

**PROTECTION OF THE NAME "OMBUDSMAN"**

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What's in a name? That which we call an "Ombudsman" by any other name would mean the same to the general public - or would it? (apologies to Shakespeare). The word is or has become so much more than a name. In its literal translation from the Swedish it means an agent, but for those citizens throughout the world who have become familiar with the ombudsman concept, it means much more - a citizen's defender against the state; an independent office established to investigate grievances which individual citizens have about the adverse effects on them of particular actions or decisions of the state; a non-adversarial and impartial officer who is accessible to the public and to whom the public can turn for help in resolving disputes with the state. The word "Ombudsman" means all that and much more to the citizens of those countries which have adopted and adapted the long-standing Scandinavian alternative grievance procedure.

In adopting and adapting the concept, some countries have tried to find a local equivalent term. For example, in New Zealand, which was the fourth country in the world to adopt the concept and the first English-speaking country to do so, the legislation establishing the office in 1962 was the *Parliamentary Commissioner (Ombudsman) Act 1962*. However, the Parliamentary Commissioner alternative did not catch on. It was the word "Ombudsman" which signified the concept and which caught the public imagination. The word very quickly became an established part of the New Zealand language.

The word has been criticized, as have many words which appear not to be gender sensitive. However, to quote the Minister of Justice when recommending the appointment of the first New Zealand woman Ombudsman, Nadja Tollemache:

It is not intended to change the title Ombudsman in order to accommodate the appointment. The concept and term Ombudsman are of Swedish derivation, and there the word applies equally to men and women who hold the position. Sweden was not only the first country to create the position of Ombudsman, it was also amongst the first to appoint a woman to that post.

For some twenty years the word in New Zealand was synonymous with an independent parliamentary officer to whom citizens could turn for help in resolving their grievances with the bureaucracy. However, in a sense, therein lay the trap. The word became a symbol which

conveyed a sense of fair play and justice in the resolution of grievances, and was seized on overseas, and particularly in North America, by private sector consumer interest groups for a myriad of consumer grievance procedures. I became concerned at the potentially adverse effects which the proliferation of the use of the term Ombudsman for a wide variety of grievance procedures might have on the status and integrity of the Parliamentary Ombudsman in New Zealand. Accordingly, in 1985 I first raised the question of the need for statutory protection for the use of the term.

I was motivated by what I saw as the potentially undermining effect on the public understanding of and confidence in the Parliamentary Ombudsman by the use of the term for all kinds of consumer protection purposes in both the public and the private sectors. It was becoming clear from overseas experience, including that of the Swedes, that the widening use of the term was causing confusion in the minds of the public. While I had no argument whatsoever with proposals to establish procedures which would assist the public to resolve grievances, I did object to those which were, generally speaking, procedures with no independence from the organization which established them using the term which in New Zealand had become accepted and understood as being synonymous with a constitutional right to have a grievance against executive government, whether central, regional or local, investigated independently and resolved impartially. In my view, proliferation of the term was likely to lead to confusion in the minds of the public as to the role and functions of the Parliamentary Ombudsman, thereby undermining the confidence and integrity of the existing constitutional process which, in New Zealand's unicameral system of government, plays an important role as one of the parliamentary checks and balances. These checks and balances protect the public from the excesses of executive government and, in the process, enhance the accountability of Ministers and officials for their decisions. The value of the Office of the Ombudsman to the public should not be diminished by unnecessary confusion as to what an ombudsman is and does.

The establishment overseas, particularly in North America and the United Kingdom, of a variety of ombudsmen for different industries (building societies, banks, insurance companies), large corporations, and colleges and universities prompted me to pursue more vigorously my wish to see the name protected in New Zealand. Newspaper articles in New Zealand led me to conclude that without such protection it was likely that a similar proliferation in the use of the term would arise here. Suggestions that there be a television ombudsman, a health ombudsman, a banking ombudsman and a children's ombudsman were being discussed in the media, and more than one local authority was considering appointing an ombudsman to deal with citizens' grievances. Such ombudsmen in particular could only lead to a confusion of the role of the Parliamentary Ombudsman and those other ombudsmen. As a result of discussions with the then Deputy Prime Minister and Minister of Justice, legislation was introduced into the House of Representatives in December 1988 which aimed to protect the use of the name.

Although discussions with colleagues from overseas in October 1988, at the Fourth International Ombudsman Conference in Canberra, suggested that they did not foresee the kind of confusion arising which I had identified, it later became clear from reports from colleagues overseas, particularly on the American continent and in Australia, that the proliferation of the use of the term was in fact creating considerable confusion. For example, in New South Wales the Sydney Morning Herald appointed a former New South Wales State Ombudsman as its

"ombudsman". Even though the person concerned never called himself by that name, the newspaper did and, in doing so, effectively capitalized on the status and reputation of the State Ombudsman. There was a degree of confusion in Australia following the establishment of the banking ombudsman: for example, the offices of both the Commonwealth and the New South Wales Ombudsmen received many telephone calls for the banking ombudsman. The situation was not helped when one daily newspaper produced an article about the banking ombudsman and used the photograph of the New South Wales Ombudsman, thus creating some confusion in the minds of the public!

In the light of that experience, I continued to lobby Ministers and officials in New Zealand to have the legislation introduced in December 1988 passed into law. This eventually occurred in late 1991. The provision inserted in the *Ombudsmen Act 1975*, states:

28.A (1) No person, other than an Ombudsman appointed under this Act, may use the name 'Ombudsman' in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman.

(2) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$1000 who contravenes subsection (1) of this section.

In the face of opposition from consumer authorities, including government sources and the Consumer Institute, this amendment did not provide a complete prohibition on the use of the term "ombudsman". It did provide for authorization for the use of the term, other than for a statutory purpose, to be subject to approval by the Chief Ombudsman as an Officer of Parliament. This enables me (and my successors in office) to exercise control over the use of the term and to ensure, as far as possible, that it is not used in a way which would undermine the public's understanding of the ombudsman concept or would create unnecessary confusion in the minds of the public.

With the enactment of the new provision, I decided to establish and publish criteria against which I would consider applications to use the name. In setting those criteria, I consulted with colleagues overseas to draw on their experience, particularly in the United Kingdom and Australia where "industry ombudsmen" have been appointed. I also consulted with the Ministry of Consumer Affairs and the Consumers' Institute to gain a "consumer perspective" on the use of the name.

As a result of those consultations, criteria to guide me in the consideration of applications were established. My overall aim has been to ensure that an office using the name is one which will afford the New Zealand consumer the right to establish a complaint against an organization, free of charge, and have it considered by a person of independence and influence and, if sustained, expect a remedy. I decided that in looking at any application, I would consult with

the Ministry of Consumer Affairs and the Consumers' Institute. As a general rule, an ombudsman scheme will only be granted to authority to use the name "Ombudsman" if it is independent, accessible, fair and effective. The aim of the approval process is to see that, in the interests of the consumer, minimum standards are set for an ombudsman operation.

The criteria which I established for guidance are:

1. Unless authorized by statute, no position entitled 'Ombudsman' should be established in any area where the Ombudsman has or may be given jurisdiction under either the *Ombudsmen Act 1975* or the *Official Information Act 1982* or the *Local Government Official Information and Meetings Act 1987*. Such a position would confuse the public and undermine the constitutional role of the statutory Ombudsmen;
2. Where it is proposed to have an "Ombudsman" type position which did not conflict with the position in (1) above, the holder of the name "Ombudsman" must be appointed and funded in a manner which enables him/her to operate effectively and independently of the organization which will be subject to the role. The position should also have a publicly notified Charter in plain language which is constantly before the consuming public. The appointed Ombudsman should have the right to make recommendations to change any provisions of the Charter;
3. The role of the person proposed as an "Ombudsman" is to receive complaints directly from a complainant, free of charge; investigate the facts impartially; conclude with a decision to not sustain or sustain; and, if appropriate, achieve a remedy. The name Ombudsman would not be approved if the role was seen to be one of counsel or advocate for special interest groups. The position will need to be seen to be independent and impartial by both the consumer and the organization to ensure maximum effectiveness and influence;
4. The use of the name by a non-parliamentary Ombudsman will be of greatest value to consumers when the appointee operates in a jurisdiction which is national in character. Permission to use the name "Ombudsman" will not normally be granted for unique local or regional roles;
5. Where all the above criteria are met, the term "Ombudsman" should not be used alone, but only in conjunction with a description which makes the role clear, e.g., "Banking Ombudsman". The name on this basis is to be used in the public Charter and in correspondence and publicity;
6. All approvals will require that the approved Ombudsman will produce an annual report and make it available to the public. Additionally, it will be desirable that the ombudsman scheme be subject to periodic public reviews to allow consumers to indicate the degree of credibility which they accord the complaint system being followed.

It seems to me that the foregoing criteria would ensure, to the maximum extent possible, that the name would only be used in New Zealand where the basic principles underpinning the ombudsman concept were present; namely, independence, impartiality, and a non-adversarial investigative approach with the power to achieve resolutions. Secondly, the requirement that the name be used only in conjunction with a description would minimize confusion.

As soon as the legislation came into effect, I received an application from the New Zealand Bankers Association for approval to use the terms "Banking Ombudsman" and "Banking Ombudsman Commission". In support of the application, the Association provided copies of its proposed Code of Banking Practice, Rules of the Banking Ombudsman Commission and the Terms of Reference for the Banking Ombudsman.

The Banking Ombudsman Commission was to be established, among other things, to appoint a Banking Ombudsman, to collect levies and fees, etc., from those banks participating in the scheme and take overall responsibility for the administration of the Banking Ombudsman's office, including payment of all associated expenses. The Commission would be comprised of a Chairperson, who would be someone with no material interest which might conflict with his or her duties; two representatives of participating banks appointed by the Council of the New Zealand Bankers Association; one person nominated by the Crown through the Minister of Consumer Affairs, and one other person who would ordinarily be the Executive Director of the Consumers' Institute of New Zealand. The Code of Banking Practice sets out minimum standards of good banking practice to be observed by all participating banks and includes provisions for the protection of customer information, access by customers to information about themselves and the establishment by banks of transparent, accessible, effective and accountable internal complaints procedures for customers.

Banks subscribing to the Code belong to the Banking Ombudsman scheme, the Banking Ombudsman's principal powers and duties being to consider at no cost to the complainant complaints over claims not exceeding \$100,000 arising out of the provision within New Zealand of banking services by any participating bank, principally to individuals, but also to groups of individuals whether incorporated or unincorporated and, subject to certain limitations, to facilitate the satisfaction, settlement or withdrawal of such complaints whether by agreement, by making recommendations or awards or by such other means as seem expedient.

After considering the application from the Bankers Association, and consulting with the Ministry of Consumer Affairs and the Consumers' Institute, I concluded that the proposal met the criteria I had established and that the Banking Ombudsman had the necessary independence, accessibility and effective resolution capability not to undermine the essential elements or the integrity of the Parliamentary Ombudsman or the public's perception of the role of an Ombudsman. I therefore approved the use of the name "Ombudsman" for a "Banking Ombudsman" and for the "Banking Ombudsman Commission", the independent body to which the "Banking Ombudsman" is accountable.

After investigation and consideration, using the above noted criteria, I have recently refused an application from a small newspaper located in a South Island town to use the name Ombudsman for a type of editorial mediator who would deal with complaints from those who

believe they did not receive fair play in articles appearing about them. It was also proposed that the mediator would deal with advertising complaints. The proposal just did not fit the criteria, nor were all the characteristics that the public have come to expect of an ombudsman present in the scheme.

While I have not achieved the total prohibition sought in the first place, the statutory power which I now have to control the use of the term "Ombudsman" is a practicable and sensible solution to the problems which I foresaw in 1985, at least insofar as New Zealand is concerned. We are a small country population-wise, where the Parliamentary Ombudsman is a well-established and, relatively speaking, well-known and understood concept. It was, therefore, important not to allow the positive influence which the office has been able to bring over the past thirty years, to the understandably at times contentious edge between the authority of the state and the rights of the citizen, to be diminished unnecessarily by the word "Ombudsman" becoming trivialized.

I think there is some magic in the name "Ombudsman" which needs to be nurtured and protected in the public interest.