

Development of the role of the Ombudsman with reference to the Pacific

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A little over thirty years ago, on 19 November 1974, the first New Zealand Ombudsman, Sir Guy Powles, welcomed, in this Chamber, to the first ever conference of this kind Ombudsmen from just five jurisdictions : Fiji and Hawaii from the Pacific and Victoria, South Australia and Western Australia from Australia. Sir Guy, who was appointed in 1962, was very lonely until the others I have mentioned arrived on the scene in the early 1970s. At the time of the conference other offices had just been established or were soon to follow: Queensland and New South Wales in 1974, Papua New Guinea in 1975, Australia in 1976 and the Solomon Islands, Tasmania and Northern Territory in 1978. By the 20th anniversary of the New Zealand Office, in 1982, the growth had spread beyond the Pacific to forty further Commonwealth jurisdictions – in the United Kingdom, nine Canadian jurisdictions, six Caribbean countries, four Indian states, Malaysia, Mauritius and Sri Lanka, Ghana, Nigeria, Tanzania, Zambia and Zimbabwe, and Cyprus. That says a great deal about Sir Guy and his missionary zeal (he was often referred to as New Zealand's leading tourist attraction), the soundness of the New Zealand model and statute, the willingness of political and administrative systems to accept further controls over administration, and underlying principle.

What is that underlying principle? Sir Guy liked to quote a passage from John Milton, writing more than 350 years ago in the middle of the English Civil War, in *Areopagitica*:

For this is not the liberty which we can hope, that no grievance should ever arise in the Commonwealth – that let no man in the world express; but when complaints are freely heard, deeply considered, and speedily reformed, there is the utmost bond of civil liberty attained that wise men look for.

A local home appliance business advertises its refrigerators, toasters, washing machines and the like with the line : “it's the putting right that counts”.

My task today is to look at the development of the office in the Pacific, now over more than forty years. My brief account will, I trust, help you to determine whether the Office has provided the remedy that Milton had in mind. Has it put things right? To the extent that it has not, how might it be improved?

“Matter of administration” – the basic grant of power

What I will do is to begin with the basic grant of power included in the original New Zealand Act and copied over into many others and then trace some of the additions and subtractions of power or jurisdiction (if you like) over the subsequent decades. I will emphasise the New Zealand material. I know it better than I do the material from

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other jurisdictions – but I will try to draw on developments elsewhere in the Pacific. In doing that I need to be sensitive to the balance to be struck between the principles underlying the Office and local circumstances. Forty years ago, Professor Stanley de Smith in his report on the possibility of an Ombudsman for Mauritius wisely commented that “An Ombudsman cannot be bought off the peg; he must be made to measure”.

That initial grant of power was captured in three words – “matter of administration” or in some statutes two – “administrative functions” or “administrative act”. What does that mean? Does it include policy? Is the word “administration” to be equated to “management”? Does it extend to executive acts, professional actions, or legislative or judicial matters? By 1974 contrasting approaches of different Ombudsmen to those questions were already to be seen. I discussed aspects of those approaches in the paper I gave to that initial conference thirty years ago. Two different approaches could be identified – a particular one focusing on the literal terms and dictionary and legal meanings, often developed in relation to court proceedings, and supported by legal opinion, or a broader approach which took account of the specific characteristics of the new Office and contrasted the characteristics of the courts. In support of that second broader approach I quoted a valuable comment by Louis Marceau, the Quebec Public Protector–

A court whose sessions are public and decisions final cannot proceed without strict receivability conditions or fairly elaborate norms of procedure. It cannot give up all rules of evidence nor free itself from basic formalism, any more than it can in principle do without the auxiliary role of attorneys. Nor can it formulate conclusions exceeding the specific cases it handles. In contrast, because he has no coercive power and can only render opinions which he hopes will be shared by the authorities, and because his investigations are informal, direct and private, the Ombudsman can easily be more available, eliminate all formalities, complete files on his own, discuss solutions freely and, finally, go beyond specific cases if necessary to influence administrative policy or even the regulation or legal text concerned. The Ombudsman has certainly not the powers of a court since his action is more or less comparable to that of a conscience but in a way he can go further and, in any case, he does not seek to fill the same need.¹

I added this comment:

This flexibility and informality is completely in consonance with one conclusion which, I suggest, comes through clearly from this paper: in general, the scope of the Ombudsman’s jurisdiction is not precisely determined either by the legislation or by the practice. It is sometimes precisely determined so far as the agencies subject to jurisdiction are concerned, and, in some areas, subject matters are clearly excluded. But, for the most part the matter subject to investigation, the issues which might be reviewed (for these may differ), the question whether in a particular case there will be review, and the basis on which they are reviewed are left very much on a case by case basis, ... In general I would again agree with Louis Marceau : the wording of the basic grant of power should be imprecise; the resulting flexibility is essential; and, moreover, ... we do not have a sufficiently accurate terminology in public law. The broad and simple

¹ 1973 Report 66.

language of the 1973 draft New South Wales Bill supports, I would submit, this conclusion : “conduct of a public authority” can be investigated, and the Act confers a very broad discretion to refuse to investigate or to discontinue the investigation. The Hawaiian Act ... is even more straightforward (see especially sections 96-5, 6 and 8).

That broader approach is supported not only by the flexibility of the expression “matters of administration” but also by two other characteristics, among others, of the Office. The first is the Ombudsman’s unfettered (or virtually unfettered) right of access to the relevant files. The second is the basis on which the Ombudsman can make rulings. In New Zealand, as the Prime Minister has reminded us, it extends all the way to decisions which the Ombudsman thinks are “wrong”.

An early commentator on the New Zealand office saw the first characteristic as most significant. That assessment is to be put in the context of the times. If we go back to the early 1960s when the legislation was being prepared, we find in New Zealand, as in much if not all of the Commonwealth, Official *Secrets* Acts not freedom of information statutes. Papers were the Queen’s papers unless she, or rather her Ministers and officials, decided in their unfettered discretion to release them. Further, there was dispute whether Judges had the power to order the production of official information when it was relevant to litigation or had to accept the Minister’s ruling on that. In the course of 1962 in New Zealand that second matter was resolved in favour of judicial control – by the judges, I should add; the Ombudsman legislation of that year similarly provided for virtually unfettered access by the Ombudsman to official files; and notwithstanding the strictures of the Official *Secrets* Act, or really by way of recommending a relaxation of them, the Royal Commission on the State Services declared that “Government administration is the public’s business, and the people are entitled to know more than they do of what is being done and why”. That declaration led to the newly established State Services Commission directing in 1964 that the rule should now be that information should be withheld only if there is good reason for doing so. That administrative direction was not in the end effective, and Official Information legislation, involving the Ombudsman, was needed, as I mention later.

Immigration cases

I would like to highlight those characteristics of the Office of Ombudsman by looking at some immigration cases from the 1970s investigated by the New Zealand Ombudsman or decided by the Courts. Those cases make another point : much of the early argument for the Office was that it would protect the citizen against an over zealous bureaucracy, but the complainants I am concerned with were of course not citizens. Many of them, thinking of geography, came from the Pacific.

A careful study by a senior student over twenty years ago suggested that “the informality and accessibility of the Ombudsman’s Office provides an appropriate service for complainants who are in the country for limited periods or are seeking recourse from abroad.”² If necessary, the Ombudsman could determine within 48 hours whether the complaint had any merit and warranted further investigation.

² Bowie “Ombudsmen and Immigration” (1982) 12 VUWLR 277, 280.

In the first of the cases, decided by the Supreme Court, an Italian, aged 26, who had lived in New Zealand since he was thirteen with two years back in Italy, was the subject of a deportation order following conviction for a drug offence and a sentence of two years imprisonment (as increased on appeal). The deportation order was made by the Governor-General on the recommendation of the Minister of Immigration. The sentencing court had refused to recommend deportation and the Crown had not raised the issue on appeal. Nor had it given any notice to Mr Pagliara in the course of the year long inquiry that it was considering deportation. He read about it in the newspaper. He challenged the deportation order, made on the ground of the public good, on the basis that he should have had a fair hearing. He should have had notice and an opportunity to challenge the facts and the arguments against him. He failed, the judge ruling that aliens had no right and no legitimate expectation of being allowed to stay in the country.³ He thought that the case was no different from that of an individual whose temporary permit was not extended, the subject of a recent English decision where natural justice was also held not applicable.

Two years later the same Judge also rejected the challenge, by a member of the Ananda Marga sect, on the ground that he had not been heard, to a Ministerial revocation of a temporary permit.⁴ The Judge referred to his earlier decision and a 1969 English case and said this:

The right of the minister to issue temporary permits and to revoke them is clear. The question is, whether the power to revoke is limited by the corollary that it is only to be exercised after an opportunity has been given to be heard. It does not seem to me that this can be so. The audi alteram partem principle is now well recognised and established in its application to the decisions of administrative authorities as well as to judicial and quasi-judicial tribunals. It is, nevertheless, clear that the case of aliens is firmly retained under a different category. Just as it was held in Schmidt's case⁵ that a refusal to grant an extension of permit was analogous to deportation so also must it be said is the revocation of an alien's permit. More particularly, however, the whole scheme of s.14 of the Immigration Act is against any distinction being drawn. It is necessary to remember that the basis upon which s.14 proceeds is first and foremost that no alien may have any right of entry into New Zealand. The minister may, upon certain defined grounds, permit an alien to enter. That permit may only be granted for a limited period and from the moment it is granted it is subject to revocation at any time. It is issued with that reservation. To hold that the observations of Lord Denning in Schmidt's case should be made to apply to the present situation would mean that the right of revocation given to the minister by statute could be exercised only in those areas in which the alien was first given the right to be heard. Whether or not in any particular instance it might be thought reasonable for that to be done is one thing; to hold, in effect, that it must be done in every case, is altogether another. That would be to take out of the minister's hands the freedom of action with regard to aliens which the legislature has been at pains to confer upon him.⁶

³ *Pagliara v Attorney-General* [1974] NZLR 86.

⁴ *Tobias v May* [1976] 1 NZLR 509.

⁵ [1969] 2 Ch 149.

⁶ [1976] 1 NZLR at 511-512.

The role played by the Ombudsmen at that time provides a sharp contrast. In the first case a young Samoan challenged the revocation by the Minister of his temporary permit. As in the Ananda Marga case he was given no reason. The Ombudsman undertook his own inquiries into matters set out in the Department's report to the Minister – to which he had automatic and full access, unlike the Judge – and concluded that some of the statements were open to question and that the young man's conduct had changed for the better. He persuaded the Department to recommend the Minister to extend the permit on a trial basis. The Minister in fact cancelled the revocation order, restoring the currency of the temporary permit.⁷

In a second revocation case the Ombudsman undertook an own motion inquiry – again something a court cannot do. The permit had been revoked, again without notice to the permit holder, in this case because the organisation sponsoring the person, a sponsored student, had withdrawn its sponsorship. The Department considered it was not obliged to inquire into the circumstances under which sponsorship was withdrawn. While the Ombudsman accepted that view and that the Department had acted within its authority in recommending revocation, he considered that before making the recommendation it should have interviewed the student to establish whether there was any special circumstance justifying a departure from, or modification of, the usual practice because it might in some circumstances be unjust:

I formed the further opinion that in this case the department could not state with confidence that it had necessarily placed before the Parliamentary Under-Secretary all relevant information to enable him to reach an informed decision in the absence of the student having been interviewed and having been given an opportunity to be heard.

I recommended therefore that the existing practice be re-examined by the department. I recommended also that in the case of the student concerned she be given an opportunity to be heard so that the department might decide whether there were any material circumstances which would justify further consideration of her case. Immediate effect was given to the second of my recommendations and I have been advised by the department that it is now considering ways in which its practices and procedures can be improved.⁸

Two other aspects of the Ombudsman's role in the 1970s and early 1980s again suggest the greater effectiveness of the Office compared with the courts. Two immigrants had entered on temporary permits. While they were discussing with the Department the extension of their permits, the permits expired; because of mistakes in departmental processes prosecutions for overstaying were launched. In the case in which the Ombudsman was approached he identified the errors in the departmental process. When the department

discovered the true position [it] considered that the proper course was to continue with the proceedings on the basis that if convicted he ask the Minister of Immigration to review his case.

This did not seem to me to take adequate account of the serious consequences for the complainant of a conviction as an overstayer. While the Minister might well decide to exercise his discretion in the complainant's favour this

⁷ 1975 Annual Report 34-36.

⁸ 1979 Annual Report 41-42.

would not alter the fact that the complainant would have a conviction recorded against him. It is my understanding that a Magistrate did not have authority to consider the circumstances leading up to the laying of the information against the complainant but only to decide whether or not the prosecution should succeed.

I therefore formed the opinion that the department had acted unreasonably in laying an information against the complainant and I recommended that the department seek the leave of the court to withdraw the information. This recommendation was accepted by the department and the Magistrate dismissed the [prosecution]. I subsequently learned that the department had received the outstanding information it required in connection with the complainant's application and that he would be granted permanent residence.⁹

In the case in which the matter was tested in court proceedings the Court of Appeal rejected the overstayer's appeal based on abuse of process.¹⁰

A further advantage, mentioned by Louis Marceau, is the ability of the Ombudsman to address a general issue on the basis of the accumulation of experience, something a court can do only rarely. In the late 1970s the Government instituted a crackdown on illegal immigrants, many from the Pacific in what the press referred to as "dawn raids". Part of this crackdown involved an offer of an amnesty to overstayers. A register was established on which overstayers could place their names so that their cases for remaining in New Zealand could be considered against criteria, laid down by the Government, by a departmental committee. While their cases were under consideration, removal proceedings were suspended. The number of complaints about this process led to the Ombudsman making a number of general procedural suggestions to the Department. The improvements achieved by the Ombudsman included:

- (a) publishing the criteria for the decisions;
- (b) ensuring that all relevant information reached the committee; and
- (c) improving the quality of the material going to the Minister when the matter was one for decision at that level.¹¹

In the following year Sir George Laking, the Chief Ombudsman, made the point more generally:

It is evident ... that some departments ... have progressively modified and improved their own procedures for the handling of grievances, in some cases instituting formal review and appeal machinery for this purpose. An encouraging example of this kind of development is to be found in the Immigration Division of the Department of Labour. A considerable number of complaints about immigration matters continues to come to my office but the concern expressed in my previous report about the possibility of a continuous upsurge has not been realised, largely, in my judgment, because of the measures taken by the department itself.¹²

⁹ 1979 Annual Report 39-40.

¹⁰ *Moenvao v Minister of Immigration* [1980] 1 NZLR 464.

¹¹ [1978] A.J.H.R. A3, 9-10.

¹² [1979] A.J.H.R. A3, 6.

In fairness to the Courts I should add that their attitude did begin to change in the late 1970s, and that Parliament too began to distinguish between different categories of individuals by providing for procedural and institutional protections for those with more substantial interests, such as those lawfully resident but subject to deportation following conviction of serious offences. The setting up of those institutions has of course an impact on the workload of the Ombudsman. They are in general a last resort.

Again to refer to a matter mentioned by the Prime Minister I wonder about just how well known the advantages of the Office are. The relative roles of Ombudsman and Courts were considered at the Fifth Conference of Australasian and Pacific Ombudsmen, held here in 1981, by Sir Ronald Davison, the New Zealand Chief Justice, Professor Jack Richardson, the Australian Ombudsman, and my then colleague Deborah Shelton.¹³ I wonder in particular about the extent of lawyers' knowledge and teaching in the law schools. The importance of the Office is not, I think, reflected in the balance of New Zealand legal scholarship.

A constitutional office?

I now move away from the New Zealand statute and the basic grant of power. One early move, in Guyana, Mauritius and Fiji, was to enshrine the office in the constitution. That would have symbolic significance and should make the abolition or damaging of the Office more difficult, depending on the relevant means of constitutional amendment. A further step, taken in Papua New Guinea, is to separate the Office from Parliament as well – a structure relevant to the role the Commission there has in relation to members of Parliament.

Protection of the Office also arises from its parliamentary character. As officers of Parliament rather than as creatures of the executive, Ombudsmen have an independence from the body over which they exercise jurisdiction, the executive. That is reflected in New Zealand in the conventions and practices including now the role of the Officers of Parliament Committee, wide consultation and if possible unanimity in Parliament before the appointment is made on the basis of a resolution of the House.¹⁴ While full independence may be impossible, it is further secured by the rules and practices for the fixing of the budget of the Office.¹⁵ Their tenure is essentially the same as a superior court judge,¹⁶ in that they can be removed from office by the Governor-General only on resolution of the House, and only on the grounds stated in the legislation (which are wider than in the case of judges).

This constitutional character of the Office is not however the whole answer. As the early history of the Mauritius Office shows it may be of no help at all. Also critical are the political and administrative realities in which the Ombudsman operates and the mana of those who hold the office.

¹³ See *Proceedings of the Fifth Conference of the Australasian and Pacific Ombudsmen* (Wellington, 1981).

¹⁴ Ombudsmen Act 1975 (NZ) s3.

¹⁵ Eg Palmer and Palmer *Bridled Power* (4th ed 2004) 267 and Ombudsmen Act 1975 (NZ) s3.

¹⁶ Compare Constitution Act 1986, s23; formerly Judicature Act 1908 s8.

There can be no doubt, thinking of those realities, that the positive attitudes of those responsible for setting up the New Zealand Office – Holyoake, Marshall and Hanan (to mention Ministers) and Robson, Wild and Ward (to mention the officials) – and Nash because the role of the Opposition was and is important as well – were crucial to the success of the Office and its launch across the world. A critical continuation of those positive attitudes is to be seen in the speeches given today by the Speaker and the Prime Minister.

Also essential were the skills and personalities of the initial holders of the Office – Sir Guy Powles, born 100 years ago this coming April in Otaki and Sir George Laking. On his swearing in Sir Guy said that:

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.

And Sir George

believed the personal touch to be very important for the holder of his position. He said, 'Any Ombudsman who appears to the public to be a remote and rather godlike figure is not a good Ombudsman ... It is a highly personal office. I think the special characteristic of it is that the ordinary citizen can feel there is some individual whom he can approach ... who's willing to take an interest in things that might seem unimportant to the system, but very important to the person who has a complaint.'

The attitudes and qualities are the more important given the lack of coercive power.

The Ombudsman is reliant on persuasion, and this must depend not only on the intrinsic merit of the Ombudsman's reasons; nor only on the office holder's personal qualities; but also on the status of the office itself. A recommendation from the Ombudsman must be seen to be important – by the department concerned and by the public, if the other main weapon in the Ombudsman's armoury – publicity or its potential – is to be effectively used. This was recognised by Sir Guy, who records in his reflections on the early years of the New Zealand office that a number of his initial public statements were deliberately high-pitched (and deliberately emphasised the office's connection to Parliament) to overcome public servants' suspicion and promise of lack of co-operation.¹⁷ To add to the statement by Justice Kirby quoted by the Prime Minister, may I quote another Judge from New South Wales. Justice Enderby of the New South Wales Supreme Court affirms that:

Goodwill is essential. When intervention by an Ombudsman is successful, remedial steps are taken, not because orders are made that they be taken, but because the weight of its findings and the prestige of the office demand that they be taken.¹⁸

The utility of the ultimate enforcement power of the Ombudsman - to report to Parliament if a department refuses to adopt a recommendation – has been questioned.

¹⁷ Sir Guy Powles "The New Zealand Ombudsman – the early days" (1982) 12 VUWLR 207, 207.

¹⁸ *Ainsworth v Ombudsman* (1988) 17 NSWLR 276, 283.

At the 1981 Conference held in Wellington, the Ombudsmen from New Zealand, Tasmania, the Solomon Islands and the Australian Commonwealth expressed doubts based on their own experiences, with only the United Kingdom representative – with a supportive select committee – giving examples of successful Parliamentary interventions.¹⁹ The experience of Vanuatu should be factored in here since the Ombudsmen in that jurisdiction could seek Court enforcement of their recommendations, as should the New Zealand experience, mentioned by the Prime Minister, of recommendations made under the Official Information Act which become binding in the absence of a Cabinet veto which has in fact never been applied.

Additions and subtractions

I have already hinted at both additions to the role of the Ombudsman – in official information matters – and subtractions – with the role of immigration tribunals.

Stanley de Smith's warning becomes relevant here. Different jurisdictions will approach such widening and narrowing differently. In New Zealand, the experience of the Ombudsman over nearly twenty years in dealing with information matters was very persuasive, indeed decisive, in the advice that they should have the monitoring role under the Official Information Act, while in other jurisdictions the regular courts, special tribunals or information commissioners were given those tasks. But it may be that the major step taken in New Zealand, over twenty years ago and with real success, does point to a more general lesson for those contemplating freedom of information legislation and worrying about the further proliferation of public offices.²⁰

A major task of Ombudsmen in their regular jurisdiction is to provide information to complainants, particularly in explaining why a complainant fails.²¹ In an early report the Mauritian Ombudsman quoted the renowned English administration lawyer, Professor H W R Wade, to the effect that in explaining that the official action under challenge was right the Ombudsman is carrying out a valuable service:

it is just as desirable to remove genuine grievances where the action is right as where it is wrong. In all his investigations, accordingly, the Commissioner is pouring oil on some point of friction between government and citizen. Government departments are, generally speaking, very good at avoiding mistakes. What they are often not good at is explaining themselves. In the Ombudsman they have, as to nine-tenths of him, a public relations officer who justifies their doings to those who are most aggrieved at them. This shows that the public service ought to look on the Ombudsman as a friend rather than an enemy. He is a lightning-conductor for *bona fide* grievances and will keep the departments out of many political storms in the long run.

I move from official information to human rights more generally.

In many jurisdictions – particularly in Latin America – there is an emphasis on the Ombudsman's role as human rights protector.²² Even without that particular

¹⁹ See n.13 above, 89-92.

²⁰ See eg Palmer and Palmer, n15 above, 229-236.

²¹ See eg D J Shelton, 'The Ombudsmen and Information' (1982) 12 VUWLR 233.

²² Judge Anand Satyanand "Growth of the Ombudsman Concept" (1999) 3 JSPL 10.

emphasis, as Judge Satyanand has noted in his paper “The Ombudsman Concept and Human Rights Protection”,²³ monitoring the actions of the executive or public sector brings forward issues which bear on human rights protection. Ombudsman oversight of prisons helps prevent degrading treatment or punishment, to take but one important example. In New Zealand, the Ombudsman’s role as the information arbiter ensures, among other things, that criminal defendants obtain full discovery before trial. Additionally, one of the grounds on which the Ombudsman can review administrative action was improper discrimination – sometimes an issue in immigration complaints.

The Mauritius and Fijian Constitutions expressly contemplate the Ombudsman as a means for securing the observance of human rights generally: good administration is after all an essential human right. While, under both, the existence of appeal rights generally bars an Ombudsman investigation, that was not the case if the complaint was that the Fundamental Freedoms provided for by the Constitution had been contravened. An early editorial in the *Fiji Times*, supporting the introduction of an Ombudsman, specifically referred to this aspect of the Ombudsman’s role:

The New Zealand Ombudsman, Sir Guy Powles, ... as well as investigating individual complaints, keeps a watch on civil liberties in general. The value of an ombudsman in Fiji’s complex multi-racial and developing society is incalculable...

An Ombudsman, or even Ombudsmen, eventually could help to create ... a feeling of unity by giving to everyone the feeling that their rights under the Constitution and the laws of Fiji are protected from over-zealous bureaucrats.²⁴

That connection with discrimination and human rights has, in some jurisdictions, been reinforced by giving the Ombudsman additional functions. A constant theme in the development of the role of the Ombudsman has been the acquisition of new roles, either in a personal or official capacity, a measure of the success of the Office and the status acquired by a number of its holders. In New Zealand this personal status has led to Ombudsmen being trusted with a number of public law initiatives including Sir Guy’s appointment as New Zealand’s first Race Relations Conciliator in 1971 and Sir John Robertson chairing the panel charged with supervising the referenda on electoral reform in 1993.

The office of Race Relations Conciliator was largely complementary to the working style of the Ombudsman established by Sir Guy. The role of the Conciliator was investigative, and the office had no powers to provide remedies; the object was to negotiate settlements. However, the new function placed strain on the resourcing of the Office of the Ombudsman and in 1973 Sir Guy resigned as Conciliator.²⁵

Less happy, certainly in the mind of Chief Ombudsman Sir George Laking, was ex officio membership of the Human Rights Commission, responsible for investigating claims of unlawful discrimination and making recommendations on human rights issues at large. That development was foreshadowed in the speech of the then Leader

²³ (1999) 29 VUWLR 19

²⁴ Editorial *Fiji Times*, 24 July 1969 quoted in *First Annual Report of the Ombudsman* (PP27, 1973) 6.

²⁵ Bryan Gilling *The Ombudsman in New Zealand* (1998) 77.

of the Opposition, Mr R D Muldoon, to the conference thirty years ago.²⁶ The work of the Commission represented in some ways a significant departure from the Ombudsman concept; the Commission was concerned with private sector discrimination as well as discrimination in public sector administration, and the methodology of the Commission also differed – the Commissioners taking a conciliation role. As well the Commission had a broad public policy advice role. The Ombudsman withdrew from the Commission's work – the Act made provision for this if it was felt that the Commission's work was incompatible with the function or office of the Ombudsman²⁷ and the office was removed from the list of Commissioners when the Commission was reconstituted in 1993.²⁸

It is in the Pacific that the general human rights development appears most significant. Under the Constitution of Papua New Guinea, the Ombudsmen Commission of three members may inquire into the justifiability of a policy of the National Government or a Minister to the extent that it may be contrary to the National Goals and Direction Principles, the Basic Rights or the Basic Social Obligations, or law. They also have the critical role of investigating and prosecuting leaders under the Leadership Code, a code designed to prevent corruption from becoming an entrenched way of life in Papua New Guinea. Sir Charles Maino, writing ten years ago as the Chief Ombudsman, gives a fascinating account of the operation of the Code, taking examples of the Code's enforcement through the Commission and the Leadership Tribunal. He said this about an inquiry

on the decision-making process used by the national government to award a contract to a foreign company for a US\$55 million public housing project for the disciplined forces. Public tender procedures were ignored and the project was not properly costed. It was not approved by the Parliament as it should have been under the *Constitution*, generous tax concessions were given away and, basically, there was a complete disregard for the laws dealing with the awarding of public works contracts.

The most disappointing aspect of this investigation was that, twelve months previously, the Ombudsman Commission had presented a very similar report to the Parliament dealing with various improprieties which led to the decision to build a freeway in the nation's capital. The freeway report was very detailed and should have provided ministers, government departments, departmental heads and public servants involved in the decision-making process for the housing project with a *code of ethics* to adopt in future projects. The thrust of that code was very simple:

We all have a duty to conduct ourselves in a way that minimises the risk of corruption and puts the decision-making processes of government above suspicion.

Unfortunately, that simple rule was disregarded and, once again, the people of my country will be forced to see huge sums of public money paid out to a foreign company under questionable and suspicious circumstances. It was

²⁶ Human Rights Commission Act 1977. For Sir George Laking's views on the Commission, see Gilling, above, 78.

²⁷ Human Rights Commission Act 1977 s7(6).

²⁸ Human Rights Act 1993 s8. For an additional New Zealand function see the Protected Disclosures Act 2000 but it has had little impact on the workload of the Ombudsmen as appears from the statistics, eg in Palmer and Palmer n15 above 269 showing over 5,000 complaints in the 2002 year but only ten under that Act.

with some exasperation that my brother Ombudsmen (Mr Joe Waugla and Mr Ninchib Tegang) and I concluded our report into the housing project with these words:

If the Government of the day ignores the laws of our country, then it can hardly expect the ordinary citizens to obey them. It is not only important but a paramount responsibility and duty for our leaders to lead by example. We therefore plead once again that our leaders lead by example.²⁹

But having gone through the relevant law and reviewed other cases he ends much more positively, stressing the role as well of the independent Leadership Tribunals (themselves subject to the check of judicial review):

I realise, and I will not be surprised, that many of you may look upon the Papua New Guinea model as a dream – to some, an impossible dream. But, since the *Leadership Code* is all about ethical considerations, and given that an ombudsman's function is essentially to work out the difference between 'right and wrong', then I hope you will look at the *Leadership Code* of Papua New Guinea as an inspiration and not something to be afraid of since, in our world of today, not only law but ethics are needed for good leadership, good administration and, of course, good government.³⁰

Sir Michael Somare, as Prime Minister, spoke at the September 2003 Conference held at Madang about the role of the Commission in promoting a culture of good governance. He said this:

A significant feature of our *Constitution* is the Leadership Code. We thought that persons in positions of power and authority who provide leadership for the nation should be subject to a special code of ethics.

... In supervising and enforcing the Leadership Code the Ombudsman commission oversees how our leaders are charting the course of the nation towards achieving the national goals.

Effective management of administrative procedures and supervision and enforcement of the Leadership Code are crucial to improving administration, governance and leadership.

We deliberately empowered our Ombudsman Commission to perform a diversity of functions. It enforces the Leadership Code. It is the guardian of the Constitution. It enforces the constitutionally guaranteed rights and freedoms.

...

The Constitution's call on the Ombudsman Commission is more relevant and desperate than ever. Corruption has gravely affected our society and weakened many of our institutions.

Tolerance or acceptance of breaches and or ignorance of well-intended legislation and administrative processes put in place to ensure transparency,

²⁹ Sir Charles Maino "Ethical Considerations : The Leadership Code of Papua New Guinea" *The International Ombudsman Anthology* (1999) 435, 436.

³⁰ Maino, n.29, 452.

accountability and probity and ultimately good governance had become the norm.

Even those who should know better ignore these processes. We must take an integrated approach to fight this culture of corruption.³¹

As Sir Michael said, the commitment to good governance is Pacific wide, affirmed recently at Biketawa and Auckland by heads of government, meeting at the Pacific Islands Forum. That commitment is being taken further in the preparation of the Pacific Plan.

The Ombudsman in Vanuatu also has a role in respect of a Leadership Code, a function initially expressly conferred by statute rather than the Constitution. That Office also has jurisdiction in respect of multilingualism.

The reports of that Ombudsman document serious breaches of the Code by the Ministers and others. Many of you would be in a better position than I am to assess those reports and their consequence. One thing I can say is that they demonstrate her sturdy independence in the best traditions of the Office. Some might also see a reflection of the stand of Sir Guy Powles, quoting Francis Bacon, that it is the duty of every good judge constantly to extend her jurisdiction.

Certainly the litigation in the Vanuatu Courts challenging the validity of the Ombudsman Act (later repealed – also a matter of challenge) and actions of the Ombudsman indicates real controversy. So too does the litigation in Papua New Guinea, which extends as well to the Leadership Tribunal, and to major political issues such as the calling of Parliament.

I leave those very difficult and contentious areas which show how far the Office has developed in different countries over the last four decades, to conclude on a more mundane matter – the subtraction of jurisdiction. Ombudsman legislation routinely provides that where another remedy is available it should in general be invoked ahead of the Ombudsman. Accordingly, to return to New Zealand, the establishment of immigration tribunals has had an impact on the Ombudsman's caseload. But the alternative remedies limit is often put in discretionary terms and the tribunal may not have available the appropriate remedy. The result is that the New Zealand Ombudsmen continue to deal with many immigration complaints, 224 last year.

In other cases the subtraction is more definite, as with privacy and police complaints. But those are details varying from country to country and falling within Stanley de Smith's "made to measure" proposition.

We are left, I believe, with the very important shared core of function and responsibility. I go back to Sir Guy's words : Ombudsmen are "put there for the protection of the individual, and if you protect the individual you protect society ... I shall look", he said, "for reason, justice, sympathy and honour, and if I don't find them I shall report accordingly."

³¹ Sir Michael Somare "The Ombudsman Commission of Papua New Guinea – its history and its role in promoting a culture of good governance", Australasian and Pacific Ombudsmen Regional Conference, Madang, September 2003.

