

THE OMBUDSMAN INSTITUTION

A MEMORANDUM BY THE COMMONWEALTH SECRETARIAT AND A PAPER PREPARED BY SIR JOHN ROBERTSON, FORMER CHIEF OMBUDSMAN, NEW ZEALAND

The Commonwealth Secretariat accords a high priority in all its activities to fair and just government. The Ombudsman is seen as an institution which will make a worthwhile contribution to this objective through directly contributing to enhancing the quality of government, including greater accountability to the people, improving relations between government and the governed, restoring faith in democracy, the elimination of maladministration and corruption in the delivery of government services, and the protection of basic human rights. These are matters covered by the Harare Commonwealth Declaration and which the Millbrook Commonwealth Action Programme is intended to address.

Consequently the Commonwealth Secretariat is prepared to consider appropriate proposals for assistance in the setting up of an Ombudsman institution, or in improving existing institutions. So far as existing institutions are concerned, appropriate assistance could cover reviews of legislation, reviews of operating procedure and administrative practices, and training workshops for investigators.

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THE PROBLEM OF DEFINITION

1. Establishing a definition of an Ombudsman is difficult, owing to the fact that in creating an Ombudsman the classical parliamentary model has been varied to suit different political philosophies and different cultural and socio-economic systems.

2. The classical model was once defined by the International Bar Association (IBA) as: "An office provided for by the constitution or by action of the legislature and headed by an independent, high level, public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion and has the power to investigate, recommend corrective action and issue reports."

3. In discussing the Ombudsman in the Commonwealth, it has to be recognised that while the bulk of those created are classical institutions in terms of the IBA definition there are also many Ombudsman institutions which do not fit this definition. The most important of these are known as executive (as distinct from parliamentary) Ombudsman. The main, and quite often only distinguishing feature is that they are appointed by, and answerable to the executive rather than Parliament. Examples of this are the Permanent Commission of Enquiry in Tanzania, and the Investigator-General in Zambia.

4. An executive Ombudsman may be supported by legislation or constitutional provisions. This paper does not set out to argue that every executive Ombudsman is disadvantaged by being accountable to the executive rather than the legislature, because clearly some may be doing the same things just as effectively as a parliamentary Ombudsman. However, even if that is so, the original concept of an Ombudsman inherited from its Scandinavian environment, is for an institution related to, or as an extension of, the role of the elected representatives of the people sitting in Parliament, and having the duty to hold the executive accountable to the people for its actions. That is why so many existing Ombudsmen in the

Commonwealth have been specifically appointed as officers of Parliament to emphasise that they are not just officials but an extra dimension of Parliament to improve the accountability process.

5. In conceptual terms therefore an executive Ombudsman cannot be part of the parliamentary machinery of accountability, and its independence to hold the executive accountable when it depends for its existence on the will of the executive may circumscribe its ability to perform and operate with the same freedom as the parliamentary Ombudsman. There is also the point that for credibility with the people who use the institution, it must be seen to be independent before its decisions will be accepted with confidence.

6. However as in so many cases the gap between concept and operation may be more apparent than real, but there are many critics of the executive Ombudsman who, in recognising the needs of developing countries to hone institutions to suit their political and social circumstances, still see allegiance to the executive as its greatest credibility risk, and its only weakness. Nevertheless many developing countries do not see this as a weakness. Mr A. Kiapi, writing in the Ombudsman Journal 90/91 about the Inspector-General in Uganda said: "The view of developing countries is that an Ombudsman must be an instrument of the President to be used in his capacity as guardian of administrative legality against excesses committed by officials subordinate to him."

7. For the purpose of this discussion paper the focus will be on the parliamentary or legislative Ombudsman, (with the possible exception only of the appointment process). There are many other complaint mechanisms where the officials are called "Ombudsman" but do not meet the criteria of the IBA for a legislative Ombudsman. For example there are single purpose parliamentary Ombudsmen (e.g. Ethnic, Health, Immigration etc.) officers handling complaints within an organisation, and a consumer type Ombudsman such as those set up in the private sector for insurance, banking etc. None of these are covered by this discussion paper.

WORLD COVERAGE

8. The Ombudsman is an institution which has already won acclaim and proved its worth all around the world. Apart from its Swedish precedent which has existed from about 1809, this acclaim has been earned mostly over the last 40 years when the great

majority of institutions were set up. In the last decade and a half the institution has had spectacular growth in Latin America, Africa, Asia, and Eastern Europe.

9. According to the latest issue of the International Ombudsman Institute Directory, the institution as defined by the IBA and including executive Ombudsmen with the same role, has been set up in 79 countries with an Ombudsman in 207 posts. There are hundreds more officials titled "Ombudsman" who do not fit the institution model used in this discussion paper.

10. Included in the 79 countries are 31 Commonwealth countries with a total of 69 Ombudsman posts which fall within the definition set for this discussion paper. The Ombudsman positions are at either national, federal, state, provincial, or local government level.

WHY AN OMBUDSMAN?

11. An Ombudsman cannot function effectively in a dictatorship or other form of totalitarian government. In such cases, if an Ombudsman is present it is usually because those who control the count want this institution to influence people to believe that the regime is sensitive to criticism of government activities. In fact any Ombudsman in these circumstances will have severe limitations on his/her ability to make any inroads into correcting proven maladministration. Consider for one moment how free the Public Complaints Commissioner in Nigeria has been to publicly criticise the human rights conduct of it's military dictatorship.

12. Modern democracy, whether it has evolved from old established democratic countries or developing nations, or totalitarian regimes, depends for its health and quality on an open and trusting relationship between the governed and the government. More and more people are demanding explanations for what their government's are doing and thinking, and more and more they expect to be treated by their government in a considerate and sensitive manner with full recognition of the rights of individual citizens to a life of quality within a democracy. The public will look for better fulfilment of this expectation as they advance into the next century.

13. The presence of an Ombudsman, or movement towards setting one up, is a natural step to assist the consolidation of a democracy and reduce the distance between officials and the people, and help them to understand each other. Always

governments must strive to produce the means to soften relations between the government and the people. An Ombudsman institution with it's independence and moral persuasion has proven itself to be a major contributor to that objective. Any one or more of three important factors may be present to justify the role of an Ombudsman.

14. First, it may be a reflection of political maturity that a government will recognise that notwithstanding pride in the policies and practices of public administration implemented for the people, some maladministration in relationships between the governed and government will occur, and that it needs to be dealt with effectively and expeditiously.

15. Second, that such maladministration should occur is inevitable, given that governments have to work through hierarchies and bureaucracies. Vaclav Kraus the Czech Prime Minister said in 1995. "The battles with communism are yesterdays battles. Today's enemy is bureaucracy, and the people are losing the struggle." Not all countries will have bureaucracies of the type and culture of newly emerging Eastern European democracies but the Czech Prime Minister is correct to warn of the danger to people's rights of excessive, unrelenting, and insensitive public administration.

16. A democracy may not endanger fundamental rights to life and liberty, but within government bureaucracies burdened with the complexities of modern day policies and public administration there can be found in some a sense of self importance, of indifference, of obsession with precedents rules and processes and a lack of sensitivity to the problems that face ordinary people when confronted by the authority of the state.

17. The display of these characteristics may be entirely unintentional, but understandable in terms of the structure within which officials work. Some of the characteristics occur with more emphasis at the periphery where administration meets the people and where officials concentrating on detailed servicing find it harder to see clearly the objectives of public policy.

18. Third, the last few decades have been characterised by a series of trends and movements toward the definition, assertion and protection of human rights. While some countries have different views on what are acceptable standards of human rights, other countries subscribe to international protocols recognising those trends and movements which clearly enshrine enlightened values. The net effect of these, and the education process which has accompanied them encourages people to be more

questioning of government actions and to demand reasons for decisions. The growth of the Ombudsman institution around the world reflects the public demand for, and response to, these movements and trends. Such demands cannot reasonably be declined in this enlightened age.

19. A government may feel that these three factors do not justify an Ombudsman, when the government itself can set up internal systems, institutions, and checks and balances, which meet the problems outlined. Be that as it may, it has been shown all round the world that the public does not have confidence that the government's bureaucracy will itself be independent enough to resolve the disputes which will inevitably arise between the people and officials. They do not see that it is fair and just for government to be judge in its own cause. If any system which is set up to resolve conflicts between the state and its citizens is to have the confidence of the people, it has to be seen to be independent. This simple requirement has most often driven the growth of the Ombudsman institution around the world.

20. Being a public office directly accessible to the people, with independence and wide powers of investigation, it safeguards an individual's rights to good governance. An Ombudsman's conclusions are not legally binding but are seldom refused, and the institution stands alongside Parliament and the Courts in monitoring the actions of public agencies. While the institution's role is that of a public "watchdog" it does however have a marked impact, through its activities, on the improvement of public administration in all its areas of jurisdiction.

21. The Ombudsman should not be seen as a threat to anyone or any institution. It has to be assumed that all democratic governments wish to accord justice and fairness to its citizens, and that all public officials wish to improve their standard of administration. Frequently the Ombudsman's investigation supports the official action complained about. Recommendations are supported by the intellectual integrity of reasons, which are not only persuasive in the way they are expressed, but also for their moral force.

22. Nor should an Ombudsman be seen as a threat to the Courts or Parliament. The Courts determine matters of law, using appeal or review processes to avoid an unfettered power, and to apply or determine the law. Law making is Parliament's role, but decisions of the Courts and recommendations of the Ombudsman will be seen by Parliament as strong reasons for creating new law or amending old law. The Ombudsman is concerned

with the process of administration, whether laws and policies are administered fairly, reasonably and in a non-discriminatory way. Where maladministration is found the moral force of the Ombudsman is used to correct the injustice, and improve the administration which caused the problem. There is a complementarity between the Courts, the Parliament, and the Ombudsman, which is not a creation of opposites, but a contrast between different methods of oversight of the executive.

ESSENTIAL CHARACTERISTICS OF AN OMBUDSMAN INSTITUTION

23. Basically there are three separate characteristics to a successful Ombudsman institution- its independence, its flexibility and its credibility - and these are now closely examined. (For this section the author draws heavily on his concluding summary to an international conference the papers of which were published by the international Ombudsman Institute in 1995 in a book entitled *The Ombudsman Concept*.)

(a) Independence

Looking first at independence, there are few who will disagree that an Ombudsman needs to be able to work from a position of independence. Because an Ombudsman comes in both parliamentary and legislature models and in different organisational forms a general presumption of independence is inadequate without further explanation. That explanation may best be set out in answer to three questions: independence from whom or what?, independence for what?, and is it total independence?

So far as the first question is concerned there is an obvious need for an Ombudsman to be independent from any organisation over which jurisdiction is held. As jurisdiction encompasses the actions of executive government, s/he must be able to operate without being influenced by any concurrent or subsequent action which a government might take to circumscribe freedom of operation. As the people's "watchdog" it is not enough to be independent in fact, but the Ombudsman in working clothes has also to be seen to be independent by those who use its services. For instance, it is desirable that the Ombudsman not be a serving career civil servant who would normally look to the civil service for a future career. This applies also to investigators who are best seen as employees of the Ombudsman and not civil servants.

Organisations subject to jurisdiction also need to see and perceive the Ombudsman as

impartial and independent. S/he must not be seen as an advocate or counsel for the complainant. The independence necessary to ascertain all the facts, assess them impartially and draw conclusions from the facts will be eroded if an Ombudsman is inclined to advocacy on behalf of the complainant. Such advocacy would cause loss of confidence and credibility with organisations subject to jurisdiction.

Independence is also necessary from special interest groups in society who may wish to influence issues through having an Ombudsman conditioned to draw conclusions in line with their interests. "Capture" by such interests must always be guarded against, and this is why an Ombudsman should give up on appointment all other activities, special interests and offices of profit. Any conflict of interest will affect independence.

The second question, "independence for what?" raises very pointedly the reasons for independence, and the personal integrity of the office holder. Independence is necessary so that the accumulated wisdom of an Ombudsman, by virtue of the office held, and the experience s/he brought to it, may be contributed freely and impartially to the conclusions of the office without being committed to extraneous or outside influences.

The third question, "is it total independence?" is a little more difficult to answer. It is generally agreed that an Ombudsman's independence is compromised by some form of accountability. However there are several aspects of accountability.

An Ombudsman must be accountable to the governing law, or constitutional provision which sets up the office. Many precedents of judicial review exist where the Ombudsman's level of accountability is not enough. An Ombudsman should not be able to escape accountability to the people for what is done under a cloak of independence. There is a necessity to publish reports, behave impeccably, give reasons for decisions, and promote in public the role of the Ombudsman. Reaching the people is an important aspect of accountability because a right to complain enshrined in a constitution, or in stature, is not a right at all if certain sections of the population are denied access to it through ignorance of its existence.

There is also need for accountability for the resources used to discharge the role. Independence necessitates that resources are made available by Parliament and not the executive but it is not an excuse for demanding unlimited budgets and presenting inadequate records of utilisation of those

resources. There must be sufficient resources for the role, but guaranteed independence in operation does not obviate the need to be transparent and accountable in the use of those resources. Performance measures need to be formulated and published, all resources used need to be subject to outside audit, and an Ombudsman should be prepared to defend effectiveness in the use of resources before the elected representatives of the people. Performance measurements however should not be extended to the conclusions of an Ombudsman on case work. That is a judgemental role relying on the experience of the office holder.

There is no unanimity on the organisational model for an Ombudsman which best protects independence. So many different cloths have been cut for an Ombudsman, the variety being by the requirements of the host country in relation to its political and social traditions. The ideal concept for an Ombudsman does not depend on its organisational form, for its effectiveness. Whatever organisational model is decided, independence can be accommodated in greater or lesser form. In the end the way it works, or is permitted to work, by the political regime of the country will determine its level of independence in operation.

(b) Flexibility

There is no doubt the Ombudsman concept has shown great flexibility in operation, and in meeting the roles it has been called upon to perform. Basic grievance resolution through a complaint-driven process will always remain the main thrust of the Ombudsman concept and indeed is usually the main driving force for the setting up of an Ombudsman.

Within that basic role most Ombudsmen in the Commonwealth have shown considerable flexibility:

- to design unique methods of taking and investigating complaints, and of drawing conclusions according to the needs of indigenous people, ethnic minorities, refugees and unusual leadership norms in society, e.g. communes
- to encompass basic human rights issues as part of the grievance resolution process for maladministration
- to improve administrative processes which are prone to the creation of grievances through systemic investigations and recommendations to the Executive or Ministers

- to act as an honest broker to resolve major issues of dissent between the governed and the government
- in the conduct of investigations and in recommending remedies most calculated to achieve substantial justice as between the individual and the state.

The Ombudsman institution has also shown flexibility to undertake functions which could be said to be related to, but not part of the basic role. Examples of such cases are:

- undertaking alternative dispute resolution to settle by mediation or other means disputes between minorities or other groups and the state
- in making the machinery of government more transparent and more participative with the people of a nation. Many Ombudsmen are now involved in freedom of information programmes, for example in New Zealand, the United Kingdom and Australia
- being able to encompass a role of "watchdog" on the behaviour of a country's leadership. Such functions are, for example, part of the role of the Ombudsman Commission in Papua New Guinea
- the concentration on human rights issues as distinct from maladministration.

Clearly the Ombudsman as an institution is flexible enough to operate in a wide range of at risk social situations where improvement from the public's point of view merits the intervention of an independent and credible review mechanism.

(c) Credibility

To be effective the Ombudsman institution must have credibility with all with whom it operates. It is wrong to believe that credibility arises from the model itself - it has to be earned. And in the process of earning credibility, the personal characteristics of the holder of the office in matters such as personal integrity, courage and sensitivity to the people are in the forefront.

The personal factor aside, there are certain inherent characteristics which assist in the earning of credibility, both with complainants and organisations subject to jurisdiction. Some of these characteristics are:

- appointment of the Ombudsman with the support of not less than two thirds (but preferably unanimously) of the people's representatives sitting in Parliament
- the extent to which the institution meets the test of independence and flexibility covered in (a) and (b) above
- the extent to which it operates in an impartial and non-political way so that people can rely on it to decide issue without fear or favour and without cost. All the socio-economic levels in society may access it by direct contact
- that it relates directly to the people in that it is complaint driven and is open at all times to receive, in a sensitive and dignified manner, people who have been unable to resolve their differences with government agencies, and wish to have a just and fair resolution of their grievances
- that the Ombudsman is not an advocate for the complainant, but is one who investigates the facts of the grievance, reports on it, makes recommendations, and gives reasons for conclusions, whether or not the complaint is sustained
- where the Ombudsman, in appropriate cases, clears a jurisdictional organisation of allegations of maladministration or corruption with the same impartiality and intellectual reasoning as it will use to sustain a complaint. The Ombudsman has no favourites
- fair and just processes of investigation which reach conclusions in an acceptable time frame
- an ability to communicate to people through reporting and public education programmes, the result of the work of the Ombudsman in a manner calculated to discharge public accountability and ensure that every citizen knows when and how it is appropriate to appeal to an Ombudsman
- the manner in which an Ombudsman offers advice and guidance even when jurisdiction does not exist.

CONCLUSION

24. Any short description of the Ombudsman institution cannot incorporate all the nuances that exist where it operates in different parts of the world. All that a paper of this magnitude can do is

to describe its role and processes in the light of a wide spectrum of international experience.

25. The institution is not just a concept: it is an actuality, alive and well in all parts of the world. Its independence, flexibility, and credibility is being seen by governments and the governed as a vehicle to reinforce the people's rights to fair and just treatment, and an instrument which can tidy up the extremes of maladministration, and help to bring about good government.

26. The Ombudsman institution is not however a panacea for curing all problems between the government and its people. It takes its place with other legislative and constitutional agencies, retaining its essential characteristics which distinguish it from other social organisations. It has proved itself adaptable to change, and its visionary outlook should keep it relevant to the people on into the 21st Century.