

29 March 2019

Attorney-General

**Ombudsman (Protection of Name) Amendment Bill v 4.0 – Consistency with the
New Zealand Bill of Rights Act 1990
Our Ref: ATT395 / 289**

1. We have considered whether the Ombudsman (Protection of Name) Amendment Bill (‘the Bill’) appears to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (‘the Bill of Rights Act’).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we considered the Bill’s consistency with s 14 (freedom of expression), the freedom most obviously affected.

The intended effect of the Bill

3. Clause 5 of the Bill if enacted will replace s 28A of the Ombudsman Act 1975 (the Act).
4. The existing s 28A says that no person may use the name ‘Ombudsman’ in connection with any business, trade, occupation or services unless the Chief Ombudsman consents in writing to them doing so. There is no restriction on the type or class of persons (natural or legal) to whom the Chief Ombudsman may grant consent.
5. Successive chief ombudsmen developed criteria to guide their decisions on requests to use the name. Those criteria included, as a “first-hurdle criterion” for applicants wishing to use the name ‘Ombudsman’, determining whether the public interest in there being a new non-Parliamentary ombudsman exceeded the public interest in non-proliferation of the name.¹ A recent Court of Appeal case held it was unlawful for the Chief Ombudsman to apply the first hurdle criterion given that the Act contemplates the giving of approvals in appropriate cases, and the criterion amounted to a fetter on the Ombudsman’s intended discretion in considering those approvals.
6. The Bill if enacted would introduce a more restrictive regime to limit use of the name ‘Ombudsman’. Under the new s 28A proposed by the Bill, only three classes of entities/persons may use the name ‘Ombudsman’: persons appointed under s 3 of the Act (that is the Chief Ombudsman and any other Ombudsman); someone

¹ *Financial Services Complaints Limited v Chief Ombudsman* [2018] NZCA 27.

appointed by the Chief Ombudsman under section 11 of the Act as an officer or employee holding a position with a title that includes the word ‘Ombudsman’; and certain government departments and organisations broadly related to government (named in Parts 1 and 2 of Schedule 1 of the Act), if they are given permission to do so by the Minister responsible for the administration of the Act.

7. If the Bill is enacted, it will no longer be possible for persons or entities to apply to use the name Ombudsman. In that sense there is to be a complete ban on the use of the name by anyone but the ‘Parliamentary’ Ombudsmen, and assistant or deputy Ombudsmen appointed by the Chief Ombudsmen under the Act, and such use as is permitted by the Minister (which is possible only for governmental departments and public entities listed in Parts 1 and 2 of Schedule 1 of the Act). There will be no possibility for private sector use of the name.
8. The Bill would, however, preserve the ability of two non-governmental entities who already have permission to use the name ‘Ombudsman’ to continue doing so.² The Bill also includes a savings provision in respect of Financial Services Complaints Ltd, the victor in the litigation mentioned above, whose application is to be reconsidered by the Chief Ombudsman in light of the Court’s judgment (and is still pending). The effect of that savings provision is that if the Chief Ombudsman permits Financial Services Complaints Ltd to use the name Ombudsman it will be able to do so.

Consistency of the Bill with s 14 of the Bill of Rights Act

9. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
10. Clause 5 of the Bill engages s 14 because the proposed new s 28A limits the ability of entities to use the name ‘Ombudsman’, and makes it an offence for an entity to use that name without being duly permitted to.
11. We note in passing that the Court of Appeal in *Financial Services Complaints Limited v Chief Ombudsman* observed that a complete ban on the use of the name would be “contrary to the New Zealand Bill of Rights Act 1990 (the right to freedom of expression)”³ – although in the context of that case it was not necessary for the Court to determine whether a complete ban, if legislated for, might be justified as a reasonable limit under s 5 of the Bill of Rights Act.

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

12. Limitations on rights and freedoms may still be consistent with the Bill of Rights Act if they can be considered reasonable limits that are demonstrably justified under s 5 of that Act. The s 5 inquiry has been summarised thus:⁴
 - a. does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:

² The ‘Banking Ombudsman’ and ‘Insurance and Financial Services Ombudsman’. Both entities are approved dispute resolution schemes under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

³ *Financial Services Complaints Limited v Chief Ombudsman* [2018] NZCA 27 at [51].

⁴ *Hansen v R* [2007] NZSC 7 at [123].

- i. is the limit rationally connected with the objective?
- ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
- iii. is the limit in due proportion to the importance of the objective?

Importance of the purpose served by this Bill

13. The Ombudsman is an important constitutional actor.⁵ The Explanatory Note records that the objective of the Bill is upholding public confidence in, and understanding of, the role of the Parliamentary Ombudsmen. We consider that is a legitimate objective and sufficiently important to justify some restriction on the s 14 right. There is, of course, already a restriction under the current law (in that the Ombudsman's consent must be obtained to use the name). The Bill imposes a greater restriction, by precluding any private sector use of the name.
14. It is said that under s 28A as it stands (and as interpreted by the Court of Appeal), it would be difficult to apply any principled approach to preventing proliferation of the name given that applicants who are first movers (in applying for approval to use the name in their industry) would be unfairly advantaged compared to others in that industry if those others were not similarly allowed to use the name.⁶ In this state of affairs it is said that proliferation is a likely consequence of the current law. The purpose of the Bill is to 'uphold public confidence in, and understanding of, the role of the Parliamentary Ombudsmen' by precluding such proliferation.

Rational Connection

15. Restricting the use of the name 'Ombudsman' to governmental organisations such as those listed in Parts 1 and 2 of Schedule 1 would remove the possibility of applications by non-governmental persons and bodies. This could conceivably reduce the reported confusion in the public by ensuring that those entities who may be permitted to use the name are all entities of a 'public' nature, or are all associated with government more broadly.
16. That said, some of the entities listed in Part 2 of Schedule 1 to the Act could not be said to be clearly associated with central government or Parliament in the public mind (Airways Corporation of New Zealand Limited, Tāmaki Redevelopment Company Limited). Preserving the possibility that any or all such entities could be granted permission to use the name Ombudsman might be thought to cut across the general aim of the Bill which is avoidance of proliferation and confusion. However, on balance, we have concluded that there is a rational connection between the limit and the objective.
17. We considered whether the objectives of the Bill could be achieved with lesser restrictions than those imposed. This is best considered under the next section – whether the proposed restriction is proportionate to the legislative purpose.

⁵ As noted by the Court of Appeal at [44].

⁶ A point made in the Regulatory Impact Statement associated with this Bill, at Section 5.

Proportionality of the measures the Bill adopts to the importance of the purpose sought to be attained

18. As to the importance of the purpose, there is no empirical evidence of need to amend the Act to achieve the goal of upholding public confidence in, and understanding of, the role of the Parliamentary Ombudsmen. To the extent there is confusion about the role of the Parliamentary Ombudsman, as the Chief Ombudsman reports, it is not clear that this is attributable to the existence of two private sector ombudsmen.⁷ However, the lack of evidence is not itself telling against the cogency of the reasons for the proposed restrictions: There are limits on the ability of government to garner empirical evidence in making law, especially when the aim of a Bill is intangible in nature, as in this instance.
19. The concern underlying the proposed restriction is said to be that, if non-proliferation of the name is no longer able to be taken into account as a “first hurdle consideration”, then there is unlikely to be any principled reason for restricting use of the name within a particular sector (for doing so would distort the market by favouring “first movers”).⁸
20. The impact of the restriction is upon private sector entities that might otherwise have applied for use of the name.
21. A plausible alternative may have been to legislate into effect what we described above as the ‘first hurdle criterion’. The Court of Appeal held that to be an impermissible fetter on discretion but that was because the Act, as currently worded, contemplated consents in appropriate cases and the first hurdle appeared to preclude consideration of the merits of applications. Legislating that approach may have met the concern of balancing the public interests in (on one hand) avoiding proliferation of the name and possible confusion and (on the other) there being a new non-Parliamentary ombudsman in some sphere of commercial activity.
22. The difficulty of that approach is the one identified in paragraph 19 – that if avoiding proliferation is made a statutory objective then it entails an unprincipled “first mover” advantage and could distort the operation of the market.
23. The proposed new s 28A does not take that path and is in essence a legislative determination that any use of the name Ombudsman beyond the current appointees (and such as the Minister may allow to certain bodies in the First Schedule) must be prohibited to maintain confidence and avoid proliferation and confusion. The question, in terms of s 7 of the Bill of Rights, is whether that can be said to be a disproportionate limit on the right to freedom of expression (for those who would otherwise wish to use the name).
24. We do not think it can be said to be clearly disproportionate. Unlike other terms associated with the administration or dispensing of justice (court, judge etc.) the noun ‘Ombudsman’ has not passed into common parlance. It must also be borne in mind that the actual speech restricted is the adoption of the name by a person engaged in “business, trade, occupation or the provision of services”. That is, the use of the name (that which the Bill would restrict) would be speech adopted for the purpose of securing, in a person’s business, trade, occupation or provision of services, the benefits associated with the name Ombudsman. In that sense the

⁷ A point made in the Regulatory Impact Statement associated with this Bill, at section 5.

⁸ A term used by the Court of Appeal: *Financial Services Complaints Limited v Chief Ombudsman* [2018] NZCA 27 at [54].

proposed use would trade on the public's confidence in the Parliamentary Ombudsman (and the existing grand-parented users). The purpose of the restriction is to maintain the confidence associated with the name, which might be lost if use of the name proliferated amongst non-governmental bodies. The restricted expression is therefore akin to commercial expression, as opposed to the expression of ideas, and that is salient to the assessment of proportionality.⁹

25. Also, importantly, the Bill saves the ability of the entities who presently use the name 'ombudsman', and saves Financial Services Complaints Ltd's extant application.
26. For those reasons, the proposed restrictions are not considered to be disproportionate to the purpose sought to be achieved by the Bill.

Conclusion

27. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.
28. This advice has been reviewed in accordance with Crown Law protocol by Vicki McCall, Crown Counsel.

Peter Gunn
Crown Counsel

Noted

Hon David Parker
Attorney-General
/ /2019

⁹ See the discussion in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington 2015) at page 537.