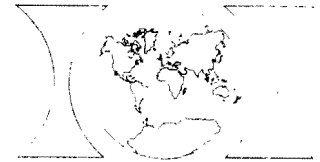


SPECIAL REFERRAL SECTIONS
IN OMBUDSMAN STATUTES
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OCCASIONAL PAPER # 1



INTERNATIONAL OMBUDSMAN INSTITUTE

July 1979

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The original New Zealand Statute of 1962 contained in its main jurisdictional section, a subsection which read as follows:

Subsection (4)

"Without limiting the foregoing provisions of this section, it is hereby declared that any committee of the House of Representatives may at any time refer to the Commissioner for investigation and report by the Commissioner, any petition that is before that Committee for consideration, or any matter to which the petition relates. In any such case, the Commissioner shall, subject to any special directions of the Committee, investigate the matter so referred, so far as they are within his jurisdiction, and make such report to the Committee as he thinks fit. Nothing in this section 17 or section 22 or section 24 of this Act shall apply in respect of any investigation or report made under this subsection."

It should be noted that the Committee may refer any petition or any matter to which the petition relates, but that the investigation is to take place so far as the matters are within the Commissioner's jurisdiction. It should also be noted that the Commissioner is required to carry out this investigation - he shall investigate, - and further that, while he may make a report to the Committee, the general powers of reporting contained in the major sections of the Act are specifically excluded.

An almost indential subsection was included in the Alberta Act when it was passed in 1967. Later Canadian statutes followed the same line with comparatively unimportant variations. The provisions referred to were in fact almost repeated in the Nova Scotian legislation and in the New Brunswick legislation. In Newfoundland the added requirement was that the

Committee should have the permission of the House before it made the request to the Ombudsman. In Saskatchewan and Manitoba an additional sub-clause gave to the Lieutenant-Governor-in-Council a similar power to require the Ombudsman to carry out an investigation relating to the administration of a department insofar as the matter was within his jurisdiction. The general power to report was not, however, excluded, except in Newfoundland, and in the new British Columbia statute which has not yet been implemented. That latter statute contains the same basic provision for referral by a Committee of the House as the New Zealand Act. Ontario had no such provision. It is fascinating to think what might have happened if it had.

These subsections were hardly ever used. There is no recorded instance of their use in many of the jurisdictions. Indeed, one Ombudsman commented that governments seemed to prefer the Commission of Inquiry procedure. In New Zealand there were only one or two isolated cases which were not of very great importance. In 1974 the relevant Manitoba section was used by the Lieutenant-Governor-Council to refer to the Ombudsman for investigation a matter dating from 1964 concerning a Community Development Programme to assist a group of Metis by loan assistance for improving or re-locating their homes. Records had been lost, funds had been misappropriated, and the Ombudsman, after full investigation, recommended that the only way "out of the morass" was to write off all outstanding debts and grant titles to the occupiers. This was done by Order-in-Council.

However, in the Antipodes, a new trend had set in with the passage of the Western Australian Act in 1971, which provided in Section 16 that the House or any committee of either House might refer "any matter" for investigation by the Ombudsman, who "shall" investigate and report to the

referring authority. This was followed by the Victorian Act of 1973. This statute gave to the Legislative Council or the Legislative Assembly or a committee thereof the power to refer to the Ombudsman for investigation "any matter other than a judicial proceeding" and went on to provide that the Ombudsman "shall investigate" etc. The general power of reporting was excluded as it had been in the other statutes. This Victorian section has not yet been used.

The Queensland Act, passed in 1974, reverted to the "matter within his jurisdiction" provision for referral by the Assembly or a Committee, but the Ombudsman "shall" report to the Speaker and not elsewhere.

In 1976 the Queensland Ombudsman received a request from the Speaker of the House asking him to ascertain the facts surrounding "the Aurukun affair and any other information so that all interested parties would be made fully aware of the situation presently existing in that part of the State." The Ombudsman determined that the matter was within his jurisdiction, and duly proceeded to Aurukun in a remote part of the State where the resident Aurukun people were disturbed and confused by the passage of legislation authorising bauxite mining in their territory. His independent inquiry was in and around the assessment of the situation on location, "not to re-open the whole matter". He interviewed the Aurukun Council and many of the people. He reported to the Speaker that in his view the legislation did adequately protect the rights of the people, but it should be further explained to the people, who did not understand it, and he made certain recommendations to this end.

In 1978 good counsels appeared to prevail in Western Australia, and the section was amended to add after the word "matter" the words "within his

jurisdiction". The section has not been used in either its original or its amended form.

Next on the scene was New Zealand, which, with the new consolidation and amendment of the Ombudsman Act in 1975, enacted the following subsection to Section 13, the principal clause relating to functions of the Ombudsman.

Subsection (5)

"Without limiting the foregoing provisions of this section, it is hereby declared that at any time the Prime Minister may, with the consent of the Chief Ombudsman, refer to an ombudsman for investigation and report any matter, other than a matter concerning a judicial proceeding which the Prime Minister considers should be investigated by an Ombudsman. Where a matter is referred to an Ombudsman pursuant to this subsection, he shall, notwithstanding anything to the contrary in this Act, forthwith investigate that matter and report thereon to the Prime Minister, and may thereafter make such report to Parliament on the matter as he thinks fit. Nothing in Section 22 of this Act shall apply in respect of any investigation or report made under this subsection."

This subsection went further than the Victorian because, while adopting the wide jurisdiction of "any matter other than a judicial proceeding", it gave the power to require the investigation to the Prime Minister with the consent of the Chief Ombudsman, and provided that the report should be made to the Prime Minister, although it expressly provided that the Ombudsman might make such report to Parliament as he thought fit.

It may be that the efficient methods of investigation carried out by the various ombudsmen impressed upon governments their utility as general investigating authorities, as much as authorities specifically designed to investigate complaints lodged by citizens. It is probable that ombudsmen themselves assisted in this change of viewpoint, because there are instances of claims having been made to the effect that the Ombudsman was a good "tool"

in the hands of the legislature to investigate matters concerning the bureaucracy.

In 1978, while Western Australia limited the special referral powers, Alberta extended them, by an amendment passed as subsection (5) to section 11, providing that:

"without limiting subsection (1) a Minister may, at any time, by order refer any matter to the Ombudsman for investigation and report by him and in that case the Ombudsman may:

- (a) subject to any special directions of the Minister investigate the matters so referred to him so far as they are within his jurisdiction and
- (b) make such report to the Minister as he thinks fit, but nothing in section 14, 20 or 21 applies in respect of any investigation or report made under this section."

Here the legislature has gone as far as authorising a Minister to ask for this report from the Ombudsman, but the report is restricted to matters which are within the Ombudsman's jurisdiction. This point was the subject of express comment by the Minister in his speech on the second reading of the amending Bill. It is especially to be noted that the Ombudsman is not mandatorily required to make the report, he just "may". The normal special reporting powers of the Ombudsman are excluded.

Bill Number C43 (House of Commons, Ottawa) given its first reading in the House on the 5th April, 1978, proposed to provide for the setting up of a Federal Ombudsman, and retreated rather to the more classical authority of the original New Zealand Act, by giving to any Committee of the Senate or the House of Commons power to refer any matter within his jurisdiction to the Ombudsman and requiring that the Ombudsman shall make such report back as he considers appropriate.

As originally conceived, the Legislative Ombudsman was an officer of the Legislature empowered to receive complaints from the public against government administration, to investigate them, and to make reports accordingly. The various Acts, in the various jurisdictions, included specific references defining or attempting to define the scope of the jurisdiction, as relating for example, to "matters of administration" or to "administrative acts" or to "administrative agencies", or to "administration", and in each jurisdiction and in each Ombudsman office a body of precedent and decision had grown up defining as best as was possible and sometimes in somewhat empirical terms, the ambits of this special jurisdiction which had been given to this Officer of Parliament. How wise is it, therefore, to depart from original principle and to provide first of all that this Officer of the Legislature may be required by government or by a Prime Minister or by a Minister to carry out an investigation on a matter in respect of which he had not received a complaint? How wise is it for the ambit of his jurisdiction to be extended to "any matter other than a judicial proceeding"? Finally, how wise is it to limit the full power of reporting and recommendation given to Ombudsmen by their general clauses, and to limit it when they carry out such special investigations at the behest of Ministers or governments?

In his report on the Security Intelligence Service issued in July, 1976, the New Zealand Ombudsman who had carried out this investigation into the Security Intelligence Service under the provisions of the new subsection quoted above, commented that he had, prior to the passage of this new amending subsection expressed his reservations to the Attorney General, stating that he had misgivings on two grounds. First, because there was no limit to the

type of matter which could be referred to an Ombudsman except that it was not to relate to a judicial proceeding. He doubted the wisdom of "abandoning at one stroke the careful jurisdictional prescriptions already written into the Act, and converting the office into a General Inquiry Agency". He thought the physical capacity of the office might be also under strain. Second, he thought that the proposal under discussion, which was to place the power of referral into the hands of the Prime Minister or of any Minister with the consent of the Attorney-General, would weaken the desirable link with Parliament which the Ombudsman had and should have. The link with Parliament should not be replaced or overshadowed by a link with government. He thought the unwise use of this power could result in the Office of Ombudsman being catapulted into current areas of political controversy as a convenient means whereby government could unload itself of a problem. He did agree that the Prime Minister in his capacity as Leader of the House could be vested with authority to request the Ombudsman to make inquiries outside the scope of his jurisdiction, and that the office could perform a useful function in certain limited aspects in this respect.

When the proposed subsection came before the Statutes Revision Committee the Attorney-General agreed to narrow the power of referral to the Prime Minister as Leader of the House. This in fact was done, although the expression "as Leader of the House" did not appear in the wording of the statute. The specific power to report to Parliament was also added by the Committee.

The government in New Zealand made quick use of this new subsection and called upon the Ombudsman to carry out an inquiry into the Security Intelligence Service. At the time that this action was taken no

Chief Ombudsman had yet been appointed, and so the Ombudsman as the only incumbent of the office was in effect subject to a mandatory requirement to undertake this inquiry. In his public report the Ombudsman said "On the request of the Prime Minister I agreed to undertake the inquiry, and did so willingly, in pursuance of my statutory duty. It is clear from my experience over this inquiry that any future Chief Ombudsman would have to consider seriously before giving his consent to the referral by the Prime Minister of an investigation to the Ombudsman." The inquiry turned out to be a massive one, involving extra staff, offices, and resulting in a voluminous "Secret" report to the Prime Minister, and a shorter public report to Parliament. Government action on the recommendations in these reports has proceeded steadily.

Similar haste on the part of government seems to have surrounded the first use of the Alberta section referred to. Immediately following the Royal Assent to the amendment the Alberta Solicitor General issued an order to the Ombudsman referring to him for an investigation and report the matter of a certain suicide in the Fort Saskatchewan Correctional Institution. In New Zealand there had been a long history of an expressed public concern and dissatisfaction over the operations of the Security Intelligence Service. In Alberta there was no long history but there was a somewhat violent upsurge of public expression, and allegations of "torture" and "gang rape" had appeared in bold print in the newspapers. Letters exchanged between the inmate and his wife had been published and editorials had called for "the answers". Thus, although this storm had only suddenly arisen, the matter was just as much hung around the neck of the government as was the question of Security Intelligence Service in New Zealand. The doubt arises therefore, as to whether activity sought of the Ombudsman in these cases was not motivated, at

least partly, by desire to remove the government from a difficult situation.

However in Manitoba, Queensland, New Zealand and Alberta, there can be no doubt that the inquiries undertaken were in the public interest.

Sir Guy Powles,
Resident Consultant,
International Ombudsman Institute.
Edmonton, 28 Sept. 1978.