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April 30, 2025.

Dear Rebecca,

Re: Ombudsman Case: 024150

Our Complaint relates to the matter of administration and poor practice, regarding the conduct of the Ministry of Business, Innovation, and Employment (MBIE) and the acting Minister in regard to their work on gene technology regulatory reform over the period 2023-2025.

Our complaint does not concern a trivial or 'specialist matter' but concerns evidence that the chain of policy making, from problem identification to agenda setting and policy formulation onwards demonstrates a failure to apply good process. As we show with our report[i] that was attached with our complaint, the policy formulation process became the basis for the Regulatory Impact Statement, and the basis of evidence that informed the content in the Gene Technology Bill 2024.

We request that the Ombudsman to investigate a series of actions that suggest a failure to demonstrate honesty and uncompromising adherence to strong ethical principles[ii], a failure of integrity. The systemic failures may amount to an administrative injustice. We suspect that there is a body of evidence that suggests that, from policy formulation onward, officials may have displayed (intentionally or unintentionally) a disregard for fair and just administrative process, and that this would set a precedent for future abuse. As the Auditor-General has noted, Transparency International concluded that New Zealand should take protecting and promoting integrity more seriously.

We believe that MBIE's control over the policy formulation has led to the development of a Bill that is unfit and unfair, and that the Bill must be reconsidered in light of the evidence that it was improperly formulated.

We are concerned that the gene technology regulatory reform processes were not politically neutral. This includes the unsuitable taking on of discretionary powers for conducting gene technology regulatory reform for the purpose of liberalising and lowering the barriers for the release of gene technologies.

Should the concerns we raise not be addressed, the result will lead to unjust outcomes that negatively affect 'a body of persons' – across human and environmental health and specific sectors of the New Zealand economy. For example, MBIEs have 'tiered out' technologies and classes of organisms. This is unprincipled. The actions of MBIE will lead to less transparency, and many papers have demonstrated that this cost will be transferred to particular industry sectors.

We recognise that this is a significant request. It is made in the democratic spirit of the separation of powers to ensure public trust in executive government.

Government agencies hold discrete and important functions, but the agency for economic growth cannot take steps to secure control over the formulation of policies and laws which heretofore were the jurisdiction of independent agencies exclusively focussed on the protection of human and environmental health.

PSGR understands that the Ombudsman is neither an advocate for either complainant or organisation but 'an enabler of good governance'.[iii]

> *It is all the more difficult to make constructive criticisms that will enable civil servants to understand how they can do their jobs better, thereby improving the standard of service to the community, and at the same time enhancing the public understanding of why a government takes the decision it does. An Ombudsman needs courage, intelligence, determination and sensitivity to do [his] work successfully.'*[iv]

We understand that the Ombudsman's role is of enshrining good government, ensuring access to justice, the protection of human rights and the maintenance of the rule of law where 'The rule of law is not a rule of the law, but a rule about what the law should be.'[v] We understand law here to mean not only statute, but constitutional and administrative law, including important conventions and principles.

This is not a technical issue that is based on a simple disagreement or one case of injustice. This is why we have not made an initial complaint to MBIE. Others have raised concerns regarding improper policy formulation and process. [vi]

MBIE is not fit to assess the potential for maladministration because the issues are broad and deep, and relate directly to their priorities of economic growth, i.e. it had taken it upon itself to reduce barriers to regulation, and had not exhibited the necessary impartiality for such a role.

The inquisitorial power of the Ombudsman is necessary to assess whether a course of decisions, recommendations, actions, omissions - are unlawful, unreasonable, mistaken or wrong.

PSGR are making this complaint because we are concerned that the actions of MBIE over time may be contrary to public law, and may be found to be unreasonable, unjust and improperly discriminatory. We believe that MBIE was wrong to take on the powers of policy and law formulation for new gene technology regulations.

We suspect that the internal processes of policy formulation have been flawed, and ask that the Ombudsman consider evidence that this body of persons acted improperly in their duties, directly undermining public law conventions, in order to expedite policies and laws in favour of the deregulation of gene editing technology.

We believe that the evidence suggests maladministration: '*conduct which is capable of causing injustice and is possibly systemic in that it might foreseeably continue if left unremedied.'*[vii] Maladministration has also been referred to as *'usually something short of outright corruption but still wrong'*.[viii]

> *'Maladministration extends beyond mere illegality to more generally framed allegations of injustice. ... The conclusion that an agency or department has engaged in maladministration requires only that its internal processes are in some way flawed, a conclusion falling short of illegality.* [ix]

We suspect that the issue may be systemic due to the culture and goals of the economic growth agency and, as such there is a possibility that MBIE is not the suitable department for this role as MBIE is not impartial but has many conflicts of interest. The concept of fairness concerns the capacity to deal with a matter in an equitable and unbiased manner.

As part of our complaint, these examples of improper or unjust or unreasonable conduct are examined in-depth in our Report. This brief list may provide the Ombudsman with a provisional view of the issues we believe are of concern:

1. MBIE has taken on powers of regulatory reform for an issue which it should not have delegated itself.
2. MBIE is not politically neutral. It is the 'economic growth' agency yet has taken it upon itself to formulate a policy and administer a law that would involve the regulation of the very 'innovations' that MBIE funds and believes would contribute to economic growth.
3. The problem definition steered MBIE officials towards an improper purpose of deregulating a technology. The problem definition reflected MBIEs focus on release of technology, not the safety of the technology that would be regulated.
4. The problem definition was incorrect as it did not revolve around the obligation of the regulator to safely steward a technology over time so that it does not harm the environment or the health and safety of people and communities.
5. Excluding the general public in early consultation and policy development was contrary to recommendations made by the Productivity Commissioner.
6. The problem definition created a cascade of errors of policy and law formulation. We are concerned that the problem definition misdirected officials to bias consultation and seek 'experts' who were themselves biased to the deregulation of new gene editing techniques and organisms.

7. The law cannot be trustworthy or future-proof. The Bill creates a plethora of uncertainties. The primary Act is so fluid and uncontainable as to hold negligible boundaries for policy makers, but provides broad powers to the producers of secondary legislation.
8. Policy-makers have provided information to some but not others, and selectively withheld information by only releasing a short 'media release' in August 2024 which was the sum total of policy and scientific reasoning before the Regulatory Impact Statement and the Bill were released. Officials displayed an unjust practice of preselecting experts and groups for the early consultation stages who were biased or predetermined to reducing regulatory barriers to new gene editing technologies and organisms.
9. Experts who were selected for consultation were not first and foremost, experts in the development of safe regulation of biotechnologies. Instead the 'experts' were people with, in many cases, political and financial interests, including in the promotion of modern biotechnologies.
10. The preselection of the expert advisory group and groups for consultation reflects a bias to individuals and organisations that are either funded by MBIE or engaged in a partnership with an organisation funded by MBIE.
11. None of these experts/consultation stakeholders have disclosed that risk assessment were not undertaken. The oral submission made by PSGR to the Health Select Committee emphasised that these experts in their oral submissions claimed that the regulator had to be scientific and evidence-based. However, they did not disclose that the evidence for safety was never provided and hence the justification for the Bill's effectiveness was, and remains, non-existent.
12. The public have a legitimate expectation that the legislation would enable genetically modified organisms to be 'safe' and that legislation would be 'risk proportionate'. Yet there was no scientifically rigorous assessment to justify claims of safety or proportionality.
13. We suspect that Members of Parliament and the public have been misled into believing that some sort of analysis has taken place where the scientific basis for the legislation being 'risk proportionate' has been undertaken, when this has not occurred.
14. It was unreasonable to remove the choice of retaining the status quo without commensurate evidence to demonstrate the safety of the replacement legislation.
15. When laws are made for the regulation of technology, they cannot risk tier classes outside of that legislation, as the regulator may never end up assessing those classes for risk. The act of excluding a considerable range of technologies from regulation without having conducted scientific assessments of risk was unprecedented and lacked any scientific basis.
16. Inclusion in the prospective legislation of clauses that have not been pre-considered in policy (e.g. Subpart 5 – Mandatory medical authorisation). We do not know whether this is a 'Trojan Horse' move or a case of over-efficiency on the part of the agency. The last minute inclusion by MBIE, of legislation that would defer decision-making to an offshore jurisdiction in an unprecedented manner, has the potential to contradict many laws and conventions in New Zealand. MBIE who had no expertise in the risk and safety assessments of drugs and medical products, so this was unprecedented and unconventional.

We ask that the Ombudsman consider whether the decision to take this on was unreasonable.

As Weeks noted, *'the ombudsman is not concerned primarily with law but justice and for this reason stands apart from other administrative law bodies. Maladministration is a concept that goes to justice rather than law; hence, law speaks to what may be done and maladministration to what ought to be done.'*

Without accountability of Ministers and their officials, it can be difficult to assess where a problem or injustice commences. We note that

> *'Secrecy is an important impediment to accountability when Parliament, press, and public cannot properly follow and scrutinise the actions of government.'*[x]

From the policy papers we can observe that the Minister took an active role in the development of policy, including, for example, to remove the option that the Hazardous Substances and New Organisms Act 1996 be retained and perhaps amended. We quote Philip Joseph:[xi]

> *Ministers, while concerned with policy formation, are not exempt from Ombudsman investigations. Section 13(2) empowers the Ombudsman to investigate departmental recommendations to ministers but does not expressly subject ministers' decisions to investigation. However, the fact that a decision is taken by a minister does not mean it is a policy decision and immune from Ombudsman investigation. Ministerial decisions are matters of administration and subject to the Ombudsmen's jurisdiction, even if such decisions will seldom be found*

wanting. It is unlikely the Ombudsman would find a defect justifying an adverse report if the minister's advisers carefully consider the subject-matter of the decision and fairly put their recommendation to their minister.

We also point to the responsible role of the Minister, who took an extremely active role in the policy formulation. Again we turn to Philip Joseph:[xii]

> *The amendatory element is an aspect of a minister's obligation to explain departmental failings. However, it also recognises what is implicit in the notion of "responsibility". If something goes wrong within a minister's department, the minister is responsible, although not personally culpable. The minister must explain to Parliament how he or she proposes to correct the error or omission and minimise the damage. Ministers must accept responsibility for loss of confidence in their government resulting from departmental failings.*

We are particularly concerned that the law should have safeguards against the abuse of wide discretionary powers, and that perhaps this has been the case in this situation. Does this extend to errors of law? We do not know. To quote Philip Joseph:

> *'Errors of law and the requirements of fairness are relevant to "matters of administration": "[A] 'matter of administration' in the Ombudsmen Act 1975 ... has always been understood as including issues of law.'. '*

PSGR understands that the Ombudsman may refuse to investigate on the grounds that the 'complainant is not personally affected'. For twenty-five years PSGR has been drawing attention to the important role of trusted government institutions in adhering to good process, trustworthy practices that uphold public trust in government regulation of the technologies that are released onto the market.

We ask that the Ombudsman recognise that the Bill as it stands would result in an unknown and unquantifiable amount of undeclared gene editing techniques and organisms on the market because of range of technologies and gene edited organisms that would not need to be declared. This would amount to the public being exposed. The Bill also ensures environmental contamination. This will impact exporters, Māori Rongoa, food practitioners and the public (consumers).

It would remove our right to know what was in our food, as we would not know whether it had been gene edited or not. This is not a trivial issue, and it cannot be dismissed as such. As an example, any GMO, gene-edited or otherwise, can produce (an) allergen/s, which may be harmful or even deadly to a certain group of the population

It is not necessary for the Ombudsman to become a scientific specialist. it is only necessary that the Ombudsman inquires into whether good practice has taken place, such as would necessarily be included in a Regulatory Impact Assessment for the establishment of a new regulatory agency. Have risk assessments been conducted where scientists have evaluated the likelihood that the new legislation would do what it says it would do? Have economic, and cost-benefit analyses been undertaken? We are not the only concerned parties. Most concerningly, we are unsure if the Health Select Committee has capacity to assess this. We observed Emeritus Professor Jane Kelsey being silenced by Dr Hamish Campbell who was uninterested in the problems with policy formulation, and her expertise in this matter.[xiii] [xiv]

We ask that the Ombudsman have the courage to investigate this complaint. To ask whether MBIE has acted fairly, transparently, and with integrity, consistently over time, in accordance with principles of public law.

> *'corruption and misconduct within government and industry is a universal issue, no matter the size of the state. In some, it is more sophisticated and can be cleverly hidden. In others, it is almost unapologetically open and an accepted part of a society or culture. The Ombudsman's oversight is seen as one means of countering officials' ability to fall into corrupt practices.'*[xv]

We look forward to your response.

Yours sincerely,

on behalf of the Physicians and Scientists for Global Responsibility New Zealand Charitable Trust.

[i] PSGR (2025) When powerful agencies hijack democratic systems. Part I: The case of gene technology regulatory reform. Bruning, J.R., Dommisse, E.. Physicians & Scientists for Global Responsibility New Zealand. ISBN 978-1-0670678-0-9. https://psgr.org.nz/component/jdownloads/send/1-root/175-gene-tech-reforms-hijack-democracy-2025

[ii] Controller and Auditor-General. Part 2: Understanding public sector accountability. https://oag.parliament.nz/2016/accountability/part2.htm

[iii] Dame Beverley A. Chief Ombudsman, New Zealand The changing role of the Ombudsman Wakem Administration, vol. 63, no. 1 (2015), pp. 15–25 doi: 10.1515/admin-2015-0003

[iv] Hon Mrs Anson Chan, then Deputy to the Governor of Hong Kong Speech to 15th Australasian and Pacific Ombudsman Conference, Hong Kong, November 1995.

[v] Field C. (2016). The Ombudsman in the 21st century. https://classic.austlii.edu.au/au/journals/UWALawRw/2018/8.pdf

[vi] Kelsey, J. Submission on the Gene Technology Bill. https://www.parliament.nz/resource/en-NZ/54SCHEA_EVI_22059628-b0cc-4931-5e07-08dd18a12bfb_HEA12017/6d348397200e9dcf52674fa7e54ee321711370e8

[vii] In Weeks, G. (2020) Maladministration: the Particular Jurisdiction of the Ombudsman (February 16, 2020) in Matthew Groves and Anita Stuhmcke (eds), Ombudsmen in the Modern State (Hart Publishing, 2021) (Forthcoming), ANU College of Law Research Paper No. 20.6, doi:.2139/ssrn.3562891 page 5/15.

[viii] Deborah Glass, 'Common Sense and Clean Hands: an Ombudsman's View of Justice' (2019) 43 Melbourne University Law Review 369, 377.

[ix] Weeks, G. (2020) Maladministration: the Particular Jurisdiction of the Ombudsman. Page 3/15

[x] Danks Committee Report, Committee on Official Information, Towards Open Government 1980

[xi] Joseph, P. (2021). Joseph on Constitutional and Administrative Law, 5th Ed. Thomson Reuters. 13.4.3 Jurisdiction of the Ombudsman. Page 448.

[xii] Joseph, P. (2021). Joseph on Constitutional and Administrative Law, 5th Ed. Thomson Reuters. 10.5.1 Conventions relating to the executive. (8) Individual ministerial responsibility. Page 297.

[xiii] PSGR (March 14th, 2025). Transcript. Gene Technology Bill 2024. Oral presentation to the Health Subcommittee Subcommittee members present: Dr Hamish Campbell, Dr Deborah Russell. https://psgr.org.nz/component/jdownloads/send/1-root/180-gene-tech-bill-2025-select-committee-presentation-transcript

[xiv] New Zealand Parliament (March 5, 2025). Health Select Committee. Professor Emeritus Jane Kelsey oral submission. At 7.25-13.50 minutes. 2025 03 10 - HE Subcommittee B (Part 1) https://vimeo.com/1058045632

[xv] Dame Beverley A. Chief Ombudsman, New Zealand The changing role of the Ombudsman Wakem Administration, vol. 63, no. 1 (2015), pp. 15–25 doi: 10.1515/admin-2015-0003