

Guidance on when to engage the Ombudsman in law reform proposals

This document sets out why and when an Ombudsman should be engaged in the law reform¹ process and sets out the Ombudsman's view on some of the key questions that are likely to arise.

¹ The focus of this document is on “law reform” in terms of proposals likely to result in changes to primary or secondary legislation. The Ombudsman’s website has a range of other guidance to support agencies undertaking other operational changes, and is happy to discuss how to apply these.

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Background

The Ombudsman engages and comments on law reform to ensure their views are considered on proposals relating to their jurisdiction. This objective is reflected in the Cabinet Manual and Legislation Design and Advisory Committee guidelines:

The Cabinet Manual states:²

Officers of Parliament should be consulted in their areas of interest as appropriate: for example, the Office of the Ombudsmen over the application of the Ombudsmen Act 1975 to a new agency.

The Legislation Design and Advisory Committee (“LDAC”) guidelines recommend that the Ombudsman’s role and jurisdiction be considered by officials when legislating in certain areas or employing certain legislative tools.³

The Ombudsman also has an interest in ensuring that the principles of good administration laid out in the Ombudsmen Act 1975 are reflected in law reforms. This derives, in part, from the Ombudsman’s power to intervene in decisions where the legislation that governs the decision is itself “unreasonable, unjust, oppressive, or improperly discriminatory” and to recommend that the “law on which the decision, recommendation, act, or omission was based should be reconsidered.”⁴

Despite these references and statutory powers, the Ombudsman is often not actively engaged by agencies in the law reform process, particularly in the early stages when consideration of their comments would be most beneficial. If it is not possible to engage before a Bill is

² At paragraph 7.45.

³ Legislation Design and Advisory Committee *Legislation Guidelines* at [18.2], [20.5], [21.5] and [28.9].

⁴ See sections 22(1)(b) and 22(3)(e) Ombudsmen Act 1975

introduced it may be necessary for an Ombudsman to raise concerns directly with Parliament, whether through the Select Committee process or as a consequence of a specific investigation under the Ombudsmen Act.

Specific areas of interest

Without limiting the matters that may benefit from an Ombudsman's viewpoint, set out below are some particular areas of interest.

Ombudsmen Act 1975 jurisdiction

The Ombudsman has a general role under the Ombudsmen Act to investigate complaints about public bodies and undertake own-motion reviews across the public sector. This jurisdiction is broad and diverse, allowing the Ombudsman to act as a general watchdog over various public entities.

According to the LDAC guidelines, where new bodies are being established to exercise public power the Ombudsman should be included as an oversight body.⁵ Agencies should consult the Ombudsman if there is any proposal to deviate from that principle. A new agency has to be brought within the Ombudsman's jurisdiction by adding it to Schedule 1 of the Ombudsmen Act.⁶

Official Information jurisdictions

The Ombudsman supports the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 by investigating and reviewing complaints and conducting systemic monitoring of official information practices across agencies.

If changes to the OIA/LGOIMA, exemptions from the OIA/LGOIMA, or the establishment of alternative official information regimes are under consideration, the Ombudsman should be consulted. The Ombudsman's view is that the OIA and LGOIMA should apply as broadly as possible as a general regime guiding official information practices across the public sector. The courts have long recognised the OIA as being '*constitutional*' in nature.⁷ In addition, the OIA is one of the vehicles by which New Zealanders may exercise their fundamental freedom to seek and receive information, as enshrined in section 14 of the New Zealand Bill of Rights Act 1990. It follows that the application of the OIA, as a constitutional measure which reflects fundamental freedoms, should only be curtailed where there is clear justification.

The OIA/LGOIMA contain a tried and tested regime which balances the competing interests in accessing information held by public agencies. Creating alternate regimes is generally unnecessary or misguided, and will inevitably involve complex and often unintended interactions with the OIA/LGOIMA.

⁵ At [20.5] and [28.9].

⁶ This can be done by Order in Council, see s 32 Ombudsmen Act 1975.

⁷ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385.

Oversight of places of detention

The Ombudsman has broad jurisdiction as a National Preventive Mechanism under the Crimes of Torture Act 1989 to examine places of detention. This includes prisons and health and immigration based places of detention.

If proposed legislation relates to the management of places of detention or the conditions of prisoners or detainees, the Ombudsman should be consulted and his advice considered, as recognised by the UN Subcommittee on Prevention of Torture.⁸

Monitoring disability issues

The Ombudsman is part of New Zealand's Independent Monitoring Mechanism under the UN Convention on the Rights of Persons with Disabilities, overseeing the treatment of disabled people by government agencies.

The Ombudsman should be consulted on major proposals concerning the treatment of people with disabilities and the government's adherence to the Convention.

Avenues of complaint

Agencies should give careful consideration to the right mix of dispute resolution processes, including rights of review and appeal, when creating a new statutory decision making regime.⁹ The Ombudsman has expertise in this area, and can provide useful views and information on best practice when dispute resolution processes are being created or updated.

Agencies should give particular consideration to how review and appeal processes will interact with the Ombudsman's jurisdiction:

- If there is to be a specific right of appeal on the merits of the decision to a court or tribunal, the Ombudsman will only have jurisdiction in special circumstances (see s 13(7) Ombudsmen Act);
- If legislation or an agency's operational policy provides for another form of administrative review, the Ombudsman will have jurisdiction but will generally not investigate the decision in question until that right of review has been exercised (see s 17(1)(a) Ombudsmen Act).

The Ombudsmen's view is that agencies should generally provide an effective complaints process allowing for review of decisions that affect people, either in legislation or operational policy.¹⁰ The process should be tailored to the circumstances, accessible and easy to understand. The Ombudsman should be consulted if an agency considers this process to be

⁸ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *OPCAT Guidelines on national preventive mechanisms* (November 2010) at [28].

⁹ See Chapter 28, Legislation Design and Advisory Committee *Legislation Guidelines*

¹⁰ For more detail see the Ombudsman's Guide on Effective Complaints Handling: <https://www.ombudsman.parliament.nz/resources/effective-complaint-handling>.

unnecessary in a particular context and can provide guidance on how to structure review processes.

Reflecting the Ombudsman's independence in public sector reforms

It is important that the status of the Ombudsman as an Officer of Parliament, independent from the Executive, is properly reflected in any reforms which create new obligations on the wider public sector. The Ombudsman has distinct accountability and reporting requirements and, as outlined above, oversees a wide range of public sector agencies which mean that obligations which are to be generally imposed on the public sector bodies may not be appropriate to impose on an Ombudsman.

For example, Officers of Parliament have distinct obligations, separate from departments under the Public Finance Act 1989.

The Ombudsman (and other Officers of Parliament) should be consulted on these kinds of reforms.

Consulting the Ombudsman

The Ombudsman can provide advice and guidance on the application of the principles set out above. You can consult the Ombudsman by emailing info@ombudsman.parliament.nz