

7 Ombudsman Offices

7.1 Role and Function

It has already been noted that in order for States to fulfil their international human rights obligations, it is vital to establish domestic infrastructure and institutions to promote and protect rights at domestic level. Further, it is desirable that these institutions fulfil the criteria set out in the Paris Principles and the Commonwealth Secretariat *Best Practice Guide*. However, some small island states lack the resources and infrastructure for a human rights commission. In such cases, an Ombudsman Office or even Public Defender may be created as an alternative. Ombudsman Offices and Public Defenders act as watchdogs of public administrative bodies, and in some cases also fulfil an explicit human rights mandate. Caiden's *International Handbook on the Ombudsman* describes the role as follows:

“The ombudsman is an independent and non-partisan officer... often provided for in the Constitution, who supervises the administration. He deals with specific complaints from the public against administrative injustice and maladministration. He has the power to investigate, report upon and make recommendations about individual cases and administrative procedures. He is not a judge or a tribunal, he has no powers to make orders or to reverse administrative action. He seeks solutions to problems by a process of investigation and conciliation. His authority and influence derive from the fact that he is appointed by and reports to one of the principle organs of the state, usually either the parliament or the chief executive.”¹⁶⁶

The notion of the Ombudsman was first conceived in Sweden in 1809. However, it was Great Britain's 1968 model of the Parliamentary Commissioner for Administration that is the most widely followed today.¹⁶⁷ This model is referred to as the 'classic Ombudsman'. It usually consists of a public official, appointed by the executive, who is responsible for the investigation of complaints and maladministration in the public law sphere (usually of different arms of the state like the police or prisons). The British Parliamentary Ombudsman sits between the legislature and the executive (and is closely linked to the latter), but is designed to be an extension of parliament.

¹⁶⁶ Caiden, G.E., (ed.), *International Handbook of the Ombudsman*, Westport, Connecticut: Greenwood Press, 1983, p.13. The author points out that an Ombudsman need not be a 'he' but can be a 'she'.

¹⁶⁷ A comprehensive discussion of the British model is beyond the scope of this study. However, for more information see Bradley, A.W., and Ewing, K.D., *Constitutional and Administrative Law* (14th Ed.) Edinburgh: Pearson Education Limited, 2007, pp. 715-724 (hereinafter 'Bradley & Ewing'). Note that the British model is derived from the Ombudsman model found in Scandinavian countries and New Zealand, but was designed to fit within the structure of existing British institutional remedies. See also Fenwick, H., and Phillipson, P. (2nd Ed.) *Text Cases Materials on Public Law and Human Rights*, Cavendish Publishing Limited: Abingdon, 2003, pp. 792-835.

The two central functions of an Ombudsman are:

1. Improving administrative efficiency of public bodies and government departments; and
2. Bridging the gap between the government and the people.¹⁶⁸

The Ombudsman fulfils an important public agenda by working towards limiting governmental power and governing the relationship between the citizen and the State. The establishment of an Ombudsman therefore reflects a commitment to the rule of law and principle of legality.

The status and jurisdiction of the Ombudsman is governed by statute.¹⁶⁹ The Ombudsman forms no part of the judiciary¹⁷⁰ and has no legal power to grant remedies. He/she simply reports to parliament.

The value of the Office of Ombudsman is its accessibility, flexibility and relative informality.¹⁷¹ This may be more effective in investigating allegations of maladministration and uncovering the factual truth than a traditional formal adversarial or inquisitorial process.

The hybrid Ombudsman model¹⁷² combines jurisdiction over maladministration with human rights. The classic Ombudsman model does not have an express human rights mandate. However, in practice, some Ombudsman Offices adopt a human rights based approach to their work, due in part to the nature of the complaints or grievances against public authorities which are submitted to them, including those regarding prison conditions, the police, local government, social security, health care, mental health, child care and support, education, tax and pensions.

Whilst there are some similarities, the scope of the powers of investigation of the Ombudsman varies. In Trinidad and Tobago, the Ombudsman is limited to investigations of decisions or recommendations made by government departments. The Guyana Ombudsman's powers are limited to investigations of actions (not decisions) of government in the exercise of administrative functions.¹⁷³ In contrast, the Barbados Ombudsman's investigatory powers are much broader, adopting almost a judicial review approach to the grounds of investigations – i.e. injustice caused by improper, unreasonable or inadequate conduct on the part of a government ministry or public authority.

Of the Ombudsmen Offices examined in this study, only Papua New Guinea, Namibia and Jamaica fulfilled an express human rights mandate. The other States examined – Antigua and Barbuda, Trinidad and Tobago, Barbados and Guyana – adopted a classic Ombudsman model. More detailed analysis is set out below.

168 See an early analysis by Cheng, H.Y., *The Ombudsman or Citizen's Defender: A Modern Institution*. *Annals of the American Academy of Political and Social Science*, Vol. 377, May 1968, pp. 20-30.

169 See for example in the UK, the Parliamentary Commissioner Act 1967.

170 See Report by Sir Cecil Clothier, Parliamentary and Health Ombudsman in the UK in 1984. Report for 193 (HC 322 (1983-4)), p.1.

171 Bradley & Ewing, p. 715.

172 Consolidation of a human rights commission and the Office of Ombudsman.

173 See speech by Edoe, K.G.A., Ombudsman of Trinidad and Tobago, *The Institution of Ombudsman – an Effective Accountability Mechanism*. Second Regional Conference of the Caribbean Ombudsman Association held in Trinidad, 7-10 May 2002.

7.2 Legal framework of the Commonwealth Ombudsman

The jurisdiction of the Ombudsman (usually set out in statute) is generally limited to matters that are not met by Constitutional remedies. The jurisdiction of the Ombudsman may be further limited by the exclusion of certain spheres of governmental activity or specifically named bodies from the remit of investigation. Thus the Ombudsman may be denied jurisdiction in matters relating to criminal law enforcement or grant of honours, government departments responsible for education, national ownership of industry and the activities of the armed forces.¹⁷⁴ This obviously impacts on the efficacy of the office.

The enabling legislation spells out the jurisdiction, powers and functions of the Office of Ombudsman. The Ombudsman commonly conducts investigations, disseminates information, raises awareness and conducts public education programmes. The most important function is that of investigation. The nature of the Ombudsman's investigatory powers is usually contingent upon the type of model of the Ombudsman – i.e., whether it follows the classic model or the human rights model. However, the line between the two is not distinct where the maladministration of public bodies also raises human rights concerns. The Ombudsman must have regard to constitutionally protected rights and international human rights instruments.

All Ombudsmen formally investigate and resolve complaints and issue recommendations. However, such recommendations are not legally enforceable. This undermines the strength of the Office. However, an Ombudsman can nevertheless exert influence over government in practical terms through the widespread publication of his/her findings and recommendations. Thus, albeit that the Ombudsman does not possess coercive powers, the status of the Office means that adverse findings are politically embarrassing for the government. Social pressure may therefore be brought to bear on a recommendation presented to parliament.

¹⁷⁴ See for example Parliamentary Commissioner Act 1967, ss 4,5 and schedules 2 and 3 respectively.

7.3 Schedules of Ombudsman Offices

Criteria	Ombudsman Commission of Papua New Guinea ¹⁷⁵ ('Commission')	Ombudsman of Belize ¹⁷⁶	Jamaica Office of the Public Defender ¹⁷⁷	Ombudsman of Antigua and Barbuda ¹⁷⁸
Established		Office established on 8 July 1999.	16 April 2000.	1994.
Constitutional or enabling legislation	Constitution Organic Laws setting out jurisdiction and functions of the Commission	Enabling Act passed in April 1994.	Public Defender (Interim) Act 1999	Constitution. Ombudsman Act later enacted in 1994 and first Ombudsman appointed 1995.
Bill of Rights	Yes.	Yes	Yes.	Yes. 1981 Independence Constitution contains Chapter on the Protection of Human Rights and Fundamental Freedoms
Type of office	Hybrid model. Established an Anti-Discrimination and Human Rights Unit within the Ombudsman ('ADHRU').	Classic model.	Hybrid model.	Classic model.
Jurisdiction	<ul style="list-style-type: none"> ● Maladministration ● Anti-corruption ● Human rights ● Anti-discrimination ● Office of the Governor-General (the only public official not subject to limiting legislation). ● Integrity of political parties ● Judicial appointments. 	Maladministration by public bodies.	<ul style="list-style-type: none"> ● Maladministration or allegations of injustice flowing from administrative action of the State or its agents ● Abuse or infringement of Constitutional rights. 	Maladministration by public or statutory bodies.
Functions	Papua New Guinea	Belize	Jamaica	Antigua & Barbuda
Investigation at own initiative	Yes	No. Complaints mechanism.	Yes. Under narrow circumstances defined in The Ombudsman Act 1978.	No. Complaints mechanism.
Other powers or functions	Power to make special reference to the Supreme Court on questions of constitutional interpretation.	Annual Reports. Established a tripartite Council in 2001 to deal with complaints against the police.	Power to appoint a Tribunal, after consultation with the Prime Minister and Leader of the Opposition, to assist in an investigation of a complaint.	Ombudsman attends meetings of Public Sector Reform Committee.

¹⁷⁵ For more information see Geno, I., *The Ombudsman Commission of Papua New Guinea – Its Role in Human Rights Issues in Papua New Guinea*. Paper presented at the Commonwealth Conference of NHRIs, London, 26-28 February 2007.

¹⁷⁶ For more information see: Rodriguez, P., *The Ombudsman of Belize and the Human Rights Mandate*. Paper presented at the Commonwealth Conference of NHRIs, London, 26-28 February 2007.

¹⁷⁷ For more information see: Witter, E., *Office of the Public Defender, Jamaica's Country Presentation*. Paper presented at the Commonwealth Conference of NHRIs, London, 26-28 February 2007.

¹⁷⁸ Thomas, H., *The Role of the Office of the Ombudsman of Antigua and Barbuda as a Human Rights Institution*. Paper presented at the Commonwealth Conference of NHRIs, London, 26-28 February 2007.

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Functions	Papua New Guinea	Belize	Jamaica	Antigua & Barbuda
Other powers or functions	Public interest standing and implied power to enforce rights such as right to life and right to freedom from inhuman treatment.		Power to make regulations in respect of the Tribunal.	
Remedies	Reports and recommendations. Has not pursued investigations through courts where human rights violations have occurred. Alternative Dispute Resolution such as mediation and persuasion. Refers cases to other more appropriate bodies.	Formal settlement of complaints.	Reports to Parliament where failure of an agency to comply with recommendation. Finds representation and legal aid for person violated. Makes recommendations that source of injustice (rule/ law etc) be amended. Recommends compensation be paid to complainant.	Formal settlement of complaints.
Advise government	Indirectly through recommendations/reports	Indirectly through recommendations/reports	Indirectly through recommendations/reports	Indirectly through recommendations/reports
Training	Yes.	–	No.	No
Education	Yes.	Yes.	No.	No
Anti-discrimination/ Equal Opportunities mandate.	Yes. Potential to take action in Court but to date has not done so.	No.	No.	No
Independence of the office	Yes: independent investigator (rather than advocate of victim).	Yes	Yes	Yes
Institutional support for the ombudsman	Office of Public Solicitor. UNDP – especially in setting up the ADHRU.	<ul style="list-style-type: none"> ● OAS ● CARICOM ● OECS 		<ul style="list-style-type: none"> ● CAROA. ● International Ombudsman Institute ● Danish Centre for Human Rights ● Inter-American Institute on Human Rights ● Caribbean Human Rights Network
Developments / Future work	Ratification of ICCPR and ICESCR would strengthen rights protection which falls short under the Bill of Rights.		Office associates itself with claims for equitable reparations in the form of direct financial settlement, debt relief, support for programmes of poverty eradication, the building or strengthening of democratic institutions and promotion of foreign direct investment and market access.	Recommendation that legislation amended to facilitate formation of hybrid model.

COMPARATIVE STUDY ON MANDATES OF NHRIs IN THE COMMONWEALTH

Criteria	Ombudsman of Trinidad and Tobago	Ombudsman of Barbados	Ombudsman of Namibia
Established	1977	1981	1990
Constitutional or enabling legislation	Constitution.	The Ombudsman Act (1981)	<ul style="list-style-type: none"> ● Constitution ● The Ombudsman Act 1990
Bill of Rights		Yes (based on UDHR)	Yes
Type of Office	Classic model	Classic model	Hybrid model
Jurisdiction		<p>Whether injustice has been caused by improper, unreasonable or inadequate conduct on the part of a government Ministry or department or other authority.</p> <p>Normally the Office cannot investigate a case where the complainant has other legal means of redress.</p>	<p>Human rights.</p> <p>Maladministration by public bodies.</p> <p>Exploitation or overuse of natural resources and the environment.</p> <p>Acts of private institutions which give rise to human rights violations.</p> <p>Anti-corruption.</p> <p>Any decision of a public body which breaches human rights is discriminatory, unjust, unreasonable or unfair etc or based on an error of law.</p>
Functions			
Power of investigation	Yes.	Yes.	Yes
Investigation at own initiative	Yes.	No. Through complaints.	<p>Dependent on subject matter of the investigation.</p> <p>It would appear that the Commission can only instigate investigations with respect to corruption but must receive complaints with respect to maladministration, human rights and the environment.</p>
Other powers or functions	<p>Advisory function.</p> <p>Power of a High Court to summon witnesses during investigations.</p> <p>In addition to annual reports, produces separate reports which focus on important areas of concern.</p>	<p>With some exceptions the Ombudsman has the power to request any minister or officer of a government department or any other person to supply information considered necessary.</p>	<p>Power includes capacity to enter premises, access to accounts and documents, require production of further particulars, power of seizure of items, power to summon witnesses.</p> <p>Reviewing legislation and making recommendations.</p>
Remedies	<p>Reports and settlement.</p> <p>Where recommendation not adopted Ombudsman under a legal obligation to refer the matter to Parliament.</p>	Settlement of complaints.	<p>Settlement of complaints.</p> <p>Referral to Prosecutor-General or to the Auditor-General or both.</p> <p>Bringing proceedings in Court of competent jurisdiction.</p>
Advise government	Yes.	No	Yes and make recommendations.
Training	No.	No	
Education	Yes.	No	Yes.
Anti-discrim/ Equal Opps mandate.	No.	No.	Yes.

7.4 Commentary on Individual Ombudsman Offices

Papua New Guinea

The Ombudsman Commission of Papua New Guinea operates as a hybrid public institution. Its mandate includes the protection of human rights and anti-discrimination, as well as the classic function of watchdog of government administration. The Commission model empowers multiple office-holders to exercise constitutional powers, rather than a single specified person.¹⁷⁹

Antigua and Barbuda

The main functions of the Ombudsman of Antigua and Barbuda are to investigate any complaint relating to any decision or recommendation made or any act done or omitted by any officer of the government or statutory body in any case in which a member of the public claims to be aggrieved, or appears to the Ombudsman to have sustained injustice as a result of the administrative functions of that officer or body.¹⁸⁰ The government bodies that can be scrutinised are defined in an exhaustive list in the Act. This list excludes the investigation of complaints relating to powers conferred on the Governor-General by the Constitution or to any decision or recommendation made or taken by the Director of Public Prosecutions or any decision in respect of the Director of Audit.

The Ombudsman does not possess any express human rights mandate, but in practice, he/she is frequently called upon to perform such related functions when dealing with complaints of maladministration in the public service, for example, when investigating complaints regarding abuse of police powers.¹⁸¹

Trinidad and Tobago

The Ombudsman is charged with a four-point mandate:

- increasing public awareness of the Office;
- accessibility to the public;
- gaining public confidence; and
- resolving complaints satisfactorily for complaints and officials.¹⁸²

The Ombudsman has fairly well established investigatory and advisory competence to meet these objectives. Of particular importance is the power (possessed by many NHRIs) to enter and inspect any premises over which he/she has jurisdiction. The Ombudsman's power in such circumstances extends to the power to call and examine witnesses and if appropriate seize documents.¹⁸³

Namibia

The Ombudsman of Namibia has one of the broadest mandates, which includes the duty to promote and protect human rights, ensure fair and effective administration, combat corrupt practices and protect the environment and natural resources of Namibia through

179 Papua New Guinea Commission – <http://www.lawandjustice.gov.pg/www/html/102-the-ombudsman.asp>

180 Annual Report for the Ombudsman of Antigua and Barbuda for the year 2002, p.7 <http://www.ombudsman.gov.ag/reports/pdf/annualreport2002.pdf>

181 *Ibid.*

182 Henry, J., *The Ombudsman and His Society – the Case of Trinidad and Tobago*, available at http://www.ombudsman.gov.tt/applicationloader.asp?app=doc_lib_details&id=87.

183 <http://www.ombudsman.gov.tt/applicationloader.asp?app=articles&id=940>

the independent and impartial investigation and resolution of complaints and by raising public awareness.¹⁸⁴

However, the Ombudsman's power of investigation is limited in terms of complaints received – he/she may not initiate investigations. A noteworthy point here is the different powers of investigation and enforcement which the Ombudsman has in relation to each of the areas of his/her mandate.

The recommendations of the Ombudsman regarding maladministration are accorded greatest force. The Ombudsman can apply to the High Court to obtain an interdict to enforce recommendations or their implementation or prevent further maladministration. Further, the Ombudsman may, following investigation, recommend the more expeditious processing of applications to relevant ministries. The Constitution entitles individuals to 'approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient' (Article 25(2)).

The Ombudsman sees the power to investigate complaints relating to the environment as an adjunct of the right of sustainable development, due to its close nexus with exploitation of mineral resources and eco-systems. This can give rise to competing claims (for example, in situations such as the creation of dams or degradation of land belonging to indigenous minority groups). The importance placed on the right to development by the Ombudsman of Namibia is fairly unique.

Jamaica

The Office of Public Defender in Jamaica replaced the classic model of Ombudsman Office on 16 April 2000. The powers and functions of the Ombudsman were split between the Office of the Public Defender (by the Public Defender Act 1999) and the Political Ombudsman, a Parliamentary Commission. The Public Defender was given the jurisdiction for the first time to investigate alleged violations of an individual's Constitutional rights. The first Public Defender took up his office on 17 April 2000.

The Public Defender can only investigate complaints by individuals or groups who have sustained injustice or suffering. This is akin to the admissibility criteria in international human rights enforcement mechanisms, where the complainant must actually be a 'victim' of a human rights violation (see for example, Article 34 ECHR). The power to investigate complaints of maladministration is based on novel grounds, which differ to those included in the enabling legislation of other Ombudsman Offices and include the following:

- i. 'When a service takes longer to be provided than it should;
- ii. When service is not conducted in the right and proper manner;
- iii. When persons are not treated fairly;
- iv. When rules are not followed; and
- v. When faulty systems are used.'¹⁸⁵

¹⁸⁴ <http://www.ombudsman.org.na/>

¹⁸⁵ <http://www.opd.gov.jm/index.php>

The Public Defender also pursues important initiatives in the field of human rights, with a current focus on slavery and human trafficking.

Barbados

There is very little available information on the work of the office of Ombudsman of Barbados to add further commentary at this stage.

Guyana

There is insufficient up-to-date information available on the work of the office of Ombudsman of Guyana to add further commentary at this stage.

Belize

The Ombudsman of Belize does not have an express human rights mandate. However, human rights aspects may feature in investigations of injury, injustice or abuse by the actions or omissions of Government agencies. In particular, the Ombudsman of Belize focuses on abuse of police powers and maladministration within that department and is mandated to protect rights and freedoms of persons involved in the criminal law system.

The Ombudsman has endeavoured to change the conceptualisation of human rights, by public officials (in particular the police) as being inconsistent with criminal law enforcement and entitlements which only benefit vagrants and the lawless.