

**“Achieving Administrative Justice
and Procedural Fairness
in Ombudsman Investigations”**

The role the Ombudsman plays alongside courts, tribunals and other bodies in providing remedial help to people and how the rules of natural justice/procedural fairness are fundamental to effective investigations.

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INTRODUCTION

A former New Zealand Ombudsman and now Governor-General, Anand Satyanand, was a District Court Judge before being appointed Ombudsman. From time to time in speeches and addresses on the role of an Ombudsman, he would draw the following distinction between the courts and Ombudsmen:

- As a judge, he noted that the courts had wide powers but a limited jurisdiction.
- As an Ombudsman, he noted that he had a wide jurisdiction but limited powers.

His experience, and my own, is that the width of an Ombudsman's jurisdiction is a significant influence on how an Ombudsman provides remedial help to people.

The sheer width of the jurisdiction means that ensuring natural justice and procedural fairness are fundamental to maintaining the integrity and effectiveness of the Ombudsman investigation process.

In simple terms, the methodology of the New Zealand Ombudsmen investigative process can be reduced to 4 simple elements;

- Establish the relevant facts;
- Apply the relevant law;
- Ensure procedural fairness and natural justice; and
- Reach a logical conclusion - and explain it adequately.

Effective investigations (especially when an Ombudsman has only the power of persuasion through non-binding recommendations) will depend upon *all 4 elements* being achieved. So ensuring procedural fairness and natural justice is just as important as properly establishing the relevant facts and identifying and applying the relevant law.

Having said that, an essential ingredient in an Ombudsman's ability to persuade agencies and complainants to accept the outcome of investigations is the assurance that they have had reasonable opportunity to be heard on relevant issues raised in an investigation.

Procedural fairness should therefore be seen as part of the investigative process for Ombudsmen and not as a separate overriding consideration to be rigidly applied in some measure, regardless of the circumstances of a particular case.

Put another way, “effective investigations” by an Ombudsman rest on getting both the *process* and the *outcome* right - and gaining complainant and agency acceptance.

What this means in particular investigations can actually be quite different depending on the circumstances of the case. In the real world of Ombudsmen investigations, the application of the principles of natural justice/procedural fairness for example, can invariably require a balance to be met with the competing demands of conducting an efficient investigation and timely closure.

Today, I want to talk about the basic principles of natural justice and procedural fairness which apply to us all and then consider some of the difficulties and challenges that can arise in operational practice with reference to an example from the New Zealand context, and one from Australia.

But first, and briefly, some thoughts on the role Ombudsmen play alongside courts, tribunals and other bodies in providing remedial help to people.

In the eyes of the public, the most recognisable role of the Ombudsman is that of performing functions similar to those of the courts and tribunals.

- The **role** is reactive, triggered by a complaint or claim from an aggrieved citizen.
- The **task** is to adjudicate on the issues arising, make judgments informed by evidence and principle.
- The **function** is to secure appropriate and just remedy.

What was envisaged as the territory of the Ombudsman was expressed quite succinctly by an English MP of the 1960s, the Rt Hon Richard Crossman, while speckaing on the second reading of the Parliamentary Commissioner Bill and has since been referred to time and again in Ombudsman circles as conveying the “*Crossman catalogue of maladministration*”. He said:

“In the first place I can define [maladministration] to some extent negatively. It does not extend to policy, which remains a matter for Parliament. Nor do we include ... that whole group of discretionary decisions ... properly exercised, which the complainant dislikes but cannot fault the matter in which they were taken.

A positive definition of maladministration is far more difficult to achieve. We might have made an attempt to define by catalogue all of the qualities which make up maladministration which might count for maladministration by a civil servant. It would be a wonderful exercise:

- *bias*
- *neglect*
- *inattention*
- *delay*
- *incompetence*
- *inaptitude*
- *persivity*
- *turpitude*
- *arbitrariness*

*It would be a long and interesting list. ... **Injustice** [is not defined] by using terms such as loss or damage as these may have legal overtones which could be held to exclude one thing which should remain – the sense of outrage aroused by unfair or incompetent administration even where the complainant has suffered no actual loss.”*

These things we know:

The Statutory Ombudsmen lacks the powers to make orders as a court may do. I cannot, for example, make a declaration of invalidity - instead, I must rely on recommendation, persuasion and publicity to effect change. I am also unable to:

- Injunct an agency;
- Command action;
- Award damages or compensation for defective administration; or
- Review ministerial actions and decisions

We also know that Statutory Ombudsmen have sometimes been described as a ‘toothless tigers’ on the basis that they only have the power of persuasion through non-binding recommendations. Because of this, and depending upon the remedy sought by a complainant, I may suggest to a complainant that it would be more appropriate for them to seek review by a court or a tribunal. Sometimes an Ombudsman will have to decline to investigate a complaint on that basis.

That said, the New Zealand Parliamentary Ombudsmen have found that, more often than not in practice, agencies are prepared to accept a reasoned argument that a decision or practice is unreasonable, contrary to law and should be altered.

The Ombudsman “system of justice” is significantly different from that of the Courts and Tribunals - and it is not just the relative flexibility of the Ombudsman process that distinguishes it from its judicial analogue.

- The formality and legalism that characterise the legal process are also absent from the Ombudsman system of review, instead an Ombudsman's inquiry is relatively informal with a view to producing a process of dispute resolution that is:
 - Responsive to the needs of citizens;
 - Fair to both parties; and
 - Effective in delivering appropriate remedies.
- The Ombudsman process is also an essentially inquisitorial one. My investigations for example, are normally conducted in correspondence and by face to face or telephone interviews rather than in the adversarial environment of a courtroom;
- Another significant difference is that Ombudsmen findings are not confined to strict judicial precedent. Instead, the conclusions reached, are founded on what an Ombudsman considers just and reasonable in the particular circumstances of the case - informed by principle of course - but far less legalistic than the judgment of a court or tribunal;
- It is true however, that the remedy recommended by an Ombudsman may not always be enforceable against the agency by the complainant - but it will nevertheless have authority derived from its logic and moral force.
- The remedy recommended by an Ombudsman will also frequently extend beyond the sort of redress that a complainant could normally expect to obtain from the court and tribunal process. For example, an Ombudsman can, and in my experience often does, determine best practice standards and recommends systemic change.

The remedies offered by the Ombudsman often have greater potential for "putting right" the specific maladministration that gave rise to the particular grievance in the first place.

As a result, they can effect a degree of future prevention as well as retrospective cure - and this is where the underlying ethos of the Ombudsman approach (which is as much concerned with the longer-term improvement of administrative systems as it is with the resolution of individual disputes), comes to the fore.

The grievances that citizens bring to Ombudsmen put them on notice of where things are going wrong and indicate where improvement is most needed. Often then, an Ombudsman's recommendation for remedial action in a particular case will include a prescription for a change of values and behaviours within an agency to promote good administration and reduce the likelihood of repetition.

Further, drawing from my experience, I think it is important for Ombudsmen to remember that the problems people have with government agencies and any other organisations that impact on their lives are, more often than not, about procedural justice than about the substantive correctness of decisions.

The prevalent issues raised before me, as an Ombudsman, are usually founded on administrative matters such as:

- Delay,
- Misleading advice,
- Inexplicable reasons,
- Lost paperwork and
- Discourtesy.

Rarely will the remedy for such a grievance actually be the reversal of a decision by a determinative decree or a declaratory, mandatory or injunctive order of the kind granted in judicial review. Rather, I have found the more appropriate and accepted remedy is quite simply an explanation or an apology coupled with a review of the process at issue.

One should never underestimate the power of an apology.

By undertaking a task which affects and involves examination of organisations' powers and responsibilities, a question arises as to whether an Ombudsman's office itself should be subject to judicial scrutiny if its investigation and recommendation breaches appropriate procedural and jurisdictional limits.

In most jurisdictions the answer will be yes.

However, this susceptibility of the Ombudsmen to judicial review can become as much a feature of Ombudsman practice as it is of those public authorities subject to Ombudsman investigation.

A useful summation of the extent of justiciability of Ombudsman decisions comes from an article in the summer edition of the publication *Public Law 2000* by Dr Philip Giddings of the Ombudsman Institute at Reading University in the UK. He wrote:

"If the Ombudsman wishes to ensure that their findings are 'judge-proof', they will have to ensure that they clearly and convincingly set out the reasons for the exercise of discretion with regard to their investigation power and the manner in which they have conducted their investigation. They will also have to make explicit the process of reasoning by which they find that 'injustice' has or has not been done to a complainant in the light of clarifications of the meaning of that term which the courts have now given."

Professor Giddings was referring to a then recent UK court decision where the findings by two successive parliamentary commissioners for administration were reviewed by the courts and overturned because of crucial omissions leading to a flawed decision.

Judicial review by the courts is certainly a potent way in which the courts can safeguard the rights of citizens. It ensures that public authorities act within the law:

- By defining the principles of law that govern administration; and
- By safeguarding individual interests against illegal or unreasonable administrative action.

One of those legal principles the courts have defined is procedural fairness - and a failure to observe procedural fairness is often a ground for challenging administrative decisions or actions.

However, the elements of what may constitute procedural unfairness can be unclear to agencies and complainants (and, dare I say it, on the odd occasion to Ombudsmen and their staff).

Procedural unfairness can take a number of forms:

One form of procedural unfairness is **bias** – and the appearance or suspicion of it. There will be apparent bias, if in all the circumstances of the case, there is a real danger or real possibility of bias.

The test has been variously expressed by Australasian courts over the years - but in New Zealand it was recently held to be:

- Whether the reasonable observer
- Aware of all the circumstances of the case
- Would think that the impartiality of the decision-maker
- Might be or might have been affected.

Examples of bias include:

- Potential conflicts of interest arising from financial interests in the substantive matter of the decision,
- Close personal contact between the decision-maker and someone subject to their decision, for example by being related to the them; or
- Prejudgment of a contested issue by something that was earlier said by the decision-maker,

- Ingrained hostility on the part of the decision-maker to one party to a dispute; or
- Having some past connection with the applicant.

In practice, the bias rule requires an absence of behaviour that would cause an onlooker to reasonably suspect or apprehend such bias.

The bias rule is potentially troublesome for Ombudsmen and their staff because they can often have some connection with the issues under investigation, e.g. It could be as simple as being:

- A taxpayer/ratepayer,
- Car owner, or
- A friend or relation of someone working in the government agency that is subject to investigation.

Generally, the bias rule is not breached because the decision-maker has a prior engagement with the parties or the issues, or has earlier expressed an opinion on those issues. Something more has to be shown to establish a reasonable apprehension of bias, e.g. that the decision-maker is so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments are presented.

If you are a sole Ombudsman then you need to give maximum opportunity to comment on provisional findings and explain the reasons for those findings very carefully and fully. If you are conflicted you will need to consider delegating to a deputy or, as has been done by some Ombudsmen, to an external, competent person.

Of course, a party may waive its objection to a decision-maker who would otherwise be disqualified on the ground of bias. But in any event, Ombudsmen and their staff are always expected to display a high degree of independence and objectivity.

Legitimate expectation – is another form of procedural fairness.

In certain circumstances, the duty to act fairly will include an obligation to act consistently with some previous representation or in accordance with how other similar cases have been treated. This applies particularly where a person's "*legitimate expectations*" may be disappointed.

A legitimate expectation is relevant only to the *process* by which the decision was reached. The *outcome* will not have a bearing on whether or not a legitimate expectation is reasonably held.

A legitimate expectation can arise from:

- Previously expressed assurances, promises or statements of intent by the decision-maker;
- A regular practice that the claimant could reasonably expect to continue;
- The wording of the legislation.

In New Zealand we have sometimes been criticized for taking a “case by case” approach. As I have already noted circumstances can differ markedly in apparently similar cases. That said, however, it would be foolish to ignore precedent cases where the *principles* are the same.

Lack of consultation or inadequate consultation is another form of procedural unfairness and is often pleaded as a separate ground for review in the courts - but it will also often merge with allegations of failure to take account of relevant considerations or breach of legitimate expectation of the general duty of fairness in Ombudsmen enquiries.

Sometimes a statute or regulations will specifically provide for consultation with affected parties before a decision can be taken. In these cases, an Ombudsman would be reviewing whether the statutory requirements were carefully followed.

In other cases, consultation is more an issue of good practice and a protection against:

- Overlooking relevant considerations; or
- Making material mistakes of fact or law;
- Or breaching a legitimate expectation of consultation before a policy is changed.

Consultation will not be required in all circumstances. There will be times:

- When decision makers (and Ombudsmen) are already adequately informed of the relevant views of those affected; or
- Where a decision is simply a step in a process and does not, *of itself*, affect a person’s legal rights.

It is also important not to confuse consultation with agreement or negotiation. Although decision-makers must approach consultation honestly and be open to changing their minds, they may very well have a preferred option as a basis for the consultation and must remain free to make the eventual decision. This applies to Ombudsmen too.

Overall then, the duty to act fairly, insofar as it relates to consultations, means decision-makers (including Ombudsmen) must give adequate opportunity for representations to be made and considered so that they may be fully aware of all the relevant considerations before making a decision. The parties consulted

must have adequate information to know the case they have to answer - and what this amounts to in practice will depend upon:

- The facts and circumstances of the case,
- The nature of the rights likely to be affected; and
- The procedures in place to give those affected a proper opportunity to put their case.

This last point leads neatly to the last form of procedural fairness that ought to be present in any investigation by an Ombudsman – namely, the obligation to observe natural justice.

This is a procedural obligation that applies to any administrative decision that adversely affects an existing right, interest or legitimate expectation of a person.

Natural justice requires that a person:

- Be told ‘the case to be met’ and
- Be given the opportunity to comment in reply.

This rule has crystallised into a legal principle that a person be given an opportunity to respond to ‘adverse information that is credible, relevant and significant’. This concept, in my experience, is most often **breached** in cases involving immigration matters. The “potentially prejudicial information” gathered is often ill-founded, incomplete, resulting from poor investigative techniques and not put adequately to the complainant.

Providing natural justice is inherent in the Ombudsman model of inquiry - which is to hear both sides of an issue and reach a measured and objective opinion.

From experience, we all know there can be two sides to a story - and often matters are not as they first seemed. Indeed, for many complainants the main grievance turns out to simply be that no one was prepared to listen to their side of the story. And all working Ombudsmen, at some time or another encounter complainants who, when we actually meet them, present a very different picture to the reputations that may have preceded them.

Natural justice requires that *before* a decision is made, an administrative hearing comprising three elements must be held:

1. Prior notice of the potential decision;
2. Disclosure of “the case to be met”; and
3. A reasonable opportunity to reply.

In practice, this can end up manifesting itself in a number of ways:

- Giving prior notice of allegations that the person or body is to answer;
- Giving the person or body reasonable time to prepare his or her case;
- Disclosing all the relevant material relied upon;
- Granting an oral hearing if requested;
- Giving prior notice of proposed findings and likely recommendations and/or the risk or likelihood of those findings (provisional views);
- Giving proper consideration to all representations made; and
- Depending on the statute and context, giving reasons for a decision

This all sounds good in theory, but in practice, problems can arise (both in administrative decision-making generally and in Ombudsmen's investigations) and here is where I would like to focus the rest of this session.

Australia's Commonwealth Ombudsman, Professor John McMillan, has articulated succinctly a number of practical problems Ombudsmen face regarding natural justice.

An obvious difficulty of imposing this rule of natural justice is that:

- It can be difficult to know **what** to disclose.

In a decision-making process there are usually many documents on file that summarise and analyse the issues, and comment upon points made in letters and submissions received from a person.

Simply collecting all the adverse comments together and providing them to a person for comment won't be good enough.

It is common to hear that administrators have discussed their uncertainty about what should be disclosed, and sought legal advice on the matter.

Also, even if disclosure has occurred, if other documents are subsequently received or prepared, it may be necessary for a further round of disclosure and comment - and it's quite possible that other rounds of disclosure even after that can be required.

The hearing rule does not, however, require disclosure of any *internal "evaluation"* of a person's submission. However, I note Professor McMillan has made the observation in the past that the dividing line between what constitutes an *in-house "evaluation"* and an *"adverse inference"* can be a fine one.

Judgments by a court on review have held that an internal remark or assessment could indicate bias or predetermination.

In this regard, while natural justice places an obligation on the decision-maker, before reaching a decision, to notify a person of any adverse comment made by other officers of the agency during their internal discussion and analysis of a case, a decision-maker is not expected to disclose his or her own preliminary or draft thoughts in advance of reaching a decision.

Professor McMillan illustrated this by reference to the case of *Kioa v West* (1985) 159 CLR 550.

The difficulty of applying that principle is illustrated by Kioa v West, in which Brennan J first enunciated that standard. Mr Kioa faced deportation after the expiration more than a year earlier of his student visa. He was given two opportunities to present his case – at an interview with a Departmental officer and in a submission from the Legal Aid Commission of Victoria. Following that, an internal paper was prepared within the Department to brief the decision-maker on the case. The internal paper referred to a point made in the Legal Aid submission, that Mr Kioa had been providing pastoral care to other illegal immigrants from Tonga, but added: ‘his active involvement with other persons who are seeking to circumvent Australia’s immigration laws must be a source of concern’. By majority, the High Court held that this internal remark – described variously as ‘extremely prejudicial’, ‘clearly prejudicial’, and ‘credible, relevant and damaging’ – gave rise to the breach of natural justice.

It is debatable whether that was a reasonable description of the remark in the internal paper. The alternative view put by Gibbs CJ in dissent was that the remark was merely ‘the officer’s comment on material put before the Department by Mr Kioa and his solicitor’ and reflected Government policy.

Putting that debate to one side, the more significant point to emerge from Kioa is that natural justice placed an obligation on the decision-maker, before reaching a decision, to notify a person of any adverse comment made by other officers of the agency during their internal discussion and analysis of a case. That obligation existed even if – as in Kioa – there was nothing to suggest that the decision-maker had been influenced by the internal comments in reaching a decision.

Another difficulty of imposing this rule of natural justice that is often experienced is that:

- It can be difficult to know **who** should be given an opportunity to comment before any report or decision it is finalised. Some officers or people referred to in a report or decision may be mentioned in an adverse light, but only to the extent that they were carrying out a flawed agency policy, or were the subject of critical comments made by some other person quoted in the

report.

- It can also be difficult to know *when* the opportunity to be heard should be given.

As I noted earlier, natural justice expresses a legal/judicial philosophy of how decisions should be made which has been modified to apply to administrative processes. Professor McMillan has warned that one should never underestimate the preparedness of courts to apply the hearing rule rigorously and even to extend its requirements, if this is the ground upon which a particular complainant seeks judicial review. Decision-makers (and Ombudsmen) should therefore be aware that the obligation to observe natural justice is not simply satisfied by following some hearing code that may be contained in either legislation or in an internal policy or practice manual.

For the parliamentary Ombudsmen in New Zealand, there is a *statutory obligation* in the Ombudsmen act to give a hearing only if there appears to the Ombudsman to be sufficient grounds for an adverse opinion to be formulated by them. Beyond that, there is no obligation in the act for any person to be heard.

So to ensure that any such hearing requirements adequately match what the rules and principles of natural justice would otherwise require, New Zealand Ombudsmen must give this careful consideration in the particular case before them. It may result in the Ombudsman telling the agency which parties were consulted and what their responses were or suggesting that the agency may wish to show the provisional view to any parties mentioned in it.

I am aware that in some jurisdictions, provisional views are not given. But in my opinion this is an important step in the process of achieving fairness. It adds to the robustness of the final decision and gives confidence to all parties about the rigour and transparency of the process. The opportunity to comment on the provisional view increases the likelihood of recommendations being accepted.

As I mentioned earlier, the obligation to be heard can continue until the moment of final decision - irrespective of how many hearings have already been held.

So, if an adverse item of information becomes relevant to a decision and has not been disclosed in any earlier hearing, this will need to occur before any final decision can be made - and in New Zealand it is certainly common now in administrative decision-making for more than one hearing to be given to a person, albeit through abundant caution in some cases.

There is no doubt, one can also go overboard in trying to comply with the principle of natural justice. It is therefore important to be sensible, possibly by remembering that:

- A breach can often be cured at a later stage in the decision-making process;
- Legal action is unlikely if there has been a good-faith attempt at consultation; and
- A hearing may not need to be given if a comment is rephrased so that the adverse sting is taken out of it without losing the essential message.

This does all sound like a minefield, and it would be fair to say that ensuring the rules of natural justice and procedural fairness are complied with does have the potential to complicate and lengthen the process of making a decision or formulating an opinion.

However, comfort can be found I think, by remembering that a breach of procedural unfairness by an Ombudsman can usually be “cured” without the need for legal action – i.e. once an Ombudsman realises a breach has occurred they can usually reopen the enquiry, provided the reconsideration is genuine and procedurally adequate. Also, the obligation to observe natural justice can be displaced by an emergency or administrative practicality. However in such a situation, there would be a heavy onus on a decision-maker to substantiate this exception.

PRACTICAL EXAMPLE FROM NEW ZEALAND

On an operational basis for Ombudsmen, one of the most common areas where the need to observe procedural fairness will arise is where there is a third party who may be adversely affected by the outcome of an investigation. Care must be taken to ensure that any consultation with a third party provides them an opportunity to be heard on an informed basis.

In the New Zealand context, there has only been one case where a third party has sought judicial review in relation to an Ombudsman investigation where one of the grounds for review was procedural unfairness because they were not heard. This was the case *Wyatt Co Ltd v Queenstown Lakes District Council* [1991] 2 NZLR 180.

In short, the case concerned a request under the Local Government Official Information and Meetings Act for certain information held by the council. Wyatt Co Ltd was a third party that had supplied some of the information at issue to the council pursuant to the provision of certain consultancy services.

Although the then Chief Ombudsman could not see any good reason for withholding the information on the basis of the material and comments before him at that time, it was clear that Wyatt may well have comments it would wish to make.

The Chief Ombudsman wrote to Wyatt summarizing the current status of his enquiries and invited Wyatt to comment in more detail why it believed the information required protection.

Wyatt did not comment despite follow up requests.

This caused the Chief Ombudsman to consider how long he should delay progressing his investigation given the obligation I referred to earlier in the New Zealand Ombudsmen act to give any person that may be adversely affected by the outcome of his investigation an opportunity to be heard.

The Chief Ombudsman decided that the interests of efficient investigation and timely closure meant that he could not wait indefinitely - so he proceeded to finalise his investigation on the basis of the material before him to date.

He formed the final opinion that certain information should be disclosed on the basis that he could not identify any good reason under the act for withholding it. He recommended that the council make it available to the requester accordingly.

Wyatt finally provided comments but only after the investigation had been completed and recommendations had been made.

The council indicated that it would comply with the Chief Ombudsman's recommendation and Wyatt Co sought judicial review on the basis that the decision was wrong in law and that it had not been heard as required by section 18(3) of the Ombudsmen Act.

An Ombudsman may hear or obtain information from such persons as he thinks fit, and may make such inquiries as he thinks fit.

*It shall not be necessary for an Ombudsman to hold any hearing and **no person shall be entitled as of right to be heard by an Ombudsman, provided that:***

*if at any time during the course of an investigation it appears to an Ombudsman that there may be sufficient grounds for his making any report or recommendation that may **adversely affect** any Department or organization or person, he **shall** give to that Department or organization or person **an opportunity to be heard.***

The High Court rejected the claim of procedural unfairness. The court found that *“in a real way, and a substantial, meaningful way, Wyatt was given an opportunity to be heard which it effectively declined to exercise until too late. There is no breach of section 18(3)”*.

In referring to the letter which the Chief Ombudsman sent to Wyatt and sought its comments, the court observed that:

“the letter is not a decision-making one but a fair mixture of explanation, guidance to the council and information-seeking at near the outset of the substantial part of the investigation. Because some document has not been made available to an interested party does not mean per se there has been unfairness, and there was none to Wyatt in this instance; see R V Chief Constable of Thames Valley Police, ex parte Cotton (The Times, 28 December 1989).”

The key lesson for the New Zealand Ombudsmen is that the opportunity to be heard is just that. So long as the opportunity is provided in a *“real way, and a substantial and meaningful way”* the Ombudsmen do not have to delay unduly if the third party declines to take up the opportunity.

CONCLUSION

As parliamentary and industry Ombudsmen, we will all have our own experiences. As a final thought from me, I think it is important to ensure that the principles of natural justice and procedural fairness are included in an Ombudsman’s methodology, regardless of how they might be provided for in our governing statute. It is incumbent on Ombudsman offices to demonstrate best practice in this regard.

However, the need to also take account of competing demands such as efficient investigation and timely closure mean that it is important on occasions to be “hard-headed and realistic”.

And the New Zealand experience from the Wyatt case is that although it may be open for the courts to require more than simply the statutory requirements for consultation, they are likely to have reasonable regard to the practical need for Ombudsmen to carry out their functions effectively.

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