



**Report of
Ombudsman Mel Smith
on Leaving Office**

Presented to the House of Representatives
pursuant to section 29 of the Ombudsmen Act 1975

Madam Speaker and Members

1. Background

- 1.1 On 5 December 2001 I took the Oath of Office in accordance with the requirement of the Ombudsmen Act 1975 to become one of New Zealand's three Ombudsmen. This followed the Motion in this House resolving my appointment and the subsequent appointment by Her Excellency the Governor-General.
- 1.2 I was humbled and proud to be appointed to the position previously held by a number of outstanding New Zealanders. I have also been privileged during my term in Office to have worked beside other Ombudsmen, Sir Brian Elwood and Judge Anand Satyanand both now retired from Office and the current Ombudsmen John Belgrave, Chief Ombudsman and Beverley Wakem.
- 1.3 I have also been extremely privileged to have been involved in carrying out my functions with Speakers of this House, first the Rt Hon Jonathan Hunt and latterly the Hon Margaret Wilson. I have also appreciated the support shown to me and the Office by the Prime Minister, Ministers and all Members of this Parliament.
- 1.4 It is also appropriate at this time that I recognise and acknowledge the public officials throughout the public sector, including local government, with whom I have worked over what has been a long career and particularly during my time as an Ombudsman. It is something of a cliché to say how well New Zealand is and has been served by its public service and the officials who work in it. I say it now because I firmly believe it. Having had the benefit of long experience in New Zealand and having worked briefly and studied in a number of overseas countries I have no doubts whatsoever in saying that we are extremely well served by a professional and dedicated public service that compares more than favourably with any in the world.

2. The Office of Ombudsman

- 2.1 The Office was first introduced in New Zealand in 1962. That fact typifies the New Zealand of that time with very forward thinking politicians and public servants. There were other similarly important developments about that time including the 1961 Crimes Act which, among many other aspects of reform abolished capital punishment in New Zealand. It is also worthy of note that New Zealand was the first western country to adopt the notion of an Ombudsman and that a considerable number of countries involving many forms of government, have since adopted the New Zealand model, and in many cases the form of the governing legislation.

- 2.2 The process undertaken by the Ombudsmen sits outside the processes and boundaries of the formal, adversarial system upon which our judicial process is founded. In this context an Ombudsman may look behind the law and is not bound by the rigidities that the law requires. I cite a Canadian case that well encapsulates the role of an Ombudsman. The decision said this:

“the basic purpose of an Ombudsman is provision of a ‘watchdog’ designed to look into the entire workings of administrative cases.....(he) can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds. If his scrutiny and reservations are well founded, corrective measures can be taken in due democratic process. If not so no harm can be done in looking at that which is good.”

- 2.3 An observation by New Zealand’s first Ombudsman Sir Guy Powles which is still particularly pertinent and with which I concur said:

“The Ombudsman is a tool. He is a valuable tool in the hands of Parliament in order to probe into the administration, to search out what the administration is doing, to find out whether the administration is honestly and effectively administering the laws of Parliament. It is not correct to think that the Ombudsman is the great Sir Galahad, who will fight all battles on behalf of the complaining citizen, because it is not true.”

- 2.4 The office of Ombudsman is I believe an institution of real relevance in modern New Zealand. We may be small in population terms but New Zealand society is intricate. The exercise of public power in a functional democracy such as ours must go hand in hand with control, transparency and appropriate accountability in the way public power is exercised. The functions of the Office of the Ombudsmen are to the benefit of both the governor and the governed. It assists in providing control, transparency and accountability to improve the relationship between the state, its agencies and its citizens, and to facilitate the resolution of grievances which cannot be resolved without the intervention of an independent authority specifically provided within the democratic constitutional framework.

3. Jurisdiction and Powers

- 3.1.1 The comprehensive jurisdiction now vested in the Ombudsmen is substantial and, I believe, reflects the recognition by successive legislatures of the importance of such a position as an Officer of the Parliament and of the functions attaching to the office, and the credibility that successive holders of office have established. The Office of the Ombudsmen as it has developed is I believe seen as an essential, some might say a critical part of the democratic process in New Zealand.

- 3.2.1. I subscribe to the view that Parliament is sovereign. That may in itself be a somewhat simplistic expression of view but is advanced to provide a framework for my comment in the preceding paragraphs. It is Parliament's prerogative, in my view, to make law and for the Party (or Parties) forming the Government to appoint from its own members an executive to administer those laws and to perform the functions of government. However Parliament has recognised and continues to recognise by its support for the Office of the Ombudsmen, that there will inevitably be slips betwixt cup and lip. As I have described earlier there needs to be a watch-dog to ensure fairness and reasonableness by the machinery of government in the application of the laws and other processes that Parliament and the Executive have determined. Consistent with this is the authority of the Ombudsmen to report to Parliament on any particular case or on general issues in addition to the usual annual reporting process.
- 3.2.2. The Ombudsmen exercise specific jurisdiction under four Acts being the Ombudsmen Act 1975 itself, the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987, and the Protected Disclosures Act 2000. The number and types of organisations and entities subject to those Acts and to investigation by an Ombudsman is substantial. This includes, under the provisions of the Official Information Act, Ministers of the Crown. It is appropriate to note that the nature of organisations that fall broadly into the definition of public sector coming within the jurisdiction of an Ombudsman has been recently extended by the Crown Entities Act 2004 and now includes organisations such as the Commerce Commission, Securities Commission and the Law Commission.
- 3.2.3. It is also important to draw attention in the context of jurisdiction, to Standing Order 362(b). This provides that any Petition to the House on a matter within the competence of the Ombudsmen is not in order if an application has not been made to an Ombudsman.
- 3.2.4. I also note in particular the provision in section 13(3) of the Ombudsmen Act whereby the Prime Minister may, with the consent of the Chief Ombudsman, refer to an Ombudsman any matter for investigation and report other than a matter concerning a judicial proceeding. This option has been used infrequently but I suggest is a process, bearing in mind the powers vested in an Ombudsman to which I refer in the next paragraph, and the investigatory skills to be found in the Office of the Ombudsmen, that could be more frequently utilised.
- 3.2.5. The powers of an Ombudsman are significant and are not well understood at either the bureaucratic or public levels. Although I and my colleagues have not had to resort to these powers often their existence ensures that any investigation cannot be thwarted by obdurate or dilatory responses or obstructive tactics. These investigatory powers are to be found in section 18 of the Ombudsmen Act which allows an Ombudsman to obtain information from such persons as he thinks fit, and to make such enquiries as he thinks fit, and in section 19 which allows an Ombudsman to require any person to give information and to produce documents or papers or

things which may be in the possession or under the control of any person. An Ombudsman may issue a summons to a person to appear before him and may examine that person on oath. Any such examination is deemed to be a judicial proceeding and the person summoned is subject to the law relating to perjury. Section 27 of the Act authorises an Ombudsman to enter premises occupied by any organisation to carry out an investigation that is within jurisdiction. These powers also apply to the exercise of jurisdiction under the Official Information Act, the Local Government Official Information and Meetings Act and the Protected Disclosures Act.

- 3.2.6. The approach that successive Ombudsmen have taken to the exercise of their mandate in respect of their several jurisdictions has of course differed in accordance with their individual views. It is fair to say that some have been more conservative than others but the cautious and narrow interpretation which has been adopted by Ombudsmen in some other jurisdictions has not been the case in New Zealand. I have noted the reference to this in Sir George Laking's Report on Leaving Office presented to this House some 21 years ago. I concur with the views he then expressed. It is opportune and timely that I reiterate, and add to what Sir George then had to say.
- 3.2.7. There has been and continues to be discussion on the involvement of Ombudsmen in what is seen by some as matters of "policy". I admit to strong views on the machinery of government decision taken a number of years ago that determined there is a logical and indeed necessary separation for public administration purposes between policy and administration/operations. I believed then, and indeed I now know from the experience of recent years, that such a separation is artificial, antithetical and unhelpful to good management from a whole of government perspective.
- 3.2.8. The Ombudsmen Act makes no such distinction and the experience of the Ombudsmen has shown that any view that this is the way government functions is quite simplistic. There is of course a distinction between policy that finds its way into any form of legislation or policy that is determined by say a Cabinet decision, and decisions that are graced with the nomenclature of "policy" but are really no more than an administrative decision or what Sir George described in his Report as "Public Service law". That is not to say that such decisions or processes are necessarily wrong. Indeed I know that such is not usually the case. The point however, is that no matter the shibboleth given to such decisions, they are decisions that fall within an Ombudsman's jurisdiction and any actions that may be taken under such decisions are likewise subject.
- 3.2.9. The exercise of discretion and delegated powers, whether that be given by law or some form of administrative process is another area of public administration where an Ombudsman may find himself in conflict with officials around the issue of jurisdiction. Sir George referred to a comment by Dr Karl A Friedman the one time Ombudsman for British Columbia who said:

“One of the most important governmental developments of the modern age, in particular the last half century, is the growth of administrative powers that are inherently discretionary.”

New Zealand is certainly no exception to that. The significant growth of government in the last two decades, both national and local, the development of alternative delivery structures within the wider public sector and the expansion of government and its agencies into the day to day lives of all New Zealanders, has inevitably lead to large areas of decision making and the exercise of significant discretionary and delegated power being vested in officials. It is of particular importance that the confidence of citizens in the way that Government and those empowered to make decisions that affect the citizen is maintained and respected. Overseas experience demonstrates that the disengagement of the citizens from the Government and loss of confidence in the bureaucracy leads to alienation, the consequences of which might be severe. In New Zealand the very high percentage of citizens who enrol on the Parliamentary Electoral Rolls and who subsequently vote indicates that there is still significant confidence in our government processes and that people wish to participate in the democratic process. The institutions that aid that opportunity, and processes that provide the essential checks and balances, of which the Office of the Ombudsmen is one, are critical to the maintenance of that confidence.

4. Particular Comment

4.1 Official Information Act 1982

This legislation has particular relevance in the democratic process. It has been described by eminent jurists as having significant constitutional importance and has remained fundamentally unchanged throughout its history. It has proved to be a particularly robust piece of legislation.

4.2 The Act has its genesis in what is known as the Danks Report (1980). The Report said:

“The case for more openness in government is compelling. It rests on democratic principles of encouraging participation in public affairs and ensuring accountability of those in office.....A no less important consideration is that the Government requires public understanding and support to get its policies carried out. This can come only from an informed public.”

In this context I note two significant comments. The first of these is by Thomas Jefferson the third President of the United States who said:

“Information is the currency of democracy”

The second is a comment from a speech made in 2004 by Rt Hon Lord Falconer the Lord Chancellor of Great Britain. He said:

“Some Freedom of Information releases will bring with them disobliging headlines for the government. But each and every release will contribute day by day towards our long term vision of a more transparent government in which people feel greater confidence”

- 4.3 I have had the benefit of considerable experience on both sides of the official information fence. First as a public official working in organisations that held official information and latterly as an Ombudsman with jurisdiction to determine complaints by way of review following decisions by a Minister or listed organisation to withhold information under the terms of the Act.
- 4.4 I do not intend and neither is it appropriate that I comment on specific current issues relating to the release or withholding of official information. My earlier comments do however emphasise the significance of the Official Information Act and reflect my views on its importance in a functioning participatory democracy. There have been and will be again difficult cases where an Ombudsman on review requires release of information that the Government or an organisation would prefer to withhold. Such cases do however reflect the strength and value of the Act and maintain the opportunity for the citizen to participate in and test decisions that the Government or an organisation is proposing. It needs to be emphasised however that the Act is not all one way. The legislators of the time recognised that even in an open and transparent system of government there needs to be, in the public interest, provisions to withhold information. The Ombudsmen are particularly sensitive to these provisions and the maintenance of conventions, and recognise the need to permit government to be able to manage the country's affairs in an effective, orderly and timely way.
- 4.5 There is no doubt that with the advent of MMP, the more complex governmental arrangements that now exist, and the evolution of different structures for the delivery of public services, issues and arguments relating to official information requests have and will become more complex and fractious. In addition, or perhaps because of, the legal profession has become more involved in the process. There also appears to be a perception among Ministers and their advisors, and organisations subject to the Act that the burden on public administration surrounding Official Information Act matters has increased significantly. If that is so that may be the price that we have to pay in a participatory democracy to maintain a process of open government that has been demonstrated to be responsive and to meet the purposes of the Act but which, at the same time, ensures that the essential business of government and the economic and security interests of the country are not prejudiced.
- 4.6 My experience, both within the bureaucracy and as an Ombudsman, is that the Act is fundamentally sound and that it continues to be an

important bulwark sustaining our democratic process. Notwithstanding the increasing demand and complexity of the issues relating to release and withholding, I see no need to tinker with the law itself. If changes are required these may be more related to the management of the process within Ministers' offices and in organisations, and to recognise that dealing with Official Information Act matters is part of the core business of an organisation requiring a specific allocation of appropriately skilled resources.

Conclusion

My time as a Parliamentary Ombudsman has been a particularly satisfying period in my lengthy career of public service. My view of the significance of the Office and the comprehensive jurisdiction and powers of the Ombudsmen within the overall system of a functioning participatory democracy is I hope made clear throughout this Report.

I conclude by referring to a comment of Sir Guy Powles on taking office. He then 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 I shall report accordingly."

For my part I have done my best to observe that creed albeit in the context of 40 years on.

It has been a privilege to hold the office of Ombudsman and as an Officer of this Parliament. I wish this Parliament and all its Members well in carrying out their duties as representatives of the People of New Zealand.



Mel Smith
Ombudsman

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