

# Part IX

# IX

## Proceedings of Commissioner

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“The hallmark of the evolved Office of the Ombudsmen in New Zealand is that the investigatory process is informal, inquisitorial, and private.”

- Eagles, Taggart, Liddell *Freedom of Information in New Zealand*, 1982

### 9.1 INTRODUCTION

9.1.1 Sections 90 to 96 relate to the procedure and powers of the Commissioner in investigations under Part VIII of the Act. Of particular importance are:

- section 91 which relates to the obtaining of information by the Commissioner; and
- sections 94 to 96 which provide for the protection and privileges of witnesses in proceedings before the Commissioner.

9.1.2 The provisions have largely proved satisfactory and I make few recommendations for change. A number of the provisions are derived from similar legislation under which the Ombudsmen and Human Rights Commission operate and therefore have been tested in practice over many years.<sup>1</sup> Certain provisions in the Official Information Act and Ombudsmen Act have recently been reviewed by the Law Commission and I have paid particular regard to the recommendations arising from that review.

9.1.3 For the record, I do not have a power to enter premises. The Privacy of Information Bill proposed to confer powers of entry for the purposes of obtaining information relevant to a Commissioner’s investigation. However, I recommended that the select committee drop that power. I did not consider it necessary at the time and my experience since 1993 would seem to bear that out. I have not recommended that any such provision be made at this time.

9.1.4 It has been difficult for some agencies, including those represented by lawyers, to understand that the procedure is not based on the adversarial litigation model. To the contrary it is an investigative approach to establish the truth rather than merely to hear a dispute conducted before it by the parties. This has advantages that are not always initially understood.

9.1.5 Thus I tend to get submissions requiring me to comply with the rules of natural justice in the course of the investigation and attempts to discourage or prevent me from talking directly to staff of agencies except in the presence of the employer’s representatives. Usually after explanation, and an understanding that my investigating officers are not acting for the complainant, I have not

<sup>1</sup> See Appendix H which sets out a table of comparable provisions.

been frustrated in the investigation. Compliments are commonly paid about the objectivity and empathy displayed by my officers in carrying out investigations, even if there is (naturally enough) dissatisfaction with the outcome by one party or the other.

## SECTION BY SECTION DISCUSSION

### 9.2 SECTION 90 - Procedure

9.2.1 Section 90 provides that my investigations of complaints are to be conducted in private. I need not hold any hearing and do not do so. No person is entitled as of right to be heard other than the person to whom the investigation relates. The only exception is that the person to whom the investigation relates has the right to submit a written response. I should also mention here that my procedures for provisional opinions, and the requirements of section 120 to allow a party to be heard before making any adverse comment, provide a fair procedure for all affected. Subject to compliance with any other provisions of the Act, I am free to regulate my procedure, obtain information and make such enquiries as I think fit.

9.2.2 The provision is satisfactory and does not, in my opinion, require amendment. It is derived from section 18 of the Ombudsmen Act 1975 and, like the procedures pioneered by the Ombudsman, allows sufficient flexibility that most investigations can be carried out in an inquisitorial, rather than adversarial mode. Most are completed by correspondence and on the telephone without the need to interview anyone in person.

### 9.3 SECTION 91 - Evidence

9.3.1 Section 91 is derived from section 73 of the Human Rights Commission Act 1977 and is comparable to section 19 of the Ombudsmen Act. The section makes a provision for the summons and examination by the Commissioner of persons on oath who are able to provide information relevant to an investigation. Examination under oath is deemed to be a judicial proceeding for the purposes of the law relating to perjury. I may also require people to furnish information and documents relevant to an investigation of a complaint.

9.3.2 It has not been common in my investigations to summon people to give evidence on oath. Since 1993 I have probably required it on only 2 to 3 occasions a year. It is not a step I take lightly because, amongst other things, it puts the person concerned to some inconvenience (although they are entitled to the fees, allowances, and expenses as would be applicable if the person was a witness in court). I have also required the production of information or documents pursuant to section 91(4) on about 2-3 occasions each year.

9.3.3 I have required evidence to be given on oath or documents to be produced in a variety of circumstances. Typically, but not exclusively, I have used the power where:

- information given in correspondence or on the telephone gives reason to question the veracity of the person;
- the matter at issue significantly turns upon the credibility of a particular person and this is, in the circumstances, best judged by interviewing the witness personally on oath;
- a respondent, or witness, is completely unco-operative and must be summoned for interview in order to get any response at all;
- a witness may have some evidence for which privilege is claimed and the circumstances of the obtaining of the evidence need to be established for the purposes of the privilege ruling;

- a respondent, for ethical reasons, will not release information except where formally required;
- one witness's account needs to be measured against another's view.

9.3.4 The provision works satisfactorily and is not in need of amendment.

#### 9.4 SECTION 92 - Compliance with requirements of Commissioner

9.4.1 Section 92 provides that, pursuant to section 91, where the Commissioner requires an agency to furnish any information relevant to an investigation of a complaint, the agency is to comply with the requirement “as soon as reasonably practicable” and, subject to section 93, in no case later than 20 working days after the day the requirement is received. If an agency that is a department, Minister, or organisation fails to comply with the time limit for furnishing information I may report such a failure to the Prime Minister.

9.4.2 There might be scope for improving the provision with a view to enhancing the speediness of complaints resolution. However, there is a need to avoid undermining the rights of agencies or imposing undue compliance costs. One risk of the existing provision is that it can be used by recalcitrant agencies to spin out a response for a minimum of 20 working days but in many cases for far longer than that. A recalcitrant agency may, for example, fail to deliver documents “as soon as reasonably practicable” and instead await the full 20 working days. Following the expiry of this period, such agencies may count on getting away with a further delay notwithstanding that they may fall short of the requirements of the law. No automatic penalty is visited upon an agency by failure to meet such a time limit (although adverse comment or a report to the Prime Minister exists as a possible, if remote, sanction). Having received documents during or after the prescribed period, it is quite possible that my office may need to seek additional documents from an agency if a response has been incomplete or the request to the agency has not been framed broadly enough. Another 20 working days may have to be allowed.

9.4.3 Although urgency may suggest more rapid action in some cases, the general balance of convenience should permit a reasonable period for compliance with a requirement. However, it should be remembered that such requests do not come “out of the blue”. In access reviews they follow on from requests that have already been made by the individual concerned. In all complaints and investigations the agency will, almost certainly, have received notification of the fact of my complaint before any demand to furnish or produce information or documents. Sometimes the period between notification of the complaint and such a requirement may be a matter of weeks. Presently, where there is a long complaints queue, an earlier general “queue letter” may have been provided many months before any requirement is made.

9.4.4 The Law Commission recently completed a study of the comparable issue under the Official Information Act. In 1987 section 29A of the Official Information Act was added requiring responses to Ombudsmen's requirements as soon as reasonably practicable, and in no case later than 20 working days, because the Chief Ombudsman had observed that a major impediment to the success of the official information review process had been its slowness and it needed to be made clear that agencies were to respond promptly to requirements of the Ombudsmen.<sup>2</sup> The Law Commission recorded the Ombudsmen's expressions of concern about the time taken by departments to respond to their requirements. However, it noted that the emphasis should not solely be on the 20 working day limit since the prime obligation is to respond “as soon as reason-

<sup>2</sup> Law Commission, *Review of the Official Information Act 1982, 1997*, paragraphs 333-334.

ably practicable”.<sup>3</sup> The Law Commission did not recommend any change to the relevant provisions of section 29A.

9.4.5 It would be desirable for the Commissioner to be able to require an agency to comply with a requirement within a period shorter than 20 working days in case of urgency. I have particularly in mind access reviews where the information or documentation at issue is reasonably finite and the urgency of the situation, or the interests of justice, require a prompt response. Sometimes there may only be a single letter which is sought for my investigation and 20 working days seems an absurdly long period to await its production.

9.4.6 The need for provision for urgency in some such cases was accepted when the Complaints Review Tribunal Regulations 1996 were issued. Although the regulations generally provide for a 30-day period for the filing and service of a statement of reply, it is provided that:

“The Chairperson may, on the application of the applicant in proceedings involving an alleged breach of information privacy principle 6 of the Privacy Act 1993, abridge the time for filing of a statement of reply in those proceedings if the Chairperson is satisfied that the urgency of the case so requires.”<sup>4</sup>



#### **RECOMMENDATION 114**

**Section 92 should be amended so that the Commissioner may require an agency to comply with a requirement made pursuant to section 91 within a shorter period than 20 working days where the urgency of the case so requires.**

##### *Sanction for breach of time limits*

9.4.7 Section 92 does not contain within it an enforceable mechanism for ensuring compliance with the requirements of the Commissioner. Instead, subsection (3) provides that the Commissioner may report the failure to comply with the Commissioner’s requirements to the Prime Minister if a Minister or central government agency<sup>5</sup> fails to comply. No mechanism is provided for failure to comply with a requirement by any other public sector agency or by an agency which is not a public sector agency.

9.4.8 The provision is not satisfactory since the sanction is applicable to only a small class of the agencies subject to my jurisdiction. So far there has been no need to issue a formal section 91 requirement against a Minister or central government agency. Where there is significant non-compliance with a requirement I would be likely to refer the matter to the Police for prosecution under section 127 which provides a \$2000 fine for any person who:

“without reasonable excuse, refuses or fails to comply with any lawful requirement of the Commissioner or any other person under this Act.”

9.4.9 Occasionally, it may also be appropriate to report the individual to a relevant authority such as a professional association or trade body. If the issue were ever to arise in relation to a Minister or central government agency I might well provide a report to the Prime Minister but believe that I have the power to do so pursuant to my general functions in section 13(1)(r) in any case. Section 92(3) is, I believe, an inappropriate “cut and paste” borrowing from the Official Information Act into this new jurisdiction. The provision should be re-

<sup>3</sup> *Ibid*, paragraph 339

<sup>4</sup> Complaints Review Tribunal Regulations 1996, clause 7(2).

<sup>5</sup> That is, a “Department or a Minister or an organisation”.

pealed since a mixed message is given by providing a response relating to non-compliance in respect of only one class of agencies.



#### **RECOMMENDATION 115**

**Section 92(3) should be repealed.**

### **9.5 SECTION 93 - Extension of time limit**

9.5.1 Section 93 provides for an agency to extend the 20 day limit specified in section 92 for compliance with a requirement made by the Privacy Commissioner for information relating to a complaint. The agency may extend the time limit “for a reasonable period of time having regard to the circumstances” if:

- the requirement relates to, or necessitates a search through a large quantity of information or a large number of documents or papers or things and meeting the original time limit would unreasonably interfere with the agency’s operation;
- necessary consultations are such that the requirement cannot reasonably be complied with within the original time limit; or
- the complexity of the issues raised by the requirement are such that the requirement cannot reasonably be complied with within the original time limit.

9.5.2 The first and second reasons for extension run parallel to the reasons for the extension of time in responding to the initial request under section 41. I have recommended the third reason should also be available at that stage.<sup>6</sup>

#### *No provision for multiple extensions*

9.5.3 Dr Paul Roth has opined that section 93 is probably to be interpreted in a manner analogous to section 41 of the Act.<sup>7</sup> Dr Roth also notes that in relation to the parallel provision in the Official Information Act the Ombudsman has pointed out that the legislation does not contemplate multiple extensions. I have therefore considered whether it would be desirable to amend section 93 - or indeed section 41 - to provide for multiple extensions. I have decided not to make such a recommendation since the extension provision is based upon agencies setting a realistic time-frame in any extension, having regard to the circumstances. The Law Commission considered the parallel provisions in the Official Information Act in its recent review and did not recommend any amendment.

### **9.6 SECTION 94 - Protection and privileges of witnesses etc.**

9.6.1 Section 94 provides that, with the exception of a claim of public interest immunity under section 119, the same privileges as would apply in legal proceedings apply in relation to the giving of information to the Privacy Commissioner. Moreover, a person will enjoy immunity from prosecution if, in supplying information to the Commissioner pursuant to section 91, such compliance constitutes an offence under any enactment. However, if the giving of information constitutes an offence against section 127 of the Privacy Act (for instance, because the information is false or misleading), then the immunity does not apply.

#### *1997 amendments - subsections (1A) and (1B)*

9.6.2 Subsections (1A) and (1B) were inserted by section 2 of the Privacy Amendment Act 1997 with effect from 17 September 1997. These provisions had a much earlier genesis and were introduced by a Supplementary Order Paper to the Social Welfare Reform Bill upon which I reported in 1995.<sup>8</sup> That Supple-

<sup>6</sup> See recommendation 71.

<sup>7</sup> *Privacy Law and Practice*, paragraph 1093.3

<sup>8</sup> Report by the Privacy Commissioner to the Minister of Justice on Supplementary Order Paper No 84 to the Social Welfare Reform Bill, May 1995.

mentary Order Paper had arisen out of earlier work, and a recommendation, by the Social Services Select Committee on an inquiry into the privilege provisions of section 11 of the Social Security Act 1964. The Committee had recommended that:

“The Privacy Act 1993 should be amended to remove any doubt about the Privacy Commissioner’s right to examine documents for which privilege is claimed in order to form an opinion on such claims when such documents are the subject of a matter of complaint under Part VIII of the Privacy Act 1993.”<sup>9</sup>

9.6.3 I supported the Committee’s recommendation which was implemented through the new subsection. In my report to the Minister, I made recommendations to improve the provisions as introduced and a number of the changes were accepted.

9.6.4 The Law Commission, in its review of the Official Information Act, studied section 19(5) of the Ombudsmen Act which is the parallel provision to section 94.<sup>10</sup> I will not repeat that material here although much of it is applicable also to section 94. However, I will quote the material which bears directly upon the 1997 amendments:

“The Law Commission therefore supports, in general, the insertion of section 19(5A) plus section 2 of the Ombudsmen Amendment Act 1997, which came into force the day before this report went to press. Section 19(5A) allows an Ombudsman - in the course of an investigation - to require the supply of, and to consider, information in respect of which privilege is claimed, in order to assess the validity of the claim. The Ombudsmen may not use that information in any way that is not permitted by subsection (5A); a new section 19(5B) specifies limits of the Ombudsmen’s disclosure of the information. Similarly, section 94 (1A) of the Privacy Act, inserted by section 2 of the Privacy Amendment Act 1997, allows the Privacy Commissioner to require the supply of, and to consider, information in respect of which privilege is claimed, in order to assess the validity of the claim.”<sup>11</sup>

9.6.5 The Law Commission went on to recommend that section 19(5A) of the Ombudsmen Act and section 94(1A) of the Privacy Act should be narrowed. I could not see any basis for that and my office sought clarification of the Commission’s reasoning. On further consideration the Law Commission took the view that section 94(1A) and the equivalent to the Ombudsmen Act do not require amendment and resiled from that part of its recommendation.<sup>12</sup>

9.6.6 The 1997 amendments were necessary to stop a practice which threatened to undermine the efficacy of the complaints review process. Certain lawyers were advising their clients that documents withheld on an access request need not be given to the Commissioner for review if the agency had claimed legal professional privilege in relation to those documents. This approach flew in the face of ten years’ experience with the Official Information Act, would have under-

<sup>9</sup> NZ House of Representatives, *Inquiry into the Privilege Provisions of section 11 of the Social Security Act 1964*, Report of the Social Services Committee, 1994 page 13.

<sup>10</sup> Law Commission, *Review of the Official Information Act 1982*, 1997, paragraphs 321-327.

<sup>11</sup> *Ibid*, paragraph 326

<sup>12</sup> Letter Law Commission to Office of the Privacy Commissioner, 10 November 1997.

**“Legal professional privilege has always been accorded the highest respect in our system of justice. In contrast, the recent amendment denigrates and diminishes the principle by giving the power to inspect confidential and sensitive material to employees of the Commissioner or the Commissioner him or herself, who are unlikely to possess the same level of competence as the judiciary in such matters, and do not have the same legal duties as officers of the Court.”**

- ELLIS GOULD,  
SUBMISSION UV17

mined the low cost and straightforward “Ombudsmen-type” review by an independent commissioner, and would have required court proceedings on each case to resolve. Such an approach may have suited some lawyers but was quite at variance with the approach of the legislation. The fact is that in most such cases under review where legal professional privilege is claimed the matter is quickly and routinely resolved at low cost by simply letting the Commissioner see the document. The Commissioner then expresses an opinion that the information is, or is not, properly withheld. It is hard to see this is a reasonable invasion into the lawyer client relationship. The opinion is not binding but is usually accepted by the parties. If it is not the matter can go to the Tribunal.

## 9.7 SECTION 95 - Disclosures of information etc.

- 9.7.1 Section 95 provides that a person bound by any enactment not to disclose particular information may be required to supply that information to the Commissioner, in which case the disclosure would not constitute a breach of the relevant enactment. Neither the Commissioner nor an employee can require the information where the Prime Minister certifies the disclosure might prejudice certain security, defence, or international relations, interests or where the Attorney-General certifies that the disclosure might prejudice law enforcement interests or injure the public interest through the disclosure of confidential cabinet matters. No certificate has yet been presented to me.
- 9.7.2 I have recommended elsewhere that the marginal note to this provision ought to be more informative, perhaps reading “Disclosures of secret information, etc.”<sup>13</sup>
- 9.7.3 The Law Commission in its review of the Official Information Act considered the equivalent provision in the Ombudsmen Act, section 20(1).<sup>14</sup> The Law Commission notes that the wording of section 20 of the Ombudsmen Act dates from the original ombudsman legislation of 1962. That legislation was enacted only a few weeks after the Court of Appeal had first pronounced that the courts could review a Ministerial claim to withhold evidence on public interest grounds,<sup>15</sup> and many years before a court was to review the decisions of Cabinet.<sup>16</sup> Administrative law has come a long way in New Zealand since that time. The Law Commission also notes that the Official Information Act, passed twenty years after the original ombudsman legislation, does not give special protection to Cabinet or to Cabinet papers. Moreover, under the Official Information Act it is for an independent officer outside government - the Ombudsman - to judge prejudice to the protected interests, at least in the first instance. The courts now also undertake a similar function. Notwithstanding all of these considerations the Law Commission did not, on balance, favour repeal of section 20(1). In the light of such recent Law Commission consideration I do not recommend repeal of section 95(3) either.
- 9.7.4 However, the Law Commission went on to say that in the event of the use of the provision, it should be clear where responsibility (and political accountability) lies for the decision to prevent access to information. The Law Commission recommended that section 20(1) should be amended to specify that only the Attorney-General personally may exercise the power to prevent disclosure of information to the Ombudsmen.<sup>17</sup> As the issues are the same under section 95 I have adopted a similar recommendation which should enhance the provision and ensure consistency if the Law Commission recommendation is adopted.

<sup>13</sup> See recommendation 2.

<sup>14</sup> Law Commission, *Review of the Official Information Act 1982*, 1997, paragraphs 316-320.

<sup>15</sup> *Corbett v Social Security Commission* [1962] NZLR 878

<sup>16</sup> *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA). See also footnote 176 to the Law Commission Report.

<sup>17</sup> Law Commission, *Review of the Official Information Act 1982*, 1997, paragraphs 319-320.

**“One of the reasons for the success of the Office since 1962 is that the Ombudsman has full access to the departmental file: thereby examining documents to which the aggrieved citizen has no legal rights of access.”**

- EAGLES, TAGGART, LIDDELL

FREEDOM OF INFORMATION IN NEW ZEALAND, 1982

**RECOMMENDATION 116****Section 95(3) should be amended to specify that:**

- (a) the Prime Minister, in respect of paragraph (a); and**
- (b) the Attorney-General, in respect of paragraph (b);**

**personally may exercise the power to prevent disclosure of information to the Privacy Commissioner.****9.8 SECTION 96 - Proceedings privileged**

- 9.8.1 Section 96 provides that the Commissioner, and any person engaged or employed in connection with the Commissioner’s work, enjoys immunity from civil and criminal proceedings for anything said or done in the course of their duties under the Act unless they acted in bad faith. Neither are they required to give evidence in any proceedings in respect of anything they learn in the exercise of their functions. Information supplied by any person in the course of proceedings before the Commissioner is to be privileged in the same way as if the information were supplied in court proceedings. “Qualified privilege” under the Defamation Act 1982 attaches to any report by the Privacy Commissioner.
- 9.8.2 I have considered the interrelationship between subsections (1) and (4) of the section as it appeared to me that a problem might potentially arise. Section 96(1) states that the section applies to:
- (a) the Commissioner; and
  - (b) every person engaged or employed in connection with the work of the Commissioner.
- However, subsection (4) appears to have more relevance to persons outside the office who deal with the Commissioner rather than the Commissioner or his staff themselves. Although section 96 is largely modelled on section 26 of the Ombudsmen Act 1975, that section has no equivalent to section 96(1).
- 9.8.3 I sought advice on the issue and was assured that while the interaction between the two subsections may be a little inelegant, there was no particular problem associated with section 96(4). It was suggested that subsection (4) “applies to” the Commissioner in the sense that it applies to an inquiry or proceedings before the Commissioner, and the status of certain evidence received in connection with that. Section 94(2) confers privilege on the production of documents and things. When and if they are produced section 96(4) operates to protect them subsequently. Accordingly, I do not recommend change.