The Ombudsman and the Matter of 'Standing'

In a communication to the Christchurch Civic Trust (date) from the Ombudsman's office regarding the matter of 'standing' in relation to complaints to the Ombudsman's Office it is stated:

> *In the course of the Trust's correspondence with this Office in relation to its several complaints, the role of the Ombudsman has been covered. In the context of the Trust's present complaint, it is relevant to draw attention to an aspect of the Ombudsman's jurisdiction as defined in section 13(1) of the Ombudsmen Act. The Ombudsman's function under that section can be briefly described as investigating the manner in which central and local government agencies and their officers and employees have performed their functions where the performance of those functions affects some person or body of persons in that person's or body's personal capacity…..*
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> *…. In terms of sufficient personal interest, the Ombudsmen have traditionally insisted that a complainant should have an interest that distinguishes that person from the interest that the public generally might have in the agency's proper discharge of its administrative functions. The interest should involve some advantage or disadvantage to the complainant that is not too remote. Without such a test, any member of the public could complain about the administrative actions and decisions of agencies by virtue of their general interest in good administration. In this instance, everybody who disagreed with the officer advice to the Council when it resolved to adopt the Community Board's recommendation, would be able to raise for investigation a complainant about the advice, without regard for its impact on anyone personally. If this were the case, the words in section 13(1) requiring there to be an affect in a personal capacity would be essentially meaningless.*
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> *An interest in the preservation of a particular environment, an intellectual or emotional concern, the satisfaction of righting a wrong, and interest in upholding a principle or a general sense of grievance, are not generally regarded as interests that are greater than that of the public generally. In such circumstances, the Ombudsman is likely to decline to investigate, exercising the discretion under section 17 on account of the complainant having insufficient personal interest.*

In response to the above, the Civic Trust made reference to a case before the UK Supreme Court. In *Walton v Scottish Ministers* [2012] UKSC 44, the Court considered the issue of 'standing' in environmental matters. This was an issue affecting the law on judicial review and equivalent statutory review mechanisms. The case concerned an unsuccessful appeal by Mr Walton to stop the £400 million Aberdeen Western Peripheral Route (AWPR), promoted by the Scottish ministers under the Roads (Scotland) Act 1984. To meet the legal 'standing' test, Mr Walton's interest required to be elevated above that of a member of the public who opposed the AWPR.

On the matter of *Genuine Interest*, the following is pertinent:

> *The Supreme Court took a very different and broader view, and noted that when considering whether an individual is a person aggrieved, the legislative and factual context will be important. The court looked to Mr Walton's participation in the consultative procedures under the Roads Act and concluded that he was indubitably such a person.*
> *The court further confirmed that it would be inconsistent with environmental law to require that a person's private interests must necessarily be affected to meet that requirement.*

It was explained that environmental law proceeds on the basis that the environment is of legitimate concern to everyone, and its protection is in the wider public interest. https://www.lawscot.org.uk/members/journal/issues/vol-58-issue-01/entitled-to-be-aggrieved/

Lord Carnwath commented at [103]:

...The courts may properly accept as "aggrieved", or as having a "sufficient interest" those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment. However, if it does so, it is important that those interests should be seen not in isolation, but rather in the context of the many other interests, public and private, which are in play in relation to a major scheme such as the AWPR.

Lord Reed stated at [88]:

... He [Mr Walton] is not a mere busybody interfering in things which do not concern him. He resides in the vicinity… He is an active member of local organisations concerned with the environment… He has demonstrated a genuine concern about what he contends is an illegality in the grant of consent for a development which is bound to have a significant impact on the natural environment. In these circumstances, he is indubitably a person aggrieved within the meaning of the legislation.

Lord Hope commented at [151]:

I should like however to add a few words of my own on the question of standing in the context of environmental law.

At [152], he dealt with the issue by reference to the example of an osprey's route to a favourite fishing loch being impeded by the proposed erection of wind turbines:

...Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.

And at [153], Lord Hope commented that anyone coming to court *'on environmental grounds'* must demonstrate *'a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity'.* Normally, one would expect either a government agency or an established NGO to take the lead. Yet, there must be room for individuals *'who are sufficiently concerned, and sufficiently well-informed*' to raise actions in this regard.

The comments of Lords Reed, Hope and Carnwath in *Walton* signal that 'standing' in environmental matters should not be interpreted as restrictively as is the New Zealand Ombudsman's recent practice under the Ombudsmen Act (1975).

If applied rigorously, no individual citizen or incorporated body of citizens might complain to the Ombudsman of deliberate use of misleading information in officer advice that is relied upon by those voting on decisions, as it will likely be rejected, not on its merits but simply for administrative convenience since the complainant is not personally affected more than the public generally.

However, it is not about not liking a decision. It is about the quality and veracity of the information supplied to decision-makers that is important. The complaint either has merit or it does not. Who acts as the whistle-blower should not influence whether or not an investigation proceeds. If the

matter has widespread impact beyond that of a single affected party, surely that raises the level of importance?

Voices that speak for elements of the environment that cannot speak for themselves until the evidence is irretrievably obvious, are currently excluded because they are not adversely affected personally over and above anyone else.

It is time that this particular discretionary restrictive access for the public to the New Zealand Ombudsman's office is changed.

Not-for-profit non-governmental organisations operating under deeds of incorporation that clearly define their objectives and credentials, should be encouraged to participate in a transparent way in processes to ensure good administrative practices are followed and misinformation is corrected, regardless of whether they are personally aggrieved.