
VISITING EXPERTS

THE ROLE OF OMBUDSMAN AND ITS CONNECTION WITH THE CONTROL OF CORRUPTION

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I. INTRODUCTION

New Zealand is a country which applies a number of tools of modern governance in its operation. New Zealand's population is small (four million) and its Parliament comprises a single House of Representatives without any written constitution. In its 160 year modern history it has followed a British Westminster kind of government, but in the last 50 years has undertaken a number of adaptations to that. For example, ten years ago, it changed to a mixed member proportional representation system of elections, similar to Germany - where there are some members elected by citizens and others appointed by political parties. Some 40 years ago in 1962 it became the first English speaking country to adopt Ombudsman legislation calling for an independent officer of Parliament being able to inquire into citizens' complaints against the Government bureaucracy. Twenty years later in 1982 New Zealand enacted Freedom of Information legislation which now covers Government Ministries and Departments and State-owned Enterprises as well as Local Government entities. In 2000 New Zealand passed "Whistle Blowing" legislation to enable people to make disclosures about serious wrongdoing without becoming endangered personally, in terms of their employment or otherwise.

So far as government administration is concerned, New Zealand has adopted modern means of public sector management with a number of mechanisms available for redress of wrongs - the courts, recourse to Ombudsmen for maladministration, freedom of information, and otherwise. New Zealand rates consistently as among the least corrupt countries in the world. Each of the mechanisms referred to has relevance in combating corruption.

II. DEFINITION OF TERM "OMBUDSMAN"

The term "Ombudsman" is Scandinavian, meaning something in the nature of "entrusted person" or "grievance representative". The part word "man" is taken directly from the Swedish (the old Norse word was "umbodhsmadr") and does not connote any necessity that the holder be of the male gender. Indeed, if one was to survey the present Ombudsman community worldwide, it would be seen that there are many women Ombudsmen. My tracing of the office will start with the Scandinavian "grievance person" since this model is said to set a standard. I do acknowledge, however, that there are several precedents from Asian (and other) settings of people, in former times, undertaking office to provide relief and redress to citizens adversely affected by government action.

In earlier times it is also recorded that the Romans installed an officer called the "tribune" to protect the interests and rights of the plebeians from the patricians. There are also writings in both China and India, which suggest that three thousand and more years ago, special officials were designated to function in the manner of Ombudsmen. In China during the Yu and Sun dynasties it was the duty of the incumbent, who was called the "control yuan", to "report the voice of the people to the Emperor and to announce the Emperor's decrees to the people". In India today there are Ombudsmen appointed in twelve

* New Zealand Ombudsman.

of the Indian states, though not at Federal level. The term for them is “Lokayukta”, an ancient word revived so as to make it meaningful in a local sense in that country.

In 1809 Sweden appointed an official entitled the “justitieombudsman” to enquire into actions of the government administration, including the military, and the courts. The establishment of this office was said to be a reaction to state absolutism and an assertion of individual rights and dignities of the citizen. Nearly 100 years later, Finland appointed a similar person and Denmark followed likewise in 1954.

A. Essential Constituents of the Term “Ombudsman”

The Ombudsman Committee of the International Bar Association has described the office thus:

“An Office provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent, high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against Government agencies, officials and employees, or who acts on [his] own motion, and who has the power to investigate, recommend corrective action, and issue reports.”¹

This contemporary definition of the term “Ombudsman” is not agreed to universally, but it does serve as a starting point in defining the role.

B. Development of Concept

In the 1950s there was considerable discussion in many countries outside Scandinavia about establishing a process to examine things undertaken by governmental administration. This was to be alongside and beyond the formal means of redress available through the courts or Parliament, or a free Press. The welfare state models in many countries had produced very large government bureaucracies. There was concern in many quarters that a simple independent means of redress needed to be provided for the individual citizen. The matter was neatly put in the following way by Professor D C Rowat in an article suggesting an Ombudsman Institution in Canada² :-

“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 the welfare state, thousands of administrative decisions are made each year by governments or their agencies, many of them by lowly officials; and if some of these decisions are arbitrary or unjustified, there is no easy way for the ordinary citizen to gain redress.”

In that country, and elsewhere, it was simply no longer possible to say that every person adversely affected in an unfair manner by action of a governmental official, would have the resources or means to engage a lawyer. Court procedures could be both lengthy and expensive. The right of a person to consult their individual Parliamentary representative, write to the newspaper, organise a petition or raise a deputation to see a Government Official or Minister, may have been no more effective. In England in the 1950s, a committee of the International Commission of Jurists, chaired by Lord Whyatt (a former Chief Justice of Hong Kong) had suggested the establishment for the United Kingdom of some kind of parliamentary commissioner.

¹ International Bar Association.

² DC Rowat, “An Ombudsman Scheme for Canada” journal of Economic and Political Science 1962 Vol. 28 No. 4 p. 543.

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In New Zealand, a similar debate was under way in a number of quarters - political, academic and among those with the task of formulating policy. The debate quickened after the abolition of the Upper House of Parliament in 1950. Consideration was being given to such things as an Administrative Court. New Zealand observed with interest the establishment in 1954 of an Ombudsman responsible to the Danish Parliament or "Folketing".

In 1962, New Zealand became the first English speaking Commonwealth (and indeed common-law) country to enact this kind of legislation, although there were a number of other jurisdictions in which Bills had been introduced, or where the matter had been canvassed. The succeeding 35 years have seen Ombudsmen installed in a great many countries. The international Ombudsman community now numbers over 200 in about 100 countries or jurisdictions. As may be known, the office has been created at both federal and provincial levels and it functions in a variety of constitutional settings.

C. Constitutional Position of the Ombudsman

To map the position of New Zealand's Ombudsmen in a constitutional sense, the New Zealand Ombudsmen are Officers of Parliament. They are appointed by the Governor-General on the recommendation of Parliament. Although it is not provided for in the law, there is a long standing convention that all Members of Parliament (that is from all parties in the House) must agree unanimously to the appointment. As a further mark of independence funding for the office is provided directly through Parliament. The Speaker of the House of Representatives is the person through whom the Ombudsmen are accountable to Parliament. This independent accountability and financing arrangement ensures that the office has complete independence and cannot be pressured by any government department or Minister of the Crown.

When the office was first established, the Ombudsman's jurisdiction was limited to the investigation of complaints from citizens about central government departments and organisations. In 1968 the jurisdiction was extended to education and hospital boards. In 1975, the legislation was amended and consolidated into the Ombudsmen Act 1975. Under that Act, with effect from 1 April 1976, the jurisdiction of the Ombudsmen was extended to territorial local authorities (city, county and borough councils) as well as to a variety of statutory boards (for example, catchment boards and electric power boards). Additional offices to that in the capital city were established. The Ombudsmen Act 1975 also contained provision for the appointment of more than one Ombudsman, one of whom would be appointed Chief Ombudsman, with responsibility for the overall administration of the office and allocation of the work as between the Ombudsmen.

Professor Philip Joseph, in his textbook "Constitutional and Administrative Law in New Zealand" 2 ed 2002 Thomson has described the Ombudsman role as being that of a "generalist" with a disinclination to intervene in specialist matters involving professional departmental judgment. When a policy is found wanting, an Ombudsman may recommend departmental reconsideration or that a specific alternative policy be adopted. But as he points out, Ombudsmen are, in general reluctant to "second-guess" actual departmental decisions.

A descriptive passage from "Bridled Power" Oxford University Press 2 ed 1997 Oxford University Press - authors Sir Geoffrey Palmer and Dr Matthew Palmer (the former a Prime Minister of New Zealand in the late 1980s and the latter a Law Professor) sets out the following regarding Ombudsman powers:

“The Ombudsmen may reach the conclusion that a decision was unfair on a number of grounds. It could be:

- contrary to law;
- unreasonable, unjust, oppressive, or improperly discriminatory;
- made under an act, regulation or by-law that was unreasonable, unjust, oppressive or discriminatory;
- based on mistake of fact or law;
- made in the exercise of a discretionary power used for improper or irrelevant purpose;
- simply ‘wrong’.

Where the Ombudsmen reach an unfavourable view of a decision they can say that:

- the matter should be further considered by the appropriate authority;
- the omission should be rectified;
- the decision should be cancelled or varied;
- the practice on which the decision was based should be altered;
- the act, regulation or by-law on which the decision was based should be reconsidered;
- reasons should have been given for the decision; and
- other steps should be taken.”

D. Jurisdiction of the Ombudsmen

When describing the jurisdiction conferred upon the individual Ombudsman, the term “Ombudsman” may itself be misleading in a comparative sense. Different countries give to the Ombudsman different functions and procedures. For example, in many jurisdictions, including the United Kingdom, the citizen may not approach the Ombudsman directly. In Australia and New Zealand however direct contact is the norm. In the United Kingdom and Northern Ireland, a citizen approaches the local Member of Parliament, who in turn makes a case to the Ombudsman. In some jurisdictions, the Ombudsman is responsible for redressing breaches of human rights. This is so in several Latin American countries such as Mexico, whereas in New Zealand that function has been undertaken by a separate Human Rights Commission. In a number of other countries (for example, Ghana and Papua New Guinea), the Ombudsman may be charged with a specific responsibility of inquiring into allegations of corruption.

Differences also arise regarding appointment and tenure. A New Zealand Ombudsman is appointed by Parliament and receives funding from that source, but in other jurisdictions the appointment may be by the erstwhile governing party and funding may become dependent upon a determination of the Government of the day. In unicameral States such as New Zealand, the Ombudsmen may be responsible to Parliament, and in bicameral States such as the United Kingdom, they may be responsible to the Lower House of Parliament (for example to the House of Commons in the United Kingdom).

From the classic state-Ombudsman role as just described, there have also developed, in many places, different kinds of “Ombudsmen”, some of whom use similar investigative methodology, but whose role may be limited by circumstances or area. If the essence of the Ombudsman role is defending citizens against the unfair administrative actions of the State, Human Rights Commissioners can be seen as undertaking a kind of Ombudsman role, but are restricted to investigating alleged breaches of human rights. There are also specialist offices such as Commissioners for Children, Health and Disability and Police Complaints Authorities who may be undertaking Ombudsman-like work, but whose work is confined within a specific area.

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The role of the Ombudsman, as a person who investigates complaints, has also led to the development of “industry Ombudsmen”, for example in banking and insurance. An Ombudsman for Northern Ireland in the 1990s, Dr Maurice Hayes, observed that the Ombudsman concept is “one of the few to have passed from the public sector to the private sector at a time when the tide of ideas is flowing in the opposite direction”. There has also developed, the notion of “organisation Ombudsmen”. In some countries, such as the United States, if one has a dispute with a department store, university or a local authority, the person designated to deal with that complaint, may be termed an “Ombudsman”.

Even that brief summary is not complete, because there may be other anomalies. In Australia, for example, some Ombudsmen may deal with complaints about behaviour of the Police and others not because of there being in place a separate stand-alone Police Complaints Authority. In Sweden and Finland, complaints about the conduct of the courts are dealt with by Ombudsmen, whilst in most countries where there is a separation of powers - legislative, executive and judicial - the Ombudsman has jurisdiction only over actions of the executive.

Owing to the threat of proliferation in New Zealand, it was thought important that the term “Ombudsman” should not be seen to lose its currency. Legislation was passed in 1993 restricting use of the term “Ombudsman” unless the particular industry which uses the term gains the approval of the erstwhile Chief Ombudsman and is able to guarantee certain kinds of delivery of service.

E. Relationship of Ombudsman Role to Courts and Ordinary Legal Processes

By undertaking a task which affects rights and involves examinations of organisations' powers and responsibilities, a question arises as to whether the Ombudsman office itself should be subject to judicial scrutiny if its investigation and recommendation breaches appropriate procedural or jurisdictional limits. In most jurisdictions the answer is “yes”. This susceptibility of the Ombudsmen to judicial review, which some would say is a discipline of its own, has led to a number of contemporary statements about the nature and efficacy of the role. The following examples suffice.

In 1984 in Canada, Justice Dickson delivering the unanimous decision of the Supreme Court of Canada in *British Columbia Development Corporation and another v Friedmann* [1984] 2RCS 447 at 460,463. There he said:

“The limitations of Courts are also well known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases...”

Read as a whole, the Ombudsmen Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad purposive interpretation consistent with the unique role the Ombudsman is intended to fulfil.”

The judgment is also authority on the meaning and application of the phrase “matter of administration”. This phrase frames the Ombudsman's area of jurisdiction, is to be construed widely “encompassing everything done by governmental authorities in the implementation of government policy”. The Court held that only the activities of the legislature and the Courts should be excluded from the Ombudsman's scrutiny.

The role of the Ombudsman in that country was also challenged in *Re Ombudsman Act*, decided in 1970 (1970) 72 WWR 176. The Chief Justice of Alberta stated:

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

In Australia, the judgment of the Federal Court *Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 134 ALR 238 undertook a thorough review of the actions of the Ombudsman and contains a number of statements distinguishing between the judicial function and the Ombudsman function. The former was for making determinations on identified issues, the latter for “investigating, reporting and making suggestions”. Several other Australian authorities have also delineated the Ombudsman role. In *Ainsworth v Ombudsman* (1988) 17 NSWLR 276 at 283 Justice Enderby of the New South Wales Supreme Court said:

“It has always been considered that the efficacy of the [the Ombudsman] Office and function comes largely from the light [he] is able to throw on areas where there is alleged to be administrative injustice and where other remedies of the Courts and the good offices of Members of Parliament have proved inadequate. Goodwill is essential. When intervention by an Ombudsman is successful, remedial steps are taken, not because orders are made that they may be taken, but because the weight of its findings and the prestige of the office demands that they be taken.”

In *Botany Council v The Ombudsman* (1995) 37 NSWLR 357 at 363, the then President of the New South Wales Court of Appeal, Justice Michael Kirby also traversed the difference between judicial and Ombudsman function:

“[The] Ombudsman lacks the powers to make orders as a Court may do. But the sanction of the provision of a report to the responsible minister and to Parliament and the requirement upon the Minister to respond promptly to any such report also affords significant sanctions. These have proved effective in all jurisdictions in which the Office of the Ombudsman has been created, to obtain reconsideration of administrative action found by the Ombudsman to be unlawful, unreasonable, mistaken or wrong...”

The Ombudsman’s authority has also been challenged in Courts in other countries, including New Zealand, although principally in recent times in regard to the freedom of information legislation jurisdiction.

F. Official Information Act Role of Ombudsmen

The Official Information Act was added to the Ombudsman role in 1982. This second aspect is responsible for much of the comment about the role in contemporary politics and in contemporary Press coverage. Often one sees in the newspaper or in electronic media the words “obtained under the Official Information Act”. This is a shorthand reference to a number of procedures which might have been actioned before publication has taken place.

New Zealand is one of many countries where Parliament has determined that there should in general be freedom of access to information so that people can play an informed role in the democracy. This

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means, from a legal standpoint, that information is to be made available unless there is some withholding ground able to be invoked. It is the Ombudsmen who determine whether the withholding tests have been met. The position was different prior to the Official Information Act, when the Official Secrets Act 1951 was in force. This statute was modelled on United Kingdom legislation under which it was said, either literally or notionally, that governmental or official information was “the property of the Queen and her advisers”.

The drawbacks in this situation led to discussion in academic and political circles that there needed to be a better way. In the civil service itself, there was a prevailing climate of change. A 1964 Circular from the State Services Commission to Permanent Heads of Government departments said that “information should be withheld only if there is a good reason”. An Ombudsman investigation into the Security Intelligence Service in 1976 highlighted the need for information access. In 1980, a committee of senior civil servants chaired by a University academic produced a well-regarded report in favour of a more open approach with regard to information. This was the Danks Committee Report - Committee on Official Information “Towards Open Government” Vol 1 General Report December 1980, which the authors of “Bridled Power” (mentioned and cited above) described as follows:

“The Danks Committee report, from which the 1982 legislation sprang, was a document of high quality and considerable liberality. Titled Towards Open Government, the report came in two parts. The reasons the committee articulated for more open access to official information could be summarised as follows:

- a better informed public can better participate in the democratic process;
- secrecy is an important impediment to accountability when Parliament, press, and public cannot properly follow and scrutinise the actions of government;
- public servants make many important decisions that affect people and the permanent administration should also be accountable through greater flows of information about what they are doing;
- better information flows will produce more effective government and help towards the more flexible development of policy. With more information available, it is easier to prepare for change;
- if more information is available, public co-operation with government will be enhanced.”

The Danks Committee concluded:

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

To the surprise of some, legislation incorporating the committee’s recommendations was passed quickly and came into force in 1983. The Official Information Act provides for people to have access to official and personal information held by Ministers of the Crown, government departments and local authorities. If a particular request for information to one of these organisations is declined, the requester has the right to ask an Ombudsman to investigate and review the decision.

The only reasons for refusing requests for information are those as set out in the Act. Upon taking up a complaint, an Ombudsman must review the information at issue and assess it against the withholding provisions set out. Some withholding grounds are conclusive: for example prejudice to the security or defence of New Zealand, or serious damage to the New Zealand economy, or prejudice to maintenance of

the law. The Ombudsman sights the information to ascertain that the claim may be made and then makes a recommendation. Other withholding grounds are defensible by the public interest in freedom of information. These include protection of trade secrets, or protection of legal professional privilege. The Ombudsman sights the information and undertakes a balancing test, expressing the public interest in the particular situation and making a recommendation. Those recommendations are then considered by the withholding organisation and acted upon. There is a potential right of veto of an Ombudsman's recommendation by the Cabinet. There has however been no occasion of use of the veto to date, which is a measure of the efficacy of the Ombudsman process. The Ombudsmen must also consider in each case whether the right to preserve personal privacy constitutes a factor in deciding if information should be protected or released. The Ombudsman must then determine whether or not the decision to withhold the information was made in accordance with the provisions of the official information legislation.

At the conclusion of an investigation, an Ombudsman may make a recommendation for release of the information at issue. In certain circumstances, this recommendation imposes a public duty upon the organisation concerned to release the information. When undertaking investigations, the Ombudsmen always keep in mind that the purposes of the legislation:

- enable citizens to effectively participate in the making and administration of laws and policies;
- promote the accountability of Ministers and officials;
- provide for proper access by each person to information about that person; and
- protect official information to the extent consistent with the public interest in the preservation of personal privacy.

In recent years the Ombudsmen have considered requests for:

- the level of salaries paid to chief executives and other Council officers;
- the redundancy packages given to officers whose positions have been terminated;
- discussion papers presented to Ministers or committees for consideration;
- detailed financial information;
- employment related information, such as references provided in confidence;
- information about building permits and planning applications;
- the identities of informants.

It can be seen that there is a wide range of requests. There were approximately 1149 official information request cases dealt with by the Ombudsmen's Office during this past year to June 2003. Several well known cases have involved the Official Information Act including *Police v Ombudsman* [1988] 1 NZLR 385, *TVNZ v Ombudsman* [1992] 1 NZLR 106, *Queenstown-Lakes District Council v Wyatt Co NZ Ltd* [1991] 2 NZLR 180 and *Attorney General v Davidson* [1994] 3 NZLR 143 and others, all of which in some way have referred to the constitutional kind of situation now pertaining to freedom of information in New Zealand.

III. DEFINITION OF CORRUPTION

The question of definition of corruption will clearly be covered in many other contributions to this conference and in more detail than here. From a New Zealand perspective the head of its civil service, the State Services Commissioner, Michael Wintringham, has said ³ that in his view "Corruption is not inefficiency, poor management or even theft as a servant or fraud but rather the use of public office for personal gain, usually involving bribery with at least two people involved, a buyer and a seller." This kind of definition is orthodox and can be compared readily with other contemporary sources. The Asian Development Bank Anticorruption Policy says it is "the misuse of public or private office for personal gain".⁴ The Oxford Unabridged Dictionary has corruption as "the perversion or destruction of integrity in the discharge of public duties by bribery or favour". Webster's Collegiate Dictionary on the other hand says corruption is "inducement to wrong by improper or unlawful means (as bribery)". In some contexts it is considered important and useful to distinguish between graft when the illicit act is proposed by the official and where corruption (so called) is limited to when the illicit act is proposed by the malefactor citizen. The OECD has it in a 1996 publication as follows "In examining conduct it is useful to make a distinction between behaviours: illegal, i.e. that is against the law which covers criminal offences to misdemeanours; unethical, i.e. against ethical guidelines, principles and values and inappropriate i.e. against normal convention and practice. Corruption may fall under any of these headings. Its defining characteristics are the misuse of public office roles or resources for private benefit, material or otherwise".⁵

A. Challenges Wrought by Presence of Corruption - [General]

At all events, the most notorious kinds of corruption can easily be recognised and described. So whether the corruption be of large or small scale it is the questions of identification and eradication that are important. In the context of India, then President Narayanan said in 1997 "Corruption is one of the greatest challenges now confronting [the country]".⁶ In another Asia Pacific state, Papua New Guinea, Simon Pentanu Chief Ombudsman of that country in a speech called "Dealing with Corruption" given in Canberra Australia in 1998, but published in June 2000, said "... the answer to corruption is becoming clear and plain. It is by and large about leadership. Honest creative competent leadership throughout all arms of government. This type of leadership is all about self-empowerment, which is the only viable antidote. ... We have to salvage ourselves and our ship of state".⁷

It can thus be stated that agreement will be reached without difficulty, that corruption is something which needs attention, even where in New Zealand for example, the number of cases may be small. Corruption is not confined to any country or continent because a small amount of reflection will bring to mind for example the Matrix - Churchill or "Cash for Questions" scandals of recent times in the United Kingdom, the Carrefours du Developpement scandal in France, each of the Flick, Barschell and Hesse controversies in Germany and either the Watergate or Iran-Contra affairs in the United States.

³ New Zealand State Services Commission Annual Report 2000.

⁴ Asian Development Bank Anti-Corruption Policy April 1998 p.1.

⁵ Ethics in the Public Service, Current Issues and practice OECD 1996.

⁶ International Herald Tribune 13 August 1997.

⁷ Papua New Guinea Ombudsman Commission 2000.

B. Challenges Wrought By Corruption [New Zealand]

The New Zealand State Services Commissioner put the matter of challenge in the following way. "If corruption is so rare in the New Zealand State sector, why should we be concerned about a handful of cases. There are three reasons. First ... such cases undermine citizens' confidence in public institutions on a scale disproportionate to the offence. In a country that relies largely on voluntary compliance with tax laws, benefit administration and range of licensing and registration arrangements, citizens' compliance is directly related to their trust in the way in which their personal information will be held, the honesty of the officials administering the law and citizens' perception that all are treated equitably. This public confidence is fundamental to a successful civil society. Secondly our [New Zealand's] admirable track record in these matters cannot be taken for granted. There are plenty of overseas examples to demonstrate that once it becomes established, corruption is difficult and costly to eliminate. Openness - that is a willingness to acknowledge the risks and to prosecute those who transgress - is fundamental to minimising such risks. Finally, a State sector and private sector free of corruption contribute to a fair society and a well-performing economy. Neither equity nor efficiency are served by corruption. In recent years international financial institutions which were once tolerant of, or at least philosophical about, a degree of corruption in countries where they were funding development programmes, have brought the eradication of corrupt practices closer to the top of their agenda".⁸

It may therefore be of interest to describe what may be termed the chemistry of the New Zealand public sector and the very limited amount of corruption that has been found to exist and to likewise examine some of the mechanisms that ensure, for the moment that it is kept to a minimum.

IV. CONSTITUENT ELEMENTS OF NEW ZEALAND'S PUBLIC SECTOR

The New Zealand Public Service is comprised of 38 Government departments plus a number of Crown Entities and State Owned Enterprises. As at 30 June 2003, the number of staff employed calculated on a full-time equivalent basis was just short of 35,000. Latest estimates put the population of the country at just over 4.0 million, there being two major ethnicities, European and Maori, the latter being 15%. To this should be added a smaller number of other groupings, people of Pacific Island descent comprising 6% and those of Asian origin 5%. In other words, New Zealand can be described as a predominantly European but significantly multi-cultural country where in day to day living there is considerable evidence of Maori and Polynesian themes. Something of that same ethnic mixture comes to be represented in those employed by the State.

During the past 20 years the New Zealand public sector has been the subject of widespread reform as what is now known as "New Public Management" has come to be applied. This has had a number of constituent elements. Laws governing labour organisations and the negotiating environment were passed. State Owned Enterprises undertaking operations on a commercially viable basis were established. A number of activities more suited to the private sector - such as railways, insurance, telecommunications and banking were sold. A State Sector Act restructured public sector management and aligned the public sector with private sector employment regulations. Employment came to be undertaken by means of contracts renewable after specific terms rather than employment being on a long-term and sometimes lifetime basis. The foregoing and other items have had considerable effects on New Zealand life, a major one being reduction in the number of public sector employees from more than 90,000 to 30,000 in that 15-year period.

⁸ New Zealand State Services Commission Annual Report 2000.

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As to employment, it can be observed that along with countries of a similar kind, namely Australia and Canada for example, employment patterns have been transformed during the 20th Century. In former times, whereas there were emphases upon manual work and bread winning being the role of the male waged person. These have been replaced by a number of more complex patterns - the involvement of both men and women and different ethnic groups, along with an expanding service sector, increased self-employment, part-time employment and job sharing. This has created, in the public sector as well, more demand for the highly skilled, with increased waged dispersion based on skill levels and greater variations in hours and conditions. In accordance with relatively new employment legislation, New Zealanders, by and large (inclusive of working in the public sector), enter individual contracts of employment with their department or Ministry. This is so at all levels with the Chief Executive very often having a specific contract with the responsible Minister. These contracts provide for particular levels of performance that are expected. It can be stated that, in the context of general employment, people in the State sector are well paid in New Zealand terms. Put in another way, there is no great disparity between ordinary wages earned in the public sector with ordinary wages earned by employees in the regular business community.

The next relevant factor in describing the New Zealand community relates to general levels of education. Without going into detail, New Zealand can be described as a country with a high degree of general literacy where there is an emphasis upon learning up to tertiary level. Education is compulsory to the end of secondary school and, whilst most students attend State funded schools, there are a number of other choices for parents and students and many opportunities for community education and advanced education thereafter.

With a tradition born of a colonial past, which emphasised things such as self-help and an egalitarian approach, New Zealanders can be said to dislike either excesses or abuses of power, which in the context of a small society they are able to remonstrate, when necessary. To describe the New Zealand community in a sentence, the elements of a relatively small but reasonably well-educated and egalitarian minded community emerges, which dislikes unfairness and which will not tolerate corruption in the way adverted to by the New Zealand State Services Commissioner above. All of these things have a bearing in keeping the amount and degree of corruption at low levels.

A. Constituent Elements Available to Combat Corruption

As indicated above in the definition of corruption, many corrupt actions will be illegal in the sense of breach of the criminal law. The New Zealand Police have responsibility for enforcement of the criminal law and principally the Crimes Act, the Summary Offences Act and Misuse of Drugs Act available for use in prosecutions before the Courts.

In addition, for specific matters of fraud of a more serious complex and multiple kind, there was established in New Zealand in 1990 a specific Serious Fraud Office, which was set up to facilitate the detection, investigation and expeditious prosecution of serious and/or fraud offenders. This office involves the resources of multi-disciplinary teams of investigators, forensic accountants and prosecutors. The inception of the New Zealand Serious Fraud Office some ten years ago reflected a trend around the world to establish similar agencies in the face of increasing difficulty for law enforcement agencies using traditional methods to come to grips with serious or complex fraud offending. In the decade to this year, over 100 prosecutions have been taken with a record of successful prosecution; it is said, of more than 90%. International fraud is now becoming a focus of interest for the Serious Fraud Office with a growing need for it to use modern technology in detection.⁹

⁹ New Zealand Official Year Book 2000 p. 502.

As was said in commencing, New Zealand was the first English-speaking country in 1962 to adopt by legislation the previously Scandinavian notion of Ombudsman methodology. This envisages the independent investigation of citizens' complaints about an act of maladministration by a Government department or agency. The Ombudsman is furnished with sufficient powers to inquire and obtain such information as may be necessary to form a view of the matter under complaint and to make a recommendation for redress, where that is appropriate. The New Zealand Ombudsman office has functioned now for nearly 40 years with there being now two Ombudsmen undertaking some 6000 cases per year, brought to them by ordinary individuals. The ready availability of a complaint mechanism is thus something to which New Zealand citizens have relatively easy recourse. The work of the New Zealand Ombudsmen, though conducted according to an individual New Zealand statute, broadly accords with the internationally accepted definition of Ombudsman, also mentioned at the outset.

All investigations undertaken by Ombudsmen are conducted in private. When an Ombudsman believes a complaint can be sustained, this opinion is reported to the Government department or organisation concerned along with any recommendation for action. A copy of this report may also be made available to the responsible Minister. At the local government level, over which, in New Zealand, the same Ombudsmen have jurisdiction, the Ombudsman reports the finding to the organisation and may provide a copy of that to the Mayor. Ombudsmen have no authority to investigate complaints against private companies and individuals or decisions of Judges. The foregoing enables Ombudsmen to become aware of evidence of corruption or corrupt activity and to take action with the relevant organisation.

As has also been described, at the beginning of the 1980s, following the report of a Government appointed Committee comprising senior civil servants, New Zealand passed an Official Information Act in 1982 and became a "freedom of information" country. This is based on the principle that information shall be made available unless there is a good reason for withholding it. The purposes of the Act are to increase the availability of official information to the people and provide for proper access by bodies corporate to official information relating to them but at the same time, where it is in the public interest, to protect official information from disclosure and to preserve such things as individual privacy. The Official Information Act, by and large, covers all Government departments, statutory bodies and State Owned Enterprises, with the exception of the Courts. Ombudsmen can review a decision by a Government organisation to refuse supply of information, and the formal recommendation of an Ombudsman, after such review, is binding unless overridden in very limited circumstances. The Official Information legislation also contains provisions enabling citizens to be advised of reasons for decisions. The provision of information or the absence of it can frequently identify something wrong (which may be evidence of corruption) and which will become apparent to an Ombudsman who can then do something about it.

In short, the Ombudsmen, whether acting in their jurisdiction on complaints about maladministration, or in their jurisdiction to make available, where appropriate, official information, play a role in ensuring the transparency and accountability of Government. It follows that the Ombudsmen can in the course of this work become aware of evidence of corruption and can be in a position to recommend action regarding it.

Statutory measures against corruption have continued to be added to the law in New Zealand. The New Zealand Parliament in April 2000 passed legislation which came into effect on 1 January 2001. This legislation, called the Protected Disclosures Act, enables employees who observe serious wrongdoing in or by an organisation to disclose that to what are called "appropriate authorities" such as the Ombudsmen, the State Services Commissioner, the Commissioner of Police, the Auditor-General, the Director of the Serious Fraud Office and others. In circumstances where that is done, the notifying person will be

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protected from civil, criminal or disciplinary proceedings, or retaliatory action which might be taken by an erstwhile employer. New Zealand thus joined those countries which have what is termed "whistleblower" legislation.

One of the functions of the State Service Commission, which superintends the Public Service and its staff, is to promote appropriate values and standards of behaviour for the Public Service. That organisation publishes a specific Public Service Code of Conduct, which comprises three principles, these being first that "employees should fulfil their lawful obligations to Government with professionalism and integrity", secondly that "employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues", and thirdly "employees should not bring their employer into disrepute through their private activities".

More recently, in 2000, the New Zealand Government appointed a State Sector Standards Board comprised of a group of senior people from commerce and Government and the Trade Unions, to draft a statement of Government expectations of the State sector and the priorities that departments and agencies are to observe in responding to citizens.

In a small country there is the opportunity for a considerable amount of cross-fertilisation of ideas and concepts. There is available, when one talks of means to avoid corruption, the following, connected with Ombudsman methodology. It will be recalled from above, that the Ombudsman concept enables independent investigation of complaints of maladministration. That model, after having been applied for a great many years in the public sector, has come to be taken up in two New Zealand industries. First, the Banking Ombudsman scheme began in July 1992. It arbitrates unresolved disputes about banking services in an independent and impartial manner and such help is available free to the complainant. The Banking Ombudsman is, in the instance of that industry, furnished with power to award compensation to cover direct losses of up to \$100,000, inconvenience of up to \$2,000 and some costs. There is a reporting mechanism to a Banking Ombudsman Commission, which comprises representatives of the banks and consumer organisations. Episodes of corruption, if any, are able to be complained of through this means. In 1995 there was also commenced in New Zealand an office of Insurance and Savings Ombudsman, this being an independent body to help consumers resolve their complaints against participating insurance and savings companies. Again, this is a free service to consumers operating independently of the insurance and savings industry and funded by levies upon companies involved in the scheme. The Insurance and Savings Ombudsman's jurisdiction extends to investigation of personal and domestic insurance, where less than \$100,000 is involved and the person is able to approach the Ombudsman after having taken it up with the insurance company in question.

One can therefore see the mirroring or modelling in the private sector of something which has proven to be successful in the public sector. Parliamentary Ombudsman methodology has proved successful for New Zealand citizens and for the public sector. The shift to the private sector and the adoption of many of the methods employed by the Parliamentary Ombudsman - inquisitorial approach, informal resolution and use of alternative dispute resolution means - assist this in being successful. It is to be noted that there is a distinction with industry Ombudsmen having the power to make binding orders in certain circumstances, whereas Parliamentary Ombudsmen are restricted to recommendations which goes back to the original Scandinavian conception of Ombudsman.

V. CONCLUSION

The foregoing has been a brief survey of measures available to combat corruption from the standpoint of a small country in the Asia-Pacific region. It is from the standpoint of a country which has registered a high placing in the well-known Transparency International Corruption Percentage Index for a number of years. That assessment, conducted each year, is not an assessment of the corruption level in any country but an assessment of the level at which corruption is perceived by people working for multi-national firms and institutions as impacting on the commercial and social life in that country. It can be said that New Zealand is fortunate in having very low levels of corruption and that, with the measures described above, such is likely to continue in the future. To quote a recent New Zealand representative for Transparency International (an international non-governmental organisation with a specific interest in public sector corruption and its eradication), Dr Peter Perry of the University of Canterbury in Christchurch New Zealand, "Corruption is an ever-present threat, globally increasing and better tackled before rather than after the event". "All commentators", he said, "agree that good governance is the best preventative".

In ending I wish to draw together the two streams - of the Ombudsman role affecting maladministration and the Ombudsman role affecting freedom of information, in order to address some general remarks about the future of the office.

A question often posed to Ombudsmen worldwide is whether the ordinary community sufficiently understands the redress offered by the service. This is no area for complacency. In New Zealand, the legislation has been in force for more than 40 years, and the jurisdiction has been extended to cover local government, state owned enterprises and schools. The daily workload of the two Ombudsmen sees several hundred cases open at any given time and some thousands dealt with each year. And yet there needs to be continuing publicity given to the work of the office. This can be in the media, through the country's ethno-minorities, in school publications and by receiving public airing in Parliament and its Select Committees. The New Zealand office continues to handle more complaints annually. In 1965 the annual total was 743; in 1975, 1163; in 1985, 1994, in 1995, 4707 and in 2003 no fewer than 5121 cases were under investigation in the course of the year to June 2003.

Publicity is vital. The notion of the office being one of last resort for the community must be preserved. It also seems appropriate to ensure that the office is reactive to complaints by individuals and is not engaged in what might be termed artificial solicitation of complaint. It is generally agreed that low key but regular publicity and dissemination regarding its services meets the matter best.

It might be thought that the Ombudsman office, by having grown incrementally for over 40 years, all over the world, would have an assured position in the framework of every modern state, and that nothing has emerged which might replace it. Developments of the last decade would suggest this to be so. The installation of an Ombudsman (entitled the Public Protector) in South Africa is a good example, but so too are new States in Africa and Eastern Europe. But there is no room for complacency regarding ongoing growth though, because whilst the office has certainly grown through two generations (taking 1960 as a baseline), government administrations of the early 21st century can be of a far different size and style and may exert a much different influence on the citizenry. In New Zealand, widespread economic reform and restructuring of government enterprise have reduced the numbers in the civil service. Many people are now working under contract and for shorter periods. Successive Governments have adopted a funder/provider split with many of the providing functions being delivered by the private sector rather than by government departments. In these terms, it could be argued that the need for an Ombudsman service in New Zealand has lessened. But yet, the number of complaints referred to our office continue to increase each year.

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Is recourse to the Ombudsman a worthwhile asset to the ordinary citizen? The question is intriguing because the term 'redress' usually connotes the ability to obtain some kind of order or sanction against a department or organisation. That ability to bring down sanctions is one reserved to judicial tribunals. The Ombudsmen have, at least in New Zealand, never been granted such powers and neither have any ever been sought. Professor Larry Hill, in his book "The Model Ombudsman" commented poignantly that "... one of the institution's most interesting puzzles is its apparent effectiveness, despite minimal coercive capabilities". The recent Netherlands Ombudsman, Marten Oosting is on record as saying that the major power available to an Ombudsman is in "the mobilisation of shame".

The emphasis has rather always been on the Ombudsmen's ability to persuade the parties to some kind of resolution. It can certainly be said, from a New Zealand standpoint, that Ombudsman recommendations have developed an enviable record of being adopted, even if not in the short term, then certainly in the medium and longer terms.

New Zealand barrister and writer, Dr Graham Taylor (who co-incidentally worked as legal counsel to the Ombudsmen in the 1980s), in a paper published in "Judicial Review of Administrative Action in the 1980s" described administrative review in New Zealand as being available by three broad means: "first in the courts, secondly under the Official Information Act and thirdly by referral to the Ombudsmen". If the jurisdiction of the third of these is to remain meaningful, there must be regular review and reappraisal of the role. The Ombudsmen must be able to operate in an independent fashion; they must be encouraged to be flexible in resolving items, particularly where dispute has occurred; and they must retain credibility both with the public and with those organisations subject to coverage. One of the keys to maintaining credibility for the Ombudsmen office is that the incumbent should never be seen to become an advocate for either complainant or organisation. The Ombudsman should be seen to undertake a separate and distinct review. If there is a role for advocacy, it should be restricted to the Ombudsman advocating the particular recommendation in a particular case following an independent review.

Let me end with four quotations, the first from "Bridled Power" one of the co-authors of which is a former New Zealand Prime Minister, Sir Geoffrey Palmer:-

"The introduction of Ombudsmen has had a healthy effect on decision-making in the New Zealand Government. They provide the check of independent scrutiny with full access to the relevant information and the possibility of publicity about erroneous Government decisions that affect individuals."

The second quotation is from Hon Mrs Anson Chan who, in 1997 was appointed to be Head of the Civil Service in the Special Administrative Region of Hong Kong - where the office has been retained, following the return of Hong Kong from British Colonial status to being part of China.

"An Ombudsman has a difficult job. [He] has to maintain [his] independence and impartiality, not an easy task as many issues become more and more politicised. And a good Ombudsman should always try to strengthen the relationship between the public and the government. It is only too easy to find fault in a way that will adversely affect the credibility of the government and demoralise staff. It is all the more difficult to make constructive criticisms that will enable civil servants to understand how they can do their jobs better, thereby improving the standard of service to the community, and at the same time enhance the public understanding of why a government takes the decision it does. An Ombudsman needs courage, intelligence, determination and sensitivity to do [his] work successfully."

The third quotation is from Justice Kantharia, recently deceased Ombudsman of the State of Maharashtra, India, writing for an Ombudsman meeting in the mid 1990's.

“The basic foundation of the institution of Ombudsman is to ensure that citizens should not be the victims of actions of the bureaucracy or other functionaries. The central feature of the institution is that the investigation and association of administrative conduct would confirm the basis for proposals as to future conduct of the bureaucrats. The purpose of investigation is not only the redress of individual complaint, but prevention of future ones. Thus an Ombudsman is able to make suggestions for improving performance and better service to the citizens in the light of experience gained while investigating into public grievances. The institution has to be quite alert to prevent maladministration. To put it precisely, the institution of Ombudsman is a device by which the state provides free service of an independent investigator for looking into citizens' complaints and submits its own decisions and suggestions for remedial action.”

The final quotation is from New Zealand's first Ombudsman, Sir Guy Powles, who declared upon taking office.

“The Ombudsman is Parliament's person - put there for the protection of the individual, and if you protect the individual, you protect society. I am not looking for any scapegoats or embarking on any witch hunts. I shall look for reason, justice, sympathy and honour, and if I don't find them, then I shall report accordingly.”