

CHAPTER 5

The Practical Workings of the Ombudsman System

"The Ombudsman is an independent official who receives complaints against government agencies and officials, from aggrieved persons, who investigates and who, if the complaints are justified, makes recommendation to remedy the complaints"¹. It is proposed in this Chapter to draw out the salient features that have been instrumental in the success of the system in the two democracies - Britain and New Zealand.

It is pertinent at the outset to point out the differences in the two countries in the arrangements for the protection of the individual. In Britain, the office of the Parliamentary Commissioner for administration (as he is called) was established pursuant to the Parliamentary Commissioner Act 1967. The New Zealand Ombudsman was instituted by the Parliamentary Commissioner (Ombudsman) Act 1962.

In Britain, the Government White Paper which introduced the Commissioner, stated that the detailed arrangements had been made to suit the particular circumstances of the country. Hence, in order to perpetuate the history and tradition of the British Parliament and so as not to erode the functions of the Members of Parliament, the latter have been made the channels through which complaints reach the Commissioner. Section 5 (1) of the 1967 Act provides that the Commissioner may investigate into matters brought to his attention by a written complaint made to an M.P. by a person

1 Bernard Frank, "The Ombudsman" Mr. Frank is Chairman, American Bar Committee, American Bar Association.

who claims to have sustained injustice in consequence of maladministration and which complaints are referred to him, with the consent of the person who made it. Schedule 3 to the Act lays down the "Matters not subject to investigation". Further, Section 5 (2) reads:

"Except as hereinafter provided, the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say -

- (a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of the Majesty's prerogative;
- (b) any action in respect of which the present aggrieved has or had a remedy by way of proceedings in any court of law.

Thus the Commissioner cannot investigate matters suo muto. The Act does not lay down the elements which vitiate an administrative action. Instead a compendious term - maladministration - has been used. This appears to be a very flexible term. The Commissioner is given wide discretion:

- (a) in determining whether to initiate, continue or discontinue an investigation;
- (b) whether a complaint is duly made under this Act².

The other distinct feature about the English Commissioner apart from the requirement to "lay annually before each House of Parliament a general report on the performance of his functions under this Act"³ the House of Commons has appointed a Select Committee the function of which is to look into the Reports and see that it is put into effect.

2 Section 5 (5) Parliamentary Commissioner Act 1967
 3 Ibid Section 10 (4).

Looked at from these angles, the English System is more restrictive in nature when compared with New Zealand's. In New Zealand Parliament appoints the Ombudsman. The Ombudsman here has wider powers in the sense that he can investigate complaints *suo muto*, that is, on his own accord. The complaint pays a nominal fee which can be waived. Complaints can be rejected as trivial or frivolous or if the individual has no personal interest in it. As in England, the Ombudsman cannot investigate matters in which there is a right of appeal to a Tribunal⁴. The main ground of difference between the two countries lies in the fact that in New Zealand grounds on which an action may be declared as 'maladministration' are laid down. For example:

- (1) If an action is contrary to law; unreasonable, unjust, oppressive or discriminatory;
- (2) if there is a mistake of law or fact;
- (3) if the administrative act is "wrong";
- (4) if discretionary power is exercised for relevant considerations;
- (5) if reasons are not given where they ought to be;
- (6) if the law under which action taken is by itself oppressive.

Thus it is clear that matters of policy and decisions by Ministers are not within the purview of the New Zealand's Ombudsman. But, decisions of the Ministers are mostly based on recommendations by departments. The question that arises here is that if the Minister accepts the recommendations can the Ombudsman declare the decision to be wrong? Here it is clear

4 Section 14 of the Parliamentary Commissioner (Ombudsman) Act, 1962.

that immediately the Ministers decision is made questionable. If for example, the Minister's decision is based on departmental recommendation, then by declaring the latter to be wrong, in fact, the Ombudsman says the Minister is wrong. On the other hand, if the Minister does not accept the department's recommendation but later the Ombudsman holds this to be correct, then again the basis of the Minister's decision is reviewed.

In New Zealand, Sir Guy Powles is the Ombudsman. It is said that the success of the system can be attributed to his personality. In his latest⁵ Report, Sir Guy Powles states that in retrospect, that he has seldom taken up matters on his own motion as he found that intake of complaints increased after any important public reference to his office or his work.

These then are the main features of the workings of the Ombudsman System in the two countries. In 1971, Frank Stacey⁶ claimed that "while, however, the British System has advantages in some detail, the overall impact of the British Commissioner is undoubtedly inferior to the impact which the New Zealand Ombudsman is having as a grievance-chaser". It is submitted that this trend is certainly not reflected in the recent Reports of the Commissioner. In the Annual Report for 1975, Mr. Alan Marre⁷ stated thus in his Concluding Reflections:

5 Report of the Ombudsman for the year ended 31.3.76, page 14.

6 Frank Stacey, "The British Ombudsman" Chapter XVI O.U.P. 1973, p.311.

7 Mr. Alan Marre was retiring from office on 31.3.76 after 5 years as the Parliamentary Commissioner in Britain.

"More and more complaints are now seeking to enlist the help of this office. I am very glad that this should be so. I believe much of it is due to the continuous efforts that I have made, with the support of the Select Committee on the Parliamentary Commissioner, to give publicity (emphasis added) to the services that this office provides, and also to the interest which the news media themselves have taken in my work⁸. Bearing this in mind, we can now indulge in an intensive analysis of some statistics. Figure 1 below shows the total number of complaints received, cases dealt with over a period of four years, i.e. 1972 - 1975:-

Figure 1

1972 - 1975

Total No. of cases received.		Total No. of cases completed.	
Britain Pop. 53 millions '73 Om. estab. 1967	New Zealand Pop. 3 millions '73 Om. estab. 1962	Britain	N.Z.
3233	4412	2701	1867

From Figure 1 we can perhaps deduce that although the volume of cases in New Zealand (in relation to the population) is higher in relation to Britain, there are two basic considerations to bear:

- (1) Although the number of complaints received are higher, Britain has a higher number of completed cases as opposed to New Zealand;
- (2) It is possible that New Zealand has reached its optimum as compared to Britain evidenced by the post-1974 pertinent statistics.

See Table 5.1 at the end of the Chapter for a year-to-year breakdown of figures.

8 Second Report of the Parliamentary Commissioner for Administration Session 1975/76 Annual Report for 1975 p.18

Figure 2 shows the average figures over the same period:-

Figure 2

1972 - 1975

(1) Average No. of complaints received		(2) Average No. of cases completed		Percent 2/1	
Britain	N.Z.	Britain	N.Z.	Britain	N.Z.
808	1103	675	469	83	42

The average number of cases dealt with as a percentage of those received is higher by 41%, (83 - 42) 43% of the cases dealt with are found justified in Britain whereas in New Zealand it works out to 29% only. See Figure 3.

Figure 3

1972 - 1975

Average No. of cases dealt with.		Average No. of cases found justified.		%	
Britain	N.Z.	Britain	N.Z.	Britain	N.Z.
675	469	287	138	43	28

In the rest of the cases, it is usually found either that the matter is outside the jurisdiction of the Commissioner or Ombudsman or that after partial investigation the case is discontinued while others are referred back for further information. Some of the grounds on which the Ombudsman grants relief may be elicited from the actual cases in which the complaint has been found to be justified.

(1) Improper discrimination in a case of entitlement to tax exemption⁹.

It was complaint that farm improvement clubs were not exempted from payroll tax whereas veterinary clubs and herd improvement societies were, although no significant difference existed between the constitution, activities and aims of the former and the exempted organisations. The Ombudsman here stated that it was not within his province to determine what types of organisations were liable to tax but in so far as the complainant alleged that the legal provisions were being applied by the department in an unfairly discriminatory manner, or alternatively that those provisions were themselves discriminatory, there has been injustice.

(2) Failure to give adequate notice of the lodgement of a Caveat¹⁰.

Where the District Land Registrar did not notify the Director (as required by Section 142 of the Land Transfer Act) of a private company regarding the lodgement of a caveat but instead served the notice on its solicitors, the Ombudsman questioned the validity of this procedure. As a result of this finding, steps have been taken to see that in future notice will be sent direct.

(3) Unreasonable length of time on penal grade¹¹.

An inmate of a penal institution complained that he had been made to serve his sentence of penal grade for more than the required period of three months. After reading the

9 Case No.7060: "Inland Revenue" Report on Ombudsman (N.Z.) 31.3.73.
10 Case No.6370: "Justice" Report of Ombudsman (N.Z.) 31.3.73.
11 Case No.8402 "Justice" Report of Ombudsman (N.Z.) 31.3.74.

relevant Regulations the Ombudsman pointed out to the authorities his own interpretation of the provisions which favoured the complainant's release from penal grade.

(4) Decision of department not to pay retrospective benefit - unfair¹².

Here the complainant had sent in her application to claim family benefit in respect of her youngest child. But the benefits were not paid into her Post Office account. On inquiry it was revealed that the District Officer had no record of her application. A fresh application was then made with the request that the benefits be made payable from the 1st day of the pay period in which her son was born. The Social Security Commission declined to pay this. The Ombudsman investigated, having satisfied himself as to the integrity of the complainant and suggested that the Commission make the appropriate payment to the complainant.

(5) Maladministration due to:

- (a) defect in process;)
- (b) refusal to state grounds for decision.))13

The complaint is that injustice has been caused as a result of maladministration within the Ministry of Defence in dealing with an application for a certificate of exemption from estate duty under Section 71 of the Finance Act, 1952. The events leading to this complaint are as follows:-

- (i) A retired Army Officer died of cancer in February 1967. The law in Section 71 of the Finance Act was that if an officer dies from a wound inflicted or disease contracted while on service, estate duty shall not be chargeable on his property.

- (ii) In June 1967 the complainants made an application to the Ministry for an exemption.
- (iii) In November 1967 the Ministry, in a letter, regretted that the department is unable to furnish a certificate.
- (iv) The complainants were dissatisfied and made a further application.
- (v) The Army Board considered the application afresh but were unable to certify that the deceased died of wound inflicted disease contracted while on service. This was in May 1969.
- (vi) Further meetings occurred between the Ministry and the Executors who asked to see the Minister's side of the medical evidence and to be given reasons for the Board's decision.
- (vii) In September 1969 the complainants decided to bring the matter through an M.P. for investigation by the P.C.A.

After a lengthy and in-depth investigation, the Commissioner concluded that injustice had been caused by maladministration in that:-

- (a) there were defects in the processes leading to the 1967 decision (stage 3). The main criticism here related to the process by which the evidence of the department of Health, Social Security and Army Medical Authorities was used, and the treatment of that evidence in relation to the medical evidence provided by the applicants;
- (b) there were defects in the process leading to the 2nd (May 1969) decision by the Army Board. The facts upon which the Board reached their decision did not include particulars of the treatment of previous applications;
- (c) The Army Board were at fault in refusing to state the grounds for their decision. "No doubt the Board were under no obligation, legal or otherwise, to convey the decision in such terms as the applicants requested. But as a matter of good relations between government and subject, it is recognised to be sound administrative practice to give"¹⁴.

(6) Maladministration due to unreasonable delay in the payment of Income Tax¹⁵.

The tax-payer complained that because of the delay by the Inland Revenue in repaying income tax he incurred bank interest of £15 and claims reimbursement of this sum. The tax-payer said he was entitled to repayment of £833 from 1965/66 on 22.9.1967. His file at the Tax Office was only recovered from the district on 13.2.68 and repayment was made on 20.2.68.

The Commissioner found that there was unnecessary delay in this case. As a result of maladministration, there was some four months delay in repayment of tax due, and the complainant was held to have sustained injustice as a consequence.

(7) Maladministration due to errors in the P.A.Y.E. Coding System¹⁶.

The complaint here is that the Inland Revenue mishandled tax affairs so that he is required to pay, by instalments, arrears of tax of \$288 and the complainant wanted the department to remit part of the tax.

The Tax Office here made an error when they calculated the code numbers for the tax year 1965/66 and gave the complainant most of his personal allowances twice over. In October 1966, they discovered and corrected their mistake but arrears of tax had accumulated.

The complainant appealed against assessment to the General Commissioner of Income Tax. The latter dismissed the appeal

15 C.803/68, 2nd Report of the P.C.A., Session 1969-70. Annual Report for 1969, p. 84.

16 C.1009/68, 2nd Report of the P.C.A., Session 1969-70. Annual Report for 1969, p. 90.

after accepting the argument of the Inspector for a reduction of expense allowance - a point not made known to the complainant.

Parliamentary Commissioner said that there had been maladministration by the Inland Revenue in this case.

In Britain, not only are more cases investigated, a larger percentage is found to be justified. (Figure 3). This goes to show that the 'shield' system of sifting complaints using M.Ps is effective to cast out non bona-fide and frivolous complaints from the public. A word of caution is voiced by the British Commissioner "The effect of the work of this office cannot be measured simply by the benefits it brings to the proportion of the individual complainants whose complaints are upheld¹⁷. Over the years, the following have been the products of the Commissioners recommendation to the British Parliament:

- (a) Improvements in administrative practice and procedure which have resulted in general benefits;
- (b) Persons of moderate means have benefited from the introduction by the Inland Revenue of a system of remission in certain circumstances;
- (c) Others are now benefiting from a change in legislation which allows interest to be paid when repayments of tax or estate duty are unduly delayed;
- (d) A special group of War Pensioners had their awards back-dated in circumstances where the ordinary rules would have precluded this.

From the Reports of New Zealand Ombudsman for the year ending 31st March 1976, a study of the cases in which redress

was offered was considered. In approximately half the number of cases where it was found for the individual, the remedy was in the form of compensation (4%), recommendations to department (40%), apology to individual department (10%). (The year 1975 - 1976 was chosen because it was felt that a dozen years of Ombudsmenial experience was a sufficient settling down period to reflect a reliable figure now). Where it was not found for the individual, the reports of investigations served to clear up misunderstandings, to clarify issues and to inform parties concerned of the true nature of the problem and of possible solutions.

As a summary of my propositions from this Chapter, I would propose that the machinery that handles complaints from the public:-

- (i) publicise its work in order to
 - (a) make its presence felt;
 - (b) to gain the confidence of the people in general.
- (ii) sift out complaints before they reach the mechanism. M.Ps work would (hopefully) become more meaningful in the process.
- (iii) The Reports and functions of the body should be supervised by a Committee in Parliament:
 - (a) to regularise the work;
 - (b) to guide the officers;
 - (c) to serve as a force in Parliament;
 - (d) to ensure that the recommendations to the departments are heard.

In concluding the comparative survey of the two Systems, it can be said that in themselves they have served to vindicate the administration. Much of the fear that the administration would come to a standstill because of the continual badgering

by the Ombudsman no longer stands¹⁸. It is a truism that the civil service in the two countries concerned is aware of a public watchdog over its acts. But the feelings that a bloodhound is sniffing around has not and will not be there so long as the powers and jurisdiction of the office are well-defined. Britain has further exploded the myth that the Ombudsman can only work in small countries, and that excessive power in the hands of a single individual can prove to be a danger. The Review function of the Select Committee should particularly be welcomed with a warm hand.

18 C. Mitchell "The Ombudsman Fallacy" (1962) Pub. Law 28. The writer said "The number of people looking over their shoulder may well affect the speed of action and certainly is likely to affect civil servants readiness to act".

TABLE 5.1

COMPARATIVE FIGURES FOR BRITAIN AND
NEW ZEALAND UNDER THE OMBUDSMAN SYSTEM.

YEAR (ending 31st Dec. for Britain & 31st March for N.Z.)	Total No. of complaints received		No. of cases dealt with		No. of cases justified		Percentage	
	Britain	N.Z.	Britain	N.Z.	Britain	N.Z.	Britain	N.Z.
1972	729	1135	596	525	278	113	47	21
1973	704	1246	536	554	251	154	47	28
1974	872	868	653	374	279	119	43	30
1975	928	1163	916	414	340	152	37	52