

**THE CLASSICAL OMBUDSMAN—AN EFFECTIVE
REVIEWER OF ADMINISTRATIVE DECISIONS
BY GOVERNMENT AGENCIES—A
NEW ZEALAND PERSPECTIVE**

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OCCASIONAL PAPER # 76

ISSN 7116349

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**THE CLASSICAL OMBUDSMAN—AN EFFECTIVE REVIEWER OF
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Sir Brian Elwood, C.B.E., D.Litt. (Hon.) LL.B. *

“In short, the powers granted to an Ombudsman allow him to address
administrative problems that the Courts, the legislature
and the executive cannot effectively resolve.”¹

Introduction

From an historical perspective it has long been recognized that, except in the simplest and most direct form of democracies, substantial powers need to be given to government officials to carry out the functions of government effectively. It has equally been long recognized that the entrusting of powers to officials opens the door to potential abuse of those powers. The need to protect citizens from such potential abuse lies at the heart of the concept of the classical ombudsman.

Evidence of the recognition of this need goes back many centuries. It appeared in the form of the *Control Yuan* in ancient China, and in the office of the *tribuni plebis* in ancient Rome, to name but two examples. However, the current term “*ombudsman*” finds its origin in Sweden where, in 1809, the institution called *Justitieombudsman* was created.

The Swedish model spread initially to the rest of Scandinavia, from where New Zealand adopted the concept in 1962—the first English speaking country and the first outside Scandinavia to do so.

The business of government has a significant influence in a civil society. Generally, that business is designed to facilitate the conduct of the collective affairs of the individuals within it and is undertaken pursuant to the rule of law. Inevitably, disputes arise between the citizen and the state as to the manner in which the citizen is treated by the state. When that occurs, the individual seeks redress or rectification generally from the judicial or the political processes. Recourse to those traditional avenues create both opportunity and limitation. The political processes can be seen to be partisan in nature and, as a result, lack a perception of independence. The judicial processes can be seen as significantly adversarial and accessible only to those able to or willing to afford the costs involved. For many people, access to the political or court processes is sufficiently daunting such that they are effectively precluded from them. Anyone can enter a Hilton Hotel, but only those with money can do anything but look. Throughout history, efforts have been made to devise systems for allowing the ordinary citizen to access a means of having their grievances against government administrative decisions reviewed and, where justified, rectified.

* Chief Ombudsman of New Zealand; President, International Ombudsman Institute. Special Lecture to Faculty of Law, Nihon University, Tokyo, Japan, June 20, 2001.

The institution of ombudsman, conceived largely for that purpose, has evolved slowly over time but with increasing rapidity during the past decade in order to help address this fundamental problem to further the good governance of a civil society. There are now ombudsmen in more than 107 countries.

I have observed with great interest the development of the system of administrative counsellors which has emerged in Japan and which is seen by many to be a particular Japanese style solution to the problem which the ombudsman institution seeks to address. The Association of Administrative Counsellors has been admitted to the International Ombudsman Institute although, in some respects, the work of the counsellors is not strictly in accord with the functioning of a classical ombudsman. It is my understanding that the counsellors do not have the kind of legislative base which underpins the work of classical ombudsmen, nor the range of powers akin to a commission of enquiry where there is a power to summon witnesses and require the production of documents. The administrative counsellor system is, however, a process which is relevant to Japanese society and appears to be highly effective. It is a basis from which could develop a statutory ombudsman system for Japan.

Although it is not strictly relevant to my lecture today, the development of the ombudsman system can sit comfortably alongside a growing recognition of the justification for making access to official information more readily available on request. The business of government is on behalf of the people being governed and, as such, official information should be available to them in order to facilitate their participation in the democratic processes—which includes the making of laws and policies and the holding to account of government officials. Information is a prerequisite to participation and holding to account.

The focus of my lecture will be upon the New Zealand ombudsman model, because I am experienced with it and because it has survived for nearly forty years in much the same form as when it was first introduced in 1962. It has stood the test of practical experience.

Citizen and State

It is now widely accepted that citizens have a right to expect good administrative behaviour by their governments. In short, this entails a right to expect government to be open and accessible, and with an emphasis upon service. In practice, citizens are entitled to be heard, to receive a prompt and reasoned response and be informed of available remedies or reviews when what is requested is denied. Government response should be characterized by action which is fair and expeditious. Good governance needs to be based upon legitimacy obtained through the consent of the governed. That consent will be more likely if there is a procedure for oversight of government's administrative conduct. Such oversight must have as its goals:

- the righting of administrative wrongs by the government; and
- the building of trust in a country's system of government.

Citizens of a civil society must interrelate with their nation state through the processes of the state. When the state gets it wrong a civil society should ensure that there be substantive rights of redress.

What is an “Ombudsman”?

Professor Stephen Owen, a distinguished Canadian lawyer, academic, former Ombudsman, and former President of the International Ombudsman Institute, in a paper published in an anthology of writings from the Institute, observed that the concept of ombudsman, “has taken firm hold as an instrument of accountability between the individual and the administrative state”. Although the use of the name “ombudsman” has spread across the world and is today applied to a variety of functions that would not have been associated with the word’s original meaning, the purpose of my lecture today is to explain the nature of the classical legislative ombudsman, rather than what the term “ombudsman” has come to be applied to in other contexts.

The International Ombudsman Institute’s Bylaws identify the classical legislative ombudsman as having the following characteristics:

The office of a person who has been appointed or elected pursuant to an Act of the Legislature; whose role is to investigate citizen complaints concerning administrative acts or decisions of government agencies from which the Ombudsman is independent; and who makes recommendations to the Legislature as an officer of that body.

This somewhat prosaic description of what an ombudsman is and does, was put eloquently by the Supreme Court of Canada, where it said:

The ombudsman represents society’s response to...problems of potential [administrative] abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman ‘can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blind’... On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.²

The New Zealand Model

New Zealand is a parliamentary democracy consisting of central and local government. Central government consists of a single House of Representatives. Since the establishment of an Ombudsman in New Zealand, the New Zealand legislation has been widely used as a model in other English-speaking countries and elsewhere, where such an office has subsequently been established. Because the legislation establishing the Office of Ombudsman is the cornerstone of the institution, setting out the scope of an ombudsman’s functions and powers, the strengths and

weaknesses of that legislation will, to a significant degree, affect the success of the office in any particular country.

In New Zealand, the original Act of Parliament establishing the Office of Ombudsman was the *Parliamentary Commissioner (Ombudsman) Act 1962*. Under that Act, an Ombudsman's powers of investigation were limited to central government bodies. That Act was replaced in 1975 by the *Ombudsmen Act 1975* (OA), and it is section 13 of that Act (copy attached) that is fundamental to the scope of an ombudsman's classical function. Ombudsmen are Officers of Parliament and, by convention, are appointed by the Head of State on the unanimous recommendation of the Parliament.

The New Zealand Ombudsmen Act 1975

While the original 1962 Act was limited in its application to central government bodies, the 1975 Act applies more widely. However, under both Acts an Ombudsman was given power to investigate acts, omissions, decisions and recommendations "relating to a matter of administration" affecting any person in that person's personal capacity, made by a department or organization listed in the Act. That jurisdiction extends to the conduct of individual officers, employees or members of those departments or organizations in their official capacity.

It should be noted that Parliament itself, Ministers, individual MPs or the courts are not subject to an Ombudsman's jurisdiction. The reasons for this differ.

In the case of Parliament, it is the supreme lawmaker, and its members are publicly elected representatives of the population at large. Ministers are accountable to Parliament for their actions in the first instance and, ultimately, all members are accountable to the electorate through the democratic process. It may, therefore, be seen as inappropriate for Ministers to be additionally accountable for their actions to a parliamentary officer appointed to investigate the actions of the bureaucracy in the discharge of its responsibilities.

As for the courts, they are independent of the executive government and their functions are judicial, not administrative. An Ombudsman is not a judicial officer and is not intended to become involved in the judicial process. New Zealand constitutional law, which is based on English law, has always recognized that the independence of the judiciary is essential to the proper administration of justice. An Ombudsman's involvement in judicial conduct may, therefore, be seen as potentially infringing that independence, and therefore inappropriate.

Although a complaint procedure about judicial conduct has very recently been formalized, it remains in the hands of the judiciary, notwithstanding the appointment of a judicial complaints lay observer. That position however, is not a legislative one, and the procedure is one that has been devised with the agreement of the judges. How it will work in practice is yet to be seen, and is a subject matter outside the scope of this lecture.

When the Ombudsman jurisdiction was extended to local government bodies in 1975, an Ombudsman's jurisdiction was also limited to apply only to the actions of committees, subcommittees, officers, employees and members of these bodies, and not to the body as a whole.

This limitation on jurisdiction with respect to local government bodies may be likened to the position of central government. Unlike appointed officials, local authorities, like central government, are ultimately accountable for their decisions to their electorate at the ballot box. Being accountable to an Ombudsman in these circumstances has therefore not been seen by Parliament to be necessary or appropriate.

The Nature of an Ombudsman's Investigation

An Ombudsman is not a judge and an Ombudsman's investigation is not in the nature of court proceedings. An Ombudsman does not declare what the legal rights of the parties are, nor does an Ombudsman make binding rulings. Unlike a court, which conducts proceedings in public and where the opposing parties bring their cases before the court, which then adjudicates on the merits of the competing claims by reference to the evidence the parties have presented, an Ombudsman does not.

Instead, an Ombudsman conducts the investigation of a complaint wholly in private as a purely inquisitorial body making whatever further inquiry is thought necessary into the material furnished by the complainant. An Ombudsman is free to call for any answers and explanations that may be required, whether from the parties to the complaint or any third party that may have relevant information relating to the subject matter of the complaint.

Ultimately, the Ombudsman must form an independent opinion on the substance of the complaint. In this he is not limited by the manner in which the original complaint may have been formulated but is entitled to consider issues raised by the complaint of which the complainant may have been unaware and which have come to light only in the course of the investigation. If a complaint is sustained, an Ombudsman may make such recommendation as he thinks fit, but cannot compel any remedy to be provided.

What Conduct May Be Investigated

However, while an Ombudsman has wide powers to obtain information, an Ombudsman is required to maintain secrecy in respect of all matters that come to his attention in performing his functions other than for the purposes of giving effect to the Act. An Ombudsman may thus disclose matters for the purposes of an investigation or to establish grounds for any conclusions or recommendations. In addition, an Ombudsman may publish reports relating either generally to the exercise of his functions, or to any particular case or cases that have been investigated, but otherwise all information is secret.

This obligation of secrecy is an assurance both to complainants and to government agencies that they may be completely frank with an Ombudsman without fear that what is being disclosed will be disclosed or used in any manner other than to the extent necessary for the purpose of investigating or reporting on a complaint. Such openness on the part of complainants and agencies enables an Ombudsman to form an opinion based on the fullest information. This not only adds to the quality of the opinion, but also serves to maintain or enhance the credibility of the office.

A critical expression in section 13 of the *OA*, and one which is easily misunderstood, is

the phrase, “*relating to a matter of administration*”. It is important to note that an Ombudsman’s function is to investigate conduct “*relating to*” a matter of administration. It does *not* say that an Ombudsman investigates conduct that *is* a matter of administration. What is required is that the decision or act, etc. being investigated is one that *relates to* a matter of administration. By way of example, if an official is alleged to have assaulted a complainant, it is not a question of whether such alleged assault is a “*matter of administration*” but, rather, whether the alleged assault occurred in the context of the administrative functions the official was performing at the time. “*Relating to*” here means much the same as “*in the context of*”.

As to what is encompassed by “*a matter of administration*”, the answer internationally accepted by ombudsmen is that given in the unanimous decision of the Supreme Court of Canada, in *Re British Columbia Development Corporation v. Friedmann* referred to earlier. There has been no New Zealand litigation on the point, and the Supreme Court of Canada is the highest Commonwealth judicial body yet to have considered the issue. In delivering the judgment of the Court, which held that only legislative or judicial acts are not encompassed by the expression, Dickson J. observed:

There is nothing in the words administration or administrative which excludes the proprietary or business decisions of governmental organizations. On the contrary, the words are fully broad enough to encompass all conduct engaged in by a governmental authority in furtherance of governmental policy—business or otherwise.

In my view, the phrase ‘a matter of administration’ encompasses everything done by governmental authorities in the implementation of government policy. I would exclude only the activities of the legislature and the courts from the Ombudsman’s scrutiny.

A second critical element that must exist before an Ombudsman may investigate a complaint is that the action complained of must be one “*affecting any person...in his personal capacity*”. If an act affects no person *in a personal capacity*, the matter cannot be investigated because it falls outside the parameters of section 13(1), which confers jurisdiction. Although most actions will affect *some* person in a personal capacity, this will not always be the case. For instance, a decision to delegate a power to the person for the time being holding a particular office could not reasonably be said to affect any person in a personal capacity. A complaint about such a delegation would therefore be outside jurisdiction. However, if the powers conferred by the delegation were exercised, and this affected any person in their personal capacity, then the exercise of that power could be investigated. Such investigation might result in the conclusion being formed, for example, that the exercise of the power appeared to be contrary to law because the delegation was seen to be unlawful.

Although Ministers and the actions of local authorities, other than those of their committees and officers, are not subject to the *OA*, the Act ensures that where a complaint relates to some action of a Minister or such an organization, an Ombudsman is still able to investigate prior administrative actions that may have contributed to the act or decision which is outside jurisdiction. The power to investigate a recommendation to a Minister or local authority is an important one because if, on investigation, it is discovered that the recommendation made was

flawed, an Ombudsman may still be able to provide a remedy. That remedy would be to suggest that the department (or a local authority's chief executive), ask the Minister or local authority to reconsider the matter in light of the fresh information. Recommendations may be flawed for a variety of reasons. It may be that not all relevant facts had been presented, or the recommendation contained an internal inconsistency, or it may have contained a legal error, or there may be some other matter that, had attention been drawn to it, may have influenced the resulting decision.

However, where a complaint relates to an alleged defect in an original recommendation, and that defect has already been cured by other means, then even if the complaint were to be sustained no remedy could be provided. In those circumstances, no investigation would be warranted.

When An Investigation May Be Commenced

The investigative function is exercisable in any of four situations:

- on a complaint made by any person;
- on an Ombudsman's own motion;
- by referral from a Committee of Parliament; and
- subject to the Chief Ombudsman's consent, at the request of the Prime Minister.

In practice, complaints are the primary grounds for commencing an investigation. Own motion investigations are uncommon and usually depend on a sufficiently significant public interest issue being involved where addressing the matter on an individual complaint basis is not seen as adequate.

Although own motion investigations are uncommon, they are an important aspect of an Ombudsman's role. Such an investigation is more readily able to consider systemic issues that have the potential for creating numerous future complaints and, by addressing these, help to avoid such complaints from arising.

Historically, while investigations have been undertaken other than pursuant to a complaint or by way of own motion, this has not occurred for many years. Nevertheless, jurisdictionally, they are possible.

Identifying Bodies That Are or Should Be Subject to The Ombudsmen Act

The identification of bodies that are subject to the *OA* is straightforward. If the body is named or specified in the First Schedule to the Act it is subject to it. If it is not so named or

specified, it is not so subject. Jurisdictional problems and legal arguments that could arise if jurisdiction were to be determined by reference to some general descriptive terms, for example, “all government bodies performing administrative functions”, are thereby minimized, if not eliminated.

The question of which bodies should be subject to the *OA* was considered in 1991 by Parliament’s Legislation Advisory Committee on Legislative Change. Its conclusion was:

As a general principle, the Ombudsmen should have jurisdiction over departments and other organizations that make decisions relating to matters of central or local government administration and which affect members of the public.

Accordingly, in the drafting of legislation that involves the creation of new public bodies, those responsible for this process are required to consider whether any such body should be added to the First Schedule of the *OA* in accordance with this principle.

Exceptions to Jurisdiction

Section 13 of the *OA*, which defines the conduct and the bodies subject to investigation also establishes some limits on the otherwise very sweeping jurisdiction an Ombudsman would have. These are, in brief:

- where the merits of the complaint are subject to a statutory appeal right to a court or tribunal, subject only to special circumstances that would make it unreasonable for that right to have been exercised;
- actions of trustees in their capacity as trustees;
- actions of Crown legal advisers;
- actions of the police, in respect of which a separate statutory body, the Police Complaints Authority, exists; and
- any matters relating to the terms and conditions of service of military service personnel or to any operational matters of the military.

Should any questions about an Ombudsman’s jurisdiction arise, the Ombudsman may seek a declaratory order about the matter from the High Court.

Discretion Not to Investigate Complaints

Whereas section 13 of the *OA* establishes the limits of an Ombudsman’s investigative functions under that Act, section 17 (copy attached) ensures that simply because a complaint may be within an Ombudsman’s jurisdiction, an Ombudsman is not therefore obliged to investigate every such complaint.

Section 17, in summary, authorizes an Ombudsman to do the following:

- refuse to investigate a complaint further if, in the course of investigation, it appears that further investigation is unnecessary;
- decide not to investigate, or not to investigate further, any complaint where the complainant has known about it for more than 12 months; or
- where the subject matter is trivial; or
- the complaint is frivolous or vexatious or not made in good faith; or
- the complainant has insufficient personal interest in the subject matter.

The section works reasonably well in practice, enabling an Ombudsman to ensure that intervention by an Ombudsman is used only as a last resort, that investigations are discontinued where this is found to be appropriate, that grievances can be dealt with promptly, and that the resources of the office are not unnecessarily spent on complaints in which the complainant does not have a genuine, substantive, personal and *bona fide* interest.

A perceived deficiency of the current section 17 is that the discretion under sub-section (b) is limited to the discontinuing of an investigation on the grounds that it is “unnecessary”. It does not address the situation of complaints where the *commencement* of an investigation may be equally “unnecessary”.

This omission is of relevance because the *OA* requires that the intention to investigate must be notified before any investigation is undertaken. In other words, whatever preliminary enquiries may be made about a complaint, an investigation under the *OA* does not commence and, hence, cannot be discontinued pursuant to section 17(1)(b), without first having notified the body concerned that an investigation is intended.

It is not infrequently the case that a preliminary consideration of a complaint, and possible other informal preliminary inquiries, disclose that the complaint, although potentially capable of investigation, is one where, whatever the outcome, it could not result in any benefit to the complainant or administrative changes on the part of the organization.

This may occur, for example, as a result of intervening law changes. Alternatively, a complaint may be an aspect of a wider matter which, although not dealing specifically with the subject matter of the complaint, has already provided a remedy that adequately addresses that issue if an investigation were to result in the complaint being sustained.

These examples indicate the kinds of complaints that it might be considered “unnecessary” to investigate, on the grounds that an investigation would be, for practical purposes, of academic interest only. Some complainants, however, have an expectation that *as a matter of principle* instances of possible maladministration ought nevertheless to be investigated.

It is currently difficult to avoid investigating such complaints outside the context of section 17(1)(b), which would require the complaint to be notified in order to be able to discontinue the investigation. Such a procedure involves a needless use of scarce resources,

better employed in seeking to address grievances where, if well founded, an effective remedy may be possible.

Complaints of this nature do not usually fit readily into any of the only other grounds for declining to investigate a complaint within jurisdiction. This is because where there is no other adequate remedy, the complaint is less than twelve months old, and where the complainant has a sufficient personal interest, an investigation may be declined only if the complaint is trivial, frivolous or vexatious, or is not made in good faith. These remaining grounds are recognized as being very narrow and to be invoked only sparingly, where the grounds for so doing are unequivocally established.

Nor does the section deal specifically with over zealous users of an Ombudsman's services. In England, the judicial observation has been made:

Every local authority has living within its boundaries a small cadre of citizens who would like nothing better than to spend their spare time complaining of maladministration.³

Experience has shown that this comment holds true for New Zealand, and one may reasonably suspect that it does so for other countries as well. The problems this can cause lies in the fact that an Ombudsman has limited resources—for those limited resources to be channeled disproportionately towards addressing the concerns of a few complainants who make frequent complaints can result in unfairness to the many who may have only one matter for which they seek an Ombudsman's intervention. All citizens should be able to have equal access to an Ombudsman's services, and a person making frequent and numerous complaints has the potential effect of disadvantaging the average citizen wishing to have a particular grievance addressed in a timely manner.

This problem can, however, currently be met only through such general procedural and administrative measures as are available to an Ombudsman under the *OA*, as there is no specific provision in the Act that expressly addresses this issue.

Powers in The Course of Investigation

Once an investigation has been commenced, an Ombudsman has wide powers under the *OA* to require anyone holding information that may relate to the investigation to be disclosed to him. The power extends to all persons holding such information, whether or not they are themselves subject to the *OA*. The power overrides statutory secrecy requirements and is subject only to such privilege as witnesses would have in court.

An Ombudsman may also summon such persons and examine them under oath (although in the case of persons not subject to the *OA*, only with the consent of the Attorney General).

In addition, the *OA* confers on an Ombudsman a power of entry upon premises of bodies subject to the *OA* for the purposes of an investigation. This power, like the power to summon and examine someone under oath is, however, regarded as a power of last resort, and I am not aware of circumstances where the need to contemplate its use has arisen.

Remedies Available Under The Ombudsmen Act

Where, following an investigation under the *OA*, an Ombudsman forms an opinion of the kind mentioned in section 22 of that Act (copy attached) the Ombudsman may make such recommendation as the Ombudsman thinks fit. Such recommendations, whilst not binding, are generally accepted. In the last two years, from the nearly 12,000 investigations completed, only one formal recommendation was not accepted.

Where a recommendation has been made and, in the Ombudsman's opinion, no adequate and appropriate action has been taken, the Ombudsman may, in the case of central government organizations, report the matter to the Prime Minister and thereafter to Parliament. In the case of local government organizations, the Ombudsman may require the body concerned to publish a summary of the report

Functions Under Other Legislation

With the advent of the *Official Information Act 1982*, and later the *Local Government Official Information and Meetings Act 1987*, Ombudsmen in New Zealand were given a new function, different from the classical function under the *OA*. Under the *Official Information Act*, Ombudsmen were given the function of investigating and reviewing complaints about decisions made in response to requests for "official information". More recently, functions have also been conferred on Ombudsmen by the *Protected Disclosures Act 2000*, under which they may be consulted to provide advice to people who wish to disclose serious wrongdoing by their employer, without fear of possible disciplinary or legal measures being taken against them.

However, these functions fall outside the role of the classical ombudsman and, as my lecture has been aimed at describing that role in general and how this is discharged in New Zealand in particular, I do not propose to stray into this wider area. The topic of access to official information in New Zealand is a subject matter in its own right and one that is more properly addressed separately. However, I detect a growing trend internationally to give consideration to the introduction of freedom of information legislation. To adopt such legislation requires courage, but is a sign of the maturing of the democratic process. An ombudsman being the independent reviewer when access to official information is denied, fits comfortably with the classical ombudsman model. Getting access to the official information relating to the subject of a citizen's grievance often helps resolve the grievance. The reasons for the act or decision complained about are then made clear.

Conclusion

The effectiveness of an ombudsman's investigation can be measured by the way in which the parties accept an ombudsman's conclusions, and not the conclusion itself or whether a recommendation was made. Earlier in my lecture I cited an observation by Professor Stephen Owen on the concept of what an ombudsman is. I shall conclude it by citing another passage from him, which serves to emphasize the point that the underlying purpose of an ombudsman's investigation is to assist the parties. This is principally done by finding out what and why something was done the way it was, and not by seeking to attribute blame:

The role of an ombudsman office is not to replace or oppose government decision-making. Rather, the office exists to assist the public service to be more aware and responsive to the individual concerns of members of the public. In addition to helping resolve individual complaints, an ombudsman office can, over time, serve as a resource to government institutions in identifying recurring unfairness (which may not display an obvious pattern to the agency) and can advise on how to avoid it in the future.

Appendix

Section 13, *Ombudsmen Act 1975*

s. 13 Functions Of Ombudsmen

- (1) Subject to section 14 of this Act, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organisations named or specified in Parts I and II of the First Schedule to this Act, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part III of the First Schedule to this Act, or by any officer, employee, or member of any such Department or organisation in his capacity as such officer, employee, or member.
- (2) Subject to section 14 of this Act, and without limiting the generality of subsection (1) of this section, it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such Department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part III of the First Schedule to this Act, as the case may be.
- (3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission.
- (4) Without limiting the foregoing provisions of this section, it is hereby declared that any Committee of the House of Representatives may at any time refer to an Ombudsman, for investigation and report by an Ombudsman, any petition that is before that Committee for consideration, or any matter to which the petition relates. In any such case, an Ombudsman shall, subject to any special directions of the Committee, investigate the matters so referred, so far as they are within his jurisdiction, and make such report to the Committee as he thinks fit. Nothing in section 17 or section 22 or section 24 of this Act shall apply in respect of any investigation or report made under this subsection.
- (5) Without limiting the foregoing provisions of this section, it is hereby declared that at any

time the Prime Minister may, with the consent of the Chief Ombudsman, refer to an Ombudsman for investigation and report any matter, other than a matter concerning a judicial proceeding, which the Prime Minister considers should be investigated by an Ombudsman. Where a matter is referred to an Ombudsman pursuant to this subsection, he shall, notwithstanding anything to the contrary in this Act, forthwith investigate that matter and report thereon to the Prime Minister, and may thereafter make such report to Parliament on the matter as he thinks fit. Nothing in section 22 of this Act shall apply in respect of any investigation or report made under this subsection.

(6) The powers conferred on Ombudsmen by this Act may be exercised notwithstanding any provision in any enactment to the effect that any such decision, recommendation, act, or omission shall be final, or that no appeal shall lie in respect thereof, or that no proceeding or decision of the person or organization whose decision, recommendation, act, or omission it is shall be challenged, reviewed, quashed, or called in question.

(7) Nothing in this Act shall authorize an Ombudsman to investigate —

(a) Any decision, recommendation, act, or omission in respect of which there is, under the provisions of any Act or regulation, a right of appeal or objection, or a right to apply for a review, available to the complainant, on the merits of the case, to any Court, or to any tribunal constituted by or under any enactment, whether or not that right of appeal or objection or application has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired:

Provided that the Ombudsman may conduct an investigation (not being an investigation relating to any decision, recommendation, act, or omission to which any other paragraph of this subsection applies) notwithstanding that the complainant has or had such right if by reason of special circumstances it would be unreasonable to expect him to resort or have resorted to it:

(b) Any decision, recommendation, act, or omission of any person in his capacity as a trustee within the meaning of the Trustee Act 1956:

(c) Any decision, recommendation, act, or omission of any person acting as legal adviser to the Crown pursuant to the rules for the time being approved by the Government for the conduct of Crown legal business, or acting as counsel for the Crown in relation to any proceedings:

(d) Any decision, recommendation, act, or omission of any member of the Police, other than any matter relating to the terms and conditions of service of any person as a member of the Police.

(8) Nothing in this Act shall authorize an Ombudsman to investigate any matter relating to any person who is or was a member of or provisional entrant to the New Zealand Naval Forces, the New Zealand Army, or the Royal New Zealand Air Force, so far as the matter relates to —

- (a) The terms and conditions of his service as such member or entrant; or
 - (b) Any order, command, decision, penalty, or punishment given to or affecting him in his capacity as such member or entrant.
- (9) If any question arises whether an Ombudsman has jurisdiction to investigate any case or class of cases under this Act, he may, if he thinks fit, apply to the [High Court] for a declaratory order determining the question in accordance with the Declaratory Judgments Act 1908, and the provisions of that Act shall extend and apply accordingly.

Section 17, *Ombudsmen Act 1975*

s. 17 Ombudsman May Refuse To Investigate Complaint

- (1) An Ombudsman may —
- (a) Refuse to investigate a complaint that is within his jurisdiction or to investigate any such complaint further if it appears to him that under the law or existing administrative practice there is an adequate remedy or right of appeal, other than the right to petition [the House of Representatives], to which it would have been reasonable for the complainant to resort; or
 - (b) Refuse to investigate any such complaint further if in the course of the investigation of the complaint it appears to him that, having regard to all the circumstances of the case, any further investigation is unnecessary.
- (2) Without limiting the generality of the powers conferred on Ombudsmen by this Act, it is hereby declared that an Ombudsman may in his discretion decide not to investigate, or, as the case may require, not to investigate further, any complaint if it relates to any decision, recommendation, act, or omission of which the complainant has had knowledge for more than 12 months before the complaint is received by the Ombudsman, or if in his opinion —
- (a) The subject-matter of the complaint is trivial; or
 - (b) The complaint is frivolous or vexatious or is not made in good faith; or
 - (c) The complainant has not a sufficient personal interest in the subject-matter of the complaint.
- (3) In any case where an Ombudsman decides not to investigate or make further investigation of a complaint he shall inform the complainant of that decision, and shall state his reasons therefore.

Section 22, *Ombudsmen Act 1975*

s. 22 Procedure After Investigation -

- (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.
- (2) 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, 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 organization, and may make such recommendations as he thinks fit. In any such case he may request the Department or organization 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 organization named or specified in Parts

I and II of the First Schedule to this Act, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organization named or specified in Part III of the First Schedule to this Act, send a copy of his report or recommendations to the Mayor or Chairman of the organization 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 organization 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) of this section a copy of any comments made by or on behalf of the Department or organization affected.
- (6) Subsections (4) and (5) of this section shall not apply in the case of an investigation relating to an organization named or specified in Part III of the First Schedule to this Act.
- (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.

Endnotes

¹ *Re British Columbia Development Corp. et al. v. Friedmann et al.* (1984), 14 D.L.R. (4th) 129 (S.C.C.).

² *Ibid.* at paras. 139-140.

³ *R. v. Local Commissioner ex p. Eastleigh*, [1988] 3 All E.R. 151.