

Hon Andrew Little

Minister of Justice

Proactive release – Ombudsmen (Protection of Name) Amendment Bill

Date of issue: 14 May 2019

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	<p>Protection of the name ombudsman: Draft Cabinet paper for ministerial consultation</p> <p><i>Key advice</i></p> <p>Ministry of Justice</p> <p>9 October 2018</p>	<p>Some information has been withheld in accordance with:</p> <ul style="list-style-type: none">• s 9(2)(a) of the OIA to protect the privacy of natural persons,• s 9(2)(g)(i) of the OIA to maintain the effective conduct of public affairs through the free and frank expression of opinions by Ministers of the Crown, and• s 9(2)(h) of the OIA to maintain legal professional privilege. <p>The draft Cabinet paper attached to the briefing has been withheld in accordance with s 9(2)(f)(iv) of the OIA to maintain the constitutional conventions for the time being that protect the confidentiality of advice tendered by Ministers of the Crown and officials.</p> <p><i>Two versions of the briefing are included:</i></p> <ul style="list-style-type: none">• <i>an electronically readable version with electronic annotations to show the Minister's decisions</i>• <i>a scanned copy of the briefing signed by the Minister.</i>

No.	Document	Comments
2	<p>Protection of the name 'Ombudsman'</p> <p><i>Cabinet paper</i></p> <p>Office of the Minister of Justice</p>	<p>Some information has been withheld in accordance with section 9(2)(h) of the OIA to maintain legal professional privilege.</p> <p><i>The Regulatory Impact Assessment attached to the paper is publicly available from</i></p> <p>https://treasury.govt.nz/publications/search and https://www.justice.govt.nz/justice-sector-policy/publications/.</p>
3	<p>Protection of the Name 'Ombudsman'</p> <p><i>Cabinet minute</i></p> <p>Cabinet Office</p>	<p>Released in full.</p>
4	<p>Ombudsmen (Protection of Name) Amendment Bill: Approval for Introduction</p> <p><i>Cabinet paper</i></p> <p>Office of the Minister of Justice</p>	<p>Released in full.</p> <p><i>The disclosure statement attached to the paper is publicly available from</i></p> <p>http://disclosure.legislation.govt.nz/.</p> <p><i>The copy of the Bill provided to Ministers with this paper has been withheld in accordance with s 61 of the Legislation Act 2012 and s 9(2)(h) of the OIA to maintain legal professional privilege. The Bill has now been introduced and is publicly available from</i></p> <p>www.legislation.govt.nz.</p>
5	<p>Ombudsmen (Protection of Name) Amendment Bill: Approval for Introduction</p> <p><i>Cabinet minute</i></p> <p>Cabinet Office</p>	<p>Released in full.</p>

Hon Andrew Little, Minister of Justice

Protection of the name ombudsman: Draft Cabinet paper for ministerial consultation

Date	9 October 2018	File reference	CON-04-01
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Action sought

Timeframe

Indicate your decision on a savings provision for Financial Services Complaints Ltd.	At your earliest convenience
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Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	Section 9(2)(a)	
Chris Hubscher	Policy Manager, Electoral and Constitutional	04 918 8930	Section 9(2)(a)	
Hayley Denoual	Senior Advisor, Electoral and Constitutional	04 466 2923		✓

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 Minister's office comments

RELEASED BY THE MINISTER OF JUSTICE

Purpose

1. The attached draft Cabinet paper seeks approval for a legislative amendment to section 28A of the Ombudsmen Act 1975, which would restrict the use of the name 'ombudsman' to a Parliamentary Ombudsman.
2. We seek your decision on the approach you wish to take in respect of a savings provision for Financial Services Complaints Ltd, whose application to use the name 'ombudsman' is under consideration by the Chief Ombudsman.

Background to Section 28A of the Ombudsmen Act 1975

3. Section 28A of the Ombudsmen Act 1975 provides that no one may use the name 'ombudsman' in connection with any business or the provision of any service, or hold themselves out to be an ombudsman, unless permitted by statute or with the permission of the Chief Ombudsman. Failure to comply is an offence carrying a fine of up to \$1,000.
4. There are no statutes that permit the use of the name 'ombudsman'. In 1992, then Chief Ombudsman, Sir John Robertson, granted approval to the Banking Ombudsman and the Insurance and Savings Ombudsman. The latter was updated in 2015 for its name change to the Insurance and Financial Services Ombudsman.
5. Financial Services Complaints (FSC) Ltd's application to use the name was refused by the previous Chief Ombudsman Beverly Wakem, and later by the current Chief Ombudsman, Peter Boshier. In February 2018, the Court of Appeal delivered its judgment in *Financial Services Complaints Ltd v Chief Ombudsman*.¹ The Court found for FSC, and directed the Chief Ombudsman to reconsider FSC's application.
6. FSC is a dispute resolution scheme, approved by the Minister of Consumer Affairs under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. FSC is one of four approved dispute resolution schemes, along with the Banking Ombudsman, the Insurance and Financial Services Ombudsman and the Financial Dispute Resolution Service.
7. The Court of Appeal considered that, in enacting section 28A, Parliament's purpose was to protect the name 'ombudsman' by regulating its use, but not to the point of a complete prohibition. It found that the internal policy for dealing with applications under section 28A gave undue weight to the 'public interest' test. This unduly restricted the scope of the Chief Ombudsman's discretion. In effect, the policy operated as a blanket prohibition on further approvals for use of the name.
8. The Court held that, in considering applications under section 28A, the Chief Ombudsman must also give due regard to existing permissions and the need to treat like applicants reasonably consistently to negate any 'first mover' advantage. Consideration should also be given to the effect of different treatment of similar schemes in the same industry, and whether this might cause confusion and reduce public confidence in the integrity of the schemes.

¹ [2018] NZCA 27

Proposed amendment and savings provisions for existing entities

9. The draft Cabinet paper reflects your decision to seek a legislative amendment to section 28A, which would restrict the use of the name 'ombudsman' to an ombudsman appointed under the Ombudsmen Act 1975.

You have agreed to a savings provision for the Banking Ombudsman and the Insurance and Financial Services Ombudsman

10. The draft paper notes that a savings provision would apply to the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman'. This will preserve these names specifically. No future change of name to include 'ombudsman' will be permitted. The proposed savings provision recognises the brand recognition and commercial goodwill tied up with these entities' historic use of these names.

We seek your direction on a savings provision for Financial Services Complaints Ltd (FSC)

11. The Chief Ombudsman has not issued his decision following the *Financial Services Complaints Ltd v Chief Ombudsman*² case so we do not know if any savings provision is needed for FSC. The issue only arises if FSC is given permission to use the name. The draft Cabinet paper currently includes alternative text to reflect the two options of either applying a savings provision to FSC, or not (in the event that the Chief Ombudsman approves FSC's application).

Option 1: Savings provision for FSC

12. Extending the savings provision to FSC would protect its right to have its application to use the name considered under the current law, and to continue to use the name. It would treat FSC in the same way as the Banking Ombudsman and the Insurance and Financial Services Ombudsman.
13. This approach is consistent with good legislative practice, as legislation generally should not have retrospective effect. Legislation Design and Advisory Committee (LDAC) guidelines state that legislation should not deprive people of their right to benefit from judgments obtained in proceedings brought under earlier law or to continue proceedings asserting rights and duties under that law.

The Minister's hand-written comment next to paragraph 13 has been withheld in accordance with section 9(2)(g)(i).

Option 2: No savings provision for FSC

14. Not extending the savings provision to FSC would prevent it from using the name, regardless of the outcome of the Chief Ombudsman's decision following the Court of Appeal judgement.
15. This approach is inconsistent with usual legislative practice, as there is a natural justice interest in safeguarding judicial outcomes for successful litigants. MBIE's Financial Markets Team has noted that preserving the name for only two schemes may risk giving consumers an incorrect impression that these two schemes are more independent, or have greater authority, than other schemes. FSC made a similar argument in the Court of Appeal noting that the use of the name gives the two

² [2018] NZCA 27

existing schemes a competitive advantage. Any such advantage over FSC would be embedded if no savings provision is made for it.

16. Legislation Design Advisory Committee guidance states, however, that there are rare occasions when a law may apply retrospectively, and to litigants in a completed case. This could be justified if the policy reasons for enacting the legislation in the first place would be undermined by leaving the litigants' victory intact.
17. The policy rationale for the proposed amendment to section 28A is the public interest in protecting the name 'ombudsman'. The reason for the protection is to maintain public confidence and trust in the Parliamentary Ombudsmen. This could be argued as sufficient justification for the lack of a savings provision for FSC. We note that this 'public interest' justification is somewhat undermined by the preservation of the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman', as this arguably weakens the policy intent of exclusivity. That said, these two entities have a long-established use of the name, and so we would not advise removing their rights to use it.
18. The retrospectivity arguments in this case are finely balanced. The Ministry's view, Section 9(2)(h) [REDACTED], is that not including a savings provision for FSC may undermine its right to natural justice, which is affirmed by section 27(2) of the New Zealand Bill of Rights Act 1990 (BORA). This will be considered further during the Bill's BORA vetting process, which will be undertaken by Crown Law.

Regulatory Impact Statement

19. We are preparing a Regulatory Impact Assessment (RIA) to accompany the Cabinet paper when it is considered by Cabinet. It will be published when the Bill is introduced to the House.
20. The RIA will summarise our advice on the impact analysis. Our draft analysis notes that a complete prohibition on the use of the name could be contrary to section 14 of the BORA (freedom of expression). This limitation may, however, be justified as necessary and proportionate to ensure the policy objective of protecting public confidence in the integrity and value of the Parliamentary Ombudsmen.
21. Our draft RIA analysis prefers either the status quo, or introducing a new provision directing the Chief Ombudsman (and Parliament) to consider the public interest in upholding the integrity of, and public confidence in, the Parliamentary Ombudsmen before permitting another entity to use the name. Such a provision could also set out in legislation the qualities that an entity using the name ombudsman must display.

Next steps

22. Delaying taking a proposal to Cabinet until the Chief Ombudsman's decision in respect of FSC is known would enable consideration about whether a savings provision is needed. We do not know, however, when his decision will be issued.
23. If you want Cabinet decisions sooner, we will update the draft Cabinet paper to reflect your decisions on this briefing and return it to your office for consultation with your ministerial colleagues and coalition/support party partners.

Recommendations

24. We recommend that you:

Timing of Cabinet Paper

EITHER

1. **agree** to delay taking a proposal to Cabinet until the Chief Ombudsman's decision in respect of Financial Services Complaints Ltd is known **YES / NO**

OR

2. **agree** to circulate the attached draft Cabinet paper to your ministerial colleagues, and coalition/support party partners (once it has been amended to reflect your decisions below) **YES / NO**

Savings Provisions

If Recommendation 2 is agreed to EITHER:

3. **agree** that a savings provision be included, as necessary, to preserve the rights of Financial Services Complaints Ltd to have its application to use the name 'ombudsman' considered under the current law, and if permission is granted, to continue to use the name **YES / NO**

OR

4. **agree** that no savings provision be made to preserve the rights of Financial Services Complaints Ltd to use the name 'ombudsman', **YES / NO** should this permission be granted by the Chief Ombudsman.

[SIGNED – CHRIS HUBSCHER]

Chris Hubscher
Manager, Electoral and Constitutional Policy

APPROVED SEEN NOT AGREED

[SIGNED – HON ANDREW LITTLE]

Hon Andrew Little
Minister of Justice

Date / / [DATED – 17 OCTOBER 2018]



Hon Andrew Little, Minister of Justice

Protection of the name ombudsman: Draft Cabinet paper for ministerial consultation

Date	9 October 2018	File reference	CON-04-01
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4. There are no statutes that permit the use of the name 'ombudsman'. In 1992, then Chief Ombudsman, Sir John Robertson, granted approval to the Banking Ombudsman and the Insurance and Savings Ombudsman. The latter was updated in 2015 for its name change to the Insurance and Financial Services Ombudsman.
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6. FSC is a dispute resolution scheme, approved by the Minister of Consumer Affairs under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. FSC is one of four approved dispute resolution schemes, along with the Banking Ombudsman, the Insurance and Financial Services Ombudsman and the Financial Dispute Resolution Service.
7. The Court of Appeal considered that, in enacting section 28A, Parliament's purpose was to protect the name 'ombudsman' by regulating its use, but not to the point of a complete prohibition. It found that the internal policy for dealing with applications under section 28A gave undue weight to the 'public interest' test. This unduly restricted the scope of the Chief Ombudsman's discretion. In effect, the policy operated as a blanket prohibition on further approvals for use of the name.
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Option 2: No savings provision for FSC

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argument in the Court of Appeal noting that the use of the name gives the two existing schemes a competitive advantage. Any such advantage over FSC would be embedded if no savings provision is made for it. Section 9(2)(g)(i)

16. Legislation Design Advisory Committee guidance states, however, that there are rare occasions when a law may apply retrospectively, and to litigants in a completed case. This could be justified if the policy reasons for enacting the legislation in the first place would be undermined by leaving the litigants' victory intact.
17. The policy rationale for the proposed amendment to section 28A is the public interest in protecting the name 'ombudsman'. The reason for the protection is to maintain public confidence and trust in the Parliamentary Ombudsmen. This could be argued as sufficient justification for the lack of a savings provision for FSC. We note that this 'public interest' justification is somewhat undermined by the preservation of the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman', as this arguably weakens the policy intent of exclusivity. That said, these two entities have a long-established use of the name, and so we would not advise removing their rights to use it.
18. The retrospectivity arguments in this case are finely balanced. The Ministry's view, Section 9(2)(h) is that not including a savings provision for FSC may undermine its right to natural justice, which is affirmed by section 27(2) of the New Zealand Bill of Rights Act 1990 (BORA). This will be considered further during the Bill's BORA vetting process, which will be undertaken by Crown Law.

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21. Our draft RIA analysis prefers either the status quo, or introducing a new provision directing the Chief Ombudsman (and Parliament) to consider the public interest in upholding the integrity of, and public confidence in, the Parliamentary Ombudsmen before permitting another entity to use the name. Such a provision could also set out in legislation the qualities that an entity using the name ombudsman must display.

Next steps

22. Delaying taking a proposal to Cabinet until the Chief Ombudsman's decision in respect of FSC is known would enable consideration about whether a savings provision is needed. We do not know, however, when his decision will be issued.

23. If you want Cabinet decisions sooner, we will update the draft Cabinet paper to reflect your decisions on this briefing and return it to your office for consultation with your ministerial colleagues and coalition/support party partners.

Recommendations

24. We recommend that you:

Timing of Cabinet Paper

EITHER

1. **agree** to delay taking a proposal to Cabinet until the Chief Ombudsman's decision in respect of Financial Services Complaints Ltd is known YES / NO

OR

2. **agree** to circulate the attached draft Cabinet paper to your ministerial colleagues, and coalition/support party partners (once it has been amended to reflect your decisions below) YES / NO

Savings Provisions

If Recommendation 2 is agreed to EITHER:

3. **agree** that a savings provision be included, as necessary, to preserve the rights of Financial Services Complaints Ltd to have its application to use the name 'ombudsman' considered under the current law, and if permission is granted, to continue to use the name YES / NO

OR

4. **agree** that no savings provision be made to preserve the rights of Financial Services Complaints Ltd to use the name 'ombudsman', should this permission be granted by the Chief Ombudsman. **YES / NO**



Chris Hubscher
Manager, Electoral and Constitutional Policy



APPROVED

SEEN

NOT AGREED



Hon Andrew Little
Minister of Justice

Date

17/10/18

RELEASED BY THE MINISTER OF JUSTICE

Chair
Cabinet Economic Development Committee

PROTECTION OF THE NAME 'OMBUDSMAN'

Proposal

1. I propose to restrict the use of the name 'ombudsman' to an ombudsman appointed under the Ombudsmen Act 1975.

Background

2. The Ombudsmen Act 1975 ("the Act") provides for the appointment of ombudsmen as Officers of Parliament and Commissioners for Investigation, hereafter referred to as 'Parliamentary Ombudsmen' for ease of reference.

The use of the name 'ombudsman' is currently protected but not absolutely prohibited

3. Section 28A was added to the Act in 1991. It provides that no one can use the name 'ombudsman' in connection with any business or the provision of any service, or hold themselves out to be an ombudsman without permission. Permission may be conferred by statute or granted by the Chief Parliamentary Ombudsman. Failure to comply is an offence carrying a fine of up to \$1,000.
4. The purpose of the 1991 amendment was to prevent the proliferation of the name, resulting in a lack of public understanding of the ombudsman concept. The Chief Ombudsman of the time was particularly concerned that its unfettered use by a wide range of disputes resolution bodies risked undermining the status of the Parliamentary Ombudsmen, and could result in a loss of public confidence in their office.
5. Parliament has not enacted any statutes that permit the use of the name 'ombudsman'. Two entities currently have permission from the Chief Ombudsman to use the name. These are the Banking Ombudsman (approved in 1992) and the Insurance and Financial Services Ombudsman (approved in 1994 as the Insurance and Savings Ombudsman and updated in 2015 following its name change).

The Court of Appeal has ruled that permission to use the name cannot be refused solely on the basis of the public interest in preventing proliferation of the name

6. In February 2018, the Court of Appeal delivered its judgment in *Financial Services Complaints Ltd (FSC) v Chief Ombudsman*. The Court found for FSC, and directed the Chief Ombudsman to reconsider FSC's application to use the name ombudsman.
7. FSC is a dispute resolution scheme, approved by the Minister of Consumer Affairs under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("the FSP Act"). The FSP Act introduced a new registration system for providers of financial services and, for the first time, mandated that all financial providers belong to an approved industry disputes resolution scheme.

8. The FSP Act does not set a limit to the number of disputes resolution schemes that may be approved. However, in granting approvals the Minister of Consumer Affairs is required to consider the number of currently approved schemes. FSC is one of four schemes that have been approved as a financial sector disputes resolution scheme so far, along with the Banking Ombudsman, the Insurance and Financial Services Ombudsman and the Financial Dispute Resolution Service.
9. The Chief Ombudsman had refused FSC permission under section 28A to use the name 'ombudsman'. The basis of the refusal was that any public interest served by the addition of a new non-parliamentary ombudsman was outweighed by the public interest in the non-proliferation of the name.
10. The Court of Appeal considered that the Ombudsmen Act 1975 aims to protect the name 'ombudsman' by regulating its use, but not to the point of a complete prohibition. The Court found that the Chief Ombudsman's policy (published in 2002), which set out the approach to reviewing applications to use the name, gave undue weight to a preliminary 'public interest' test. According to the Court of Appeal, this unduly fettered the Chief Ombudsman's discretion.
11. The Court held that, in considering applications, the Chief Ombudsman must give due regard to existing permissions and the need to treat like applicants consistently. Consideration should also be given to the effect of different treatment of similar dispute resolution schemes in the same industry, and whether this might cause confusion and reduce public confidence in the integrity of any schemes.
12. The Court of Appeal decision leaves section 28A in a precarious position. Section 28A is meant to protect the use of the name 'ombudsman'. The effect of the Court of Appeal decision is that previous decisions of the Chief Ombudsman conferring consent to use the name "ombudsman" must be taken into account in future decisions, with a view to ensuring those currently consented do not have market advantage. That reasoning could compel the Chief Ombudsman to grant consent, in particular to applicants operating in the same field as current consent holders. This is inconsistent with the intent of section 28A, which is to provide protection of the name.

Protecting the integrity and value of the Parliamentary Ombudsman

13. There is a clear public interest in protecting the integrity and value of the Parliamentary Ombudsmen. They hold a unique place in New Zealand's constitutional arrangements, upholding the rights of individuals to have grievances against the executive (local and national) independently examined and concluded.
14. This is why it is important that public confidence in, and understanding of, the role of the Parliamentary Ombudsmen is not undermined or diminished by confusion over what the name 'ombudsman' attaches to. The Office of the Ombudsman's experience of public enquiries indicates there is already confusion about its role versus the existing private-sector bodies which use the name ombudsman.

I propose to restrict the use of the name 'ombudsman' to the Parliamentary ombudsmen

15. While the Court of Appeal decision referred to at paragraph 6 does not require the Chief Ombudsman to grant permission to all suitable applicants, the judgement does reduce the weight that can be placed on the public interest in non-proliferation of the name. The Chief Ombudsman has expressed his concern that this may have the effect, over time, of increasing the number of entities and organisations using the name.

16. I therefore propose to restrict the use of the name 'ombudsman' to the Parliamentary Ombudsmen only. I consider full prohibition is necessary, because there is no principled way to restrict the use to a limited number of entities within an industry, without risking providing unfair advantage to those granted permission. Legislating for the Chief Ombudsman to take non-proliferation into account as a relevant factor would not fully address this concern because it would still permit further use of the name. This risks adding to the public misperceptions the Chief Ombudsman already experiences. My proposal allows us to take advantage of the fact that New Zealand is in a unique position to be able to prevent proliferation of the name, while there are only two private-sector entities using it.
17. It is also instructive to consider that Parliament has not expanded the name beyond the original concept of an ombudsman as an 'officer of Parliament'. For example, the Privacy and Health and Disability Commissioners and the Independent Police Conduct Authority, have similar functions and powers to the Parliamentary Ombudsman within their designated spheres, yet were not given the name 'ombudsman'.
18. Officials have not identified any other country that has restricted the use of the name 'ombudsman', even when the establishment of various entities for dispute resolution became more common. As a result, the word has entered into everyday use overseas, and is used in the name of both public and private sector disputes resolution bodies. Not all of these embody the traditional concept of an 'ombudsman' as fully independent, and providing accessible and impartial review of complaints. Although the term is in common usage overseas, this does not diminish the value to New Zealand of protecting it here.
19. Although placing us in a unique position internationally, there is precedent domestically for protecting the use of certain words in names, to maintain public confidence and trust. For example, the Reserve Bank of New Zealand Act 1989 restricts a company from including the words "bank", "banking", or "banker" in its name unless, *inter alia*, the company is a bank or has authorisation from the Reserve Bank, to promote confidence in the banking sector. Similarly, the use of the word 'Anzac' is protected under the Flags, Emblems, and Names Protection Act 1981 in connection with any business, trade, or occupation, to protect the term from commercialisation and ensure that the use is not offensive to public sentiment.

A savings provision will allow two schemes with permission to use the name to continue using it

20. I propose to allow the Banking Ombudsman and the Insurance and Financial Services Ombudsman, which currently have permission under the current Act, to continue to use the name 'ombudsman'.
21. This savings provision will apply to the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman'. It will preserve these names, but no future change of name to still include 'ombudsman' will be permitted.
22. This savings provision recognises the historic use of these names by these entities. Forcing a name change after this amount of time would be unfair, impact on their brand recognition and could impose significant costs on the schemes. Requiring both schemes to change their name could undermine consumer confidence in these schemes, and by extension in the broader financial markets disputes resolution system (as both play a sizeable role in that system).

The savings provision will not apply to Financial Services Complaints Ltd

23. The Chief Ombudsman has not yet issued his final decision in respect of Financial Services Complaints (FSC) Ltd's application to use the name ombudsman, following the Court of Appeal's recent judgement. However, even if the outcome of the Chief Ombudsman's consideration under current law gives it permission to use the name, I do not propose to extend the same savings provision to FSC.
24. The lack of a savings provision for FSC may draw criticism that the law is being applied with retrospective effect, depriving it of the benefits of the court judgment. In effect, FSC's right to have its application reconsidered would be rendered worthless by the change of law. There might also be criticism from other consumer disputes organisations which would like to have the option of seeking permission to use the name in future.
25. In my view, however, the public interest in protecting the name 'ombudsman' justifies the lack of a savings provision in this case. As FSC does not use the name 'ombudsman' currently, it does not have any existing brand recognition tied up in the name, which differentiates it from the Banking Ombudsman and the Insurance and Financial Services Ombudsman.
26. Allowing only the two existing schemes continued use of the name may give them a competitive advantage. Indeed, this was one of the arguments put forward by FSC in its Court of Appeal case. The Ministry of Business, Innovation and Employment has noted that restricting the savings provision to only these two schemes may risk giving consumers an incorrect impression that these schemes are more independent, or have greater authority, than schemes that do not use the name. However, there is little evidence that the current naming situation has adversely impacted on the business development of any of the current disputes resolution schemes, nor has it effected their ability to gain approval under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Consultation

27. The Ministry of Business, Innovation, and Employment, Parliamentary Counsel Office, Crown Law, The Treasury, the State Services Commission, Financial Markets Authority, and the Policy Advisory Group of the Department of the Prime Minister and Cabinet were consulted on this paper
28. The Office of the Ombudsman was consulted on its views on this proposal. It provided some background information on the current issues it sees with the proliferation of the name.
29. No public or external consultation has been carried out. The Banking Ombudsman and the Insurance and Financial Services Ombudsman have not been consulted on the proposal to preserve their names (in their current form only).

Financial Implications

30. There are no fiscal implications for this proposal.

Legislative Implications

31. An amendment Bill is required to implement this proposal. I will make a bid to include this bill on the 2019 Legislative programme.

32. The Bill will not bind the Crown as it will amend the Ombudsmen Act 1975, which does not bind the Crown.

Impact Analysis

33. Regulatory Impact Analysis requirements apply to this proposal. A Regulatory Impact Assessment (RIA) is attached. The RIA notes that the Ministry's preference would be to either retain the current approach, or legislate for a public interest test and criteria listing the qualities that an individual or body given permission to use the name must display.
34. The Ministry of Justice's RIA Panel has reviewed the RIA and considers that the information and analysis summarised in the RIA meets the Quality Assurance criteria. In reaching this conclusion, the QA panel notes that the advice sets out all the necessary information. The analysis is balanced, adequately explores the feasible options, and is convincing in its conclusions. The constraints are clearly identified for decision makers. Stakeholder consultation was not possible however an assessment of the likely impact on affected parties is included.

Human Rights

35. A complete prohibition could be contrary to section 14 of the New Zealand Bill of Rights Act (BORA) 1990 (freedom of expression). This limitation may be justified as necessary and proportionate, to ensure the policy objective of protecting public confidence in the integrity and value of the Parliamentary Ombudsmen, by preventing proliferation of the name in New Zealand.
36. As noted at paragraph 26, the lack of savings provision for FSC to use the name, should it be given permission by the Chief Ombudsman following its recent Court of Appeal case, contravenes the conventional rule of law by applying the law with retrospective effect. This may raise consideration under section 27(2) of BORA (the right to natural justice).
37. The initial view from the Ministry of Justice **Section 9(2)(h)** is that both of these arguments are finely balanced, and so any resulting law change may attract a report under section 7 of BORA.

Publicity

38. I do not propose to issue a media release, as this change impacts a very small number of entities. Instead my office will give advance notice to those directly affected in advance of the proactive release of this Cabinet paper.

Proactive Release

39. I propose to release this Cabinet paper in full, once the relevant stakeholders have been advised.

Recommendations

40. The Minister of Justice recommends that the Committee:
- 1 agree to amend the Ombudsmen Act 1975 to restrict the use of the name 'ombudsman' to an Ombudsman appointed under the Ombudsmen Act 1975;

2. agree to a savings provision so that the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman', which are currently permitted uses under the Ombudsmen Act 1975, may continue to be used by their respective entities;
3. note that the Chief Ombudsman has not yet issued his decision in following the Court of Appeals judgement in Financial Services Complaints Ltd v Chief Ombudsman;
4. agree that no savings provision be made to preserve the rights of Financial Services Complaints Ltd to use the name 'ombudsman', should permission be granted by the Chief Ombudsman under current law;

Legislative drafting

5. note that the Minister of Justice will make a bid to include an amendment bill on the 2019 Legislative programme; and
6. invite the Minister of Justice to prepare drafting instructions for Parliamentary Counsel Office to give effect to these recommendations.

Authorised for lodgement

Hon Andrew Little
Minister of Justice



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Protection of the Name 'Ombudsman'

Portfolio Justice

On 28 November 2018, the Cabinet Economic Development Committee:

- 1 **agreed** to amend the Ombudsmen Act 1975 to restrict the use of the name 'ombudsman' to an Ombudsman appointed under the Ombudsmen Act 1975, or any public sector department or organisation approved by the Minister;
- 2 **agreed** to a savings provision so that the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman', which are currently permitted uses under the Ombudsmen Act 1975, may continue to be used by their respective entities;
- 3 **noted** that the Chief Ombudsman has not yet issued his decision following the Court of Appeal's judgment in *Financial Services Complaints Ltd v Chief Ombudsman*;
- 4 **agreed** that no savings provision be made to preserve the rights of Financial Services Complaints Ltd to use the name 'ombudsman', should permission be granted by the Chief Ombudsman under current law;
- 5 **noted** that the Minister of Justice will make a bid to include an amendment bill on the 2019 Legislation Programme;
- 6 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs.

Janine Harvey
Committee Secretary

Hard-copy distribution: (see over)

Present:

Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson (Chair)
Hon Phil Twyford
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Damien O'Connor
Hon Shane Jones
Hon Kris Faafoi
Hon Willie Jackson
Hon James Shaw
Hon Eugenie Sage

Officials present from:

Office of the Prime Minister
Officials Committee for DEV

Hard-copy distribution:

Minister of Justice

RELEASED BY THE MINISTER OF JUSTICE

In Confidence

Office of the Minister of Justice

Chair, Cabinet Legislation Committee

Ombudsmen (Protection of Name) Amendment Bill: Approval for Introduction

Proposal

1. I propose that the Ombudsmen (Protection of Name) Amendment Bill is approved for introduction.

Policy

2. Cabinet agreed to amend the Ombudsmen Act 1975 to restrict the use of the name 'ombudsman' to:
 - an Ombudsman appointed under the Ombudsmen Act 1975; or
 - any public-sector department or organisation approved by the Minister responsible for the administration of the Ombudsmen Act 1975.

[DEV-18-MIN-0278 and CAB-18-MIN-0592 refer].

3. In respect of the first bullet point, and consistent with the policy intent of this amendment, the bill has been drafted to encompass both Ombudsman appointed under the Ombudsmen Act 1975 and positions that the Chief Ombudsman has established within his Office, such as that of Assistant Ombudsman and Deputy Ombudsman. These latter positions are held by staff appointed by the Chief Ombudsman.
4. These amendments are intended to uphold public confidence in, and understanding of, the role of the Parliamentary Ombudsmen, by ensuring the role is not undermined or diminished by confusion over the status of any entity using the name ombudsman in New Zealand.

A savings provision will allow two schemes with permission to use the name to continue using it

5. Cabinet also agreed to include a savings provision so that the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman', which are currently permitted uses under the Ombudsmen Act 1975, may continue to be used by their respective entities. This savings provision recognises the historic use of these names by these entities. I have written to both entities to advise them of this proposal.

I also propose to protect the rights of Financial Services Complaints Ltd's in respect of its recent Court of Appeal judgement

6. In 2015 a disputes resolution scheme, Financial Services Complaints Ltd (FSCL)¹, applied to the Chief Ombudsman for permission to use the name ombudsman but was refused. In February 2018, the Court of Appeal delivered its judgment in Financial Services Complaints Ltd v Chief Ombudsman. The Court found for FSCL and directed the Chief Ombudsman to reconsider FSCL's application to use the name ombudsman.
7. The Chief Ombudsman has not yet issued his final decision in respect of FSC's application to use the name ombudsman, following the Court of Appeal's judgement.
8. Cabinet agreed that, even if the outcome of the Chief Ombudsman's consideration under current law gives FSCL permission to use the name, no savings provision should be extended to FSC. This was partially because FSCL does not currently use the name 'ombudsman', so it does not have any existing brand recognition tied up in the name
9. However, upon further consideration I now propose to include a provision to protect FSCL's extant application. This will allow FSCL to use the name 'ombudsman', should it be given permission to do so by the Chief Ombudsman under the current law.
10. Without such a provision for FSCL, the Bill would be inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, and in particular with section 27(2), as FSCL could be deprived of the benefits of the court judgment. This outcome could risk damaging the public perception of the integrity of the Office of the Ombudsmen, and so undermine the intent of this policy change. This attached draft bill therefore includes provision for FSCL too.

Impact analysis

11. A Regulatory Impact Analysis for the Ombudsmen (Protection of Name) Amendment Bill was prepared in accordance with Cabinet requirements and was submitted to Cab net along with the paper seeking policy approvals in November 2018 [DEV-18-MIN-0278 and CAB-18-MIN-0592 refer].

Compliance

12. The Bill complies with:
 - 12.1. the principles of the Treaty of Waitangi;
 - 12.2. the rights and freedoms contained in the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990;
 - 12.3. the disclosure statement requirements (a disclosure statement prepared by the Ministry of Justice is attached);
 - 12.4. the principles and guidelines set out in the Privacy Act 1993;
 - 12.5. relevant international standards and obligations; and

¹ Financial Services Complaints Ltd is one of four approved dispute resolution schemes under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. The other three currently approved schemes are the Banking Ombudsman, the Insurance and Financial Services Ombudsman and the Financial Dispute Resolution Service.

- 12.6. the [Legislation Guidelines](#) (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Consultation

13. The Ministry of Business, Innovation, and Employment, Parliamentary Counsel Office, Crown Law, The Treasury, the State Services Commission, and the Office of the Ombudsman were consulted on this Bill. The Policy Advisory Group of the Department of the Prime Minister and Cabinet was informed.
14. No public or external consultation has been carried out.
15. The government caucus and other parties represented in Parliament have been consulted.

Binding on the Crown

16. The Bill will not bind the Crown as it will amend the Ombudsmen Act 1975, which does not bind the Crown.

Creating new agencies or amending law relating to existing agencies

17. The Bill does not create any new agencies.

Allocation of decision making powers

18. The Bill does not allocate decision making powers between the executive and judiciary.

Associated regulations

19. Regulations are not required to bring the Bill into operation.

Other instruments

20. The Bill does not include any provision empowering the making of other instruments deemed to be legislative instruments or disallowable instruments.

Definition of Minister/department

21. The Bill does not contain a definition of Minister, Department or Chief Executive of a department.

Commencement of legislation

22. The Bill will come into force on the day after the date of Royal assent.

Parliamentary stages

23. The Bill should be introduced in April May 2019 and passed by June 2020, if possible.
24. I propose that the Bill be referred to the Governance and Administration Committee for consideration.

Proactive Release

25. I propose to release this Cabinet paper, and the previous Cabinet papers and Minutes (DEV-18-SUB-0278, DEV-18-MIN-0278 and CAB-18-MIN-0592) in full, once the Bill has been introduced.

Recommendations

The Minister of Justice recommends that the Committee:

1. **note** that the Ombudsmen (Protection of Name) Amendment Bill holds a category 4 priority on the 2019 Legislation Programme (to be referred to a select committee in the year);
 2. **note** that the Ombudsmen (Protection of Name) Amendment Bill will prevent the proliferation of the use of the name ombudsman by restricting the use of the name to:
 - an Ombudsman appointed under the Ombudsmen Act 1975;
 - a person appointed to a position established by the Chief Ombudsman under section 11 of the Ombudsmen Act 1975 (such as that of Assistant Ombudsman or Deputy Ombudsman); or
 - any public-sector department or organisation approved by the Minister responsible for the administration of the Ombudsmen Act 1975.
 3. **note** that the Ombudsmen (Protection of Name) Amendment Bill includes a savings provision for the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman' which are currently permitted uses under the Ombudsmen Act 1975;
 4. **note** that on 28 November 2018, the Cabinet Economic Development Committee:
 - 4.1 noted that the Chief Ombudsman has not yet issued his decision following the Court of Appeal's judgment in Financial Services Complaints Ltd v Chief Ombudsman;
 - 4.2 agreed that no savings provision be made to preserve the rights of Financial Services Complaints Ltd to use the name 'ombudsman', should permission be granted by the Chief Ombudsman under current law;
- [DEV-18-MIN-0278]
5. **agree** to recommend that Cabinet rescind the decision referred to in paragraph 4.2 above;
 6. **agree** to include a provision in the Bill which will allow Financial Services Complaints Ltd to use the name 'ombudsman', should it be given permission to do so by the Chief Ombudsman under the current section 28A in respect of its extant application;
 7. **approve** the Ombudsmen (Protection of Name) Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;

8. **agree** that the Ombudsmen (Protection of Name) Amendment Bill be introduced in April or May 2019; and
9. **agree** that the government propose that the Ombudsmen (Protection of Name) Amendment Bill be:
 - 9.1. referred to the Governance and Administration Committee for consideration;
 - 9.2. enacted by June 2020.

Authorised for lodgement

Hon Andrew Little
Minister of Justice



Cabinet

Minute of Decision

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Ombudsmen (Protection of Name) Amendment Bill: Approval for Introduction

Portfolio **Justice**

On 15 April 2019, following reference from the Cabinet Legislation Committee, Cabinet:

- 1 **noted** that the Ombudsmen (Protection of Name) Amendment Bill holds a category 4 priority on the 2019 Legislation Programme (to be referred to a select committee in the year);
- 2 **noted** that the Ombudsmen (Protection of Name) Amendment Bill will prevent the proliferation of the use of the name ombudsman by restricting the use of the name to:
 - 2.1 an Ombudsman appointed under the Ombudsmen Act 1975;
 - 2.2 a person appointed to a position established by the Chief Ombudsman under section 11 of the Ombudsmen Act 1975 (such as that of Assistant Ombudsman or Deputy Ombudsman); or
 - 2.3 any public-sector department or organisation approved by the Minister responsible for the administration of the Ombudsmen Act 1975;
- 3 **noted** that the Ombudsmen (Protection of Name) Amendment Bill includes a savings provision for the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman', which are currently permitted uses under the Ombudsmen Act 1975;
- 4 **noted** that on 28 November 2018, the Cabinet Economic Development Committee:
 - 4.1 noted that the Chief Ombudsman has not yet issued his decision following the Court of Appeal's judgment in Financial Services Complaints Ltd v Chief Ombudsman;
 - 4.2 agreed that no savings provision be made to preserve the rights of Financial Services Complaints Ltd to use the name 'ombudsman', should permission be granted by the Chief Ombudsman under current law;

[DEV-18-MIN-0278]
- 5 **rescinded** the decision referred to in paragraph 4.2 above;

- 6 **agreed** to include a provision in the Bill which will allow Financial Services Complaints Ltd to use the name 'ombudsman', should it be given permission to do so by the Chief Ombudsman under the current section 28A in respect of its extant application;
- 7 **approved** the Ombudsmen (Protection of Name) Amendment Bill [PCO 21829/5.0] for introduction, subject to the final approval of the government caucuses and sufficient support in the House of Representatives;
- 8 **agreed** that the Ombudsmen (Protection of Name) Amendment Bill be introduced in April or May 2019;
- 9 **agreed** that the government propose that the Ombudsmen (Protection of Name) Amendment Bill be:
- 9.1 referred to the Governance and Administration Committee for consideration;
- 9.2 enacted by June 2020.

Michael Webster
Secretary of the Cabinet

Secretary's Note: This minute replaces LEG-19-MIN 0035. Cabinet agreed to the recommendation in paragraph 5 to rescind an earlier decision.

Hard-copy distribution:
Prime Minister
Deputy Prime Minister
Minister of Justice