The Ombudsman in transition

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This essay, by a former Chief Ombudsman, surveys the development of the office of Ombudsman in New Zealand during the first twenty years of its existence. It assesses the achievements of the first Ombudsman in grafting on to the New Zealand constitutional structure a concept foreign to the Westminster-type system of government and discusses the impact on the office of new and enlarged responsibilities entrusted to it from time to time. Particular emphasis is given in this context to the Official Information Act 1982. Finally the essay poses some questions about the emergence of a new concept of accountability in government and the part which the Ombudsman should play in it.

> For perhaps hundreds of years the trend towards increasing the power and centralising all power in the hands of the State has tended to restrict the rights of individuals. This Bill is an attempt to hold or reverse that trend.[1]
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> It is extremely difficult to work out something that is going to give substantial new rights to a citizen and yet not breach important and fundamental constitutional principles.[2]

This year marks the twenty-fifth anniversary of the institution of the office of Ombudsman in New Zealand. It is an appropriate time for a review of its achievements and its continuing relevance to the governmental process. Some preliminary questions suggest themselves. What expectations did Parliament have of the office when it was set up in 1962? To what extent has it fulfilled those expectations? How successful has it been in adjusting to changes in New Zealand society and the consequential changes in the relationships between government and the individual? Any contribution to such a review by a former Ombudsman is bound to lack objectivity but it can perhaps inject some thoughts and insights based on an experience which is necessarily peculiar to the "inside trader". They, of course, need to be balanced by external scrutiny.

The concept of the Ombudsman — a people's advocate — was an innovation adapted from systems of government which, as the sponsoring minister's comments implied, were very different from the Westminster-type structure inherited by New Zealand from London. That being so, one might have expected that the proposal to introduce it into New Zealand would arouse much greater controversy than it did. The debate which

* Ombudsman 1975-1977; Chief Ombudsman 1977-1984.

1 New Zealand Parliamentary debates Vol. 327, 1961; 1803 per the Hon. J. R. Hanan introducing the Ombudsman Bill.

2 Ibid., 1804.

accompanied the passage of the Bill through the House was relatively short, surprisingly well informed and unmarked by any of the superficial political point scoring which is so depressingly characteristic of more recent times.

One can only speculate as to why so basic a constitutional change should have been accepted by the House with such equanimity. The smooth passage of the Bill obviously owed something to the climate of the times. It occurred in a period when growing emphasis was being given throughout the world to human rights. The United Nations had begun to play its part in providing a focus for moves towards self-government and independence among subject peoples. In the United States positive action to eliminate the deeply entrenched discrimination against blacks was gathering momentum. These were manifestations of a widespread resurgence of emphasis on government for the benefit of the governed rather than the governors. It would be too much to suggest that this exerted any great conscious influence on the attitudes of New Zealand legislators, preoccupied as they always have been with more parochial concerns, but the temper of the times was such that any move to enhance and protect the rights of the individual was more likely to be received favourably than unfavourably by the electorate.

A more hard-headed approach might suggest other more immediate influences as having had a greater bearing on the attitude of parliamentarians. The notion of a parliamentary officer, answerable to that body rather than to the government of the day, with responsibility for checking the excesses of the bureaucracy, had a certain novel appeal. It was the kind of innovation on which New Zealanders have always prided themselves. To be the first country outside Scandinavia to adopt it gave it an additional cachet.

Moreover, the office was presented as being concerned only with the acts and omissions of public servants, dealing with matters of administration and not with questions of policy. Thus it could not be seen as exposing the activities of ministers to enquiry or as constituting a threat to their status by cutting across the lines of responsibility and accountability between officials and ministers. The Bill, as presented to the House, was deceptively simple in its approach. It paid proper deference to these constitutional concerns. It gave the Ombudsman no power of decision, confining him to the right to make recommendations which might or might not be accepted by the government. It appeared to involve ministers in the Ombudsman process only to the extent of authorising and in some cases requiring the Ombudsman to consult with ministers before making a recommendation.

Such concerns as were expressed by members generally were minor. One said he did not "wish to be relieved of his Parliamentary responsibilities" or to have the Ombudsman "usurp the normal functions of a parliamentarian concerning his constituents". Others, perhaps reflecting a more general (if unstated) negative or neutral reaction to the concept, questioned whether an Ombudsman would be fully employed. They probably saw it as a noble idea, enhancing the notion of Parliamentary supremacy, and, in short, an innovation which might do little good but could probably do no harm. Outside Parliament there was more active opposition, principally from the public service, which resented being subjected to what it saw as unwarranted

interference in the exercise of its proper function. A few elements of the bureaucracy lobied successfully to limit the Ombudsman's effective intervention in their affairs. However, in the nature of things the public service view carried little weight with parliamentarians who, despite their heavy reliance on the public service, were not averse to seeing it prodded into greater accountability for its actions and inaction.

Against that background of benign endorsement by the legislature, the new office might have been expected to go down the same track as many another statutory bodies, beginning with a rush of blood to the head but quickly subsiding into anaemic passivity. If the first Ombudsman had not so clearly seen and so skilfully exploited the potential of the office it could have done so.

In an address at the Law Centre, University of Alberta, shortly after his retirement, Sir Guy Powles laid out what he saw as the prime justification for the office.[3] He reviewed the efforts of the judicial system in Common Law jurisdictions to accommodate itself to the changing "concept of the proper sphere of governmental activity" brought about by the development of the welfare state. The courts, he suggested, had struggled manfully to develop an adequate doctrine for the judicial review of government action. However, that doctrine left the administration with a substantial area of legislative and executive discretion shielded from judicial scrutiny so that citizens, even those who had overcome the formidable difficulties, financial and otherwise, of challenging the Crown in the courts, could well find that the principles on which they were operating prevented them from dealing with the substantive issue. It was into this gap Sir Guy suggested, that the Ombudsman was able to intrude and to attract public support. The intrusion was at first slow but quickly spread from New Zealand to other countries. It soon developed into what he called an "Ombudsman explosion" so that at the time of his address there were sixty-four Ombudsmen of all kinds, of whom forty-six were in Common Law countries. That number has since increased still further.

There can be little doubt that that "explosion" was triggered by the early achievements of the office in New Zealand. In a relatively short time, public service opposition was defused, the fears expressed by members of Parliament that their relations with their constituents would be interfered with proved to be groundless and public support of the office was reflected in the large numbers of complaints brought to the Ombudsman. That endorsement was sufficient in the early years of the office's existence to induce the government of the day to pay considerable deference to the Ombudsman's recommendations. Sir Guy Powles attributes this in large part to the Prime Minister, the Rt. Hon. Sir Keith Holyoake, who encouraged the members of his Cabinet to accept the Ombudsman's recommendations rather than complain about them to their Cabinet colleagues.

There was, however, one very significant and largely unforeseen development which arose out of the first Ombudsman's activities. It was the exposure of the fallacy that a

3 (1979) 5 Commonwealth Law Bulletin 522.

clear line can be drawn between matters of administration and questions of policy. From the beginning many of the complaints received by the Ombudsman were directed at decisions made by ministers which, in the view of the Ombudsman, related to matters of administration. In many instances those decisions were based on recommendations made by departmental heads which the Act of 1962 specifically authorised the Ombudsman to investigate. He very soon found himself forming opinions which, while directed at departmental recommendations, were inevitably seen by ministers as a challenge to their decisions, as in fact they were. Many ministers were (and some remain) reluctant to accept that not all their decisions were policy decisions and they were (and are) often embarrassed by the need to adjudicate between conflicting recommendations of their departmental advisers and the Ombudsman. Thus the support given to the office by the Prime Minister in the early stages of its development was crucial. As longer experience of the working of the Act showed that the authority of ministers was not undermined or threatened by it, their fears on that score diminished. In this way a crucial question of jurisdiction which might otherwise have been presented to the courts for resolution was set on one side in favour of practical understandings. That this happened is a tribute both to the first Ombudsman and to the Prime Minister's judgment of the political realities. Moreover, those who drafted the New Zealand legislation were vindicated in their intention to find a formula which, while not subjecting ministers to the jurisdiction of the Ombudsman, would involve them in the workings of the office. Other Ombudsmen were not so fortunate.

The first Victorian Ombudsman was frustrated from the beginning by a series of challenges to his jurisdiction which seriously hampered his activities on behalf of complainants.[4] By contrast a recent decision of the Supreme Court of Canada has given substantial judicial support to the broad view of the jurisdiction which has always been taken by New Zealand Ombudsmen.[5] That judgment rejects the notion of a distinction between policy and administration and concludes that the words administration or administrative are ". . . broad enough to encompass all conduct engaged in by a governmental authority in furtherance of governmental policy — business or otherwise."[6] It is worthy of note, in relation to recent developments in New Zealand, that that decision concerns the activities of a government corporation.

By 1968 the office had gained sufficient credibility in the eyes of the public and the government to support an extension of its jurisdiction to education and hospital boards. That was followed in 1975 by a much greater enlargement which brought within its ambit all territorial local authorities as well as an additional number of ad hoc authorities. Those extensions presented no problem of absorption (other than practical problems of work load) because they did no more than extend the scope of the original jurisdiction to a second tier of government. By contrast, later responsibilities either

4 See for example *Booth* v. *Dillon* Nos 1, 2 & 3 [1976] V.R. 291 and 434, [1977] V.R. 143.
5 *Re British Columbia Development Corporation and Friedmann* (1984) 14 D.L.R (4th) 129.
6 Ibid., 147.

imposed on or accepted by the office have been of a different kind. They included the offices of Race Relations Conciliator, (1971) and Wanganui Computer Centre Privacy Commissioner, (1976) — both for short periods only; membership of the Human Rights Commission since 1978, and, since 1982, responsibility for monitoring the operation of the Official Information Act.

A general conclusion which can reasonably be drawn from these enlargements of responsibility is that in the eyes of the legislature, which presumably reflects public reaction, the office has met many of the expectations which accompanied its birth. It may not have met them all. On the other hand, as I have suggested, it has in some respects exceeded them and has developed in directions which were not contemplated by the originators.

In the report which I made to Parliament on leaving the office in October 1984, I made an initial attempt to assess the impact of these changes and to address what seemed to me the central issue confronting the office.[7]

> 1.6 In the 22 years that it has been in existence, the office . . . has been subjected to severe pressures and has undergone major changes. Its response to the challenges with which it has been faced needs to be examined against the extent to which it has been able to maintain the three essential features of the office.
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> 1. Its *independence* as a Parliamentary office not responsible to the Executive Government.
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> 2. Its *flexibility* in the conduct of investigations and in recommending remedies most calculated to achieve substantial justice as between the individual and the State.
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> 3. Its *credibility* with the Executive Government and with the public.
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> 1.7 It is not without significance in this context that New Zealand is one of a very few countries which do not have written constitutions; also that it is a unitary state with a unicameral legislature. It is thus not subject to the political restraints inherent in a dispersion of power between Federal and State legislatures. It also lacks some of the checks on the exercise of governmental authority such as can be provided by a second legislative chamber.

In developing my views on the three essential features mentioned above I devoted much of the report to an examination of the impact on the *independence* of the office of a provision inserted in the revision of 1975 which enables the Prime Minister, with the consent of the Chief Ombudsman, to refer to an Ombudsman for investigation and report any matter, other than a judicial matter, which the Prime Minister considers should be investigated. I also canvassed the significance of the Official Information Act for the *flexibility* of the office; and the potential damage to the *credibility* of the office arising from the restrictions on the Ombudsman's jurisdiction to deal with complaints against the police.

7 Laking, *Report of the Chief Ombudsman, G. R. Laking, on Leaving Office* (Government Printer, Wellington, 1984), 4-5.

A valuable contribution to the discussion of some of these matters has been made by Sir David Beattie in the first Lester Castle Memorial Lecture.[8] It is symptomatic of the speed with which change is now taking place in the whole governmental process that in the two and a half years since my final report was presented, two of the principal issues which I raised are now the subject of amending legislation before Parliament.

A new mechanism for the investigation of complaints against the police, separate from the office of the Ombudsman, is to be set up. The draft Bill, which is based on the report of an Officials Committee headed by Sir David Beattie, goes some way to removing the limitations on the jurisdiction of the Ombudsman to deal effectively with those complaints, while paying considerable (possibly undue) deference to what the police themselves consider acceptable. It is, on the other hand, encouraging that the emphasis in the report on the scope for conciliation of complaints receives some recognition in the Bill. That approach, it might be observed, sits comfortably with an Ombudsman but much less so with the police or a judicial or quasi-judicial authority. The investigative process of the Ombudsman is concerned not with the apportionment of blame but with the equitable resolution of the issue which has given rise to the complaint. It remains to be seen whether under the new regime conciliation will emerge as a significant element in its development.

The report of the Officials Committee also shows that, even leaving aside the distortions created by the aftermath of the South African rugby tour of 1981, a material part of the Ombudsman's resources is being devoted to the investigation of complaints against the police. If the office is relieved of that responsibility those resources will be released at a time when heavy new demands will be made on them by the proposal to enlarge the scope of the Official Information Act. The comments made by Sir David Beattie on this issue seem to me to acknowledge, at least by implication, the interrelationship between the conventional Ombudsman process and the investigation of complaints under the Official Information Act. The objective, in both instances, is to resolve as many complaints as possible by means short of a resort to any formal conclusion and recommendation leading to the possibility of a ministerial veto or other confrontational situations such as a resort to the courts. The experience of the past five years since the Act first came into operation has been very similar to that of the early years under the Ombudsman Act. Much of the initial hostility on the part of government agencies has been gradually eroded by the patient discussion and exploration of the legislative intention. As a consequence, both direct and indirect, of those efforts, the flow of official information to the public has increased markedly from year to year.

The apprehension, which was to a great extent shared by the Ombudsmen themselves, that there would be a series of confrontations with ministers and frequent resort to the courts by government agencies, has not been borne out. In fact, those in the

8 Given in Wellington on 28 April 1987 and published by Butterworths in support of the Wellington District Law Society's Law Week.

first category have led to a healthy redefinition of the significance and scope of the ministerial veto. Those in the second category offer an instructive demonstration of both the differences between the judicial and Ombudsman processes (to which Sir Guy Powles referred in the address mentioned earlier in this essay) and the way in which they can complement each other. I prefer to see the Ombudsman's functions, while being subject to review by the courts, as complementary rather than supplementary to the judicial system.

Of the two instances in which the courts have been asked to review decisions under the Official Information Act, the first, *Commissioner of Police* v. *Ombudsman,*[9] was instigated by the police by way of an application for review of a recommendation that briefs of police evidence should *in one particular case* be made available to defence counsel. The decision of the High Court, which is subject to appeal, was that the Ombudsman's conclusion was based on an error of law. At the same time the judge acknowledged the existence of a police practice of making such briefs available in many instances. The basis on which they exercise their discretion was not explored as being presumably outside the scope of the review. The judgment nevertheless prompted the government to ask the Criminal Law Reform Committee to give priority to the preparation of a comprehensive report on discovery in criminal cases which it produced in December 1986.[10] In short, the judicial and Ombudsman processes, complementing each other, eventually secured movement towards a resolution of the basic issue which prompted the complainant (no doubt at considerable cost) to pursue his complaint —namely, is it appropriate for the police to exercise an unfettered discretion or should there be legislation providing for a formal system of disclosure, as the Committee now recommends.

This, I would suggest, demonstrates precisely the point made by Sir Guy Powles in exploring the origins of the Ombudsman concept: "The citizen," he said, "having put up money for costs and having got his case into Court, might well find that the principles on which the Courts acted would not give him complete satisfaction."[11] A footnote might be added here. The same result could have been achieved much sooner and at much smaller cost without the need to resort to the courts if the minister concerned had been offered the opportunity to veto the Ombudsman's recommendation which he could reasonably have done on the grounds that the broad issue of discovery in criminal cases was already high on the agenda of the Criminal Law Administrative Committee and would be given even greater priority.

At the time of writing, the second case before the courts, *Hicks* v. *Attorney General,*[12] remains unresolved after more than two years. It had its origin in a request under the Act for access to the Public Service Classification List which contains the names, ages,

9 [1985] 1 N.Z.L.R. 578.

10 Criminal Law Reform Committee *Discovery in Criminal Cases* (Government Printer, Wellington, 1986).

11 Supra n.3, 523.

12 Unreported, February 1984 High Court Wellington No. 33/84.

salaries and public service status of all public servants. The refusal of the State Services Commission to meet the request was referred to the Ombudsman who recommended release. The Minister in Charge of State Services did not veto the recommendation. The Public Service Association obtained an interim injunction blocking the release. Whatever the reasons why the matter has not yet come to a substantive hearing, the passage of time has probably made the issue irrelevant. Had this been a case where the significance of the information sought lay in having prompt access to it, it would have been a telling example of the way in which the "law's delays" can effectively frustrate the purposes of the Act. It highlights the distinction between the passive nature of the judicial process as an instrument of justice and the Ombudsman process which, while not having compulsive effect, encourages the active pursuit of a solution.

The recital of these cases supports rather than weakens the view that the concerns expressed both before and since the Official Information Act came into effect about the exercise of the review function by the Ombudsman have by and large not been realised. The Act has been applied with relatively little friction, its purposes are being reasonably achieved and the office of the Ombudsman, while saddled with a major workload, does not seem to have been damaged in the eyes of the public or the administration. Its image has probably been enhanced.

The question remains as to whether in the long run another type of agency and the more direct involvement of the courts would be desirable. There is little evidence so far that this would result in a more effective realisation of the Act's purposes. I expressed the view in the early stages of the Act's operation that its full impact could probably not be assessed until there have been at least two changes of government, in the course of which any differences in the approaches of the political parties to the Act will be exposed to the customary pendulum process. However, it would be safe to assume that no government of whatever political colour would be likely to forego the power of veto entirely. If it did so it would be only at the expense of much more restrictive provisions inserted into the Act. More potently, the resources which governments are prepared to devote to the protection of their position severely limit the range of persons and organisations with the financial ability to challenge the Crown. In those circumstances the potential for delay, which is inherent in the judicial process, is in many instances sufficient to discourage any such challenge. In the great majority of cases, information sought in 1987 would be seen as having little value if the best that could be expected was an order for release given in 1990. These seem to me persuasive arguments against a too confident reliance on compulsion as an aid to the individual seeking to assert rights against the state through resort to the Official Information Act.

The discussion of these issues in relation to the future role of the Ombudsman is important. It is indeed inevitable in the context of the sweeping changes in the whole governmental process which have been taking place in the past few years. Almost every aspect of the administrative and constitutional structure is being subjected to intensive scrutiny. Already radical changes in the public service have taken place as a range of government functions has been transferred to state owned enterprises, with the promise that this process will continue. The Minister of Justice, has commissioned the

Legislation Advisory Committee to carry out a review of tribunals. The Law Commission has a reference on the structure of the courts. The Economic Development Commission has begun to look at the possibilities of deregulation of industry and the professions on a broad front. There are proposals for electoral reform which, if adopted, will affect both the composition and functioning of the legislature. The adoption of a Bill of Rights is being advocated. The implications of an increasing recognition in law of the relevance of the Treaty of Waitangi have yet to be worked out.

While there is regrettably little evidence of cohesion or co-ordination in these initiatives, they are all facets of a mounting debate as to the proper function of government in the development and management of the economic and social structure of the country. It would be idle to suppose that in all this turmoil an institution such as the Ombudsman will remain unaffected except by the relatively haphazard addition or subtraction of particular functions.

There must emerge sooner or later from the debate a new concept of accountability in government, in which the Ombudsman for the past twenty-five years has had a significant place. During that time there have been changes in the social climate which have moved it away from an emphasis on individual rights to a concentration on efficiency in financial and economic management of public resources. Even before the move towards corporatization, the public servant (using that term in the broad sense) had become less and less simply an adviser to the government in office and a faithful administrator of policies laid down by ministers. The public servant is now increasingly a relatively independent manager of commercial and financial enterprises which exercise a major influence on the economy and the welfare of society as a whole. While continuing to look on himself or herself as the repository of the public interest, the new public servant is disposed to see that interest as being equated primarily with the need to compete successfully with private enterprise and to produce an acceptable return on the investment of public assets. If that is an accurate representation of what is happening in the public service, much more sweeping change is implicit in the transfer of those assets to the managers of the new state owned enterprises. The legislation which set them up imposes on them a measure of financial accountability, but they do not inherit the tradition of concern for other aspects of the public interest which has until recently been acknowledged as a necessary ingredient of the public service approach to its responsibilities. It will not develop spontaneously but will need to be inculcated in them.

The implications of these new developments for the future scope of government activity are canvassed in a submission dated 13 February 1987 by the Legislation Advisory Committee to the Select Committee considering the State Enterprise Restructuring Bill:

> 2. The State-Owned Enterprises Act 1986 makes it clear that the State continues to have direct involvement in the activities of the new corporations. Ministers continue to have serious responsibilities. They have corresponding powers in respect of the membership of

13 February 1987.

> the boards of the corporations, their functions (for instance in respect of their statements of corporate intent and their non commercial activities), and their financial structures. The corporations themselves are not simply companies under the Companies Act 1955 pursuing profit in the most effective way. They have serious wider duties as indicated in S.4(1)(b) and (c) of the 1986 Act. Accordingly they are under special obligations of accountability. These involve the public and Parliament, and include for example the Office of Ombudsman . . . .
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> 5. . . . The state, notwithstanding the changes made by the 1986 Act, still has very important responsibilities. It is to provide a postal service, electricity must be available, telecommunications services must operate, and there must be air services to facilitate the safe and efficient transportation of people and goods by air. This is recognised in part in the present legislation, for example in the obligation of the Ministry of Energy to provide electricity to be found in section 7 of the Electricity Act 1968. In the other areas covered by the Bill the obligation is also one at international law . . . . The satisfying of these obligations, to the people of New Zealand and to the wider international community, cannot be ensured simply by *enabling* the corporations to undertake the services in question. It is already of course the case that Ministers have relevant powers under the State-Owned Enterprises Act for instance to give directions or in respect of the statement of corporate intent to ensure that effect is given to many of the obligations which have just been briefly mentioned. But there is no statement either in that Act or in the new bill of the particular duties. It should not be possible for the State, through the inaction of Ministers and the decisions of the corporations, to opt out of those important obligations.

The contribution which the Ombudsman will be expected to make to the development of this new concept of accountability to Parliament and the public may well put the relevance and effectiveness of the office to a new and severe test. It is no secret that the new corporations do not welcome the prospect of involvement with the office, in either its original jurisdiction or the exercise of its responsibilities under the Official Information Act. The Ombudsman is in a sense on probation[13] and will be operating at first in an environment even less receptive than existed in the public service in 1962. There will seldom be any basis for involving ministers (at least under the Ombudsman Act) which will allow them to influence the reaction to an Ombudsman's recommendations.

In the longer term there is a much broader question. The Minister of Justice in 1962 saw the office of the Ombudsman as ". . . something that is going to give substantial new rights to a citizen and yet not breach important and fundamental constitutional principles."[14] What were those principles? To what extent are they being either discarded or modified by recent developments? It is the answers to these basic questions which will determine whether those "substantial new rights" are still available to the citizen and if so by what mechanism they can best be protected. The fragile and sketchy constitutional structure under which New Zealand has always conducted its affairs has been sustained to a great extent by the acceptance of a number of conventions — about

13 The application of the Ombudsman Act and the Official Information Act in this area is to be reviewed at the end of 2 years see State-owned Enterprises Act 1986, s.31.

14 Supra n.2.

ministerial responsibility and accountability and about the anonymity and political neutrality of the public service. The events of recent years have challenged them all. The progressive dismantling of the public service in favour of a series of state corporations cannot take place in isolation. Its effects must flow on to the other key elements of the constitutional and administrative structure. The changes in the composition and nature of New Zealand society make it impossible to predict how those effects will be worked out, but it is safe to assume that whatever new framework of legislative and executive power is developed, it is the adequacy of any checks and balances on the exercise of that power which will decide its political acceptability. As Lord Scarman said in an address given at the Royal Institute of Public Administration Conference in September 1984, "The public want their individual grievances met and specifically righted."[15] No theory of accountability which seeks to ignore that reality can expect to survive in a society which is democratically based.

15 (1985) 63 Public Administration (U.K.).