The Ombudsman and the legal profession

G. R. Laking*

What contribution has the establishment of the Office of Ombudsman made to New Zealand's constitutional development? And what sort of relationship exists or ought to exist between the ombudsmen and the legal profession? These are the issues addressed here by the Chief Ombudsman.

I. THE ROLE OF THE OMBUDSMAN IN THE LEGAL SYSTEM

> I hope you have not come expecting a scholarly discourse replete with copious references. If you have, I fear you will be disappointed: for I have come . . . to speak, as it were, to the common people . . . and to further amongst them the knowledge of their laws, so that they may realise their privileges and likewise their responsibilities.
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> Lord Denning[1]

> The obligation of our profession is, or has long been thought to be to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.
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> Chief Justice Warren Burger[2]

These two eminent judges were addressing themselves to a problem which has always exercised lawmakers, law enforcers and the more thoughtful members of the legal profession — how to ensure that the law fulfils its primary purpose of ensuring the orderly development of society in such a way as to promote individual freedom and fulfilment. It is a problem by no means peculiar to modern society though the measures necessary to deal with it have become more complex and difficult of achievement as society itself has become more complex and the impact of the law on the life of the citizen has become more pervasive. It was the rigidities of the Common Law which led to the emergence of the doctrine of equity — the appeal to the conscience of the King to secure a just and reasonable solution for the concerns of the individual where they did not fit conveniently within the conventional framework of the legal process. Nor is it a problem which admits of any final or uniform solution applicable to all societies, whatever their structure or

* Chief Ombudsman.

1 Lord Denning *Freedom under the Law. Hamlyn Trust Lectures* 1949 (Stevens, London, 1949).

2 Address by Chief Justice Warren Burger to the American Bar Association, 24 January, 1982.

traditions. In our legal tradition, equitable doctrine, except for those well versed in its more esoteric refinements, would seem to have become almost indistinguishable from Common Law doctrine and in our own society we have been obliged to look for other ways of applying its basic tenet to current needs.

Twenty years ago the Office of Ombudsman was instituted in New Zealand. It was hailed at the time as a major constitutional development and indeed has been described as the "new equity". The purpose of this article is to consider the contribution which the office has made in this field; more specifically what relationship exists or ought to exist between it and the legal profession.

It would be misguided to assert that the proliferation of ombudsmen throughout the world since this country first adopted the concept from its Scandinavian originators is evidence that it can provide the answer to all the law's delays, uncertainties and costs. In the first place, the ombudsman is concerned only with a limited area, that is to say, where the citizen finds himself at odds with the machinery of government, either central or local. If his problem originates in a dispute with another citizen, it is outside the ombudsman's purview. Moreover, while Common Law countries have in general found that the ombudsman concept adapts well to their constitutional structures, it may not be adaptable in the same way to other jurisdictions. In the United States, for example, while ombudsmen are to be found in a few states and in others ombudsmanlike persons have been appointed with limited functions (such as Ombudsman for Correctional Institutions), it is unlikely that a federal ombudsman could operate with any effectiveness. The place of the courts is so central to United States constitutional concepts, based as they are on a rigid separation of powers, that any proposal to intrude an officer of the legislature into what is regarded as the exclusive province of the judiciary would not find the necessary acceptance. In his address the Chief Justice makes no mention of the field of administrative law but concentrates his attention on large, complex commercial disputes for which he advocates a system of arbitration. It is nevertheless of interest that he sees a need to seek out in the public interest some means to provide the citizen with a more effective and speedy means of securing redress for grievances than the courts are able to provide. Part of his thesis, of course, is that it would relieve the pressures on the courts, enabling them to give closer attention to the discharge of their basic function. "I do not suggest" the Chief Justice said "that arbitration can displace the courts. Rather arbitration should be an alternative that will complement the judicial systems. There will always be conflicts which cannot be settled except by the judicial process."[3]

That comment can equally well be applied to the function of the ombudsman. The Conference of Australasian and Pacific Ombudsmen which was held in Wellington in September/October 1981 had as its theme the relationship between the ombudsman and the courts. The proceedings of the conference[4] include a full report of the discussions on that issue, following an address by the Chief Justice,

3 Ibid.

4 *Proceedings of the Fifth Conference of Australasian and Pacific Ombudsmen.* (Issued by the Office of the Ombudsman, Wellington, 1981).

Sir Ronald Davison, in which he considered three issues, one of which was:[5]

> Do the Court and the Ombudsman provide a comprehensive cover of remedies for a citizen aggrieved by maladministration, or do they fail to be fully complementary and leave a gap which causes the citizen in some circumstances to be without the prospect of effective remedy?

A study of the conference proceedings will, I believe, contribute to an understanding of the relationship between the ombudsman and the courts and equally of the areas within which the ombudsman can operate effectively and those in which he cannot.

Every year the ombudsman in New Zealand receives up to 2000 complaints of administrative error or omission resulting in injustice. The reasons why the numbers vary from year to year are not readily apparent. Comparisons with the experience of ombudsmen in other similar jurisdictions show, however, a certain similarity over the long term — a steady rise in the years after the office is first set up, to a plateau which appears to provide the norm against which annual variations can be measured. Presumably some credit for this (if it is a matter for congratulation) can be taken by the ombudsmen themselves on the grounds that their investigations and the mere existence of the office provide a spur for agencies of the Government to improve their own administrative procedures. In New Zealand, the availability of review and appeal procedures in areas such as social welfare, accident compensation and inland revenue, offer effective avenues of recourse for the citizen which now make it unnecessary in many cases to resort to the services of the ombudsman. The institution of a Human Rights Commission and other agencies, such as Small Claims Tribunals, presumably has the effect of diverting a number of complaints which, whether or not they would have been within the jurisdiction of the ombudsman, would have come to him in the past simply because he was the only complaint handling agency available. But this is little more than speculation which provides no reliable basis for assessing the effectiveness of the ombudsman's functions.

One thing is clear. Measured by the degree of public support which it enjoys and which in turn determines the support it receives from successive governments, the office of ombudsman continues to serve a useful purpose. There are, equally clearly, limits to its effectiveness and the ability to recognise those limits is the hallmark of a successful ombudsman. Whether the office has attained its full effectiveness in New Zealand is an open question. It was tested in 1975 by a revision of the Ombudsmen Act which extended the jurisdiction to include local authorities. The experience of the past six years has shown that to be a well judged advance. It is about to be tested again when, as is generally supposed, legislation providing for greater access to official information[6] is enacted and in the process enlarges the ombudsman's involvement in this field. Other facets of the experience of the office suggest that while it can operate effectively in some aspects of employer/employee relationship within the government sector that does not

5 Sir Ronald Davison, C.J. "The Courts and the Ombudsman". Paper presented to the 5th Conference of Australasian and Pacific Ombudsmen, supra n.4, 30.

6 Official Information Bill 1981. See the article by D. J. Shelton in this issue.

extend to intervention in industrial disputes. Moreover, my term as the first Privacy Commissioner[7] pointed up the undesirability of an ombudsman becoming involved in any aspect of the administrative process. Again, there are pitfalls in plenty for the ombudsman who allows himself to be tempted into offering opinions on questions which are matters of professional judgment or technical expertise. That area is much narrower than most technical and professional experts like to think, but the ombudsman who strays from an examination of the administrative decisions and omissions, which usually surround an expert judgment, into expressions of opinion on the merits of that judgment itself is liable to find himself in difficulties. This does not mean that he is not entitled and indeed required to insist that any cloak of so-called expertise thrown over an investigation in the hope of diverting his attention from an associated administrative error should be pushed aside and the problem analysed to allow him to form an opinion on those matters which are properly within his jurisdiction.

II. THE OMBUDSMAN AND THE COURTS

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 Act itself, while setting out broad parameters for his guidance, does not relieve him of the obligation to make this judgment in many instances.

The basic principle which distinguishes the ombudsman's approach to his function from that of the courts finds expression in section 22 of the Act which lays out the kind of opinion he is called upon to form at the end of his investigation. He is not confined to determining whether the decision, recommendation or act which he is investigating appears to have been contrary to law but also (inter alia) whether it was unreasonable, unjust, oppressive, improperly discriminatory or wrong; and where the issue is one involving the exercise of an administrative discretion he must also consider whether the discretionary power was exercised for an improper purpose or on irrelevant grounds or by taking into account irrelevant considerations. In short, he ranges more widely over the possible causes of injustice than the courts in many instances would be prepared to go.[8]

Section 13(7) imposes some limitations on him, stipulating that an ombudsman is not authorised to investigate:

> 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 . . . .

But that restriction is qualified by a proviso that an investigation may nevertheless

7 Under the Wanganui Computer Centre Act 1976.

8 See the paper by D. J. Shelton on "The Courts and the Ombudsman" presented to the 5th Conference of Australasian and Pacific Ombudsmen, supra n.4.

be carried out notwithstanding that the complainant has any such right, if by reason of special circumstances it would be unreasonable to expect him to resort to it.[9]

Here the ombudsman is entirely on his own in deciding what constitutes "special circumstances".[10] The Act offers no help. Do they include, for example, the likely cost of exercising rights of appeal or the prospect of long delay in getting the matter before the courts? Those questions may be easier to answer in a particular case than some others. Where does the ombudsman stand if he invites the complainant to use the services of his office or succumbs to the complainant's own urging on that score and the complaint is not sustained, particularly if in the meantime the complainant has run out of time for the exercise of his review or appeal rights?

Again, if the complaint is sustained and the ombudsman's recommendation for a remedy is not accepted by the agency concerned, perhaps for some purely political reason or because in its view a significant point of law is involved on which the courts should be asked to rule, is the complainant likely to feel that he has been misled?

These are difficult judgments which naturally inspire caution in any ombudsman who is considering whether to invoke the proviso to section 13(7) and take up a complaint and, as I shall suggest later in this article, they are not without relevance to the ombudsman's relations with the legal profession.

Much the same questions arise for an ombudsman in deciding whether or not to exercise the discretion conferred on him by section 17 of the Act to refuse to investigate a complaint if —

> it appears to him that under the law of existing administrative practice there is an adequate remedy or right of appeal . . . to which it would have been reasonable for the complainant to resort.[11]

A particular area where this question arises relates to complaints of the unjustified use of force by police in the course of making an arrest. Not infrequently such complaints are made by persons who have subsequently been charged with criminal offences and the ombudsman is called upon to decide whether the court hearing offers an adequate means through which the complainant can air his complaint and seek a remedy. In many instances, but not all, he may have the opportunity in court, either personally or through his solicitor, to present his allegation and to test by cross-examination the validity of the police evidence. If he decides or is advised to plead guilty, the complaint presumably cannot be advanced except as a plea in mitigation of the seriousness of his offence. If, on the other hand, he pleads not guilty, his solicitor may advise him that to raise the issue would not be in his best interests. In either event, the judge may well decide that it is an ancillary question on which he is not called to take a decision

9 See also the article by W. G. F. Napier in this issue.

10 See also the paper by Professor J. E. Richardson, Australian Commonwealth Ombudsman on "Availability of Alternative Remedies — Commonwealth Ombudsman Act 1976, s.6(3)", presented to the 5th Conference of Australasian and Pacific Ombudsmen, supra n.4.

11 See also the article by Matheson in this issue.

and which could not have any direct bearing on the complainant's guilt or innocence or on the penalty to be imposed if he is found guilty.

A survey of the investigations which I have undertaken, assisted by informal discussions with District Court Judges, has led me to conclude that in many instances it is not appropriate for me to exercise the discretion available to me but to take up the complaint with the police as an issue separable from the court proceedings.

III. THE OMBUDSMAN AND THE LEGAL PROFESSION

I address myself now to the relationship between the ombudsman and the legal profession.

Whether or not the establishment of the Office of Ombudsman was indeed a major constitutional development, its early years were characterised by a monumental ignorance of its purpose and function and a lofty disdain of its existence on the part of all but a few members of the legal profession. That situation has now changed, possibly in harmony with a thesis I have often advanced, that any new idea of significance requires some twenty five years to implant itself in the New Zealand consciousness. Sir Henry Maine said[12]

> Social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them but it has a perpetual tendency to reopen. Law is stable; these societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.

It would be claiming a great deal to assert that the Office of Ombudsman has closed the gap between the law and the social necessities of our time but it would not perhaps be too immodest to suggest that it is playing a part in that process. To that extent it is entitled to look for an increasing degree of understanding and co-operation from both the courts and members of the legal profession.

For the latter, it requires an acknowledgement of the differences between the adversarial approach appropriate to judicial proceedings and the investigatory processes of the ombudsman. He is not an advocate for the complainant; his function is to hold the balance between the complainant and the government agency against which the complaint is directed. To do so he must maintain the confidence of both in his impartiality. He requires from government agencies full disclosure of all facts and files which in his opinion, rather than in the opinion of the agency, are relevant to his investigation. The same obligation rests on the complainant and on his solicitor to present all the facts and not merely those thought to be favourable to the client. In one case, which is fortunately unique in my own experience, it was necessary to discontinue an investigation when it was revealed that the solicitors acting for the complainant had withheld information which would have been sufficient to show that the complaint had not been made in good faith.[13]

12 H. S. Maine *Ancient Law* (New ed., John Murray, London, 1930) 31.
13 Case No. W13821, *1979 Annual Report* 40-41.

There is no requirement that a complainant should approach the office through a solicitor. The majority of complaints come directly from the persons affected but in recent years an increasing number are presented by lawyers. That can have demonstrable advantages, particularly in the early stages, in giving precision to the nature of the complaint, the more so if the complainant does not have ready access to one of the Ombudsman's Offices in Auckland, Wellington or Christchurch. It is of course an advantage to both parties if the solicitor has taken the trouble to read the Ombudsmen Act and inform himself of the ombudsman's jurisdiction before presenting the complaint.

Once the investigation is under way, it is often more satisfactory to both parties if the ombudsman is able to deal directly with the complainant, provided he and his solicitor agree to that course. If on the other hand the complainant prefers to have his solicitor handle the matter throughout, it is important that the solicitor should pass on to his client all questions and comments received from the ombudsman. Not infrequently cases arise in which it is difficult for the ombudsman to satisfy himself that communications from a solicitor have been sent with the full knowledge and on the instructions of a client. This can only delay and inhibit the effectiveness of an investigation.

There is in my opinion no objection of principle to solicitors obtaining through the Office of the Ombudsman information which may be relevant to court proceedings either under way or contemplated provided:

(a) that it is not simply a device to circumvent the normal processes of discovery; and

(b) that proper regard is paid to section 19(6) of the Ombudsmen Act which severely limits the direct use in court proceedings of information coming to the knowledge of the ombudsman in the course of an investigation.

The exact significance of section 19(6) is not at all clear. There is no recorded judgment of which I am aware where a ruling has been made on the point. It may in any event need to be looked at more closely in the light of any legislation giving freer access to official information.

Perhaps the most significant area in which members of the legal profession can be of help both to the ombudsman and to their complainant clients is in relation to the exercise of the ombudsman's discretion under sections 13(7) and 17(1)(a) of the Act. I have dealt with those issues in some detail mainly to point up the difficulties which the ombudsman confronts in deciding whether to exercise one of those discretions in any particular case. It is an area in which the knowledge and experience of members of the legal profession in forming an opinion as to the course which will best serve the interests of their complainant clients can be invaluable to them and to the ombudsman.

On the other side of the coin, a special relationship exists between the ombudsman and the Crown's legal advisers. Section 13(7)(c) of the Ombudsmen Act excludes from the ombudsman's investigatory jurisdiction "any decision, recommendation, act or omission of any person acting as legal adviser to the Crown . . . or acting as counsel for the Crown in relation to any proceedings".

The precise significance of that exclusion is not apparent nor is it necessarily given the same interpretation by the ombudsman and the Solicitor-General but like so many other jurisdictional issues, it is handled on the basis of good sense in any dealings between the two. The intention of those who drafted the original Act was to exclude the possibility that a minister of the Crown or a department, if called upon to decide whether to implement a recommendation of the Ombudsman, would be confronted with two opposing interpretations of the relevant law. That was an entirely commendable objective but whether section 13(7)(c) achieves it, or indeed whether any such exclusion is necessary, are debatable matters. It is difficult to contemplate a situation in which an ombudsman could set out to "investigate" an interpretation of the law given by the Solicitor-General, presumably with the objective of forming an opinion as to whether it was correct. That would be entirely outside his competence; it is a matter for the courts. By the same token, however, the ombudsman cannot be restrained from forming his own view as to the correct interpretation of the law which may be different from that of the Crown Law Office. In such a situation, which is not uncommon, the practice is for the ombudsman, before formulating his recommendation, to invite the Crown Law Office to consider his interpretation of the law against its own opinion to see whether it is of sufficient weight to require some modification of the Crown Law Office view. If not, the department concerned cannot be criticised for acting in conformity with the opinion of the Crown's legal advisers.

In practice, the function of the Crown Law Office goes well beyond the tendering of advice to the Crown on purely legal matters and in those circumstances different considerations apply.

The decision of the Law Faculty of Victoria University to devote an issue of its Law Review to a survey of the operations of the ombudsman provides my colleague and me with a welcome opportunity, following the Ombudsmen's Conference last year, to contribute to a greater understanding of our role and the relationship of the office with the judiciary and the legal profession. They are well summarised by Professor H. W. R. Wade of the University of Oxford in a paper entitled "The Ombudsman: the Citizen's Defender":[14]

> The whole conception of the office is of great importance for lawyers, because it takes up the business of controlling administrative malpractice at the point where the law leaves off. The limits of what the law can or should do may thus be affected by the powers of the Ombudsman . . . .
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> The Ombudsman may therefore be welcomed as the ally of an independent judiciary and the legal profession, who can supplement the rule of law with the rule of administrative good sense and even of generosity. He carries into further fields the mission of setting standards of administrative conduct on which the Courts have for so long been engaged, for example in developing the principles of natural justice.

14 H. W R. Wade, "The Ombudsman: the Citizen's Defender" in *Law and the Commonwealth*. Occasional papers for the 4th Commonwealth Law Conference, New Delhi, 1971, pp. 4-5.