

# CONSTITUTIONAL REFLECTIONS ON FIFTY YEARS OF THE OMBUDSMEN IN NEW ZEALAND

Rt Hon Sir Geoffrey Palmer SC\*

## ABSTRACT

This paper explores the Ombudsmen after fifty years in New Zealand within the context of New Zealand's rather odd Constitution. It is odd because there is no upper house, no entrenched written constitution, no judicial review of legislative action, and many of the arrangements flow from constitutional conventions not law. New Zealand has a strong tradition of parliamentary supremacy. The New Zealand Constitution is highly fluid and elastic. It is like a living, breathing organism and it mutates. This may be thought to be a somewhat unstable foundation for the Ombudsmen but such has not proved to be the case. The institution of the Ombudsmen has become an established and settled part of the constitutional landscape in New Zealand.

The specific issues that arise from the paper include the following questions:

Has the performance matched the original vision and how would we know?

How does the institution fit in with Parliament?

Was it a good idea to add the Official Information Act functions to the office?

Was it useful to add the other functions?

Has the office been given adequate resources?

Is there a threat that the office is being crowded out with a proliferation of complaint agencies?

What changes should be made now?

What discussion of the Ombudsmen institution would be useful in the current constitutional review going on in New Zealand?

---

\* Barrister and Distinguished Fellow Centre for Public Law and Faculty of Law, Victoria University of Wellington. I am grateful for comments on a draft this paper from Professor Claudia Geiringer of the Victoria University of Wellington and David McGee QC, Ombudsman.

## INTRODUCTION

This paper explores the institution of the Ombudsmen in New Zealand after fifty years. It does so within the context of New Zealand's rather odd Constitution, the structure of which was described by the former Chief Ombudsman Sir George Laking as "fragile and sketchy."<sup>1</sup> The Constitution is odd because there is no upper house, no entrenched written constitution and no judicial review of legislative action in the sense that statutes cannot be struck down by the courts.<sup>2</sup> Many of New Zealand's constitutional arrangements flow from constitutional conventions or customs, not law. The New Zealand has a strong tradition of parliamentary supremacy.<sup>3</sup> Despite the introduction of a system of proportional representation for parliamentary elections that has produced a tendency towards minority governments supported by confidence and supply agreements,<sup>4</sup> New Zealand exhibits still many characteristics of a dominant executive government.<sup>5</sup> The New Zealand Constitution is highly fluid and elastic. It is like a living, breathing organism and it mutates. This may be thought to be a somewhat unstable foundation for the Ombudsmen but such has not proved to be the case.

The institution of the Ombudsmen has become an established and settled part of the constitutional landscape in New Zealand.<sup>6</sup> The office has survived, changed and

---

<sup>1</sup> Sir George Laking, "The Ombudsman in Transition" (1987) 17 VUWLR 307,316.

<sup>2</sup> Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992); Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government*(4th ed, Oxford University Press, Melbourne, 2004).

<sup>3</sup> Michael Cullen "Parliament: Supremacy over Fundamental Norms?" (2005) 3 NZJPIL 1. Dr Cullen was at the time he published this article Deputy Prime Minister. For the Chief Justice's contrasting view see Dame Sian Elias "Sovereignty in the 21st Century: Another spin on the merry-go-round" (2003) 14 PLR 148.

<sup>4</sup> Geoffrey Palmer "The Cabinet, the Prime Minister and the Constitution" (2006) 1 NZJPIL 1 contains an assessment of the effects of MMP upon the Constitution.

<sup>5</sup> Geoffrey Palmer "The Bill of Rights after 21 Years: The New Zealand Constitutional Caravan Moves on?" (2012) 10 NZJPIL 19.

<sup>6</sup> The best accounts of the office can be found in Larry B Hill *The Model Ombudsman-Institutionalizing New Zealand Democratic Experiment* (Princeton University Press, Princeton, 1976); Bryan Gilling *The Ombudsman in New Zealand*(Dunmore Press, Palmerston North, 1998); Mai Chen *The Public Law Toolbox* (LexisNexis Wellington 2012) 679-712, see also Mai Chen "New Zealand's Ombudsmen Legislation: The Need for Amendments after almost 50 years"(2010) 41 VUWLR 723 ; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3<sup>rd</sup> ed, Thomson Brookers, Wellington 2007) 363-375. For the parliamentary procedures and law for officers of Parliament in New Zealand of which the Ombudsman was the first see David McGee *Parliamentary Practice in New Zealand* (3<sup>rd</sup> ed, Dunmore Publishing Ltd, Wellington 2005) 70-82. There are also a large number of articles in legal periodicals only some of which are cited in this article. The most useful are a series of articles that appeared in the Victoria University of Wellington Law Review on both the twentieth anniversary of the office and the twenty-fifth, see Volume 17 of the Review 1987 and Volume 12 in 1982.

mutated along with the government agencies over which it sits in watch. It is not going too far to say that the institution has been a resounding success and over a long period. New Zealanders should be grateful. Not all reforms work so well.

This paper is neither a comprehensive account of the performance of the office nor a policy critique of what has been accomplished. It is simply the thoughts of someone who has seen the office from a number of points of view-as a constitutional lawyer in the university, as a Member of Parliament and Minister, as a legal practitioner, as President of the Law Commission and an observer of the ever changing cavalcade of the Wellington policy making establishment. A lot has been written about the office of Ombudsmen in New Zealand, since it was the first to be adopted in a Westminster style of parliamentary democracy. No attempt will be made here to review the literature or generate any general theories.

When New Zealand's Sir Guy Powles took office as the first Ombudsman in the English speaking world he felt what he called "strangeness, isolation and challenge."<sup>7</sup> He had no-one to talk things over with, no colleagues and he faced a public service that was suspicious. Sir Guy thought it took two years before the office was fully accepted by the public service. Upon taking the oath of office Sir Guy said "The Ombudsman is Parliament's man-put there for the protection of the individual, and if you protect the individual you protect society.... I shall look for reason, justice, sympathy and honour, and if I don't find them then I shall report accordingly."<sup>8</sup> The function was described neatly in 1978 as "the formulator of administrative equity by the power of persuasion."<sup>9</sup>

While the office has Scandinavian origins, the New Zealand model seemed to cause an explosion of the institution around the world. Many of them were within common law jurisdictions where legal traditions were rather hostile to such developments. Lawyers in New Zealand regarded the new institution with a certain amount of amusement at the creation of such a strange office, Sir Guy observed. It took a long time for the legal profession in New Zealand to become accustomed to the idea that there were other ways of resolving disputes than those familiar to them in 1962.<sup>10</sup> It is now accepted by

---

<sup>7</sup> Sir Guy Powles "The New Zealand Ombudsman- the early days" (1982) 12 VUWLR 207.

<sup>8</sup> Sir Guy Powles above n 7.

<sup>9</sup> Quoted in Geoffrey Palmer *Unbridled Power?* (Oxford University Press, 1979) 123.

<sup>10</sup> G R Laking "The Ombudsman and the Legal Profession" (1982) 12 VUWLR 217. He remarks at 222 "its early years were characterised by a monumental ignorance of its purpose and function and a lofty disdain of its existence on the part of all but a few members of the legal profession."

the legal profession members of which who use the office reasonably extensively on behalf of clients, by the public service and by the public.

In looking to see why the office has endured three features stand out. They are those isolated by Sir George Laking at the time of the he left office:<sup>11</sup>

- (1) Its *independence* as a Parliamentary office not responsible to the Executive Government.
- (2) Its *flexibility* in the conduct of investigations and in recommending remedies most calculated to achieve substantial justice between the individual and the State.
- (3) Its credibility with the Executive Government and with the public.

An historian who wrote a book on the office published in 1998 said:<sup>12</sup>

New Zealand Ombudsmen have broadened their approach from concentrating on the investigation and redress of complaints against administration *to embrace the promotion of good public administration practice*. They seek to engender an attitude of positive compliance (rather than the negativity associated with fault-finding), *encouraging better systems and procedures within organisations*. Their reports and case notes comprise a body of “ombudsman law” which guides the work and attitudes of officials, *a valuable protection against future flawed decision making*. They have tried to be *responsive to the public’s needs by providing a process that is direct, informal, speedy and cheap*.

The statute under which the Ombudsmen work is showing its age and needs revision. But consonant with the modern requirements of public administration in New Zealand the Ombudsmen have analysed the outcomes and impacts they seek in their work. The major outcome is “enhanced public trust and confidence in a fair, responsive and

---

<sup>11</sup> *Report of the Chief Ombudsman on Leaving Office* [1984 - 85] AJHR A.3A 4-5.

<sup>12</sup> Bryan Gilling above n 6, 130.

accountable government.”<sup>13</sup> The six intermediate outcomes that contribute to the overall one are:

- improved administrative and decision making practices in the state sector agencies
- increased transparency, accountability and public participation in government decision making
- potential serious wrongdoing brought to light and investigated by appropriate authorities
- people in detention treated humanely
- improved capability of state sector agencies in administrative decisions making and complaints handling processes and operation of official information legislation
- improved public awareness and access to Ombudsmen services.

It can be seen that the office has moved from lying in wait for the complaints to proactively trying to improve processes to avoid complaints being made. No doubt the sheer weight of the caseload coupled with the rapidity of its increase has made such steps inevitable. How far that development can go in converting a complaints agency into an institute for quality public administration must remain a matter for speculation. It would seem a more appropriate function for the State Services Commissioner.

The only general observation I will offer is that the success of the office depends upon the quality of the people who occupy the office. The quality has been high. That is why it has succeeded. From Sir Guy Powles, who served for more than 14 years, to Beverley Wakem and David McGee QC, they have been people of judgment and discernment who know when to push bureaucracy and when to let go. One Ombudsman, Sir Anand Satyanand became Governor-General. The office is, in constitutional terms, a check and a balance on the power of the bureaucracy to make decisions that affect people adversely and unfairly. It allows people to complain about the actions of government and local government and for judgments to be made by the Ombudsmen on that conduct in robust and common sense and terms. A key provision in the Ombudsmen Act 1975 is section 22 that sets out in downright direct terms the criteria the Ombudsmen are to apply to the their investigations:

---

<sup>13</sup> Office of the Ombudsmen, *Report of the Ombudsmen for the year ended 30 June 2010* [2010], AJHR A3 16-17. This material is substantially repeated in the Office of the Ombudsmen, *Report for the year ended 30 June 2011* [2011] AJHR, A3, 16-19.

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
  - a) appears to have been contrary to law; or
  - b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
  - c) was based wholly or partly on a mistake of law or fact; or
  - d) was wrong.
  - e) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations,
- (2) or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.
- (3) If in any case to which this section applies an Ombudsman is of opinion -
  - a) that the matter should be referred to the appropriate authority for further consideration; or
  - b) that the omission should be rectified; or
  - c) that the decision should be cancelled or varied; or
  - d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
  - e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
  - f) that reasons should have been given for the decision; or
  - g) that any other steps should be taken —

the Ombudsman shall report his opinion, and his reasons therefor, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in [Parts 1](#) and [2](#) of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in [Part 3](#) of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned.

- (4) If within a reasonable time after the report is made no action is taken which seems to an Ombudsman to be adequate and appropriate, the Ombudsman, in his discretion, after considering the comments (if any) made by or on behalf of any department or organisation affected, may send a copy of the report and recommendations to the Prime Minister, and may thereafter make such report to the House of Representatives on the matter as he thinks fit.
- (5) The Ombudsman shall attach to every report sent or made under subsection (4) a copy of any comments made by or on behalf of the department or organisation affected.
- (6) Subsections (4) and (5) shall not apply in the case of an investigation relating to an organisation named or specified in [Part 3](#) of Schedule 1.
- (7) Notwithstanding anything in this section, an Ombudsman shall not, in any report made under this Act, make any comment that is adverse to any person unless the person has been given an opportunity to be heard.

## THE BEGINNING

I remember the beginning of the Office of Ombudsman in New Zealand. I was a law student. We had lectures about it and the office excited a lot of publicity then and during its first few years. Indeed, that publicity was much more in the early days than it is now. It has become part of the constitutional furniture now, but then it was regarded as an innovative constitutional novelty that was approached somewhat gingerly by the Parliament. There were in some quarters mutterings based on an apprehension that the Ombudsmen might undercut the position and authority of Members of Parliament and disturb the relationships between Ministers and public servants. In the early 1960s there was political concern about the balance of power between the citizen and the state.<sup>14</sup> In the 1960 election Manifesto the National Party contained a policy for a Citizens' Appeal Authority. The Minister of Justice of the day was a notable reformer, the Hon Ralph Hanan. The Department of Justice provided advice on the Ombudsman institution in Scandinavia. The department had material on the institution in both Sweden and Denmark. It was the Danish model that was most influential with the Department and that legislation was used as the basis for the New Zealand proposals.<sup>15</sup> The Ombudsman would not be deciding anything, he would investigate the complaints to get the facts, express his views in a report and attempt to persuade where he thought fit. Any sanction would lie in publicity for the report. The emphasis was to proceed administratively not judicially. The jurisdiction, as it was planned then and remains to this day, was whether the issues complained of was one "relating to a matter of administration."<sup>16</sup>

There were a number of quite difficult issues that had to be resolved. These included whether the decisions of Ministers should be within the scope of the scheme, whether military administration should be excluded, and whether areas covered by a Tribunal should be excluded. One of the biggest issues was the issue of Crown privilege, now known as public interest immunity, and how it could be restricted to avoid handicapping

---

<sup>14</sup> Much of this section of the paper is drawn from a memoir by the Secretary of Justice of the time, Dr J L Robson *Sacred Cows and Rogue Elephants-Policy development in the New Zealand Justice Department* (Government Printing Office, Wellington 1987) 217-236.

<sup>15</sup> Robson above n 14 at 217-218.

<sup>16</sup> Ombudsmen Act 1975, section 13(1).



the new office.<sup>17</sup> Justice wanted the decisions of ministers included within the ambit of the Ombudsmen and Crown privilege restricted. The Solicitor-General, as head of the Crown Law Office took an opposing view to Justice on three principal issues. Mr H R C Wild (later to be Chief Justice of New Zealand) thought the procedure should be judicial rather than administrative. So the principles of natural justice should apply and public servants should have the right to counsel and cross-examination. He also argued Crown privilege should not be restricted as the courts had not abused the doctrine. Decisions of Ministers should be excluded on the grounds that to include them would impair the doctrine of ministerial responsibility.

The Legislation Committee of Cabinet decided that Ministers should be excluded and that Crown privilege should be left untouched. But it accepted that the process should be administrative not judicial. And in truth given the way in which the office has approached decisions of ministers, it can almost always find a way to treat an issue as a matter of administration.

The bill received what Dr Robson, the Permanent head of the Department of Justice, described as a “lukewarm” reception when it was introduced in 1961. The Department of Justice thought that exclusion of Ministers and the absence of a provision restricting Crown privilege gave too much protection to the Executive. The policy issues were re-litigated at Cabinet and a statutory restriction of Crown privilege was approved. But the officials were split on the issue of Ministers. In the end it was referred to the Government caucus which approved the statutory restriction on Crown privilege but not the inclusion of ministers.

When the legislation was passed and the office up and running it received 760 complaints in its first year. Twenty-one per cent of those complaints were sustained. In the year ended 30 June 2010 the office received 8,488 complaints. In 1968 the jurisdiction of the office was extended to education boards and hospital boards. In 1975 quite extensive increases in jurisdiction were granted so that most governmental organisations were included. It was also extended to local government. Provision was also made for the appointment of more than one Ombudsman. Power was also granted

---

<sup>17</sup> There was a very significant case on Crown Privilege, or public interest immunity as it is now called, decided by the New Zealand Court of Appeal around this time: *Corbett v Social Security Commission* [1962] NZLR 878(CA). This was a decision where the Crown refused to disclose certain documents concerning an application for social security benefit because they were within a class of documents that for the proper functioning of the public service it was necessary to keep confidential to ensure freedom and candour of communication within the public service. The Court held that it has the power to overrule a ministerial claim for privilege but they refused to do so in the particular circumstances.

for the Prime Minister, with the consent of the Chief Ombudsman, to refer any matter for investigation, except one concerning a judicial proceeding. That provision was first used for investigation over controversy concerning the Security Intelligence Service<sup>18</sup>

Sir Guy Powles was, in the words of Sir John Robson, “skilful and adroit in handling the media....he succeeded in projecting an image of a person who cared for people and who would expose injustice.”<sup>19</sup> Sir Guy himself felt he had to tread a difficult balance on the publicity front “between oblivion and overexposure.”<sup>20</sup>

Robson who was the official responsible for advising on the creation of the office judged him to be “an outstanding success, especially in areas where there was need for more sensitivity, fairness and humanity.”<sup>21</sup> The fact that Sir Guy occupied the office for 14 years certainly helped the office to become firmly embedded in New Zealand’s system of government. The office being of a pioneering character attracted a good deal of international attention and a Fulbright Scholar student, later Professor Larry B Hill, wrote an excellent book about it, the tone of which can be gleaned from the title *The Model Ombudsman-Institutionalizing New Zealand’s Democratic Experiment*. New Zealand basked in the reflected glory of adopting a bold and successful constitutional innovation.

## RELATIONS WITH THE PARLIAMENT

In New Zealand, as in other Westminster style democracies, elected members of Parliament conduct regular clinics with their constituents and take up issues with the responsible minister by correspondence.<sup>22</sup> Sometimes the correspondence is prolonged. It receives priority in Departments and care is taken to ensure the issues have been properly dealt with. MPs see a lot of practical problems with government

---

<sup>18</sup> Report of the Chief Ombudsman, *Security Intelligence Service 1976 [1976] AJHR A A* The role played in the Ombudsmen in New Zealand in advancing the concept of open government is insightfully portrayed in K J Keith “Open Government in New Zealand”(1987) 17 VUWLR 333. That article was part of a special volume of the Victoria University of Wellington Law Review in honour of Sir Guy Powles and I recall as Minister of Justice hosting a dinner at Parliament in his honour on 24 November 1986.

<sup>19</sup> Robson above n 14 at 236.

<sup>20</sup> Powles above n 1 at 210.

<sup>21</sup> Robson above n 14 at 236.

<sup>22</sup> I once carried out an analysis of my constituency work as MP for Christchurch Central and published it- Geoffrey Palmer “The Growing Irrelevance of the Civil Courts” (1985) 5 Windsor Yearbook of Access to Justice 327. The issues that came to my office that were capable of being dealt with the legal system numbered almost fourteen per cent over four years. But my constituents never regarded the legal system as being a practical option in any way.

policies and administration and their effects upon individuals. At the time the Ombudsman was introduced in New Zealand the then Labour Opposition was not keen on the idea. The Ombudsmen are linked to Parliament in the sense that they are officers of Parliament, but in fact their tangible contacts with Parliament are not all that great—they probably have more contact with Ministers than MPs. The issue became controversial in Britain in that it was thought the Ombudsmen would come between the relationship between an MP and his or her constituent. MPs could regard the Ombudsman as a rival. Professor Hill's research published in 1976 did not show the Ombudsman figuring extensively in MPs' minds. His research showed that MPs were still heavily involved in grievance handling. He found that MPs handle a great many issues that are similar to those handled by the Ombudsmen. MPs told Professor Hill, over two fifths of them, that they never thought of the Ombudsman. Forty-six per cent admitted they paid little attention to the reports of the Ombudsman. Others read them carefully. But a total of 44 per cent of the MPs interviewed by Hill had on at least one occasion advised constituents to contact the Ombudsman. Most doubted that the office had any effect on Ministers.

About three-quarters of the MPs felt the Ombudsman had had no effect on political life. But none of the MPs said the Ombudsman had adversely affected them. Nearly half were confident that the existence of the office had made public servants more careful. The interaction between the Ombudsmen and Ministers was also examined by Professor Hill and I do not believe it has been examined systematically since then. He found Ministers as MPs were still "grievance men for their own constituents."<sup>23</sup> They took complaints seriously and did not seem to be apologists for their departments. None of the ministers he interviewed regarded their relationship with the Ombudsman in negative terms. But nearly one-third seemed to have no relationship with the Ombudsman. No Minister thought the office had any long term effect upon the relationship between the Minister and his Chief Executive.<sup>24</sup>

It seems clear from Hill's research, and indeed my own experience much later as an MP, that the institution of Ombudsman has had little impact on the constituency work of MPs in New Zealand; they tend to be rather indifferent to the office, although they believe it does no harm and may improve the performance of the public service. They do not perceive the Ombudsman as a rival. This is somewhat surprising as it does

---

<sup>23</sup> *The Model Ombudsman* above n 6 at 299.

<sup>24</sup> *The Model Ombudsman* above n 6 at 305.

duplicate what MPs do to a degree. Three-quarters of Hill's interviewees felt the office had no effect on their parliamentary role. Remember, however the Ombudsman cannot investigate ministerial decisions. Yet this has not been such an obstacle to the office as it may seem. As Sir George Laking stated in 1987, it is a fallacy to think that a clear line can be drawn between matters of administration and questions of policy.<sup>25</sup> As he observed, the office was inevitably involved in cases that seemed to challenge ministerial decisions and were reluctant to decide between conflicting recommendations of the departmental advisers and the Ombudsman. The management of this sensitive interface must be regarded as one of the achievements of the office in New Zealand. Ministers in New Zealand today do not behave as if they are threatened by the Ombudsmen, in the Ombudsman Act jurisdiction. It is somewhat of a different story in the official information segment of the office's work.

Obviously, the policy worry at the beginning was that MPs and Ministers may be hobbled or restricted by the establishment of the office, otherwise it would not have been necessary to attach the institution to Parliament. Much was made and is still made of the fact that the Ombudsmen are officers of Parliament. The Ombudsman was created an officer of Parliament by statute. The effort was mainly to confer official or symbolic status, or so it seems to me. Many other complaints bodies that have been created since do not have this status. But in the case of the Ombudsmen the status ensures that the officers are more clearly seen to be independent of the Executive branch of government than a statutory officer would be. There is a Select Committee of Parliament with responsibility for oversight of the officers. It has important tasks involving budget setting and appointment. Officers of Parliament are appointed by the Governor-General but there was a practice of inter-party consultation and then a notice of motion endorsing the appointment.<sup>26</sup> Since the 1990s appointments have been agreed consensually by the Officers of Parliament Committee chaired by the Speaker of the House.

## **THE OFFICE NOW**

The administrative and political world that Sir Guy Powles inhabited when he took office in 1962 and which he left fourteen years later is a world we have lost. New

---

<sup>25</sup> The Ombudsman in Transition above n1 at 309-310.

<sup>26</sup> *Parliamentary Practice in New Zealand* above n 6 at 70-82.

Zealand is now, so to speak another country. The Ombudsmen have had to adapt and change because of the massive alterations that have taken in government administration, government policies, departmental structures, and public attitudes to government and its decisions. It is a much more complicated world. That world generates many more complaints for the Ombudsmen from the public than used to be the case. The number of complaints has more than doubled in a decade. At times the weight upon the office has been unreasonably heavy. One such occasion were the problems experienced by the office dealing with the weight of complaints against the New Zealand Police resulting from the highly controversial Springbok tour of 1981. Sir George Laking, then Chief Ombudsman, was almost overwhelmed and this development led to the establishment of what is now the Independent Police Conduct Authority to deal with complaints against the conduct of the Police.

Indeed, New Zealand today has a plethora of agencies to which complaint can be made. One might get the impression from the statute book that New Zealanders are a nation of whingers, that is to say people who whine or grumble peevishly. Indeed, it does seem to me that people here have much less tolerance of public administration and are much less stoic about decisions that go against them than they were in earlier years. When the welfare state was introduced into New Zealand during the late 1930s with programmes for health, social security, and housing people were grateful. They tended not to complain about their new found advantages. The conventional techniques of Westminster style ministerial responsibility in Parliament were sufficient to contain this massive increase in state activity.

The opening up of the New Zealand economy in the late 1980s by floating the exchange rate, handing over monetary policy to the Reserve Bank, dismantling import licensing, and reducing tariffs changed things. So did the passage of the State-Owned Enterprises Act 1986 that subjected state owned businesses to a commercially based regime rather than one based on ministerial responsibility. All this led to a different configuration of state power. The Office of the Ombudsmen was directly involved in the policy changes. Sir George Laking remarked in 1987 "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 the effectiveness and effectiveness of the office to a new and severe test."<sup>27</sup> The office survived that test with flying colours. When a Parliamentary Select Committee reported

---

<sup>27</sup> The Ombudsman in Transition above n1 at 316.

in 1990 on the question of whether the jurisdiction of the Ombudsmen and the Official Information Act should extend to state-owned enterprises the question was answered with a resounding “Yes.”<sup>28</sup> It was argued that because these businesses pursued significant social and economic goals the public law protections should remain as they were enacted in 1986.

Because of the changes made to the public sector in the 1980s the market was more important, contracting out in the public sector became more common. The whole of the state sector was reorganised by the State Sector Act 1988. I am sure an analysis of the Ombudsmen’s case load during this period would show a changing diet of cases, although I have not have the leisure to conduct such an analysis.

The pattern of government regulation has expanded in the years since then and there has been quite a lot of discontent in the business community at the extent, method and effects of government regulation in a number of fields.<sup>29</sup> Regulatory decisions within government agencies and the activities of state-owned enterprises come within the purview of the office. Yet the main staples of the Ombudsmen part of the office seems to me much the same as it ever was as reflected in the analysis of major complaint areas in the last available report to Parliament<sup>30</sup>:

The Department of Corrections provided 64% of the Ombudsmen jurisdiction workload in the latest report. This number is somewhat misleading because most such complaints are quickly resolved without extensive investigation. Significant numbers of cases arose in the following areas:

Ministry of Social Development that deals with social services and assistance 375

Department of Labour that deals with immigration 243

Inland Revenue 121

Ministry of Justice 56

Department of Internal Affairs 30

---

<sup>28</sup> *Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee on the Review of the Effect of the Ombudsmen Act 1975 and the official Information Act 1982 on the Operation of State Enterprises* [1990] AJHR I 22A 6-8.

<sup>29</sup> Susy Frankel (ed) *Learning from the Past, Adapting for the Future-Regulatory Reform in New Zealand* (LexisNexis, Wellington 2011)

<sup>30</sup> Office of the Ombudsmen, *Report for the year ended 30 June 2011* above n13, 32

Perhaps some scholars have subjected the Ombudsmen's caseload to analysis over the years to work out what implications can be drawn from it for public administration, but I have seen no such studies. It does seem to me to be fertile field for research.

Another point that strikes me is that the Annual Report to Parliament is now much fuller of the management speak that seems to be the dominant fashion in New Zealand public administration and threatens to crowd out substance. There is a great deal of information in the annual report to Parliament about managing performance, human resource management, risk management and financial and asset management. The Office itself has itself become something of a bureaucracy with more than sixty employees. Yet the institution itself has never been subjected to an exterior review, as most government agencies are periodically. This must say something about the regard in which it is held. The office is necessarily in my view less inspirational than it was in early days and has a lower public profile. That is because it is no longer novel. The office formerly published a useful compendium of case notes that has been discontinued in recent years due to resource constraints. This was a great pity in my view. It makes it harder to learn from the experiences of the office. But the Office is now starting to publish findings on its website.

Perhaps the biggest change the Ombudsmen have had to face are their competitors within both the public and private sectors. The institution has so much attraction that private business organisations, the banks for example, have arranged to have Ombudsmen and the name has had to be protected by statute. But the number of complaint agencies within the public sector has mushroomed over the years:

- Independent Police Conduct Authority<sup>31</sup>
- Privacy Commissioner<sup>32</sup>
- Human Rights Commission and the Race Relations Commissioner<sup>33</sup>
- Parliamentary Commissioner for the Environment<sup>34</sup>
- Health and Disability Commissioner<sup>35</sup>
- Children's Commissioner<sup>36</sup>

---

<sup>31</sup> Independent Police Conduct Authority Act 1988.

<sup>32</sup> Privacy Act 1993.

<sup>33</sup> Human Rights Act 1993.

<sup>34</sup> Environment Act 1986.

<sup>35</sup> Health and Disability Commissioner Act 1994.

<sup>36</sup> Children's Commissioner Act 2003.

- Mental Health Commissioner<sup>37</sup>

The cumulative effect of these complaint agencies seems to me to reduce the scope for MPs to do their traditional constituency work for which they have been provided with electorate secretaries and offices at public expense since 1986 in order to facilitate that work. The office of the Ombudsmen as we saw earlier did not trench upon that function significantly, but it seems to me now that the range of complaints coverage is so wide that it is bound to have had an effect upon the Members of Parliament making representations to Ministers. True, such representations on policy continue still. But many of the detailed remedies for administrative wrongs now lie elsewhere, not in the hands of Parliament. Parliament has set up agencies to deal with them. There is, I suppose, no way of measuring in any empirical way whether all of this activity has resulted in a net benefit to the community. But the demand for bodies to register and investigate complaints from the public about various exercises of power over people is one of the most noticeable features of public administration in New Zealand over the last thirty years. Parliament has passed seven major statutes directing that this should occur since the Ombudsman statute started the trend in 1962.

---

<sup>37</sup> Mental Health Commission Amendment Act 2012.



## **ADDITIONAL RESPONSIBILITIES**

The Office of the Ombudsmen has acquired fresh and additional responsibilities over the years. There is an issue whether that has caused the office to lose some focus on its Ombudsman Act responsibilities. The most important of those responsibilities was the work of dealing with complaints about access to official information under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987, about which I shall have more to say later. But there are three other responsibilities:

- The Protected Disclosures Act 2000 under which the Ombudsmen provide advice and guidance to employees concerned about serious wrongdoing in organisations. The burdens flowing from this regime do not seem too great. On average the office has to deal with ten cases a year.
- The Crimes of Torture Act 1989 under which the Ombudsmen make recommendations to improve the conditions and treatment of detainees in prisons, immigration detention facilities, health and disability places of detention, child care and protection residences and youth justice facilities. The work here comprises visits to institutions and the production of reports upon them. The latest report shows there were 20 inspection visits with 103 recommendations made.

Disabilities - The office has also taken on responsibilities with “other independent mechanisms to monitor implementation of the<sup>38</sup> United Nations Convention on the Rights of Persons with Disabilities.” The new jurisdiction generated twenty complaints in the first year.<sup>39</sup>

## **THE OFFICIAL INFORMATION JURISDICTION**

When the Official Information Act was passed by the Parliament in 1982 the task of resolving disputes over access was given to the Ombudsmen. There was some debate about whether that would adversely affect the nature of the Office and change it. The

---

<sup>38</sup> Done at New York 13 December 2006, 2515 UNTS 3

<sup>39</sup> *Report for the year ended 30 June 2011* above n 13 48.

Danks Committee that recommended the policy contained in the Official Information Act did not want court decisions on access to information:<sup>40</sup>

“We believe that in the New Zealand context there are convincing reasons not to give the court ultimate authority in such a matter. The system we favour involves the weighing of broad considerations and the balancing of competing public interests against one another, and against individual interests. If the general power to determine finally whether there should be access to official information were given to the courts, they would have to rule on matters with strong political and policy implications.”

There can be no doubt that it was a significant step to make the Ombudsmen responsible for dealing with official information cases. The open-textured nature of the Act made the task a difficult one, but it was a task that was similar in some respects to the task performed within the ordinary jurisdiction of the office. It is important to note that the Ombudsman had always been able to access all the departmental information relevant to complaints with which he was dealing as provided by section 19 and 20 of the Act. Further, the office had profound knowledge about how the public service works. So the Ombudsmen were already located in the ballpark where the official information game was being played.

The Danks Committee also proposed that ministers could impose a veto on the release of information. Indeed, this proposal walked in lock-step with the manner in which the Ombudsmen functioned in their ordinary work. When I was Minister of Justice I favoured eliminating the ministerial veto.<sup>41</sup> Ten had been made from the commencement of the Act up until the 1984 general election. The policy was opposed by the Ombudsmen on the grounds that it would have given the office power of decision and that was contrary to the character of the office. They said: “The abolition of the ministerial power of directive would result in the Ombudsman’s decision becoming a binding directive and thus a decision. Such a change would herald a major departure from the traditional characteristics of the Ombudsmen”<sup>42</sup>.

As Minister of Justice I was confronted with the choice of taking the Ombudsmen out of the Official Information Act if the veto were abolished and setting up an Information

---

<sup>40</sup> Committee on Official Information *Towards Open Government*, vol.2, (December 1980) 14.

<sup>41</sup> An account of issue and how it was handled appears in Geoffrey Palmer *Unbridled Power-An Interpretation of New Zealand’s Constitution and Government* (2<sup>nd</sup> ed, Oxford University Press, Auckland 1987) 260-277.

<sup>42</sup> *Report of the Ombudsmen for the year ended 31 March 1985*, [1984 -85] 1 AJHR A3 8.

Commissioner. Since the Act was new and the public had confidence in the Ombudsmen I decided to stay with them. So I devised a solution to circumscribe the ministerial veto by requiring it to be done by order-in-council, and that required a Cabinet decision, not merely the minister exercising the veto in the privacy of his office. Further, the right to judicial review was made explicit on the face of the statute. Since then no order-in-council containing a ministerial veto has been made. The law on this issue remains as it was enacted in 1987.

The Law Commission in a 2012 report completed a comprehensive and excellent review of the Official Information Act.<sup>43</sup> The Law Commission made 137 separate recommendations concerning reform of the Official Information Act. They cannot all be reviewed here. Essentially, however, the Law Commission recommended that the investigation of official information complaints should remain with the Ombudsmen.<sup>44</sup> It followed from that recommendation that the Commission also recommended that the veto of the Ombudsman's recommendation by order-in-council should be retained.<sup>45</sup> For local government official information applications the Commission recommended that a veto in those cases should be exercisable only by an order-in-council also. It also recommended new provisions to allow court action by a requester where an agency is under a public duty to release information. Indeed, the Commission makes numerous recommendations to tighten up the Act and aid its enforcement.

In particular, the Commission makes detailed recommendations to try and encourage the production of more guidelines to lessen the "at large" character of a case-by-case approach to decisions.<sup>46</sup> The aim is to produce more certainty than exists at present in the application of the Act. The clear intention is to produce something more in the nature of a system of precedent as an aid to predictability. The detailed recommendations made by the Commission illustrates how important it thought the issue is in improving the official information regime.

These recommendations are:

---

<sup>43</sup> NZLC R125, *The Public's Right to Know-Review of the Official Information Legislation* (Wellington, 2012). I should disclose that when I was President of the Law Commission I persuaded the then government to give the official information reference to the Commission and I worked on the reference with Professor John Burrows QC until my departure from the Commission in November 2010.

<sup>44</sup> *The Public's Right to Know* above n 43, R107

<sup>45</sup> *The Public's Right to Know* above n 43, R80,R81

<sup>46</sup> *The Public's Right to Know* above n 43 ,40

- a new provision expressly conferring on the Ombudsmen the function of publishing opinions and guidelines on the legislation
- significant case notes and opinions should be compiled and published in a readily accessible database. They should be indexed and made searchable
- the database should be accompanied by a regularly updated analytical commentary
- the guidelines should give specific examples drawn from previously decided cases and where appropriate state presumptions and principles deriving from them
- in preparing the Guidelines the Ombudsmen should consult with the oversight office.<sup>47</sup>

This last point flows from another recommendation that an oversight office be established that would promote the purposes of the legislation, provide policy advice, review, statistical oversight, promotion of best practice, training oversight and oversight of requester guidance. These functions are developed by the Commission in a detailed manner.<sup>48</sup>

The Commission's recommendations will certainly improve the Act. But the recommendations go so far as to suggest an alternative policy narrative. The elements of that narrative seem to me to be:

- give an independent decision-maker power to make binding decisions
- remove the veto altogether
- produce a certain and predictable set of guidelines that will reduce the uncertainty and smudginess of the present system
- locate the decision maker in a new Information Authority
- such a system would necessarily involve either appeal to the courts on a point of law or judicial review

Such a structure would allow the policy functions for the Information Authority as recommended by the Law commission to be combined under one roof so that what is learned in one arm of the office's activities could reinforce the activities in the other arm. The Ombudsmen would cease to have an official information jurisdiction There are

---

<sup>47</sup> *The Public's Right to Know above n43* R1,R2,R3, R4, R5.

<sup>48</sup> *The Public's Right to Know above n43* 296-329.

reasons why the alternative policy narrative may have strength. First, New Zealand has had thirty years of experience with the official information legislation and we should be learning more from our own experience than we have learnt so far. A greater tendency towards bright lines rules would be of an advantage. It is obvious that circumstances alter cases, but there is a great deal within the government information system that is routine and this should be recognised. There are real and practical issues about clarity in the Act's application that must bedevil the relatively junior public servants who have to deal with requests and it poses the same problems for the requesters. Secondly, my experience has been that the Official Information Act is disliked by ministers and by some officials. Sometimes there was a reluctance to comply with it and tactics were adopted to delay the release of information in order to reduce political embarrassment. I do not think anything has changed in that regard over time. And as has already been observed these information cases can be a source of tension between the Ombudsmen and ministers. Third, after the experience New Zealand has had we know that lifting the veil on government secrecy was not the end of effective public administration, indeed the former State Services Commissioner said Dr Mark Prebble remarked in 2010 that the Official Information Act "is the best reform that's happened during my whole time in the public service; it has been good for every agency it's been applied in."<sup>49</sup> Fourth, the importance of transparency in the government decision-making process is an important and growing trend internationally. More robust measures towards this end are warranted in New Zealand in my view. The New Zealand legislation has been a success, but as the Law Commission review demonstrates there are problems that need to be addressed. I would like to see the information issue elevated and enjoy the focus of a new agency that can develop new approaches. My conclusion is that the time has come in New Zealand to push boat out a little further on official information.

The major argument against the alternative policy narrative lies in the increased involvement of the courts that would be likely to ensue. The non-litigious nature of the Official Information Act in New Zealand is certainly one of its strengths. Just how much litigation would result from the change discussed here is difficult to estimate. The incentives upon the government not to litigate may be quite powerful. The price for dispute settlement by the Ombudsmen has been a "fuzzy" jurisprudence. The issue is whether the trade off is remains worth it after thirty years.

---

<sup>49</sup> Quoted in *The Public's Right to Know* above n43 at 34.

An independent Information Authority could be set up and it could be entrusted with both the complaints function and the oversight function. The new model would be along the administrative lines the enacted by the Commonwealth of Australia in 2010 in the Australian Information Commissioner Act 2010. But I would not include the Privacy Commissioner within that office, as was done in Australia. The Privacy Commissioner in New Zealand was the subject of an extensive and separate review by the Law Commission.<sup>50</sup> The New Zealand Law Commission's view was "Removing the Ombudsmen as the complaints body would mean losing the institutional knowledge and awareness built up over more than 25 years of dealing with information complaints."<sup>51</sup> I think there are many answers to that observation, the most obvious of which is to move the relevant people to the new agency.

Answering the question posed as to whether the information jurisdiction has been a distraction, I think it must have been but that is not obvious on the outside. Under the two pieces of legislation concerning official information there were a total of 1258 complaints recorded in the latest available annual report of which 256 concerned local government. During the year final opinions were issued in 366 cases and 302 cases were informally resolved. The annual report emphasises the importance of timeliness and analysed the problems encountered with delays. In New Zealand it is the Police who generate most OIA complaints, 16.2 per cent of total in 2010. Some of these involve difficult and sensitive issues.<sup>52</sup>

## **CONCLUSION**

The Ombudsmen in New Zealand are here to stay. Whatever future decisions are made on their involvement with the Official Information Act, the Ombudsmen have increased the quality of administrative justice in New Zealand. They enjoy the confidence of the public as far as one can tell. I do wonder what knowledge the public actually has concerning rich and varied avenues of complaint available to them now in contemporary New Zealand. Public awareness has a big impact on what use is made of the Ombudsmen and other complaints bodies.

The advent of the Ombudsmen does not appear to have adversely affected the role of Members of Parliament in New Zealand, although it would be useful to do some

---

<sup>50</sup> NZLC R123 *Review of the Privacy Act 1993* (Wellington, 2011).

<sup>51</sup> *The Public's Right to Know*, above n43 at 305.

<sup>52</sup> *Annual Report for the year ended June 2010* above n13 at 32-34.

empirical research about what MPs think these days about the plethora of complaints bodies that exist. It would also be useful to know how much of their time MPs spent on constituency work these days. My impression is that the pressure of other duties may have reduced that compared to the days when Parliament did not meet as much as it does now. What would be worthwhile empirical research among MPs would be to know what effects the introduction of List MPs wrought upon MPs' interest and engagement in constituency work. I have described the move in New Zealand to a mixed-member system of proportional representation that came into existence in 1996 as the most important constitutional change in a century because it reduced the power of the executive.<sup>53</sup> The government often has to go hunting for support to get its measures through Parliament. This change has broken the old two party duopoly. There are currently seven political parties represented in Parliament. But as far I can see this change has had no effect itself upon the institution of the Ombudsmen.

Nor does it seem that the Ombudsmen in their Ombudsmen Act role have caused any significant problems to ministers discharging their duties. Ministerial responsibility has been attenuated by a variety of developments in the organisation of government but the Ombudsmen have not been a factor in those developments.

I do know that from time to time the Ombudsmen office has had inadequate resources with which to carry out its functions and they are under strain now as indeed all government agencies are due to economic stringency. Doing more with less is the current mantra of New Zealand public administration and there are limits to how far that approach can go. But this feature is one that New Zealand shares with most governments around the world at this time.

The Ombudsmen in New Zealand are an important check and a balance upon the Executive New Zealand. That is their most important constitutional function. But securing fairness for people in dealing with government agencies is their most important human function. This is constitutional accountability of a practical sort from which people can see real benefits. One would have thought that was contribution enough and New Zealanders should be grateful that the institution has such a large measure of public acceptance and utility. How it will develop in the future is impossible to say, but I doubt that it will change much nor should it.

---

<sup>53</sup> Geoffrey Palmer "The New Zealand Constitution and the Power of the Courts" 15 *Transnational Law & Contemporary Problems* 551 (2006) 551, 553.