

Ombudsman (pillar 7)

Summary

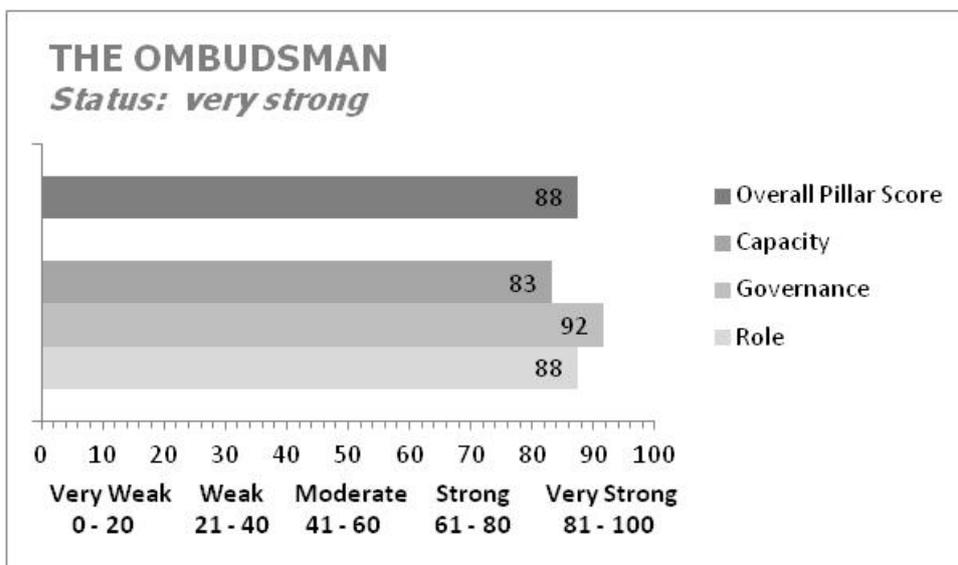
The Office of the Ombudsman meets high standards of independence, integrity, and accountability. It is an important check on the exercise of administrative power and on the proper use of the official information legislation.

Although the Ombudsmen’s funding has not been reduced, it has not kept up with the increase in complaints, or with the new functions they have been required to undertake. This has resulted in a backlog of complaints and an ongoing inability to carry out some functions. A substantial increase in funding was recently announced, but the office may still be under-resourced.

The Ombudsmen are effective in their handling and resolution of citizens’ complaints and thus in acting as a check on the exercise of administrative power. However, they are not funded to carry out educational functions or to assess the quality of agencies’ systems for handling complaints and requests for information. In practice, they do some educational work, but do not systematically audit agencies’ processes.

Recommendations in Chapter 6 relating to the Office of the Ombudsman reflect the need for more effective oversight by the Ombudsmen of agencies’ compliance with both the spirit and the letter of the Official Information Act 1982, as well as a wider educative role. For both of these roles, and possibly even to carry out current functions well, more resources are needed, so a review of funding is recommended for 2014/15.

Figure 9: Ombudsman scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

The Office of the Ombudsman has an important role to play in maintaining the integrity of government processes and practices. Its stated aim is to achieve an overall outcome that a “high level of public trust in government is maintained”.⁷¹⁸

The Governor-General appoints the Ombudsmen (there are currently two) on the unanimous recommendation of Parliament Their statutory functions are to:⁷¹⁹

- investigate state sector administration and decision making
- investigate and review decisions made on requests to access official information
- deal with requests for advice and guidance about alleged serious wrongdoing
- monitor and inspect places of detention for cruel and inhumane treatment
- provide comment to the Ministry of Transport on applications for authorised access to personal information on the motor vehicle register.

The Ombudsmen are also an “independent mechanism”, protecting and monitoring the implementation of the United Nations Convention on the Rights of Persons with Disabilities.

There is a separate Human Rights Commission, and the Ombudsman does not take cases that can be considered under the Human Rights Act 1993.

New Zealand was the first English-speaking and the first common law country to appoint an Ombudsman, and the Office of the Ombudsman recently celebrated its 50th anniversary.

The Banking Ombudsman and the Insurance & Savings Ombudsman are private sector ombudsman schemes that investigate and resolve disputes between financial service providers and those who use those services. Although they do not carry out statutory functions, they do “provide the assurance that important private actors too are accountable and observe principles of fairness and consistency in decision-making”.⁷²⁰ They are not part of the Office of the Ombudsman and are not covered further in this assessment.

The main powers of the Ombudsmen derive from the Ombudsmen Act 1975. This has stood the test of time well, but is now in need of review to bring it into line with modern legislation.⁷²¹ The official information legislation has been the subject of a recent review by the Law Commission.⁷²²

⁷¹⁸ Office of the Ombudsman, *Annual Report 2011/12*, 2012, p. 8.

⁷¹⁹ See Office of the Ombudsman, *Statement of Intent for the period 1 July 2012 to 30 June 2015*, 2012.

⁷²⁰ See, for example, Dame Sian Elias, Chief Justice, “The place of the Ombudsman in the justice system”, paper presented at Australia and New Zealand Ombudsman conference It’s the Putting Right that Counts, Wellington, 6 May 2010.

⁷²¹ Mai Chen, “New Zealand’s ombudsmen legislation: The need for amendments after almost 50 years” *Victoria University of Wellington Law Review* vol. 40(4), 2010, p. 723.

⁷²² Law Commission, *The Public’s Right to Know: Review of the official information legislation*, NZLC R125 (Wellington: Law Commission, 2012).

Probably because of the diversity of forms taken by the institution of Ombudsman worldwide, there are few international benchmarks or norms. However, the international status of the Ombudsman of New Zealand is reflected in the fact several New Zealand Ombudsmen, including the current Chief Ombudsman, Dame Beverley Wakem, have been presidents of the International Ombudsman Institute. The Chief Ombudsman is also a member of the Australian and New Zealand Ombudsman Association, which sets stringent criteria for membership.⁷²³

7.1.1 Resources (practice)

To what extent do the Ombudsmen have adequate resources to achieve their goals in practice?

Score: 3

The Office of the Ombudsman has a serious backlog and despite a recently announced increase in funding is probably still under-resourced.

The Chief Ombudsman is of the view that since about 2009, the Ombudsmen have been seriously under-resourced and a substantial backlog of complaints is awaiting investigation. In addition, they have not been in a position to compete in the market for staff, and staff salaries are about 14 per cent below market rate. Staff turnover is low, but increased from 6 per cent in 2010 to 14 per cent in 2011.⁷²⁴

As part of the Budget for 2012, additional funding allowed the Ombudsmen to make a 3.5 per cent adjustment to staff remuneration. For 2013/14, sufficient funding is to be made available for six more investigating staff. In the current economic climate this is a substantial increase, although in the opinion of the Chief Ombudsman a further two investigating staff (that is, eight additional staff) are needed to bring workloads down to a reasonable level.⁷²⁵ The recent introduction of an ongoing continuous practice improvement initiative may make for more efficiency.⁷²⁶

From 2008/09 to 2011/12, the number of complaints on hand at any one time increased from about 1,000 to about 1,700, a 59 per cent increase. In contrast, the Ombudsmen's annual appropriation from Parliament increased only 6.3 per cent, from NZ\$8.33 million to NZ\$8.86 million over the same period. At 31 December 2012, 465 requests for assistance had not been allocated to a case officer.⁷²⁷ In 2011/2, only 53 per cent of complainants considered the ombudsman process to be timely and overall satisfaction with their standard of service has dropped, from 66 per cent in 2008/09 to 55 per cent in 2011/12.⁷²⁸

⁷²³ See the website of the Australian and New Zealand Ombudsman Association. www.anzoa.com.au [accessed 17 February 2013]. The criteria relate to independence, fairness, accountability, accessibility, efficiency, and effectiveness.

⁷²⁴ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷²⁵ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷²⁶ However, the 2012/13 annual report of the Office of the Ombudsman, which arrived too late for analysis in this report, records a further 29 per cent increase in work.

⁷²⁷ Office of the Ombudsman, *Budget Report 2012 for Officers of Parliament Select Committee*, 2012, p. 14.

⁷²⁸ Office of the Ombudsman, *Budget Report*, 2012: 10.

Senior lawyers say that although the Ombudsmen's investigations are thorough and fair, they are no longer referring clients to the Ombudsmen if there is an alternative.⁷²⁹ The process takes too long and irreparable damage may be done to their clients' interests before the investigation can be completed. A case was cited in which a family lodged a complaint in July 2011 against the Immigration Department, which had declared the family to be in New Zealand illegally.⁷³⁰ By January 2012, an Ombudsman had not yet decided whether to accept the case for investigation, and a deportation order was served on the family. Shortly afterwards, the Ombudsman decided to commence an investigation, but the Immigration Department refused to suspend the order and the family was deported.

The Ombudsmen sometimes have insufficient resources to perform new functions allocated to them, or at least to perform them to an acceptably high standard.⁷³¹

In their role under the UN Optional Protocol Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, for example, their inspection team consists of two staff, which is the minimum recommended in the guidelines provided by the Association for the Prevention of Torture.⁷³² No funding is available to employ a medically qualified team member as also recommended by the guidelines.⁷³³ Similarly, no extra funding was made available in 2010 when the Ombudsmen were required to take on the function of providing comment to the Ministry of Transport on applications for authorised access to personal information on the motor vehicle register.⁷³⁴

7.1.2 Independence (law)

To what extent are the Ombudsmen independent by law?

Score: 5

With the minor exception of the reappointment process., the independence of the Ombudsmen is strongly protected by law.

An Ombudsman is appointed by the Governor-General for a term of five years (with provision for reappointment) on the recommendation of the House of Representatives (that is, Parliament).⁷³⁵ It is established practice that the recommendation must be unanimous. An Ombudsman may be removed from office only by Parliament and only for a limited number of specified reasons such as bankruptcy or misconduct.

⁷²⁹ Interview of Tim Clarke, partner at Russell McVeagh, with author, 12 December 2012; interview of Doug Tennent, University of Waikato, with author, 21 December 2012; Mai Chen (public law specialist), "Celebrating 50 years of Ombudsmanship in New Zealand", paper presented at the International Ombudsman Institute conference, Wellington, 16 November 2012.

⁷³⁰ Interview of Doug Tennent, University of Waikato, with author, December 2012.

⁷³¹ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷³² Association for the Prevention of Torture, *Optional Protocol to the UN Convention against torture*, 2010, pp. 51, 71–72. www.apt.ch/content/files_res/opcat-manual-english-revised2010.pdf [accessed 2 May 2013].

⁷³³ Association for the Prevention of Torture, 2010.

⁷³⁴ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷³⁵ Ombudsmen Act 1975, section 3(2).

The Ombudsmen Act 1975, which governs the role of the Ombudsmen, contains no provision declaring it to be a constitutional Act, though there is judicial authority for the constitutional status of the Ombudsmen,⁷³⁶ and they are generally regarded as a constitutional watchdog.

An Ombudsman is an officer of Parliament and accounts to Parliament through the Officers of Parliament Committee, which is a non-partisan committee headed by the Speaker of the House. The Ombudsmen are not subject to the oversight of Treasury or any other government department.

An independent body, the Remuneration Authority, determines the Ombudsmen's salaries, and they may not be diminished during the continuance of an Ombudsman's appointment.⁷³⁷ They are roughly comparable to the salary of a District Court judge.⁷³⁸ Funding for the Ombudsmen's salaries is by way of "permanent legislative authority". An Ombudsman may not hold any other office or undertake any other employment without the specific approval of the Prime Minister.⁷³⁹ The annual budget for the Office of the Ombudsman is agreed with the Officers of Parliament Committee, and then automatically included in the national budget for the year. It is not controlled by Treasury or any other body over which the Ombudsmen have jurisdiction.

The Ombudsmen have sole authority to appoint and dismiss staff, and the relationship between the Ombudsmen and staff is governed by general employment law.

The independence of the Ombudsmen is fully protected by law. However, it should be noted that the reappointment, as well as the appointment, of an Ombudsman requires a unanimous recommendation of Parliament. Accordingly, any political party can block an Ombudsman's reappointment. It has been suggested that it might be preferable for an Ombudsman to serve a single term of five or seven years with no provision for reappointment.

Ombudsman processes (but not decisions) are judicially reviewable. No recent judicial review has involved an Ombudsman.⁷⁴⁰

7.1.3 Independence (practice)

To what extent are the Ombudsmen independent in practice?

Score: 5

Successive Ombudsmen have maintained high standards of independence in practice, and neither their independence nor that of their staff has been seriously questioned.

⁷³⁶ See *Wyatt Co (New Zealand) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, 190 (HC).

⁷³⁷ Ombudsmen Act 1975, section 9(3).

⁷³⁸ Taking into account the allowance for general expenses paid to a District Court judge but not to an Ombudsman.

⁷³⁹ Ombudsmen Act 1975, section 4.

⁷⁴⁰ *Television New Zealand Ltd v Ombudsmen* [1992] 1 NZLR 106 (HC).

It is clear from reported cases⁷⁴¹ and, in particular, from the Ombudsmen's reports on investigations undertaken on their own initiative under the "own motion" powers⁷⁴² that the Ombudsmen act independently of government or any other outside influences.

There have been no examples of political influence (or attempts to exert political influence) on the appointment of Ombudsmen and their staff in the past 20 years. In 1992, a serving Ombudsman's reappointment was blocked by the government of the day,⁷⁴³ but since then Ombudsmen who have signified their availability for reappointment have always been reappointed, and there has been no apparent attempt to influence the appointment or reappointment process.

Complainants to the Ombudsmen are generally treated with respect by the agencies against whom the complaint is made. Any suggestion of retaliatory action could itself be the subject of an Ombudsman's investigation.⁷⁴⁴

In general, the courts support the independence of the Ombudsmen. In one of the few cases where an Ombudsman's decision has been before a court, the judge said, "Parliament delegated to the Chief Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the Chief Ombudsman is plainly and demonstrably wrong, and not because he preferred one side against another".⁷⁴⁵

An independent commentator recently noted that "the gravitas of the office, as an independent and professional Officer of Parliament, allows them to use persuasion to great effect in resolving complaints about matters of administration".⁷⁴⁶

7.2.1 Transparency (law)

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the Ombudsmen?

Score: 4

Adequate transparency provisions are in place, but they could be improved by adopting the Law Commission's recommendations.

The Ombudsmen must report annually to Parliament on the exercise of their functions.⁷⁴⁷ The report is comprehensive and is published electronically and in hard

⁷⁴¹ Available from www.ombudsmen.parliament.nz

⁷⁴² See, for example, the 2012 "own motion" investigation into prison health services: Chief Ombudsman Beverley Wakem and Ombudsman David McGee, *Investigation of the Department of Corrections in Relation to the Provision, Access and Availability of Prisoner Health Services*, 2012. www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/456/original/own_motion_prisoner_health.pdf?1349735789

⁷⁴³ See parliamentary questions recorded in *Hansard* for April 1992:

⁷⁴⁴ Although it is more likely to be the subject of comment in the Ombudsman's opinion on the complaint – email communication with Principal Adviser, Office of the Ombudsman, 18 July 2013.

⁷⁴⁵ See *Wyatt Co (New Zealand) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180, 190 (HC).

⁷⁴⁶ Chen, 2012.

copy. They are also required to publish an annual Statement of Intent.⁷⁴⁸ They have the power to publish reports about the exercise of their functions or about specific cases⁷⁴⁹ and regularly publish case notes, opinions, reports, and guidelines. However, they are not formally required to do so.

In its recent review of the official information legislation,⁷⁵⁰ the Law Commission recommended that the Ombudsmen should expressly be given the function of publishing opinions and guidelines on that legislation. The Ombudsmen accept the desirability of such a change and consider it should also be extended to their general jurisdiction under the Ombudsmen Act.⁷⁵¹

The Official Information Act 1982 does not apply to the Ombudsmen, but the Law Commission has recommended that it be extended to cover all officers of Parliament in respect of their administrative functions.⁷⁵² The government has not accepted the recommendation. It seems reasonable that the Ombudsmen should be open to the same scrutiny as other public bodies.

The Ombudsmen and their staff have a general duty of confidentiality in respect of information they receive⁷⁵³ and do not publish identifying information about complainants.

There is no legal requirement for Ombudsmen or their staff to publish declarations of assets.⁷⁵⁴

7.2.2 Transparency (practice)

To what extent is there transparency in the activities and decision-making processes of the Ombudsmen in practice?

Score: 5

There is a good level of transparency in practice, generally more than is required by law.

The Ombudsmen regularly publish the annual report required by the legislation. It gives a comprehensive account of the Ombudsmen's activities in the previous year, including the numbers and types of complaints and the time taken to complete investigations. Reports on own motion investigations are also published.

For many years, the Ombudsmen have published case notes, and they now offer an extensive range of guidance notes, newsletters, reports, and other publications. Their

⁷⁴⁷ Ombudsmen Act 1975, section 29.

⁷⁴⁸ Public Finance Act 1989, section 39.

⁷⁴⁹ Ombudsmen Rules 1989.

⁷⁵⁰ Law Commission, NZLC R125, '2012: 44.

⁷⁵¹ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷⁵² Law Commission, 2012: 339.

⁷⁵³ Ombudsmen Act 1975, section 21.

⁷⁵⁴ But see the discussion under "Integrity mechanisms", p. 220.

new website⁷⁵⁵ has the stated purpose of informing the public about the role of the Ombudsmen and providing a platform from which to build resources for both the public and state sector agencies.⁷⁵⁶

Information is available in several languages, including New Zealand's three official languages.⁷⁵⁷ A suite of information leaflets in different languages (including some directed specifically at prison inmates), was recently reviewed in view of New Zealand's changing demographic and now includes information in Braille.

A recently introduced policy requires the maintenance and publication of registers of interests for Ombudsmen and their staff.⁷⁵⁸

7.2.3 Accountability (law)

To what extent are there provisions in place to ensure that the Ombudsmen have to report and be answerable for their actions?

Score: 5

The law requires the Ombudsmen to be fully accountable.

As already noted, the Ombudsmen are accountable to Parliament through a select committee – the Officers of Parliament Committee – and make an annual report to Parliament. The report is publicly available.

Audit New Zealand audits the performance of the Office of the Ombudsman in relation to its published performance measures as agreed with the select committee and in regard to its obligations under the Public Finance Act 1989.

In relation to their function as a “national preventive mechanism” under the Crimes of Torture Act 1989, the Ombudsmen contribute to a national report made by the Human Rights Commission to the UN Subcommittee on the Prevention of Torture.

The Ombudsmen are subject to the general law (including the Protected Disclosures Act 2000). There is an exception for the protection of confidentiality and for “anything [the Ombudsmen] may do or report or say” in the course of exercising the statutory functions, unless in bad faith.⁷⁵⁹ Ombudsman processes are judicially reviewable.

The Office of the Ombudsman has a formal, documented process for ensuring complaints about the Ombudsmen and their staff are taken seriously and handled appropriately.⁷⁶⁰

⁷⁵⁵ www.ombudsman.parliament.nz

⁷⁵⁶ Office of the Ombudsman, *Annual Report*, 2012: 9.

⁷⁵⁷ English, Māori, and New Zealand Sign Language.

⁷⁵⁸ See below under “Integrity mechanisms”.

⁷⁵⁹ Ombudsmen Act 1975, section 22.

⁷⁶⁰ Office of the Ombudsman, *Continuous Practice Improvement Manual*, 2012.

7.2.4 Accountability (practice)

To what extent do the Ombudsmen report and be answerable for their actions in practice?

Score: 5

The Ombudsmen comply with the legal accountability requirements. There has been no occasion in recent years for judicial review.

The Ombudsmen report to Parliament through the Speaker each year, and the report contains comprehensive information on the activities of the Ombudsmen and their staff, including performance against the measures specified in their public Statement of Intent. The report has always been submitted on time. Neither the House nor the Officers of Parliament Select Committee has recently debated the Ombudsmen's report,⁷⁶¹ though there has been debate in the Government Administration Select Committee.

It is not unusual for complaints about the Ombudsmen to be made to the Speaker. Although the Speaker has no legal duty to consider such complaints, there is a practice whereby the complaint is forwarded to the relevant Ombudsman, who then reports to the Speaker on it.⁷⁶²

There have been no cases of whistle-blowing within the Office of the Ombudsman and no suggestion of circumstances where whistle-blowing would be desirable.

A judicial review mechanism exists, but has not been used in recent years.

7.2.5 Integrity mechanisms (law)

To what extent are there provisions in place to ensure the integrity of the Ombudsmen?

Score: 4

The statutory provisions ensuring the integrity of the Ombudsmen have a few gaps, but the new code of ethics fills most of them.

On taking office, an Ombudsman is required to take an oath that "he will faithfully and impartially perform the duties of his office, and that he will not except in accordance with [certain specified exceptions] divulge any information received by him under this Act".⁷⁶³

An Ombudsman and the staff of the Ombudsmen's office are "officials"⁷⁶⁴ for the purposes of sections 105 and 105A of the Crimes Act 1961, which prohibit bribery of, and the corrupt use of official information by, officials.

⁷⁶¹ An Ombudsmen's report was last debated in 1999.

⁷⁶² Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷⁶³ Ombudsmen Act 1975, section 10.

⁷⁶⁴ Ombudsmen Act 1975, section 21.

There are no statutory provisions for a public declaration of an Ombudsman's assets or other pecuniary interests, and no restriction on post-service employment. An internal code of conduct (a code of ethics) was recently introduced, but is not yet fully in effect.

The code is contained in an internal office manual and includes policies that apply to Ombudsmen and their staff. Key points from the code are:

- staff and Ombudsmen must complete a comprehensive annual conflict of interest declaration, including financial assets and interests as well as gifts and hospitality invitations, and the Chief Ombudsman may publish this register
- all staff must proactively notify management of any potential conflicts of interest in areas for which they have official responsibility
- a conflict of interest register in relation to managing specific conflicts of interest is maintained
- staff and the Ombudsmen must avoid hospitality invitations unless the business benefit to the office exceeds any private benefit
- staff and the Ombudsmen must record details of all gifts and hospitality invitations on a gifts and hospitality register that will be publicly released at least annually.⁷⁶⁵

As noted above, the courts may conduct a judicial review of the process by which an Ombudsman determined a complaint, and this power would extend to a review of any allegations of bias or improper influence.

7.2.6 Integrity mechanisms (practice)

To what extent is the integrity of the Ombudsmen ensured in practice?

Score: 5

The integrity of the Ombudsmen and their staff has never been seriously questioned.

Staff of the Ombudsmen's office take an oath of secrecy, adhere to a code of ethics, go through formal induction and training programmes, make regular declarations of conflicts of interest, and have the necessary security clearances.⁷⁶⁶

The new code of ethics has been in place only a short time, so it is not yet possible to assess its effectiveness. The gifts and hospitality register (see above) has not yet been published.

In general, the integrity of the Ombudsmen is ensured through the appointment process, their accountability to Parliament, and the openness of their processes, including the process for handling complaints about the Ombudsmen.

⁷⁶⁵ Office of the Ombudsman, 2012. The two registers are being implemented.

⁷⁶⁶ Office of the Ombudsman, *Statement of Intent for the period 1 July 2011 to 30 June 2014*, 2011.

7.3.1 Investigation

To what extent is the Ombudsman active and effective in dealing with complaints from the public?

Score: 5

The Ombudsmen are highly active and effective and are greatly respected.

The jurisdiction of the Ombudsmen extends to almost all government departments and agencies, local government bodies, including the governing bodies of state-run schools, and (under only the official information legislation) ministers of the Crown. It does not extend to the Parliamentary Service. It extends to government trading enterprises, but debate is considerable about whether it should extend to mixed-ownership-model enterprises such as power companies that are currently state owned but the government has announced its intention to sell up to 49 per cent of its interest. There is a similar debate about the inclusion of proposed “charter schools” (currently excluded), which will be privately owned but receive public funding.

Complaints to the Ombudsmen are usually made in writing (including by email), but if a complainant has any difficulty making a written complaint, Ombudsmen staff will take an oral complaint, write it down, and check its accuracy with the complainant.

In 2011/12, the Ombudsmen received 10,636 complaints and other contacts requiring action and completed 10,250.⁷⁶⁷ Most investigations are of complaints from the public, but the Ombudsmen have, and regularly exercise, the power to investigate an issue of their own motion.⁷⁶⁸

There is a reasonable degree of public awareness of the right to complain to an Ombudsman. A survey by an independent research organisation in 2012 found that 69 per cent of respondents had heard of the Ombudsmen, although 14 per cent of those respondents were not sure what the Ombudsmen did.⁷⁶⁹

Under the Ombudsmen’s general jurisdiction, they have recommendatory powers only. However, it is unusual for an Ombudsman’s recommendation to be declined. In 2011/12, 23 recommendations were made: 20 were accepted, 1 was partially accepted, and the Ombudsmen were awaiting the agency’s response on the other 2.

Under the official information legislation, an Ombudsman’s recommendation imposes a public duty on the relevant organisation to observe that recommendation.⁷⁷⁰ Cabinet may veto a recommendation, but has never done so. Rather different provisions apply to recommendations in respect of local government⁷⁷¹ where the veto has been used very occasionally.

⁷⁶⁷ Office of the Ombudsman, *Annual Report 2011/12*, 2012: 5.

⁷⁶⁸ Ombudsmen Act 1975, section 13(3).

⁷⁶⁹ UMR Research, *Nationwide Omnibus Survey*, May 2012

⁷⁷⁰ Official Information Act 1982, section 32.

⁷⁷¹ The Law Commission ‘recommended extending the Cabinet veto to local government recommendations in place of the existing provisions: Law Commission, 2012: 242.

In general, the Ombudsmen are highly regarded. Two independent lawyers interviewed for this assessment expressed the highest regard for the Ombudsmen, their staff, and the quality of their processes and decisions, with concern only about the time taken over investigations.⁷⁷² Surveys of complainant satisfaction are not a good indicator of the Ombudsmen's performance as unsuccessful complainants will usually be dissatisfied, however well the complaint was handled. However, note that complainant satisfaction has recently declined.⁷⁷³

The Law Commission stated that, "The flexible and inquisitorial nature of the processes followed by the Ombudsmen is effective for resolving official information disputes".⁷⁷⁴ It also noted that concerns had been raised about the time taken to complete investigations.

7.3.2 Promoting good practice

To what extent is the Ombudsman active and effective in raising awareness within government and the public about standards of ethical behaviour?

Score: 4

Although the Ombudsmen have been active through the complaint investigation process, especially in the use of the "own motion" powers, and do some training, they do not generally carry out oversight or educational activities.

There appears to be a case for reviewing the Ombudsmen's functions and funding with a view to enabling them to promote better administrative practices in the public sector and, thus, greater public trust in government.

The Ombudsmen have always been active in identifying and addressing all kinds of maladministration, usually through the investigation and resolution of specific complaints.

In recent years, the Ombudsmen have made greater use of the power to conduct an "own motion" investigation,⁷⁷⁵ especially in relation to conditions in prisons.⁷⁷⁶ The Chief Ombudsman also recently announced an investigation into the handling of requests for official information in certain government departments and agencies⁷⁷⁷ in view of concerns that delay and obstruction may have become institutionalised in them.

In 2012, the post of senior adviser wider administrative improvement was created to consider and recommend to the Chief Ombudsman issues that might warrant an

⁷⁷² Interview of Tim Clarke, partner at Russell McVeagh, with author, 12 December 2012; interview of Doug Tennent, University of Waikato, with author, 21 December 2012.

⁷⁷³ Office of the Ombudsman, *Budget Report*, 2012: 10.

⁷⁷⁴ Law Commission, 2012: 244, para. 11.102.

⁷⁷⁵ Section 13(3) of the Ombudsmen Act 1975 gives an Ombudsman power to investigate a complaint or "of his own motion".

⁷⁷⁶ Recent investigations related to self-harm in prisons (2010), prisoner complaints systems (2011), and prison health services (2012).

⁷⁷⁷ Media release, 18 December 2012.

investigation of this kind – that is, systemic issues or when investigation of a complaint identifies an opportunity for wider administrative improvement.⁷⁷⁸

There is a training programme for state sector agencies, and advice and comment are also provided on legislative, policy, and procedural matters.⁷⁷⁹ However, the Ombudsmen do not have the legislative authority or the funding to carry out more extensive educational or awareness programmes.

The Chief Ombudsman notes that in other jurisdictions Ombudsmen have published material on the principles of good administration and similar topics,⁷⁸⁰ and indicates that she would be able to do the same if funding were available.

The Law Commission, in its review of the official information legislation, identified the absence of an oversight function. It recommended that the legislation be amended to include provision for the functions of policy advice, review, statistical oversight, promotion of best practice, oversight of training, oversight of requester guidance, and annual reporting.⁷⁸¹ To date, the government has not accepted this recommendation. The Law Commission did not extend its comments to the operation of the Ombudsmen Act, but a similar oversight function would enable the Ombudsmen to act more effectively in raising awareness within government and the public about standards of ethical behaviour.

In the wake of a major mining disaster at Pike River after which a Royal Commission found that workers and management knew the mine was unsafe, questions were asked about public understanding and knowledge of the Protected Disclosures Act 2000.⁷⁸² However, there does not appear to have been any suggestion that the Ombudsmen are failing in their duty to provide advice and guidance to potential whistle-blowers, and they are not required or funded to provide general education on the Act's provisions. Any criticism has been directed at the Act itself and the level of protection it provides.

Agencies must develop their own processes for those who want to make protected disclosures, and these processes should include providing information about the advice and other information available from the Ombudsmen. However, the Ombudsmen have not audited the processes and have no resources to do so.⁷⁸³

⁷⁷⁸ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

⁷⁷⁹ Office of the Ombudsmen, *Annual Report*, 2012.

⁷⁸⁰ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012 where she cited, in particular, Ann Abraham, *Principles of Good Administration*. www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples

⁷⁸¹ Law Commission, NZLC R125, 2012: 317.

⁷⁸² See, for example, "Where were the mine whistleblowers?", *The Press*, 11 November 2012.

⁷⁸³ Interview of Dame Beverley Wakem, Chief Ombudsman, with author, 11 December 2012.

7.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect, and participation. What do the Ombudsmen do to partner with Māori, to respect and affirm Māori rights to make decisions, and to enhance Māori participation in its field of activity? In particular, where the Ombudsmen have legal rights and obligations in this respect given to them by the Crown, how well do they honour them, including any Treaty obligations passed on by the Crown?

Ombudsman staff receive training in the Treaty, and information is available in te reo. There are some outreach programmes in areas of high Māori population.

The Ombudsmen appear very conscious of the Treaty of Waitangi and their relationship with Māori. For example, when the Ombudsmen recently hosted the International Ombudsman Institute conference, Māori were involved in the planning and there was a formal welcome by Māori at the commencement of the conference.⁷⁸⁴

The Deputy Ombudsman advises that staff were given specific training on the Treaty of Waitangi five years ago, and such training has since been reviewed and incorporated into the staff training schedule. The Ombudsmen plan to use existing links with Māori communities and tailor aspects of the training to focus on the Treaty, and on constitutional arrangements from the perspective of the office, described as “fairness for all, how we impact on Māori communities, and being able to navigate Māori people to access information and education, particularly rights based education”.⁷⁸⁵ Discussions are under way with Port Nicholson Settlement Trust and Ngāti Poneke (a pan-tribal iwi) to build the capacity of the organisation and enhance the professional knowledge of staff for working with all communities, particularly Māori.⁷⁸⁶

The Ombudsmen’s information leaflets are produced in te reo Māori (language), and the office subscribes to Language Line, an interpretation service for telephone callers. Until mid-2012, the Ombudsmen had one staff member (now retired) who was a fluent speaker of te reo (Māori language) and had expertise in tikanga Māori (law, rules, and practice).⁷⁸⁷ Another staff member has some knowledge of te reo and tikanga Māori. Both were available to advise the Ombudsmen and staff and to accompany them as appropriate on business with public sector agencies and international visitors.

The Ombudsmen engage in some outreach programmes delivered by government in remote areas with substantial Māori populations. In areas such as Gisborne, Kaitia, Whangarei, Whanganui, and Hawke’s Bay, they deliver presentations to the public generally, to groups interested in Māori health, budgeting, and advocacy, and to interest groups such as Citizens Advice Bureaux and community law centres. In particular, they participate in an outreach programme organised by staff from the

⁷⁸⁴ See the conference programme for Speaking Truth to Power: The Ombudsman in the 21st century, Wellington, 12–26 November 2012.

⁷⁸⁵ Email communication between author and Deputy Ombudsman Bridget Hewson, 23 January 2013.

⁷⁸⁶ Email communication between author and Deputy Ombudsman Bridget Hewson, 23 January 2013.

⁷⁸⁷ An appointment has not yet been made to fill the vacant position.

Ministry of Consumer Affairs, who are extremely competent at promoting the programme to Māori communities.⁷⁸⁸

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⁷⁸⁸ Email communication between author and Deputy Ombudsman Bridget Hewson, 23 January 2013.