an investigation. This has been the experience in a number of cases. But there have been numerous occasions when despite the availability of these avenues of redress, an investigation has been undertaken, where for example the amount involved is comparatively small, the costs involved are comparatively large, where there has been a failure to advise of the availability of statutory rights of objection and appeal and where there has been or there is likely to be considerable delay. But the ombudsman does not inhibit himself by adopting rules and guidelines in exercising this discretion. The circumstances of each case must be considered on their own merits and the discretion exercised against the particular background.

A view is held in some local authorities that because a full council or board reaffirms a previous decision after notice of intention to conduct an investigation has been given, jurisdiction is thereby precluded. I believe this to be a mistaken view for such reaffirmation does not prevent me from considering the reports and recommendations of officers and committees of the council or board upon the basis of which the original decision was taken. If I am not satisfied that these reports and recommendations fairly assessed the matter at issue, and if they were, in my opinion, inaccurate or relevant facts or features were omitted or overlooked, then I am entitled to ask, and indeed recommend that the matter be reconsidered by the relevant committee or officers as the case may require with a view to a reassessment being made with all facts and information at their disposal.

The number of complaints relating to rates has been significant, prompted in many instances by the marked increases in the level of rates. In this context the striking of the rates, being a decision taken by the full council or a committee of the whole, is outside jurisdiction in terms of section 13(1) of the Ombudsmen Act 1975. That in itself does not preclude an examination of the reports and recommendations made by committees and officers of the local authority upon the basis of which council reaches its decision but it is a fact that, based on those recommendations and reports, members of the council will pare, defer, increase or modify in some other way the recommendations when considered as a whole. This overall consideration is given by the elected representatives who are answerable to the electorate and in consequence I have entertained but rarely complaints, the substance of which relates to the level of rates following the "political" decision to strike a rate at "x" cents in the dollar.

Conversely, a number of investigations have been undertaken involving alleged irregularities or illegalities in the imposition of rates on separate rateable properties

and the levying of multiple water charges thereon, the introduction of or modifications to differential rating schemes and classifications thereunder.

Some have necessitated validating legislation to cure inequities and irregularities following a formal recommendation to this effect. The complexity of these investigations is matched by many others in the local body field which leads to the comment that the types of complaints now being investigated are, after a period of six years, of a greater substance than hitherto.

Complaints relating to rates and charges for drainage, water and refuse collection services have consistently formed the largest grouping of complaints received (22.8%). The second largest grouping has comprised complaints about town planning, subdivision of land and building bylaws (collectively 16.6%).

It is well known that an ombudsman may form an opinion on a complaint in such circumstances as to warrant a finding that a decision was based on some law, regulation, or practice which is unreasonable, unjust, oppressive, or improperly discriminatory. As to a law or a regulation within this category, any recommendation for change must obviously stem from the results of an individual investigation. Although a single instance of injustice may not always justify reform, on occasions suggestions have been made and adopted for the redrafting of certain town planning ordinances, promulgating of bylaws for the control of noise, amendments to the Fumigation Regulations 1967, removal of anomalies relating to the definition of "ratepayer" for the purposes of the Local Authorities Loans Act 1956 and Local Elections and Polls Act 1976, and the desirability of all local authorities becoming full contributing members of catchment boards. Without doubt, however, a much greater influence is exercised in recommending or suggesting modifications to practices and procedures to rectify inadequate systems of administration. There are many instances of this influence.

A number of topics which stem from investigations undertaken throughout the last two or three years are still under study, notably in the realm of more comprehensive legislative authority entitling the making of ex gratia payments by local authorities on the recommendation of the ombudsman along the lines of the authority granted to their counterparts in England and Wales under the Local Government Act 1978 (U.K.). Another area still under study concerns the planning "limbo" which blights land where a statement of a proposed designation of land for municipal purposes is publicised but no formal designation by the local authority is promulgated for some years thereafter.

An ombudsman, following the conduct of an investigation, is entitled in terms of section 22(1)(a) and (c) to form an opinion that a decision appears to have been contrary to law or has been based wholly or partly on a mistake of law. As earlier noted, there have been a number of investigations involving legal interpretations. It is emphasised that to give a definitive view of the law is not the prerogative of an ombudsman. He is entitled to be an advocate of his own interpretation of the law following an investigation where, for example, a local authority has relied on legal advice for the decision taken. The ombudsman cannot be critical of the local authority for having followed that advice but clearly he is not

precluded from making submissions to those advisers to clarify the issues to support his interpretation and thereby on occasions convincing those advisers that their view is mistaken. It is therefore not sufficient for an ombudsman to step away from an investigation simply on the grounds that the local authority has acted on the advice of its solicitors.

It is recognised and accepted by many local authority officers that a complainant cannot be expected to know whether the act or decision complained of was taken by an employee or committee or the full council. It is therefore often necessary to make enquiries of the principal administrative officer of the organisation against which the complaint is made, not for the purpose of investigating the complaint, but in order to ascertain if the act or decision complained of passed through the hands of an officer or committee of the organisation. In a word, an ombudsman must establish whether he has jurisdiction before he begins his investigation. Such a process is often time consuming. If, after this preliminary investigation, an ombudsman finds he has no jurisdiction, he has an obligation to tell the complainant the reason why. Some complainants see no distinction between the acts and decisions of an employee, or a committee of council and the acts and decisions of a full council. Indeed it may happen that the same complaint will be able to be investigated by an ombudsman in X county and not in Y county for the reason that in Y county certain matters may always be dealt with by the full council alone, without it seeking any preliminary reports or recommendations from its officers or committees. In X county, on the other hand, the same matters may always be considered first by officers and committees who make recommendations to the full council. These recommendations are, of course, subject to an ombudsman's jurisdiction. It seems on the face of it unreasonable that a person's right to have his complaint investigated by an ombudsman should depend upon the way a local body organisation orders its business. It would be a pity if a local body set out to avoid the possibility of an ombudsman's investigation by dealing with a vexatious matter only in full council.

The Chief Ombudsman, Mr G. R. Laking, also mentioned this difficulty when he gave an address some years ago to the Rating Forum in Wellington which was sponsored by the Department of Internal Affairs. In the course of his address, he said:[2]

> If I may intrude a personal view, the exclusion of decisions of the full Council from the Ombudsman's jurisdiction is an unnecessary limitation of that jurisdiction. In our collective experience a high proportion of the decisions taken by local authorities are purely administrative decisions. As it is only that category of decision which in any event comes within the ambit of the Ombudsman's enquiries, and given also that an Ombudsman may not impose any course of action on a local authority but can merely form opinions and make recommendations, it seems to me sensible that he should be able to look directly at the administrative decisions of local authorities at whatever level they are taken, as is the case for example in England and Wales. He should not be obliged to establish first whether a particular decision proceeded from a recommendation made to the authority by an officer or a committee. I stress again that I am talking here only about decisions 'relating to matters of administration'.

2 *1980 Annual Report* 17.

Mr A. E. Hurley, former Ombudsman, wholeheartedly concurred in those views. He said on his retirement:[3]

> When jurisdiction was first extended to include local organisations, some may have regarded it as an unnecessary intrusion into their affairs. Now, after 4 years' experience, I think any misgivings of that kind have been dispelled. There are indications that the local organisations themselves welcome the impartial non-partisan type of enquiry that an Ombudsman is able to carry out, particularly where there have seemed to be intractable matters at issue. On several occasions, a local organisation has itself referred a complaint to me or encouraged and assisted a complainant in approaching my office. During the first year I was engaged in a long and involved investigation of one council's differential rating system about which I had received a number of complaints. After that exercise had been completed, and in the second year of my term of office, the same council invited me to investigate certain of its domestic affairs. I think therefore that the time is approaching, and may now have arrived, where local organisations would be amenable to the removal of the limitation to an Ombudsman's jurisdiction to which I have referred.

I support those views.

Researchers and statisticians are wont to query the effectiveness of the Office of Ombudsman on the basis of the number of victories, defeats, no win situations or draws. One can always learn from critical and objective analyses by people outside the ombudsman institution — such has been the case with some analyses by the Law Faculty of Victoria University of Wellington. Similarly, there have been moves from time to time to give the office more teeth, but the moment power to make binding decisions is given, there must inevitably follow an appellate structure. Such a structure would be quite foreign to the ombudsman's functions and powers and to his constitutional position as an officer of Parliament.

But it needs to be emphasised that precious few complaints which have been found to have substance have either not been resolved to the satisfaction of the complainant or have been the subject of a formal recommendation which has been denied.

The experience of the past six years affirms demonstrably that there is much more evidence of good intelligent, administration than of bad, and that where errors of omission or commission have been made or a discretion exercised on unreasonable grounds, remedial action has, for the most part, been taken. It is after all in everyone's interest that administrative deficiencies where they exist be identified and corrected. If actions have been entirely fair and the administrative procedures proper, there is surely nothing to hide from an independent scrutiny.

3 Idem.