

## **WEBINAR: UN Resolution on Ombudsman and Mediators**

The IOI, as the only global Ombudsman organisation, has consistently worked to develop partnerships with other international organisations. Examples of this include links with GANHRI and the World Bank. These links are designed to strengthen the institution of the Ombudsman, to provide additional support to individual members, especially those under threat, to promote improved legislation and practice and to develop global standards for Ombudsman offices.

As part of this activity, the IOI worked with the European Commission for Democracy Through Law, which is usually known as the Venice Commission. The Venice Commission was established by the Council of Europe to provide legal advice to the Council and its member states. The members of the Commission are distinguished lawyers nominated by the member states.

The Council of Europe itself was founded after the Second World War to promote democracy and the rule of law. It has 47 member states, which includes the 27 members of the European Union but also other key countries including Russia.

The European region of the IOI has had a Memorandum of understanding with the Venice Commission for some time and encouraged them to take a particular interest in Ombudsman matters. This has been assisted by the fact that members of the Commission have included current and serving Ombudsman office holders.

The IOI was therefore very pleased when the Venice Commission appointed a working group to develop a set of standards for Ombudsman institutions. The working group included Ms Lydie Err (Member, Luxembourg) the former Ombudsman of Luxembourg, Mr Jan Helgesen (Member, Norway), Mr Johan Hirschfeldt (Substitute Member, Sweden), Mr Jørgen Steen Sørensen (Member, Denmark) who was then the Danish ombudsman and is now a Supreme Court Judge and Mr Igli Totozani (Expert, Albania) who is the former Albanian Ombudsman. Considerable credit is also due to Caroline Martin, who acted as Secretary to the group.

The IOI was also concerned about a possible negative consequence. If the standards developed were not strong enough, if they were based on the lowest common denominator, they ran the risk of undermining members if Governments decided to lessen their powers or jurisdiction on the basis of bringing legislation in line with the Principles. The IOI determined to take a very active role in their development to ensure that they represented an aspirational standard that could help to protect members and drive improvement.

The IOI encouraged the working group to hold a consultation session and to share drafts. Other regional and language based Ombudsman Associations were also active including the Mediterranean Ombudsman Association, L'Association des Ombudsmans et des Médiateurs de la Francophonie (AOMF) and FIO, the Iberoamerican Federation of Ombudsman.

The IOI chose to provide redrafts, rather than make submissions. Many of the changed elements of the redrafts were accepted, leading to a final version which was considerably strengthened from the initial drafts. This approach is one which often can prove effective.

The Principles were adopted by the Commission at their meeting in March 2019. As IOI President, I addressed the Commission and participated with colleagues in the discussions and negotiations. Several Ombudsman colleagues who were IOI Board members at the time or who have been elected to the incoming Board also participated as representatives of other Associations including Catherine De Bruecker, Andreaas Potakis and Marc Bertrand.

The Venice Principles were subsequently formally adopted by the Council of Europe.

The Council of Europe recommendation provides that:

- Ombudsman institutions should be in place in all member States
- Member States should provide a firm legal basis for ombudsman institutions, preferably at the constitutional level
- The process of selection and appointment of the head of an Ombudsman institution should promote its independence
- Member States should ensure that ombudsman institutions are allowed to carry out their mandate independently of any provider of public services over which they hold jurisdiction.

It is important to say at this point that the Principles were conceived as universal. There is nothing Europe specific about them, and the IOI always had in mind that they could become a universally accepted set of standards for Ombudsman institutions worldwide, in the same way that the Paris Principles set out the requirements for National Human Rights Institutions.

That is why we were particularly pleased to be able to work with Ombudsman Benalilou of Morocco to have the Principles appended to a strengthened UN resolution on the Ombudsman and Mediateur, which was adopted in December and I am delighted that we will hear more about his work shortly and that he will also be followed by IOI Secretary General Amon.

Now I will turn to the Principles themselves.

*1. Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms. While there is no standardised model ..., the State shall support and protect the Ombudsman Institution and refrain from any action undermining its independence.*

This underlines the key principles which have always underpinned the work of the Ombudsman, promoting good administration and the rule of law. It also firmly locates the Ombudsman as a vital element of a strong democracy and sets out the role that all Ombudsman offices play in protecting human rights. Finally, it highlights the central significance of independence.

*2. The Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.*

This second principle looks for a firm legislative foundation for the Ombudsman. By referring to the constitution, it suggests that the Ombudsman should be embedded in the fundamental law of the state, helping to guarantee its independence and authority.

*3. The Ombudsman Institution shall be given an appropriately high rank, also reflected in the remuneration of the Ombudsman and in the retirement compensation.*

The need to ensure that the post is at a very senior level, again to reinforce its importance and authority is reflected here. The position of Ombudsman is a very personal one, with each of us bringing our own approach to the work. Ensuring that the right individuals are engaged in the work is essential.

*4. The choice of a single or plural Ombudsman model depends on the State organisation, its particularities and needs. The Ombudsman Institution may be organised at different levels and with different competences.*

Not every state will opt for a single national Ombudsman. Some have a National Ombudsman supplemented by regional or specialist Ombudsman offices such as a police Ombudsman. There are also municipal Ombudsman Offices, and offices which reflect the particular cultural requirements of their country, as is the case in Belgium where there is a French speaking Ombudsman and a Flemish speaking Ombudsman working together at the Federal level. Other countries devolve power to regions, and there can be an Ombudsman at the regional level to reflect this, as is the case in Canada, Pakistan and Australia, for instance. The important issue here is that the flexibility should not be at the expense of people wishing to make complaints, so there needs to be comprehensive coverage of all public services and good inter-working if there is more than one Ombudsman.

*5. States shall adopt models that fully comply with these Principles, strengthen the institution and enhance the level of protection and promotion of human rights and fundamental freedoms in the country*

This is firstly a call for all states to ensure that there is an Ombudsman institution or institutions, and that these are fully compatible with the Venice Principles. This will assist the IOI in continuing to press the case for the creation of Ombudsman offices where they do not exist and will also assist existing offices in seeking improvements to their legislation to enhance their independence, jurisdiction and powers.

*6. The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority.*

The relationship between the Ombudsman and the elected Parliament is a key one. The use of a qualified majority should help to ensure that there is wide political support for the appointment and protect against any suggestion of patronage. In many instances, the actual appointment will be made by the Head of State following a vote in the Parliament.

*7. The procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law.*

This is a highly significant principle. Having a public and transparent recruitment process offers real assurances about the independence of the Ombudsman. Using a formal recruitment process, preferably independently verified, will ensure that the most capable candidate is selected. Examples of excellent processes include the use of a committee chair from the parliament rather than a government representative, involving a retired Ombudsman or an Ombudsman from another jurisdiction and using independent HR experts to manage the process.

*8. The criteria for being appointed Ombudsman shall be sufficiently broad as to encourage a wide range of suitable candidates. The essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms.*

Whereas in some countries, only lawyers are considered eligible to be the Ombudsman, this Principle identifies the importance of ensuring that a wide field of people can be considered, but that they must have the characteristics to allow them to command respect and demonstrate the capacity for excellent and objective judgement. Once again, the emphasis on human rights shows the importance of this aspect of the work of the Ombudsman.

*9. The Ombudsman shall not, during his or her term of office, engage in political, administrative or professional activities incompatible with his or her independence or impartiality. The Ombudsman and his or her staff shall be bound by self-regulatory codes of ethics.*

The importance of the Ombudsman being seen to be fair, independent and objective cannot be underestimated. Many contracts properly exclude the Ombudsman from engaging in any other work during her or his tenure. The Ombudsman and the staff of the office need to demonstrate the standards they expect of others in their behaviour and practice. The office must be above politics, and clearly located in the administrative justice space.

*10. The term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for re-election; at any rate, the Ombudsman's mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years.*

All of these stipulations are designed to ensure the independence of the office. A short term does not allow an Ombudsman to properly come to terms with the work. Renewal can lead to greater pressure on the Ombudsman to “pull their punches” so as to safeguard re-election. A long single term is increasingly being adopted as the optimum solution.

*11. The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of “incapacity” or “inability to perform the functions of office”, “misbehaviour” or “misconduct”, which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament- shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.*

Essentially, it should not be possible to remove an Ombudsman from their post because they have upset the Government of the day or other powerful figures. On occasions, it is necessary for the Ombudsman to be highly critical and they must be able to do so without concern about their tenure.

*12. The mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms.*

This is a clear and unambiguous statement about the role of the Ombudsman. These issues, together with upholding the rule of law, should be at the heart of the work of every public service Ombudsman.

*13. The institutional competence of the Ombudsman shall cover public administration at all levels. The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities. The competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system.*

This is an interesting Principle, because it does not confine the jurisdiction of the Ombudsman to services directly provided by public bodies. Many Ombudsman offices have commented on the trend to privatise public services. Where these are then removed from the jurisdiction of the Ombudsman, users lose access to redress. This clearly states that even if a service is privatised, the Ombudsman should retain the competence to deal with any complaints. It also makes clear that the administration of the courts can come within the Ombudsman's jurisdiction, but that the independence of the judiciary must be respected.

*14. The Ombudsman shall not be given nor follow any instruction from any authorities.*

Whereas it is reasonable for the Ombudsman to be asked by a public authority to consider opening an investigation into a particular matter, the decision as to whether or not to do so must rest with the Ombudsman.

*15. Any individual or legal person, including NGOs, shall have the right to free, unhindered and free of charge access to the Ombudsman, and to file a complaint.*

Free access is a fundamental feature of the Ombudsman institution. Whereas access to justice through the courts can be difficult and expensive, the Ombudsman is open to all.

*16. The Ombudsman shall have discretionary power, on his or her own initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies. The Ombudsman shall be entitled to request the co-operation of any individuals or organisations who may be able to assist in his or her investigations. The Ombudsman shall have a legally enforceable right to unrestricted access to all relevant documents, databases and materials, including those which might otherwise be legally privileged or confidential. This includes the right to unhindered access to buildings, institutions and persons, including those deprived of their liberty. The Ombudsman shall have the power to interview or demand written explanations of officials and authorities and shall, furthermore, give particular attention and protection to whistle-blowers within the public sector.*

This is an incredibly powerful statement. Firstly, it allows the Ombudsman to open an investigation with or without a complaint. Own initiative, or own motion as it is sometimes called, is a very powerful tool to cast light on areas where improvement is required. It is particularly useful to consider the treatment of people who may be disadvantaged when it comes to complaining.

Coupled to this is a wide range of powers to require full co-operation from public service providers and officials. Having full access to buildings and individuals is essential for work with prisoners, for example.

*17. The Ombudsman shall have the power to address individual recommendations to any bodies or institutions within the competence of the Institution. The Ombudsman shall have the legally enforceable right to demand that officials and authorities respond within a reasonable time set by the Ombudsman.*

In keeping with the normal Ombudsman model, this does not require that the Ombudsman should have legally binding powers. Rather it gives the power to make recommendations while requiring the body in jurisdiction to respond within a set timetable.

*18. In the framework of the monitoring of the implementation at the national level of ratified international instruments relating to human rights and fundamental freedoms and of the harmonization of national legislation with these instruments, the Ombudsman shall have the power to present, in public, recommendations to Parliament or the Executive, including to amend legislation or to adopt new legislation.*

This ensures that in those instances that the Ombudsman concludes that existing legislation is not compatible with human rights obligations, they have the power to recommend changes to address the shortfall.

*19. Following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts. The Ombudsman shall*

*preferably be entitled to intervene before relevant adjudicatory bodies and courts. The official filing of a request to the Ombudsman may have suspensive effect on time-limits to apply to the court, according to the law.*

Often in the course of an investigation the Ombudsman will conclude that even though the public service provider has acted within the law, the law itself is leading to an unfair or unjust outcome. Equally, there will be occasions where the Ombudsman will conclude that a law has in practice, breached the constitutional rights of the person complaining, or a class of people. Having the power to intervene in court cases is a powerful tool to facilitate this.

*20. The Ombudsman shall report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the Ombudsman sees appropriate. The Ombudsman's reports shall be made public. They shall be duly taken into account by the authorities.*

The power to report to Parliament is a key tool in the Ombudsman's armoury. The Ombudsman's relationship with the Parliament is critical if the administration is reluctant to implement recommendations. The requirement that reports should be public also ensures that the work of the Office is open and transparent, and provides a further incentive for bodies in jurisdiction to implement recommendations.

*21. Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions. The Ombudsman shall be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.*

For an Ombudsman to be effective and independent, they must have sufficient resources to undertake their work. Threats to cut the Ombudsman's budget in response to unfavourable reports can undermine the work of the Office, as can adding responsibilities without providing adequate resources. This provision will help to guard against that. It also helps to protect against interference by an auditor in the operation of the Office, as happened in Cyprus. An intervention by the IOI in support of the Ombudsman there citing this provision led to a successful outcome.

*22. The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff.*

As with financial resources, being free to recruit your own staff, and having enough suitably skilled people is of vital importance.

*23. The Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity). Such functional immunity shall apply also after the Ombudsman, the deputies or the decision-making staff-member leave the Institution.*

We have seen in Africa, and in Europe, attempts to take legal action against an Ombudsman for carrying out their duties. Such threats can have a chilling impact on the work of their Office. This Principle is designed to protect against such actions.

*24. States shall refrain from taking any action aiming at or resulting in the suppression of the Ombudsman Institution or in any hurdles to its effective functioning, and shall effectively protect it from any such threats.*

*25. These principles shall be read, interpreted and used in order to consolidate and strengthen the Institution of the Ombudsman. Taking into consideration the various types, systems and legal status of Ombudsman Institutions and their staff members, states are encouraged to undertake all necessary actions including constitutional and legislative adjustments so as to provide proper conditions that strengthen and develop the Ombudsman Institutions and their capacity, independence and impartiality in the spirit and in line with the Venice Principles and thus ensure their proper, timely and effective implementation.*

Taken together, these principles offer a very sound basis for any Ombudsman Office. Any Office whose legislation is consistent with them will have the capacity to be independent, fair and effective. I would urge all of you to review your own legislation in light of the Principles, and ask your Parliaments to make any necessary arrangements to bring it in line.

The IOI has been promoting peer review as a means of providing an objective and informed means of assessing your office. The guidance is in a Best Practice paper on the IOI website and this is being updated to take account of the Venice Principles. Each IOI region is being asked to prepare a list of peer reviewers to include Ombudsman office holders, senior staff and suitably knowledgeable academics. A well-focused review can help you make the case for necessary changes. I look forward to the day when every country has an Ombudsman, and that all of them are compliant with these Principles. Thank you for your attention.

Peter Tyndall