

**“DOES NEW ZEALAND’S OMBUDSMEN LEGISLATION NEED
AMENDING AFTER (almost) 50 YEARS?”**

**Mai Chen
Partner,
Chen Palmer New Zealand Public Law Specialists
LLB (Hons)(Otago), LLM (Harv) FNZIM**

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IMPORTANCE OF OMBUDSMEN’S CONSTITUTIONAL ROLE

One of the key lessons I have learned since moving 17 years ago from being a public law academic to a public law practitioner is the importance of Ombudsmen. I now understand the reality of the power imbalance between the government and those it governs, and how crucial it is to have Ombudsmen as a constitutional watchdog. They provide redress for individual grievances as well as improving standards of administration in government,¹ they “humanise state administration”² by “supervising the administrative activities of the executive,”³ they enhance government accountability to the public,⁴ and they provide a safety net when something goes wrong in public administration. As Bryan Gilling says, “Ombudsmen represent the possibility for ordinary people to bring to account the leviathan of the modern state.”⁵

¹ Mary Seneviratne *Ombudsmen: Public Services and Administrative Justice* (Butterworths, London, 2002) at 17.

² Ann Abraham “The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy” (2008) 61 *Parliamentary Affairs* 681 at 681. See also Brian Elwood “The Ombudsman Travels to the Anglo-Saxon World” (paper presented to the 9th World Conference of the International Ombudsman Institute, Stockholm, June 2009) at 6, where the author talks about the adoption of Ombudsmen as part of a significant constitutional shift which has taken place over centuries and in different ways from the absolute power of monarchs to the electoral power of individuals.

³ Linda C Reif *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff, Leiden, 2004) at 1.

⁴ *Ibid*, at 2.

⁵ *The Ombudsman in New Zealand* (Dunmore Press, Palmerston North, New Zealand, 1998) at 21.

In 1999, the Ombudsman's constitutional role was defined by former Ombudsman and current Governor-General, Hon Sir Anand Satyanand, as a way:⁶

... to afford the ordinary citizen some kind of hearing and redress in a simple inexpensive and direct fashion when allegedly dealt with adversely by the actions of a large and remote government bureaucracy. The traditional means of redress – citizens being able to raise matters in Parliament through the local Member of Parliament, or to obtain judgment through the courts or to energise the Press had all proved to be less feasible than when originally envisaged. [...] The larger problem was however expressed in the following way by Professor Donald Rowat in a 1962 article called 'An Ombudsman's Scheme for Canada' which, although expressing the Canadian viewpoint, registers likewise in this country:

'It is quite possible nowadays for a citizen's right to be accidentally crushed by the vast juggernaut of the government's administrative machine. In this age of a welfare state, thousands of administrative decisions are made each year by the governments or their agencies, many of them by lowly officials; and if some of these decisions are arbitrary or unjustified, there is no way for the ordinary citizen to gain redress.'

Sir Anand Satyanand also said this year that "good governance is a basic requirement for the enjoyment of all civil rights."⁷ In 2009, the current Chief Ombudsman, Beverley Wakem, said:⁸

[T]he role is clearly one of addressing citizens' complaints about public sector administration, and looking more widely at systemic issues which militate against good administrative practice. It is also one of promoting transparency and ensuring that citizens have adequate access to information. This allows citizens to participate more effectively in the democratic process, and encourages government agencies to be proactive in making information available which will assist citizens to do just that.

The reason why the Ombudsmen's constitutional role is so important is that the government usually has superior access to the information relevant to resolve any disputes or disagreements that arise; certainly better access than the citizen, business or organisation does. The government may also enjoy discretion as to whether or not it will share that information.

It is also hard to get leverage against a public law decision maker who may not have acted fairly or reasonably, but who can always decide against the citizen, business or organisation. Ongoing relationships have to be factored in, especially where the government official or agency concerned funds or otherwise makes decisions

⁶ Anand Satyanand "The Ombudsman Concept and Human Rights Protection" (1999) 29 VUWLR 19 at 20.

⁷ Anand Satyanand "Speech to the Australian and New Zealand Ombudsman Association Conference" (Wellington, 6 May 2010) at 3.

⁸ Office of the Ombudsmen *2008/2009 Report of the Ombudsmen for the year ended 30 June 2009* (2009) at 6 ["2008/2009 Report"].

affecting that citizen, business or organisation. Citizens, businesses or organisations understandably fear a pyrrhic victory as much as they fear a defeat.

While litigation continues to become less affordable for the majority of New Zealanders, the government always has deep pockets. It has taxpayer-funded resources in the form of in-house legal advisors and Crown Law, with appropriations for litigation funding being a standard feature of departmental and crown entity budgets. Moreover, even if a citizen wins, the government can and often does appeal, citing the public interest as its motivation.

Alternatively, Parliament can change the law, again citing the broader public interest. Parliament remains sovereign in law-making and even legislation inconsistent with any rights and freedoms in the New Zealand Bill of Rights Act 1990 still prevails under section 4 of that Act.

Finally, Courts have tended to be deferential in judicially reviewing government agencies and statutory bodies, making it difficult to successfully challenge the actions of such bodies as unlawful, unfair and unreasonable. As the High Court said of Pharmaceutical Management Agency Ltd, a Crown Entity created by section 46 of the New Zealand Public Health and Disability Act 2000, in *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd*:⁹

Nevertheless I accept that the nature of the decision and of the decisionmakers considered in the context, are relevant factors in determining the approach of the Court to the issues raised by the proceedings. They justify a restraint which recognises the fact that such decisions are best made by those whose expertise fits them to make such decisions.

THE UNIQUE ROLE OF OMBUDSMEN IN NEW ZEALAND'S PUBLIC LAW TOOLBOX

Measuring the effectiveness of Ombudsmen in performing their constitutional role is difficult as their impact in preventing grievances and resolving disputes earlier and better than other avenues may be diffuse and intangible.¹⁰ The Ombudsmen's Office is

⁹ HC Wellington CP 9/96, 13 August 1997 at 17. This case was appealed to the Court of Appeal: [1998] NZAR 58 and then to the Privy Council: [2001] NZAR 476 (NZPCC).

¹⁰ See Beverley Wakem "Improving Operational Efficiency and Effectiveness" (paper presented to ANZOA Conference, Wellington, May 2010) at 7-9.

currently reviewing its own achievement of “enhanced public trust and confidence in fair, responsive and accountable Government” through:¹¹

- (a) Improved administrative and decision-making practices in state sector agencies;
- (b) Increased transparency, accountability and public participation in Government decision-making;
- (c) Serious wrongdoing brought to light and investigated;
- (d) People in detention treated humanely;
- (e) Improved state sector capability and administrative, decision-making and complaint-handling processes and knowledge of official information legislation; and
- (f) Improved public awareness and access to Ombudsman services.

In my experience, Ombudsmen best deal with complaints on matters of administration about a wide range of government departments and public organisations where it may be difficult to prove a judicial review breach in a court. Section 22(1) of the Act nevertheless applies to matters of administration where the Ombudsman is of the opinion, after investigation, that the decision, recommendation, act or omission was wrong or appears to be contrary to law (including exercising a discretion for an improper purpose or on irrelevant grounds or by taking account of irrelevant considerations), to be based on a mistake of law or fact, or to be (or may be) unreasonable, unjust, oppressive, or improperly discriminatory.¹²

¹¹ The Chief Ombudsman explained that the goal of undertaking this measurement is to ensure that the Ombudsmen’s office is more on the front foot, quicker to respond, more relevant, and that the transaction costs for agencies in dealing with requests and in responding to the Office is reduced. Interview with Beverley Wakem, Chief Ombudsman, and officials from the Office of the Ombudsmen (Mai Chen, 3 March 2010). See also Frank Fowlie “A Practitioner’s Guide to Evaluating Ombudsman Offices” (2007) ICANN Ombudsman <<http://www.icann.org/ombudsman/guide-evaluate-ombudsan-offices.pdf>>.

¹² This jurisdiction is broader than that given to the UK Ombudsman, who can only receive written complaints on “sustained injustice in consequence of maladministration” referred to them by an MP, with the complainant’s consent, under section 5(1) of the Parliamentary Commissioner Act 1967 (UK).

Even if you could establish a breach in a judicial review action, the complainant may get a declaration or a quashed decision, but no monetary compensation.

For a complainant with no money to instruct a lawyer and little or no leverage with the public official concerned, getting the Ombudsmen to investigate means that the issue is immediately escalated to the Chief Executive of the public body, who must be notified of an investigation under section 18(1) of the Ombudsmen Act 1975 (“**the Act**”). And the Ombudsman can take the complaint even where there are other avenues of redress, including to the courts.

Section 13(6) and (7) of the Act provides:

(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 organisation whose decision, recommendation, act, or omission it is shall be challenged, reviewed, quashed, or called in question.

(7) Nothing in this Act shall authorise 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:** ...[Emphasis added]

As Sir George Laking said:¹³

One of the most difficult areas in which the ombudsman is called upon to exercise an informed judgment concerns his relationship with the courts. In what circumstances should he assume jurisdiction to investigate a complaint on the grounds that he is not only authorised by the Ombudsmen Act to do so but believes that this is the more effective way to establish the merits of a complaint and to correct an injustice if one can be shown to exist.

The Ombudsmen’s investigative (as opposed to adjudicative) role means the complainant is not required to put together the case against the public body. They can simply respond to the Ombudsman’s questions aimed at determining whether the complaint is valid and requires redress.

¹³ George Laking “The Ombudsman and the legal profession” (1982) 12 VUWLR 217 at 220.

At the very least, the complainant gets to have their complaint investigated by an independent officer of Parliament of some standing. At the most, if the Ombudsmen find substance to their complaint, they will get leverage to drive the government department or public organisation to the bargaining table, and may even get substantive redress, including compensation, as well as systemic process changes, thereby preventing the problem happening again. Section 22(3) shows how broad the Ombudsman's remedial recommendations can be:

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 therefore, to the appropriate Department or organisation, and may make such recommendations as he thinks fit...

The Ombudsmen also has value for the Government and its officials as a place to send complainants to get an independent investigation. A decision by the Ombudsman not to pursue an investigation may be the only way to convince complainants there is no merit to their complaint.

The Canadian Supreme Court has said that:¹⁴

...the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.

Sir Kenneth Keith has undertaken analysis that suggests the “greater effectiveness of the Ombudsmen compared with the courts.”¹⁵ Sir Kenneth reviewed the Ombudsmen's consideration of immigration cases concerning non-citizens and contrasted the Court's handling of the same cases. For example, in a case concerning the revocation by the Minister of a young Samoan's temporary permit, the Ombudsman undertook his own inquiries into matters set out in the Department's

¹⁴ *BC Development Corp v Friedmann* [1985] 1 WWR 193 (SCC) at [40].

¹⁵ Kenneth J Keith “Development of the Role of Ombudsman with Reference to the Pacific” (paper presented at the 22nd Australasian and Pacific Ombudsman Regional Conference, Wellington, New Zealand, February 2005) at 5.

report to the Minister. He concluded that some of the statements were open to question and that the applicant's conduct had changed for the better. The Ombudsman persuaded the relevant department to recommend that the Minister extend the temporary permit on a trial basis. The Minister in fact cancelled the revocation order, restoring the currency of a temporary permit.¹⁶

In a second revocation case, the Ombudsman undertook an own motion inquiry (again something a Court cannot do) and concluded that before making the recommendation to the Minister to revoke the permit, because the organisation sponsoring the student had withdrawn its sponsorship, the Department 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.¹⁷ Sir Kenneth also notes the ability of the Ombudsman to address a general (systemic) issue on the basis of the accumulation of experience, something a Court can do only rarely.¹⁸ Sir Kenneth then says:¹⁹

...I wonder about just how well known the advantages of the [Ombudsmen's] Office are. ... 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 scholarship.

RATIONALE FOR REVIEWING THE OMBUDSMEN LEGISLATION

The Ombudsmen jurisdiction was introduced almost fifty years ago with the Parliamentary Commissioner (Ombudsman) Act 1962, precursor to the current Ombudsmen Act 1975. The role has evolved since that time, with Ombudsman playing a major role under the Official Information Act 1982 (**OIA**), the Local Government Official Information and Meeting Act 1987 (**LGOIMA**), the Crimes of Torture Act 1989 ("**COTA**") and the Protected Disclosures Act 2000 ("**PDA**").

The Ombudsmen's role in redefining the constitutional relationship between the public service and the public of New Zealand is as important as ever given the growing reach of government into every aspect of citizens' lives. However, the constitutional framework in which the Ombudsman operates has changed significantly since the Office's establishment, with the creation of numerous complaints bodies,

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid, at 6.

¹⁹ Ibid at 7.

other officers of Parliament and other agencies which exact government accountability and handle citizens' complaints, like the Human Rights Commission,²⁰ the Privacy Commissioner, the Independent Police Conduct Authority, the Health and Disability Commissioner,²¹ and the Inspector-General of Intelligence and Security.

The expansion of judicial review and appeal rights (and the creation of appeal bodies like the Social Security Appeal Authority²² and the Immigration and Protection Tribunal²³) may also have resulted in some overlapping and parallel jurisdiction with the Ombudsman.

As a result of these changes, it is timely to review how well the Ombudsman jurisdiction is working and whether we can make it work better. What is the unique role of the Ombudsman in New Zealand's Public Law Toolbox and is it carrying out that role well? I define the Public Law Toolbox as those instruments or levers which ensure accountability and provide mechanisms to remedy wrongs in the state's dealings with its citizens.

Does the Act enable Ombudsmen to make government and their officials respond quickly, with compassion, meaningfully and effectively?²⁴ As a constitutional watchdog, are Ombudsmen operating to their full potential?²⁵ Does the Act need amending or does it just need better implementation by the Ombudsmen's Office - or both? Does the Ombudsmen's jurisdiction need to grow or shrink or change given the other public law tools described above?

This article's focus is the Ombudsmen Act, as opposed to the OIA and the LGOIMA, except to the extent that breaches of the OIA and the LGOIMA are problems with a

²⁰ The protection of human rights by Ombudsmen in other countries is separately performed by the Human Rights Commission in New Zealand. See Linda C Reif "Reconciling Multiple Mandates: Ombudsman Institutions with a Human Rights Mandate" and Riitta-Leena Paunio "The Ombudsman as Human Rights Defender" (papers presented at the 9th World Conference of the International Ombudsman Institute, Stockholm, June 2009).

²¹ See Julia Maskill "The Ombudsmen and Health" (1982) 12 VUWLR 285 on the extent to which complaints about professional health decisions are within the Ombudsman's jurisdiction before the passage of the Health and Disability Commissioner Act 1994

²² Social Security Act 1964, ss 12A-12R. See WGF Napier "The Ombudsmen and Social Welfare" (1982) 12 VUWLR 249 on the Ombudsman's jurisdiction over complaints about the Department of Social Welfare when a statutory right of appeal exists.

²³ Immigration Act 2009, ss 217-251.

²⁴ Gilling, above n 5, at 145.

²⁵ Seneviratne, above n 1, at 324 where the Parliamentary Ombudsman Sir Michael Buckley raised concerns that the Ombudsmen have not reached their full potential.

matter of administration. Both the Act and the OIA are rightly described as having constitutional significance,²⁶ but the role the Ombudsmen perform under each statute is different. There has been some assessment of how the OIA and LGOIMA are operating, but relatively little review of the Ombudsmen's performance under the Act. The Law Commission also announced a review on 9 December 2009 of the OIA and Parts 1-6 of LGOIMA relating to official information,²⁷ but that does not appear to include the Ombudsmen Act.

KEY ISSUES FROM A USER'S PERSPECTIVE.

Public Ignorance of the Ombudsmen's Office

I have encountered widespread ignorance of the Office in advising clients on using the Ombudsmen's office under the Act with the result that clients sometimes go to lawyers who bring failed judicial review proceedings when a complaint to an Ombudsman would have been cheaper and given a more effective remedy.²⁸

The New Zealand Ombudsmen's public survey in 2008/2009 found that they needed to increase their efforts to be more accessible across different sectors of society, and to communicate their role and functions on a wide variety of fronts.²⁹ That said, the Ombudsmen dealt with 8,855 complaints in the 2008/2009 year, up from 7257 complaints in the 2007/2008 year, due mainly to the tough economic climate resulting in departments and public organisations reviewing staffing and service levels. It is difficult to compare numbers of complaints to the Ombudsman in 2009 with the Privacy Commissioner (806 complaints),³⁰ the Health and Disability Commissioner (1,360 new complaints),³¹ and the Human Rights Commission (3,489 complaints,

²⁶ See *The Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180 (HC) at 19, citing Cooke P, as he then was, in *Commissioner of Police v The Ombudsman* [1988] 1 NZLR 385 (CA) at 391 who regarded the OIA as a constitutional Act.

²⁷ Law Commission "Have Your Say about Access to Official Information" (press release, 9 December 2009).

²⁸ As Professor Seneviratne says, "lack of awareness about the existence and role of the ombudsman presents a major barrier to access... Surveys have revealed little awareness of the [UK] Parliamentary Ombudsman." Above n 1, at 146-147. The Ombudsmen's remit is still not well known or understood by citizens and their lawyers. See also Philip Giddings "The Parliamentary Ombudsman: A classical Watchdog" in Oonagh Gay and Barry K Winetrobe (eds) *Parliament's Watchdogs: At the Crossroads* (The Constitution Unit, University College of London, London, 2008) at 96.

²⁹ Office of the Ombudsmen *2008/2009 Report*, above n 8, at 38.

³⁰ Privacy Commissioner *Annual Report of the Privacy Commissioner 2009* (2009) at 5.

³¹ Health and Disability Commissioner *Annual Report for the year ended 30 June 2009* (2009) at 3.

1,405 of those raising issues of unlawful discrimination)³² as these agencies can take complaints against private individuals and companies as well as the state sector and government relating to their particular statutory issues.

Although Ombudsmen do not have a publicity or an education function in the Act, the Office does run a Publicity and Public Awareness Programme. In addition to publishing their Annual Report, Practice Notes, information pamphlets and Compendium of Case Notes, the Ombudsmen's Office also run training programmes which are offered on request to those looking to increase their understanding of the role of the Ombudsmen. In 2008/2009, the Office conducted over 20 training sessions.³³ Media organisations, government ministers, local authorities, central government agencies, universities and private organisations were among those who received training. In 2008/2009 the Office delivered over 40 presentations on the role of the Ombudsmen to professional development conferences, government agencies, local authorities, Crown entities, tertiary education institutions, and non government organisations.³⁴ The Office also operates regional clinics around the country, in Dunedin, Oamaru, Nelson, and Blenheim in 2008/2009.

The Ombudsmen's Office undertakes these activities because "[a]n improved understanding of the Ombudsmen's role and associated legislation is expected to contribute to better decision-making and to fewer complaints being lodged with government agencies and our office."³⁵ Improving public awareness was also identified as a key organisational priority in the 2008/2009 Annual Report.³⁶ The Ombudsmen's Office is also more proactively publishing what they do to guide complainants, their lawyers if any, and the agencies.

The Ombudsmen Rules 1989 also enable the Ombudsmen to publish reports relating generally to the Ombudsmen's functions under the Act, the OIA or the LGOIMA.

³² Human Rights Commission *Annual Report 2009* (2009) at 30.

³³ Office of the Ombudsmen, *2008/2009 Report*, above n 8, at 36.

³⁴ *Ibid*, at 37.

³⁵ Office of the Ombudsmen "Training and speaking engagements"
<<http://www.ombudsmen.govt.nz/index.php?CID=100088>>.

³⁶ Office of the Ombudsmen, *2008/2009 Report*, above n 8, at 37. Significant efforts on the part of the Ombudsmen to educate the public about the Office and the Act have always been made. See Gilling, above n 5, at 120.

Ombudsmen are understandably concerned about being accused of “touting for business” or stirring up complaints. As Gilling said:³⁷

An ombudsman has...to walk a tightrope. On the one hand, he must champion and defend the rights of citizens against unfair or oppressive acts of government administration, investigating complaints fearlessly and fully. On the other, he must preserve the rights of the public servant to a fair hearing and not jump to the conclusion that where there is smoke there is necessarily an officially created fire.

Certainly when the Ombudsmen’s Office was first established, there was sensitivity that Ombudsmen not engage in “improper solicitation of business,”³⁸ and politicians were reluctant to have Ombudsmen “encouraging” complaints against their departments and public organisations.³⁹ That may explain why the Ombudsmen legislation did not include an express statutory function to educate the public about the Act and the Ombudsmen’s role.

Other independent agencies, like the Securities Commission, have an express function to “promote public understanding of the law and practice relating to security and the law and practice relating to financial advisers” (section 10(1)(d) of the Securities Act 1978). The Privacy Commissioner has an express function to “promote, by education and publicity, an understanding and acceptance of the information privacy principles and of the objects of those principles” (section 13(1)(a) of the Privacy Act 1993) and the Human Rights Commission has various functions relating to promotion and education.⁴⁰

Recommended amendment

An express statutory function to educate the public about the Act and the Ombudsmen’s role is necessary to ensure that the Ombudsmen can legitimately perform such essential activities with proper funding instead of trying to cram education and promotion into the edges of a very busy role, using what resources can be spared from the prescribed output class. It would allow the Office to hire dedicated staff and give these functions the time they deserve.

³⁷ Gilling, above n 5, at 21.

³⁸ Ibid, at 44.

³⁹ Ibid.

⁴⁰ See Human Rights Act 1993, ss 5(1)(a), 2(a) - (d).

The Ombudsmen could also fund publications like the UK Parliamentary and Health Service Ombudsman “Principles of Good Administration,”⁴¹ to prospectively promote good administration rather than the retrospective eradication of administrative problems.⁴²

I recommend that section 13 of the Act be amended to include the following additional function:

“To promote, by education and publicity, an understanding of the Ombudsmen’s role, the Act, and good administration.”

Crimes of Torture Act and Protected Disclosures Act

There should be more education about the Ombudsmen’s role under the COTA and the PDA. The COTA has significantly increased the Ombudsmen’s workload. On 21 June 2007, the Ombudsmen were formally designated as a National Preventative Mechanism in accordance with the Optional Protocol to the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (“OPCAT”). The objective of OPCAT is to establish a system of regular visits by the United National Subcommittee on the Prevention of Torture and designated National Preventive Mechanisms to places of detention to examine and monitor the conditions and the treatment of detainees.

In New Zealand, the Ombudsmen have appointed a Chief Inspector, which visits and inspects facilities of people detained against their will or without their informed consent under the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Intellectual (Compulsory Care and Rehabilitation) Act 2003, the Criminal Procedure (Mentally Impaired Persons) Act 2003, the Alcoholism and Drug Addiction Act 1985, the Corrections Act 2004, the Criminal Justice Act 1985, the Extradition Act 1999, the Summary Proceedings Act 1957, the Terrorism Suppression Act 2002, the Immigration Act 1987 and the Protection of Personal and Property Rights Act 1988.

⁴¹ The 6 principles are getting it right, being customer focused, being open and accountable, acting fairly and proportionately, putting things right and seeking continuous improvement.

⁴² See Ann Abraham “The Ombudsman as Part of the UK Constitution: A Contested Role?” (2008) 61 Parliamentary Affairs 206 at 210 [“A Contested Role?”].

The 2008/2009 Annual Report highlights a number of significant concerns arising from the visits concerning potential cruel and inhumane treatment in mental health, invalid legal paperwork in mental health and unlawful detention in prisons under the Criminal Procedure (Criminal Impaired Persons) Act 2003 which required offenders to be detained in a hospital.⁴³

In contrast, the Ombudsmen receive few inquiries about potential or actual disclosures under the PDA. The Protected Disclosures Amendment Act 2009, which came into force on 27 June 2009, enhances the Ombudsmen's role of assisting whistle-blowers and to give information and guidance to public or private sector employees on using the Act. However, the Ombudsmen only reported 8 enquiries in the 2008/2009 Annual Report, although a matter first raised under the PDA resulted in an own motion investigation by the Chief Ombudsman into a DHB for a problem concerning a matter of administration under the Ombudsmen Act.⁴⁴

Delay in Resolving Complaints

Overall, the Ombudsmen's Office has been efficient in resolving disputes, mainly within 6 months despite their very heavy workload, but we have experienced much longer delays of well over a year to resolve complaints where the department or organisation was slow to respond to the Ombudsman's requests for information about the complaint. That said, this timeframe is still much faster than trying to resolve the issue in court.

The Office of the Ombudsmen's 2008/2009 Annual Report shows that:⁴⁵

- (a) 94% of general complaints under the Ombudsmen Act were completed within six months. On average, complaints took 59 days to investigate;
- (b) 100% of prisoner complaints under the Ombudsmen Act were completed within six months. On average, complaints took 7 days to investigate;
- (c) 76% of Official Information Act complaints were completed within six months. On average, complaints took 97 days to investigate; and

⁴³ Above n 28, at 30-32

⁴⁴ Ibid, at 29.

⁴⁵ Ibid, at 59-60

- (d) 89% of Local Government Official Information and Meetings Act complaints were completed within six months. On average complaints took 61 days to investigate.

A comparison with the Annual Reports of the Privacy Commissioner, Human Rights Commission and Health and Disability Commissioner shows that the Ombudsmen takes a similar amount of time to other bodies to resolve complaints.⁴⁶

The Ombudsmen's own survey of members of the public in 2008/2009 found that "although two-thirds of complainants are satisfied with our service, there is less satisfaction with the timeliness of our service." The Report goes on to say that:⁴⁷

[W]e are taking steps to reorganise and refocus the use of resources, to address concerns that were raised in terms of timeliness issues. It is also important to remember that, to an extent, we are dependent on receiving timely responses from government agencies in order to progress an investigation in a timely manner.

Timeliness has improved with enhancements to the Office's case management system, which captures and records all complaints, requests and enquiries as soon as they are received.⁴⁸ The enhanced system is also expected to help highlight systemic issues more effectively, to help manage workflow within the office, to measure where work pressure builds and what amount of work is required to achieve particular outcomes.⁴⁹

The department or public organisation complained about needs to be given proper rights to respond consistent with natural justice, but some departments or public organisations are often tardy or refuse to respond to an ombudsman's requests for a response to complaints. In one recent case we were involved in, the organisation took five months to respond to the Ombudsman's 'please explain' about the complaint. Meanwhile, the complainant's institution, which had lost public funding due to the

⁴⁶ During the 2008/2009 year the Privacy Commissioner received 806 new complaints and closed 822 complaints. 74% of those complaints were closed within six months of receipt and 94% within a year of receipt. Privacy Commissioner *Annual Report of the Privacy Commissioner 2009* (2009) at 25 and 28; During the 2008/2009 year the Human Rights Commission received 1405 complaints which raised issues of unlawful discrimination (out of 5834 complaints and inquiries). The Human Rights Commission closed 1135 complaints. 74.4% of complaints were closed within sixty days of receipt and 96% were closed within twelve months of receipt. Human Rights Commission *Annual Report 2009* (2009) at 30 and 31; during the 2008/2009 year the Health and Disability Commissioner received 1378 complaints. 87% of those complaints were closed within six months of receipt, and 96% were closed within a year. Health and Disability Commissioner *Annual Report for the year ended 30 June 2009* (2009) at 46.

⁴⁷ Office of the Ombudsmen, *2008/2009 Report*, above n 8, at 38.

⁴⁸ *Ibid*, at 46.

⁴⁹ *Ibid*, at 8.

organisation's alleged wrong decision, struggled to keep her business viable. Twelve months after the original complaint was made, the Ombudsman made a provisional opinion. After a further round of comments by both parties, the public organisation was encouraged by the Ombudsman to meet with the complainant to see if the matter could be resolved, with the threat that failure to do so would result in a formal opinion being issued. The complaint was resolved 15 months after it was filed with a confidential settlement.

Undue delay by the department or the public organisation is itself a 'matter of administration' which is unreasonable, unjust, oppressive and improperly discriminatory. It renders the complainant powerless, unless the Ombudsman is prepared to take the department or public organisation to task about the delay. I have had to request Ombudsmen to do that, but complainants who are not represented tend not to be so bold. Some clients have come to me after making a complaint themselves to the Ombudsmen's Office and not getting a response.

Gilling writes that timeliness of response has always been a problem. In 1986, Chief Ombudsman Castle named 3 unacceptably tardy departments – the Treasury, Inland Revenue and the Development Finance Corporation. In 1988, the Ombudsman resorted for only the second time ever to take a matter to the Prime Minister. This concerned a Customs delay of nearly three years in cooperating with an investigation, resulting in the Chief Ombudsman recommending an *ex gratia* payment to the complainant to cover his legal costs. When the Comptroller refused to pay, the Chief Ombudsman referred the matter to the Deputy Prime Minister who enforced the payment after his own review.⁵⁰

These actions are ones of last resort for the Ombudsmen, and there has to be an easier mechanism to ensure that the department or organisation is taking the Ombudsman's requests for information seriously and responding promptly.

⁵⁰ Gilling, above n 5, at 99. In contrast, an earlier study done of the complaints processed and investigated as set out in the Ombudsmen's Report the Year ended 31 March 1973 found under "speed of departmental reply" that almost one-third of departments had substantively replied to the Ombudsman within a week of receiving a request for information. Nearly as many replied in the second week, and less than one-tenth took more than a month. See Larry B Hill "Institutionalisation, the Ombudsman, and the Bureaucracy" (1974) 68 *Am Pol Sci Rev* 1075 at 1082.

Recommended amendment

Just as section 29A of the OIA places a deadline to provide the Ombudsman with any information or document or thing requested “as soon as reasonably practicable, and in any case not later than 20 working days after the day on which that requirement is received by that Department ... or organisation ...,” so departments and organisations should have to respond to Ombudsman requests for information about a complaint under section 19(1) of the Ombudsmen Act within 20 working days. The amendment should allow the Chief Executive of a department or organisation to request an extension, but this must be within 10 working days of receiving the Ombudsman’s information request, and only for good reason, which should be set out in the request along with the requested period of extension. Any extension shall only be for a reasonable period of time having regard to the circumstances. The Ombudsman shall decide on the request as soon as reasonably practicable and shall notify the department or organisation as well as the complainant of the decision.

Are Ombudsmen Under-utilising their Powers in the Act?

Another way of preventing undue delay by departments and organisations in responding to the Ombudsmen’s requests for information under section 19(1) of the Act is to summon and examine on oath any person under section 19(2) of the Act. This is most apposite when the information the Ombudsman is seeking is not in documents but when there are disputed facts. Section 19(2) provides one of the strongest (and least-used) powers of the Ombudsmen, which begs the question why the Ombudsmen needs any more powers when the powers they already have appear not to be used.

One case we were involved in came down to the complainant’s word against that of the departmental official. Our client swore briefs of evidence that the official had told them that they could file late funding applications which would be considered, but when they did, the official refused to consider them as they were late! Others on the teleconference when the official had made these statements also swore briefs of evidence. The official said he never made these statements, and the Ombudsman investigating the case refused to put the official under oath. The complainant got no redress for the loss of funding and felt he was being called a liar, despite having corroboration.

The Ombudsmen also have the power to enter and inspect the premises of any department or organisation, after first warning its CEO, to carry out any investigation under section 27 of the Act. But formally using the sections 19 or 27 powers can be very resource-intensive. Thus, the Ombudsmen try to get the necessary information through informal means, making the formal use of such powers rare.⁵¹

There are, however, examples of the Ombudsman formally using statutory powers in the “lying in unison” controversy, for example, regarding an OIA request relating to Algerian refugee, Mr Ahmed Zaoui.⁵² Ombudsman Mel Smith became aware that relevant information he had requested to properly determine the complaint concerning the OIA request had not been supplied to him, by the leak of this media log:

I was let down badly ... Everyone had agreed to lie in unison, but all the others caved in and I was the only one left singing the original song.

The Ombudsman then decided under section 13(3) to undertake an own motion investigation given that the failure to provide the official information had affected his investigation under the OIA and had affected the complainant personally. Several officials were examined under oath, the Ombudsman concluding that the Department omitted to provide him with information “contrary to law” and “was wrong” within the meaning of section 22(1) of the Act. He also expressed adverse opinions on the credibility of some officials and the way they fulfilled their departmental responsibilities:⁵³

It has grieved me to do so, and I would hope that it will never again become necessary for me to express any similar opinions in the course of any future investigation which may fall to me.

He then referred to the Ombudsman’s statutory powers under sections 19 and 27 and said:⁵⁴

These are significant powers, and historically there has been little use of them. In this case, of course, I did find it appropriate to examine certain persons on oath and consider that to have been a proper and necessary action. I would regard it as highly unfortunate if the climate of compliance with the Official Information Act

⁵¹ Hill, above n 49, at 1080 where only 3 percent of the cases he reviewed in 1973 used the power to investigate departmental premises.

⁵² Office of the Ombudsmen *Report of the Ombudsman, Mel Smith, Upon the Actions of the Department of Labour in regard to the Official Information Act Complaint by Sarah Boyle of the Office of the Leader of the Opposition* (24 February 2004).

⁵³ *Ibid.*, at 46.

⁵⁴ *Ibid.*

deteriorated to the point where it became normal practice for the full powers of the Ombudsmen under the Ombudsmen Act to be exercised.

These statements reflect the cooperation the Ombudsmen usually get for their investigations.⁵⁵

The Ombudsmen have also used their powers under section 18(6) to refer substantial evidence of any significant breach of duty or misconduct to the appropriate authority. For example, in an own motion investigation into prisoner transport in 2007, the Ombudsmen considered that Chubb's non-compliance with sections 70B and 70C of the Transport Act concerning driver hours was a significant breach of duty or misconduct and referred the matter to Land Transport New Zealand.

The Ombudsmen have not used section 30 of the Act, however, which makes it an offence to wilfully obstruct, hinder or resist an Ombudsman without lawful excuse, including refusing to comply with an Ombudsman's lawful requirement and making false or misleading statements, or wrongly holding out as having authority. The Ombudsmen's Office tell me that they have not needed to resort to this provision, as talking to the CEO of the department or organisation about any wilful obstruction, hindrance or resistance usually resolves the issue. A good example is in the 1997 Annual Report.⁵⁶

Withholding information may be misconduct

The withholding of information by a Government Department may in extreme circumstances raise questions of actual misconduct by Departmental staff.

A communication between a Departmental area manager and a district solicitor was marked "*privileged, not to be released*" and signed by a district solicitor. The problem is that a claim of privilege is a matter which is usually given weight immediately upon its invocation. There was no possible basis on which such a claim could be made in this case.

More serious was a marginal note by the same district solicitor on the document, which transferred matters under an Official Information Act request from the district solicitor to the area manager. The district solicitor appeared to have hand-written the following note: -

'I suggest your secretary whites out what you will find ruled out by me with red biro in the ensuing 55 pages or alternatively cuts out or pastes up some messages. Page numbers could be whited out. Otherwise (the subject) will jump to the conclusion that we are keeping secrets from her and wants to go to the Ombudsman or Privacy Commissioner, or both, with resulting further waste of our valuable time'.

It was of concern to us that a legal adviser made this kind of comment to an area manager. The Department was under a legal obligation to advise a requester the

⁵⁵ As Hill concluded in a very old study of complaints reported in the 1973 Annual Report of the Ombudsman, "bureaucrats have not obstructed the Ombudsman... cooperation is the norm." Hill, above n 49, at 1084-5.

⁵⁶ Office of the Ombudsmen *Report of the Ombudsmen for the year ending 30 June 1997* (1997) at 38.

kind of information being held, what the reasons for the refusal to release information were, and of their statutory right of review by an Ombudsman. We pursued this matter with the department concerned.

When the departmental CEO was told about the solicitor's wrongdoing, described above, the solicitor was dismissed. However, section 30 remains an important deterrent to obstructing the Ombudsmen, and that should be reflected in an appropriate fine. The current fine "not exceeding \$200" was in the Act when it was enacted in 1975, and has never been updated.

Recommended amendment

At the very least, there needs to be a ten-fold increase in the fine for obstructing the Ombudsmen under section 30. Sections 143 of the Human Rights Act and section 127 of the Privacy Act, which are almost identical to section 30 of the Ombudsmen Act, impose fines not exceeding \$3,000 and \$2000 respectively.

Under section 59A of the Securities Act 1978, a person who "wilfully resists or obstructs, or deceives or attempts to deceive, any person acting in the discharge of his or her function or duties, or in the exercise of his of her powers, under [the Securities Act]" is liable on summary conviction to a fine not exceeding \$300,000 and, if the offence continues, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence is continued.

I also note that section 36 of the Australian Commonwealth Ombudsmen Act 1976 prescribes a penalty of \$1000 or imprisonment for 3 months.

Is the Ombudsmen's Recommendatory Jurisdiction Adequate?

The recommendatory jurisdiction of the Ombudsmen under the Act means that they are reliant on persuasion. This is sometimes at odds with their powers to make binding recommendations under the OIA on disclosure of Official Information, unless vetoed by an Order in Council approved by the whole Cabinet within 21 days, as this creates friction with departments and organisations which makes it harder for the Ombudsmen to be persuasive with the same bodies. Remember that the traditional role of the Ombudsmen under the Act generally deals with private citizens, whereas

OIA cases often concerns journalists, pressure groups and the political Opposition to the Government.⁵⁷

If Ombudsmen have to resort to coercive powers too often, their power to persuade may be eroded.⁵⁸ As Gilling says, “[f]orcing unpalatable decisions on politicians could lead to a strong government overturning the Office’s recommendations or drawing its teeth.”⁵⁹ It is a difficult balancing act, which often leaves the Ombudsmen engaged in essentially negotiated forms of justice.⁶⁰ That is why statistics on use of powers to compel and the number of formal recommendations are difficult to interpret even if they were more readily available. The reason is that so much of the Ombudsmen’s work is in private that the lack of formal use of statutory powers may be the best testament to their effectiveness in using persuasion to get those complained about to redress the problem with the matter of administration.

There are a large number of ways that Ombudsmen can make officials’ lives very difficult under the Act, if pushed. Under section 22(3), the Ombudsman can make recommendations and require a department or organisation to report within a specified time what steps they intend to take to implement the recommendation. The Ombudsman shall send a copy of the report or recommendations to the relevant Minister. Under section 22(4), the Ombudsman can escalate the matter further if he or she thinks no adequate response is being made by sending the report and recommendations to the Prime Minister and to Parliament. Ombudsmen have sent one such report to Parliament. Five further reports have been made under section 29 of the Act, which is the requirement to report annually "without limiting the right of an Ombudsman to report at any other time.”

The *Standing Orders of the New Zealand House of Representatives* were amended in 2008 to provide in Standing Order 387 that reports from Officers of Parliament, like the Ombudsmen, other than an annual report, will stand referred to the relevant subject committee for examination, given the infrequent scrutiny of such reports up to that time.

⁵⁷ Robert Hazell “Freedom of Information: The Implications for the Ombudsman” (1995) 73 Public Administration 263 at 268.

⁵⁸ Keith, above n 15, at 8.

⁵⁹ Above n 5, at 107.

⁶⁰ See Abraham “A Contested Role?” above n 41, at 209.

The Report of the Standing Orders Committee said that:⁶¹

A committee to which a report stands referred under this new provision should consider requesting a briefing from the Officer of Parliament and, if applicable, from Government officials or spokespeople from a local authority... [T]he Ombudsmen do have the power to request a response [Ombudsman Act 1975, section 22(3)]. The involvement of a select committee may promote efforts to engage in implementing or responding to recommendations. The select committee may itself make recommendations in the light of the report, and recommendations addressed to the Government would require a response [under Standing Order 253]

The Ombudsmen can also require, under section 23 of the Act, local authorities and organisations named under Part 3 of Schedule 1 to publish a summary of the report and recommendations and make it available for inspection and copying by members of the public. A public notice that the report and recommendations are available for public inspection shall be put in whatever media the Ombudsman requires. This provision appears to have been used on only one occasion, against a City Council which granted permission to erect a block wall on the boundary in contravention of Town Planning ordinances.⁶² The City Council's actions were also unreasonable as permission was granted after it had told the complainant that such a wall could not be erected and without his consent or according him natural justice.

The Ombudsman, Nadja Tollemache, recommended that \$4000 be paid in compensation for the loss of the rights to be notified and heard, but the City Council's CEO decided to pay only half of that amount in compensation. The Ombudsman then required a summary of the case to be publicly notified under section 23, given that the recommendation had not been completely implemented, and because the matter of discretion to dispense with consent is a matter of some interest to members of the public.

Under section 24, the Ombudsman can also inform the complainant of his or her recommendation with whatever comments and at such time as he or she thinks fit, if there is no appropriate or adequate action by the department or organisation within a reasonable time.

⁶¹ Standing Orders Committee *Review of Standing Orders, Report of the Standing Orders Committee* (I.18B, 48th Parliament, August 2008) at 42.

⁶² Office of the Ombudsmen *10th Compendium of Case Notes of the Ombudsmen* (1992) Case note A2618 at 76-78.

The threat of these “sunlight is the best disinfectant ...”⁶³ mechanisms should not be under-estimated. And the judiciary have supported a broad view of the Ombudsmen’s jurisdiction, unlike in other countries where repeated judicial challenges to the Ombudsmen’s jurisdiction have severely hampered activities on behalf of the complainant.⁶⁴ In the leading case of *The Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, Jeffries J said:⁶⁵

The allegations of errors, unreasonableness and failure to take into account relevant matters are attacks on the several judgments the Chief Ombudsman had to make in the functions ordained for him by the Act. That Act requires him to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the Chief Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the Chief Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another.

Thus, I conclude that the Ombudsmen’s record of making relatively few recommendations, and their enviable record of having the over-whelming majority of the recommendations they do make adopted, is not because of undue compromise or soft recommendations. The current Chief Ombudsman has only had to make one formal recommendation since she took office 3 years ago because the moral suasion of the Office and the threat of using the powers available to her have been sufficient to resolve complaints. As Gilling writes:⁶⁶

The Ombudsmen’s strongest sanction was to make a recommendation. This was done relatively infrequently, since Powles [the first ombudsman] had decided that informal means of complaint resolution were preferable in terms of efficiency and relations. ‘Using praise as an encouragement, criticism as a punishment, and possible censure as a prophylactic have increased the Ombudsman’s authority potential beyond the bare outlines of the Act, although the precise effect is incalculable.’

⁶³ Louis Brandeis *Other People’s Money and How the Bankers Use It* (FA Stokes, New York, 1914) at 92.

⁶⁴ Sir George Laking refers to the frustration of the first Victorian Ombudsman. See for example, *Booth v Dillon Nos 1,2 & 3* [1976] VR 291 and 434, [1977] VR 143, cited in George Laking “The Ombudsman in transition” (1987) 17 VUWLR 307 at 310. See also Kenneth J Keith “Judicial Control of the Ombudsmen?” (1982) 12 VUWLR 299.

⁶⁵ *The Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council*, above n 26, at 19-20. This case was not appealed to the Court of Appeal. It has been further considered in *Rangitikei District Ratepayers Association Inc v Rangitikei District Council* HC Wanganui CP12/00, 28 September 2000 and was referred to in *Sanford Ltd v Minister of Fisheries* HC Wellington CP257/94, 31 October 1994 and *Television New Zealand v Ombudsman* [1992] 1 NZLR 106 (HC).

⁶⁶ Above n 5, at 63, citing Larry Hill “The New Zealand Ombudsman’s Authority System” (1968) 20(1) Political Science 40 at 48.

Also, the counter-factual of giving the Ombudsmen binding decision-making powers is fraught.⁶⁷ It would fundamentally change the role of Ombudsmen into a general administrative appeal tribunal,⁶⁸ and create duplication with the court's judicial review role. We would lose the unique benefits of the Ombudsmen's flexibility which allows them to solve problems that no other public law tool can resolve. Sir George Laking identified the Ombudsmen's "flexibility in the conduct of investigations and in recommending remedies calculated to achieve substantial justice as between the individual and the state" as one of the three essential features of the Office.⁶⁹

Professor John McMillan, the Australian Commonwealth Ombudsman, has said that:⁷⁰

It may be thought appropriate to extend this s 15 power [under the Ombudsman Act 1976 to recommend actions that should be taken by an agency to address deficient administrative action], to provide that an agency shall be taken to have the power to cancel or vary a decision if the Ombudsman has made a recommendation to that effect.

However, he acknowledges the argument against providing that an agency can act on an Ombudsman recommendation to correct a decision that is otherwise final is that it "may interfere with legislative certainty and allow a departure from Parliament's intention, in the same way as giving an officer an extra statutory concession power."

I also do not think a majority of New Zealand Parliamentarians would ever agree to legislate to give the Ombudsmen binding powers over substantive law-making. As Sir George Laking wrote:⁷¹

... the office was presented as being concerned only with the acts and omissions of public servants, dealing with matters of administration and not with questions of policy. Thus it could not be seen as exposing the activities of ministers to enquiry or as constituting a threat to their status by cutting across the lines of responsibility and accountability between officials and ministers. The Bill, as presented to the House, was deceptively simple in its approach. It paid proper deference to these constitutional concerns. It gave the Ombudsman no power of decision, confining him to the right to make recommendations which might or

⁶⁷ Although note that countries like Sweden and Finland do give their Ombudsmen power to prosecute officials. See the binding powers of ombudsmen in other countries in Reif, above n 3, at 19.

⁶⁸ As Reif said "the institution would become just another type of court or tribunal – institutions which the state already has in place". Ibid, at 18.

⁶⁹ Laking, above n 63, at 311. Stephen Owen also said that "It may be that this inability to force change that represents the central strength of the office and not its weakness. S Owen "The Ombudsman: The Essential Elements and Common Challenges" in L Reif, M Marshall and C Ferris (eds) *Ombudsman: Diversity and Developmen*, (Edmonton International Ombudsman Institute, Alberta, Canada, 1992) at 52. See also Sir Keith, above n 15. at 2 where he cites Louis Marceau, the Quebec Public Prosecutor who stressed that "flexibility is essential."

⁷⁰ Commonwealth Ombudsman *Mistakes and Unintended Consequences – a Safety Net approach* (Issues Paper, November 2009) at 15-16.

⁷¹ Above n 63, at 308.

might not be accepted by the government. It appeared to involve ministers in the Ombudsman process only to the extent of authorising and in some cases requiring the Ombudsman to consult with ministers before making a recommendation.

However, Parliament may be prepared to consider adding to our Act a provision similar to section 10 of the Australian Commonwealth Ombudsmen Act 1976 which allow an Ombudsman to grant a certificate to a complainant certifying that there has been unreasonable delay in deciding whether to do an ‘act or thing’. A decision not to do the act or thing is deemed to have been made on the date on which the certificate is granted. This deemed decision is thereupon reviewable by the ‘prescribed tribunal’. The section only applies where no time limit for the making of a decision is prescribed, and the decision is reviewable by a ‘prescribed tribunal’, which includes the Administrative Appeals Tribunal.⁷²

A section 10 certificate has never been issued because:⁷³

The need for such a certificate is often obviated by the lodgement or threatened lodgement of an application for a certificate, which may impel decision makers to take immediate action.

For example, the Australian Capital Territory Ombudsman would have issued a certificate under section 12 of the Ombudsman Act 1989 (which is a similar provision to section 10 of the Australian Commonwealth Ombudsmen Act 1976) if the decision had not been made during the course of the Ombudsman’s investigation.⁷⁴ The Ombudsman concluded that there was an unreasonable delay of nearly two and a half years in the making of the relevant decision by the ACT Revenue Office (a part of ACT Department of Treasury).⁷⁵ Even if a certificate is issued, the person may still encounter filing fees and court costs in appealing the matter (depending on the nature of the ‘prescribed tribunal’), and they still are not guaranteed a favourable decision, as even if the prescribed tribunal finds in favour of the complainant, it is likely to remit the matter back to the agency complained of to make a decision. However, Professor

⁷² A corresponding provision appears in section 25(5) of the Administrative Appeals Tribunal Act regarding cases where a time limit is prescribed.

⁷³ See Administrative Review Council report to the Attorney-General on *The Relationship between the Ombudsman and the Administrative Appeals Tribunal* (1985) at 19.

⁷⁴ Australian Capital Territory Ombudsman *ACT Department of Treasury: Handling of Revenue Objections* (August 2007) <[http://www.ombudsman.act.gov.au/act/publish.nsf/AttachmentsByTitle/investigationreport_treasury_012007/\\$FILE/act_treasury_report_012007.pdf](http://www.ombudsman.act.gov.au/act/publish.nsf/AttachmentsByTitle/investigationreport_treasury_012007/$FILE/act_treasury_report_012007.pdf)> at [1.3].

⁷⁵ See Australian Capital Territory Ombudsman *ACT Department of Treasury – Report on delayed objection decision: Mr A* (November 2006).

MacMillan, who is now the Australian Commonwealth Ombudsman, says that he supports the Ombudsman having such a power “as an extra lever to force an agency to make a decision.”⁷⁶

Recommended amendment

I recommend that this binding power be considered for inclusion in New Zealand’s Act as it only applies where there has been “unreasonable delay” by a person, under an enactment that provides that application may be made to a “prescribed tribunal” for review of the relevant decision, so the Ombudsman is not second guessing the substantive decision of any person. The Ombudsman is simply ensuring that a person actually carries out his or her public obligations, and the ability to prescribe the tribunals covered means that the list can be limited to those bodies where there is no other way to remedy unreasonable delay except to go to Court and file a writ for mandamus. Such court action would be expensive and time consuming. The Ombudsman’s certificate that the person is deemed not to have done the act or thing on a particular date allows the complainant then to escalate that matter to the prescribed tribunal to get a decision made on their matter.

Nature of Ombudsmen’s Recommendations

A large part of the effectiveness of the Ombudsman is his or her broad discretion to make such recommendations as he or she thinks fit under section 22(3). Most of the thousands of complaints the Ombudsmen investigate each year are resolved by informal inquiry. However, where the outcome of an investigation is documented, there are good examples of the Ombudsmen making helpful substantive recommendations which redress unfairness:

- (a) In a case where the Ombudsman found the IRD omitted to clarify a student’s loan position with her, the Ombudsman invited IRD to review the student’s loan position, which they did. Although the IRD could not write off the loan (there was no proof it was paid), the IRD did cancel accumulated penalties and interest;⁷⁷

⁷⁶ Email from Professor MacMillan to Mai Chen regarding the use of section 10 powers under the Australian Commonwealth Ombudsman Act 1976 (27 May 2010).

⁷⁷ Office of the Ombudsmen *14th Compendium of Case Notes of the Ombudsmen* (2007) Case note W46487 at 19.

- (b) In a case where tenants renting a school house from the Board of Trustees found they were paying \$35 per week more than permitted under the Ministry of Education guidelines, the Ombudsman was initially satisfied that the Ministry would work with the Board to remedy the situation. When this did not happen within six months the Ombudsman reopened the investigation and formally recommended the Ministry pay the tenants a sum equal to the rent paid in excess of the Ministry's guidelines. The Ministry eventually accepted the recommendation and fully compensated the tenants;⁷⁸ and
- (c) In the Painted Apple Moth Report 2007, the Ombudsman recommended amending section 7A of the Biosecurity Act 1993, which enables actions taken to eradicate organisms, including aerial spraying, under that Act to be exempted from the constraints imposed by Part 3 of the Resource Management Act 1991, including the requirement for resource consents.⁷⁹

The Report stated:

Also, I consider that there needs to be consideration given to the desirability of the seemingly automatic use of section 7A of the Biosecurity Act, which has the effect of **overriding protections which might otherwise exist under Part 3 of the Resource Management Act**. I appreciate that the processes of that Act can be time consuming, but it should be possible to devise a procedure which provides a sufficient opportunity for the Environment Court to furnish an independent judgement.

...

Recommendation 2

I therefore recommend that amendments to the relevant legislation be considered and enacted as a matter of urgency so that they are immediately available should the need arise. [Emphasis added]

Authorities rarely refuse to accept Ombudsman recommendations, and where they do, the ability to bring the matter before Parliament and have it debated puts real pressure on agencies to remedy their actions. The Southern Institute of Technology ("SIT") complaint is a good example.

In 1999, students enrolled in the National Certificate in Social Services programme conducted by SIT complained that the programme had been held out to be the first of

⁷⁸ Ibid, at 28.

⁷⁹ Office of the Ombudsmen *Report of the Opinion of Ombudsman Mel Smith on Complaints Arising from Aerial Spraying of the Biological Insecticide Foray 48B on the Population of Part of Auckland and Hamilton to Destroy Incursions of Painted Apple Moths, and Asian Gypsy Moths, respectively during 2002-2004* (December 2007) at 11.

a two year course of study that would lead to a National Diploma in Social Services, and that when SIT decided not to proceed with the Diploma programme in 2000, the remedy offered by SIT for the effect of this decision on the students was inadequate and unreasonable. SIT had offered the students one year's free tuition in another course.

The students then initiated legal proceedings. However, at a judicial settlement conference in March 2002 the students were informed that it was unlikely their claim would succeed and the proceedings were discontinued. They then approached the Ombudsmen's Office to investigate their complaint. The Ombudsman held that the remedy offered by SIT was, in the circumstances, inadequate and unreasonable. He recommended that SIT reimburse the course fees and related expenses of each of the complainants, totalling \$21,000.

SIT did not accept the recommendation and sought to discuss the matter further with the Ombudsman. Following a meeting between SIT and the Ombudsman, SIT's solicitor wrote to the Ombudsman arguing that the agreement reached at the judicial settlement conference in 2002 was a full and final settlement of the dispute and that it was unfair for the students to have lodged the Ombudsman complaint. The Ombudsman asked to be provided with a copy of that agreement but the document was never produced. SIT's final advice to the Ombudsman was that it did not propose to give effect to his recommendation.

A copy of the Ombudsman's opinion and recommendation was then sent to the Prime Minister and the final report submitted to Parliament in 2004. The report was the subject of a special debate in Parliament, after which SIT settled the matter with the students.

The most recent instance where a recommendation has been refused is the Painted Apple Moth spraying case in 2007, discussed above. As well as recommending widening the jurisdiction of the Environment Court with regard to the Biosecurity Act, the Ombudsman also recommended the greater accessibility of information to the public, the appointment of a senior official to look critically at the human health implications for future spray programmes, and research into the effects of the particular spray used in this case. The Government has agreed to implement only part

of recommendation one relating to public communications. However, despite the Government's initial response denying any shortcomings in the spraying programme, the follow-up response indicated that there were areas of the spraying programme that needed improvement and that a number of new policies and processes had been developed to improve future programmes.⁸⁰

Cases reviewing rejection of Ombudsman's findings

Such refusals might in future be challenged in our courts, if they are based on a rejection of the findings of an Ombudsman's investigations, as they have been in the UK Courts. In the recent case of *R (Bradley and Other) v Work and Pensions Secretary*, the Pensions Action Group brought an action on the basis of the Ombudsman's report "Trusting in the Pensions Promise."⁸¹ The case arose from the loss by more than 125,000 pensioners of all or part of investments made in final salary schemes. The Ombudsman reported that the Government's own maladministration was a significant contributory factor in the context in which those losses were incurred. The official information produced around the security of final salary schemes was potentially misleading and the Government should pay meaningful compensation for the financial losses suffered by the individuals and for the distress, anxiety and uncertainty suffered. The Government refused. The complainants brought High Court action, and the High Court quashed the Government's rejection of the Ombudsman's central finding. The Crown appealed and the principal issues in the Court of Appeal were the extent to which the Ombudsman's findings were binding on the Secretary of State and whether the Secretary of State had acted rationally in rejecting the report.

The Court of Appeal decided that Ministers are bound by Ombudsman's findings of fact in investigations unless they are shown to be flawed or irrational, or there is

⁸⁰ Office of the Ombudsman, *2008/2009 Annual Report*, above n 8, at 20. Earlier examples of Ombudsmen recommendations that were not followed include the Ruru Primary School case concerning a student exclusion, *Report of the Ombudsmen year ending 30 June 2005* (2005); and the Hamilton Boys High School case in the *Report of the Ombudsmen year ending 30 June 2003*, also about the exclusion of 2 students.

⁸¹ *R (Bradley and others) v Secretary of State for Work* [2008] 3 WLR 1059 (CA).

genuine fresh evidence to be considered. Wall LJ summed up the decision by stating:⁸²

[I]t is not enough for a Minister who decides to reject the Ombudsman's finding of maladministration simply to assert that he had a choice; he must have a reason for rejecting a finding which the Ombudsman has made after an investigation under the powers conferred by the Act.

The very recent UK High Court case of *R (Equitable Members Action Group) v HM Treasury* [2009] All ER (D) 163 (Oct) (QB), which cited *Bradley*, concerned 21,000 current and former policyholders with the Equitable Life Assurance Society, who had complained to the Ombudsman that individuals had suffered injustice through maladministration when Equitable had closed to new business, and then progressively decreased the value of the policy funds. This resulted in a significant reduction in annuity payments. The maladministration allegations were against public bodies responsible for the prudential regulation of Equitable and the Government Actuary's Department.

The Government accepted some of the Ombudsman's findings of maladministration and injustice, but rejected the recommendation for a compensation scheme, instead saying that some ex gratia payments will be warranted.⁸³ The Group challenged the Government's rejection of some of the findings of maladministration and the recommendation for a compensation scheme. Most of the Group's challenges were not successful, but the Court did say the following of interest:⁸⁴

Although not bound by them, the public body can only reject the findings of the Ombudsman for "cogent" reasons, that is for reasons other than merely a preference for its own view. That is not a precise test, but it would be wrong in our view for us at this level to attempt a further definition of the "cogent" reasons test or to suppose that there is some exhaustive list of such reasons. What is required instead is a careful examination of the facts of the individual case - with the focus resting upon the decision to reject the findings of the Ombudsman, rather than the Ombudsman's findings themselves.

Particular factors weighing against rejection in the present case are the complex nature of the Ombudsman's investigation, together with the fact that her findings were made after taking detailed expert advice, including actuarial advice; and the fact that the public bodies involved in the Ombudsman's investigation had extensive opportunities to make representations. On the other hand, where it can be demonstrated that the Ombudsman has gone wrong in fact or in law, or where

⁸² Ibid, at [51]. See Ann Abraham "The Ombudsman and the Executive: The Road to Accountability" (2008) 61 Parliamentary Affairs 535, for the Ombudsman's own view about the significance of what happened.

⁸³ *R (Equitable Members Action Group) v HM Treasury* [2009] All ER (D) 163 (Oct) at [49] (QB).

⁸⁴ Ibid, at [66].

the Government has carried out further work not done by the Ombudsman, the case for rejection may be easier to justify.

Own motion investigations

The Ombudsmen are also able to undertake own motion investigations, and have done so if they see a need and are not otherwise asked by complainants, Parliament or the Executive. Own motion investigations are important as past Ombudsmen's annual reports have said that such investigations:⁸⁵

...are most likely to focus on a real or perceived systemic issue in a government agency or multiple agencies. These investigations **require the commitment of significant time and staff resources and while they are not lightly undertaken**, they can identify maladministration or lead to improved processes and practices thereby preventing many complaints arising. [Emphasis added]

Sir Anand Satyanand recently talked about the “gut instinct” to spot the difference between one-off, isolated factors that may never be repeated from others caused by deeper systemic issues.⁸⁶ The Ombudsmen have signalled in their 2008/2009 Report that they will “consider greater use of their ‘own motion’ powers,” but this will have resource implications.⁸⁷

There have been “own motion” investigations into the Department of Corrections since 2004 on the detention and treatment of prisoners (including the availability of health services), and another into prisoner transport in 2007.⁸⁸ The 2007/2008 Annual Report records an ongoing investigation into complaints relating to the operations of the Pacific Division of Immigration New Zealand.⁸⁹ And the 2008/2009 Annual Report says that own motion investigations were commenced into the efficiency and effectiveness of procedures for prisoners to complain to the Department about Corrections Inmate Employment and its staff, the treatment and conditions of

⁸⁵ Office of the Ombudsmen, *2007/2008 Report of the Ombudsmen for the year ended 30 June 2008* (2008) at 40. This sentiment is also repeated in the *Report of the Ombudsmen for the year ended 30 June 2006* (2006) at 44 and the *Report of the Ombudsmen for the year ended 30 June 2007* (2007) at 44, which states: “Own motion investigations require the commitment of significant time and staff resources. They are not lightly undertaken.”

⁸⁶ Sir Anand Satyanand “Speech to the Australian and New Zealand Ombudsman Association Conference” (Wellington, 6 May 2010) at 3.

⁸⁷ Office of the Ombudsmen, *2008/2009 Report*, above n 8, at 7-8.

⁸⁸ *Ibid*, at 9 and 13-14.

⁸⁹ Above n 85, at 21.

segregated staff, and the provision, access and availability of health services to prisoners.⁹⁰

Better Utilisation of Ombudsmen by Parliament?

Any Committee of Parliament may at any time refer to an Ombudsman for investigation and report back to the Committee any petition that is before the Committee and the Ombudsman can investigate the matter as far as they are within his jurisdiction under section 13(4) of the Act. However, there only appears to have been one Parliamentary petition referred to the Ombudsman by a Select Committee under section 13(4) in the last ten years. The Commerce Select Committee referred the petition of John Dickson to the former Chief Ombudsman, John Belgrave, in 2007. After Mr Belgrave's death in December 2007, the petition had to be referred once more in 2008 to the new Ombudsman, David McGee.

Mr McGee's report was presented to Parliament in July 2009. It found that there was no causal connection between losses suffered by Mr Dickson and any failures on the part of the Commission, and that Mr Dickson's losses could not be attributed to any lack of clarity in the Commission's responses to him. The Minister of Commerce has now sought independent advice on the Commerce Committee's recommendation that the Government consider making an ex gratia payment to Mr Dickson to recognise the Committee's view that the Commerce Commission had underperformed in response to complaints about independent livestock agents over access to sale yards that contributed to Mr Dickson losing his legal rights under the Commerce Act 1986. The advice will inform the Government's final decision on this matter, which will be reported back to the house by July 2010.⁹¹

Prior to this, in 1978, the petition of G W Hawkins and 5088 others was referred, and the Ombudsman in reporting expressly refrained from investigating the actions of the Ministers involved. In 1979 the petition of Rangitahi Access Group, which had arisen out of an earlier Ombudsman inquiry, was referred, effectively for the Ombudsman to complete that inquiry.⁹² The original complaint alleged that the residents whose

⁹⁰ Above n 28, at 14.

⁹¹ Minister of Commerce *Terms of Reference for independent advice regarding issues raised by the recommendation by the Commerce Committee on Petition 2005/78 of John Andrew Dickson* (April 2010).

⁹² Office of the Ombudsmen *Report of the Ombudsmen for the year ended 30 June 1980* (1980) at 7-8.

properties are bounded on two sides by tidal waters, although having practical vehicular access at low tide by means of a causeway and pedestrian access at all times by means of a footbridge to their properties, did not have practical legal access and that the local authority had declined to provide such access.” The Ombudsman carried out the investigation and reported back to the Petitions Committee in January 1980.

A survey needs to be conducted to better understand why select committees do not use their ability to refer petitions to Ombudsmen more frequently. Is it because of ignorance of section 13(4) of the Act, or is it because MPs want to hear and decide the appropriate response to petitions themselves, in the first instance, without an Ombudsman’s investigations and report? Do they only see referral to the Ombudsman as a last resort? There appear to be petitions select committees could refer if they wanted to.

Referrals from the Prime Minister

Under section 13(5) of the Act, the Prime Minister may, with the consent of the Chief Ombudsman, also refer to an Ombudsman for investigation and report back to him any matter, other than a matter concerning a judicial proceeding, which the Prime Minister considers should be investigated by an Ombudsman. The Ombudsman can then make such report to Parliament as he or she sees fit. However, the last time the Prime Minister, with the consent of the Chief Ombudsman, referred a matter to an Ombudsman for investigation and report to Parliament, was in April 2007, when the Prime Minister asked Ombudsman Mel Smith to investigate the administration of the criminal justice system. The Ombudsman’s report to the Prime Minister on 30 Nov 2007, which was tabled in Parliament on 5 Dec 2007, was only the fourth time the referral power has been exercised, and the first since 1983. It was also the first time there has been a comprehensive review of the entire sector.

The problem for the Ombudsmen with Prime Ministerial referrals is not to become a convenient repository for controversial political problems. Thus, previous Chief Ombudsman, Sir George Laking, refused to accept a referral of the Marginal Lands Board matter, although he accepted two other investigations instigated by the PM – one into the granting of import licences by the Department of Trade and Industry to

National MP Ray La Varis in 1978, and another in 1983 into the application for rural loan finance from the Rural Bank to business magnate John Spencer.⁹³

Recommended amendment

To safeguard the Ombudsman from any perception of acting politically or in a partisan nature through accepting controversial referrals from the Prime Minister, and to safeguard the Prime Minister from any allegations of trying to (mis)use the Ombudsmen in this way, the Act should be amended to require a resolution of Parliament before such a referral can be made to an Ombudsman.

Inconsistent Application of Ombudsmen’s Jurisdiction

There is no presumption that the Ombudsmen and Official Information Acts will apply to any departments and organisations exercising public power affecting the public, and which are publicly funded. Rather, section 32 of the Ombudsmen Act enables the Governor-General by Order in Council to expressly add or remove from the list of departments or organisations which are subject to the Act’s jurisdiction. There is no requirement to bring any changes to the attention of Parliament.

After almost 50 years of credibility-building and incremental increases in the scope of the Ombudsman’s jurisdiction,⁹⁴ with some carve-outs,⁹⁵ a statutory presumption of coverage by the Ombudsmen and Official Information Acts should be created in the Act. As the Legislation Advisory Committee Guidelines on Process and Content of Legislation state:⁹⁶

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

⁹³ (1979) AJHR A-3 at 9-10; (1983) AJHR A-3 at 3-4.

⁹⁴ As early as 1965, American academic Walter Gelhorn, commented that the exclusion of any matter for which a judicial remedy could be sought, the restriction of the jurisdiction to matters of administration, and the exclusion of local authorities from the jurisdiction were potential areas for improvement in the 1962 Act: Walter Gellhorn “The Ombudsmen in New Zealand” (1965) Cal L Rev 1155 at 1155. See also Gilling, above n 5, at 51-53; Sir Guy Powles “The New Zealand Ombudsman – the early days” (1982) 12 VUWLR 207 at 211-213; Sir George Laking, above n 63, at 310, said that the Office had by then gained sufficient credibility in the eyes of the public and the government in its early years “to support an extension of its jurisdiction to education and hospital boards.”

⁹⁵ The creation of the Independent Police Conduct Authority to decide complaints about the police, for example, took away some of the Ombudsmen’s jurisdiction. See Gilling, above n 5, at 100-101. See further Official Information Act 1982, s 49.

⁹⁶ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (May 2001) at 186-187.

be taken into account are the relationship between the agency and central or local government and its public purpose. [...].

In general, the Ombudsmen Act 1975 and either the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 should apply to a public agency. If it is proposed that a public agency not be subject to those Acts, the Office of the Ombudsmen should be consulted.

In the case of Crown entities, the Official Information and Ombudsmen Acts should apply to all newly established entities, and to entities with legislation under review. An exception is where the entity's functions are judicial in nature - such as where the members of the entity examine evidence on oath and make determinations affecting individual interests or rights on the basis of that evidence (eg the Police Complaints Authority).

Presumption of jurisdiction

New Zealand should consider including a hybrid approach in the Act, comprising a presumption that some generic types of bodies will be covered, and allowing specific bodies which might have doubtful status or be difficult to easily fit into a generic description to be added via a list.⁹⁷

The Australian Ombudsmen Act 1976 does not set out a list of agencies to which the Act applies, but states in section 5(1)(a) that “the Ombudsman shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority...” A “prescribed authority” is defined in section 3 as:

- (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment...; or
- (b) a Commonwealth-controlled company that is a prescribed authority by virtue of section 3A of the Act; or
- (ba) a body corporate, or unincorporated body, established by the Governor-General or by a Minister and declared by the regulations to be a prescribed authority; or
- (bb) a chief executive officer of a court or tribunal; or
- (c) the person holding, or performing the duties of, an office established by an enactment ...; or
- (d) the person performing the duties of an appointment declared by the regulations to be an appointment the holder of which is a prescribed authority for the purposes of this Act, being an appointment made by the Governor-General, or by a Minister, otherwise than under an enactment; or
- (e) an eligible case manager.

The Problem of Contracting Out

In Sweden and Denmark, there is also a presumption in favour of all decisions of public servants being subject to investigation by the Ombudsmen, unless there is

⁹⁷ Seneviratne, above n 1, at 103-104.

sound reason to the contrary.⁹⁸ In contrast, the UK Parliamentary Ombudsman – called the Parliamentary Commissioner for Administration – only has jurisdiction over those Departments and organisations listed in the Schedule to the Parliamentary Commissioner Act 1967. However, the Commissioner is authorised to investigate actions taken by or on behalf of an authority listed in the schedule, which brings within their remit bodies with functions delegated to them by government departments. There are as many investigations of cases involving departmental agencies as there are involving the parent departments themselves, but bodies operating under a contract, rather than an agency relationship, fall outside the jurisdiction. This contrasts with Austria, Albania and France, where coverage of the Ombudsmen is extended to supervision of private sector entities close to the state.

In New Zealand, Ombudsmen are already authorised under the Act to investigate all actions taken by or on behalf of an authority listed in the schedule subject to its jurisdiction. Those departments and organisations cannot escape statutory responsibility by engaging independent contractors, who fall outside the jurisdiction of the Ombudsmen and Official Information Acts, to carry work out. If the contractor causes loss or other problems, then they attach to the authority where the responsibility is non-delegable. Where the authority cannot be considered liable, then they can still be subject to a complaint or an own motion investigation for maladministration for engaging a contractor in circumstances where there is no remedy for the public when they are affected. If this were not the case, it would undermine Parliament’s intention that “the public are to be given worthwhile information about how the public’s money and affairs are being used and conducted...,”⁹⁹ and that the public should be able to get redress for maladministration.

As stated in the 2007/2008 Annual Ombudsmen Report:¹⁰⁰

Public funds, from both central and local government, are provided to many entities which are not subject to the Ombudsmen’s jurisdiction – for example, the Animal Health Board, private schools and numerous charitable institutions providing care to the disabled and needy. Not only is the accountability and transparency regarding the use of such public funds potentially shrouded, but also individuals affected by decisions of these entities may not have any adequate

⁹⁸ See R Gregory and J Pearson “The Parliamentary Ombudsman after twenty-five years: problems and solutions” (1992) 70 Public Administration 469 at 489.

⁹⁹ *The Wyatt Co (NZ) Ltd v Queenstown-Lakes District Council*, above n 26, at 19.

¹⁰⁰ Above n 85, at 23.

means of redress outside the Court system. In our view, before substantial public funds are granted to these entities, the agency providing the funding should ensure that there are adequate and simple means of redress available to those with complaints about those entities. There seems no reason why that should not be the case.

An Express Power to Comment on Law-making with Implications for the Ombudsmen and Official Information Acts.

The Cabinet Manual provides that “the Office of the Ombudsmen should be consulted over the application of the Ombudsmen Act 1975 to a new agency.” For example, the Ombudsmen were recently consulted on whether the council-controlled entities being created as part of the reform of Auckland local government should be subject to the Ombudsmen and the Official Information Acts.¹⁰¹

The Ombudsmen should also be consulted on any law reform which affects extant coverage of organizations by the Ombudsmen and Official Information Acts. For example, the Ombudsmen were appropriately consulted on the Immigration Bill 2007 [no.132]. Clause 32(1) of that Bill provided that classified information relied on for the purpose of making any decision or determining any proceedings under the proposed Act must be kept confidential regardless of “any enactment or rule of law to the contrary.” (Original subsection (2)). This would have included the Ombudsmen and Official Information Acts. The Ombudsmen’s submission resulted in the Transport and Industrial Relations Committee recommending that the Bill be changed so as not to limit or affect the application of the Ombudsmen and the Official Information Acts.¹⁰² This is now section 35(2) of the Immigration Act 2009.

The Ombudsmen also submitted that clause 32(1) of the original Bill substitute the words “classified information **relied on** for the purpose of making any decision or determining any proceedings under this Act must be kept confidential” in place of “**used.**” The word “used” would capture all information that had been certified as classified, irrespective of whether it had been actually relied on to make a decision.¹⁰³

An express power for Ombudsmen to comment directly to relevant Ministers and to Parliament on bills would prevent officials deciding whether to pass on comments

¹⁰¹ See the Local Government (Auckland Law Reform) Bill 2009 currently before Parliament.

¹⁰² Transport and Industrial Relations Committee *Immigration Bill [132-2] as reported from the Transport and Industrial Relations Committee* (21 July 2008) at 71.

¹⁰³ *Ibid*, at 6.

made to them by Ombudsmen during consultation on the department or organisation's bill.

Recommended amendment

Section 13 of the Ombudsmen Act should be amended to include the following new function for the Ombudsmen:

“To keep under review any proposed legislation which may have implications for coverage by the Act and the Official Information Act 1992, and to advise the relevant select committee or Minister(s) where he or she sees fit.”

This would not unduly fetter Parliament's sovereignty in law-making, and would obviate the need for Ombudsmen to creatively use an own motion investigation to report that the complaint could have been better resolved if a body/bodies were subject to the Ombudsmen or Official information Acts. Involving Ombudsmen also means that law makers are better informed about any unintended consequences of the law reform impacting on the coverage of the Ombudsmen or Official Information Acts.

Extending Jurisdiction to “Committees of the Whole” in Local Government

Section 13(1) of the Act provides:

... 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, ... by any committee (**other than a committee of the whole**) or subcommittee of any organisation named or specified in Part 3 of Schedule 1 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. [Emphasis added]

The Ombudsmen do not therefore have jurisdiction to investigate administrative decisions and recommendations or acts done or omitted, by local authorities at full council meetings. However, decisions of individual council members or of a council committee (not being a “committee of the whole”) may be subject to investigation.¹⁰⁴

¹⁰⁴ Office of the Ombudsmen *Ombudsmen Quarterly Review* (Vol 9:4) (December 2003).

The reason for exempting committees of the whole from the Act is not immediately apparent from Hansard¹⁰⁵ and commentary. But it is probably because local authorities are made up of democratically elected representatives, and often deal with policy matters. The problem is, however, as Gilling writes:¹⁰⁶

...that **as various councils operated differently**, so the Ombudsman could sometimes investigate a certain problem in one body's area, but not a similar problem in another's, **because in the former the issue was dealt with administratively and in the latter it was by full council decision**. Such anomalies did not occur with central government.

Some councils tried to **escape the Ombudsmen altogether by dealing with contentious matters in full council meetings**. Files supplied were sometimes altered. Occasionally, local authorities simply did not operate as Wellington bureaucrats expected. One investigating officer was informed by a West Coast mayor that his authority had no reports by officers to the council, leaving the Ombudsman with nowhere to turn. [Emphasis added]

Ombudsmen can effectively review council decisions anyway through preliminary recommendations, as Professor Ken A. Palmer states:¹⁰⁷

... although the ombudsmen have no power to act as a "court of appeal" or review body from the decision of a full council or board, or a committee of the whole, they have the right to investigate **any preliminary recommendations** made to the full body. In practice the majority of council decisions are made upon a recommendation and are vulnerable to investigation. [Emphasis added]

Understandably, we have been told that Ombudsmen find it frustrating to have to be creative, and to have to tell complainants that Ombudsmen have no jurisdiction over full council meetings, especially given the significant number of complaints.¹⁰⁸ As Len Castle who was allocated specific responsibility for local Government complaints, said "[s]ome complainants see no distinction between the acts and decisions of an employee, or a committee of council and the acts and decisions of a full council."¹⁰⁹

¹⁰⁵ Hon Dr A. M. Finlay, Minister of Justice, noted at the first reading of the Ombudsmen Bill (1974 NZPD 395 at 5736): "I do not think there can be much argument that there is a place in local government administration for an independent investigation of citizens' complaints. The primary position of a local authority in matters affecting it is acknowledged and preserved in the legislation, but there should be no fears that this Bill is a device to increase central government control over local government." Dr Finlay also said at the second reading of the Bill (1975 NZPD 396 at 533): "The associations representing local authorities saw some difficulty in applying the term "a matter of administration" to local body affairs... The committee, quite correctly in my view, declined to provide a different jurisdiction test though it was strongly pressed by a number of witnesses to adopt a number of different alternatives..."

¹⁰⁶ Gilling, above n 5, at 76.

¹⁰⁷ *Local Government Law in New Zealand* (The Law Book Company, Sydney, 1993) at 89.

¹⁰⁸ Interview with Beverley Wakem, Chief Ombudsman, and officials from the Office of the Ombudsmen (Mai Chen, 3 March 2010).

¹⁰⁹ LJ Castle "The Ombudsman's Experience with Local Government," (1982) 12 VUWLR 225 at 230.

The annual number of complaints to the Ombudsman regarding Local Government acts of administration is about 400.¹¹⁰

Allowing the Ombudsman to consider full local government council actions and decisions is also largely consistent with the ombudsmen's jurisdiction in Australia and the UK. All Australian states and territories other than the state of Victoria have no such restriction on investigating full council decisions.¹¹¹ Nor does the UK's Local Government Ombudsman.¹¹²

Recommended amendment

The exemption in section 13(1) of the Act should be removed to stop abuse and to allow the Ombudsmen to act as a safety net for unintended consequences, where ratepayers have no other remedy.

Review of Ombudsmen's Role in the Public Law Toolbox

A consideration of the Ombudsman's jurisdiction is not complete without a review of their role given the creation of other complaints bodies, officers of Parliament and agencies that assist citizens who have problems with government or particular aspects of government in the last fifty years. For example, some countries do not have Ombudsmen and a Human Rights Commission, but create hybrid offices with Human Rights Ombudsmen.¹¹³ Should this be explored in New Zealand to increase efficiency?

The expansion of judicial review and appeal rights may also have resulted in some overlapping and parallel jurisdiction with Ombudsmen, thus challenging the conventional view that Ombudsmen deal with grievances when the complainant cannot reasonably resort to any other remedy.¹¹⁴ Such a review should take account of

¹¹⁰ There were 417 complaints in 2008/2009, 394 complaints in 2007/2008, 393 complaints in 2006/2007, and 497 complaints in 2005/2006.

¹¹¹ See Ombudsman Act 2001 (QLD), s 7; Ombudsman Act 1974 (NSW), s 12; Parliamentary Commissioner Act 1971 (WA), s 14; Ombudsman Act 1978 (TAS), s 12; and Ombudsman Act 1972 (SA), s 13 as cf Ombudsmen Act 1973 (VIC), s 13.

¹¹² See Local Government Act 1974 (UK), s 26.

¹¹³ Reif, above n 3, at 8-9.

¹¹⁴ Senevirante, above n 1, at 311-312.

the Law Commission's Report reviewing tribunals.¹¹⁵ How do the various parts of the jigsaw fit together?¹¹⁶

Reviewing the Act and the Ombudsman's role should result in more analysis before new constitutional watch dogs and complaints bodies are created which may duplicate or overlap with what Ombudsmen already do.¹¹⁷

That said, the Ombudsmen appear to be working effectively and efficiently with other agencies. For example, multiple inquiries were undertaken into the Pacific Division of Immigration New Zealand in response to concerns regarding the conduct of Mary-Anne Thompson and other senior immigration staff. Inquiries were held by the State Services Commissioner, the Controller and Auditor-General, and the Department of Labour. However, each of these inquiries approached the matter differently, according to their specific terms of reference and their jurisdictional remits under their respective statutes.

For example, the OAG's inquiry was concerned with matters of 'public concern', and it did not have jurisdiction to overturn immigration decisions affecting particular individuals or to review the organisational structure or direction of Immigration New Zealand or its Pacific Division.¹¹⁸ The Ombudsman, however, considered a number of complaints on how individual section 35A of the Immigration Act 2009 requests were considered by the Pacific Division, and was able to comment on the systemic problems these complaints highlighted.¹¹⁹

¹¹⁵ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (March 2004).

¹¹⁶ See Ann Abraham "The Ombudsman and Individual Rights," (2008) 61 *Parliamentary Affairs* 370 at 374, although she was focussed on the courts role vis-à-vis that of the Ombudsman.

¹¹⁷ A UK Study of Parliament Group's Report on "Parliament's Watchdogs: At the Crossroads", includes essays on the proliferation of constitutional watchdogs, many of which New Zealand does not (yet?) have, but as the authors of Chapter 5 on "An Overview of Northern Ireland's Constitutional Watchdogs" observe, "watchdogs tend to be created to deal with an unexpected scandal," and that "the particular circumstances of Northern Ireland has resulted in a greater level of watchdoggery and accountability than in other constituent parts of the UK." Ruth Berry and Zoe Robinson "An Overview of Northern Ireland's Constitutional Watchdogs" in Gay and Winetrobe (eds), above n 27, at 59. See generally Gay and Winetrobe (eds), above n 27.

¹¹⁸ See Controller and Auditor-General "Terms of Reference for the Inquiry" in *Inquiry into Immigration Matters: Public sector recruitment processes involving Mary Anne Thompson and related issues (Volume 2)* (May 2009).

¹¹⁹ Controller and Auditor-General *Inquiry into Immigration Matters (Volume 1): Visa and Permit decision-making and other issues* (May 2009) at [6.39]: "The Ombudsmen noted that a common theme in the complaints was a lack of understanding or certainty among complainants about the relationship between the section 35A processes and the residual

There are already provisions in the Act that allow the Ombudsman to consult with the Privacy Commissioner (section 21A), the Health and Disability Commissioner (section 21B), and the Inspector-General of Intelligence (section 21C). Section 14 of the Act also requires an Ombudsman to forward complaints regarding police to the Independent Police Conduct Commission, and the Ombudsman can hear or obtain information from such persons (from other agencies) as they think fit and make such inquiries as they see fit. Section 17 also allows Ombudsmen to exercise their discretion not to investigate if there is an adequate alternative remedy or a right of appeal. So if another agency is already carrying out investigations which will remedy the complaint, or there is a right of appeal which it is reasonable for the complainant to use in the circumstances, then the Ombudsmen can decide to stop investigating.

The Ombudsmen also consult informally with other government agencies like New Zealand Police and the Children's Commissioner, as well as government departments such as the Ministry of Education, where they consider it necessary or desirable to do so.¹²⁰

Complaints and enquiries from sentenced prisoners

A review of the Ombudsmen's Office would also confirm whether calls for a Prison Ombudsman are unnecessary given the recent extension to the Ombudsman's role.¹²¹ A significant part of the Ombudsmen's workload is prisoner complaints. For example, the 2008/2009 Annual Report records that 3583, 3570 and 4183 complaints and enquiries were received from sentenced prisoners in the year ended 30 June 2007, 30 June 2008 and 30 June 2009 respectively.¹²² That is about 47%, 49% and 54% of the

places policies. Complainants had gained the impression that there were inconsistencies in Immigration New Zealand's decision-making."

¹²⁰ For example, the Ombudsmen consulted with the New Zealand Police on their respective roles when investigating matters involving allegations of criminal offending, and entered into a Memorandum of Understanding with New Zealand Police for the supply of appropriate information about police investigations. See Office of the Ombudsmen, *2008/2009 Report*, above n 8, at 15. The Ombudsmen also consulted with the Ministry of Education, Human Rights Commission and the Children's Commissioner to discuss how they may better coordinate responsiveness to complaints and prevent areas of overlap. See *Report of the Ombudsmen for the Year ended 30 June 2006*, above n 85, at 18.

¹²¹ See ID Matheson "The Ombudsmen and Prison Complaints" (1982) VUWLR 265, where the introduction of a special prisons' Ombudsman is recommended.

¹²² Office of the Ombudsmen *2008/2009 Report*, above n 8, at 93.

complaints to the Ombudsmen’s office for 2007, 2008, and 2009, which is a very high proportion of overall complaints – and growing.

However, the Ombudsmen have now extended their role to more closely monitor death in custody investigations by the Inspectors of Corrections and to investigate serious incidents within prisons and other thematic concerns, on their own motion. The Ombudsmen call these “special” investigations, and have appointed an Assistant Ombudsman (Prisons) and additional investigators.

The Ombudsmen have also revised their protocol with the Department of Corrections, which is a protocol required under section 160 of the Corrections Act 2006, and agreed a Memorandum of Understanding with the New Zealand Police on the supply of appropriate information about police investigations to the Ombudsmen.¹²³ The Ombudsmen say that the MOU’s purpose is because “we do not wish to trespass on the proper domain of the Police and Criminal justice system.”¹²⁴

Parliamentary Ombudsman and Private Sector Complaints

In addition to the Parliamentary Ombudsmen established under legislation, the Australian and New Zealand Ombudsman Association (“ANZOA”) has 10 industry members in Australia (7) and New Zealand (3), which oversee decisions made within private sector industries (such as banking, insurance, electricity, energy, water, and telecommunications) to ensure consumers are not treated unfairly by some act, omission, decision or recommendation of these industry bodies. Further, there is one “WorkCover Ombudsman” in South Australia, whose role is to investigate complaints about the operation of the South Australian WorkCover (Workers Rehabilitation and Compensation) Scheme. There are also many additional complaints and investigative bodies in Australia using the “ombudsman” title, which are not members of ANZOA.

New Zealand has broad statutory protection for the name “Ombudsman” under section 28A of the Act, as follows:

28A Protection of name

(1) No person, other than an Ombudsman appointed under this Act, may use the name “Ombudsman” in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself,

¹²³ Ibid, at 13.

¹²⁴ The Ombudsmen also consulted with the Privacy Commissioner over the MOU.

herself, or itself out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman.

(2) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$1,000 who contravenes subsection (1) of this section.

The Chief Ombudsman's written consent has been given twice: for the Banking Ombudsman¹²⁵ and Insurance and Finance Ombudsman. These schemes are non-statutory, voluntary, industry-led responses to increase the perception of consumer protection within their respective industries. The third industry member of ANZOA from New Zealand is the Electricity and Gas Complaints Commissioner. Section 158G of the Electricity Act 1992 requires every electricity distributor and retailer to participate in an approved complaints resolution scheme, and the Gazette notice of 10 December 2009 approves the Electricity and Gas Complaints Commissioner Scheme. Thus, although the scheme is not statutory, participation in the scheme is required by statute.

Australia has no equivalent to section 28A of New Zealand's Act and the term "ombudsman" has been applied to many different types of organisation.

Allowing wider use of name Ombudsmen?

The proliferation of complaints bodies have raised issues as to whether section 28A of the Act should be amended to make it easier to use the name "Ombudsman", or whether the parliamentary Ombudsmen's role should be extended to include private sector complaints. The gravitas of the name "Ombudsman" means that industries seeking to establish voluntary complaints bodies have coveted the name. Industries such as water, telecommunications, Private Training Establishments, and finance companies have discussed or tried getting authorisation for the use of the name "Ombudsman" for their complaints person.

The "Notice by the Chief Ombudsman Concerning Restrictions on the Use of the Name 'Ombudsman'" ("**Notice**"), issued in February 2002, sets out matters that will be taken into account in considering whether to grant a request under section 23A of

¹²⁵ Only 11 of the 19 registered banks operating in New Zealand are members of the scheme. In accordance with section 69 of the Reserve Bank of New Zealand Act 1989, the Reserve Bank keeps a public register of banks registered in New Zealand. A list of registered banks is available on the reserve bank's website: <<http://www.reservebank.govt.nz/nzbanks>>. A list of participating banks in the ombudsman scheme is available at <<http://www.bankomb.org.nz/eng/About-us/Participating-banks>>.

the Act. The first consideration “would be to balance the public interest served by the establishment of an additional, non-parliamentary ‘*Ombudsman*’ against the public interest in the non-proliferation of the name.”

This is because under the Act, the term Ombudsman is “applied to an office holder who is a clearly recognisable part of the constitutional checks and balances that protect the public against excesses of executive government and thereby enhance the accountability of Ministers and officials”. It is in the public interest not to impair that recognition, which can occur if voluntary, non-statutory ‘Ombudsmen’ are appointed.

Second, if the Chief Ombudsman is satisfied that the public interest in establishing a non-Parliamentary Ombudsman outweighs the need to avoid proliferation of the name, the request for consent will be further considered against the following factors:

- (a) The proposed use should not be in an area where an Ombudsman under the Act has or may be given jurisdiction;
- (b) The scheme must meet the approval of the Chief Ombudsman to ensure that the holder of the name is able to operate effectively and independently of the persons subject to the scheme. The scheme should include provision that any modification to the scheme will require the Chief Ombudsman’s consent;
- (c) The holder of the name must be appointed and funded in a manner that enables him or her to operate effectively and independently of those subject to the scheme. He or she should be appointed under a publicly notified charter in plain language;
- (d) The public charter should be subject to periodic public review to assess its effectiveness and credibility;
- (e) The scheme should provide for complainants to make complaints free of charge direct to the ‘Ombudsman’, who must impartially investigate the facts and conclude with a decision on the complaint. A remedy should be provided where appropriate. The ‘Ombudsman’ should not be or seen to

be an advocate for any party or group and must be publicly seen to be independent and impartial;

- (f) The name should be associated with a function that is of a national character and application;
- (g) There must be an assurance of continuing and future resources to guarantee tenure to the ‘Ombudsman’ and his or her staff and to ensure the effective and efficient administration of the scheme; and
- (h) The system and procedures used by the ‘Ombudsman’ must ensure fair and impartial decision making.

The current cautious approach to allowing the name “Ombudsman” to be used should continue. Even Parliament observes this approach as recent statutory creations of independent complaints bodies such as the new Commissioner for Financial Advisors under the Financial Advisors Act 2008, or the Real Estate Agents Authority under the Real Estate Agents Act 2000 have not been named “ombudsmen,” or made officers of Parliament (like the Controller and Auditor-General, although not called an Ombudsman). These complaints bodies do not play a constitutional role, but they are independent crown entities.

ANZOA itself has recently adopted a policy statement that calls for stronger controls over the use of the term Ombudsman, given the lack of any statutory protection for the term in Australia, and the proliferation of different types of Ombudsmen that has resulted:¹²⁶

The development and popularity of the Ombudsman institution has come about for one reason—the office is renowned for independent, accessible and impartial review and investigation. In increasing numbers, the public turns to Ombudsman offices for assistance and support.

It is important, therefore, that members of the public are not confused about what to expect when they approach an Ombudsman’s office—public trust must not be undermined.

...

Public respect for the independence, integrity and impartiality of Ombudsman offices is at risk if bodies that do not conform to the accepted model are inappropriately described as an Ombudsman office.

...

¹²⁶ Australian and New Zealand Ombudsmen Association “Essential Criteria for Describing a Body as an Ombudsman” (Policy Statement, February 2010).

[ANZOA] is concerned to ensure appropriate use of the term Ombudsman. Our view is that a body should not be described as an Ombudsman unless it complies with six essential criteria addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

The Commonwealth Ombudsman of Australia, Professor McMillan, describes the proliferation in the use of the term since 1994:¹²⁷

Many local councils and universities have created an internal ombudsman, sometimes called by that name. Examples are the Sutherland Shire Council, Warringah Shire Council, Wollongong Shire Council, University of New England, and University of Technology Sydney. The ombudsman designate is often a staff member of the organisation – sometimes with other part-time duties in the organisation – who reports to other senior officers in the organisation.

Some companies – such as Westpac, Synergy and AAMI – have likewise created an internal ombudsman.

There are ombudsmen created by industry bodies, such as the Produce and Grocery Industry Ombudsman. The function of that particular office is not to resolve complaints from the public but to mediate industry disputes over the supply of produce to markets and retailers. There is a \$50 application fee to engage the services of the Ombudsman.

There are government ombudsmen that do not follow traditional principles: an example is the Private Health Insurance Ombudsman, established by statute, but who is appointed by the Minister for Health, can be dismissed by the Minister for misbehaviour, and can be directed by the Minister to investigate and report to the Minister.

Almost every month in the media the government is called on to create a new specialised ombudsman office. Over the last few years I have counted at least thirty such proposals, including a sports ombudsman, medical ombudsman, aged care ombudsman, superannuation ombudsman, student ombudsman, youth care ombudsman, research ombudsman, crimes victim ombudsman, franchising ombudsman, arts ombudsman, motor industry ombudsman, airport ombudsman, sports doping ombudsman, gambling ombudsman – and to add colour to the list – strata title ombudsman, online auction ombudsman, grains ombudsman, drinking ombudsman (the line starts behind me), and funeral ombudsman (the line starts next door).

As Professor McMillan said “[t]he problem has more to do with unconstrained and unsystematic use of the term,” followed by an elaboration of the problem of public deception and public confusion.¹²⁸

Extending Parliamentary Ombudsmen’s jurisdiction to private sector complaints?

In New Zealand, a ministerial inquiry into the electricity industry in 2000 recommended that the industry establish an electricity ombudsman scheme that would apply to all electricity retail and distribution companies¹²⁹ The reform legislation did

¹²⁷ John McMillan “What’s in a name? Use of the term “Ombudsman” (paper presented at the Australian and New Zealand Ombudsman Association, 22 April 2008) at 2.

¹²⁸ Ibid, at 2 and 4. See also Reif, above n 3, at 53 and following on “Overuse of the ‘Ombudsman’ Title.”

¹²⁹ Ministry of Economic Development *Inquiry into the Electricity Industry: Report to the Minister of Energy* (Wellington, 2000) at 49-50. The Scheme would provide for all consumers to have the right to access the scheme, the means of appointing and holding to account the industry Ombudsman;

not include an Electricity Ombudsman, but empowered the Electricity Commission (or, in the case of gas distributors/retailers, the relevant Minister) to require all distributors and retailers to participate in a complaints resolution system, if the industry did not voluntarily participate.¹³⁰ The Gas Amendment Act 2004 inserted a comparable provision into the Gas Act 1992 (section 43E).¹³¹

An academic has suggested that the trend of importing the ombudsman model of dispute resolution into the private sector has resulted in the growth of large, bureaucratic institutions in the private sector, blurring the formal distinction between what is public and what is private. “The exercise by these institutions of monopolistic or oligopolistic economic powers is regarded as essentially governmental.”¹³²

A Law Honours paper has also argued that it is appropriate to extend the Parliamentary Ombudsman’s jurisdiction to cover private sector injustice, as Parliamentary ombudsmen afford the public the greatest possible protection; are appropriate for the private sector due to their independence, flexibility and credibility, that voluntary or industry-run schemes may not possess; and is a natural extension of the “private influence” that Parliament has already given to the Parliamentary Ombudsmen, given their jurisdiction under the Protected Disclosures Act 2000.¹³³

funding of the Ombudsman and office; fines to be levied and compensation to be provided to consumers; and the procedures to be followed by the industry in resolving Ombudsman disputes.

¹³⁰ Section 158G of the Electricity Act 1992 (inserted by the Electricity Amendment Act 2004), provides: that “(1) Every electricity distributor and every electricity retailer must participate in a complaints resolution system that is approved by the Commission for the purpose of addressing complaints by any person (including potential consumers and owners and occupiers of land) relating to electricity retailers and electricity distributors. (2) This section applies provided the Commission has approved 1 or more complaints resolution system by notice in the *Gazette*.”

¹³¹ This resulted in the creation of the Electricity Complaints Commissioner in 2001, which later became the Electricity and Gas Complaints Commissioner (“EGCC”) in 2004. The EGCC started as a voluntary complaint handling service, and it was not until December 2009 that the EGCC was approved as a complaints resolution system for electricity and gas disputes. The Electricity Industry Bill 2009 intends to repeal these provisions and replace them with a new, more comprehensive framework that is based on provisions in the Financial Service Providers (Registration and Dispute Resolution) Act 2008. The Bill retains the requirement to participate in a dispute resolution scheme, but provides for an alternative to an approved scheme (like the EGCC), in the form of a regulated scheme. Schedule 4 of the Electricity Industry Bill 2009 sets out the details about the alternative schemes.

¹³² Ann Farrar “A Banking Ombudsman in New Zealand” [1992] NZLJ 320 at 326. Farrar cites the discussion by PE Morris in “The Banking Ombudsman Five Years on” [1992] Lloyd’s Maritime and Commercial Law Quarterly 227 at 229-30.

¹³³ Alastair Cameron “The Ombudsmen: Time for Jurisdictional Expansion: The Case for Extending the Jurisdiction of the Statutory Ombudsmen to cover the exercise of Public Power in the Private Sector” (2001) 32 VUWLR 549 at 561-565.

Parliament is sovereign and can extend the Ombudsman's jurisdiction by statute to the private sector, but all of the extensions of the Ombudsmen's jurisdiction (the OIA, LGOIMA, the PDA and the COTA) have the Ombudsman playing a constitutional role in the public sector. The Ombudsman's role under the PDA focuses on serious wrongdoing in public sector organisations, and the COTA implements the Government's obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984.

In contrast, private sector "ombudsmen" are not undertaking a *constitutional* role. Although, like Ombudsmen, they are independent complaints bodies, private industry ombudsmen decide disputes involving contractual interpretation rather than disputes concerning the rule of law. There may be some "public law" characteristics about the complaints handled by industry-based ombudsmen, and were it not for the rules of each scheme, they may be justiciable in an administrative law sense under section 4 of the Judicature Amendment Act 1972 and following the authority of *R v Panel on Take-overs and Mergers, ex parte Datafin*,¹³⁴ and *Electoral Commission v Cameron*.¹³⁵ With all three of New Zealand's private sector Ombudsmen, industry participants must agree not to challenge the decisions made by the Ombudsman/Commissioner in order to participate in the scheme.

Private industry Ombudsmen are sometimes established to "ward off" state regulation of the industry. As Farrar writes of what became the Banking Ombudsman Scheme in New Zealand:¹³⁶

The threat of possible government regulation prompted the Bankers' Association to adopt a form of self-regulation in an attempt to keep the initiative for reform within the banking industry itself.

Industry ombudsmen play a vital role in ensuring consumers and businesses are treated fairly in accordance with contractual law and industry standards. The independent periodic reviews I have undertaken of the Banking Ombudsman¹³⁷ have

¹³⁴ [1987] QB 815.

¹³⁵ [1997] 2 NZLR 421.

¹³⁶ Farrar, above n 131, at 321, citing an interview on 24 July 1992 with Mr Simon Carlaw, Executive Director of the New Zealand Bankers' Association.

¹³⁷ Chen & Palmer *Inaugural Periodic Process Review of the Banking Ombudsman* (Wellington, 2000); Chen Palmer & Partners *Second Periodic Review of the Banking Ombudsman [For the Period 1 September 2001 – 31 October 2002]* (Wellington, 2003); and Chen Palmer *Third Periodic Process Review of the Banking Ombudsman* (Wellington, 2006).

always scored highly in terms of administrative fairness and good process and efficiency as well as complainant satisfaction. Similarly, my work with the Electricity and Gas Complaints Commissioner has left me in admiration of the justice they manage to achieve for customers while not unleashing a flood of unreasonable claims on companies, in a very complex and difficult technical area.¹³⁸

I do not think an extension of the Parliamentary Ombudsman's jurisdiction to private commercial matters is appropriate. It misunderstands their remit as an officer of Parliament to keep the executive accountable. Private sector Ombudsmen provide oversight of private sector commercial dealings, and their effectiveness is a result of the workings of the market. An industry participant that is the subject of constant complaints to an industry ombudsman is unlikely to succeed in a competitive market, such as the banking and electricity industries.

Appointment of Ombudsmen

The controversy concerning the non-appointment of Ombudsman Nadja Tollemache for a second five year term after it was alleged she had pushed hard to gain official information from some SOEs, like Electricorp's pricing policies and top executives' salaries,¹³⁹ raises the question of whether further reform is needed to strengthen the true independence of the Ombudsmen office. As Buchanan writes:¹⁴⁰

The system of appointments is also comparatively weak. Despite the practice of inviting applications, the process involving endorsement by party caucuses (as a prelude to a unanimous resolution of the House recommending appointment) lacks transparency and brings an element of **political acceptability, rather than merit, to the appointment**. The emergence of the multi-party parliaments, following New Zealand's adoption of proportional representation in 1996, tends to amplify tensions of this type and points to the need for a more open process. As discussed elsewhere in this Report, the adoption of single, non-renewable terms of office can reduce the risks surrounding officers of parliament appointments. (Emphasis added)

The Officers of Parliament Committee can operate on party lines like any of the other select committees of Parliament, despite the desirability of a cross-party environment. But there do not appear to be any better alternatives to ensure truly independent merit-

¹³⁸ Chen Palmer *Report of the Independent Review of the Electricity Complaints Commission Code of Practice: Inaugural Review After 6 Months Operation* (Wellington, 2003).

¹³⁹ Gilling, above n 5, at 132.

¹⁴⁰ Robert Buchanan "Commonwealth Experience II – Officers of Parliament in Australia and New Zealand: Building a Working Model" in Gay and Winetrobe (eds), above n 27, at 86.

based appointments, only to ensure greater independence once the Ombudsman has been appointed to the Office.

The Controller and Auditor-General is appointed for a single, fixed term, not exceeding seven years,¹⁴¹ and the UK Ombudsmen are appointed for a single fixed term of 7 years,¹⁴² but Ombudsmen in Australia can be reappointed after holding office for a period not exceeding 7 years.¹⁴³

Recommended amendment

The Act should be changed to provide one fixed term of appointment for seven years for the Ombudsman. Ombudsmen need to be able to carry out their role without fear of non-reappointment, especially if the other recommendations I have made in this paper for amendments to the Act are adopted. Timidity for fear of upsetting the Government will result in the Ombudsman's role atrophying.¹⁴⁴

KEY CONCLUSIONS AND RECOMMENDATIONS

The Ombudsmen have built an institution over nearly fifty years which is in the main trusted and respected, and whose gravitas as a truly independent and professional officer of Parliament allows them to use their persuasion to great effect in resolving matters of administration where the decision, recommendation, act or omission has gone wrong.

Just because the Ombudsmen make few formal recommendations to government departments and statutory organisations, and do not make many reports to Parliament or the Prime Minister, does not mean they are not succeeding in redressing problems with matters of administration. Indeed, Ombudsmen are sometimes more effective than courts in getting a person with a meritorious complaint substantive redress, including compensation, in a shorter timeframe. The Ombudsmen can also achieve changes to systemic failures in administrative process which no court can do. Rather than seeking public vindication through the Courts, complainants (and the lawyers who advise them) need to give more consideration to making a complaint to the Ombudsmen.

¹⁴¹ Schedule 3, clause 1 of the Public Audit Act 2001.

¹⁴² Employment Equality (Age) Regulations 2006 (UK).

¹⁴³ Ombudsman Act 1976, s 22.

¹⁴⁴ Hill, above n 49, at 1078.

The unique role of the Ombudsmen tends to turn the statistics on its head. The use of formal powers to examine any persons on oath, and to enter and inspect premises, for example, is the exception and not the rule because departments and organisations generally comply with an Ombudsman's requests. The threat of using formal statutory powers is enough to ensure compliance with an Ombudsman's requests and recommendations to redress justified complaints of on matters of administration.

Thus, many of the Ombudsmen's triumphs are necessarily achieved behind closed doors, and without gloating over "wins," so that officials do not feel like scapegoats or the subject of a witch-hunt.¹⁴⁵

A significant factor in the Ombudsmen's success in resolving complaints is their personal standing and skills in utilising their numerous statutory discretions at the right time, in the right way. To be effective, Ombudsmen also need well-tuned political antennae, to a greater extent than judges, for example.¹⁴⁶ I have been struck by how dependent the performance of the institution has been on the high personal qualities and capabilities of the Ombudsmen New Zealand has had, and currently has.¹⁴⁷

The energetic and necessary changes Chief Ombudsman, Beverley Wakem, and Ombudsman David McGee QC have made to strengthen professional practice in the Ombudsmen's Office, to model good administrative practice, to assist government agencies to improve the complaints handling practices and to improve their knowledge and application of the Ombudsmen Act and of the Official Information Act, in particular, have brought the Ombudsmen's Office into the 21st Century and will help to ensure that it can effectively carry out its important constitutional role for another 50 years.

But after 50 years, it has also become clear what works, what does not work and where there are gaps and weaknesses in the system. Apart from the need to update the language of the statute to plain English drafting, substantive changes are needed to the Act to:

¹⁴⁵ See Sir Guy Powles, above n 93, at 207.

¹⁴⁶ Gavin Drewry "Ombudsmen and Administrative Law" (2009) 17 Asia Pacific Law Review 3 at 5.

- Ensure greater independence through:
 - a single fixed term appointment for Ombudsmen of seven years;
 - changing the Prime Minister's ability to refer matters (which may be politically controversial) to Ombudsmen by requiring a resolution of Parliament (rather than from the Prime Minister alone); and
 - an ability to keep under review (and to report to relevant Ministers and to Parliament) any proposed legislation that has implications for coverage by the Ombudsmen and Official Information Acts;
- Create a presumption that Ombudsmen have jurisdiction over all departments and organisations that exercise public power and act for a public purpose using taxpayers' money, unless bodies are specifically excluded;
- Remove the current exemption for full local council meetings, to prevent contentious matters being dealt with in full council by local authorities as a means to escape the Ombudsmen's jurisdiction;
- Expressly empower the Ombudsmen to undertake education about the Act and good process, to facilitate prevention and cures, including of systemic maladministration issues, to ensure that the Ombudsmen are more than a small claims court;¹⁴⁸
- Make promotion of the Ombudsmen an express statutory function in the Act, so that the office is known to citizens and to Parliament and is fully utilised;
- Provide more powers to the Ombudsmen, including binding powers to make findings of unreasonable delay by a government department, organisation or official, which would allow a complainant under certain

¹⁴⁷ Reif, above n 3. See also Marten Oostin who notes that it is the authority of the ombudsman which is essential to the strength of the institution. In M Oosting "Ombudsman and his Environment: A Global View" (1995) 13 Int'l Omb J 1 at 10.

¹⁴⁸ Seneviratne, above n 1, at 324.

specified enactments to escalate the matter to a “prescribed tribunal” for review;

- Place greater obligations on departments and organisations subject to the Act to respond to Ombudsmen requests for information within 20 working days, using section 29A of the OIA as a precedent, unless there is good reason to apply to the Ombudsman for an extension within 10 working days after the request, and then only for a reasonable period;
- Impose greater fines for actions which prevent the Ombudsmen from carrying out their functions consistent with the important constitutional role Ombudsmen perform; and
- Provide proper resourcing of the Ombudsmen so they can fully perform their constitutional watchdog role, in proactively tackling more systemic maladministration issues and better educating citizens and the Government on good administration.

There needs to be a systematic review of the Ombudsmen’s role and jurisdiction in the very different constitutional landscape that exists in New Zealand nearly 50 years on from when the office was established. This includes a review of the relationship between the roles of the courts, tribunals and Ombudsmen.

Any growth of private sector “Ombudsmen” in New Zealand should remain limited given the important constitutional role of “Ombudsman.” Industry complaints bodies play an invaluable role in contractual disputes between companies and their customers, but they are not undertaking a constitutional role and do not deal with disputes concerning the rule of law. The role of Parliamentary Ombudsmen should not be extended to include private sector complaints.

As officers of Parliament, the Ombudsmen need to be better understood and utilised by Parliamentarians.

I do not think we will see a significant increase in litigation over an Ombudsman’s jurisdiction despite the recent findings in the UK Courts that Ministers are bound by Ombudsman’s findings of fact in investigations unless they are shown to be flawed or

irrational, or there is genuine fresh evidence to be considered. Legal challenges to binding Ombudsmen recommendations under the OIA have also been rare.¹⁴⁹

¹⁴⁹ Nicola White *Free and Frank: Making the Official Information Act 1982 work better* (Institute of Policy Studies, Wellington, 2007) at 65-68.