LEGISLATION

THE NEW ZEALAND OMBUDSMAN

The complexity of modern government is such that today administrative acts and decisions influence almost every aspect of the life of the ordinary citizen. He is only too aware of the proliferation of government agencies and instrumentalities charged in one way or another with the exercise of the Executive discretion, and with the implementation of policy and decision-making that daily affect his rights, liberties, and privileges.

Inevitably with the existence of a great bureaucracy there are occasions, not insignificant in number, where through error or indifference injustice is done—or appears to be done.[1] Sometimes the aggrieved citizen may have formal redress through the established courts and tribunals, on other occasions he may seek assistance through some informal procedure available under our system of government.[2]

These aside, there exists a large and ever growing area of public administration which is not subject to any review other than by Parliament itself. An attempt to provide some such independent review has been made in New Zealand with the enactment of the *Parliamentary Commissioner (Ombudsman) Act 1962*.[3] Under this legislation, a Parliamentary Commissioner[4] has been appointed "to investigate administrative decisions or acts of Departments of State and certain other organizations".[5]

The New Zealand legislation was prompted, in the words of Sir Guy Powles,[6] by the realisation that "the question of controlling the administration is one of the central problems of democratic government, for without adequate and effective controls . . . the citizen would have no defence against administrative despotism".[7] It was felt that whether the citizen's complaint is one of sheer maladministration by public officials or whether it is directed rather to what the complainant regards as a genuine mistake, misjudgment, or unreasonable decision in the light of all the circumstances known to him, a bona fide complainant is entitled to fair and impartial adjudication of his grievance. Indeed, the legislation may well be said to be grounded in the twin concepts

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[1] *The Citizen and the Administration.* A Report by Justice, Stevens & Sons. London (1961). Preface by Lord Shawcross.

[2] These include representations to Members of Parliament and to the Press. An obvious disadvantage is that the particular instrumentality involved itself prepares the reply, frequently based on confidential documents. For similar reasons adjournment debates are largely ineffective.

[3] Act No. 10 1962 (New Zealand).

[4] S.2 provides that the Parliamentary Commissioner shall be called the Ombudsman. The office of Ombudsman (literally in Swedish "attorney or representative") was first set up in Sweden in 1809, and has functioned continuously in that country to the present. Similar offices have been created in Finland (1919) and Denmark (1954). The New Zealand legislators drew on the experience of these countries, particularly Denmark which possesses a system of responsible government most closely resembling the New Zealand and Australian systems.

[5] Preamble to the Statute.

[6] The first New Zealand Ombudsman, appointed on 7th September, 1962. Sir Guy was described by the New Zealand Attorney-General as "a distinguished gentleman . . . a lawyer, a soldier, an administrator, and a diplomat". (*Hansard* No. 15, 1962 p. 1908.)

[7] *Address to Hutt Valley (N.Z.)* Jaycees April 3rd, 1963, 3.

of fairness and impartiality of procedure coupled with necessary provision for flexibility and informality.[8]

The Office

The Act provides[9] for the appointment of the Ombudsman by the Governor-General on the advice of Parliament—a departure from the normal method of appointment of senior officials by the executive.[10] Interestingly, the Act limits the tenure of office to the life of a single Parliament,[11] and the New Zealand Attorney-General has explained this provision by pointing out the necessity for the Ombudsman as an officer of Parliament to have the full support of the House, reaffirmed at the outset of each new Parliament. No effective argument, however, was put forward to distinguish the Ombudsman's position in this regard from other positions of a similar nature (for example, the Auditor-General) which commonly enjoy security of tenure. The well-known advantages of security of tenure would appear to outweight Parliamentary fears of a hostile occupant, but in any case it seems safe to assume that in the ordinary course of events the incumbent will be regularly re-appointed unless he proves manifestly unsuitable.

Jurisdiction and Powers

The jurisdiction of the Ombudsman, which extends over some sixty-five governmental departments and organizations listed in the Schedule to the Act, is grounded in s.11(1), which provides:

> The principal function of the Commissioner shall be to investigate any decision or recommendation made (including any recommendation made to a Minister of the Crown) or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or Organizations named in the Schedule to this Act, or by any officer, employee or member thereof in the exercise of any power or function conferred on him by any enactment.

The most striking feature of this provision is, of course, the remarkably wide scope of the jurisdiction conferred on the Ombudsman. His investigations are not confined merely to alleged acts of maladministration, but extend also to cover the vast area of discretionary administrative decisions, where the allegation is not so much an accusation but rather a complaint that the decision the particular official has reached is not, in all the circumstances, appropriate. It might be thought that the Ombudsman, with his necessarily small staff, would in time become overburdened by sheer number of complaints, but experience in Scandinavian countries and more recently in New Zealand

[8] The alternative to flexible and informal procedure on investigation would almost certainly be the evolution of an Ombudsman Department, bound by rigid practices and procedures and inevitably equated in the minds of the public at large with the other existing Departments of State. Any such development would plainly destroy the public image of the Ombudsman as an officer of Parliament completely independent of administrative control or influence. Significantly, the Attorney-General has declared that a staff of eleven would be "the highest possible number".

[9] S.2(2).

[10] This serves to emphasise the Ombudsman's status as an officer of the Parliament—separate from administrative influence. Not surprisingly, the Ombudsman is not permitted to hold any other office of trust or profit without approval (s.3) and both he and his staff are excluded from the Public Service Act (s.9(4)).

[11] S.4(1).

shows that this has not proved the case, and that the backlog of investigation work has never reached unmanageable proportions.[12]

Quite properly, the Act contains a number of important limitations on the ambit of the Ombudsman's investigations. In the first place, there is express exclusion from those matters in which there is "a right of appeal or objection, or a right to apply for review, on the merits of the case, to any Court, or to any tribunal constituted by or under any enactment".[13] This provision emphasises the role of the Ombudsman as a supplement to, rather than a replacement of, existing procedures available for review of administrative action. However, it is by no means easy to predict when the Courts will be prepared to review administrative decisions on the merits, and indeed the cases in this area of the law have been described as a "wilderness of single instances". The decision of the House of Lords in *Ridge* v. *Baldwin*[14] suggests that the writs of certiorari and prohibition are available in respect of administrative actions which affect rights—at least in so far as to ensure compliance with the so-called rules of natural justice, but the more recent decision of the High Court of Australia in *Testro Bros.* v. *Tait*[15] indicates that the Courts have not completely abandoned Lord Atkin's added requirement in these circumstances of "a duty to act judicially".[16] Mandamus will lie to compel the performance of a public duty, but where the question involved is the improper exercise of a discretionary power the Courts will generally adopt a supervisory role.[17] Recent cases have extended the availability of the injunction, particularly where rights of a public nature are involved,[18] and the declaration is perhaps the fastest growing remedy of all in this field, judging by recent developments in England and the other Australian States.[19] Undoubtedly, the law on judicial review of administrative acts and discretions is presently in a rather confused state, and in time to come the Ombudsman will be faced with many difficult decisions when he has to determine whether in the particular instance an appeal will lie to the courts . . . "on the merits of the case".[20]

Besides this express limitation on the Ombudsman's jurisdiction, other important restrictions emerge by implication from s.11 of the Act. Thus, while that section empowers the Ombudsman to investigate recommendations, decisions and acts "relating to a matter of administration", there is clearly no corresponding power to inquire into matters involving policy. The impossibility in practice of drawing a firm dividing line between policy and administrative matters is well recognized, and on this problem Sir Guy Powles has commented "So far it has not been possible to construct any guiding principles but merely to decide, upon common sense grounds each case as it arises."[21] In vew of the

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[12] It is submitted that, on a comparative basis, a similar office in New South Wales and the other Australian States should be able to function adequately and not become stultified by the amount of work involved. In larger countries such as England, it has been proposed that an Ombudsman should be confined to investigation of allegations of maladministration, and that complaints against discretionary decisions should be adjudicated by an extended system of administrative tribunals. See *The Citizen and the Administration* (*Whyatt Committee Report*), *supra.*

[13] S.11(5).

[14] (1963) 2 W.L.R. 935.

[15] (1963) 37 A.L.J.R. 100.

[16] *R.* v. *Electricity Commissioners* (1924) 1 K.B. 171.

[17] Lord Greene, M.R. in *Associated Provincial Picture Theatres* v. *Wednesbury Corporation* (1948) 1 K.B. 223.

[18] *Cf. Cooney* v. *Ku-ring-gai Municipal Council* (1963) 37 A.L.J.R. 212.

[19] In New South Wales, of course, the declaration is not available as a remedy outside the equity jurisdiction. C.f. *David Jones* v. *Leventhal* (1927) 40 C.L.R. 357.

[20] In these situations the Ombudsman may be expected to rely on s.11(7) of the Act, which permits him to obtain from the Supreme Court of New Zealand a Declaratory Order as to his jurisdiction in any case or class of cases arising under the Act.

[21] *"The Citizen's Rights Against the Modern State and its Responsibilities to Him."* Sir Guy Powles—Address at the Sydney Law School 25th November, 1963, 16.

uncertainty here it might be thought that Ministers faced with the prospect of an unwanted investigation might seek to have the subject matter declared a policy matter, but it has been pointed out[22] that any such attempt to evade the Ombudsman's jurisdiction could be brought before Parliament where the Minister would be compelled to justify his action.

Looking again at s.11, it will be seen that while the Ombudsman can inquire into "any recommendation made to a Minister", he is not at liberty to inquire further into the actual decision of the Minister himself. In other words, the Act is careful to preserve intact the principle of ministerial responsibility to Parliament—a cornerstone principle of all British-style constitutional governments. The Act thus properly recognizes the pre-eminence of the doctrine of ministerial responsibility in our system of government, but equally properly it acknowledges that "ministerial responsibility may imply that Ministers must monopolize decision making; it does not follow that they must monopolize all inquiry into decision making".[23] In practice though, the Ombudsman may arrive in some invidious positions in his investigations of recommendations made to Ministers, and the Act perhaps wisely provides[24] that in such circumstances the Ombudsman should consult the Minister before forming a final opinion.[25]

A further important implied exception to the Ombudsman's jurisdiction lies in the field of local government. The New Zealand legislature felt that, at least until the office was fully set up and functioning smoothly, the Ombudsman should not carry the additional burden of investigating complaints arising out of the vast network of local government agencies and officials. As a temporary measure this decision to exclude local government seems sound enough. Experience in this country reminds us that the central government departments are more directly responsible to Parliament, and personify the Administration to a greater degree than local councils, where the elected representatives are in much closer touch with the day-to-day workings of their organization. At the same time though, it is clear that there are potentially many disputes between citizens and local government, and there appears to be no valid objection to extending, in time, the operations of the Ombudsman to cover this important area of citizens' rights and duties.

In the exercise of his jurisdiction the Ombudsman is empowered to make[26] a report and such recommendations as he thinks fit[27] in a wide variety of circumstances, ranging from an act or decision which is in his opinion

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[22] By the New Zealand Attorney-General in the debates on the Bill.

[23] Geoffrey Marshall "Should Britain Have an Ombudsman". *The Times* 23rd April, 1963.

[24] S.15(5).

[25] The rather enlightened attitude of the New Zealand government towards the problems associated with ministerial responsibility contrasts sharply with the attitude of the United Kingdom government on this same question. The Whyatt Committee (*supra*) in its recommendations went so far as to propose a ministerial power of veto on any investigations by the Ombudsman—a proposal described by the New Zealand Attorney-General as "curious"—but the United Kingdom government replied tersely that "it would not be possible to reconcile (the proposals) with the principle of ministerial responsibility to Parliament". One suspects that that government's attitude to the proposal for an Ombudsman is more correctly stated, as is undoubtedly the attitude of the New South Wales government, by the complacent declaration that "in the government's view there is already adequate provision for the redress of any genuine complaint against maladministration, in particular by means of the citizen's right of access to Members of Parliament". Such an evident state of mind in the Executive seems to the writer to be of itself perhaps the most persuasive argument available in favour of the need for an Ombudsman *Cf. Public Law* Winter 1962, 391-2.

[26] S.19(1).

[27] But he cannot, unlike the Swedish Ombudsman, institute direct proceedings. In the circumstances, it would seem unwise to permit the Ombudsman to institute Court proceedings, since this would be foreign to existing practices in Commonwealth Countries, and would tend to give rise to unnecessary alarm and unrest amongst Public Servants.

contrary to law to others which he regards as unreasonable, unjust, oppressive, based on a mistake of law or fact, or simply wrong.[28] In any of these instances, the Ombudsman has a general power to recommend that the act or decision or practice should be varied, rectified or cancelled as the case may be.[29] Initially he is to report to the Department concerned, and if no action has been taken after a reasonable time he is empowered to report to the Prime Minister and thence to Parliament.[30]

It might be argued in criticism that by limiting the Ombudsman's power to mere recommendation the Parliament has rendered the office largely ineffective. In practice, while it is true that the Ombudsman cannot of his own motion vary an administrative decision, it is equally true that the recommendations of the Ombudsman are likely to be received with the utmost respect by the administrative authorities. A good deal will, of course, depend on the ability of the Ombudsman himself and the personal skill and tact he exhibits in his dealings with the authorities, and there is always the ultimate sanction of review by the Prime Minister and Parliament.

In any case, it would probably be unwise to empower the Ombudsman to vary administrative decisions of his own motion. No one would be willing to give the Ombudsman comparable power over laws and regulations made by the Parliament, and by analogy there should be a reluctance to permit the Ombudsman, in effect, to substitute his own opinion for that of duly appointed administrative officials. *Per se* there is no guarantee that the Ombudsman's opinion is to be preferred, and the final decision in this matter must rightly be left with the Prime Minister and the Parliament, who are charged ultimately with the responsibility of maintaining a competent and efficient administration.

It is worthy of note that the Ombudsman is protected from excessive interference in the exercise of his jurisdiction by the insertion in the Act of a generally worded privative clause.[31] The effect of such a privative clause is uncertain, and it has already been pointed out[32] that the Act safeguards appeals to courts and tribunals where such are available on the merits of the case. These aside, however, it is probable that the Court will give effect to the privative clause "provided always that the decision (of the relevant authority) is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body".[33]

Procedure

As previously noted, the keynote to proceedings of the Ombudsman is the provision for informality and flexibility in investigation. Thus, any person may lodge a complaint directly[34] with the Ombudsman upon payment of a nominal fee of £1,[35] designed to discourage the inevitable cranks.[36] Alternatively, the

[28] The Ombudsman may also, under s.19(1), report on any enactment which he considers unjust, etc.

[29] S.19(3).

[30] S.19(4).

[31] S.21.

[32] *Supra*, 4.

[33] *R.* v. *Hickman* 70 C.L.R. at 615.

[34] The Whyatt Committee (*supra*) felt it would be advisable at first to channel all complaints through local Members of Parliament. To do so would inevitably tarnish the image of the Ombudsman as a sort of people's champion, and might also raise undesirable political implications. Those who feel that their local Member might tend to off load too many of his responsibilities on to the Ombudsman are free to express their displeasure in the ballot box.

[35] S.13.

[36] The Ombudsman may refuse in his discretion to investigate a complaint that is frivolous or trivial, or lacks bona fides or sufficient personal interest. S.14(2).

Ombudsman may commence an investigation of his own motion[37] and he may also be required to investigate any matter referred by Committees of the House of Representatives.[38] Importantly, the Act provides that all investigations are to be conducted in private[39] and the Ombudsman and his staff are bound by oath to maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions under the Act.[40] The Ombudsman has wide powers to seek information from any person, whether a public servant or not, whom he thinks may be of assistance to the investigation,[41] and any such person, and the complainant, may be examined on oath.

A highlight of the Act is the liberal approach adopted towards the availability to the Ombudsman of government documents. Clearly, the success of any investigation by the Ombudsman will be measured greatly by the degree of access he has to Departmental records, which alone can adequately provide the rationale behind the majority of administrative acts and decisions. Recognizing this fact, the Act in the first place imposes no restriction on the Ombudsman's right of access to internal minutes of Departments, nor to inwards and outwards correspondence. On this point, concern has frequently been expressed lest the Ombudsman's probings might seriously affect administrative efficiency, partly because of interference with the day-to-day workings of the organization, but much more importantly because, it is felt, public servants would tend to worry and exercise excessive caution with the threat of some outside investigating authority continually uppermost in their minds. Such a contention fails to take account of existing systems of public service inspection, and furthermore experience in Scandinavian countries and in New Zealand has demonstrated that by and large public servants welcome investigations by the Ombudsman. Far from being a source of annoyance and inconvenience, the Ombudsman is in most instances regarded as an ally and protector against unjustified allegations and complaints, to which the public servant is usually unable to reply by virtue of his position.[42] Sir Guy Powles has repeatedly stressed his appreciation of the unreserved co-operation he has received from officials at every level of administration.[43]

Additionally, the Ombudsman's right of access to official documents is fortified by the provisions of Section 17(2), which states that the rule of law requiring the withholding of any documents on the grounds that such disclosure would be injurious to the public interest shall not apply to the proceedings of the Ombudsman.[44] Consequently the Ombudsman will not be frustrated by frequent pleas of Crown privilege, and his investigations will

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[37] S.11(2).

[38] S.11(3).

[39] S.15(2). The legislature undoubtedly felt that the maintaining of a strictly confidential relationship during the course of the investigation outweighed the value of Press publicity. In any event, the Ombudsman is expressly empowered, and indeed required, to report fully and openly to Parliament at least once a year—s.25.

[40] S.18.

[41] The Act specifically excepts some sources of information from the Ombudsman, particularly in cases involving national security, defence, or deliberations of Cabinet.

[42] *"The Citizen and The Administration"* (*supra*) para. 162.

[43] The Act, by s.15(3) further safeguards the interests of public servants by providing that the Ombudsman, before making an adverse report on any administrative body or person must give that body or person an opportunity to be heard.

[44] This rule of law was given wide expression by the House of Lords in *Duncan* v. *Cammell Laird & Co.* (1942) A.C. 624 in contrast to the more restrictive interpretation adopted by the Privy Council in *Robinson* v. *State of South Australia* (1931) A.C. 704. Recently the New Zealand Court of Appeal in *obiter* expressed a preference for the Privy Council interpretation in *Corbett* v. *Social Security Commissioners* (1962) N.Z.L.R. 878; the House of Lords decision was explained by the English Court of Appeal in *Merricks* v. *Nott-Bower* (1964) 1 All E.R. 723 as still requiring the Minister to describe the nature of the documents for which privilege is sought with some particularity, so that Parliament and the public can see that the claim for privilege is well justified.

stop short only of matters involving national security, defence, cabinet deliberations and the like.

The Act is clearly designed to provide a liberal and informal basis for investigation, with only the most essential limitations expressly reserved. Within these limits, the Ombudsman may regulate his procedure in such manner as he thinks fit,[45] and it is evident that the success or otherwise of the office will depend to an extraordinary degree on the ability, the approach and the personal qualities of the Ombudsman himself. In this context, it is pertinent to note the words of Sir Guy Powles:

> Indeed a constant attempt is made in practice to prevent the developing of hard and fast rules of procedure—the main objective being that the complaint should be investigated according to its merits and its substance, guided by a basic principle that, as far as the Ombudsman is concerned, the complainant is deemed to be right until he is proved wrong.[46]

Conclusion

It will necessarily be some time before a full and fair evaluation can be made of the Ombudsman's work as a guardian against abuse and misuse of administrative discretion. It can be said, however, that the New Zealand legislature has made an honest and determined attempt to provide the citizen with an adequate and impartial hearing of his grievances; the results achieved by the Ombudsman in his first months of office[47] are encouraging both to those who participated in the legislation and those who favour a similar system in other countries. It should be pointed out though, that the legislation imposes a unique burden on one man, and that the success of the office turns almost wholly on his individual ability and tact, his diplomacy, sense of justice and fair play. Furthermore, the possibilities of the office should not obscure the fact that the Ombudsman is merely one rather small means of securing independent review of administrative actions. The Parliament, the Courts and the Administrative Tribunals each have parts of fundamental importance to play, and the search should continue for further ways and means to combat the growth of an indifferent and sometimes overbearing bureaucracy.

But the office of Ombudsman seems to be a step in the right direction, and the refusal of the Commonwealth and New South Wales governments to recognize it as such is disquieting. Their arguments that Members of Parliament can and do perform the same functions in present circumstances are totally incorrect. Members do not have access to documents and are easily (and often enough) rebuffed by Departments; there are inevitably political overtones involved. In any event, the office of Ombudsman should be a supplement to established Parliamentary practices; far from being a competitor the Ombudsman should be of great assistance to Members of Parliament, whose time is inevitably occupied with a wide variety of functions. Following the publicity given in recent years to the rather indifferent allocation of children to secondary schools, to the inconsistent exercise of the prosecution power, and to the alleged abuses of police power, amongst many other things, there must be many citizens and not all of them lawyers and social reformers, who would see in the Ombudsman a useful ally and protector of individual rights and liberties.

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[45] S.15(7).

[46] *The Citizens Rights Against the Modern State and Its Responsibilities to Him* (*supra*), 17.

[47] Report of the Ombudsman 31st March, 1963. N.Z. Government Printer.