

ADDRESS TO THE AFRICAN OMBUDSMAN ASSOCIATION CONFERENCE

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THE OMBUDSMAN AND CITIZEN PARTICIPATION

I am very grateful for the opportunity to be able to address this Conference of distinguished colleagues from Africa and acknowledge the support of the Commonwealth Secretariat who have made my visit possible. My address draws heavily on the jurisdiction and practices of the Ombudsmen in New Zealand. I hope nevertheless that you will find that what I have to say is relevant to your own jurisdictions.

First a quotation from a Canadian, D C Rowat, who was writing on "An Ombudsman Scheme for Canada". He said when describing the Reason for Establishment and Continuance of the Office of Ombudsman:

"It is quite possible nowadays for the rights of a citizen to be accidentally crushed by the vast juggernaut of the government's administrative machine. In this age of the welfare state thousands of administrative decisions are made each year by governments or their agencies, many of them by lowly officials; and if some of these are arbitrary or unjustified, there is no easy way for the ordinary citizen to gain redress".

While this quotation points to the need for an Institution to help the ordinary citizen it stops short of suggesting what type of an Institution will fulfill this need. Clearly in my experience the Office of Ombudsman is such an Institution. As another Canadian, Stephen Owen, one-time President of the IOI said:

"Fundamental to the Ombudsman concept is the ability to invert bureaucratic attention towards the individual citizens who are intended to be served".

My paper demonstrates the challenges facing Ombudsmen in providing for citizens accessible, effective and practical solutions to problems arising from a range of decisions by agencies of government that influence directly the lives of those citizens.

Citizens of all of our countries are increasingly no longer prepared to have decisions and policies of governments forced upon them. Citizens want Governments and government institutions, whose decisions can influence many aspects of their day to day existence, to be more accountable for those decisions. What's more, citizens want to have their say in the decisions themselves.

To the average citizen it sometimes appears that only large and well resourced organizations have the intellectual capacity and the critical mass to be able to take part in government decision making.

Citizen's ability to participate and be informed of government decisions that impact on their daily lives can be inhibited also by an inability to question, or seek redress, about decisions which they think are against their best interests. If one couples this with a lack of information on which decisions were made, there is little citizens can do to redress the balance.

The classical Ombudsman, with which we are all familiar, provides an avenue through which citizens can advance their goals of participation in the processes of Government. Traditionally an Ombudsman is empowered to review decisions of Government agencies. In my jurisdiction an Ombudsman is also mandated to review refusals by Government agencies, including Ministers and local authorities, to release "*official information*". "*Official information*" covers a very wide range of information on which the business of Government is based. Citizens have a vital interest in the information on which decisions were made that influence their daily lives. Indeed without this information it is very difficult for citizens to participate at all in the business of Government.

New Zealand's Official Information Act (OIA), often called Freedom of Information in other jurisdictions, has proved to be a very effective tool in the growing participation by citizens in the processes of Government. Certainly this statute has provided a very strong impetus for Government institutions and organizations to release more "*official information*" as a matter of course. As I mentioned a moment ago the legislation has also given citizens the right to appeal to my Office against decisions of Government agencies not to release "*official information*".

The very fact that this avenue of appeal exists has made Government agencies conscious of the desirability of not being seen to frustrate the intent of our freedom of information legislation. There is of course some debate around this usually focused on very sensitive issues surrounding the need for decision-makers to have frank advice available to them or the need to protect information that is important for economic or other security. However, freedom of information statutes are well able to accommodate such circumstances. In New Zealand for example there have been no situations that I can recall where the legitimate business of Government has been frustrated by the operation of our Freedom of Information Legislations.

I see therefore these two fundamental powers of the classical Ombudsmen, the ability to investigate the decisions of government agencies, and the ability also to review the withholding of information on the part of such agencies, working very much in tandem. Information is power. The degree to which freedom of information statutes are successful in widening the availability of information, the more citizens' involvement in Government decision-making will become a reality.

Nevertheless it is all very well to establish institutions such as the Ombudsman to which citizens can have redress. However, unless ready access to these institutions is available to the citizenry at large their impact can be severely limited.

Sometimes the Ombudsmen function might be seen as concerned with matters of high constitutional importance and not be seen to be available to the person in the street. It is important in this context therefore that the Ombudsmen is, and is seen to be, independent from Government decision-makers and is able to demonstrate this independence. The way in which Ombudsmen are appointed is very important. Citizens need to be confident that they will not be penalized if they take complaints to an Ombudsman. The development and maintenance of this confidence is very important if an Ombudsman is to function effectively.

Also, and this applies particularly in my country which is increasingly becoming much more multicultural, Ombudsmen need to make particular efforts to reach out to the various communities that increasingly make up modern societies. Currently in New Zealand for example, we are at the moment looking at what we need to do to make our Office more approachable to the increasingly diverse range of communities that now make up New Zealand Society.

As a consequence we are having to see how our operational practices might need to be changed to accommodate different cultural norms so that all New Zealanders can have effective access to the Ombudsman.

New Zealand, like many countries, is also facing an increase in the numbers of older people who make up our population. As a consequence, increasingly, many more people are becoming subject to decisions from Government agencies that are concerned with pensions, health and general facilities for older citizens compared with citizens at large.

These citizens are also likely to have different expectations of Governments from the expectations of citizens we have traditionally dealt with. Also older citizens are likely to expect more from Government agencies. Using this analogy they

will expect similar professional treatment from Ombudsmen as part of our response to their complaints. We can expect that their complaints against government agencies will be well researched and well argued, presenting Ombudsmen, and for that matter, the government agencies themselves that service older citizens, with new challenges.

However access to an Ombudsman is only one side of the equation. The other side relates to how an Ombudsman deals with complaints that citizens make to the Ombudsman.

In New Zealand, and I suspect elsewhere, an Ombudsman's recommendations on complaints about actions of Government agencies are not usually backed up by the force of the law. Ombudsman recommendations must therefore in large measure stand on their own. As a consequence many decisions are based on the test of reasonableness of the decision of the organization against whom a complaint is directed. Sometimes citizens who complain to an Ombudsman feel very strongly indeed about the matter. As a consequence in cases where an Ombudsman is unable to sustain a complaint, care must be taken to explain fully the grounds on which this position has been reached. It goes without saying that where complaints are sustained, the grounds for such findings must also be explained clearly to the organization concerned. Indeed I would submit that the point of final recommendation, is for Ombudsmen generally, the culmination of an open and consultative investigation process involving all relevant parties.

Finally to end on a note of realism:

As I said earlier, although an Ombudsman is often powerless at law to the extent that he or she cannot direct or coerce, Ombudsmen have an enormous opportunity to influence most powerfully by persuasion, outcomes for citizens who have been wronged by decisions of government agencies. It is after all how we can help the ordinary citizen, often in circumstances where the Ombudsman

is the last person available, to redress wrongful decisions. Indeed it is this somewhat awesome responsibility that should guide our total approach to our work.

I conclude with reference to a judgement of the Supreme Court of Canada. This judgement describes accurately the role of the Ombudsmen from the perspective of both the citizen who might bring a complaint, and the organization against whom the complaint is made:

"The Ombudsman represents society's response to problems of potential (administrative) abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free and available to all because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. On the other hand, he may find the complaint groundless, not a rare occurrence, in which his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self confidence of the public employees impugned".

Thank you for the opportunity to speak to you today.