

The Ombudsman

No authority more useful and necessary can be granted to those appointed to look after the liberties of the state than that of being able to indict before the people or some magistrate or court such citizens as have committed any offence prejudicial to the freedom of the state.

Niccolo Machiavelli, The Discourses, I (8)

What can the ordinary citizen do when things go wrong? When grievances arise, and complaints about government bureaucracy fall on deaf ears? One option is to turn to the legal system, but even when the legal system is operating in accordance with the law, the courts tend to be slow, expensive, public and far from user-friendly.

However, the courts, too, may be in disarray, perhaps themselves corrupt, and the Rule of Law may be faltering if not actually foundering. How, then, can people be protected when the legal system itself is failing? Many turn to the Ombudsman, however described – styled as Defender of the People (Defensor del Pueblo) in Spain, and as Public Protector in South Africa.¹

What is an Ombudsman?

Although the word “Ombudsman” is Scandinavian in origin, the first Ombudsman actually flourished in China over 2,000 years ago, during the Ts’ in Dynasty (221 BC) and in Korea, too, during the Choseon Dynasty. The Romans also grappled with the problem, but it was the example of the second Muslim Caliph, Umar 1 (634-644) and the concept of Qadi al Qadat (developed in the Muslim world), which influenced the Swedish King, Charles XII. In 1713, fresh from self exile in Turkey, Charles XII created the Office of Highest Ombudsman. The Scandinavians subsequently moulded the Office into its contemporary form. As a result, in modern times the institution was thought to be unique to the needs of Scandinavians, until the 1960s, when New Zealand introduced its first Ombudsman.²

As Sir Guy Powles, New Zealand’s and the common law world’s first Ombudsman later observed, citizens found the Office to be useful in dealing with the powerful engines of authority and the concept quickly spread to the rest of the world.

South Korea’s Ombudsman

In the spirit of Shin-moon-go and O-sa (a royal inspector who travels incognito to check on local governments), the Korean government established the Ombudsman of Korea on April 1994. The rationale for its establishment was to meet:

- **Increasing public demand for administrative reform**

Complicated, diverse functions of public administration inevitably produced many regulations and restrictions on the daily life of citizens. Additionally, growing public awareness of individual rights has resulted in a growing number of unfulfilled desires and demands for improved public administration and related affairs. Consequently, the number of petitions submitted to such offices as the Presidential Secretariat, the Office of the Prime Minister and the Board of Audit and Inspection (BAI) has increased rapidly.

- **Growing distrust of government handling of civil appeals**

Despite the government’s efforts to resolve problems raised by these petitions, very few were settled by the offices to which they were submitted. In fact, more often than not these offices ended up transferring the action to the very agencies that triggered the petition in the first place. This procedure produced little satisfaction and soon sparked widespread public distrust of the government’s procedures for handling complaints.

- **The need to restore public confidence**

For the government to continue to carry out effective public administration and regain public confidence, it was imperative that it eliminate outdated rules and unnecessary restrictions to restore the rights of citizens.

- **Administrative reforms focused on citizen convenience**

The Ombudsman of Korea was established to protect the rights and interests of the citizens from illegal, unreasonable administrative dispositions of government agencies, and enable the government to carry out fair, efficient administrative reforms.

http://www.ombudsman.go.kr/eng_page/index.htm

1 Large numbers of citizens in the U.K. have opted for the services of the Ombudsman. The Sunday Times (14 August 1994) listed these services as including the Personal Investment Authority Ombudsman, Investment Ombudsman, Insurance Ombudsman, Building Societies Ombudsman, Banking Ombudsman, Inland Revenue Adjudicator and the Estate Agents

Ombudsman, as well as others dealing with separate aspects of government administration.

2 Bryan Gilling, *The Ombudsman in New Zealand* (1998, Dunmore Press and Historical Branch, N.Z. Department of Internal Affairs, pp 13-15)

Today, the Office of the Ombudsman is found in the constitutions of many countries. It has also proliferated in larger countries so that there are ad hoc “Ombudsman” offices in various sectors – banking, health, insurance to name but a few.³

The British and Irish Ombudsman Association works to criteria which eliminates those “Ombudsman” institutions which are really captive to the organisations they are supposed to monitor, rather than being independent of them. It recognises only those offices which meet four criteria:

- independence of the Ombudsman from the organisations the Ombudsman has the power to investigate;
- effectiveness;
- fairness; and.
- public accountability.

It is independence which above all distinguishes recognised Ombudsman schemes from other complaints procedures. Those who head the internal complaints procedures of their own organisations, even if described as Ombudsmen, are not wholly independent and so misuse the expression when it is applied to them. The concept of the “Ombudsman” has become popular with the private sector, and the expression is increasingly found there, but for the purposes of this discussion we are looking at the classic “Ombudsman”, the Ombudsman in the public sector.

The Ombudsman constitutes an Office which independently receives and investigates allegations of maladministration.⁴ It does not compete with the courts, or act as a further body to which those unsuccessful in the courts can appeal.⁵ Most do not have jurisdiction to investigate the courts themselves. The primary function of the Ombudsman is generally to examine:

- (i) a decision, process, recommendation, act of omission or commission which is contrary to law, rules or regulations, or is a departure from established practice or procedure, unless it is bona fide and has valid reason; is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory; based on irrelevant grounds; or, involves the exercise of powers or the failure or refusal to do so for reasons of corrupt or improper motives such as bribery, jobbery, favouritism, nepotism, and administrative excesses; and,
- (ii) neglect, inattention, delay, incompetence, inefficiency and ineptitude in the administration or discharge of duties and responsibilities.⁶

In essence, “The Ombudsman can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds”.⁷

The institution of Ombudsman gives individuals an opportunity, in addition to existing provisions such as Parliament, the Judiciary, and internal complaints procedures, to place complaints about the practices of government before an independent and expert body. Complaints to the Ombudsman may result in remedial action being taken to resolve maladministration in particular cases, and, in a broader context, help to restore confidence in the integrity of institutions.

3 Over the last thirty years, the Ombudsman has emerged from Scandinavia and found its way to more than eighty countries, and in all parts of the world.

4 A holder of the post in Zambia wrote that “the abuse of authority or maladministration...may take various forms, for example corruption, favouritism, bribes, tribalism, harshness, misleading a member of the public as to his or her rights, failing to give reasons when under a duty to do so, using powers for the wrong reasons, failing to reply to correspondence and causing unreasonable delay in doing desired public acts.” See Annual Report of the Commission for Investigations 1975, Lusaka, Zambia, p.3.

5 Some Ombudsman offices are barred from receiving complaints

that could otherwise go to a court of law. Others make it a condition of receiving a complaint that the complainant waive any right of court proceedings (this to eliminate the possibility of complaints being used to fish for information for later court proceedings and to foster greater elements of co-operation from government departments than might otherwise be forthcoming).

6 The definition comes from the Pakistan legislation establishing the Office.

7 The quote arises from a landmark Canadian case on the Ombudsman (*British Columbia Development Corporation and another v Friedman* [1984] 14 DLR 129 at 140).

In view of this role vis-à-vis the individual, the law establishing an Ombudsman often deliberately elects to place a single person, the National Ombudsman, as the representative of the institution in the eyes of the outside world, as a counterbalance to an often faceless bureaucracy.

As a high-profile constitutional institution, the Office is potentially better able to resist improper pressure from the Executive, than are others. It can perform an auditing function to stimulate information flows which reveal and contain the limits of corruption in government. The confidentiality of these procedures gives the Office the added advantage of providing a shield against possible intimidation of informants and complainants.⁸

In many countries, the mandate of the Ombudsman also extends to investigation and inspection of systems of administration to ensure that they restrict corruption to a minimum. Thus, it can recommend improvements to procedures and practices and act as an incentive for public officials to keep their files in order at all times.

The Office has also been found to be extremely adaptable, and has worked well in parliamentary democracies, societies with radically different ethnic and religious backgrounds, and in one-party as well as military states. For instance, when Tanzania introduced a one-party state, the Presidential Commission observed that:

“In a rapidly developing country, it is inevitable that many officials, both of the government and of the ruling party, should be authorised to exercise wide discretionary powers. Decisions taken by such officials can, however, have the most serious consequences for the individual, and the Commission is aware that there is already a good deal of public concern about the danger of abuse of power. We have, therefore given careful thought to the possibility of providing some safeguards for the ordinary citizen.”⁹

The result was the establishment of the Permanent Commission of Enquiry - an Ombudsman. This was a landmark development. For the first time, concern about corruption of leaders in developing countries led a country to establish a leadership code in its Constitution for which the Ombudsman Commission was made responsible for supervising, as well as its traditional Ombudsman role.¹⁰

Poland created its Ombudsman Office in 1987 to investigate violations by the administration of the law and principles of community life and social justice. Its success has inspired other emerging European democracies to do the same.¹¹

What criteria does an Ombudsman apply when judging official actions?

When is conduct proper or improper? If a particular government action conflicts with statutes and principles, and does not appear to be justified on other grounds, it cannot, in principle, be regarded as proper conduct. Ideally, an Ombudsman approaches the action broadly and reviews it both in the light of the provisions of the written law, and in the light of unwritten legal principles, as well as, against the standards for good governance.

Investigations of the action in view of the written law include such areas relating to human and constitutional rights, definitions of competence, and provisions governing from procedure and substance. Investigation of the action in view of the unwritten legal principles (developed

8 John Hatchard, “The Office of the Ombudsman”, in *National Human Rights Institutions in the Commonwealth*, Commonwealth Secretariat, London (1992).

9 Ibid.

10 This model was followed by Papua New Guinea, the Solomon Islands and Vanuatu.

11 *Using an Ombudsman to Oversee Public Officials*, Nick Manning and D. J. Galligan (PREM Notes, The World Bank, Washington D.C., April 1999)

in case law and legal doctrine) are equally relevant to the lawfulness of government conduct, and include the principles of: equal treatment for equal cases; reasonableness; proportionality between means and end; legal certainty and of legitimate expectations; the requirement to provide reasons for decisions; and, of certain duties of care.

In addition, when reviewing a government action, an Ombudsman also uses standards or guidelines for good governance which contribute to the propriety of the way the Executive authorities act. The standards can be summed up as the imposition of a broad duty of care. These are manifested in certain accepted standards for administrative processes and the conduct of public servants in relation to the public. They include the requirement to act without undue delay; to supply the individual with relevant information; to treat people fairly and respectfully; and, to be unbiased and helpful.

Finally, the Ombudsman sets standards for the government organisation – such as those of co-ordination, monitoring of progress, protection of the individual’s privacy, and accessibility of the authorities.

And how does an Ombudsman decide which cases to investigate?

The Offices of Ombudsman around the world receive many more complaints than they are authorised under their legislation to handle. Hence, they operate within the jurisdiction set out in their legislation. Guidelines for accepting or rejecting complaints commonly include the following questions:

- Is the complaint within the Ombudsman’s jurisdiction at all? (A surprising number are not.)
- Has the person complaining exhausted the other remedies available to them? (The Ombudsman should be a last resort, not a first port of call.) If not, is it reasonable to expect them to have done so?
- Has the complainant sufficient personal interest in the subject matter of the complaint?
- Is the matter already before the courts? If so, is it appropriate for the Ombudsman to become involved?
- On the face of the complaint, does it appear that the person complaining is not acting in good faith?

Should an Ombudsman have a distinct anti-corruption role?

A classic Ombudsman is concerned with eliminating “maladministration”, and generally “maladministration” stems from some degrees of corruption in public administration. Therefore, an Ombudsman will need to tackle corruption where it is the cause of malfunction in the administration.

In order to perform its function of improving public administration, the Ombudsman needs to develop a relationship of trust and confidence among those whose standards he or she is responsible for overseeing. It is generally thought inadvisable – if it can be avoided – for the Ombudsman to have an investigative and prosecutorial role. This is to convert the “friendly Ombudsman” into the “feared policeman”, and could, in some environments, render the wider function of the Office less effective.

However, several countries have taken the view that the Ombudsman, with right of access to government files, is in a far better position to investigate and police the administration than are the less expert orthodox police investigators.¹²

A recent development of interest, in the Australian State of New South Wales, has been the appointment of the Ombudsman also to be the Commissioner responsible for the Independent Commission Against Corruption.

Monitoring assets

In some countries, such as Papua New Guinea and Taiwan¹³, the Ombudsman is seen as being in a unique position to review and to monitor declarations of income and assets made by senior public officials. Independent of government, with a high level of public trust and profile, and investigative capacities to examine their contents, the Ombudsman's Office can be an effective instrument, thereby, avoiding the necessity for establishing other independent mechanisms specifically for monitoring assets. Alternatively, where a large number of applications for information are likely to be disputed, the option of establishing a separate Ombudsman's Office to handle these has been adopted.¹⁴

Access to information

In the same way, an Ombudsman's Office is well placed to handle appeals where officials refuse to provide members of the public with information they are entitled to have. This would fall within the general ambit of an Ombudsman's work, but as there is usually specific legislation dealing with access to information (where there is any at all), the question arises of who should handle appeals when the legislation is passing through a Parliament. Obviously, the Ombudsman's Office has advantages because it is accustomed to handling sensitive information.¹⁵

Feedback on the quality of government services

An Ombudsman can also contribute significantly to the quality of government, by providing feedback as to how the administration is performing its tasks. This is particularly important for government organisations wishing to perform their functions in a customer-friendly manner. Complaints are signals, constituting a valuable source of information for quality assurance. This feedback can be of particular value for government organisations as they often have a monopoly of their own and are rarely exposed to the dynamics in the outside world. Observing the criteria for proper conduct developed through the Office of the Ombudsman can, in short, contribute to the rationality and legitimacy of public administration.

The appointment process

As with many other elements in a system of checks and balances, the process of appointing an Ombudsman is crucial to building and sustaining public confidence in the institution. If the Office is filled with party faithful or pensioned-off officials, chances of success are severely

Explaining an Ombudsman's role in fighting corruption

On 17 November 1999, Commissioner Irene Moss stated: "Yesterday the Premier [of New South Wales] announced in Parliament that I had made a proposal that there would be benefits in closer co-operation between the Office of the Ombudsman and the Independent Commission Against Corruption. I suggested that this could be achieved by the appointment of one person as both Ombudsman and as Commissioner for the Independent Commission Against Corruption. Given the concerns that have been raised about the proposal it is important for me to put on record why I believe the proposal, if implemented, has the potential to strengthen both organisations. At the same time I wish to correct misconceptions evident in the media concerning my attitude towards the ICAC's investigation function in general and the use of public hearings in particular. Whilst the two organisations both strive to achieve a more ethical, efficient and effective public sector and have functions which are in some respects similar there are significant and necessary differences between the organisations which mean that a merger of the two would be inappropriate and something that I would not countenance. I wish to see the ICAC and the Ombudsman's Office continue as separate independent accountability mechanisms and to see their respective roles strengthened by creating a strategic alliance between them. Because of my appointment as ICAC Commissioner a rare opportunity has arisen to trial a single leadership of both organisations with the goal of achieving that strategic alliance and thereby delivering a better service to members of the public who raise concerns about maladministration or corruption and a better service to the public sector to which both agencies have responsibilities. I see these benefits particularly arising in the areas of:-

- Better co-ordination and less duplication of:
 - the collection and initial assessment of complaints
 - consultation with and provision of advice to the public sector
- More comprehensive approach to corruption prevention, education and reduction of maladministration in the public sector.
- Research about the public sector leading to better knowledge about the public sector and therefore better targeted ICAC and Ombudsman investigations and projects

¹² For example, the Office of the Inspector-General of Government in Uganda.

¹³ The Papua New Guinea model is widely seen as having had positive impact. However, in Taiwan, in order to cope with the implementation of the asset disclosure law, the Control Yuan set up the Department of Asset Disclosure for Public Functionaries in August 1993.

¹⁴ Finland is an example.

¹⁵ This approach has been adopted, e.g. in New Zealand. Some other countries, where the demand for information is likely to be high, have established the Office of Information Commissioner, along the lines of the Office of Ombudsman, but with a limited mandate.

limited. In some countries, Parliament itself makes the selection and the head of state formally announces the appointment. In others, the appointment is made by the head of state after consultation with the Leader of the Opposition and the Prime Minister (if there is one). Or, in some cases, the appointment is simply made by the Executive without any formal requirement for consultation. The actual mechanics of the process are secondary to the outcome. The Office must be seen by the public as independent, fair, competent, and serving the best interests of the people, and not as a bureaucratic appendage, serving the objectives of the ruling political party.¹⁶

One distinguished Ombudsman has noted that:

“However the appointments procedure may be set up, the institutional safeguards for independence will be undermined if there is any possibility of party political considerations leading to bias - or the appearance of bias - in the person appointed. It is equally important to guard against making an appointment that waives or dilutes the necessary professional qualifications. In this respect all that can be done, once a sound selection procedure is enshrined in the law, is to hope that the responsible authority will act wisely. The Ombudsman himself, of course, must endeavour to steer clear of any conduct that could undermine his impartiality or public confidence in him in this regard. He must never use his Office to pursue his own personal interests, for instance in connection with his future career.¹⁷

Term of office

The position of the person appointed Ombudsman needs statutory safeguards to ensure independence. Thus a fixed term of office needs to be laid down, making it impossible for him or her to be dismissed before this term expires. Or, in the event that they can be dismissed prematurely, special procedural and substantive conditions must be enshrined in statutory provisions, to guard against any political or administrative influence that might prejudice the independence of the Ombudsman’s Office.

The status of the Ombudsman must not be subordinate to that of the leadership of the bodies that he is empowered to investigate. Salary is a different matter from formal status. There are many Ombudsman operating in the Commonwealth and elsewhere who have lower salaries than the leadership of jurisdictional bodies, but who are still very effective.

During his or her term of office, an Ombudsman should not hold any other position. This minimises possibilities of conflict of interests, as well as reducing the space for an administration to “show favours” to an obliging office-holder.¹⁸

Removal from office

The Ombudsman must feel secure in tenure and not subject to removal at the whim of the Executive. When an Ombudsman has a short-term position or is not otherwise guaranteed tenure of office, the holder of the post may lack the confidence to act as fearlessly and as

16 One of the most attractive models is provided by the Melanesian state of Papua New Guinea, where the appointment is made by the (non-Executive) President acting in accordance with the advice of a specially-constituted committee comprised of members of the Judiciary, the public service and Parliament (including the Leader of the Opposition).

17 Address by Dr Marten Oosting, President of the International Ombudsman Institute, National Ombudsman for The Netherlands, in *“The independent Ombudsman in a democracy, governed by the Rule of Law”* given at the Opening Ceremony of the

Third Asian Ombudsman Conference, Macau, 4 May 1998

18 For example, the New Zealand legislation provides in the Ombudsmen Acts (1975-1996), Section 4, that – “Ombudsmen to hold no other office – An Ombudsman shall not be capable of being a member of Parliament or of a local authority, and shall not, without the approval of the Prime Minister in each particular case, hold any office of trust or profit, other than his office as an Ombudsman, or engage in any occupation for reward outside the duties of his office.”

impartially as required. Ideally, an Ombudsman should have the same assurance of tenure as a superior court judge, removable only through a special procedure.¹⁹

If the functions of the Ombudsman are to be conducted credibly, the post-holder must also be shielded from hasty or ill-considered action by those who are the subject of criticism or exposure. It is, however, interesting to note that very few Ombudsmen have suffered such a fate.²⁰

Best practice suggests that the grounds for removal of an Ombudsman should be similar to those for members of the senior Judiciary. In other words, the office-holder can only be removed due to an inability to perform the duties required by reason of physical or mental incapacity, or misconduct. Usually the Legislature has to be involved in removal procedures. For example, with two-thirds of the Members voting for the establishment (by the Chief Justice) of a tribunal of enquiry.

The post-holder must also enjoy some form of protection after he or she has left office. This is critical where a period in office is of relatively short duration and where the office-holder is expected to resume gainful employment elsewhere in the public or private sector after their period has ended. Unfortunately, some administrations can hound office-holders into their retirement, and to attract able people to the post (and likewise to the post of Auditor-General) it is important that this type of “revenge” is inhibited.

Resources

“An Office of the Ombudsman that does not have an adequate budget, is not properly staffed, and is not backed by those who brought it into being amounts to nothing more than a front and a façade.”²¹

Even so, a common complaint is that the Office of the Ombudsman is under-funded for the job it has to do. It matters little that the Constitution of a country may actually state that “the Ombudsman shall be provided with a staff adequate for the efficient discharge of (his or her) functions,” as it does in the Constitution of Trinidad and Tobago. Such constitutional requirements are more honoured in the breach.

With a lack of resources to fulfil the mandate of the post, it is often only “the will of the Ombudsman” which sustains the office-holder in the job. This is an undesirable situation and a matter which needs to be seriously addressed in any overhaul of a country’s integrity system. The Ombudsman is uniquely placed to identify gaps and weaknesses in the system and to recommend preventive action. Any failure to equip the Office adequately for this task will, in many instances, prove costly in terms of undetected corruption, inefficiencies, and malpractice. A functioning Ombudsman’s Office should be highly cost-effective, and be recognised as such.

Whether under-funded or not, the Office of the Ombudsman should be responsible for its own budget and not be subordinate for funding to another, larger department. For example, the

19 In New Zealand, the legislation establishing the Ombudsman (Acts (1975-1996) Section 6, reads “Ombudsmen Removal or suspension from office), provides: (1) Any Ombudsman may at any time be removed or suspended from his office by the Governor-General [Head of State] upon an address from the House of Representatives, for disability, bankruptcy, neglect of duty, or misconduct; (2) At any time when Parliament is not in session, any Ombudsman may be suspended from his office by the Governor-General in Council for disability, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General; but any such suspension shall not continue in force

beyond two months after the beginning of the next ensuing session of Parliament.”

20 Marie-Noelle Ferrieux-Patterson, Vanuatu’s first Ombudsman (appointed by the President in 1994), completed her five-year term in July 1999, having released 68 reports concerning maladministration and corruption on the part of Vanuatu leaders and officials during her term. She applied for re-appointment but, despite her undoubted popularity, she was not re-appointed.

21 Arthur Maloney QC in his 5th report as the Ombudsman of Trinidad and Tobago.

Ombudsman in Zimbabwe is largely funded through the Ministry of Justice. The Ombudsman in Barbados has complained that the government refuses to acknowledge the independence of his Office by presenting its annual estimates of expenditure as a sub-head of a ministry, rather than under its own head of expenditure.

Although the question of budgetary allocation and control is a matter for parliamentary and other channels, the Ombudsman ought to be able to authorise travel and other expenditure, within approved limits, in order to conduct expeditious and discreet investigations, without seeking the permission of someone else. As many complaints will concern the slow pace of government administration, the Ombudsman cannot fall prey to the same malady or else the Office may quickly resemble just another inefficient government department. The quality of staff is also important. In some Offices, staff with investigative skills will be needed (in Uganda, serving police officers are seconded into the Office) and relevant training is essential.²²

Accessibility

The hallmark of the Office of the Ombudsman is that citizens have direct access; they don't have to go through lawyers or involve their elected representatives.²³ The process is generally free, and can simply be a matter of writing a letter knowing that someone will read it and take notice.²⁴ However, a special concern, as President Julius Nyerere once observed, is that "we must not forget that the Ombudsman receives complaints only from the most literate, aware or energetic and courageous of our citizens."²⁵

As a consequence, some Ombudsman Offices find it necessary to travel to rural areas in order to make their office more accessible and better known. Certainly, the available evidence indicates that such outreach efforts lead to an increase in the number of complaints against maladministration made by those in the rural areas. For example, the Office of the Ombudsman in Swaziland did not reach out to the outlying areas. As a result, only 40 complaints were received in three years of operation and the institution was scrapped. In larger countries, decentralisation of the Office is also necessary and other awareness-raising initiatives, including publicity campaigns, paid-for advertising (if the budget allows), newspaper interviews, and "talk-back" radio, are often used to increase accessibility.

In addition, the Ombudsman must win the trust and confidence of the various departments within the government structure in order to operate effectively. These departments should be encouraged to view the Ombudsman as both accessible and as a potential ally - one which can independently vindicate the department and its officials when they are the subject of unjust criticism.

However, a right to complain is not much of a right if the general population are unaware of the right. Public education is an important part of any Ombudsman's role and should be adequately funded and, where possible, promoted by civil society groups. Education can take the form of "clinics" undertaken as a part of the Ombudsman's outreach activities. "Doorstep justice" is an important element in building the integrity of the Ombudsman institution.

22 Fortunately, the International Ombudsman Institute (IOI) has become active in arranging attachments for training purposes. An excellent manual is their *Guidelines for Investigators of Pacific Ombudsmen - The Dawson File*, IOI, Alberta, Canada; the outcome of a Workshop for Investigators of Pacific Ombudsmen, Auckland, New Zealand, April 1993.

23 Concerned at the prospect of losing profile and some influence (and perhaps wishing to control the process), MPs in Britain deny their constituents direct access to the Ombudsman. Instead, complaints must be channelled through elected con-

stituency representatives. This is out of line with best practice, and inevitably raises doubts about the integrity of a process which requires complaints about governmental behaviour to be ciphered through the elected representatives of, as is most often the case, the governing party.

24 Some systems provide for small fees to be paid as a way of "rationing" access to the Ombudsman.

25 Julius Nyerere, *Freedom and Development/Uhuru na Maendeleo: a selection of writings and speeches 1968-73*, Dar es Salaam, 1973, p. 182.

Remedies

If maladministration or corruption has been identified by the Office of the Ombudsman, what happens next? The Office of the Ombudsman operates in the expectation that public officials will undertake the recommended remedial action. Where recommendations are ignored or deferred at the highest levels of public officialdom, a culture of disrespect will be engendered and the Office will lose its effectiveness. Civil society therefore has a clear role in upholding the findings of an Ombudsman and in insisting on implementation.

The Ombudsman is not a court of law and has no power to order action on its findings. This may seem strange, but bear in mind that the Ombudsman does not make a binding determination according to law, as a judge would at the conclusion of a court hearing. Rather, the Ombudsman determines the conclusion of an investigation based on the merits of a particular case. Defining merit is infinitely more vague and intangible. However, the Office is guided by its own previous recommendations and those of colleagues from countries with similar administrative and constitutional arrangements.

If the Ombudsman has powers of determination, rather than simply recommendation, the Office may be obliged to proceed much more formally and cautiously. We could all be back to where we started: complaining about the absence of a remedy that is accessible, speedy and inexpensive. In practice, fears that departments will simply ignore the findings of an Ombudsman are seldom realised, and the general view among Ombudsman Offices around the world is that powers of enforcement would not be helpful. On the other hand, the argument for increased powers of enforcement may be stronger in situations where the Office of the Ombudsman has a specific mandate to investigate corruption. In Uganda, for example, the Office of Inspector-General of Government has uncovered a number of corruption cases, and, having documented these, has forwarded the files to the prosecuting authorities for action, only to see the cases disappear into a void or prosecuted with a distinct lack of vigour. As a consequence, the new (1995) Constitution of Uganda confers powers of prosecution on the Ombudsman. Even so, these new powers do not confer the power of enforcement per se, but rather they allow the Ombudsman to access the criminal courts for adjudication on findings.

Effectiveness

For an Ombudsman to fulfil his or her role, they must be visible to the public, which in turn must have confidence in his/her impartiality and method of operation. Where the government is concerned, decisions made by an Ombudsman are generally not legally enforceable. Where formal power is lacking, respect for the authority of the Ombudsman and the Ombudsman's decisions is of particular importance, if they are to have any impact at all. That authority is determined in the first instance by the quality of the work itself: a brisk and thorough investigation, well-reasoned decisions, and readable reports.

Quality work is a *sine qua non*, but not enough by itself. For the Ombudsman to function properly as an independent institution, it makes certain minimal demands on the democracy of which it forms a part. It must have political support (from Parliament, government, administration and the courts); it must be given adequate resources; and the public must be aware of, and understand, the Office and its functions.

In an environment where it is insufficiently recognised that the government exists to serve the people - and where it is not taken for granted that Executive government officials must uphold the Rule of Law, or that government bodies have continuous external accountability - the

existence of an independent Ombudsman will easily be experienced as a threat to existing interests and positions of power within the government. As Dr. Marten Oosting noted:

The Ombudsman will have his work cut out for him in such surroundings, to say the least. Approaching the Ombudsman will pose risks for the general public, while the Ombudsman himself will find it difficult, if not impossible, to perform his investigation, and to find a listening ear in the government for his views and recommendations. This means that the Ombudsman's role as protector of the public is under pressure, making it hard for him to build up and maintain credibility. Some Ombudsmen do indeed have to work in such circumstances, reliant on the support of those who, like themselves, are dedicated to developing their country as a democracy governed by the Rule of Law. The pressure under which they have to perform their responsibilities may even be such that their personal safety, or that of their family, is at stake. I have great respect for these colleagues' dedication to performing their task with credibility, while upholding their independence.²⁶

The first international Ombudsman

Although the European Parliament has established its own "regional" Office of Ombudsman, the first moves to translate the concept of Ombudsman into a truly international setting took place in 1999. Then, after discussions among the private sector, interested NGOs and his staff, the World Bank Group President recruited the first appointee to serve as Compliance Adviser/Ombudsman (CAO). The same multi-stakeholder consultation process helped produce Operational Guidelines for the new Office, and continues to serve as a reference group.

The new Office has three basic functions:

- To respond to complaints by individuals, groups, communities or other parties affected or likely to be affected by IFC/MIGA projects. It uses a range of conflict resolution techniques, including mediation and conciliation, to resolve the issues raised,. The emphasis is on negotiating settlements which are widely acceptable, and which work.
- To be proactive and preventive through the provision of timely advice to IFC and MIGA managements, and so help head off problems before they develop into a crisis. Advice can be given both in relation to particular projects and in respect of broader environmental and social policies.
- To foster adherence to an approved set of IFC/MIGA policies and procedures. The CAO's compliance role is to oversee audits and reviews of IFC/MIGA's social and environmental performance. In so doing, it seeks to build confidence among all stakeholders that projects are planned and implemented to approved standards, within known, monitorable and enforceable guidelines.²⁷

Future developments will be followed with close interest, as the success of the initiative could well lead to the adoption of this approach by other international institutions, and so render them far more accountable than they ever have been in the past.

26 Address by Dr Marten Oosting, President of the International Ombudsman Institute, National Ombudsman for The Netherlands, in *The independent Ombudsman in a democracy, governed by the Rule of Law*, given at the Opening Ceremony of the Third Asian Ombudsman Conference, Macau, 4 May 1998

27 The first CAO, appointed in mid-1999, is Meg Taylor a Papua New Guinean lawyer with an NGO (Transparency International) and diplomatic background. To find out more about the CAO Office go to www.ifc.org/cao.

OFFICE OF THE OMBUDSMAN, HONG KONG, CHINA - CODE OF CONDUCT²⁸**Preface**

The establishment of the Office of The Ombudsman is to provide a channel for independent investigation of public complaints against administrative conduct, decisions and actions. The essential features of the Office are its independence, flexibility, credibility and accessibility. The mission of The Ombudsman is to redress grievances and address issues arising from maladministration in the public sector by way of recommendatory oversight to bring about improvements in the standard and quality of services and to promote fairness in public administration. It is this prime obligation which demands the performance of the Office and the conduct and integrity of its staff to be of standards no less high than what it seeks on the part of the public sector in pursuit of this mission. This Code of Conduct will be subject to a review on an annual basis.

Introduction

This Code of Conduct applies to The Ombudsman and all his staff. The Code is intended to provide general guidance to all staff who are expected to perform their duties to the highest level of integrity and professionalism. It is important that all efforts made by individual staff should adhere to the mission, vision and values of the Office and contribute towards its established goals and objectives. The Code rests on ten basic principles which all staff should follow. It also sets out specific conduct in areas central to the exercise of The Ombudsman's functions and powers.

The Code in its present form is by no means exhaustive. It should be read in conjunction with The Ombudsman Ordinance, operational policy/procedures/guidelines and office instructions and general circulars that are in force or promulgated from time to time. It is the responsibility of individual staff to familiarise themselves with all of them as appertain to their duties.

Basic Principles

The public are entitled to bring their grievances to The Ombudsman for redress. It is reasonable for them to expect a high quality service from The Ombudsman which is characterised by -

- * vigorous pursuit of truth, without fear or favour
- * timely response and quality reporting in plain and simple language
- * equity and ease of access
- * procedural simplicity and fairness
- * attending to the public and organizations with courtesy and respect
- * absence of prejudgement, prejudice and private interests
- * faithful, diligent and professional discharge of duties and responsibilities
- * promotion of fairness in public administration
- * advancement of good administrative practices and ethical principles
- * efficient and effective use of resources

Compliance with the Law, Instructions and Policies

You are obliged to act in accordance with the provisions of The Ombudsman Ordinance and comply with the Office's administrative and operational policies, procedures, delegations and instructions in relation to complaint and human resource management. You are also subject to Government circulars and regulations, the applications of which are relevant to the efficient and effective operation of this Office.

You are to make yourself fully conversant with the enabling ordinance, manuals, circulars and instructions promulgated from time to time.

You should promptly carry out the legitimate instructions of your supervisors and give adequate guidance and support to your subordinates.

Personal Conduct

You are expected to act responsibly, and you will be held responsible for your own acts and omissions.

You should be honest, courteous, just and fair to colleagues, complainants and complainee organizations and treat them with respect. You should conduct yourself in a manner consistent with your position and refrain from engaging in conduct and/or behaviour that might bring discredit or embarrassment to the Office. You must not discriminate against any colleagues, complainants and complainee organizations on grounds of race, nationality, sex, age, marital status, language, health, social status, religion, education, occupation, ability and political beliefs.

The Office has a prior call at all times on your abilities, efforts and attention. You should endeavour to do your utmost to achieve the highest possible standards in the performance of your duties. As a rule, no paid outside work is allowed without prior consent.

You should strive to avoid waste and misuse of resources. You have an obligation to help preserve the environment.

Professional Conduct

You have a duty to maintain a high level of professional competence and ethical practices commensurate with your profession. You should be committed and dedicated to the work of the Office and be in continuous search for improvements in your performance.

You should discharge your duties and responsibilities with care, diligence and thoroughness in accordance with the relevant legislative provisions as well as policies, procedures, instructions and practices issued by The Ombudsman from time to time with special attention to -

- * honesty and integrity
- * timeliness, accuracy and completeness
- * constructiveness and reasonableness
- * impartiality and procedural fairness
- * equity and natural justice
- * accountability and professionalism
- * conflicts of interest
- * confidentiality of information

Dress, Demeanour and Appearance

You are expected to maintain professional standards and demeanour and conform to the formality of duties in both dress and appearance.

Information Security and Secrecy Provision

The success and integrity of the Ombudsman system is built on public confidence and trust. Strict confidentiality must be maintained in respect of all information that come to your actual knowledge concerning complaints, complainants, enquiries received and investigations undertaken, in accordance with the secrecy provisions of The Ombudsman Ordinance.

Conflicts of Interest

Conflicts or potential conflicts of interest, which may be seen to improperly influence the impartial exercise of your duties, must be declared at the first available opportunity. You may be relieved of your personal involvement in handling the complaint. General guidance on the definition of conflicts of interest, whether real or potential, and the declaration procedure are set out in the Office's General Circular.

Acceptance of Advantages, Gifts and Benefits

The soliciting and/or acceptance of advantages, gifts and benefits is subject to the prevailing Government circulars/regulations in force. As a general rule, you must not accept any advantage, gift or benefit that might be seen to have an impact on your work or could lead to an actual and apparent conflict between your private interests and your official position.

As a general rule, such offers should be declined unless it would be offensive to refuse. In such a case, you should report them and seek approval from The Ombudsman for their retention.

Media Enquiries and Public Comment

The Office is committed to an open policy for easy access to information by the media subject to the secrecy provision. All media enquiries should be referred to officers tasked with such responsibilities unless you are the officer designated to handle media enquiries in relation to certain specific issues.

You must not disclose any information unless it is normally given to the public seeking that information or it is already knowledge made public by way of its publication in the Office's annual reports, anonymised investigation reports, the monthly "OMBUDS News" and/or through speaking engagements, media interviews or other form of releases.

Breaches of the Code and Other Instructions

The Ombudsman attaches great importance to the full compliance of this Code of Conduct and the basic principles upon which the Code is developed. If a staff member is found to be in contravention of the Code (including any provisions of The Ombudsman Ordinance, regulations and circulars mentioned in this Code), be unsatisfactory in the performance of duties or be involved in behaviour that would bring this Office into disrepute, he/she may be liable to disciplinary actions.

Some indicators for assessing the Office of Ombudsman as an integrity pillar

- Is there an Office of the Ombudsman or a comparable institution?
- Is the public generally aware of the existence of any such Office? If so, is the Office respected by the community?
- Does the Office have adequate budget and is it adequately staffed?
- Is the appointment of an Ombudsman made in a non-partisan manner?
- Is the office-holder protected from arbitrary removal from office by the government of the day?
- Does the Executive respect and act on the reports of the Office?
- Is there ease of access for complainants?
- Can complainants complain anonymously where they believe they might suffer reprisals if their identity is known?