

## **Ombudsman in South Africa**

Ombudsman offices exist in approximately 120 countries. The Ombudsman is an independent, impartial public official with authority and responsibility to receive, investigate or informally address complaints about government actions, and, when appropriate, make findings and recommendations, and publish reports. An Ombudsman works for the resolution of particular issues and, where appropriate, makes recommendations for the improvement of the general administration of the entities over which it has jurisdiction. The term “Ombudsman” should only be used if six key criteria are met. Those criteria are: independence of the Ombudsman from those whom the Ombudsman has the power to investigate; accessibility; fairness, public accountability, effectiveness; and impartiality. These standards were developed to provide advice and guidance on the structure and operation of Ombudsman schemes so that Ombudsman may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process.

### **A. ESTABLISHMENT AND OPERATIONS**

An entity intending to establish an Ombudsman should do so pursuant to a legislative enactment in plain language, which is available and accessible to the public and which clearly sets forth the role, powers and jurisdiction of the Ombudsman and which authorizes the Ombudsman to:

- (1) receive complaints about alleged acts, omissions, maladministration, improprieties, and systemic problems within the Ombudsman’s jurisdiction as defined in the legislative enactment establishing the scheme
- (2) exercise discretion to accept or decline to act on a complaint
- (3) operate by fair and timely procedures to aid in the just resolution of a complaint or problem
- (4) gather or demand relevant information
- (5) resolve issues at the most appropriate level of the entity
- (6) function by such means as:
  - (a) conducting an inquiry
  - (b) investigating and reporting findings

- (c) facilitating, negotiating, and mediating
- (d) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them
- (e) identifying complaint patterns and trends
- (f) educating
- (g) issuing public reports annually
- (7) initiate litigation to enforce or protect the authority of the office as defined by the legislative enactment, as otherwise provided by these standards, or as required by law

## **B. QUALIFICATIONS**

An Ombudsman should be a person of recognized knowledge, judgment, objectivity, and integrity and should be qualified by appropriate training or experience, or both. The Ombudsman should periodically update his/her or her training. The Ombudsman should be aloof of party politics.

## **B. INDEPENDENCE, ACCESSIBILITY, FAIRNESS, PUBLIC ACCOUNTABILITY, EFFECTIVENESS AND IMPARTIALITY**

To ensure the effective operation of an Ombudsman, the legislative enactments should authorise the Ombudsman to operate consistently with the following essential characteristics. Entities that have established Ombudsman offices that lack appropriate safeguards to maintain these characteristics should take prompt steps to remedy any such deficiency.

### **(1) Independence**

- (a) The Ombudsman is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry.
- (b) The Ombudsman is appointed at a suitably senior level for a fixed, long term, of at least three years, of office and may be reappointed, to a maximum total of eight years.
- (c) The Ombudsman is appointed by and reports to the parliament or legislature or a committee thereof, which settles the remuneration and monitors the independence and performance of the Ombudsman in regard to the legislative enactment. If The Ombudsman is appointed by and reports to

the executive, such appointment should be made only if a supermajority (for example two thirds) of the parliament or legislature supports the appointment.

(d) The Ombudsman is paid at a level commensurate with the Ombudsman's responsibility.

(e) The Ombudsman has the power to delegate responsibilities to staff. The Ombudsman has the sole power to appoint, fix the compensation of and remove staff.

(f) The Ombudsman is immune from liability for acts performed in good faith under the law.

(g) A person who holds the office of Ombudsman is a full time employee who does not hold any other office or employment in respect of which emoluments are payable or engage in any other occupation, profession, business or commercial enterprise and is not involved in any activity likely to detract from the full-time performance of his/her or her duties as Ombudsman or to result in a conflict of interest or an appearance of impropriety or partiality.

(h) In assessing whether an Ombudsman is independent in structure, function, and appearance, the following factors are important: whether anyone subject to the Ombudsman's jurisdiction or anyone directly responsible for a person under the Ombudsman's jurisdiction (i) can control or limit the Ombudsman's performance of assigned duties or (ii) can, for retaliatory purposes, (aa) eliminate the office, (bb) remove the Ombudsman, or (cc) reduce the budget or resources of the scheme.

(i) The appointment must not be subject to premature termination, other than for incapacity or misconduct or other good cause.

(j) The Ombudsman may not be subpoenaed by either of the parties to a dispute to testify in any subsequent court action. The legislative enactment should contain a provision to this/her effect.

## **(2) Accessibility**

(a) The scheme seeks to ensure that all potential users are aware of its existence through promoting its existence in the media or by other means and by producing readily available material in simple terms explaining:

(i) how to access the scheme;

- (ii) how the scheme works;
- (iii) the major areas with which the scheme deals; and
- (iv) any restrictions on the scheme's powers.

(b) The scheme provides appropriate facilities and assistance for disadvantaged complainants and those with special needs.

(c) In most cases the staff of a scheme will help a complainant reduce a complaint to writing where the complainant requires assistance to do so.

(d) Complainants are not obliged to pay any application or other fee or charge before a complaint is dealt with by the scheme, or at any stage in the process.

(e) The scheme's processes are simple for complainants to understand and easy to use.

(f) The scheme discourages the use of legal representatives before the Ombudsman except in special circumstances.

### **(3) Fairness**

(a) The Ombudsman produces decisions that are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

(b) The Ombudsman conduct inquiries and investigations in a procedurally fair manner which includes informing the responding party of the allegations against it, permitting the parties to respond to information that is an adverse to them and taking into account relevant considerations and ignoring irrelevant considerations.

(c) The Ombudsman makes findings about the complaint based on the facts, the law and conclusions drawn on an analysis of them.

(d) Where appropriate, the Ombudsman applies principles of equity in resolving a complaint.

### **(4) Public Accountability**

(a) The scheme publicly accounts for its operations by publishing its decisions and information about complaints and highlighting any systemic problems.

(b) The scheme publishes a detailed and informative annual report containing specific statistical and other data about the performance of the scheme, including:

- (i) the number and types of complaints it receives and their outcome;
  - (ii) the time taken to resolve complaints;
  - (iii) any systemic problems arising from complaints;
  - (iv) examples of representative case studies.
- (c) The annual report is distributed to relevant stakeholders and otherwise made available upon request.

#### **(5) Effectiveness**

- (a) The Ombudsman follows informal and cost-effective procedures and has sufficient human, financial and operational resources, funded by the 7 participants in the scheme, to enable the Ombudsman to conduct inquiries and investigations in an effective and timely manner.
- (b) The Ombudsman may recommend clarification, amendment, or initiation of legislation and administrative rules and regulations or remedial action to address any systemic issue identified by the Ombudsman.
- (c) Before the Ombudsman commences an investigation, the complainant has first exhausted the internal complaints procedures of the entity complained against.
- (d) The Ombudsman's procedures are straightforward for complainants to understand and use.
- (e) The legislative enactment establishing the Ombudsman scheme should be subject to periodic review to assess its effectiveness and credibility.

#### **(6) Impartiality in Conducting Inquiries and Investigations**

- (a) The Ombudsman conducts inquiries and investigations in an impartial manner, free from the bias and conflicts of interest.
- (b) The Ombudsman is not an advocate for any individual or group.
- (c) Impartiality does not preclude the Ombudsman, after an investigation has been conducted, from developing an interest in securing changes that are deemed necessary or advocating for recommendations that would benefit a complainant.
- (d) The Ombudsman or any member of the Ombudsman's staff does not personally deal with a complaint brought by a party known to him or her.
- (e) The questions, concerns and complaints of consumers are treated equitably and consistently in a courteous manner.

#### **D. LIMITATIONS ON THE OMBUDSMANS'S AUTHORITY**

(1) An Ombudsman should not:

(a) make, change or set aside a law, policy, or administrative decision.

(b) conduct an investigation that substitutes for administrative or judicial proceedings.

(c) accept jurisdiction over an issue that is currently pending in or has been disposed of in a legal forum.

(d) accept jurisdiction over an issue that the entity complained against has not had the reasonable opportunity to resolve.

(e) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of Ombudsman.

#### **E. REMOVAL FROM OFFICE**

The legislative enactment that establishes the office of the Ombudsman should also provide for the discipline or removal of the Ombudsman from office for good cause by means of a fair procedure.

(1) Good cause may include bias, neglect of duty, misconduct, or inability to perform duties through incompetence or ill health.

(2) The decision to dismiss the Ombudsman should be by more than a majority of the members of the appointing body, such as two-thirds.

(3) The Ombudsman may not be dismissed for making decisions that are unpopular with the entities over which it exercises jurisdiction, with consumer or political groupings or the media.

(4) The Ombudsman should only be dismissed if a supermajority (for example two thirds) of the parliament or legislature supports the dismissal.