

6 April 2023

Section (9)(2)(f)(iv)

Section (9)(2)(f)(iv)

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Our ref: OIA 102423

Tēnā koe Section (9)(2)(f)(iv)

### Official Information Act request: Independent Police Conduct Authority

Thank you for your email of 10 February 2023, in which you requested, under the Official Information Act 1982 (the Act), information about the Independent Police Conduct Authority (IPCA). Specifically, you requested:

*...any discussions or plans to review the workings, jurisdiction, powers, and supporting law for the Independent Police Conduct Authority. As well as relevant emails, letters, meeting agendas and minutes, and other documents, we are particularly interested in policy papers and any data collected or collated to aid in the process.*

As your request relates to questions of the legal and political system, the Ministry of Justice (the Ministry) has consulted other agencies to provide a comprehensive response. Therefore, on 7 March 2023 the Ministry extended the timeline to respond to 11 April 2023 to complete consultation.

Appended to this letter, is a list of documents that fall within the scope of your request and copies are enclosed. Some information has been withheld or refused under the following sections of the Act:

- section 18(d) the information requested is or will soon be publicly available
- section 9(2)(ba) to protect information that is subject to an obligation of confidence
- section 9(2)(f)(iv) to maintain the confidentiality of advice tendered to Ministers
- section 9(2)(h) to maintain legal professional privilege

In withholding information under section 9 the Ministry has considered the public interest and does not consider it outweighs withholding the information at this time.

For clarity, the Minister of Justice was due to meet with the Chairperson of the IPCA in July 2022. The Minister was provided an aide memoire (document 4) by the Ministry to support that meeting. However, the meeting was rescheduled and occurred in September 2022. The Ministry provided an updated aide memoire (document 7).

In addition, you will notice documents 8 and 9 are similar in substance. The Minister requested a briefing on the issue after she met with the Chairperson of the IPCA in early September 2022. The Ministry sent a briefing to the Minister's office on 21 September 2022. A technology issue meant the document had to be resent on 14 November 2022.

Please note that this response, with your personal details removed, may be published on the Ministry website at: [justice.govt.nz/about/official-information-act-requests/oia-responses/](https://justice.govt.nz/about/official-information-act-requests/oia-responses/).

If you are not satisfied with this response, you have the right to make a complaint to the Office of the Ombudsman under section 28(3) of the Act. The Office of the Ombudsman may be contacted by email to [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or by phone on 0800 802 602.

Nāku noa, nā

A handwritten signature in blue ink, appearing to read 'Brightwell', with a stylized flourish above the 'i'.

Kathy Brightwell  
**General Manager, Civil & Constitutional**

## Documents for release

| Number | Document Type   | Document Date  | Title  | Decision on release  |
|--------|---|--|--|--|
| 1      | Letter from Ministry of Justice to Petitions Committee                                    | 8 December 2021  | MoJ Response to Petition of Conrad Petersen  | Refused under s18(d) as the information is publicly available at: Submissions and Advice - New Zealand Parliament - parliament.nz<br><br><i>parliament.nz/resource/en-NZ/53SCPET_EVI_115787_PET1940/cc847f28388d6e75bda585bb94d40829ce0abf04</i> |
| 2      | Letter from Judge Doherty, Chair on the IPCA to Andrew Kibblewhite, Secretary for Justice | 1 April 2022   | The IPCA and Judicial Review: the need for legislative amendment                                       | Some information withheld under s9(2)(f)(iv)   |
| 3      | Letter from Rajesh Channa, Deputy Secretary Policy, to Judge Doherty, Chair on the IPCA   | 4 May 2022   | The Independent Police Conduct Authority and judicial review   | Some information deemed out of scope   |
| 4      | Aide Memoire for Minister Allan   | 5 July 2022<br><br>Note: This Aide Memoire was prepared for the meeting that was initially scheduled for 5 July 2022, but due to diary conflicts this meeting actually took place on 8 September 2022. | Meeting with the Independent Police Conduct Authority  | Some information deemed out of scope   |
| 5      | Agenda  | 18 July 2022   | Agenda for Relationship meeting with IPCA and MOJ  | Released in full   |
| 6      | Meeting Minutes   | 18 July 2022   | Minutes of Relationship Meeting with the Independent Police Conduct Authority                          | Some information withheld under s9(2)(ba) and some deemed out of scope   |
| 7      | Aide Memoire for Minister Allan   | 8 September 2022   | Meeting with the Independent Police Conduct Authority  | Some information deemed out of scope   |
| 8      | Email   | 19 September 2022  | <b>Title withheld under s9(2)(h)</b>   | Withheld in full under s9(2)(h)  |
| 9      | Briefing  | 21 September 2022  | Independent Police Conduct Authority Act 1988 - Proposal to Exclude the Authority from Judicial Review | Some information withheld under s9(2)(f)(iv)   |
| 10     | Aide Memoire for Minister Allan   | 14 November 2022   | Independent Police Conduct Authority Act 1988 - Proposal for Exemption from Judicial Review            | Some information withheld under s9(2)(f)(iv)   |



1 April 2022

Andrew Kibblewhite  
 Secretary for Justice  
 Ministry of Justice

Dear Mr Kibblewhite

### THE IPCA AND JUDICIAL REVIEW: THE NEED FOR LEGISLATIVE AMENDMENT

1. Recent events have brought into sharp focus a significant gap in the Independent Police Conduct Authority Act 1988 (IPCA Act); that is, the absence of an explicit, unambiguous privative clause statutorily ousting the right to challenge actions and decisions of the Authority by way of judicial review.
2. The recent High Court judgment of Gault J in *Deliu v The Independent Police Conduct Authority*<sup>1</sup>, dismissing the Authority's argument that s 33 of the IPCA Act is such a privative clause, has far-reaching implications for the work of the Authority. Considering the nature and volume of the Authority's work, this judgment has created a precedent with substantial risk to the Authority's ability to perform its core role of independently handling, investigating, and resolving complaints about the Police. There are strong policy reasons that support the argument for a privative clause, and the Authority's current engagement in several large-scale contentious and high-profile inquiries underlines the need for immediate action.
3. For these reasons we ask the Ministry to find a vehicle for an appropriate legislative amendment as a matter of urgency.

### DELIU V THE INDEPENDENT POLICE CONDUCT AUTHORITY

4. Mr Deliu sought judicial review in relation to the response of the Authority to five complaints he made to the Authority between January and April 2018 about conduct of the New Zealand Police. Mr Deliu complained that the Authority acted illegally, caused unjustifiable delays, and breached its statutory duties by failing to make decisions in respect of the five complaints.

<sup>1</sup>*Deliu v The Independent Police Conduct Authority* [2022] NZHC 413.

5. Substantively, the Authority submitted that his complaints either had no basis or had subsequently been rendered moot:
- Two purported complaints concerned correspondence by Mr Deliu in respect of matters he had already complained about to the Authority. This correspondence was appropriately treated as supplementary information, rather than as discrete complaints.
  - For two other complaints, the Authority decided on an action in terms of its statutory powers but, by oversight, did not promptly inform Mr Deliu of the decisions. Once aware of this procedural oversight, the Authority considered each complaint afresh and communicated its findings to Mr Deliu. The decision in each case was to take no further action.
  - Only one complaint was not decided by the Authority promptly upon receipt. This was an oversight, caused in part by the number and nature of communications received from Mr Deliu at that time. Once the Authority became aware of its oversight, it considered the complaint, decided on a course of action in terms of its statutory powers, and communicated that decision to Mr Deliu. The decision was to take no further action.

### Section 33 of the IPCA Act – the Authority’s submissions

6. As a preliminary issue, the Authority argued that Mr Deliu’s claims were barred by s 33 of the IPCA Act, which precludes proceedings against the Authority for things done or said in the course of the exercise, or intended exercise, of its statutory functions.
7. Section 33(1)(a) provides that, other than in respect of the specified criminal offences listed in subs (2):

**33 Proceedings privileged**

(1) Subject to subsection (2), –

(a) no proceedings, whether civil or criminal, may lie against the Authority, any member of the Authority, or any person holding any office or appointment under the Authority, for anything done or said by them in the course of the exercise or intended exercise of their functions under this Act, unless it is shown that they acted in bad faith:

(b) the Authority, members of the Authority, and any person holding office or appointment under the Authority must not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to their knowledge in the exercise of their functions under this Act.

8. Relatedly, s 32 precludes the Authority from communicating any and all matters that come to its knowledge in the exercise of its functions, except for the purpose of carrying out its statutory functions.



9. The Authority argued that, read together, these provisions confer a broad privilege on the Authority against all proceedings, be they civil or criminal. The Authority further argued that this privilege extended to judicial review.
10. The Authority cited recent judicial consideration of the Ombudsmen Act 1975 as supporting the Authority's interpretation of s 33. Section 26 of the Ombudsmen Act affords almost identical privilege against proceedings. It provides:

no proceedings, civil or criminal, shall lie against any Ombudsman, or against any person holding any office or appointment under the Chief Ombudsman, for anything he may do or report or say in the course of the exercise or intended exercise of his functions under this Act or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 or the Protected Disclosures Act 2000, unless it is shown that he acted in bad faith:

11. The purpose of s 26 is the same as for s 33 of the IPCA Act, reflecting the fact that, like the Authority, the Office of the Ombudsman is investigative and supervisory in nature, and it provides an alternative means for pursuing complaints with only recommendatory relief available.
12. Two recent High Court decisions indicate that the s 26 immunity applies so long as the conduct in dispute forms part of the Ombudsman's core statutory functions (or the intended exercise of those functions), and there is no bad faith.<sup>2</sup>
13. Accordingly, the Authority argued that, in the absence of bad faith, s 33(1)(a) of the IPCA Act privileged the Authority against the judicial review proceeding.

### **Gault J's Judgment in *Deliu***

14. Gault J accepted that, on its face, s 33(1)(a) provides the Authority and its officers civil and criminal immunity for anything said or done in the course of the exercise or intended exercise of functions under the IPCA Act, unless it is shown that they acted in bad faith.
15. Gault J also accepted that the Authority's role is like that of the Ombudsman, in that it does not determine private legal rights; rather, it forms opinions and may make recommendations.
16. However, Gault J considered that a cautious approach to interpretation of privative provisions is appropriate where it is suggested that they preclude applications to the High Court for judicial review. While agreeing that s 33 is similar to s 26 of the Ombudsmen Act, Gault J noted that the IPCA Act does not contain an equivalent of s 25 of the Ombudsmen Act. That section provides:

25 Proceedings not to be questioned or to be subject to review

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<sup>2</sup> *Taylor v the Social Security Appeal Authority* [2019] NZHC 1718; *Financial Services Complaints Ltd v Wakem* [2016] NZHC 634.

No proceeding of an Ombudsman shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of an Ombudsman shall be liable to be challenged, reviewed, quashed, or called in question in any court.

17. Gault J cited *Financial Services Complaints Ltd v Wakem*<sup>3</sup> - a strike out application based on s 25 and s 26 of the Ombudsmen Act. In that case, Toogood J considered that s 25 would prevent the courts from reviewing or questioning the exercise of the Ombudsman's investigative functions; and described s 26 as a companion provision limiting the personal civil and criminal liability of the Ombudsman for anything said or done in carrying out these functions.
18. While recognising that caution should be exercised before placing too much reliance on the specific form of wording, Gault J considered that in the absence of a clear ouster such as that in s 25 of the Ombudsmen Act, s 33(1)(a) of the IPCA Act is aimed at precluding civil and criminal liability but does not preclude applications to the High Court for judicial review.
19. Accordingly, Gault J held that s 33 did not bar consideration of Mr Deliu's application for judicial review.

#### Likelihood of success on appeal

20. The Authority has considered whether Gault J's judgment should be appealed and, to that end, sought senior counsel's advice on the likelihood of success on appeal.
21. The advice we have received is that, given the traditional reluctance to uphold privative provisions and a fairly strong line of authority holding that express words are required, while it *can* be argued that s 33 ousts judicial review, the absence of the words "review" or "judicial review" in s 33 mean this argument would have only limited prospects of success in the Court of Appeal.

#### IMPLICATIONS FOR THE IPCA

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22. Gault J's judgment has significant, far-reaching, and immediate implications for the Authority and its operations.
23. In its report, *Crown Liability and Judicial Immunity* (1997), the Law Commission reviewed the Crown Proceedings Act and considered the criminal and civil liability of the Crown, its officers, and agencies in light of two (then) recent decisions: *Simpson v Attorney General (Baigent's case)*<sup>4</sup> and *Harvey v Derrick*<sup>5</sup>. In particular, the Law Commission considered whether legislative amendment was appropriate in light of the liability implications of these two judgments.
24. When assessing the likely implications of those cases, the Law Commission considered as relevant, first, the Crown's contingent liability; second, predictions made by Police of "a

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<sup>3</sup> See fn 2.

<sup>4</sup> *Simpson v Attorney General (Baigent's case)* [1994] 3 NZLR 667.

<sup>5</sup> *Harvey v Derrick* [1995] 1 NZLR 314.



dramatic increase" in claims; and, third, the cost of processing the claims. Similar considerations are highly relevant when assessing the implications of the *Deliu* judgment and are set out below.

25. As New Zealand's independent Police oversight body, the Authority plays a vital role in ensuring the integrity of the criminal justice system. If performed effectively, independent oversight:
  - protects citizens against abuse of Police powers, including the use of excessive force;
  - exposes misconduct;
  - improves Police practice and policy;
  - provides public accountability;
  - encourages discipline within the Police;
  - protects against corruption;
  - protects against politicisation of the Police;
  - enhances public trust and confidence in the justice system; and
  - contributes towards the justice sector outcomes of a safe and just society.
26. Complaints to the Authority have been increasing steadily over recent years. In the 2017/18 financial year, the Authority received 2,592 complaints. In the 2020/21 financial year, we received 4,257 complaints. As these figures show, we have experienced a 64% increase in complaints over a three-year period.
27. The Authority anticipated that this number would continue to rise year-on-year, but the expected rise in numbers for the current year will clearly be far exceeded due to the unforeseen events surrounding the occupation and protest at Parliament. To date, the Authority has received nearly 1,900 complaints related to this event alone.
28. Given the nature of the Authority's work, it is inevitable that many complainants will be dissatisfied with the outcome of their complaint. While we do not have precise figures for the number of Expressions of Dissatisfaction (EODs) we receive on an annual basis, a snapshot from mid-2020 showed that our case resolution staff were each dealing with an average of nine EODs at that point in time.
29. These EODs take a variety of forms, including: complainants seeking clarification of our findings; complainants making further submissions in relation to their closed complaints; complainants raising new issues in relation to their complaint; and complainants requesting a review of the Authority's decision. A number of complainants are extremely persistent in their endeavours to relitigate the independent opinion of the Authority and refuse to accept a finding not in their favour.
30. Threats of legal action in general, and judicial review in particular, are not uncommon. In addition to the *Deliu* matter, in 2020 the Authority also dealt with another application for judicial review. Ultimately, the Authority was able to resolve this matter directly with the complainant, who then withdrew his application. However, several other complainants have, over the past year, indicated their intent to seek judicial review. We cannot presume these to be idle threats, given that these complainants include individuals who have previously taken judicial review or other civil proceedings against NZ Police and/or other governmental agencies. As the number of complaints the Authority handles increases, we anticipate that the number of



EODs will increase proportionately, as will the Authority's exposure to judicial review proceedings.

31. The Authority is concerned that Gault J's judgment further increases the Authority's potential exposure. As complaints and dissatisfied complainants increase, there now exists a precedent that will offer encouragement and instruction to those dissatisfied complainants seeking to challenge actions the Authority has taken. We know of at least one persistent complainant who is already aware of the outcome in *Deliu* and has flagged an intention to also turn to the High Court for satisfaction.
32. That risk of potential and imminent exposure to judicial review proceedings is exacerbated not only by the increasing number of complaints the Authority is handling, but also by the nature of projects the Authority is currently undertaking. These include highly contentious and highly publicised reviews, including the Coordinated Review of events leading up to the attack at New Lynn Countdown on 3 September 2021, and the review of policing at the occupation at Parliament. Both matters carry a very real and imminent risk of individuals, groups, or agencies looking to challenge the Authority's actions throughout the course of the reviews. With the *Deliu* case as a precedent, the likelihood of any such challenges involving judicial review applications will have increased substantially.
33. The Authority is committed to doing its core role as an independent investigative body for complaints about Police conduct effectively and efficiently. The Authority's increasing workload continues to put pressure on our resources and, consequently, our ability to deliver expected outputs. Exposure to judicial review applications increases that pressure.

#### THE POLICY ARGUMENTS FOR A PRIVATIVE CLAUSE

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34. While the courts are generally slow to conclude that Parliament has intended to preclude access to judicial review, this interest is lessened when the entity under scrutiny is itself an oversight body, rather than a core part of the executive with statutory enforcement powers; and when the claimant has alternative means of redress available to them. This is clearly illustrated in the case of the Office of the Ombudsman.
35. This principle was elucidated in a 1982 article by (then) Professor Kenneth Keith in relation to judicial control of the Ombudsman. In this article (cited by Gault J in *Deliu*) the author states:<sup>6</sup>

[T]he growing willingness of the courts to reassert and widen their traditional authority to control public power has been widely – if not unanimously – welcomed: the insistence on procedural fairness, on allowing litigants access to official information relevant to their litigation, on the lawful use of discretions by Ministers and local authorities, and on lawmakers and tribunals staying within the law. Why should the ombudsmen be seen differently? It is not really suggested that they should be. If they fail to comply with the fair procedures laid down in their Acts or if they attempt to exercise their powers over bodies which are not subject to their authority, the court should be able to intervene.

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<sup>6</sup> K J Keith "Judicial control of the Ombudsmen" (1982) 12 VUWLR 299 at 322 (footnotes omitted).

But there are several important features of the law relating to the ombudsmen that suggest judicial caution. One is that they can, in the end, “do no more than recommend or comment”. A second is that they are control agencies rather than themselves the direct wielders of public power. A third is that the statutes confer the powers in broad, non technical terms, with flexible procedures to match.

36. These features of the Ombudsman’s function, cited by (then) Professor Keith as reasons for the Ombudsman to *not* be subject to judicial review, are also distinctive features of the function and powers of the Authority. They equally support the case for a privative clause in the IPCA Act. These factors, and others, are discussed below. This discussion shows the similarities in the functions and powers of the Office of the Ombudsman and the Authority and support the case for the Authority having the same privilege from judicial review.

### The Authority is a purely a recommendatory body without enforcement powers

37. The Authority is an independent Crown Entity. Like the Office of the Ombudsman, the Authority is an investigative and oversight body. To that end, it does not have any statutory enforcement powers. Instead, it has powers to receive and respond to complaints, to investigate Police conduct and, if warranted, to make recommendations to the Commissioner of Police. Recommendations may pertain to individual Police officers or to broader Police policies, practice, and procedures.
38. In the event the Authority investigates and concludes the Police acted improperly, any recommendations it makes to the Commissioner of Police are not enforceable. Nor does the Act entitle complainants to a remedy.
39. In *Deliu*, while ultimately finding against a privative clause in the IPCA Act, Gault J agreed with this characterisation of the Authority as a recommendatory body, and recognised that this may favour a privative clause, stating at [39]: “... I accept that IPCA does not determine private legal rights. Rather, it forms opinions and may make recommendations. IPCA’s role is more like that of the Ombudsman. As (then) Professor Keith said, that suggests judicial caution – in the exercise of judicial review.”
40. Professor Keith is not the only legal academic to highlight the absence of enforcement powers as weighing against the availability of judicial review to challenge an agency’s decisions. In a 2004 article discussing proposals then before Parliament to extend the role and jurisdiction of the Office of the Children’s Commissioner, Professor Kathryn Hollingsworth noted the Commissioner’s lack of enforcement powers, linking enforcement powers with the suitability of judicial review as an appropriate oversight mechanism.<sup>7</sup>
41. In its function as a recommendatory body, the Office of the Children’s Commissioner is similar in many ways to the Authority and the Office of the Ombudsman. Like the Ombudsmen Act, the

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<sup>7</sup> Kathryn Hollingsworth “Speaking Loudly and Carrying a Small Stick? The New Zealand Commissioner for Children” (2004) 10 Otago LR 599.



Children's Commissioner Act 2003 ousts the right of judicial review, although using a very different method to that used in the Ombudsmen Act.

42. The Crown Entities Act 2004 applies generally to Crown entities (including the Office of the Children's Commissioner), but its provisions may be supplemented or expressly modified or negated by an entity's own Act. Sections 120 to 126 of the Crown Entities Act set out the protections from liability of members, officer holders, and employees. Section 121 notes that: "Nothing in this section affects ... the right of any person to apply, in accordance with the law, for judicial review".
43. Section 27 of the Children's Commissioner Act is similar to s 33 of the IPCA Act and s 26 of the Ombudsmen Act. However, the Children's Commissioner Act does not contain an explicit ouster provision, such as s 25 of the Ombudsmen Act. Instead, s 27(5B) of the Children's Commissioner Act expressly ousts s 121 of the Crown Entities Act. Thus, there is an ouster of judicial review, but a very different vehicle is used to that in the Ombudsmen Act.

#### **The Authority's powers conferred in broad, non-technical terms**

44. The Authority has a broad discretion as to how it responds to complaints it receives. The ways in which it may respond to complaints is prescribed in ss 17 and 18 under which the Authority may, inter alia, investigate the complaint, refer the matter to Police for investigation, or take no action at all. The circumstances in which the Authority may take no action include when more than 12 months has passed since the conduct in question, where in the Authority's opinion, the complaint is minor, frivolous, vexatious, or not made in good faith, and where the complainant has an adequate remedy or right of appeal. Section 18(2) is particularly broad, allowing the Authority to decide not to take any further action "if it appears to the Authority that, having regard to all of the circumstances of the case, any further action is unnecessary or inappropriate".
45. In addition, s 23(4) of the IPCA Act underlines the flexibility of the Authority's procedures, providing that "the Authority may regulate its procedure in such manner as it thinks fit". This reflects s 18(7) of the Ombudsmen Act.
46. The absence of strictly defined powers with clear, mandatory procedures also weighs against the exercising of judicial review. The broad, flexible procedures is a function of these agencies' recommendatory role. In the absence of enforcement powers, the need for strictly prescribed procedures is reduced as interested parties do not face the same jeopardy as in enforcement proceedings. However, by giving these agencies the independence to determine the procedures that will best suit the agency's role in any given investigation, this increases the potential of interested parties challenging the procedures ultimately adopted. A privative clause enables such an agency to operate with the independence and flexibility needed in this context.

#### **Alternative remedies available**

47. Like the Office of the Ombudsman, the Authority provides an alternative route to civil proceedings for the public to lay complaints against the Police. However, filing a complaint does

not preclude a civil remedy. For complainants seeking substantive relief or who are dissatisfied with the outcome of the Authority's process, they may still seek recourse against the Police through civil proceedings for any alleged misconduct.

48. When assessing the consequences of *Baigent's case* for the Crown and various Crown agencies, the Law Commission in its report *Crown Liability and Judicial Immunity* noted the fact that in almost all proceedings where *Baigent* compensation was sought, a remedy in tort also appeared to be available. The courts are generally of the view that such remedies can be sufficient alternatives to judicial review.<sup>8</sup>
49. Accordingly, the fact that the Authority's complainants face no deprivation of their legal remedies lessens the interest in protecting access to judicial review.

### Oversight of the Authority remains

50. The Authority recognises that there is a compelling interest in the courts retaining a degree of scrutiny over the actions and decisions of Crown agencies, and that Parliament is traditionally very reluctant to exclude an agency from any judicial oversight. However, the interest in retaining that scrutiny is lessened where some form of oversight will remain even with the ouster of judicial review.
51. The Authority has a form of inbuilt judicial oversight in that the IPCA Act requires that it be chaired by a judge or a retired judge.
52. Furthermore, a privative clause would not give the Authority blanket authorisation to do as it pleases without judicial scrutiny. The court would retain jurisdiction to intervene where the Authority has acted in bad faith, or where it has acted outside of its functions. This is an important safeguard, and it strikes a balance between allowing the court to retain oversight of improper decision making, and the policy interest in the Authority's proceedings remaining independent.

### SUMMARY: THE IPCA'S NEED FOR A PRIVATIVE CLAUSE

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53. The ultimate inquiry here is whether, by ousting judicial review, a justified end is achieved by proportionate means. That involves weighing the aims of the IPCA Act against the consequences of excluding review. The Authority's view is that, for the reasons discussed above, that weighing exercise shows that a privative provision in the IPCA Act is, indeed, justified and proportionate.
54. To summarise, the following factors support the case for a legislative amendment ousting any right to have actions and decisions of the Authority challenged by way of judicial review:

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<sup>8</sup> Luke Sizer "Privative Clauses: Parliamentary Intent, Legislative Limits and Other Works of Fiction" (2014) 20 Auckland UL Rev 148.



- The judgment in *Deliu* creates a precedent which exposes the Authority to the ongoing, recurring risk of judicial review litigation.
- The risk of further litigation is increased, given the steady increase in complaints to the Authority and the nature of several high-profile investigations currently being undertaken by the Authority.
- The Authority's role and powers distinguish it from other entities which wield public power directly and are therefore ordinarily susceptible to judicial review and civil or criminal liability. Like the Offices of the Ombudsman and the Children's Commissioner, the Authority is an investigative and oversight body, and does not have any statutory enforcement powers.
- The broad discretion and flexibility in the Authority's procedures also lessens the utility of maintaining judicial review. Rather, judicial review may inhibit the intended independence of the Authority in its operations.
- While the courts are generally slow to conclude that Parliament has intended to preclude access to judicial review, this interest is lessened when the claimant has alternative means of redress available to them. Complainants dissatisfied with an action of the Authority retain an alternative remedy, as they are entitled to bring civil proceedings against Police for alleged misconduct.
- While ouster of judicial review would remove a level of judicial oversight, sufficient safeguards would remain to ensure the Authority can be challenged if acting in bad faith or outside of its jurisdiction.

#### A PROPOSED PRIVATIVE CLAUSE

55. Given the similarities between the functions and powers of the Authority and the Office of the Ombudsman, and given that the Ombudsman has been judicially acknowledged as being privileged against judicial review, the Authority has turned to the source of the Ombudsman's privilege for an appropriate privative clause.
56. As discussed above, s 26 of the Ombudsmen Act is essentially identical to s 33 of the IPCA Act. For Gault J in *Deliu*, it is s 25 of the Ombudsman Act that is the point of difference between the two Acts when it comes to the issue of ouster of judicial review. Section 25 is drafted as an explicit, unambiguous ouster provision, and, on its face, it provides an appropriate model for an equivalent clause for the IPCA Act.
57. However, given the broad definition applied to the term "jurisdiction" in recent litigation, that is, to extend to all errors of law (essentially making the privative clause meaningless)<sup>9</sup>, we have drawn on s 193(2) of the Employment Relations Act 2000 and included an additional definitional subsection restricting the concept of jurisdiction. s9(2)(f)(iv)

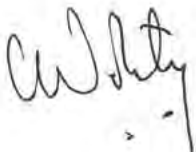
<sup>9</sup> See, for example, *Zaoui v Attorney-General (no 2)* [2005] 1 NZLR 690 (CA).

s9(2)(f)(iv)

58. I have approached this problem as a stand-alone issue given the need for urgency, in the hope that a suitable vehicle can immediately be found to enact a change. This issue is not the only legislative "fix" the Authority has foreshadowed. We have identified other issues in recent years and various advices to the Minister have set these out. If there is no ability to deal with the judicial review issue immediately, then I would welcome the opportunity to explore with you how all issues might be progressed in a consolidated amendment to the IPCA Act.

59. I am happy to discuss this further.

Yours sincerely



Judge Colin Doherty  
Chair  
INDEPENDENT POLICE CONDUCT AUTHORITY





Judge Colin Doherty  
Chair  
Independent Police Conduct Authority  
P O Box 25221  
Wellington 6140

Dear Judge Doherty,

### **The Independent Police Conduct Authority and judicial review**

Thank you for your letter of 1 April 2022 to the Secretary for Justice on the need for a privative clause in the Independent Police Conduct Authority Act 1988 (IPCA Act). Your letter has been referred to me for response as the issues you raise fall within my responsibility as the Deputy Secretary, Policy.

I acknowledge your concern that the precedent set in *Deliu v IPCA* may lead to additional applications for judicial review. You have proposed an amendment to the IPCA Act similar to s 25 of the Ombudsmen Act which will prevent proceeding or decisions from being subject to judicial review. You note that that:

- The Authority is a purely recommendatory body without enforcement powers.
- The Authority has a broad discretion as to how it responds to complaints it receives.
- A complainant has alternative remedies available such as civil proceedings against the Police for alleged misconduct.
- Oversight remains through the appointment of a judge or retired judge. The court has the power to intervene where the Authority has acted in bad faith or outside its statutory function.

You have asked for an urgent amendment to the IPCA Act to incorporate such a privative clause. I regret that this will not be possible at this time. The *Deliu* case does highlight some important policy questions concerning the status and independence of oversight agencies, such as the IPCA, and the relationship between your oversight role and the judicial system. However, as you will appreciate, removal of access to judicial review through a privative clause is a highly significant step, and one that would require detailed policy and rights analysis and public consultation.

The Minister's legislative priorities for the Justice portfolio for the remainder of the Parliamentary term are focused on Government priority projects and other mandatory commitments. I also note that the Government's legislative programme for the coming year is largely set and it would be difficult to successfully add an additional bill to the House schedule.

While we are unable to progress an urgent amendment to the IPCA Act at this time, the Ministry's Electoral and Constitutional policy team is available to discuss how we might assist in addressing the issues raised in your letter. I am also aware that the IPCA has previously identified other potential amendments to the IPCA Act, for example:

- clarifying of the intent of sections 17 and 20 of the IPCA Act;

- “own motion” investigations to instigate investigations on a matter that does not involve death or serious bodily injury; and
- powers to prosecute or to refer prosecution decisions to the Crown.

This will support us in providing advice to the Minister on a potential package of reforms to the IPCA Act, when considering future policy and legislation work programmes. The manager of the Electoral and Constitutional team, Hayley Denoual, will be in contact with your General Manager, Kevin Currie, to set up a meeting to discuss shortly.

I have also noted your concerns that an increase in applications for judicial review may strain the existing resource of the IPCA. This is within the context of IPCA resource already strained by increasing complaint numbers and their growing complexity.

**Out of scope**

The Electoral and Constitutional team will also assist and support those discussions from a policy perspective, as appropriate.

Yours sincerely



Rajesh Chhana  
**Deputy Secretary, Policy**

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## Meeting with the Independent Police Conduct Authority

Minister of Justice, Hon Kiri Allan  
Meeting on Tuesday, 5 July 2022

### Purpose

1. You are meeting with the Independent Police Conduct Authority (IPCA) on 5 July 2022  
IPCA attendees will be:
  - Judge Colin Doherty (Chair/Chief Executive)
  - Kevin Currie (General Manager)

### IPCA lifts public trust and confidence in the Police

2. IPCA is an independent Crown entity currently overseen by a Board of three members (up to five members can be appointed), which must be Chaired by a Judge or retired Judge. The full-time Chair also acts as the Chief Executive of IPCA and is supported by a General Manager.

Out of scope

***A recent court decision may increase pressure on IPCA's capacity***

14. A recent High Court decision<sup>1</sup> has determined that IPCA's responses to complaints are eligible for judicial review. Given the increasing number of complaints, growing complexity, and the contentious and public nature of some complaints, engaging in the judicial review process has the potential to further impact on IPCA's stretched capacity.

**The IPCA has identified several legislative changes it would like progressed as part of a future policy work programme**

15. The IPCA has identified several potential reforms of the IPCA Act, to improve their service. In its 2020 Briefing to Incoming Minister and its most recent briefing to you it has suggested:

- resolving the scope of the IPCA's jurisdiction for matters that the IPCA have referred to Police for investigation by clarifying of the intent of sections 17 and 20 of the IPCA Act;
- improving "own motion" investigations to instigate investigations on a matter that does not involve death or serious bodily injury; and

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<sup>1</sup> *Deliu v The Independent Policy Conduct Authority* [2002] NZHC 413

- providing the IPCA powers to prosecute or to refer prosecution decisions to the Crown.


16. In addition, the IPCA recently wrote to the Ministry proposing an urgent legislative change to exclude IPCA from the judicial review process, following the *Deliu* High Court decision mentioned above. The *Deliu* decision has highlighted some important policy questions concerning the status and independence of oversight agencies, such as the IPCA, the Privacy Commissioner and others, and the broader relationship between their oversight role and the judicial system.

17. While there is no immediate capacity to include an additional project on the policy work programme, right now we will be meeting with officials from the IPCA to discuss the issues raised by the IPCA, with a view to informing any future advice to potential reform and regulatory stewardship priorities, when considering future policy work programmes.

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**Appendix One – Biography on Independent Police Conduct Authority attendees**

| Who you will meet   | Biography  |
|---|--|
|  <p><b>Judge Colin Doherty,<br/>Chair/CE of IPCA</b></p> | <ul style="list-style-type: none"> <li>• Appointed Chair August 2017 for a five-year term, which was to expire on 29 July 2022. The previous Minister agreed the Judge's tenure should be extended until March 2023 to oversee the delivery of the Parliament Protest Review.</li> <li>• Judge Doherty has extensive judicial experience. Over the past 15 years he's held several senior administrative positions in the District Court judiciary.</li> <li>• Prior to joining the IPCA he was the National Executive Judge of the District Court of New Zealand.</li> <li>• Judge Doherty is a District Court Judge, an Alternate Judge of the Environment Court and a Justice of the High Court of the Cook Islands. He previously served as an Associate Judge of the High Court of NZ and a Justice of the Supreme Court of Samoa.</li> </ul> |
| <p><b>Kevin Currie,<br/>General Manager</b></p>   | <ul style="list-style-type: none"> <li>• Appointed to General Manager November 2021.</li> <li>• Comes from an extensive operational and managerial background in regulatory work over the last 20 years (in both the private and public sectors). Formerly a detective in the NZ Police before embarking upon a legal career in the 1990s.</li> <li>• Formerly worked as a temporary Manager: Investigations in IPCA in 2019/20.</li> </ul>  |

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## Relationship Meeting between the Independent Police Conduct Authority and the Ministry of Justice Policy Group

|                      |   |  |                 |
|----------------------|---|--|-----------------|
| <b>Date:</b>         | Monday 18 July 2022   | <b>Time:</b>   | 2:00pm – 3:00pm |
| <b>Venue:</b>        | KS 6-1/Microsoft Teams Meeting  |  |                 |
| <b>Participants:</b> | Kevin Currie – General Manager<br>Gerry Dobbyn – Principal Operations Advisor | Kathy Brightwell – General Manager, Civil & Constitutional<br>Hayley Denoual – Policy Manager, Electoral & Constitutional<br>Robert Jordan – Senior Policy Advisor, Electoral & Constitutional<br>Georgia Shen – Policy Advisor, Electoral & Constitutional<br>Shea Fraser – Principal Advisor, Crown Entity Monitoring Unit |                 |

### Agenda Items

### Lead

|  |      |
|--|------|
| <b>Opening Karakia</b><br>Whakataka te hau ki te uru,<br>Whakataka te hau ki te tonga<br>Kia mākinakina ki uta,<br>Kia mātaratara ki tai<br>E hī ake ana te atākura he tio,<br>he huka, he hauhu<br>Tihei Mauri Ora! | MOJ  |
| 1. Introductions (10 mins)   | All  |
| 2. Overview of the IPCAs structure and operating model (15 mins)   | IPCA |
| 3. Discussion of recent policy/legislative issues identified by IPCA (20 mins)   | IPCA |
| 4. Establishing Policy/IPCA regular relationship meetings (10 mins)  | MOJ  |
| 5. Closing remarks   | All  |
| <b>Closing Karakia</b><br>Kia hora te marino<br>Kia whakapapa pounamu te moana<br>Hei huarahi mā tatou i te rāngi nei<br>Aroha atu aroha mai<br>Tātou i a tātou katoa<br>Tihei Mauri Ora!                            | MOJ  |



Minutes of Relationship Meeting between the Independent Police Conduct Authority  
and the Ministry of Justice Policy Group

**Date:** Monday 18 July 2022      **Time:** 2:00pm – 3:00pm

**Venue:** KS 6-1/Microsoft Teams Meeting

**Participants**

|  |   |
|--|---|
| <p>Kevin Currie – General Manager</p> <p>Gerry Dobbyn – Principal Operations Advisor</p> | <p>Kathy Brightwell – General Manager, Civil &amp; Constitutional</p> <p>Hayley Denoual – Policy Manager, Electoral &amp; Constitutional</p> <p>Robert Jordan – Senior Policy Advisor, Electoral &amp; Constitutional</p> <p>Georgia Shen – Policy Advisor, Electoral &amp; Constitutional</p> <p>Shea Fraser – Principal Advisor, Crown Entity Monitoring Unit</p> |
|--|---|

**Formal Items**

Out of scope

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## 2. Discussion of recent policy/legislative issues identified by IPCA

Mr Dobbyn referred to two documents that were recently shared with MOJ:

- 2.1 Letter from the IPCA Chair to the Secretary of Justice
- 2.2 IPCA Briefing to the Incoming Minister (BIM)

MOJ provided a response letter to the IPCA Chair, which correctly identified the policy issues that the IPCA is anxious for progress to be made.

### Privative clause

The privative clause was raised, which relates to two applications for judicial review that the IPCA is dealing with. One application was resolved after further engagement with complainants. However, the other application was not as straightforward, where the IPCA has expended significant amounts of time

and resources to resolve the application. The IPCA is concerned there will be more cases threatening judicial review in the future. The IPCA sees this as a potential issue on top of the volume of cases they are currently dealing with, which includes the Occupation and Protest at Parliament (“the Protest”).

The IPCA acknowledges that a privative clause is a significant step. They consider the nature of their work to be similar and in line with agencies such as the Ombudsman, where the IPCA believes they have the characteristics that would make a privative clause appropriate for the IPCA in light of their risks going forward.

The IPCA notes their role and statutory powers are much more discretion-based and flexible. They also do not have any enforcement powers. When compared to the Ombudsman, the IPCA believe they have similar rules, powers, and discretion.

The IPCA also expressed concern for their resource implications and their ability to perform their core obligations. With the discretion that has been granted to the IPCA, they feel that there is a risk that the risk of judicial review will impede their operations going forward. Ms Brightwell enquired on who had the authority to make such decisions, where the IPCA advised on introducing amendments for the minister.

The IPCA indicated they are a recommendatory body which does not have enforcement powers. With their current processes and authorities, the IPCA consider that having enforcement powers is needed for flexibility given the number and nature of cases they deal with.

Out of scope

s9(2)(ba)

The IPCA believes that agencies such as the Ombudsman and the Children’s Commission contains the similar protection that they are looking for.

Clarifying the intent of section 17 and section 20 of the IPCA Act

This policy issue raised with the Minister relates to how the IPCA deals with cases as they come in.

The IPCA expressed that the issue arises in *Category B* cases, where investigations are undertaken by Police with IPCA oversight. The IPCA expressed they are not clear about the extent of oversight they are meant to have, which includes the question of whether the IPCA is directing or guiding police in the investigations they undertake. This issue has been apparent in Police employment investigations, which the IPCA has been working with the Police in that regard, and notes is dependent on Police cooperation. The IPCA is unable to see the report until they are finalized, which prevents them from ensuring the investigation is comprehensively completed. The IPCA feels this reduces their effectiveness in making criticism. They are unable to ensure a fair process is being undertaken as the case is being progressed.

The IPCA believe they should have a firmer role in being able to guide and direct the Police. The IPCA observed that there has been a behavioural shift in the way the Police have been carrying out investigations, which are long-standing issues. It was acknowledged by the IPCA that there has been some improvement from the Police, where some police districts are involving the IPCA in the early stages, whereas the IPCA observes lots of resistance in other districts. The IPCA advises they are



dependent on this involvement and the Police's attitudes too. This enabling part of the role would make the purpose of the IPCA clearer on what needs to be done.

#### Powers to prosecute

The IPCA wishes to refer cases to the Crown for prosecution rather than rely on the Police for prosecution. The IPCA acknowledges that this would change the nature of their agency significantly, including the investigating and prosecuting processes currently in place. The current criticism of the IPCA is that they are a 'toothless' organization, and they believe that referral to the prosecution should be considered as part of any review.

#### Own motion investigations

The IPCA consider the inability to initiate investigations on their own are shortcomings to police policy and police practice. The lack of power to instigate its own investigations fall out of scope of the specific complaints that the IPCA receives. The Police have previously expressed concern on whether the IPCA has power to be doing that.

The IPCA suggested that there may be incidents reported by the media relevant to the IPCA that they are unable to act on and believe that it would be valuable to have such powers to initiate investigations.

The IPCA have indicated that they have a range of issues that they would like to instigate investigations on, where they referred to instances where the Police were reluctant to refer matters to the IPCA as they did not believe it was relevant to the IPCA's work.

### **3. Establishing Policy/IPCA regular relationship meetings (10 mins)**

Both MOJ and IPCA agreed to have regular conversations at a policy level and will touch base throughout the year. A follow-up meeting will be scheduled in due course.

### **4. Closing remarks**

#### **Out of scope**

Mr Fraser raised a question in relation to s19 of the IPCA Act, where he observes that this section of the Act provides for additional levers and powers of authority to the IPCA, including directing police to reopen complaints, and reconsider actions. Mr Fraser enquired whether the IPCA uses such provisions in their oversight of category B complaints, as there are specific references in s19 potentially relevant in discussions with policy. The IPCA noted that they will go back and clarify this section on their end.



## Meeting with the Independent Police Conduct Authority

Minister of Justice, Hon Kiri Allan  
Meeting on Thursday, 8 September 2022

### Purpose

1. You are meeting with the Independent Police Conduct Authority (IPCA) on 8 September 2022. IPCA attendees will be:
  - Judge Colin Doherty (Chair/Chief Executive)
  - Kevin Currie (General Manager)

### IPCA lifts public trust and confidence in the Police

2. IPCA is an independent Crown entity currently overseen by a Board of three members (up to five members can be appointed), which must be Chaired by a Judge or retired Judge. The full-time Chair also acts as the Chief Executive of IPCA and is supported by a General Manager.

Out of scope



Out of scope

***A recent court decision may increase pressure on IPCA's capacity***

15. A recent High Court decision<sup>1</sup> has determined that IPCA's responses to complaints are eligible for judicial review. Given the increasing number of complaints, growing complexity, and the contentious and public nature of some complaints, engaging in the judicial review process has the potential to further impact on IPCA's stretched capacity.

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<sup>1</sup> *Deliu v The Independent Policy Conduct Authority* [2002] NZHC 413

**The IPCA has identified several legislative changes it would like progressed as part of a future policy work programme**

16. The IPCA has identified several potential reforms of the IPCA Act, to improve their service. In its 2020 Briefing to Incoming Minister and its most recent briefing to you it has suggested:
- resolving the scope of the IPCA's jurisdiction for matters that the IPCA have referred to Police for investigation by clarifying of the intent of sections 17 and 20 of the IPCA Act;
  - improving "own motion" investigations to instigate investigations on a matter that does not involve death or serious bodily injury; and
  - providing the IPCA powers to prosecute or to refer prosecution decisions to the Crown.
17. In addition, the IPCA wrote to the Ministry on 1 April 2022 proposing an urgent legislative change to exclude IPCA from the judicial review process, following the *Deliu* High Court decision mentioned above. This letter is attached as Appendix Two. The *Deliu* decision has highlighted some important policy questions concerning the status and independence of oversight agencies, such as the IPCA, the Privacy Commissioner and others, and the broader relationship between their oversight role and the judicial system.
18. The Ministry's Policy team met with IPCA to discuss the agency's concerns regarding its legislation and agreed to establish regular meetings going forward. While there is no immediate capacity to include an additional project on the policy work programme, these discussions will inform any future advice on potential reform and regulatory stewardship priorities when considering future policy work programmes. In the interim, staff within the IPCA are reviewing its entire Act for any other changes that may be required as well as examining whether it is using existing legislative levers.

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**Appendix One – Biography on Independent Police Conduct Authority attendees**

| Who you will meet   | Biography  |
|---|--|
|  <p><b>Judge Colin Doherty,<br/>Chair/CE of IPCA</b></p> | <ul style="list-style-type: none"> <li>• Appointed Chair August 2017 for a five-year term, which was to expire on 29 July 2022. The previous Minister agreed the Judge’s tenure should be extended until March 2023 to oversee the delivery of the Parliament Protest Review.</li> <li>• Judge Doherty has extensive judicial experience. Over the past 15 years he’s held several senior administrative positions in the District Court judiciary.</li> <li>• Prior to joining the IPCA he was the National Executive Judge of the District Court of New Zealand.</li> <li>• Judge Doherty is a District Court Judge, an Alternate Judge of the Environment Court and a Justice of the High Court of the Cook Islands. He previously served as an Associate Judge of the High Court of NZ and a Justice of the Supreme Court of Samoa.</li> </ul> |
| <p><b>Kevin Currie,<br/>General Manager</b></p>   | <ul style="list-style-type: none"> <li>• Appointed to General Manager November 2021.</li> <li>• Comes from an extensive operational and managerial background in regulatory work over the last 20 years (in both the private and public sectors). Formerly a detective in the NZ Police before embarking upon a legal career in the 1990s.</li> <li>• Formerly worked as a temporary Manager: Investigations in IPCA in 2019/20.</li> </ul>  |

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Hon Kiri Allan, Minister of Justice

**Independent Police Conduct Authority Act 1988: Proposal to exclude the Authority from judicial review**

| <b>Date</b>  | 21 September 2022                            | <b>File reference</b> | CON-2209-01      |                                     |
|--|--|-----------------------|------------------|-------------------------------------|
| <b>Action sought</b>   |  |                       | <b>Timeframe</b> |                                     |
| <b>Agree</b> that officials investigate further whether a restrictive ouster clause might be suitable and preferable to a total ouster and whether to give the IPCA powers either to refer matters for prosecution or prosecute them itself. |  |                       | N/A              |                                     |
| <b>Agree</b> to discuss with officials the prioritisation, sequencing and timing of any regulatory stewardship work for the IPCA, as part of our future work programme discussion.   |  |                       | N/A              |                                     |
| <b>Agree</b> to share a copy of this briefing with the IPCA  |  |                       | N/A              |                                     |
| <b>Contacts for telephone discussion (if required)</b>   |  |                       |                  |                                     |
| <b>Name</b>  | <b>Position</b>                              | <b>Telephone</b>      |                  | <b>First contact</b>                |
|  |  | <b>(work)</b>         | <b>(a/h)</b>     |                                     |
| Kathy Brightwell   | General Manager, Civil and Constitutional    |                       |                  | <input type="checkbox"/>            |
| Hayley Denoual   | Policy Manager, Electoral and Constitutional | 04 466 2923           |                  | <input checked="" type="checkbox"/> |

**Minister's office to complete**

|   |                                    |   |
|---|------------------------------------|---|
| <input type="checkbox"/> Noted              | <input type="checkbox"/> Approved  | <input type="checkbox"/> Overtaken by events  |
| <input type="checkbox"/> Referred to: _____ |                                    |   |
| <input type="checkbox"/> Seen               | <input type="checkbox"/> Withdrawn | <input type="checkbox"/> Not seen by Minister |
| <b>Minister's office's comments</b>         |                                    |   |
|   |                                    |   |

**In Confidence**

## **Purpose**

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1. This briefing provides the additional information you requested on the implications of exempting the Independent Police Conduct Authority (IPCA) from judicial review (an 'ouster clause'), which was discussed at your meeting with the IPCA Chair, Judge Colin Doherty, on 7 September.
2. We have also provided an initial view on the IPCA's lack of power to prosecute, which was also discussed at that meeting.

## **Key Messages**

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3. The IPCA has proposed that the Independent Police Conduct Authority Act 1988 (the Act) be amended to exempt the IPCA from judicial review except where there is a lack of jurisdiction (including an act of bad faith). This would mirror the current 'ouster clause' for the Ombudsman.
4. Judicial review is the means by which courts fulfil their constitutional role of ensuring public powers are exercised in accordance with law. Removing or restricting the right to judicial review is rarely a proportionate response to the perceived risk. Ouster clauses also raise significant issues of consistency with section 27(2) of the New Zealand Bill of Rights Act 1990 (NZBORA).
5. We propose that further work be undertaken on the issues that the IPCA have identified. However, our initial analysis of the IPCA's proposal for a total ouster clause is that:
  - 5.1. although the Ombudsman's functions are similar to the IPCA, Ombudsmen are accountable to Parliament and this distinction is an important factor in why the Ombudsmen's work may be less amenable to judicial scrutiny;
  - 5.2. the IPCA's functions and powers are more similar to other recommendatory bodies, such as the Children's Commissioner, which remain subject to judicial review;
  - 5.3. although judicial review is less justifiable where other legal remedies are available, this may not always be the case for IPCA complainants;
  - 5.4. the fact that the IPCA must be chaired by a former judge is not sufficient in itself to provide 'judicial oversight'; and
  - 5.5. a lack of resources to consider complaints and respond to future judicial reviews is not a relevant criterion for restricting judicial review.
6. We also propose to investigate further an IPCA proposal giving it powers either to refer matters for prosecution or prosecute them itself. Such an amendment would involve a major change to the advisory nature of the IPCA and its relationship with Police.
7. If you are interested in including a regulatory stewardship project for the IPCA, we will need to discuss with you the prioritisation, sequencing and timing of the work, as part of our future work programme discussion.

## Background

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### *Judicial review*

8. Judicial review is the review by a judge in the High Court of any exercise of (or any refusal to exercise) a public decision-making power to determine its legality or validity. It is an essential mechanism in the constitutional balance of powers between the executive, the legislature and the judiciary. The courts will not allow their processes to be used to inhibit the free functioning of Parliament,<sup>1</sup> but have a constitutional duty to uphold the rule of law over executive government.<sup>2</sup> The right to judicial review is protected under NZBORA unless clearly excluded in legislation.<sup>3</sup>
9. Judicial review is an essential mechanism in the constitutional balance of powers between the executive, the legislature and the judiciary. It is a flexible and potent way in which the courts can control the activities of the executive and safeguard the rights of citizens. Accordingly, any decision to limit or remove the right of judicial review needs to have a very strong justification.
10. Legislation excluding the right to judicial review could be seen to immunise unlawful exercise of power from judicial scrutiny and for this reason is, in practice, narrowly interpreted by courts.<sup>4</sup> The Legislation Design and Advisory Committee's Legislation Guidelines note that removing or restricting the right to judicial review is rarely a proportionate response to the perceived risk. Restrictions placed upon the right should be rare and limited to cases where finality is critical and be proportionate to that objective.<sup>5</sup>

### *The Deliu Case and its implications for the IPCA*

11. In *Deliu v Independent Police Conduct Authority*<sup>6</sup> (Deliu) it was alleged that the IPCA failed to make a decision on a number of the applicant's complaints. The IPCA argued that s.33(1)(a) of the Act granted immunity from criminal and civil proceedings (including judicial review) for things done by the IPCA when exercising functions under the Act, except when acting in bad faith. The IPCA drew parallels with the protections from judicial review under the Ombudsmen Act 1975. It argued that, like the Ombudsman, the IPCA is an oversight body rather than a core part of the Executive doing no more than recommending or commenting and its powers are conferred in broad, non-technical terms, with broad procedures to match.
12. The High Court determined that s 33 did not bar consideration of the applicant's review claims. It accepted that the IPCA was similar to an Ombudsman in that it did not determine private legal rights. However, although it contained protections for individuals equivalent to the Ombudsmen Act, the Act did not have a clear ouster clause expressly protecting the IPCA from judicial review proceedings in certain circumstances. This was in contrast to the

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<sup>1</sup> P. Joseph *Constitutional and Administrative Law in New Zealand*, 3<sup>rd</sup> Ed, p.500.

<sup>2</sup> *Ibid* p 815.

<sup>3</sup> New Zealand Bill of Rights Act 1990, ss.4, 27.

<sup>4</sup> Legislation Design and Advisory Committee Annual Report 2018, p.9; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129.

<sup>5</sup> Legislation Design and Advisory Committee 'Legislation Guidelines 2021 Edition: Supplementary Material - Excluding or limiting the right to judicial review'.

<sup>6</sup> [2022] NZHC 413.



Ombudsmen Act which, through s.25, protects any proceeding or decision of an Ombudsman from judicial review except on the ground of lack of jurisdiction, but leaves an Ombudsman liable to review in other circumstances.<sup>7</sup> The Court held that, on this basis the application for judicial review could proceed.

#### *The IPCA's proposed amendment*

13. The Chair of the IPCA, Judge Colin Doherty, wrote to the Secretary for Justice on 1 April 2022 proposing an amendment to the Act to address the implications of the High Court decision in *Deliu*. The IPCA proposed including an ouster clause in its Act because:
  - 13.1. it is similar in function to an Ombudsman; and
  - 13.2. from a resourcing perspective, an increase in judicial reviews could impact on its ability to deliver on its core functions.
14. IPCA's proposed amendment is set out at **Appendix One**. The amendment would introduce an exemption from any judicial challenge of an IPCA investigation, proceeding, opinion, recommendation or decision, except on the ground of jurisdiction (including where there is an act of bad faith).

#### **Initial analysis of the proposed amendment**

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15. Our initial analysis of the IPCA's arguments for limiting judicial review indicates that a **total** ouster clause is not appropriate. However, we propose that these issues be considered further in discussions with the IPCA, including whether some other form of restrictive clause might be suitable and preferable to a total ouster.
16. This is on the basis of the following considerations.

#### *The Ombudsman has similar powers but a different constitutional role to the IPCA*

17. The IPCA maintains that its functions and powers are broadly similar to an Ombudsman and that on this basis it should benefit from an ouster clause similar to that in s.25 of the Ombudsmen Act.
18. There are strong comparisons between the powers of the IPCA and the Ombudsmen. Both the members of the IPCA and Ombudsmen are appointed by the Governor-General on the recommendation of the House of Representatives. Both provide independent oversight of administrative decisions, with an investigatory role, either in response to a complaint or, in certain circumstances, on their own motion. Both may require information or documents they consider relevant to the investigation and have discretion as to whether to hold a hearing to

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<sup>7</sup> For example, in *Financial Services Complaints Limited v Wakem* [2016] NZHC 634 (12 April 2016) (Wakem) the High Court held that ss. 25 and 26(1)(a) of the Ombudsmen Act did not protect the Ombudsman from being judicially reviewed over a decision to refuse the plaintiff consent to using the term 'Ombudsman' in its company name under s.28A of that Act, because the powers in s.28A did not form part of the functions of the Ombudsman.

hear evidence. Both may choose to take no action in response to a complaint, or to refer the complaint to other bodies.<sup>8</sup>

19. However, although it based aspects of the IPCA Act on the Ombudsmen Act, Parliament did not intend that the IPCA be another form of Ombudsman. During the passage of the IPCA Act, Ministers indicated their intention that the IPCA be “separate from the ombudsman's office, [but] stand alongside it to complete a comprehensive machinery for the resolution of complaints.”<sup>9</sup>
20. There are fundamental differences between the two entities, due to their constitutional status, which may have been one reason why Parliament decided to give an ouster clause to one and not the other. The IPCA is an Independent Crown Entity (ICE), a body corporate, whose members are accountable to the responsible Minister. On this basis, despite its independent status, the IPCA, along with all other ICEs form part of the executive and are, by default, subject to judicial review as part of upholding the rule of law over executive government.
21. The Ombudsman, by contrast, as an officer of Parliament, is accountable to the House of Representatives (House). For example, Ombudsmen must swear an oath administered by the Speaker or Clerk of the House, are subject to the House's rules for guidance of Ombudsmen and are audited by an auditor appointed by the House.
22. The ouster clause in the Ombudsmen Act is not mirrored in the legislation establishing other Officers of Parliament (i.e. the Controller and Auditor-General and the Parliamentary Commissioner for the Environment). The reason for this is unclear, however it may have to do with neither of these other Officers having powers to investigate complaints, in the manner of the Ombudsman. Despite the lack of ouster clause, we have not been able to find any examples of either office being judicially reviewed.
23. The Ombudsman remains liable to judicial review in certain circumstance; for example in relation to their decision-making process in respect of allowing other entities to use the name ‘Ombudsman’.<sup>10</sup> In addition, the Ombudsman has been judicially reviewed for decisions made under the Official Information Act 1982, due to s.25 of the Ombudsmen Act being disapplied where the Ombudsman exercises any function or power under the Official Information Act.
24. Nevertheless, the caution with which the judiciary approaches interference with the legislature is one likely reason for limiting the scope of judicial review for the Ombudsman. We therefore consider comparisons of the IPCA with ICEs with similar functions to be a more valid analysis when considering the justification for an ouster clause.

*The IPCA's powers are equivalent to other recommendatory bodies which remain subject to judicial review*

25. The IPCA suggest that an ouster clause is justified due to the judicial caution in reviewing bodies which (i) do no more than recommend or comment, (ii) are control agencies rather

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<sup>8</sup> The IPCA may refer complaints back to the Police (IPCA Act s.17), the Ombudsman may refer complaints to the Privacy Commissioner, the Health and Disability Commissioner or the Inspector-General of Intelligence and Security (O Act ss.17A, 17B and 17C). <sup>9</sup> (16 February 1988) 486 New Zealand Parliamentary Debates, 2008.

<sup>9</sup> (16 February 1988) 486 New Zealand Parliamentary Debates, 2008.

<sup>10</sup> See the case of *Wakem* above (footnote 7).

than direct wielders of public power and (iii) have statutory powers in broad non-technical terms, with flexible procedures to match. A parallel is drawn directly with the Ombudsman, and with the Children's Commissioner (which is inferred to benefit from an ouster clause)

26. As outlined above, the IPCA has a strong investigative and recommendatory role, with flexibility, subject to certain criteria being met, on whether to investigate, whether to refer the complaint to the Police and how to investigate (for example, whether to hold a hearing). However, the IPCA has other powers which arguably stretch beyond merely recommending or commenting. A failure to exercise them validly could have serious repercussions for the investigation of Police conduct on issues of public interest. For example, the IPCA:
- 26.1. may choose to oversee a Police investigation of a complaint and give whatever directions to the Police it sees fit, regarding that investigation;
  - 26.2. must decide whether there are reasonable grounds to carry out an investigation in the public interest of any incident involving death or serious bodily harm notified to it by the Commissioner of Police;
  - 26.3. may require from the Commissioner of Police all such information and assistance as is necessary for the proper performance of its functions in relation to its investigation of any complaint or incident;
  - 26.4. if it does choose to hold a hearing, the IPCA has many of the powers of a Commission of Inquiry. These are conferred with the powers of the District Court, in the exercise of its civil jurisdiction, in citing parties and conducting and maintaining order at the inquiry; and
  - 26.5. may send a copy of its findings and recommendations to the Attorney-General and Minister of Police, where the Commissioner of Police does not indicate how they will take forward the IPCA's recommendations or give reasons for not implementing them.
27. Other public bodies with similar powers to the IPCA remain subject to judicial review.<sup>11</sup> For example, the Criminal Cases Review Commission (CCRC) has powers to review convictions and sentences, to initiate and conduct inquiries into general matters and to advise the Minister of Justice on exercise of the royal prerogative of mercy. As with the IPCA it may decide to investigate a complaint or not and may regulate its own procedures for gathering evidence. It does not re-litigate criminal cases but rather may refer a conviction or sentence to an appeal court under certain circumstances with its advice on matters such as the prospects of the appeal being successful.
28. Unlike the IPCA, the CCRC does not have the powers of a Commission of Inquiry and, beyond its recommendations, cannot direct how a case is considered. As with the IPCA, although the CCRC provides statutory immunity to members, office-holders and employees under certain circumstances, it does not benefit from an ouster clause.

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<sup>11</sup> By contrast, the Ombudsman, although it may refer matters to, and consult with other bodies, has no power to direct how such investigations are carried out, require assistance from other statutory bodies or a right to be informed of the outcome.



29. In its letter of 1 April, the IPCA drew a comparison with s.27(5B) of the Children's Commissioner Act 2003 (CC Act) as an example of a similar entity which benefits from an ouster clause.
30. However, our view is that s.27(5B) does not over-ride the default preservation of the right to apply for judicial review in s.121 of the Crown Entities Act 2004. Our understanding is that s. 27(5B) of the CC Act is not an 'ouster clause'; rather it clarifies that, to the extent that s.27 of the CC Act is inconsistent with s.121 of the Crown Entities Act, for example in its application to criminal as well as civil liability, s.27 of the CC Act prevails. As s.27 of the CC Act does not refer to 'judicial review', or 'review', it is not inconsistent with the default preservation of the right to apply for judicial review in the Crown Entities Act.
31. On this basis, judicial review is available in respect of a body with weaker powers than the IPCA. The Children' Commissioner, for example, has the power to investigate a decision, recommendation or omission in respect of a child in its personal capacity and to provide reports to a court at the request of the court or the parties on the interests, rights or welfare of children. It may refer matters to other statutory officers such as the Commissioner of Police and may require information and documents under certain circumstances. It may also monitor and assess the policies and practices of Oranga Tamariki. However its other functions are largely focussed on advocacy or consultation. The Children's Commissioner lacks the IPCA's powers to direct how an investigation it refers is conducted, to compel cooperation or to take on the functions of a Commission of Inquiry in conducting a hearing.

*Other legal remedies are not necessarily available to IPCA complainants*

32. The IPCA further justifies the inclusion of an ouster clause on the basis that, like the Ombudsman, its complainants face no deprivation in legal remedies by making their complaint (for example they may still have an action in tort). It argues that the courts are generally of the view that such alternative statutory remedies can be sufficient alternatives to judicial review. It also argues that the right to judicial review is still available where the IPCA has acted without jurisdiction, and that alternative remedies are also available such as civil proceedings against the Police for alleged misconduct.
33. We accept there is some validity to this argument. However, we also note that a ground for the IPCA taking no action is that, in its opinion, there is an adequate remedy or right of appeal that it would be reasonable for the complainant to exercise (either currently or in the past). This infers that the IPCA may not investigate where alternative remedies remain but may investigate where they are not available. In these circumstances, it is arguable that the full right to a judicial review should be retained for the very reason that there may be no other remedies available to a complainant.
34. We also note that legal remedies may be available for those wishing to challenge the decisions of other ICEs such as the CCRC or the Health and Disability Commissioner (HDC). Indeed, the HDC can similarly decide not to investigate on the ground that other legal remedies are available, and its decisions can be appealed to the Human Rights Review Tribunal. Neither of these bodies benefit from an ouster clause with respect to their decisions.

*The IPCA should still be subject to judicial scrutiny, despite being Chaired by a former judge*

35. The IPCA submits that the fact that the Chair of the IPCA is a judge or retired judge ensures there is some judicial oversight over its actions. It maintains that this in turn lessens the need for judicial scrutiny in the form of judicial review.
36. We do not agree that the status of the Chair of the IPCA as a judge or retired judge provides sufficient judicial oversight over the decision-making to justify limiting judicial review rights, given their primary role in ensuring that the IPCA fulfils its functions. It is well established that similar bodies, chaired by judges, may nevertheless be subject to judicial review. For example, Royal Commissions, which are often chaired by current or former judges, are amenable to judicial review.<sup>12</sup>

*There are other solutions to address a lack of resourcing if future judicial review applications materialise*

37. The IPCA is also concerned that exposure to judicial review applications in the future may further increase pressure on its resources and its capacity to deliver expected outputs.
38. The IPCA has received an increase in baseline appropriation from \$4.671m in 2019/20 to \$6.74m in 2022/23. Nevertheless, in the IPCA's Briefing to the Incoming Minister, in June 2022, it indicated it had received a 130% increase in the number of complaints and notifications it has received over the last four years, and that it faces a continuing increase in demand for its services and ongoing constrained resources.<sup>13</sup>
39. We acknowledge the pressure which the IPCA is under, particularly in the light of the increase in complaints following the Parliament protests in February this year. However, a lack of resources to consider complaints and respond to future judicial reviews is not a relevant criterion for undermining a fundamental principle of constitutional law by restricting a key right through which the IPCA is held to account for its decisions.
40. If the IPCA experiences a continued rise in workload, including an increase in judicial reviews, it should seek further funding in budget bids. Regular performance discussions occur with the Ministry's Crown Entity Monitoring Unit in this regard.

#### **Other concerns raised by the IPCA: a lack of powers to prosecute**

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41. In addition to the proposed ouster clause discussed above, the IPCA has also raised the issue of its lack of powers to prosecute under the Act. Currently Police are solely responsible for making the decision on whether to prosecute police officers for their conduct. IPCA have pointed out that this has some benefits as it leaves Police wholly accountable for the action taken in relation to their staff who have demonstrated questionable conduct.
42. However, Police may lack, or be perceived to lack, the necessary independence when prosecuting members of the Police. They are expected to strike the correct balance between

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<sup>12</sup> See for example *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618, where the decisions of a Royal Commission, chaired by a judge of the High Court, were judicially reviewed.

<sup>13</sup> IPCA, 'Briefing to Incoming Minister Hon Kiritapu Allan, June 2022', p.12.

the critical nature of dealing with conduct issues effectively and being a good employer who protects and supports their frontline staff.

43. This issue arose in the Court of Appeal's consideration of *Wallace v Attorney-General*<sup>14</sup> In that case, which arose from an investigation by Police into a killing by one of its own officers, the Court set aside declarations made by the High Court that the inquiry into the killing had not complied with s.8 of NZBORA, affirming the right not to be deprived of life. The Court noted however that the independence, impartiality and effectiveness of police investigations were questions of fact to be resolved in each case and could not be assumed, particularly as police investigations were not in every case required to be compliant with the International Covenant on Civil and Political Rights.<sup>15</sup>
44. IPCA have proposed further consideration of the benefits and disadvantages of extending the Authority's jurisdiction either through an amendment to the Act giving the IPCA power to investigate and prosecute and/or allowing the IPCA the power to refer some matters directly to the Crown for decisions on prosecution to be made (such as driving matters, or cases regarding use of excessive force).
45. We agree that there is merit in exploring whether such a change is appropriate. We note that such a change could fundamentally change the nature of the IPCA from an advisory and review body to something more akin to an enforcement body. For example, if the IPCA had powers to prosecute in its own right, this would change the nature of its role in advising the Commissioner of Police. Consequential changes may also be necessary to strengthen its powers of investigation (for example it may be necessary to give it powers of entry and seizure).

### **Next Steps**

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46. The IPCA have proposed policy and legislative reform in their 2020 and 2022 BIMs. Although our initial analysis is that a total ouster clause is not appropriate, we propose that these issues be considered further in discussions with the IPCA, including whether some form of restrictive clause might be suitable and preferable to a total ouster. We also propose further discussions with IPCA on potential changes to its power to prosecute.
47. There may be other minor regulatory stewardship work that we could usefully complete at the same time, which could form the basis of a limited IPCA-related work package and potentially future amendments to the Act.
48. Further analysis would include, for example, comparisons with other similar international bodies such as Independent Office for Police Conduct (UK) and the Civilian Review and Complaints Commission for the RCMP (Canada), which on initial analysis both appear to be subject to judicial review. The IPCA's current statutory tool to conduct oversight and the impact it has on their core function should also be considered.

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<sup>14</sup> [2022] NZCA 375, [123] – [124].

<sup>15</sup> [2021] NZHC 1963 at [478].



s9(2)(f)(iv)

**Recommendations**

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50. It's recommended that you:

1. **Note** that, following the High Court case of *Deliu*, the IPCA has proposed an 'ouster clause' to exempt the IPCA from judicial review except where there is a lack of jurisdiction (including an act of bad faith); and to investigate giving it powers to prosecute.
2. **Note** that our initial advice is that a total ouster clause is not appropriate given the form and function of the IPCA.
3. **Agree** that officials investigate further whether some form of restrictive clause might be suitable and preferable to a total ouster and whether to give the IPCA powers either to refer matters for prosecution or prosecute them itself. YES / NO

s9(2)(f)(iv)

5. **Agree** to share a copy of this briefing with the IPCA. YES / NO

*H Denoual*

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Hayley Denoual  
Policy Manager, Electoral and Constitutional

APPROVED      SEEN      NOT AGREED

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Hon Kiri Allan  
Minister of Justice

Date    /    /

s9(2)(f)(iv)

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982



## Independent Police Conduct Authority Act 1998: Proposal to exclude the Authority from judicial review

Hon Kiri Allan, Minister of Justice  
14 November 2022

### Purpose

1. This note provides the additional information you requested on the implications of exempting the Independent Police Conduct Authority (IPCA) from judicial review (an 'ouster clause'), which was discussed at your meeting with the IPCA Chair, Judge Colin Doherty, on 7 September.
2. We have also provided an initial view on the IPCA's lack of power to prosecute in the Act, which was also discussed at that meeting.

### Key Messages

3. The IPCA has proposed that the Independent Police Conduct Authority Act (the Act) be amended to exempt the IPCA from judicial review except where there is a lack of jurisdiction (including an act of bad faith). This would mirror the current 'ouster clause' for the Ombudsman.
4. Judicial review is the means by which courts fulfil their constitutional role of ensuring public powers are exercised in accordance with law. Removing or restricting the right to judicial review is rarely a proportionate response to the perceived risk. Ouster clauses also raise significant issues of consistency with section 27(2) of the NZ Bill of Rights Act.
5. We propose that further work be undertaken on the issues that the IPCA have identified. However, our initial analysis of the IPCA's proposal for a total ouster clause is that:
  - although the Ombudsman's functions are similar to the IPCA, Ombudsmen are accountable to Parliament, and this distinction is an important factor in why the Ombudsmen's work may be less amenable to judicial scrutiny;
  - the IPCA's functions and powers are more similar to other recommendatory bodies, such as the Children's Commissioner, which remain subject to judicial review;
  - although judicial review is less justifiable where other legal remedies are available, this may not always be the case for IPCA complainants
  - the fact that the IPCA must be chaired by a former judge is not sufficient in itself to provide 'judicial oversight'; and
  - the IPCA should look to other solutions to address a lack of resourcing if future judicial review applications materialise.
6. We also propose to investigate further an IPCA proposal giving it powers either to refer matters for prosecution or prosecute them itself. Such an amendment would involve a major change to the advisory nature of the IPCA and its relationship with Police.
7. If you are interested in including a regulatory stewardship project for the IPCA, we will need to discuss with you the prioritisation, sequencing and timing of the work, as part of our future work programme discussion.

### Background

#### *Judicial review*

8. Judicial review is the review by a judge in the High Court of any exercise of (or any refusal to exercise) a public decision-making power to determine its legality or validity. It is an

Approved by: Hayley Denoual, Policy Manager, Electoral and Constitutional



essential mechanism in the constitutional balance of powers between the executive, the legislature and the judiciary. The courts will not allow their processes to be used to inhibit the free functioning of Parliament,<sup>1</sup> but have a constitutional duty to uphold the rule of law over executive government.<sup>2</sup> The right to judicial review is protected under the New Zealand Bill of Rights Act 1990 unless clearly excluded in legislation.<sup>3</sup>

9. Legislation excluding the right to judicial review could be seen to immunise unlawful exercise of power from judicial scrutiny and for this reason is, in practice, narrowly interpreted by courts.<sup>4</sup> The Legislation Design and Advisory Committee's Legislation Guidelines note that removing or restricting the right to judicial review is rarely a proportionate response to the perceived risk. Restrictions placed upon the right should be rare and limited to cases where finality is critical and be proportionate to that objective.<sup>5</sup>

#### *The Deliu Case and its implications for the IPCA*

10. In *Deliu v Independent Police Conduct Authority*<sup>6</sup> (Deliu) it was alleged that the IPCA failed to make a decision on a number of the applicant's complaints. The IPCA argued that s.33(1)(a) of the Act granted immunity from criminal and civil proceedings (including judicial review) for things done by the IPCA when exercising functions under the Act, except when acting in bad faith. The IPCA drew parallels with the protections from judicial review under the Ombudsmen Act 1975 (Ombudsmen Act). It argued that, like the Ombudsman, the IPCA is an oversight body rather than a core part of the Executive doing no more than recommending or commenting and its powers are conferred in broad, non-technical terms, with broad procedures to match.
11. The High Court determined that s 33 did not bar consideration of the applicant's review claims. It accepted that the IPCA was similar to an Ombudsman in that it did not determine private legal rights. However, although it contained protections for individuals equivalent to the Ombudsmen Act, the Act did not have a clear ouster clause expressly protecting the IPCA from judicial review proceedings in certain circumstances. This was in contrast to the Ombudsmen Act which, through s.25, protects any proceeding or decision of an Ombudsman from judicial review except on the ground of lack of jurisdiction, but leaves an Ombudsman liable to review in other circumstances.<sup>7</sup> The Court held that, on this basis the application for judicial review could proceed.

#### *The IPCA's proposed amendment*

12. The Chair of the IPCA, Judge Colin Doherty, wrote to the Secretary for Justice on 1 April 2022 proposing an amendment to the Act to address the implications of the High Court decision in *Deliu*. The IPCA proposed including an ouster clause in its Act because:
  - it is similar in function to an Ombudsman; and

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<sup>1</sup> P. Joseph *Constitutional and Administrative Law in New Zealand*, 3<sup>rd</sup> Ed (Joseph), p.500.

<sup>2</sup> *Ibid* p.815

<sup>3</sup> New Zealand Bill of Rights Act 1990, ss.4, 27.

<sup>4</sup> Legislation Design and Advisory Committee Annual Report 2018, p.9; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129.

<sup>5</sup> Legislation Design and Advisory Committee 'Legislation Guidelines 2021 Edition: Supplementary Material - Excluding or limiting the right to judicial review'.

<sup>6</sup> [2022] NZHC 413.

For example, in *Financial Services Complaints Limited v Wakem* [2016] NZHC 634 (12 April 2016) (Wakem) the High Court held that ss. 25 and 26(1)(a) of the Ombudsmen Act did not protect the Ombudsman from being judicially reviewed over a decision to refuse the plaintiff consent to using the term 'Ombudsman' in its company name under s.28A of that Act, because the powers in s.28A did not form part of the functions of the Ombudsman.

- from a resourcing perspective, an increase in judicial reviews could impact on its ability to deliver on their core functions.

s9(2)(f)(iv)

The amendment would address the lack of ouster clause in the Act, identified by the High Court, by introducing an exemption from any judicial challenge of an IPCA investigation, proceeding, opinion, recommendation or decision, except on the ground of jurisdiction (including where there is an act of bad faith).

### Initial analysis of the proposed amendment

14. Our initial analysis of the IPCA's arguments for limiting judicial review suggests that a total ouster clause is not appropriate, although we propose that these issues be considered further in discussions with the IPCA, including whether some form of restrictive clause might be suitable and preferable to a total ouster.
15. This is on the basis of the following considerations.

*The Ombudsman has similar powers but a different constitutional role to the IPCA*

16. The IPCA proposes that its functions and powers are broadly similar to an Ombudsman and that on this basis it should benefit from an ouster clause similar to that in s.25 of the Ombudsmen Act.
17. There are strong comparisons between the powers of the IPCA and the Ombudsman. Both the members of the IPCA and the Ombudsman are appointed by the Governor-General on the recommendation of the House of Representatives. Both provide independent oversight of administrative decisions, with an investigatory role, either in response to a complaint or, in certain circumstances, on their own motion. Both may require information or documents they consider relevant to the investigation, and have discretion as to whether to hold a hearing to hear evidence. Both may choose to take no action in response to a complaint, or to refer the complaint to other bodies.<sup>8</sup>
18. However, although it based aspects of the IPCA Act on the Ombudsmen Act, Parliament did not intend that the IPCA be another form of Ombudsman. During the passage of the IPCA Act, Ministers indicated their intention that the IPCA be "separate from the ombudsman's office, [but] stand alongside it to complete a comprehensive machinery for the resolution of complaints."<sup>9</sup>
19. There are fundamental differences between the two entities, due to their constitutional status, which may have weighed on Parliament's decision to give an ouster clause to one and not the other. The IPCA is an Independent Crown Entity (ICE), a body corporate, whose members are accountable to the responsible Minister. On this basis, despite its independent status, the IPCA, along with all other ICEs form part of the executive and are, by default, subject to judicial review as part of upholding the rule of law over executive government.
20. The Ombudsman, by contrast, as an officer of Parliament, is accountable to the House of Representatives (House). For example, Ombudsmen must swear an oath administered

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<sup>8</sup> The IPCA may refer complaints back to the Police (IPCA Act s.17), the Ombudsman may refer complaints to the Privacy Commissioner, the Health and Disability Commissioner or the Inspector-General of Intelligence and Security (O Act ss.17A, 17B and 17C).

<sup>9</sup> (16 February 1988) 486 New Zealand Parliamentary Debates, 2008.

by the Speaker or Clerk of the House, are subject to the House's rules for guidance of Ombudsmen and are audited by an auditor appointed by the House.

21. The ouster clause in the Ombudsmen Act is not mirrored in the legislation establishing other officers of Parliament (i.e. the Controller and Auditor-General and the Parliamentary Commissioner for the Environment). The reason for this is unclear, however it may have to do with neither of these offices having powers to investigate complaints, in the manner of the Ombudsman. Despite the lack of ouster clause, we have not been able to find any examples of either office being judicially reviewed.
22. The Ombudsman remains liable to judicial review in certain circumstances; for example in relation to his decision-making process in respect of allowing other entities to use the name 'Ombudsman'.<sup>10</sup> In addition, the Ombudsman has been judicially reviewed for decisions made under the Official Information Act 1982, due to s.25 of the Ombudsmen Act being disapplied where the Ombudsman exercises any function or power under the Official Information Act.
23. Nevertheless, the caution with which the judiciary approaches interference with the legislature is the likely rationale for limiting the scope of judicial review for the Ombudsman. We therefore consider comparisons of the IPCA with ICEs with similar functions to be a more valid analysis when considering the justification for an ouster clause.

*The IPCA's powers are equivalent to other recommendatory bodies which remain subject to judicial review*

24. The IPCA suggest that an ouster clause is justified due to the judicial caution in reviewing bodies which (i) do no more than recommend or comment, (ii) are control agencies rather than direct wielders of public power and (iii) have statutory powers in broad non-technical terms, with flexible procedures to match. A parallel is drawn directly with the Ombudsman, and with the Children's Commissioner (which is inferred to benefit from an ouster clause).
25. As outlined above, the IPCA has a strong investigative and recommendatory role, with flexibility, subject to certain criteria being met, on whether to investigate, whether to refer the complaint to the Police and how to investigate (for example, whether to hold a hearing). However, the IPCA has other powers which arguably stretch beyond merely recommending or commenting. A failure to exercise them validly could have serious repercussions for the investigation of Police conduct on issues of public interest. For example, the IPCA:
  - may choose to oversee a Police investigation of a complaint and give whatever directions to the Police it sees fit, regarding that investigation;
  - must decide whether there are reasonable grounds to carry out an investigation in the public interest of any incident involving death or serious bodily harm notified to it by the Commissioner of Police;
  - may require from the Commissioner of Police all such information and assistance as is necessary for the proper performance of its functions in relation to its investigation of any complaint or incident;
  - if it does choose to hold a hearing, the IPCA has many of the powers of a Commission of Inquiry. These are conferred with the powers of the District Court, in the exercise

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<sup>10</sup> See the case of *Wakem* above (footnote 6).



of its civil jurisdiction, in citing parties, and conducting and maintaining order at the inquiry; and

- may send a copy of its findings and recommendations to the Attorney-General and Minister of Police, where the Commissioner of Police does not indicate how they will take forward the IPCA's recommendations or give reasons for not implementing them.
26. Other public bodies with similar powers to the IPCA remain subject to judicial review<sup>11</sup>. In particular ICEs which are subject to a default preservation of the right to apply for judicial review. For example, the Criminal Cases Review Commission (CCRC) has powers to review convictions and sentences, to initiate and conduct inquiries into general matters and to advise the Minister of Justice on exercise of the royal prerogative of mercy. As with the IPCA it may decide to investigate a complaint or not and may regulate its own procedures for gathering evidence. It does not relitigate criminal cases but rather may refer a conviction or sentence to an appeal court under certain circumstances with its advice on matters such as the prospects of the appeal being successful.
27. Unlike the IPCA, the CCRC does not have the powers of a Commission of Inquiry and beyond its recommendations, for obvious reasons cannot direct how a case is considered. As with the IPCA, although the CCRC provides statutory immunity to members, office-holders and employees under certain circumstances, it does not benefit from an ouster clause.
28. In its letter of 1 April, the IPCA drew a comparison with section 27(5B) of the Children's Commissioner Act 2003 (CCA) as an example of a similar entity which benefitted from an ouster clause.
29. However, our view is that section 27(5B) does not over-ride the default preservation of the right to apply for judicial review in s.121 of the Crown Entities Act 2004. Our understanding is that section 27(5B) of the CCA is not an 'ouster clause'; rather it clarifies that, to the extent that s.27 of the CCA is inconsistent with s.121 of the Crown Entities Act, for example in its application to criminal as well as civil liability, s.27 of the CCA prevails. As a.27 of the CCA doesn't refer to 'judicial review', or 'review', it is not inconsistent with the default preservation of the right to apply for judicial review in the Crown Entities Act.
30. On this basis, judicial review is available in respect of a body with weaker powers than the IPCA. The Children' Commissioner, for example, has the power to investigate a decision, recommendation or omission in respect of a child in its personal capacity and to provide reports to a court at the request of the court or the parties on the interests, rights or welfare of children. It may refer matters to other statutory officers such as the Commissioner or Police and may require information and documents under certain circumstances. It may also monitor and assess the policies and practices of Oranga Tamariki. Its other functions are largely focussed on advocacy or consultation. The Children's Commissioner lacks the IPCA's powers to direct how an investigation it refers is conducted, to compel cooperation or to take on the functions of a Commission of Inquiry in conducting a hearing.

*Other legal remedies are not necessarily available to IPCA complainants*

31. The IPCA further justifies the inclusion of an ouster clause on the basis that, like the Office of the Ombudsman, its complainants face no deprivation in legal remedies by making their

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<sup>11</sup> By contrast, the Ombudsman, although it may refer matters to, and consult with other bodies, has no power to direct how such investigations are carried out, require assistance from other statutory bodies or right to be informed of the outcome.

complaint (for example they may still have an action in tort). It argues that the courts are generally of the view that such alternative statutory remedies can be sufficient alternatives to judicial review. It also argues that the right to judicial review is still available where the IPCA has acted without jurisdiction, and that alternative remedies are also available such as civil proceedings against the Police for alleged misconduct.

32. We accept there is some validity to this argument. However we also note that a ground for the IPCA taking no action is that, in its opinion, there is an adequate remedy or right of appeal that it would be reasonable, for the complainant to exercise (either currently or in the past). This infers that the IPCA may not investigate where alternative remedies remain but may investigate where they are not available. In these circumstances, it is arguable that the full right to a judicial review should be retained for the very reason that there may be no other remedies.
33. We also note that legal remedies may be available for those wishing to challenge the decisions of other ICEs such as the CCRC or the Health and Disability Commissioner (HDC). Indeed, the HDC can similarly decide not to investigate on the ground that other legal remedies are available, and its decisions can be appealed to the Human Rights Review Tribunal. Neither of these bodies benefit from an ouster clause with respect to their decisions.

*The IPCA should still be subject to judicial scrutiny, despite being Chaired by a former judge*

34. The IPCA submits that the fact that the Chair of the IPCA is a judge or retired judge ensures there is some judicial oversight over its actions. This in turn lessens the need for judicial scrutiny in the form of judicial review.
35. We do not agree that the status of the Chair of the IPCA as a judge or retired judge provides sufficient judicial oversight over the decision-making to justify limiting judicial review rights, given their primary role in ensuring that the IPCA fulfils its functions. It is well established that similar bodies, chaired by judges, may nevertheless be subject to judicial review. For example, Royal Commissions, which are often chaired by current or former judges, are amenable to judicial review.<sup>12</sup>

*There are other solutions to address a lack of resourcing if future judicial review applications materialise*

36. The IPCA is also concerned that exposure to judicial review applications in the future may further increase pressure on its resources and its capacity to deliver expected outputs.
37. The IPCA has received an increase in baseline appropriation from \$4.671m in 2019/20 to \$6.74m in 2022/23. Nevertheless, in the IPCA's Briefing to the Incoming Minister, in June 2022, it indicated it had received a 130% increase in the number of complaints and notifications it has received over the last four years, and that it faces a continuing increase in demand for its services and ongoing constrained resources.<sup>13</sup>
38. We acknowledge the pressure which the IPCA is under, particularly in the light of the increase in complaints following the Parliament protects. However, a lack of resources to consider complaints and respond to future judicial reviews is not a relevant criteria for

<sup>12</sup> See for example *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618, where the decisions of a Royal Commission, chaired by a judge of the High Court, were judicially reviewed.

<sup>13</sup> IPCA, 'Briefing to Incoming Minister Hon Kiritapu Allan, June 2022', p.12.

undermining a fundamental principles of constitutional law by restricting the a key right through which the IPCA is held to account for its decisions.

39. If the IPCA experiences a continued rise in workload, including an increase in judicial reviews, it should seek further funding in budget bids. Regular performance discussions occur with the Ministry's Crown Entity Monitoring Unit in this regard.

#### **Other concerns raised by the IPCA: a lack of powers to prosecute**

40. In addition to the proposed ouster clause discussed above, the IPCA has also raised the issue of its lack of powers to prosecute under the Act. Currently Police are solely responsible for making the decision on whether to prosecute police officers for their conduct. IPCA have pointed out that this has some benefits as it leaves Police wholly accountable for the action taken in relation to their staff who have demonstrated questionable conduct.
41. However, Police may lack or be perceived to lack the necessary independence when prosecuting members of the Police. They are expected to strike the correct balance between the critical nature of dealing with conduct issues effectively and being a good employer who protects and supports their frontline staff
42. This issue arose in the Court of Appeal's consideration of *Wallace v Attorney-General*<sup>14</sup>. In that case, which arose from an investigation by Police into a killing by one of its own officers, the Court set aside declarations made by the High Court that the inquiry into the killing had not complied with s.8 of the New Zealand Bill of Rights Act 1990. The Court noted however that the independence impartiality and effectiveness of police investigations were questions of fact to be resolved in each case and could not be assumed, particularly as police investigations were not in very case required to be compliant with the International Covenant on Civil and Political Rights.<sup>15</sup>
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44. We agree that there is merit in exploring whether such a change is appropriate. We note that such a change could fundamentally change the nature of the IPCA from an advisory and review body to something more akin to an enforcement body. For example. if the ICPA had powers to prosecute in its own right, this would change the nature of its role in advising the Commissioner of Police. Consequential changes may also be necessary to strengthen its powers of investigation (for example it may be necessary to give it powers of entry and seizure).

#### **Next Steps**

45. The IPCA have raised the need for policy and legislative reform in their 2020 and 2022 BIMs. We consider that the issues raised by the IPCA in respect of the scope of judicial review powers, and its powers to prosecute should be further considered, in discussion with the IPCA. There may be other minor regulatory stewardship work that we could

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<sup>14</sup> [2022] NZCA 375, [123] – [124].

<sup>15</sup> [2021] NZHC 1963 at [478].

usefully complete at the same time, which could form the basis of a limited IPCA-related work package and potentially future amendments to the Act.

46. Further analysis would include, for example, comparisons with other similar international bodies such as Independent Office for Police Conduct (UK) and the Civilian Review and Complaints Commission for the RCMP (Canada), which on initial analysis both appear to be subject to judicial review. The IPCA's current statutory tool to conduct oversight and the impact it has on their core function should also be considered.
47. This work is not currently part of our policy work programme. From a resourcing perspective our understanding is that there is a need to prioritise your electoral reform work, and the upcoming privacy/EU adequacy reforms over the next six months. If you want to include a regulatory stewardship project for the IPCA, we can discuss with you the prioritisation, sequencing and timing of the work, as part of our future work programme discussion.

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