A PUBLIC LAW TOOLBOX PERSPECTIVE ON THE OMBUDSMAN'S ROLE AFTER 50 YEARS

Paper presented to the 10th World Conference of the International Ombudsman Institute

14-16 November 2012, Wellington

Mai Chen, Founding Partner, Chen Palmer New Zealand Public and Employment Law Specialists, Adjunct Professor, University of Auckland.

INTRODUCTION

1 Fifty years ago, citizens and business could have gone to the Ombudsman for most of their concerns about Government, because apart from judicial review through the Courts and representations to Members of Parliament, there were few avenues available to seek accountability from public decision-makers.

2 The success of the Ombudsman model has spawned a subsequent proliferation of complaints bodies overseeing the public and private sectors. A number of the Ombudsman's functions have been reallocated to other complaints bodies, such as the Privacy Commissioner and the Independent Police Conduct Authority. Numerous other complaints bodies and agencies which exact government accountability and/or handle citizens' complaints have also been created, such as the Human Rights Commission, the Health and Disability Commissioner, and the Inspector-General of Intelligence and Security.[1] There are now two other officers of Parliament, the Office of the Auditor General and the Parliamentary Commissioner for the Environment, with whom the Ombudsman has a close working relationship. Judicial review is a broader remedy than 50 years ago and there has also been an expansion of appeal rights and the creation of appellate bodies such as the Social Security Appeal Authority and the Immigration and Protection Tribunal. As a consequence, the constitutional framework in which the Ombudsman operates has changed significantly since the Office's establishment in 1962.

3 Citizens and business therefore need to adopt a Public Law Toolbox approach, and think carefully about when the Ombudsmen tool is the most appropriate in the circumstances to solve their particular issue with Government.

4 Over the last two years I have written and spoken about the importance of the Office of the Ombudsman in New Zealand's constitutional arrangements. In the first edition of my book *Public Law Toolbox* published in March of this year, I made the following key conclusions:[2]

(a) Given the growing reach of government into every aspect of citizens' lives, the Ombudsman's role in redefining the constitutional relationship between the public service and the public of New Zealand is as important as ever;

(b) The gravitas of the office, as an independent and professional Officer of Parliament, allows them to use persuasion to great effect in resolving complaints about matters of administration;

(c) Indeed, Ombudsmen are sometimes more effective than courts in achieving substantive redress, including compensation,[3] for a person with a meritorious complaint and in a shorter time frame. The Ombudsman can also facilitate the

---

[1] Each of these bodies is discussed in detail in Mai Chen *Public Law Toolbox* (Lexis Nexis, Wellington, 2012).

[2] Mai Chen *Public Law Toolbox* (LexisNexis, Wellington, 2012) at 679.

[3] In 2011/12, financial remedies were provided in 36 cases under the Ombudsman's Ombudsmen Act 1975 jurisdiction. *Annual Report* (2011/12) at 21.

resolution of systemic failures in administrative process, which no court can do, and promote good public administration process.

5 However, it is important to recognise that the Ombudsman's jurisdiction does have its limits. It is one tool among many in the Public Law Toolbox; it is not a panacea for all of the problems citizens experience with Government, and it is not a substitute for judicial review.

6 The Office of the Ombudsman is currently under significant pressure as a result of, *inter alia*:

(a) An increasing expectation by the public of fairness and accountability from Government, identified in chapter 2 of the *Public Law Toolbox*, which has continued to reflect itself in the burgeoning number of complaints to the Ombudsman's office made under both its Official Information and Ombudsmen jurisdictions. The Christchurch earthquakes have been the cause of some of this increase in the number of complaints. In 2011/2012, the Ombudsmen had a 22% increase in the number of complaints received over both its Official Information and Ombudsmen jurisditions(up to 10,636). This expectation is also making it harder to resolve complaints;

(b) Increasing pressure on lawyers to use the Ombudsman's office as a tool of last resort to resolve problems with Government for their clients, as litigation becomes increasingly expensive and thus inaccessible. This inevitably makes the Ombudsman's process more contested, and requires the Ombudsmen to draw a clear line between matters that are within their jurisdiction and those legally contested matters which must be decided by a court; and

(c) Continued under-resourcing. In the period 2008/09 to 2011/12, numbers of complaints on hand at any one time increased from around 1,000 to around 1,700, a 59% increase. In contrast, the Ombudsmen's annual appropriation from Parliament has only increased 6.3%, from $8.33 million to $8.86 million over the same period. The Ombudsmen recently reported that they have 300 complaints on hand which they cannot allocate to a case officer.

7 The result is that the Ombudsmen are becoming slower to respond, and in practice, I am recommending them less to clients as a tool to solve public law problems.

8 Nevertheless, the Office remains a crucial constitutional watchdog, and its role has never been as important to New Zealand's constitutional arrangements as it is now, and particularly its jurisdiction under the Official Information Act, given the increased public expectation of transparency and accountability. The OIA is a fundamental constitutional tool which is likely to expand its reach following the Law Commission's recent review of that legislation. The Law Commission recommended that Officers of Parliament, the Parliamentary Counsel Office, the courts, the Office of the Clerk and the Parliamentary Service should also be subject to the OIA.

9 The Ombudsmen have also expressed concern at attempts to restrict the application of the OIA, noting in their most recent Annual Report that:[4]

> Proposals to exclude the OIA on the basis of a need for greater protection [for certain agencies or types of information] are inconsistent with one of the stated policy purposes of the legislation and should always be regarded with a healthy degree of suspicion.

The Law Commission's review underscores the importance of the OIA being properly implemented, and thus, the importance of the Ombudsmen's complaints and educative function. The burgeoning numbers of complaints to the Ombudsmen in its OIA jurisdiction certainly attest to this. Interestingly, MPs and political party research units accounted for seven per cent of OIA complaints received by the Ombudsmen in 2011/12.[5]

10 For that reason, urgent action is needed to address the causes of delay and improve efficiency in the Ombudsmen's process, including:

(a) A commitment from Government to adequately resource the Office of the Ombudsman to allow it to deal effectively with its workload;

(b) Clearer guidance and training for public servants on their obligations under the Official Information Act 1982, and the Ombudsmen's role under the Ombudsmen Act 1975;

(c) Law reform to require agencies to comply with timeframes for responding to requests for information by the Ombudsmen under the Ombudsmen Act 1975; and

(d) Legislative amendment to facilitate closer coordination between the Ombudsmen, the Privacy Commissioner, and the Chief Archivist, given the interrelationship between the Official Information Act, the Privacy Act 1993 and the Public Records Act 2005.

11 Additional measures to increase compliance with the Official Information Act would also assist the Ombudsmen by reducing complaints about public decision-makers who find innovative ways to manoeuvre around, or simply breach, their statutory obligations. For example, sending communications via text message or not writing down the reasons for their decision-making, contrary to sound administrative practice. This is particularly important as the Ombudsmen note a significant increase in the number of complaints received about delays by agencies in making decisions on official information requests in 2011/12.[6]

---

[4] *Annual Report (*2011/12) at 27.

[5] Interesting given concerns that Ombudsmen would take the place of MPs when first established. See B Gilling *The Ombudsman in New Zealand* (Dunmore Press, Palmerston North, 1998) at 32.

[6] A 105% increase on the previous year, or a 34% increase if the 199 complaints from a single complainant were removed from the figures. *Annual Report (*2011/12) at 42.

KEY CHALLENGES

12 As noted above, there are a number of key challenges facing the Ombudsmen in New Zealand, including:

(a) The public's increased expectations of transparency and accountability, resulting in more complaints;

(b) A more contested process with lawyers making complaints for their clients, and pressure to extend the Ombudsmen's jurisdiction, given the expense of litigation; and

(c) Under-resourcing, resulting in pressure on staff and delays in processing complaints.

Increasing expectation by the public of fairness and accountability

13 Ombudsman David McGee has commented that societal expectations of what citizens can expect from public agencies and the Ombudsmen are now much higher than when the Office was first established 50 years ago.[7] The Law Commission notes that "the technology revolution has made information much more readily available. This has increased public expectations of openness and has made a reality the proactive release of information without the necessity of anyone asking for it."[8] I devote a whole chapter to this trend in chapter two of the *Public Law Toolbox*.

14 The trend of increased expectations by the public of fairness and accountability has continued to reflect itself in the number of complaints to the Ombudsman's office. In 2011/12, the Ombudsmen received 10,636 complaints and other contacts, an increase of 22 per cent on 2010/11 numbers. The Christchurch earthquake added additional pressure to the Office. The Ombudsmen noted a particular increase in official information complaints and complaints relating to the Earthquake Commission.[9]

15 The burgeoning number of complaints, coupled with the other pressures discussed below, means that the Ombudsmen currently have 300 complaints on file that they are unable to allocate to a case officer.

Pressure to extend the Ombudsmen's jurisdiction

16 In addition to more complaints, more lawyers are also using the Ombudsman's office as a last resort, particularly as litigation becomes increasingly expensive and thus inaccessible for their clients. This inevitably makes the Ombudsman's process more contested, and puts pressure on the Ombudsmen to extend the margins of their

---

[7] Interview with David McGee.

[8] Law Commission *The Public's Right to Know: A Review of the Official Information Legislation* (NZLC R125, 2012) at 8.

[9] *Annual Report* (2011/2012) at 8.

jurisdiction, which though extending over and above what the courts can find, is not a substitute for judicial review.

17 Judicial review is a broader remedy than it was 50 years ago, when the Ombudsmen's jurisdiction was established in New Zealand in 1962. At that time, judicial review was a relatively narrow remedy and few other non-political mechanisms existed for citizens to hold public decision-makers to account.

18 While there is now a greater overlap between the Ombudsmen's jurisdiction and judicial review, the Ombudsmen's role remains different from that of the courts.

19 While the Ombudsmen may find that a decision "appears to have been contrary to law" under s 22 of the Ombudsmen Act 1975, they will only do so where there are reasonably clear grounds for such a finding. In 2011/12, the Ombudsmen identified only two cases of legal error.[10]

20 It must be right that the Ombudsmen cannot make definitive determinations on the correct interpretation of relevant law, where the position of each party is reasonably tenable. They are not judges, and they may not be lawyers. The fact that New Zealand's Chief Ombudsman is not a lawyer speaks volumes about the non-legal nature of the Ombudsmen's role. The Ombudsmen's jurisdiction concerns what is fair and reasonable.

21 The Ombudsmen's role extends beyond the law and their jurisdiction is highly discretionary. It is concerned with what citizens can expect from public decision-makers acting fairly and reasonably. A decision by a public agency may be lawful, but is it fair; is it reasonable? An Ombudsman may find that a decision-maker's actions were "unreasonable, unjust or oppressive", even if they were legal, and vice versa.

Increasing cost of civil litigation

22 The prohibitive cost of litigation means that increasingly citizens (and their lawyers) are turning to the Ombudsmen as a last resort to seek a remedy for their problem with Government. These are often problems which are legally contested, in which case the Ombudsmen are generally not the appropriate tool. The appropriate forum to resolve a contest on unclear law is the High Court. But managing complaints to the Ombudsmen which should properly be filed as applications for judicial review contributes to the strain on the Ombudsmen's resources.

23 Litigation has increasingly become too expensive for most citizens and many businesses. The New Zealand Supreme Court, established in 2003, was intended to ensure our highest appellate court was more accessible to everyday New Zealanders. However most people can barely afford to go to the High Court or the Court of Appeal. That is why I wrote the *Public Law Toolbox* which highlights a wide range of non-litigious tools to solve problems with Governments, and uses litigation only as a last resort.

---

[10] *Annual Report* (2011/12) at 20.

24 A number of legal practitioners and researchers have expressed concern at the increasing cost of civil litigation. In 2004, a report on the performance and cost of the court system commissioned by the Law Commission concluded:[11]

> … demand and throughput are generally falling, cases are taking longer on average to come to court and the courts are typically spending longer on deciding them. In civil cases in particular, users appear to be moving elsewhere for justice or simply not pursuing a legally-based outcome. In other words, New Zealand's court system appears to be doing less work and doing it less efficiently. This is despite undoubted recognition of the problems and a firm commitment to improvement by both judiciary and administration.

25 In 2009, Justice John Hansen stated that the cost to parties of litigating a major dispute is now beyond the means of those who are neither wealthy nor eligible for legal aid.[12] Barrister Anthony Grant commented in 2011 that even a modest dispute in the Courts is likely to require litigants to produce a lot of expensive documents, including written submissions, statements of evidence and affidavits.[13] Grant goes on to state:

> The Courts haven't encouraged barristers to exercise restraint, but have done the opposite, by imposing more and more liabilities on them for negligence, making them engage in "defensive lawyering". And defensive lawyering is invariably expensive lawyering.
>
> The end result is that the cost of complying with the High Court's procedures is much greater than most citizens can pay.
>
> Until the rules are changed to reduce these costs, most citizens will be excluded from the State's system of dispute resolution.

26 A University of Otago research paper published in April 2011 highlighted the average time taken to resolve civil disputes in the High Court,[14] and noted that anecdotal evidence suggests litigants are increasingly choosing alternative dispute resolution over formal Court procedures, despite the risks involved in foregoing trying the dispute in Court, such as limited rights of appeal.

27 Whatever the cause of the increasing expense and delay in civil litigation,[15] it is a barrier to accessing justice through the court system. The result is an increased incentive to attempt an "end-run" around the Court system by complaining to the Ombudsmen instead.

---

[11] Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004).

[12] Justice John Hansen "Courts Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View" (2007) 11 Otago LR 351 at 354.

[13] Anthony Grant "Is the High Court's civil jurisdiction in "a death spiral"?" *NZ Lawyer* (Issue 153, Feb 2011).

[14] "Nationally in the High Court in 2010 the cases resolved prior to being allocated a hearing date were disposed of in an average of 252 days, with the remaining cases that proceeded to the point in the legal process of being allocated hearing dates taking an average of 608 days to resolve." Rachel Laing, Saskia Righarts, Mark Henaghan *A Preliminary Study on Civil Case Progression Time in New Zealand* (15 April 2011).

[15] See Hon Robert Fisher QC "Whether the adversarial process is past its use-by-date – a New Zealand perspective" (paper presented for the NZ Bar Association and Legal Research Foundation Civil Litigation Conference, 22 February 2008, Auckland, New Zealand).

Ombudsman's process more contested

28 The increasing involvement of lawyers for the complainant and for those complained against in the Ombudsman's process does introduce an element of litigious conduct, greater contestation, and can result in delay in resolving a complaint. The fact that lawyers have been instructed may be because the issue is more complex and difficult, which may also make complaint resolution more difficult. It can change the nature of the remedy sought, as complainants also seek payment of their legal fees by the public agency involved.

29 Lawyers are also increasingly looking to the Ombudsmen as an alternative to litigation. For example complainants may try to use the Ombudsmen to determine what are essentially questions of legality, such as whether a decision is ultra vires; attempting to change the nature of their role from problem-solvers of maladministration to determiners of the law.

30 Even where lawyers understand the limitations on the Ombudsmen's jurisdiction, there may be no other option where a client cannot afford to litigate. In a recent decision, the Ombudsmen had this to say about a complaint we assisted with:

> An Ombudsman is authorised under section 13(1) of the Ombudsmen Act 1975 to investigate decisions by the [Department] when that decision relates to a matter of administration and affects a person in their personal capacity.
>
> In the circumstances of your complaint, I note that your desired result appears to be that the Ombudsman would:
>
> - Form an opinion that the [Department's] position is;
>   - Contrary to law;
>   - Unreasonable;
>   - Based wholly or partly on a mistake of law or fact; or
>   - Wrong; and thus
> - Recommend that the Ministry provide a remedy for the decision to interpret the legislation in such a manner.
>
> This essentially invites an Ombudsman to consider the correct interpretation of relevant law, and more specifically the question of whether the [proposed action may properly be taken].
>
> I note that there is no judicial authority on the question that is raised, and it seems to me that the positions of both Chen Palmer and the [Department] are reasonably arguable. In light of that, it is difficult to see how an Ombudsman could come to the opinion that the [Department's] interpretation of [the relevant provision] is unlawful, unreasonable, contrary to law, or wrong. The position of the [Department] is at least tenable, and I would not be able to form an opinion that it constitutes maladministration to adopt this position. Rather, it seems to me that the only [way] to resolve the dispute would be by way of judicial determination.

Under-resourcing and timeliness issues

31 While timeliness of the Ombudsmen's process has been an issue for some time, the problem has been compounded in recent years by under-resourcing and a dramatically increased case load. Numbers of complaints on hand at any one time have increased from around 1,000 complaints and other contacts in 2008/09 to around 1,700 in 2011/12, a 59% increase. In contrast, the Ombudsmen's annual appropriation from Parliament has only increased 6.3%, from $8.33 million to $8.86 million over the same period.

32 The Ombudsmen note in their 2011/2012 Annual Report that there is less satisfaction with their timeliness in responding, with only 53 per cent of complainants agreeing in

2011/12 that the Ombudsman was timely. Overall satisfaction with the Ombudsmen's standard of service has also dropped, from 66 per cent in 2008/09 to 55 per cent in 2011/12.[16]

33 Indeed, a number of our clients have experienced significant delays in receiving a final decision from the Ombudsmen, which can have a significant impact on clients, including on legal proceedings. For example, a complaint was lodged with the Ombudsmen regarding a decision by the Ministry of Education to charge for an Official Information Act request, which in the opinion of the complainant was excessive (the charge imposed was $20,000, larger than any I have ever seen in private practice). The complaint was lodged in October 2011, with a request that the Ombudsmen urgently investigate as the complaint was made in the wider context of an urgent claim before the Waitangi Tribunal. The Ombudsmen responded in March 2012 that they had taken a decision to investigate the complaint. A preliminary substantive decision was not issued by the Ombudsmen until September 2012, well after the Waitangi Tribunal hearings had concluded and only days before we received the Tribunal's report.[17]

34 In practice, this means that I am recommending the Ombudsmen less as an effective way to resolve issues of maladministration with Government.

35 In part, delay in the Ombudsmen's process is a resourcing issue. In its most recent report, the Ombudsmen note that "the pressure on [their] staff remains intense and is unsustainable in the long run":[18]

> …we are still significantly under resourced. Whilst we have managed to increase our throughput to deal with the increasing number of complaints and other contacts we are receiving, we are struggling to meet some of our timeliness targets and there has been an impact in terms of the work we have on hand at any one time…. We currently have approximately 300 complaints on hand that we do not have the resource to immediately progress.

36 This issue was the catalyst for a Member's Bill narrowly voted down at first reading by Parliament earlier this year, which would have allowed the Ombudsmen to set guidelines for recovering the costs of their investigations from the agencies being investigated.[19] It would be difficult to disagree with the sentiment behind the proposed legislation. As Hon Shane Jones, promoter of the Bill, stated at first reading:[20]

> The Office of the Ombudsman has a bark that can have an effect not unlike a set of teeth marks on recalcitrant bureaucrats. At all times we need to ensure that this office is suitably and adequately resourced.

---

[16] *Annual Report (*2011/12) at 10.

[17] Waitangi Tribunal *Matua Rautia: the report on the Kohanga Reo Claim* (Wai 2336, 2012).

[18] *Annual Report* (2011/12) at 10.

[19] Ombudsmen (Cost Recovery) Amendment Bill 2012

[20] (19 September 2012) 684 *NZPD* 5414

37 I did not support the Bill itself however, as the overriding benefit that citizens and the Government derive from the Ombudsmen's office is its independence. The incentives created by the Bill would have resulted in undermining the perception, if not the reality, of independence, as the Ombudsmen would derive financial benefit from finding against the agency concerned. Responsibility for properly resourcing the Ombudsmen lies with the Government, through the annual allocation of public funds in the Budget process.

URGENT ACTION NEEDED

38 The Office remains a crucial constitutional watchdog, and its role has never been as important to New Zealand's constitutional arrangements as it is now, and particularly its jurisdiction under the Official Information Act, given the increased public expectation of transparency and accountability. While the Ombudsmen are not a substitute for judicial review, and cannot make determinative findings on the law, they do have broad investigative powers, a lower threshold to find wrongdoing or trigger an investigation than the courts, a wide reach in terms of jurisdiction and the discretion to make wide-ranging recommendations for remediation. They are also free to the complainant. Given the power imbalance between the government and citizens and business, it is crucial to have watchdogs to provide redress for individual grievances about bad public administration, and to improve systems, standards of performance and financial accountability in government.[21]

39 For that reason, urgent action is needed to address the causes of delay and improve efficiency in the Ombudsmen's process, including proper resourcing and clearer guidance and training for public servants on their obligations under the Official Information Act 1982, and the Ombudsmen's role under the Ombudsmen Act 1975. Law reform is also needed to:

(a) ensure agencies comply with timeframes for responding to requests for information by the Ombudsmen under the Ombudsmen Act 1975;

(b) give the Ombudsmen broader grounds to refuse to investigate a complaint; and

(c) facilitate closer coordination between the Ombudsmen, the Privacy Commissioner, and the Chief Archivist, given the interrelationship between the Official Information Act, the Privacy Act 1993 and the Public Records Act 2005.

40 Additional measures to increase compliance with the Official Information Act would also assist the Ombudsmen by reducing complaints about public decision-makers who find innovative ways to manoeuvre around, or simply breach, their statutory obligations. This is particularly important as the Ombudsmen note a significant increase in the number of complaints received about delays by agencies in making decisions on official information requests in 2011/12.[22]

---

[21] M Seneviratne *Ombudsmen: Public Services and Administrative Justice* (Butterworths, London, 2002) at 17.

[22] A 105% increase on the previous year, or a 34% increase if the 199 complaints from a single complainant were removed from the figures. *Annual Report 2011/12*, p 42.

Clearer guidance and training

41 In its recent review of the Official Information Act, the Law Commission stated that one of its "key recommendations" was the development by the Ombudsmen of clearer guidance on applying the OIA, and the maintenance of a database of decided cases to serve as exemplars and precedents:[23]

> Rather than prescribe by regulation, or attempt widespread statutory amendment, we think the solution lies in better guidance. We believe that it would be desirable to have a set of firmer guidelines than currently exists, to supplement the case-by-case approach.

42 Such an approach is not only valuable for the Ombudsmen's official information jurisdiction, but also for their jurisdiction under the Ombudsmen Act 1975 concerning maladministration by Government. This "ambulance at the top of the cliff" approach will reduce complaint numbers, as public servants are better able to assess their behaviour against precedent decisions and established principles.

43 The Ombudsmen are already putting out more precedents which will help public decision-makers to understand their obligations, and help potential complainants to understand their rights and what they can reasonably expect of the Ombudsmen. This work contributes to wider attitudinal and culture change.

44 For example, since 2011 the Ombudsmen have published a wide range of materials, including six case notes,[24] two Ombudsmen Act opinions,[25] ten guidance documents,[26] three reports,[27] and three submissions.[28] In 2011/12, the Ombudsmen also undertook their first nationwide public awareness survey, to gauge the level of awareness of their

---

[23] Law Commission *The Public's Right to Know: A Review of the Official Information Legislation* (NZLC R125, 2012) at 9 and 40.

24 Request for taser camera footage, ref 290369 (28 June 2012); Request for list of titles and dates of reports and briefings received by the Minister of Finance from specified government agencies, ref 179181 (12 February 2012); Requests for documents concerning the Government's proposed mixed ownership programme (24 November 2011); Request for / disclosure of building consent information (February 2011); Requests for EQC cost estimates (case notes) (February 2012); Request for public submissions made on the Green Paper for Vulnerable Children (case notes) (29 August 2012).

25 Complaint by the Hubbard Support Team and others concerning a recommendations for statutory management made by the Securities Commission to the Minister of Commerce on 19 June 2010 (April 2011); Request for / disclosure of building consent information (February 2011)

26 Good decision making (1 October 2012); Effective complaint handling (2 October 2012); Good complaints handling by school boards of trustees (6 August 2012); Managing unreasonable complainant conduct: A manual for frontline staff, supervisors and senior managers (October 2012); Making a protected disclosure – "blowing the whistle" (3 October 2012); Official information requests made by twitter and facebook (6 August 2012); The OIA and school boards of trustees (6 August 2012); Address information for the purposes of civil court proceedings (21 March 2012); Chief executive expenses (1 March 2012).

27 Investigation of the Department of Corrections in relation to the provision, access and availability of prisoner health services (2012); Complaints arising out of bullying at Hutt Valley High School in December 2007 (2011); Investigation of the Department of Corrections in relation to the complaint procedures of Corrections Inmate Employment (1 April 2011)

28 Submission of the Ombudsmen to the Finance and Expenditure Committee – Mixed Ownership Model Bill (13 April 2012); Submission of the Ombudsmen to the Law and Order Committee – Corrections Amendment Bill (12 April 2012); and advised on 31 legislative, policy and administrative proposals relevant to the Ombudsmen's jurisdiction.

service in the community. This survey found that 69% of New Zealanders had heard of the Ombudsmen.[29]

45 The Ombudsmen's most recent Annual Report also includes more explanation of the Ombudsmen's decision-making and the reasons for it, especially on complex complaints which required the Ombudsmen to make a difficult call and complaints concerning what falls within and outside of their jurisdiction. For example, the 2010/11 Annual Report included an explanation of Ombudsman David McGee's reasoning in a complaint concerning the withholding of information relating to Ministerial residences, and an assertion that correspondence to an MP from the Registrar of Pecuniary Interests could not be released as it would constitute contempt of the House of Representatives. This was a matter on which the Ombudsman was uniquely able to advise given his previous role as Clerk of the House. In this case, the Ombudsman released his decision regarding information of this nature for future reference.

Law reform needed

46 There are plans for reforming to the Ombudsmen Act 1975, to amend s 17 to provide the Ombudsmen with broader grounds to refuse to investigate a complaint. However, more reforms are needed urgently.

Responding to an Ombudsman's request for information

47 Currently, s 29A of the OIA sets a deadline for agencies to provide the Ombudsman with any information or document or thing requested "as soon as reasonably practicable, and in any case not later than 20 working days after the day on which that requirement is received by that…organization"; however, there is no similar requirement for agencies to respond to requests for information from the Ombudsmen under their Ombudsmen Act jurisdiction.

48 This requirement should be inserted into the Ombudsmen Act so that departments and organisations are required to respond to Ombudsman requests for information about a complaint under s 19(1) of the Ombudsmen Act within 20 working days, unless there is good reason to apply to the Ombudsman for an extension within 10 working days after the request, and then only for a reasonable period.

49 This amendment would ensure that agencies do not unreasonably delay an Ombudsman's investigation of complaints.

50 A further option would be to empower the Ombudsmen in matters within its jurisdiction under the Ombudsmen Act to make conclusive findings of unreasonable delay by a government department, organisation or official, which would allow a complainant under certain specified enactments to escalate the matter to a "prescribed tribunal" for review.

51 Such a power would be similar to s 10 of the Australian Commonwealth Ombudsmen Act 1976, which allows an Ombudsman to grant a certificate to a complainant certifying

---

[29] *Annual Report* (2011/2012) at 8.

that there has been unreasonable delay in deciding whether to do an "act or thing". A decision not to do the act or thing is deemed to have been made on the date on which the certificate is granted. This deemed decision is thereupon reviewable by the "prescribed tribunal". The section only applies where no time limit for the making of a decision is prescribed, and the decision is reviewable by a "prescribed tribunal", which includes the Administrative Appeals Tribunal.

52 While a person may still encounter court costs and other barriers in reviewing the unreasonable delay, Parliament may support the Ombudsmen having such a power as an extra lever to force an agency to make a decision. The Ombudsmen would not be second-guessing the substantive decision of any person, but simply ensuring that a person actually carries out his or her public obligation. The Ombudsman's certificate that the person is deemed not to have done the act or thing on a particular date allows the complainant then to escalate the matter to the prescribed tribunal to get a decision made on their matter.

53 The Ombudsmen have expressed concern at delays in resolving complaints, and greater powers to ensure departments are responsive may go some way to mitigating these concerns.

Relationship with the Public Records Act

54 The Ombudsmen necessarily have a close working relationship with other complaints bodies and officers of Parliament. Under the Ombudsmen At 1975, the Ombudsmen are empowered to consult with and refer complaints to the Privacy Commissioner, the Health and Disability Commissioner, and the Inspector General of Intelligence and Security.[30]

55 Importantly, however, the Chief Archivist established under the Public Records Act 2005 is excluded from this list. This needs to be rectified. The Public Records Act underpins the purposes of the OIA, by ensuring that official information is stored so that it can be accessed by citizens.[31] As the Law Commission states:[32]

> The one prescribes what information should be maintained by agencies and the record-keeping practices which are necessary to maintain it. The other prescribes the making available of that information.

56 The Law Commission went on to note:[33]

> Destruction of records contrary to the [Public Record Act]'s requirements is already an offence. But the problem extends wider than this: it is not just a question of the destruction of information. If record-keeping is poor, information may be unable to be located, or the task of collation may be so large as to lead to a refusal under section 18 of the OIA. Moreover, if

---

[30] Ombudsmen Act 1975, ss 17A, 17B, 17C, 21A, 21B, and 21C.

[31] See, for example, Law Commission *The Public's Right to Know: A Review of the Official Information Legislation* (NZLC R125, 2012) and Parts 1–6 of the *Local Government Official Information and Meetings Act 1987* (NZLC IP18, 2010) at 208: "The proper functioning of the OIA thus depends on proper compliance with the PRA".

[32] *The Public's Right to Know* at 17.

[33] *The Public's Right to Know* at 360.

> advice or information is supplied orally between officials, rather than being written down as normal prudent business practice requires, it may be said in response to a later OIA request that the information "does not exist" (section 18(e)) or that it "is not held" (section 18(g)).

57 If a public office asserts that a document does not exist, it may be possible to complain to the Chief Archivist about non-compliance with the Public Records Act.[34] This is an important tool, as a lack of records makes it impossible to hold the government to account.

58 The Chief Archivist has oversight responsibilities for both central and local government agencies, and his functions under the Public Records Act include monitoring and reporting on the compliance of public offices with that Act.[35] The Chief Archivist may inspect the public records of a public office,[36] and may give notice in writing directing an office to report to the Chief Archivist or to any other person specified by the Chief Archivist on: any specified aspect of its recordkeeping practice; or the public records that it controls or (in the case of an approved repository) has possession of.[37]

59 I support the Law Commission's recommendation that in cases where requests are refused because the information is not available, the Ombudsmen may refer the matter to the Chief Archivist.[38] Specifically, the Law Commission recommend that the OIA (and the Local Government Official Information and Meetings Act 1988) be amended:

> … to provide that the Ombudsmen may notify the Chief Archivist if a request is refused on any of the following grounds:
>
> (a) The information does not exist or cannot be found;
>
> (b) The information cannot be made available without substantial collation or research; or
>
> (c) The information is not held by the agency in question.

Lack of compliance with the Official Information Act

60 In its 2011/12 Annual Report, the Ombudsmen reported a considerable increase in the number of Official Information Act complaints, up 25 per cent to 1,236 complaints.[39] The Law Commission's review of the Official Information Act also raised a number of concerns about the way in which the legislation is being applied, including the application of statutory grounds for withholding information and consideration of the public interest.

---

[34] Public Records Act 2005, ss 17–18.

[35] Public Records Act 2005, s 11(1)(b)

[36] Public Records Act, s 29.

[37] Public Records Act, s 31.

[38] *The Public's Right to Know*, chapter 15.

[39] *Annual Report* (2011/12) at 40.

61 The Ombudsmen note their particular concern with current policy on recording reasons for decisions made by public agencies. Immigration New Zealand currently has a policy not to record reasons for the exercise of absolute discretion under s 61. The Ombudsmen found that not recording reasons for s 61 decisions at all is contrary to sound administrative practice:

> Records of decisions need to be made for the purposes of accountability, to promote public trust and confidence in the integrity of the decision making process, and to enable verification of what was done. In this regard, we would generally consider a record of a decision under s 61 to be sufficient if it includes:
>
> - Brief reasons for the decision made;
> - Relevant factors taken into account in making the decision; and
> - An indication as to whether the reasons are to be made available to a requester.

62 We have also noticed the practice of public officials not writing down the reasons for their decisions so there is nothing on the record to be sought under the OIA.

63 Good process results in good decision-making, and there has to be some adducing of reasons before a decision is made. Those reasons should be recorded. Section 23 of the OIA enables an affected individual or body to seek a written statement of reasons for decisions or recommendations made by a public agency. The Ombudsmen can request that the agency concerned interview their staff to ascertain reasons for a decision, but this may be ineffectual if the person simply cannot recall because they took no notes. They can summons officials under s 19 of the Ombudsmen Act and put the person under oath as to why they made the decision that they made, even if those reasons are not written down.

64 Other problematic practices include the communication of advice and decisions via text messages, not traditionally included within the scope of an OIA request. These are now inevitably being specifically sought under the OIA.

65 Reform is therefore needed to increase compliance with the Official Information Act. This would assist the Ombudsmen by reducing complaints about public decision-makers who find innovative ways to manoeuvre around, or simply breach, their statutory obligations.

Grounds of complaint

66 The Ombudsmen note a significant increase in the number of complaints received about delays by agencies in making decisions on official information requests in 2011/12:[40]

> This is a worrying trend, and we are currently considering what further action we may need to take in the area of delays, including the possibility of a general review and administrative audit of agencies' official information request handling procedures.

---

[40] A 105% increase on the previous year, or a 34% increase if the 199 complaints from a single complainant were removed from the figures. *Annual Report* (*2011/12*) at 42.

67 The Law Commission has recommended that there be additional grounds of complaint to the Ombudsmen to cover unsatisfactory agency processes such as lack of timeliness, decisions on transfer, and failure to give notice to third parties where required under the OIA. Currently, complaints about delay are referred to as 'delay deemed refusal' complaints, because the delay is deemed by section 28(4) of the OIA and section 27(4) of LGOIMA to be a refusal of the request. Delay is not currently a separate ground upon which a complaint may be made to the Ombudsmen.

Applying the public interest

68 There are also a number of examples recorded by the Ombudsmen of public agencies misapplying, or failing to consider the public interest. I know from my own experience that clients do not understand this concept and how it applies.

69 Many of the withholding grounds under the OIA are subject to a public interest override.[41] In other words, even if such a withholding ground is made out, in the circumstances it may be overridden by the greater public interest in releasing the information. The Law Commission found that "that override is sometimes not applied as well as it might be and again we think it would benefit from careful guidance with plenty of examples."[42]

70 A good recent example of weighing the public interest in decisions under the OIA is the Ombudsmen's investigation into the Government's decision to withhold information relating to the proposal to partially-privatise state-owned energy companies:[43]

> The Chief Ombudsman accepted that disclosure of the information at issue would prejudice the "good government" interests protected by sections 9(2)(f)(iv) and 9(2)(g)(i) of the OIA, and the argument turned on the weight to be accorded to the public interest in disclosure.
>
> The significant public interest factor in this case was the forthcoming General Election, in light of the fact that the Government was effectively seeking a mandate from the electorate for pursuing the mixed ownership policy. The Chief Ombudsman agreed with views expressed by earlier Ombudsmen, that "a general election is the central event in a constitutional democracy", and acknowledged "the constitutional importance of ensuring that the electorate [is] well informed before it commit[s] itself to selecting the parliamentarians from whom a government would be formed".
>
> Whilst acknowledging the "exceptionally strong public interest in disclosure of information that may help voters to decide how to exercise their vote", the Chief Ombudsman was not persuaded that the information requested in this case raised this public interest consideration. Having regard to the specific information at issue, the stage reached in the advisory and decision making process, and the information that was already publicly available, the Chief Ombudsman formed the opinion that the applicable withholding grounds were not outweighed by the public interest in disclosure, and so there was good reason to withhold the information.
>
> Because of the high public interest in the case, the Chief Ombudsman published her full opinion, which is available at www.ombudsman.parliament.nz.

---

[41] Official Information Act, s 9(1).

[42] *The Public's Right to Know* at 9.

[43] *Annual Report* (2011/12) at 27.

71 The appropriate weight to be accorded to the public interest in OIA decision-making was also considered by the Ombudsmen in 2011/12 in the context of the Queen Elizabeth Trust:[44]

> Subject to any countervailing public interest in release, section 9(2)(ba)(ii) provides good reason for withholding official information where it is necessary to:
>
> "protect information which is subject to an obligation of confidence…where the making available of the information .. would be likely otherwise to damage the public interest."
>
> The Ombudsman considered that the nature of the relationship between the Trust and landholders of covenanted land gives rise to an obligation of confidence by the Trust, in respect of non-registered management plans, inspection reports, and instances of poor adherence. There is a public interest in maintaining that relationship to ensure the ongoing good management of the covenants, and the creation of new covenants. Release of the requested information would be likely to damage the relationship between the Trust and landholders to the extent that it would adversely impact on the Trust's ability to effectively monitor the current covenants, and the willingness of private landholders to enter into covenants in the future.
>
> The Ombudsman acknowledged a public interest in the release of information about the effectiveness of Trust covenants. However, he considered this must be balanced against the ongoing effectiveness of the management and monitoring of the existing covenants, and the ability to form new covenants. The Ombudsman therefore discussed with the Trust the sort of information that could be made available without prejudicing the Trust's relationship with landowners and lessees of covenanted land. Following these discussions, for the first time the Trust released a table outlining the number of covenants in poor adherence, the nature and scale of the poor adherence, and the actions taken by the Trust.
>
> The Ombudsman formed the opinion that release of this information met the public interest in making available information about the effectiveness of the covenants, and there was good reason to withhold the remaining information at issue.

72 In its 2010/11 report, the Ombudsmen noted some general principles that apply to requests for the names of beneficiaries of state sector hospitality following a number of complaints concerning requests for information about expenses incurred by state sector chief executives and elected officials:

> The public interest in disclosure will depend on factors such as:
>
> - The amount of expenditure incurred;
> - The type of expenditure, for instance, whether it is "sensitive expenditure" as defined by the Auditor-General;
> - Whether there are problems, difficulties or concerns in relation to the expenditure; and
> - Whether sufficient information has been disclosed about the purpose of the event to assure the public of the propriety of the expenditure.

73 In its review of the OIA, the Law Commission considered whether the "public interest" should be defined in the Act itself but concluded that "it is not desirable to constrain

---

[44] *Annual Report* (2011/12) at 48-49.

decision makers by propounding a statutory definition."[45] The Law Commission could not find any place in New Zealand's statute books where the "public interest" has been defined, and also notes:

> Even when cases reach the courts, judges have been notably reluctant to attempt a definition, other than to say it means more than public curiosity, but rather conveys that the matter is one in which the public have a legitimate concern. One judge has simply described it as "a yardstick of indeterminate length.

74 The Law Commission did recommend a recasting of the relevant provision in order to give the public interest requirement more prominence.

Is structural reform required?

75 The Law Commission has recommended a suite of changes to the Official Information Act regime which would improve its operation, and thus the ability of the Ombudsmen to effectively deal with complaints and agency compliance.

76 My learned former law partner Sir Geoffrey Palmer has proposed an alternative policy narrative - that the official information complaints function be removed from the Ombudsmen to an independent Information Authority entrusted with both a complaints and oversight function. However, this would require additional backroom resourcing, would result in the increased involvement of the courts, and would not address other fundamental issues, such as delay by public agencies in responding to OIA requests and requests by the Ombudsmen for further information.

77 In general, the structure of our current model is working well. We do not have a process for appeal from Ombudsmen rulings on the Official Information Act, but it seems that there is no need for one given the Ombudsmen's gravitas, and the effectiveness of the complaints resolution procedure if properly resourced. The Danks Committee Report that recommended that the function of receiving OIA complaints should sit with the Ombudsman continues to have relevance today:[46]

> We believe that in the New Zealand context there are convincing reasons not to give the court ultimate authority in such a matter. The system we favour involves the weighing of broad considerations and the balancing of competing public interests against one another, and against individual interests. If the general power to determine finally whether there should be access to official information were given to the courts, they would have to rule on matters with strong political and policy implications.

78 However, greater certainty in how the OIA is to be applied is required. I agree with the Law Commission that this can be achieved through the provision of better guidance and precedents.

---

[45] *The Public's Right to Know* at 145.

[46] Committee on Official Information *Towards Open Government* (December 1980), volume 2 at 14.