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Editorial:

Farewell from retiring Ombudsman

One of the early decisions taken by my then new colleague, Brian Elwood, and myself as I began office as an Ombudsman at the beginning of 1995 was that the Ombudsmen should publish a quarterly newsletter, that would both highlight examples of cases we had completed as well as offer advice on compliance with both the Ombudsmen and Official Information legislation. It was thought that both complainants and requesters on one side, and institutional personnel on the other, might be assisted by reference to examples of the kind in which they might be involved.

For 40 years, Ombudsmen in New Zealand have endeavoured to be catalysts for the most suitable outcome, as opposed to being the decider of winner and loser. This has helped ensure over thousands of cases that Ombudsmen recommendations tend to be accepted, even though some degree of compromise may be called for.

This issue of the "Ombudsmen's Quarterly Review" or "Te Arotake" in December, 2004, is the 39th successor in which that approach has been continued. Its present regular circulation of more than 1,000 is to ministries, departments and public sector agencies, territorial councils, and libraries and citizens' advice bureaux. Our information output is underpinned by an actively-consulted website.

The chemistry in which the Ombudsmen have worked over a decade can be described as "the same as well as different". Whether by means of people's general knowledge, their civic awareness, rights consciousness, or otherwise, the number of cases being brought to the Ombudsmen continues to rise. During this current year, some 6,000 New Zealanders will bring a case to us under either the Ombudsman jurisdiction or the Official Information Act (in central or local government form) or the Whistleblower's legislation.

While most requesters and complainants are still members of the ordinary public, one of the changes during the decade is that of increased usage of the Ombudsmen by news media, lawyers and politicians. This development is partly the result of the MMP change to the electoral system, which has resulted in more politicians sitting in the House of Parliament, more questions being asked in the House and more litigation over the answers. This has led to a definite increase in tempo and likewise complexity.

We are fortunate as an office to have retained the assistance of highly motivated and hard working staff members as investigators and support personnel. It is both interesting and affirming to see the large amount of interest expressed in applications for work within our office, whenever that has come to be advertised

Challenges for the future will include ensuring that recourse to the Ombudsmen in New Zealand remains an avenue that is considered to provide timely and relevant resolution for difficulties, and is regarded in that fashion for the authorities of the day. By way of a report to Parliament, I shall be making some technical suggestions in that regard. The office of Ombudsman is one with high levels of job satisfaction because of the dual function of influencing events and helping people resolve problems. It remains a task well worth doing.

I wish my remaining colleagues - John Belgrave, Mel Smith and Beverley Wakem - all the best in that regard.

Anand Satyanand

Being flexible can avoid problems

If a local authority can be flexible and compromise, then that may lead to the resolution of a complaint to the Ombudsman which otherwise might have the potential to cause ongoing difficulties.

A couple bought a house on land leased from a local authority at a seaside settlement. They realised there might be difficulties in freeholding the land because of its location close to a reserve, but contacted the local authority several times to explore that possibility. When the local authority confirmed that this was not an option, they considered selling the improvements and their leasehold interest in the land.

There was interest in the property but the fact that the land was leased proved to be an impediment to the sale because of the reluctance of financial institutions to lend money on leasehold land. Also, the house itself was not physically able to be moved and although the local authority offered to buy the improvements the owners did not accept because the amount offered was insufficient to allow them to purchase another property.

In the end, with no other potential remedy in sight, the local authority agreed to extend the lease. Although it was under no legal obligation to do this, the local authority was able to adopt this remedy because it did not require the land in the immediate future.

OIA and the Privacy Commissioner

Section 52(3)(b) of the Official Information Act (OIA) provides that nothing in the Act derogates from any provision in any other Act that imposes a prohibition or restriction on the availability of official information.

A complainant to the Ombudsman under the OIA sought information from the Privacy Commissioner about a complaint under the Privacy Act.

The requester complained to the Ombudsman after his request had been refused under section 18(c)(i) of the OIA, which permits refusal of a request where disclosure would be contrary to the provisions of a specified enactment. The specified enactment in this case was section 116(1) of the Privacy Act which requires the Commissioner and her staff to maintain secrecy over matters that come to their knowledge in the exercise of their functions under the Act. However, section 116(2) gives the Commissioner a discretion to disclose information if, in her opinion, this would give effect to the Act. The Commissioner did not consider that to be so in this case.

The Ombudsman considered that he could not substitute his opinion for that of the Privacy Commissioner since that would derogate from the Commissioner's authority. The information was therefore rightly withheld under OIA s.18(c)(i).

Also, because the Privacy Commissioner is not subject to the Ombudsmen Act (OA), an Ombudsman had no authority under the OA to investigate the reasonableness of the Commissioner's exercise of her discretion.

Body corporate's right of access to evaluation of its work

A company complained about a Government department's refusal to supply personal information about the company. This information was a paper written by the department that evaluated another paper that a principal of the company had written.

During the Ombudsman's investigation, the department itself decided that Part 4 of the Official Information Act (providing a right of access to personal information for bodies corporate) applied to its evaluation.

The Department made only a minor deletion, permitted by s27(1)(a) of the Act, which resolved the complaint.

Judge Satyanand retires

Judge Anand Satyanand will end his second five-year term as an Ombudsman on February 14, 2005, and retire. He gave notice to Parliament in 2003 that 10 years of office was to be his preferred limit and that by retiring from office in 2005 he would be able to leave open the prospect of making other contributions.

Born and raised in Auckland, he studied at the University of Auckland Law School and was admitted to the Bar in 1970. He practised principally before the courts, for some time in the Crown Solicitor's Office and then as a partner in a Queen Street law firm.

He was appointed a District Court Judge in 1982 and worked in a number of postings, including Palmerston North, suburban and central Auckland. During this time he also worked in law reform as a member of the Government Criminal Law Reform Committee, in prison and parole work as a member of the National Parole Board, in the development of litigation skills programmes for lawyers, and in the establishment of an orientation programme for newly-appointed New Zealand judges.

Judge Satyanand was appointed by Parliament to be an Ombudsman in 1995 and re-appointed in 2000. During his time in office, three strands can be identified:

- his concentration on work primarily to do with complaints emanating from the general public, especially over Social Welfare, Inland Revenue and the Police (this last for official information purposes), and complaints based in Auckland;

- his association with writing and presenting material about the Ombudsman jurisdiction to university, conference and community audiences; and

- his connection each year since 1998 with Ombudsman matters outside New Zealand - eg, in the delivery of a Commonwealth Secretariat programme for newly appointed Ombudsmen from the Commonwealth in London, and with papers to several conferences in Asian and Pacific settings about the relevance of the Ombudsman institution in helpiing combat corruption.

At least in the immediate future Anand and his wife Susan plan on remaining in Wellington.

Installation of video camera surveillance at Auckland Prison

In our Annual Reports to Parliament over the last three years, we have advocated the installation of permanent video camera surveillance at Auckland prison to assist in investigations of complaints alleging assaults on inmates by prison staff. Investigation of such complaints can be difficult, especially where there are few or no independent witnesses.

Video surveillance may provide credible evidence to assist investigation of such incidents; it may also provide a safeguard for staff in the case of false allegations being made.

We are pleased to note that in October the Department of Corrections advised that installation of Closed Circuit TV cameras at Auckland prison has commenced. The cameras will be programmed to record 24 hourly and will provide continuous monitoring of key areas throughout the prison. Funding of $1.1 million has been allocated and the project is due for completion in February 2005.

Official Information Act Practice Note
Substantial Collation and Research

The issue of when it is appropriate to use section 18(f) of the Official Information Act (OIA) to refuse a large or broadly framed official information request has been clarified by recent amendments to the Act.

There are a number of administrative mechanisms in the OIAto assist agencies to manage large or broadly defined requests. Section 18(f) is one of these mechanisms. It provides that a request may be refused if the information requested cannot be made available without substantial collation and research.

The Ombudsmen have always viewed section 18(f) of the Act as a *"provision of last resort".* Section 18(f) should only be used if the other mechanisms in the Act do not provide a reasonable basis for managing the administrative burden of processing the request. This approach has been confirmed by recent amendments to the OIA.

> ***"18A Requests involving substantial collation and research***
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> *(1) In deciding whether to refuse a request under section 18(f), the Department, Minister of the Crown, or organisation must consider whether doing either or both of the following would enable the request to be granted:*
>
> *(a) fixing a charge under section 15:*
>
> *(b) extending the time limit under section 15A….*
>
> *(2) For the purposes of refusing a request under section 18(f), the Department, Minister of the Crown, or organisation may treat as a single request 2 or more requests from the same person—*
>
> *(a) that are about the same subject matter or about similar subject matters; and*
>
> *(b) that are received simultaneously or in short succession.*
>
> ***18B Duty to consider consulting person if request likely to be refused under section 18(e) or (f)***
>
> *If a request is likely to be refused under section 18(e) or (f), the Department, Minister of the Crown, or organisation must, before that request is refused, consider whether consulting with the person who made the request would assist that person to make the request in a form that would remove the reason for the refusal."*

Accordingly, before deciding whether section 18(f) of the Act provides grounds to refuse a request, agencies must first consider whether:

? imposing a charge for the supply of the information at issue or extending the time frame for responding to the request would enable the request to be granted; and

? consulting with the requester would assist the requester to make their request in a manner which would not involve substantial collation and research.

In addition, if a requester makes more than one request on the same, or similar, topics simultaneously or in short succession, those requests may now be treated as one for the purposes of section 18(f) of the Act.