The New Zealand Ombudsman – the early days

Sir Guy Powles*

A personal memoir of New Zealand's first Ombudsman. Sir Guy reflects on his hopes and fears of the first years of the office.

An article written about the early days of the ombudsman in New Zealand by the founder of that office must necessarily be a personal memoir. Objective studies of the work of the office in those earlier years have already been made, and I shall proceed without inhibition to give a subjective account — part of the "inside story" as it were. Neither I nor the nature of the office which I was to assume in 1962 was widely known in New Zealand. I had been effectively out of circulation in Wellington for over 20 years — first with war service and then with diplomatic service — and the functions of an ombudsman had become known to the New Zealand public only through the efforts of a few dedicated legal politicians and public servants — as has been fully related elsewhere. My first feelings were of strangeness, isolation, and challenge.

Strangeness, because, as I have said, not very much about the office of ombudsman was really known in New Zealand. It was also strange to me because it was an investigatory office and I had been brought up in and had practised the adversarial traditions of a Common Law lawyer. It therefore seemed necessary to adopt some particular stance from which to carry out my duties — a stance which could be seen in the public eye. When I was sworn in before Sir Ronald Algie, the then Speaker of the House, on 1 October 1962, I made a short statement in which I said "The Ombudsman is Parliament's man — put there for the protection of the individual, and if you protect the individual you protect society". I also said "I am not looking for any scapegoats or embarking on any witchhunts. I shall look for reason, justice, sympathy and honour, and if I don't find them, then I shall report accordingly". This was somewhat high-pitched, but deliberately so. Right from the very beginning it had seemed from press comments and other statements made that an initial attitude on the part of public servants generally would be of suspicion, and even in some respects almost a promise of lack of co-operation. Perhaps I did not mollify this attitude by the statement I made in my first written report to Parliament given just about a month after I had taken office. I said there that it would be a cardinal principle of the office that all work was to be carefully

* Ombudsman 1962-1975; Chief Ombudsman 1975-1977.

and thoroughly done, "the presumption being that the complainant is considered right until he is proved to be wrong". I felt that this was the only basis upon which an investigation could begin, but I also made it clear, as time went on, to departments and civil servants generally, that my investigation was a search for the truth, and was not in any way an attempt to establish a particular or partisan view on behalf of any complainant. Other ways of securing the co-operation of the public service were adopted, such as close and continuing contact with departmental heads, with the State Services Commission and with the Public Service Association. There were also the speeches I made from time to time, and the general assistance given to the office by the public media generally. It took, however, nearly two years before one could say that the office was fully accepted by the public service as being as much in their interest as in that of the public at large.

There was then the question of isolation. There was no person whom I could consult as a colleague. There were the judges, the magistrates, the heads of departments, and there were other groupings, all of which became as it were, collegiate associations which were of great value to every one of them in dealing with the particular problems that arose in their spheres of work. However, the ombudsman was the only one in New Zealand. Indeed, he was the only one in the English-speaking world, and it was some time before translations in English of the work of the ombudsmen in Scandinavia became available for the assistance and instruction of myself and my office.[1] The initial attitude of the New Zealand legal profession as a whole was tinged with a certain amount of amusement — amusement at the creation of such a strange office — and this amusement seemed at times to have a kind of contemptuous quality. I therefore relied upon and valued very highly the support that I received right from the very beginning from the Minister of Justice, the Hon. J. R. Hanan, the Secretary for Justice, Dr. John Robson, the then Solicitor-General Mr. H. R. C. Wild, all of whom had been closely associated in the work leading up to the establishment of the office. They all took personal part in the drafting of the Act which was ultimately passed in Parliament — an Act which bore the hallmarks of most intelligent and far-seeing drafting, and which came to be the standard English text for ombudsman legislation throughout the world. Then I must specifically mention the Prime Minister, Mr. Keith Holyoake, as he was then, whose initial support was strongly and firmly given and who never throughout his term of office wavered in this support. Indeed it is probable that his attitude was crucial to the success of the office in New Zealand right from the very beginning and throughout. In the early stages he said to me "my door is always open to you", and it was. I served under four other prime ministers, but none of them said this. There is a story, probably apocryphal, that quite in the early days one of the ministers said in Cabinet that he had received a recommendation from the Ombudsman, his department objected to it, and he was not very sure about it himself. The Prime Minister is reported to have said "Well, what is it that the Ombudsman wants to do?". The minister explained and the Prime Minister said "Well, go away and do it — don't bother this Cabinet with recommendations from the Ombudsman". Whether this story is true or not, it is clear that this in a sense was the attitude which permeated from the prime

1 See postscript infra p.215.

ministerial level down to departments and which, of course, made the ombudsman much more confident in his work.

Then the office was a challenge. It was a challenge to me and my staff, and also in a sense it was a challenge to the public itself, to appreciate that here was an official who had a particular task to do quite different from that performed by any other in the past. It was a challenge to me and my staff because we had to work out methods of handling the complaints, the methods of investigation. In this respect we were greatly assisted by following the explicit words of the statute itself, which required the head of the department to be informed of my intention to make an investigation, required the investigation to be conducted in private, and provided that the department or organisation concerned must be given an opportunity to be heard if there was a suggestion of an adverse report being made. The statute also allowed the ombudsman, in his discretion, to consult any minister who might be concerned in the investigation at any time, and also required the ombudsman to consult a minister at any time that minister so desired. This process of consultation became valuable, and developed into a type of to-and-fro contact with departments which greatly facilitated the work of the office, the whole being done on a very informal basis.

In meeting the problems of isolation and challenge, the assistance and constant support of a devoted and efficient staff was essential, and this fortunately I had. They were caring people as well as being extremely efficient at their job, and the overall isolation and strangeness of our position brought us very closely together — indeed, it was a case of "we few, we happy few, we band of brothers" and sisters. Indeed there was more joy in the office about the one complaint which was found to be justified than over the very many whose investigation showed that the department had not been in error. I like to think that the value of our warm association is shown by the quality of the work the office produced and also by its quantity. We were able, with a comparatively small staff, to deal with a comparatively large case load compared with the way in which ombudsman offices subsequently developed throughout the English-speaking world. Of course this work was greatly assisted by my general principle of inviting departments to co-operate in the investigation of complaints against themselves. This lightened the load of the ombudsman's office and it served to build a firm structure of confidence between the office and the departments which had undoubtedly developed in the national interest. Interestingly enough I think this co-operation also exemplified the highstandard of probity which exists in our government departments — indeed it has been said by modern commentators that the ombudsman system will not work unless it is applied to a public service which shares the ideals of the office. We found very early that it was necessary to stick rigidly to the investigation of complaints made to us because there was no time to do anything else. Although the ombudsman had authority under the statute to carry out investigation of complaints on his own motion very few of these were done in the early years.

However, to operate a complaint-based system successfully the office must be sufficiently and widely enough known to attract complaints from all strata of society. The press was very helpful, dealing in a kindly and supportive way with me and my office. The following is a quotation from a long article in a metropolitan daily

covering the whole work of the office:

> 'My staff and I always feel pleased when we can relieve some injustice. I think we are happier, too, when we can do it for persons who are really in need of some relief of that kind — rather than some of the more glamorous or bigger cases that we take'. These words perhaps more than any others express the simple reverence for human liberty possessed by Sir Guy Powles — the Ombudsman.

Being placed upon a pedestal such as this it would have been almost impossible not to have had at least some measure of success. Nevertheless the question of publicity was very much to the fore in the early years and has been a problem ever since. Not publicity in the sense of being well and favourably known in certain circles, but publicity in the sense that the essence and even the existence of the office were known to every citizen. There has been an endeavour to strike some form of balance between oblivion and overexposure. It was found that the intake of complaints increased after any important public reference to the ombudsman or his work. This led one to suspect that the system did not in fact touch as many of the potential complaint-sufferers as it ought to. Ombudsmen from other parts of the world are increasingly finding it necessary to adopt deliberate publicity measures. Attempts to do this in New Zealand have not been particularly successful. Jumping forward a little bit from the early years, in the late 1960's I started a scheme for the publication in the press of regular articles entitled "Leaves from the Ombudsman's Notebook". This was objected to by Mr. Norman Kirk, then Leader of the Opposition, who made an attack on it, and inferentially on the office, in a speech in Parliament. I went to see him and pointed out to him that the practice I had adopted was perfectly in accordance with the rules for the ombudsman's office approved by Parliament in the early days. He agreed that what I had done was probably quite lawful, but nevertheless he disagreed with it and thought it was most unwise. In those circumstances I decided to discontinue the practice as I felt it important that the office should continue to be regarded as speaking on behalf of Parliament in its investigation of the activities of the administration. Later still, and again out of the early days, I approached Mr. John Marshall, who was then Prime Minister, with a specific request that he would approve the issue by the office of a series of explanatory pamphlets which could be put on the counters in post offices and so on. However he most definitely did not approve. He said that he would not wish to see the ombudsman touting for business. I was rather set back by this, because it was just what I felt the office needed to fulfil the intentions of its founders, but I may have been wrong because Mr. Marshall had himself been a founder. Thus we were left with a situation where it became my strong impression that we were not well enough known to the lower-income groups in society, particularly to the Maori group. Although statistics were never kept on a racial basis, a study of them with the information that we had at our disposal showed quite clearly that we received a much smaller percentage of complaints from our Maori population than was warranted by their numbers. Samoans were a different matter because they were very interested in questions relating to immigration and these continued to come before the office, starting in my time and I think it goes on in this way today.

I think I did find, even in those early days, that the office's method of operation, which was wholly investigatory as I have said, and not adversarial, did lend itself to an objective pursuit of the truth in each case and, in so doing, generated con-

fidence in those persons — either complainants or departmental officers — whose actions might eventually be found open to criticism. The statute gave full authority for the holding of hearings or confrontations between the parties and there was power to deliver oaths and to take sworn evidence. Some ombudsmen overseas have used this method, and to advantage, but in my office it was not used. We found it much better to deal with the matter in our own quiet way and not to face confrontations. There were a few cases where obdurate disputes of fact emerged and the investigation was then discontinued upon the ground that the resort to the courts and the well-known principles of cross-examination would provide the best decision. The investigatory procedure, of course, sometimes takes a long time and in some cases that the office has handled the time taken has been really very long, much longer than one could have hoped, but I think it has somehow succeeded where adversarial methods would have failed.

The principal problem, right in the early days, even as I imagine it is today, related to the question of jurisdiction. I remember the somewhat purist attitude of Sir Roy Jack, who, when Speaker, refused to speak about the jurisdiction of the ombudsman, preferring to speak about his competence, which was intended in a way to reduce the status of the office to somewhat less than a decision-making body. Nevertheless it is significant that an early academic commentator was Professor Sawer of the Australian National University, and he was able to write about the jurisdiction of the ombudsman; even going on to discuss his jurisprudence. The ombudsman statute has not yet been before the courts in New Zealand for interpretation, partly because of its own clarity and partly because no one has seen fit to challenge the office's official interpretation of its own statute. There have, of course, been difficulties, but over the years the office seemed to have worked out to general satisfaction interpretations of its minor obscurities. The principal problem was how to define "relating to a matter of administration" as the keynote of the jurisdiction. Here it seemed that the course of careful pragmatism which was adopted did produce acceptable answers. This did not happen in the early days without considerable difficulty and much heavy thought. There were a group of public servants, and indeed some in the Departments of Political Science and Law at Victoria (if I may say so in this Review), who made constant reference to the difference between "administration" and "policy", contrasting them as if what was "administration" could not be "policy", and vice versa and leading to what I thought was an unduly narrow interpretation of the jurisdiction. Consequently I often had to meet arguments on the part of departments and other bodies being investigated that what was done was "policy" and not "administration". All that the Act said was "relating to a matter of administration", and "policy" was not mentioned at all, and I had to attempt a certain amount of education in this field. I am not sure myself whether the doctrine that I preached was correct — indeed, only time will tell. My reply was that the whole question was the level at which a particular decision was made. A decision at one level could be "administration" for somebody and "policy" for somebody else, and I tried to explain this a number of times in speeches and comments. I have not yet been proved wrong in what I said, which was that, broadly speaking, everything that was done by a department pursuant to a statute was related to a matter of administration. In New Zealand almost everything that is done by departments is done pursuant to a statute, and I

therefore concluded that everything a department did related to a matter of administration. The big problem which arose in this connection was raised on behalf of the Police Department. It was contended with considerable ability by Crown Counsel as well as by the police authorities themselves, that what the policeman did in preserving the peace was not related to a matter of administration but was an independent act in pursuance of his authority as an officer of the peace. This attitude was strongly based upon British precedent, whereas in my view the legal situation of the police officer in Britain differed from that of his counterpart in New Zealand. In New Zealand it seemed to me that the police officer was carrying out his statutory duties and that there was no field in which he could operate independently as an officer of the peace because there was no provision in New Zealand law to give him any such authority. This view is not an accepted view in New Zealand at the present moment. The police view has been responsible for difficulties between the ombudsman's office and the police, but in the early days a good working arrangement was attained by close contact with the then commissioners. Some important police investigations were in fact undertaken but in each case this was because of the desire and consent of the commissioner and his senior officers that this should occur in that particular case. Generally speaking, however, the block still remained, and in 1975 I felt able to accept the statutory provision in the new Act to the effect that complaints against the police were, first of all, to be investigated by the police and then, after that, the ombudsman could come into the matter and carry out his own investigation in the light of what the police had done. This amounted to a statutory recognition of the ombudsman's power of investigation with reference to the police, but cannot be regarded as satisfactory by any means and I am sure that the end of this matter has not been heard.

Another jurisdictional matter which gave a good deal of trouble in the early stages was the exclusion from investigation of any matter relating to the terms and conditions of service of a member of the armed forces or to any order, command, decision, penalty, or punishment given to him or affecting him in his capacity as such member. I had several cases brought to me which I could not fully investigate because of this prohibition, but, nevertheless, I did form the opinion that something was needed to be done in the armed services themselves relating to their own method of handling complaints. As a result of discussions with the defence authorities, and coincidental with the development of moves already on foot in the services themselves, a new and more streamlined system of handling of complaints was introduced. It seems that over the years this must have worked fairly satisfactory because, on the whole, complaints from the armed services almost ceased. There was, however, one particular early complaint of importance which I shall mention later on.

Bacon, the great Bacon, said that it was the duty of every good judge constantly to extend his jurisdiction. The ombudsman endeavoured to follow this precept. Weighty discussions were held and memoranda submitted to the Prime Minister, and the Minister of Justice covering possible extensions of jurisdiction in two ways, the first clarifying and strengthening the existing statute, the second bringing local bodies and quangos into the ombudsman fold. These matters, begun in the first

years, yielded slowly to fairly steady pressure, the first move coming in 1968 when the statute was amended to cover education boards, and hospital boards — as an experiment said Mr. Hanan. It was not until 1975 that full extension to cover local bodies and organisations was enacted coincidental with a major change in the structure of the office — Chief Ombudsman and Ombudsmen, and so on, but the record shows these changes were in the minds of the office from the early days. Also in those days counter-proposals were put forward for the enactment of legislation restricting the jurisdiction of the office, notably by the State Services Commission, which suggested the removal from the ombudsman's jurisdiction of administration matters which were particularly the concern of that Commission. Fortunately discussions produced an abandonment of this proposal.

Right from the beginning a most valuable guide to the manner in which the ombudsman should exercise his discretion was provided by section 19(1) of the Act. With characteristic foresight and perception the draftsmen here provided that the ombudsman might form an opinion that the decision, recommendation, act or omission which was the subject matter of the investigation (a) appeared to have been contrary to law, or (b) was unreasonable, unjust, oppressive, or improperly discriminatory or was in accordance with a rule of law or a provision of any enactment or a practice which is or may be unreasonable, unjust, oppressive or improperly discriminatory, or (c) was based wholly or partly on a mistake of law or fact, or (d) was wrong. Overseas commentators have insisted that one of the essential attributes of the office of Legislative Ombudsman, as it has now come to be called, (to distinguish it from the hundreds of other people who are known by the name of ombudsman) is the complete political independence of the office. This, of course, is true, but it seems to me to be very important to prescribe in exact terms what that politically independent officer may do. Consequently it may be that definitions current in academic circles as to what a Legislative Ombudsman truly is, ought to be revised. In the statute, the use of the word "wrong" is quite fascinating, challenging, and from a statutory point of view, almost, I believe, unprecedented.

One of the first of the "wrong" cases is one I shall always remember. It seems to me to illustrate the high points of the ombudsman in operation — the poor and helpless complainant, heartless departmental rigidity crystallising an initial misconception of equities and responsibility, bringing into operation an intense investigation.

A naval petty officer was killed in a training accident on board a New Zealand naval vessel in March 1955. He had been in charge of a party preparing demolition charges which were intended to be thrown over the ship's side in an exercise simulating the warding off of an attack. The first of these charges was about to be thrown when it exploded killing the petty officer and a seaman. There was an inquest, followed by a Commission of Inquiry, but no fault was found on the part of the Navy or any officer or rating. For the next ten years the widow strenuously asserted that her husband had never been qualified to handle or deal with explosives in the manner suggested and that the Navy's action in using him in this manner was a grave error which led to his death. This lady and her advisers asserted that the circumstances were such as to warrant a compassionate grant by

the Government, and she continued to assert this with great persistence. From time to time various different firms of solicitors acted for her, the Admiralty was communicated with, and her cause espoused by *Truth*. Then later the Chairman of the Heritage organisation in Auckland made personal ministerial representations on her behalf. In all, it seems that her case came before some four different ministers of defence, and two different ministers of justice, and was brought personally to the attention of one prime minister. The Navy's attitude, fortified throughout by the advice of the Crown Law Office, was firmly negative to the lady's claim.

Finally, 10 years after the petty officer's death, the Heritage organisation brought her case to me. From the correspondence I was given I discovered how obdurate the Navy's attitude had been, that the lady herself had over the years become somewhat obsessive, which I thought to be quite understandable, and that — believe it or not — the Navy still held arrears of pay due to the petty officer, and the proceeds of his kit sale held on the ship after his death. I was walking in Queen Street, Auckland, one day, with the case on my mind wondering how to get past the seemingly impregnable defences erected by the Navy and Crown Law, when I met one of our leading barristers (as he then was — he is now the highest citizen in the land) and asked him whether he would, as a matter of professional duty, help me in the case for no fee, and advise how a lawful ombudsman complaint could be made. He readily agreed. As a result I was able to present to the Navy a beautifully drawn complaint alleging that the employment of the petty officer in the circumstances which led to his death was pursuant to an administrative practice which was wrong, namely a practice which required persons without technical qualifications to do work for which those qualifications were required and which might be dangerous when undertaken without those qualifications, and that the treatment of the widow had been unjust and oppressive. This complaint successfully breached the "no ombudsman jurisdiction" defence, and I was handed a massive stack of files. After studying these and the relevant naval instructions and regulations, I discussed the case with the Minister of Defence and further information was sought from the Admiralty. Then there was the preparation of the draft report followed by further discussions. The final report, to summarise, concluded that the Crown bore a measure of responsibility for the petty officer's death, and for the manner in which the widow was dealt with subsequently. I recommended a compassionate grant of £800, the return of the moneys lawfully due, and an allowance for costs. This was eventually agreed to by the Crown, and my office closed the file with relief and satisfaction two years after the complaint had been made to me and twelve years after the unfortunate accident.

There is one more case I would like to mention. This was a very early case. Indeed it was amongst the bundle of 142 complaints received by the Clerk of the House before I took office. It established that there was nothing to prevent the ombudsman receiving and investigating complaints from persons who were not citizens of New Zealand, nor even resident here, provided the respondent was a government department or agency named in the Schedule to the Act. It also established that the ombudsman could, and would, seek to influence departmental advice when that advice bore upon the exercise of an unfettered ministerial

discretion. The complainant was a citizen of the United Kingdom and he and his wife and family of three sons were resident there. He had obtained permits to emigrate to New Zealand for all of them except one son who was mentally handicapped. It was normal policy to refuse entry to persons who could not reach a certain standard of health, and there was no doubt that under this policy this boy would not qualify for entry. Close relatives of the family were in New Zealand and assurances had been given regarding the care and maintenance of this boy. However, ministerial permission was still refused. I requested a serious review of the case in the light of its special circumstances, pointing out that we could well accept the boy who was bound to benefit from being here and that we could well afford any slight burden there might be (this was nearly 20 years ago). The Minister did reconsider, and granted a permit on condition that the case would not be treated as a precedent. The whole family duly arrived and settled.

Ten years later I received a letter from the mother. She said they had arrived and settled in Auckland in 1963. Her eldest son had now graduated B.Sc. at Auckland University and was studying for his M.Sc. Her youngest son was a trade apprentice in engineering. Her husband was manager of a small manufacturing company. Christopher, the handicapped one, was a trainee at the Auckland Sheltered Workshop and "had progressed so rapidly that we can hardly believe it has happened". She herself was assistant to the purchasing officer of a large printing company. "I feel we are all useful citizens of New Zealand and only because of the interest shown by you in this family". This letter shone like a beacon light in the later years when the office became very involved in immigration troubles, but that is another story.

A memoir is, as George Ball has just said, an exercise in self indulgence. I have indulged myself long enough, and must return to my brief, which was that I might talk about the hopes and fears of those early days. Some of these may be gleaned from what I have said. However, to summarise, my main hope was that all aspects of public administration, at any level and without exception, would be open to the scrutiny of the ombudsman, and my main fear was that the office might become embroiled in party political strife. But, as the poet said, "If hopes were dupes, fears may be liars".

Postscript: For five years I was the only English speaking member of what later became a fraternity of ombudsmen. This isolation was broken on 1 September 1967 when George McClellan was appointed Ombudsman of Alberta under a statute which was almost a copy of the New Zealand one. He had just retired from being the Commissioner of the Royal Canadian Mounted Police. His was a strong personality, lacing integrity and considerable ability with a sense of humour and profound common-sense and knowledge of the world. We quickly formed, by correspondence, a strong friendship which was happily cemented later when we met several times, and which lasted until he died when this article was going to the press. His example greatly helped the establishment of the institution of ombudsmen throughout Canada.