

# Developing and reforming Ombudsman schemes.

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*An IOI guide for those undertaking these tasks.*

## Introduction

All users of public services should have access to a fully independent redress mechanism when things go wrong. Ombudsmen offer free, independent and objective consideration of complaints with the aim of facilitating this redress. They also strive to improve services through learning from complaints.

The IOI was established in 1978 and is committed to promoting and developing the concept of the Ombudsman. It is the only global organisation for the cooperation of more than 170 independent Ombudsman institutions from more than 90 countries worldwide. A key objective of the IOI is to secure the core values of independence, objectivity and fairness which should underpin each Ombudsman Office and inform its work.

There are many different models of Ombudsman office in existence across the world as the institution has evolved from its original roots in Scandinavia and the public service. Ombudsmen now operate at national and regional level in many countries and the concept has also taken root in the private sector, offering independent redress to consumers. Ombudsmen also take on other roles, such as National Human Rights Institution. The original vision of a Parliamentary Ombudsman with oversight of all public services continues to be a key component of good governance and excellence in public services.

This guide is intended for individuals either designing new Ombudsman schemes or reforming existing schemes. It is primarily aimed at those developing or reforming public service Ombudsman schemes, but many elements of it are likely to be relevant when developing consumer Ombudsman schemes also.

## Introducing a new scheme

The IOI promotes the development of Ombudsman schemes to provide full coverage of all public services, whether delivered by the State, by municipalities or State bodies, on behalf of the State or by independent bodies or companies. Service users should be able to seek independent redress regardless of how services are provided.

The IOI strongly supports the existence of a national or federal Parliamentary Ombudsman scheme in every state, and encourages the creation of new schemes at this level where none already exist. There is also a strong tradition of devolved schemes which reflect the devolution of Government e.g. at local, state or municipality level, although redress in devolved settings can equally be delivered by a national or federal Ombudsman.

The IOI is anxious to avoid unjustified proliferation of Ombudsman schemes, as this can cause confusion for complainants. Any proposal to provide access to redress in areas where it is not currently available should consider whether an existing Ombudsman could undertake the work.

The decision to create a new scheme either to allow access to redress where this has not been previously available, or to create a specialist Ombudsman scheme to take on work previously dealt with by an existing scheme, should only be taken where a strong case can be made that value will be added for complainants.

Similarly, in cases where public services which are currently in the jurisdiction of an existing Ombudsman scheme are being privatised, the IOI strongly recommends that access to redress should remain unchanged. The IOI has produced a separate policy paper on this issue which is available on the IOI website.

## Legal basis

The concept of independence is central to the legitimacy of the Ombudsman. The Ombudsman must be demonstrably independent from all bodies in his or her jurisdiction. The legal basis upon which an Ombudsman scheme is established in the public sector is a core building block for this. The Paris Principles are an excellent reference point when considering the measures necessary to secure independence.

In a constitutional democracy, the role of the Ombudsman should preferably be established in the Constitution, with the arrangements to ensure that the Ombudsman is not subject to control by the Executive clearly set out. Where this is not possible, the position should be established in law. In either event, accountability should be to the elected body (Parliament) and not to a Government Department or to the Government.

Public Service Ombudsmen are well established at a national or federal level, but many also exist at other levels of Government, such as state, local authority, or municipal level. There are also specialist Ombudsmen covering particular subject areas such as the police or children. The principles of independence apply equally to these schemes. In such instances the Ombudsman should report to the regional assembly, local authority or appropriate elected assembly. Specialist Ombudsmen, where they exist, should also generally report to the appropriate elected assembly, e.g. a national children's Ombudsman should report to the national parliament.

The same principles apply in the case of supra national ombudsmen, e.g. the EU Ombudsman. In this instance, the office holder is elected by the European Parliament.

Where there are consumer Ombudsmen, these will also preferably be created on a statutory basis, so that they are independent from the companies in their jurisdiction. Where this is not the case, their constitutions should be designed in such a way as to ensure that they are demonstrably independent.

To avoid the dilution of the Ombudsman concept, it is strongly advised that the use of the title, Ombudsman, be protected in legislation.

## Appointment

The appointment of an Ombudsman should preferably be undertaken under the auspices of the democratic assembly to which they report. The appointment may be made by this body, or by the Head of State, following a vote of the elected assembly or parliament.

Best practice suggests that the recruitment should be open. The role should be widely advertised and in some instances, executive search agencies have been used to source candidates. It is important, however, that candidates identified in this way are not otherwise advantaged in the selection process.

There should be a clear role description, and a person specification setting out the required competences. Candidates should be invited to submit applications or CVs which address these competences, and decisions as to who to shortlist or interview, and ultimately, who to recommend for selection, should be made by objectively assessing candidates against the required competences.

The process should be led by a Committee of the elected body, but best practice suggests that others should be involved including human resource experts and experts in the work of Ombudsmen. In this context, Ombudsmen from other jurisdictions or former Ombudsmen can make a useful contribution. The IOI panel of experts drawn principally from distinguished former Ombudsmen is a useful source of expertise. Those engaged in the selection process should have received appropriate training. Equal opportunities principles should be explicitly observed. Where there is an independent Public Appointments agency or Commissioner, these can play a useful role in managing the appointment process.

In some jurisdictions, there is a tradition of appointing lawyers as Ombudsmen, but there are many examples of successful Ombudsmen coming from other backgrounds including public service, journalism, academia or politics. Broadly speaking it is personal qualities, authority and experience which determine whether an Ombudsman will be effective, rather than any particular professional background.

## Removal

An Ombudsman's appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause. The grounds on which dismissal can be made should always be stated in the legislation. The appointing body, usually the relevant elected assembly, should be the only body with the power to dismiss. It is appropriate to consider a qualified majority, e.g. two thirds of all of those entitled to vote. It is essential that no individual or body in the Ombudsman's jurisdiction should have the power to remove the Ombudsman.

## Term of Office

Most Ombudsman positions have fixed term contracts. This is widely regarded as the most appropriate arrangement. An over-short term can impact on the capacity of the Ombudsman to properly develop the office during his or her mandate. Consequently, seven or eight year terms are increasingly common. Terms of fewer than five years should be avoided.

In some instances, the term of Office is linked to the life of the elected assembly, and this can also be an appropriate means of proceeding, albeit it is important to ensure that the selection process is conducted in such a way as to avoid the apparent or actual politicisation of the appointment.

## Remuneration

The Remuneration of an Ombudsman should reflect the stature of the post, and should be at a level which will attract candidates with suitable experience and authority. Linkage to an appropriate pay scale is a convenient means of ensuring that it is updated when required. The salary of a senior judge is sometimes used, and this is usually appropriate given the quasi judicial nature of the work of an Ombudsman.

The salary should not be subject to reduction or alteration by anybody in jurisdiction and the salary scale should be fixed for the term of office.

## Powers

The Ombudsman should be able to require the co-operation of any individuals or organisations who may be able to assist in his or her investigations. He or she should have access to all relevant documents, including those which might otherwise be legally privileged. Staff from his or her office should be able to enter premises if necessary and be entitled to full co-operation from all bodies in jurisdiction.

The Ombudsman should have the power to consider all complaints within jurisdiction, and determine which require more detailed consideration. Equally, the Ombudsman should be able to discontinue an investigation at any time. Ombudsmen should be able to take any steps necessary to resolve a case. These may include reaching agreed settlements or mediation.

Investigations should be held in private, but the Ombudsman should have the power to publish reports. Any public reports should enjoy privilege from claims of defamation.

The Ombudsman should be able to undertake investigations on his or her own initiative. On occasions, the Ombudsman will be made or become aware of possible maladministration where no complaint has been made.

The reasons for this can include a reluctance on the part of complainants to come forward for fear of negative consequences or because the people concerned do not have ready access to the Ombudsman. Such investigations often consider systemic issues and ensure that the Ombudsman can be effective in tackling poor administration and improving public services.

Ombudsmen should be able to delegate their functions to members of their staff. In some instances, Deputy Ombudsmen are appointed who can accept responsibility in the absence of the Ombudsman, whether this is temporary, or while the appointment process for a new Ombudsman is underway.

Ombudsmen should also have the power to share information and co-operate with others. This is particularly important where the Ombudsman is working alongside other monitoring or regulatory bodies who deal with the same public service providers. Their inspections can provide valuable context for Ombudsmen while Ombudsman investigations can help to inform their work.

It is usually preferable that the Ombudsman enter into a memorandum of understanding with such bodies. This reduces the possibility of duplication or inconsistency of approach and ensures the seamless transfer of information and intelligence to enable each entity to carry out its respective statutory role.

## Access

Ombudsman schemes should be free to use, and readily available to all service users. Ombudsmen will generally expect complainants to have given the body complained about an opportunity to resolve the matter first, but should have discretion to accept complaints where this has not happened if circumstances warrant it.

Ombudsmen are often seen as an alternative to the courts, and will often not take on a case where court action is being pursued. Again, they should retain the discretion to take on cases in such circumstances where it is appropriate to do so e.g. where the complaint may point to a systemic failure.

Complaints should be accepted in any appropriate format, written, verbal or electronic. Representatives including family members, elected officials or advocates, should be able to complain on behalf of an individual provided there is evidence of consent. There should be no requirement, however, that a complaint must be channelled through a representative.

It is important that complaints reflect the broad spectra of users of public services so access should be available in all commonly used languages and special arrangements should be made to ensure that the communication requirements of people with disabilities are catered for. Other groups may also need special arrangements, for example, prisoners will want to be reassured that they can communicate privately with the Ombudsman.

## Maladministration

Ombudsmen typically consider complaints from users of services who believe they have suffered an injustice as a consequence of an error by service providers. Ombudsmen, in determining such complaints, need to be able to examine the decision from the perspectives of legality and compliance. In short, was the decision legal and did the body follow its own policies and procedures.

However, the role of an Ombudsman goes beyond legality and compliance. The Ombudsman is a promoter of human rights and good administration. In considering complaints the Ombudsman needs to be able to ask, was the outcome fair and was the outcome just? Often, Ombudsmen will look to ensure that decision makers used any discretion available to them appropriately.

They will regard any failure to take account of an individual's human rights as maladministration. While some Ombudsmen are also the National Human Rights

Institution for their country, all Ombudsmen should use a human rights perspective in considering cases.

Legislation establishing or reforming Ombudsman schemes should explicitly reflect this wider role. It should also provide the authority for bodies in jurisdiction to provide redress in line with the Ombudsman's recommendations without requiring approval or permission from any other individual or organisation e.g. the Finance Ministry.

The Ombudsman also needs to be able to make recommendations regarding changes to practice or policy, where the injustice has arisen through the correct application of a current policy. There is also a need to be able to recommend changes to legislation, where injustice has arisen as a consequence of flaws in existing laws. It is of course, a matter for the legislature to make or amend legislation in response.

## Recommendations

The Ombudsman should be able to make recommendations to remedy injustice and to set out changes required to improve services. The principle to be observed in determining remedy is to attempt to put the individual back in the position they would have been in had the injustice not occurred. This should include financial redress in respect of any loss. In some instances, this can be easy to establish, e.g. where someone has not received a grant or benefit to which they were entitled, or has had to pay too much tax. In other cases it may be necessary to calculate the sum, e.g. where a property has been devalued as a consequence of an incorrect planning decision.

The ability to recommend financial redress where it is not possible to put the person back in the position they would otherwise have been in is also helpful. Examples of when this might be appropriate include where someone should have received municipal housing but did not do so because of maladministration, or where someone was unable to pursue a course of study because a grant was incorrectly withheld. Many Ombudsmen also offer redress for distress or delay, and giving the Ombudsman the power to recommend redress in such circumstances is recommended.



## Enforcing recommendations

A variety of approaches can be used, each of which has merit. One common arrangement is for the Ombudsman to make recommendations which are not binding on the body in jurisdiction. For this approach to be effective, the Ombudsman should have the power to have reports considered by the elected body to which he or she relates. This is especially so where a body in jurisdiction refuses to implement a recommendation. In some instances, a qualified majority (two thirds for example) in the elected assembly is required if recommendations are to be rejected.

The power to publicise the outcome of investigations is also essential as public opinion, informed by the media, can help to ensure that bodies in jurisdiction heed the Ombudsman's reports.

A second model is for the Ombudsman to have recourse to the courts. In this approach the Ombudsman can bring actions against public bodies on behalf of complainants.

Binding recommendations are less usual in the public services arena but are often necessary when dealing with consumer issues, or where public services have been privatised. In such circumstances, it is normally only possible to challenge the recommendation via the courts.

## Resources

The Ombudsman must have access to sufficient resources to enable all complaints to be properly considered. This includes the ability to recruit sufficient, suitably skilled, staff and all of the necessary supports including premises, IT and so on. The Ombudsman should be able to recruit staff directly.

The Ombudsman's budget should not be capable of influence by a body in jurisdiction. This ordinarily means that the budget is agreed with the elected body, and not with the Government, in the case of a national or federal Ombudsman, with equivalent arrangements being made for Ombudsmen at other levels. Ordinarily, the Ombudsman should be able to prepare an annual budget and present this to a relevant Committee of the elected assembly for consideration and approval.

## Reporting

The Ombudsman should normally make an annual report to the elected assembly. This should be the subject of discussion, either at a plenary session, or more usually, at a Committee.

The Ombudsman should also be able to bring reports to other subject Committees where appropriate, as well as being able to bring special reports when bodies do not accept recommendations.

It is also common for Ombudsmen to report to another Committee in respect of their use of resources.

## Renewal

Some Ombudsmen are appointed on a renewable, fixed-term basis. This can lead to difficulties at the point of re-appointment. The IOI has adopted a formal policy encouraging a public, staged approach to the management of the renewal of mandate.

This states that it is appropriate for the appointing body to agree at the time of the Ombudsman's appointment or before, the basis on which the consideration of renewal will be approached. Formal criteria should be set against which the Ombudsman will be evaluated in advance of the renewal date. Ideally, if the decision is taken not to renew, there should be sufficient time to allow for a recruitment process to be undertaken so that a new Ombudsman can be in post in time to avoid any gap between terms of office. The evaluation should be conducted in a way which does not undermine the independence of the Office. This should largely follow the principles suggested for appointments above e.g. involving individuals with appropriate expertise, perhaps former Ombudsmen such as those in the IOI Pool of Experts. It should specifically exclude representatives from anybody in jurisdiction.

Where the Ombudsman is to have a renewable term of office, there is a case to be made for restricting the number of occasions upon which it can be renewed. One renewal is often considered to be appropriate.

## Other roles

Many Ombudsman institutions undertake roles other than addressing complaints about maladministration. This is entirely appropriate provided these roles do not clash with the core function and are properly resourced. As set out above, some Ombudsman institutions are also the National Human Rights Institution. Many are the designated monitoring body under the Optional Protocol on Torture (OPCAT).

More recently, some have become the regulatory body for complaints handling in the public sector. Scotland has been a pioneer in this work. Because of their close familiarity with the operation of complaints systems, Ombudsmen are uniquely well placed to devise standard complaints handling systems, to monitor compliance, and to report on trends. Many Ombudsmen also offer training in complaints handling.

Some Ombudsmen also offer complaints portals. The South Korean e-people system is an excellent example. When developing or reforming Ombudsman schemes, the inclusion of such a role is recommended.

Other Ombudsmen are also the anti-corruption body for their country. This role can include dealing with ethical matters, investigating alleged conflicts of interest and any other form of corruption. Many African and Asian and Caribbean Ombudsmen include anti-corruption as one of the founding elements of their institutions.

## Conclusion

This guide is not intended to be exhaustive. Best practice is developing all of the time as Ombudsmen adapt to new challenges and opportunities. Anyone developing or reforming a scheme is advised to contact the IOI, to speak to local Ombudsman associations, and above all, to speak to other Ombudsmen about what works, and what doesn't.