

# Coversheet: Protection of the name ‘ombudsman’

Advising agencies	The Ministry of Justice
Decision sought	This analysis has been prepared for the purposes of informing decisions to be taken by Cabinet regarding the proposal to restrict the use of the name ‘ombudsman’ to a Parliamentary Ombudsman appointed under the Ombudsmen Act 1975 (with an exception for two existing private-sector bodies currently using the name).
Proposing Ministers	Minister of Justice

## Summary: Problem and Proposed Approach

<p><b>Problem Definition</b></p> <p><b>What problem or opportunity does this proposal seek to address? Why is Government intervention required?</b></p>
<p>The proposal seeks to protect public confidence in the integrity and value of the office of the Parliamentary Ombudsmen, by reserving the name ‘ombudsman’ for their use.</p> <p>There is a risk that the use of the name may proliferate, if the effect of a recent Court of Appeal decision<sup>1</sup> is that previous decisions of the Chief Ombudsman conferring consent to use the name must be taken into account, to ensure those currently consented do not have market advantage. This 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.</p> <p>The Government is seeking to intervene now, to prevent further proliferation of the use of the name ombudsman, while there are very few other entities using it.</p>

<p><b>Proposed Approach</b></p> <p><b>How will Government intervention work to bring about the desired change? How is this the best option?</b></p>
<p>The proposal will prevent any additional body or entity from using the name ‘ombudsman’. This will underscore the unique constitutional position of the Parliamentary Ombudsman.</p> <p>An exception will be made for the continued use of the name ‘Banking Ombudsman’ and ‘Insurance and Financial Services Ombudsman’ by their respective entities, as these are both well-established brands in the financial markets disputes resolution sector.</p>

<sup>1</sup> [2018] NZCA 27

# Section B: Summary Impacts: Benefits and costs

**Who are the main expected beneficiaries and what is the nature of the expected benefit?**

There are no monetised benefits arising from this change.

The main beneficiary is expected to be the public, through reducing the risk of confusion about the unique constitutional role of the Parliamentary Ombudsman. This will help promote public confidence and trust in government and constitutional arrangements, which is an important component of social infrastructure.<sup>2</sup>

The existing private sector entities that are permitted to continue using the name may benefit from consumers placing a value on the name 'ombudsman'. This could provide them with some commercial advantage, as they are protected against competition from other entities using the 'ombudsman' label. However, there is no evidence to quantify if, or how much, competitive value their continued use of the name ombudsman might create, vis-à-vis other features of their service offering.

**Where do the costs fall?**

As noted above, to the extent that there is some commercial value in the use of the name 'ombudsman', entities prevented from using it may have a 'cost' from revenue opportunities foregone. This has not been able to be quantified; most entities are already prevented from using the name as they do not have permission from the Chief Ombudsman.

Financial Services Complaints Ltd recently won a judicial review of the Chief Ombudsman's decision not to give it permission to use the name. The Court of Appeal found for Financial Services Complaints Ltd.<sup>3</sup> There is therefore a potential cost to Financial Services Complaints Ltd, to the extent that this proposal renders the Chief Ombudsman's reconsideration of its application to use the name ineffective.

**What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?**

Preventing other disputes resolution schemes from using the name 'ombudsman' may have an unintended impact that consumer confidence in such schemes is lower, because they do not use the name; this assumes that consumers' place trust and value in the name. We do not consider any such impact will be significant. The current restrictions on the use of the name mean most schemes have already established themselves using different names.

There is a small risk that (as has happened once previously) a New Zealand based resident individual or entity will be appointed to an international role which carries the title 'ombudsman'. If they cannot use this name under New Zealand law they may face restrictions on the way they can carry out or promote themselves in that role in New Zealand. This risk cannot be mitigated if the use of the name is fully prohibited.

<sup>2</sup> OECD (2017). *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*.

<sup>3</sup> [2018] NZCA 27

**Identify any significant incompatibility with the Government’s ‘Expectations for the design of regulatory systems’.**

The proposed approach may not align with expectations that regulatory systems:

- retain flexibility to adapt and innovate to the needs of different parties;
- are fair and equitable in the way they treat regulated parties; and
- take an approach that has the least adverse impact on market competition, property rights, and individual autonomy.

A constraint was our inability to seek comment from affected and interested parties outside of Government about the proposed or alternative options.

## Section C: Evidence certainty and quality assurance

**Agency rating of evidence certainty?**

Our rating of evidence certainty is low.

The Office of the Ombudsman, from its experience in receiving public enquiries, has indicated there is some public confusion about its role versus those of the existing private-sector entities which use the name ombudsman. However, the extent to which this confusion is attributable to these private-sector entities’ use of the name ‘ombudsman’ is not clear. It could indicate a broader misunderstanding of the Office of the Ombudsman’s jurisdiction over private-sector entities such as banks, which would result in many of the same calls being received.

The term is neither restricted nor protected internationally, so there is little international evidence we can refer to.

Constitutional concepts are intangible in nature. Their impact on issues such as public confidence in public institutions and the rule of law is hard to measure, and costs and benefits are hard to estimate. The analysis in this RIA is therefore primarily qualitative. The key judgments (and assumptions) we have made about the impacts on agencies and individuals are included in relevant sections in the RIA.

**Quality Assurance Reviewing Agency:**

The Ministry of Justice

**Quality Assurance Assessment:**


The Ministry of Justice Regulatory Impact Assessment Quality Assurance Panel has reviewed the RIA” *Protection of the name ‘ombudsman’* prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIA meets the Quality Assurance criteria.

**Reviewer Comments and Recommendations:**

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.

# Impact Statement: Protection of the name ombudsman

## Section 1: General information

<b>Purpose</b>
The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing Cabinet consideration.
<b>Key Limitations or Constraints on Analysis</b>
<p>A key limitation is the qualitative nature of the analysis. This affects our evidence certainty, which is low. Limitations on the analysis in this document include:</p> <ul style="list-style-type: none"><li><i>A lack of empirical evidence about the nature and extent of the problem</i> Quantitative evidence of the nature or extent of the problem with other agencies using the name ‘ombudsman’ is not available. We cannot extrapolate from existing data sources to estimate the costs and benefits to disputes resolution service providers, from the use, or inability to use, the name. Nor can we identify or quantify costs or benefits to the public, consumers or agencies and institutions they serve. The analysis in this RIA is therefore qualitative.</li><li><i>Key gaps and assumptions in the data or analysis</i> There is an implicit assumption that the name ‘ombudsman’ does, or has the potential to, generate economic benefit. We have not been able to quantify this value as it is an intangible (brand) asset.  Another assumption underpinning the analysis is that the public’s ability to complain about executive actions to an independent body is a fundamental contributor to trust in government/constitutional arrangements.<sup>4</sup>  A related assumption is that the use of the name ‘ombudsman’ by a disputes resolution body supports public and consumer confidence in that entity’s independence from the industry and organisation about which they are complaining.</li><li><i>Insufficient consultation and information to inform analysis or test assumptions</i> We have not consulted with existing disputes resolution providers and other consumer interest groups. Consultation was restricted due to the risk of signalling the proposed change ahead of Cabinet consideration.</li></ul>
<b>Responsible Manager:</b>
 Chris Hubscher Policy Manager, Electoral and Constitutional Policy, Ministry of Justice Date: 21 November 2018

<sup>4</sup> OECD (2017). *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*.

# Section 2: Problem definition and objectives

**2.1 What is the context within which action is proposed?**

Section 28A was added to the Ombudsmen Act 1975 in 1991. It provides that no one other than a Parliamentary Ombudsman can 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.

In May 2015 Financial Services Complaints Ltd applied to the then Chief Ombudsman Beverly Wakem for permission to use the name ombudsman in May 2015. This application was declined in June 2015. Financial Services Complaints Ltd sought a judicial review on the Chief Ombudsman's decision in 2015, on the basis that the Chief Ombudsman had misinterpreted the width and purpose of the discretion under section 28A. The High Court upheld the decision of the Chief Ombudsman in March 2017.<sup>5</sup> Financial Services Complaints Ltd appealed the High Court decision in October 2017.

In February 2018, the Court of Appeal delivered its judgment in *Financial Services Complaints Ltd v Chief Ombudsman*.<sup>6</sup> The Court found for Financial Services Complaints Ltd. It considered that the Act aims to protect the name 'ombudsman' by regulating its use, but not to the point of a complete prohibition. It found that the Chief Ombudsman's policy (published in 2002), which sets out his approach to reviewing applications under section 28A, gave undue weight to a preliminary 'public interest' test. This unduly restricted the scope of the Chief Ombudsman's discretion. The Court directed the Chief Ombudsman to reconsider Financial Services Complaints Ltd's application to use the name ombudsman.<sup>7</sup>

While the Court's decision does not require the Chief Ombudsman to grant permission to all applicants, the decision does reduce the weight that can be placed on the public interest in non-proliferation of the name. This may have the effect, over time, of increasing the number of entities using the name and so gradually diminish its status.

**2.2 What regulatory system, or systems, are already in place**

*Section 28A of the Ombudsmen Act 1975*

The Ombudsmen Act 1975 ("the Act") provides for the appointment of ombudsmen as Officers of Parliament and Commissioners for Investigation. Section 28A of the Act provides that no one other than a Parliamentary Ombudsman can 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.

<sup>5</sup> [2017] NZHC 525

<sup>6</sup> [2018] NZCA 27

<sup>7</sup> We do not know what name Financial Services Complaints Ltd is seeking to adopt, incorporating the name ombudsman.

*Notice by the Chief Ombudsman concerning Restrictions on the use of the name “Ombudsman”*

In February 2002, then Chief Ombudsman Sir Brian Elwood published guidelines to assist those seeking his approval to use the name, which were available from the Office of the Ombudsmen on request. This was the last publicly notified change of policy by a Chief Ombudsman on how requests would be considered.

The guidelines noted that the over-riding consideration for the Chief Ombudsman would be whether the public interest will be served by the creation of another organisation using the name ‘Ombudsman’ as part of its title. The Guidelines then listed several factors (or criteria) against which requests would be further considered, but only if the Chief Ombudsman saw the public interest in having an additional non-parliamentary ‘Ombudsman’ as greater than the need to protect the non-proliferation of the name.

*Applications made under section 28A of the Ombudsmen Act 1975*

Over the years the Chief Ombudsmen have granted permission to use the name ombudsman under section 28A to:

- the Banking Ombudsman (approved in 1992);
- the Insurance and Financial Services Ombudsman (approval updated in 2015; originally approved in 1994 as the Insurance and Savings Ombudsman); and
- a New Zealand resident in relation to his international role with the overseas-based Internet Corporation for Assigned Names and Numbers Ombudsman. The individual concerned no longer holds this role.

Other applications to use the name have been denied by the Chief Ombudsmen. For example, an ‘Electricity Ombudsman’ was denied due to concerns that its jurisdiction overlapped with the Parliamentary Ombudsmen, and this could create public confusion about their respective roles. The Chief Ombudsman also stepped in to prevent a local authority designating an internal function as a ‘Corporate Ombudsman’. This was because, in the Chief Ombudsman’s view, the lack of independence of this internal function (carried out by an employee) from the local authority (the employer) undermined the classical understanding of an ombudsman as independent and impartial from the agency under investigation.

No other statutes permit the use of the name ‘ombudsman’. Several public-sector disputes resolution bodies have been established by statute. For example, the Independent Police Conduct Authority has similar functions and powers to the Parliamentary Ombudsman within its designated sphere, yet was not given the name ‘ombudsman’.

*The Financial Service Providers (Registration and Dispute Resolution) Act 2008*

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 (“the FSP Act”) introduced a new registration system for providers of financial services. This mandated, for the first time, that all financial providers must belong to an approved industry disputes resolution scheme. These schemes are funded by membership levies/fees.

The FSP Act does not set a limit to the number of disputes resolution schemes that may be approved, nor is the name of a scheme relevant in granting approval.

Four schemes have been approved under the FSP Act so far, including Financial Services Complaints Ltd. These schemes are summarised below:

Scheme	Established	Membership (Areas of Investigation)	# of complaints
<b>Banking Ombudsman</b>	1992	New Zealand banks and some non-bank deposit takers	1,263 enquiries 2,565 complaints 144 disputes <sup>8</sup>
<b>Insurance and Financial Services Ombudsman</b>	1995	Insurance; Superannuation, investments and securities; Financial advice and broking services; Loans and credit; Foreign exchange and money transfer service	3,357 enquiries 320 complaints <sup>9</sup>
<b>Financial Dispute Resolution Service</b>	Incorporated 2010	Financial advisers or brokers, lenders, non-bank deposit takers, foreign exchange platforms, Qualifying Financial Entities, Banks or insurers	455 complaints completed 236 new complaints registered <sup>10</sup>
<b>Financial Services Complaints Ltd</b>	2009	Loans and credit, Insurance, Financial planning, Financial advice and investments, Insurance broking, Mortgage and finance broking, Stock broking, Superannuation funds, Managed funds, Funds transfers, Foreign exchange, and Card services	4,365 enquiries and complaints received 216 investigations resolved <sup>11</sup>

### 2.3 What is the policy problem or opportunity?

*There is a risk of increased proliferation of the name 'ombudsman'*

Section 28A of the Ombudsmen Act provides a discretionary power for the Chief Ombudsman to consider applications to use the name 'ombudsman'. The Court of Appeal held that, although section 28A does not contain any guidelines the Chief Ombudsman was entitled, under this discretion, to develop his own criteria and policies. However, he could not set a threshold so high as to constitute an undue limit of the exercise of that discretion.<sup>12</sup>

The Court decision effectively reduces the weight that can be placed by the Chief Ombudsman on considering protection of the name and limiting misunderstanding of the ombudsman concept. There is a risk that, over time, this may increase the number of entities and organisations which would be granted permission to use the name, and so gradually diminish the uniqueness and so the status of the name.

<sup>8</sup> 2017/18 Annual Report, accessible at <https://bankomb.org.nz/about-us/reference-documents/>

<sup>9</sup> 2018 Annual Report; accessible at <https://www.ifso.nz/news-and-publications/annual-reports/>

<sup>10</sup> FDRS is a wholly owned subsidiary of FairWay Resolution, which, until 30 June 2017 was a Crown company. 2016/17 Annual Report: accessible at <https://fdrs.org.nz/resources/publications/>

<sup>11</sup> 2016/17 Annual Report; accessible at: <http://www.fscl.org.nz/2017-annual-report>

<sup>12</sup> [2018] NZCA 27 at [48 - 50]

*Proliferation risks undermining public understanding of the ombudsman concept, and risk public confusion about the role of the Parliamentary ombudsmen*

The Office of the Ombudsman's experiences in taking calls from the public indicates confusion about the public-sector focus of its role. Its administrative data for 2016-17 and 2017-18 indicates it received 510 complaints that were outside its jurisdiction; generally because they related to private businesses and enterprises. Of these, it estimates approximately one third were related to financial and insurance disputes with private-sector banks, insurers and financial service providers. A very small number of the complaints were against the schemes approved under the *Financial Service Providers (Registration and Dispute Resolution) Act 2008*. This includes those using the name ombudsman, which the Office attributes to public confusion that the Parliamentary Ombudsman has jurisdiction over all entities called 'ombudsman'. It is not known if the private-sector schemes themselves experience the same type of customer confusion over their respective jurisdictions.

There is some academic research from overseas, where the name is not restricted, that it is used, or attempts are made to use it, by entities and bodies that do not display the expected ombudsman qualities of independence, accessibility and impartiality.<sup>13</sup>

*There is an opportunity to prevent proliferation while the name is still relatively contained*

New Zealand is in a position to be able to prevent further proliferation of the use of the name ombudsman, while there are only two private-sector entities using the name.

## **2.4 Are there any constraints on the scope for decision making?**

Consistency with the New Zealand Bill of Rights Act (NZBORA) is an important consideration in any decision-making process.

Any increased restriction on use of the name may be a restriction on freedom of expression under section 14 of NZBORA. This may be justified under section 5 of NZBORA as necessary to ensure the policy objective of protecting public confidence in the integrity and value of the Parliamentary Ombudsmen.

A lack of savings provision for FSC, should it be given permission by the Chief Ombudsman to use the name, *prima facie* appears to contravene the constitutional convention of not legislating with retrospective effect nor depriving litigants of the benefits of their victory. This may raise considerations under section 27(2) of NZBORA (the right to natural justice).

The arguments are finely balanced in both cases.

<sup>13</sup> McMillan, J. (2008). What's in a name? Use of the term 'Ombudsman'. Australian and New Zealand Ombudsman Association; [http://www.anzoa.com.au/assets/2008\\_john-mcmillan\\_what-s\\_in\\_a\\_name\\_use\\_of\\_the\\_term\\_ombudsman.pdf](http://www.anzoa.com.au/assets/2008_john-mcmillan_what-s_in_a_name_use_of_the_term_ombudsman.pdf)



## 2.5 What do stakeholders think?

### Parliamentary Ombudsmen

Current and former Chief Ombudsmen have had a long-standing interest in preventing proliferation of the name.<sup>14</sup> Their long-standing concern has been that proliferation risks undermining public understanding of the ombudsman concept, and risk public confusion about the role of the Parliamentary ombudsmen.

### Disputes resolution providers

External consultation was restricted to the risk of signalling the proposed change ahead of Cabinet consideration. The expected impact on the various stakeholder groups is set out below.

#### *Financial Services Complaints Ltd*

Financial Services Complaints may be impacted by allowing the Banking Ombudsman and the Insurance and Financial Services Ombudsman to continue to use the name, to the extent this gives them a commercial advantage. The lack of any savings provision arguably removes the rights obtained in its recent Court of Appeal victory to use the name, should permission be granted by the Chief Ombudsman, once he has reconsidered its application under current law.

#### *The Banking Ombudsman and the Insurance and Financial Services Ombudsman*

If their right to use their current names is protected, the impact on the Banking Ombudsman and the Insurance and Financial Services Ombudsman is expected to be relatively neutral. They may be slightly negatively impacted by their inability to change their own names going forward, if they also wish to retain the use of the name 'ombudsman'.

#### *Other private sector disputes resolution providers*

From previous applications and the recent Court of Appeal case, we can surmise that there is some interest from disputes resolution schemes in using the name. However, given how infrequently permission to use the name has been granted over recent years, we cannot gauge the market value which might attach to the name. We do not know how strongly these entities would react to a complete legislative prohibition, nor can we estimate which, if any, might be interested in using the name if it were to become more freely available.

#### *Other public-sector disputes resolution providers*

No other public-sector disputes resolution providers are called 'ombudsman'. Most have established themselves, and received public name recognition, under different names. We expect them to be relatively neutral about any change in this area.

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<sup>14</sup> See, for example, the Report of the Ombudsmen for the year ending 31 March 1988; then Chief Ombudsman's, (Sir John Robertson's) 1994 Report on Leaving Office and Chief Ombudsman Sir Brian Elwood's article in the Ombudsman Quarterly review, September 2001

# Section 3: Options identification

## 3.1 What options are available to address the problem?

We assessed three options against the status quo/do nothing.

We did not consider non-regulatory options (for example the Office of the Ombudsman developing guidance on the use of the name) as we considered this to be broadly the same, in effect, as the current status quo.

The options are mutually exclusive.

### Option 1) Legislate for a public interest test and ‘ombudsman’ criteria

This option would introduce a public interest test in section 28A. This would direct the Chief Ombudsman to consider the public interest in upholding the integrity and public confidence in the Parliamentary Ombudsmen before permitting another person or entity to use the name.

Section 28A would also include a list of qualities that an individual or body given permission to use the name must display. This could be done in several ways, for example by either listing specific qualities of an ombudsman, as understood in the New Zealand context, or through reference to the need to obtain membership of an international ombudsman association (such as the Australian New Zealand Ombudsman Association) which set out such qualities in its membership criteria.

This option would effectively codify much of the Chief Ombudsman’s current approach to considering applications to use the name.

Some of the advantages of this option are:

- it would clarify and thus allow greater weight to be given to the public interest in upholding the special constitutional position of the Parliamentary Ombudsman;
- it makes explicit the core qualities of an ombudsman for any entity using the name;<sup>15</sup> and
- it is flexible, by not preventing permission being granted in cases where there is clearly no public interest concern (such as in the 2015 approval for a New Zealand resident in relation to his international role with the overseas-based company).

Some of the disadvantages of this option, which also apply to the status quo are:

- the need to obtain permission to use the name restricts market freedom; and
- the limited granting of permission (to avoid proliferation of the name) may provide commercial advantage by appearing to ‘sanction’ certain disputes resolution schemes over others.

### Option 2) Restrict use of the name with savings provision for existing users

<sup>15</sup> Internationally some Ombudsman and Bar Associations have been looking to define the parameters of the ombudsman function, and how this could be defined to protect the core concepts of ombudsman and ensure the term retain some sense of meaning in the public perception. Galdin, H. (2007). The ombudsman: What’s in a name? Negotiation Journal, 16(1), 37-48

Option 2 provides a statutory recognition of the unique role of the Parliamentary Ombudsmen in New Zealand's constitutional arrangements, by restricting the use of the name to them.

Option 2a and 2b set out two alternative approaches to considering 'existing use' for the purpose of a savings provision. This impacts on Financial Services Complaints Ltd. The Chief Ombudsman has not yet issued his decision in respect of Financial Services Complaints Ltd's application to use the name ombudsman, following the Court of Appeal's recent judgment. This proposal does not negate the Chief Ombudsman's obligation to make that decision based on current law, but these options would affect the ongoing implications of any affirmative decision.

*Option 2a – savings provision for the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman' only*

This would preserve the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman' only. These are used by two existing private-sector dispute resolution schemes, both of which received permission to use the name over 25 years ago.

Some of the advantages of this option are:

- it provides certainty that, in New Zealand, the name is mostly restricted to the Parliamentary Ombudsman;
- the savings provision recognises existing schemes have used the name for the last 25 years, and have developed a level of brand recognition; and
- other than the two existing schemes, all current and future public and private disputes resolution schemes would be treated in the same way.

Some of the disadvantages of this option are:

- there would be no discretion in cases where there is clearly no public interest concern. There is a small risk that, as has happened once previously, a New Zealand based resident individual or entity will be appointed to an international role which carries the title 'ombudsman', and may be restricted in the way they can carry out or promote themselves in that role in New Zealand. It is unclear whether this risk can be mitigated.
- if the Chief Ombudsman decides that Financial Services Complaints Ltd can use the name ombudsman, the lack of a savings provision would then deprive Financial Services Complaints Ltd of the benefit of this subsequent decision in its favour. This would be inconsistent with the generally accepted constitutional position that changes to the law should not have retrospective effect nor deprive litigants of the benefits of their victory.
- it could provide a permanent commercial advantage to the Banking Ombudsman and the Insurance and Financial Services Ombudsman, particularly vis-à-vis other industry schemes that are also registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.
- the Banking Ombudsman and the Insurance and Financial Services Ombudsman would not be able to change their names in the future (and still retain use of the name ombudsman); this may slightly restrict their freedom of expression.

*Option 2b - savings provision for all entities with permission under current Act*

Option 2b is similar to option 2a, except that in addition to preserving the names 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman', it would include a savings provision that would recognise Financial Services Complaints Ltd right to have its application to use the name ombudsman considered under the current law. If necessary, should permission be granted, the legislative amendment would preserve Financial Services Complaints Ltd's use of the name 'ombudsman' too.

The advantages and disadvantages are similar to option 2b, except that this option does not have retrospective effect in relation to Financial Services Complaints Ltd. Also, the advantage of restricting the name mostly of the Parliamentary Ombudsman is arguably undermined if there is further proliferation of the name to another entity.

### **Option 3) Restrict use of the name with no savings provision for existing users**

Option 3 is similar to option 2, except that existing permissions to use the title 'ombudsman' would be removed, over a 3 to 5 year transition period.

Some of the advantages of this option are that it:

- provides exclusivity of the name to the Parliamentary Ombudsman; and
- treats all public and private disputes resolution schemes in the same way; this reduces any risk that allowing some schemes to be called "ombudsman" and others not might undermine public confidence in the broader disputes resolution system.

Some of the disadvantages of this option are:

- there would be no discretion on use of the name, even in cases where there is clearly no public interest concern;
- the lack of a savings provision could impose significant costs, both actual and in terms of market visibility, on the Banking Ombudsman and the Insurance and Financial Services Ombudsman; and
- forcing these schemes to change their name could reduce consumer confidence in these schemes.

## **3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?**

We have equally weighted the criteria against which we have analysed the options. They are:

- 1) Public trust and confidence** – the option supports trust and confidence in government and constitutional arrangements.
- 2) Consumer confidence** – the option promotes consumer trust and confidence in regulated markets.
- 3) Flexibility** - the option can adapt and innovate to the needs of different parties.
- 4) Market competition** – the option supports, or does not hinder, commercial freedoms including the right to freedom of expression, and is fair and equitable in the way it treats regulated parties.

The main interrelationships and potential trade-offs are considered to be between public trust and confidence (e.g. restricting use of the name) and flexibility and market freedom (e.g. creating or embedding commercial advantage).

## **3.3 What other options have been ruled out of scope, or not considered, and why?**

We have not considered the option of removing all restrictions on use of the name, as happens overseas, as this would be inconsistent with the policy objective of preventing proliferation of the name 'ombudsman'. We have included this option in the summary table in section 4 as a counterfactual, however, to provide a point of comparison.

## Section 4: Impact Analysis

	Status quo	Option 1: Legislate for a public interest test and criteria	Option 2a: Restrict use (limited savings provision)	Option 2b: Restrict use (savings provision for all three entities)	Option 3: Restrict use (no savings provision)	COUNTERFACTUAL: Remove all restriction on use
<b>Public trust and confidence in government and constitutional arrangements</b>	<b>0</b>	+ allows more weight to be given to public interest in non-proliferation of name when considering requests for permission to use the name	+ signals unique constitutional role of Parliamentary Ombudsman -- retrospective law; deprives litigants of benefits of their victory <b>0</b> consumer confusion may continue with some entities' use of name	+ signals unique constitutional role of Parliamentary Ombudsman <b>0</b> consumer confusion may continue with more entities use of name	+ signals unique constitutional role of Parliamentary Ombudsman	- could be used by entities and bodies that do not display qualities of independence, accessibility and impartiality
<b>Consumer confidence in regulated markets</b>	<b>0</b>	+ provides statutory criteria relating to qualities an entity called 'ombudsman' should display (e.g. independence, accessibility and impartiality)	- would prevent further use of a name even if it could enhance consumer confidence in the integrity of a dispute resolution scheme/system	- would prevent further use of a name even if it could enhance consumer confidence in the integrity of a dispute resolution scheme/system	- would prevent all use of a name even if it could enhance consumer confidence in the integrity of a dispute resolution scheme/system	- risk of use by entities that are not independent accessible and impartial. + enhance consumer confidence in integrity of schemes using name
<b>Flexibility</b>	<b>0</b>	<b>0</b> no impact; decisions still made by Chief Ombudsman or Parliament on case-by-case basis	- no discretion, even if no public interest concern with a particularly individual or entity using the name	- no discretion, even if no public interest concern with a particularly individual or entity using the name	- no discretion, even if no public interest concern with a particularly individual or entity using the name	+ entities can self-select whether to use the name
<b>Market competition</b>	<b>0</b>	<b>0</b> no impact; decisions still made by Chief Ombudsman or Parliament on case-by-case basis	- embeds potential commercial advantage in the private-sector to two entities with preserved rights	- embeds potential commercial advantage in the private-sector to three entities with preserved rights	+ creates level-playing field - negative impact on existing entities' brand; could impose significant costs	+ supports freedom of expression - proliferation may diminish value of name in public perception
<b>Overall assessment</b>	<b>0</b>	<b>+</b>	-	-	-	-

**Key:** + better than doing nothing/the status quo  
**0** about the same as doing nothing/the status quo  
 - worse than doing nothing/the status quo

++ much better than doing nothing/the status quo  
 -- much worse than doing nothing/the status quo

# Section 5: Conclusions

## 5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The Ministry's preference would be to either retain the status quo, or legislate for a public interest test and criteria (option 1).

The evidence of need for any significant change in approach is inconclusive. The Parliamentary Ombudsman's long-standing public profile and status already affords a high degree of public confidence and trust. To the extent there is public confusion over the role or jurisdiction of the Parliamentary Ombudsman this does not appear solely, or even mostly, attributable to the use of the name 'ombudsman' by the two-existing private-sector bodies.

Several overseas jurisdictions have an equivalent body to the Parliamentary Ombudsman that uses the name 'ombudsman', such as the UK's Parliamentary and Health Service Ombudsman, or the Commonwealth Ombudsman in Australia. These bodies do not appear to have experienced a loss of public confidence or respect, even though these jurisdictions do not restrict the use of the name ombudsman.

As a general principle, we consider it undesirable to impose legislative prohibition on the use of any word, unless there is real evidence of need. The Act's current approach to restricting the use of the name strikes a balance between the public interest in protecting the integrity and value of the office of the Parliamentary Ombudsman, and other factors such as freedom of expression.

The Act already provides some limits on freedom of expression. Legislating for a public interest test and criteria (option 1) would give greater weight to the 'public interest' consideration over freedom of expression and market equity. It may not fully address the Court of Appeal's concern about the need to treat like candidates reasonably similarly. There is no simple way to restrict the use of the name to a limited number of entities within an industry, without risking providing unfair advantage to those granted permission. However, we think the public interest in non-proliferation is sufficient justification for any potential market distortion.

Option 1 would afford many of the same benefits as the status quo, and avoid the pitfalls of full prohibition. By making clear the core qualities of an entity using the name ombudsman it might even enhance public understanding of the ombudsman concept.

Both the status quo and Option 1 have the benefit of flexibility, as they do not prevent permission to use the name being granted in cases where there is clearly no public interest concern (such as in the 2015 approval for a New Zealand resident in relation to his international role).

*The recommendation in the Cabinet Paper is to restrict any further use of the name*

The Cabinet paper recommends an amendment to restrict the use of the name 'ombudsman' to the Parliamentary Ombudsman.

It also recommends that an exception be made for the continued use of the name 'Banking Ombudsman' and 'Insurance and Financial Services Ombudsman' by their respective entities, as these are both well-established brands in the financial markets disputes resolution sector.

## 5.2 Summary table of costs and benefits of the preferred approach

Affected parties	Comment:	Impact	Evidence certainty
<b>Additional costs of proposed approach, compared to taking no action</b>			
General Public/Consumers	None	Low Impact	Low
Regulated party – Financial Services Complaints Ltd	Potential (non-monetised cost) to the extent that this proposal renders any reconsideration by the Chief Ombudsman ineffective.	Low Impact	Low
Regulated parties – Existing entities using name	None		
Regulated parties – Public or private-sector disputes resolution entities	Entities prevented from using the name may have a ‘cost’ from revenue foregone (non-quantifiable).	Low Impact	Low
Parliamentary Ombudsman	None		
<b>Non-monetised costs</b>		Low Impact	
<b>Expected benefits of proposed approach, compared to taking no action</b>			
General Public/Consumers	Enhanced public understanding of the unique constitutional role of the Parliamentary Ombudsman	Low Impact	Low
Regulated party – Financial Services Complaints Ltd	None		
Regulated parties – Existing entities using name	Potential commercial advantage from consumer’s placing brand value in the name ‘ombudsman’.	Low Impact	Low
Regulated parties – Public or private-sector disputes resolution entities	None		
Parliamentary Ombudsman	Slight reduction in administrative costs if receive fewer complaints about private-sector bodies or fewer application to use the name (non-quantifiable).	Low Impact	Low
<b>Non-monetised benefits</b>		Low Impact	

## 5.3 What other impacts is this approach likely to have?

No impacts in addition to those outlined above.

#### **5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?**

The Ministry's preferred options (retaining the status quo, or legislating for a public interest test and criteria) align with the expectations for the design of regulatory systems.

The Minister's preferred option is to prohibit the use of the name 'ombudsman' by all entities, except the two entities currently using it (option 2a). This option may not align with expectations that the design of regulatory systems:

- retain some flexibility to adapt and innovate to the needs of different parties,
- are fair and equitable in the way they treat regulated parties, and
- take an approach that has the least adverse impact on market competition, property rights, and individual autonomy.

The analysis has not fully determined the nature and underlying causes of the problem. We have not been able to seek comment from affected and interested parties outside Government about either the Ministry or the Minister's preferred options, or any alternative options.

## **Section 6: Implementation and operation**

### **6.1 How will the new arrangements work in practice?**

The proposal requires legislation.

Following enactment there will be minimal implementation implications, as the restriction of the use of the name effectively formalises the current situation.

The Chief Ombudsman will be responsible for liaising with existing users, and with Financial Services Complaints Ltd in respect of its current application. It will also be responsible for updating its guidance materials to reflect the new restrictions on the use of the name.

### **6.2 What are the implementation risks?**

No implementation risks have been identified.

## **Section 7: Monitoring, evaluation and review**

### **7.1 How will the impact of the new arrangements be monitored?**

The Office of the Ombudsman will continue to monitor the New Zealand public and private sector disputes resolution markets to ensure no unauthorised use of the name.

### **7.2 When and how will the new arrangements be reviewed?**

There are no plans to formally review this arrangement. The Chief Ombudsmen provides an annual report to the House of Representatives on the exercise of the Ombudsmen's functions under the Act. As has happened previously, this can include comment on the operation of section 28A if necessary.