

**Lecture by mr. F.P. Wiel LL.M., Ombudsman of Curaçao,  
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## **Investigation Aspects of the Ombudsman 's Role**

### *Introduction*

#### **1. Legal basis for an Ombudsman investigation**

The United Nations ' guideline on Ombudsman investigations starts with the observation that the legal basis for an Ombudsman to conduct inquiries and investigations of complaints is in the country 's constitution and/or law creating the institution. Without specific authority, the Ombudsman could not conduct an investigation of a complaint received within the office 's competence. The Ombudsman is a Rule of Law institution. Ombudsmen must be the first to follow the laws creating their offices and providing the powers they can use to receive and investigate complaints.

Each Ombudsman and staff who conduct investigations should carefully read, analyze, understand and use appropriately the powers and authorities provided in the office 's legal basis. To do otherwise would open the Ombudsman institution to the kind of criticism it makes of other authorities about not following the law.

#### **2. Adaptation for local practice**

The United Nations Development Programme must have found out that each Ombudsman and National Human Rights Institution (NHRI) has its own legal basis in the country 's constitution and the law creating the institution as well as in the regulations, and policies and procedures adopted for each institution.

If there is a conflict between the guideline and national legislation, the Ombudsman, according to the guideline, should follow national legislation. If provisions in national legislation do not agree with international standards, Ombudsman should seek amendments to the legislation to bring it into agreement with international standards. In the mean time, in my opinion, the Ombudsman should let the international standards prevail in his policies and procedures.

We can read in the United Nations ' guideline that no one set of practices fits every local situation. The basic concept of an independent, impartial institution that receives and investigates complaints about alleged violations of human rights is implemented using different methods in different countries. What is important is that the Ombudsman institution be and be seen to be independent and impartial, capable of conducting fair and unbiased investigations credible to both complainants and the authorities under the institution 's competence.

### **3. Regulations, policies and procedures**

According to the UN Guideline, in whatever manner an Ombudsman office is structured under law, an important goal is to create one or more documents prescribing how the office functions in its various aspects. While it is difficult to create a manual early in an office 's history, it is important to begin and to draft and adopt regulations that amplify and complement the law creating the Ombudsman institution. The regulations should be further amplified in policies and procedures, the Ombudsman can change instantly, that prescribe how the office operates.

Documents and manuals are important for the efficient, effective and consistent operation of an Ombudsman institution. Practices should be documented in written policies and procedures. This is vitally important for investigations. Written policies and procedures help insure that staff conducts investigations in manners approved in advance by the Ombudsman that are consistent from one investigation to another.

### **4. Investigative principles**

The United Nations ' guideline on Ombudsman investigation has also laid down a set of principles that I would like to share with you.

These principles have been derived from examining laws creating more than 130 Ombudsman institutions around the world, reading investigative reports from many Ombudsman offices, experience in conducting investigations and discussions with Ombudsmen and their staff.

These principles describe how Ombudsmen and staff have found it best to investigate complaints.

### *The principles*

- § Giving explanations is a large part of an Ombudsman's work. From helping complainants understand how government functions through explaining what an investigation determined, Ombudsmen devote much energy to explaining.
- § In nearly all Ombudsman offices around the world, investigations are inquiries, not adversarial processes. The Ombudsman is responsible for all investigations, even in those offices where the Ombudsman may delegate some, many or all of the powers to conduct investigations. Based on powers provided in law, the Ombudsman determines how each investigation will be conducted.
- § The Ombudsman protects the rights of all parties in a complaint and assures that natural justice, due process or procedural fairness is observed. The Ombudsman does not represent the complainant, authority, government or Parliament. The Ombudsman represents good government and observance of human rights.
- § Investigations are conducted in private. Staffs are required to observe secrecy and confidentiality. Information is normally only disclosed for purposes of the investigation or to establish grounds for the Ombudsman's determination and recommendations. (Some Ombudsmen return documents or copies to the person or authority that provided them.)
- § The Ombudsman or staff conducts an impartial and independent investigation of actions over which the office's legal basis gives the Ombudsman jurisdiction. The Ombudsman has no interest in the results of investigations other than that they are fair, impartial, independent and correct. The Ombudsman responds to actions found to be violations of human or other rights over which the Ombudsman has competence. Generally, if an authority's action was not a violation of human rights or other rights, the Ombudsman has no basis to make recommendations.
- § Once the Ombudsman receives a complaint and decides to investigate it, the authority is notified of the proposed investigation and given an opportunity to comment.
- § Subject to the office's legal basis, the Ombudsman determines whether any person may be represented or advised by legal counsel and what role that counsel may play other than advising the person before the Ombudsman.
- § The Ombudsman normally may compel individuals to appear and give testimony or produce information the Ombudsman determines is relevant to the investigation. Individuals, compelled to appear, testify and/or produce information, usually have the same rights as witnesses in the country's courts.
- § The Ombudsman and investigative staff should not make up their minds about a complaint before concluding the investigation. They should not assume that

violations of human rights or other rights will be found to have occurred just because they have been alleged or found in the past. Staff should not express opinions, personal or otherwise, about complaints, complainants, authorities, civil servants or government officials. To do so may compromise the Ombudsman's impartiality prior to conducting an investigation or considering future complaints. Internal debate among staff and the Ombudsman is welcome and essential to a vigorous consideration of issues before the Ombudsman makes a finding or takes a position after conducting an investigation. The Ombudsman benefits from hearing a broad range of opinion from staff and others when that is appropriate. Broadly discussed issues result in better recommendations and actions by the Ombudsman.

- § The Ombudsman issues a report after each completed investigation. It summarizes the complaint, the facts the investigation found, the law governing the situation, an analysis of the facts in light of the law, a finding on what the complaint alleged, and any recommendations the Ombudsman proposes the authority implement to remedy the situation or to prevent it from happening again.
- § The Ombudsman gives any person, official or authority that will be criticized the opportunity to read a preliminary report on the investigation and respond in any manner the person, official or authority sees fit. The Ombudsman incorporates written responses or summaries of them and any other responses in the final report.
- § Final reports are presented to the complainant, the authority that was the subject of the complaint, any individuals who acted on the matter complained about along with their supervisors and any other person or authority the Ombudsman determines should receive the report.
- § According to the UN Guidelines, Courts may not review the acts of the Ombudsman in investigations as in other matters. Ombudsman communications or publications are absolutely privileged and cannot form the basis for suits charging defamation, libel or slander.

## **5. Determination of the investigation frame-work**

I deem it very important that the investigating ombudsman commences with establishing the frame-work of his investigation. This will determine the scope of his investigation activities and its results. This will also determine the scope of his judgment.

In order to set the frame-work of his investigation and thus ensuring a major influence on the ultimate success of the investigation, the Ombudsman should establish:

- the focus of his investigation, excluding other topics that are apparently likeable as such but which do not necessarily belong to the investigation scope;
- the adequate frame-work within which he deems himself authorised to conduct the investigation;
- the terms of reference, which not only set the topic and the limits **to** the investigation scope, but also the background and the purpose, in both a broad and a small perspective;
- the investigation plan, which includes the indication of the activities and the estimated time schedule required for a specific investigation.

Establishing the frame-work of the investigation will also serve as a guideline for the Ombudsman in the process of his investigation and its planning; the ombudsman will be, in a natural manner, quite aware of the path to be followed and its nature, the boundaries of the factual and content aspects of his activities and the consequences of his decision to finalize or even to interrupt the investigation.

The established frame-work will also serve to the Ombudsman as the platform on which, during the process of the investigation, he may include new chosen parts or exclude formerly intended parts or activities of his investigations and so maintain a well functioning, adjustable frame-work of his investigation.

This establishment and maintenance of the frame-work will also facilitate the task of the Ombudsman's assistant, who takes down on paper the investigation activities, such as the hearings and Interviews of witnesses or officials involved, during and after the session. This assistant, who must have acquainted him-/herself with the frame-work before engaging in reporting activities, will then know which of the fragments of the verbal statements, to be rendered during the planned session, would be relevant and which would be not, so that this assistant will be much better able to include the right contents and focus in the text of his or her report.

As a matter of fact the assistant should not spend time and energy during and after the session making notes and reports of verbal statements or even the questions of the Ombudsman, which are not relevant to the investigation purposes. This will facilitate the correction task of the Ombudsman.

It is therefore also very important for the Ombudsman, prior to a particular session of hearing or interview, to conduct a short briefing with his assistant, about the investigation frame-work in general and the purposes of the session in particular. By doing so he will ensure that the assistant will know in advance which particular information the Ombudsman would like to gather by that particular hearing or interview, so that the assistant concentrates in his notes and report on relevant information. This will also enhance the self-confidence of the assistant when he or

she is carrying out his or her task during and after the session, which will naturally contribute to his or her labour satisfaction.

The formal aspects of the investigation frame-work will also determine the scope of the competence and authorisations of the Ombudsman to conduct the investigation. The competence powers of the Ombudsman are mainly determinant for the range and the effectiveness of the investigation.

The Ombudsman must not only be aware of his competence to summon government officials in order to obtain from them information about the execution of policies, about procedures, practices and access to relevant records, or not only be aware of his powers to summon witnesses and of his powers to require witnesses to render statements in the interview, but he must also be aware of e.g. the fundamental right of also government officials to not implicate themselves as trespasser of statutory provisions.

So, the Ombudsman should carefully maintain himself to this formal part of the frame-work in order to not enter in an irregular area of activities and so make parts of his investigation and easily his whole investigation non-valid and put his own integrity at stake.

If the Ombudsman lacks sufficient power in a particular case, he should rather refer the investigation to the indicated agency which possesses the necessary authority to take over the investigation; the Ombudsman in such a case may limit himself to a preliminary investigation in order to better be able to qualify the nature of the case and (help) determine further steps to be taken.

## **6. The investigating role of the Ombudsman**

### *a. The headlines of the investigation activities*

The task of the investigating Ombudsman or the investigator in his office comprises, in a particular case, the following activities:

- the formulation and ascertainment, if necessary also in consultation with the complainant in the intake session, of the relevant aspects of the complaint and their limits, to be the reference of the investigation;
- fact-finding activities, in order to bring to light and ascertain the relevant facts, circumstances and materials that are hidden, not directly available or unknown in order to establish the truth about and around the government actions that are the object of the investigation;
- the reporting of the activities, the results and the findings

*b. Steps that may be followed*

In handling and investigating complaints, most offices, according to the UN Guideline, use some form of these steps:

- *Receiving and focussing the complaint:* Communicating with the complainant(s) to determine what is being alleged and which person or authority is the subject of the complaint.
- *Determining whether the Ombudsman has authority/power/jurisdiction to investigate:* Examining the Ombudsman's legal basis to determine whether the complaint is within the Ombudsman's power to consider and investigate.
- *Deciding whether to investigate:* After a preliminary examination of the complaint, determining whether it can be resolved without an investigation and if not whether it will be investigated.
- *Investigating through fact-finding:* Using the Ombudsman's powers to interview persons with information about the events that are the subject of the complaint, and obtaining records about the events to determine the facts surrounding the complaint.
- *Testing the facts:* Examining the facts to resolve conflicts and determine which are most important to be able to make a finding on the complaint.
- *Analyzing the facts:* Finding laws or other legal instruments that govern the facts and then analyzing the facts in light of the laws.
- *Consulting with the subject of the investigation in an attempt to settle the complaint:* Interviewing the subject to determine whether it is possible to settle the complaint or to restore rights that have been violated. Resolving complaints where and when possible.
- *Preliminary report to the authority/institution:* Writing a report that summarizes the investigation—the facts found, the law that governs them, analysis of the facts in light of the law, the Ombudsman's findings and recommendations on the complaint. A preliminary report is sent to any person or authority that is being criticized for any comments or responses.
- *Final report with findings and recommendations:* Any responses are included or summarized, any changes made as a result of the responses are indicated and the findings and recommendations are made final. Confidential material is removed before the report is issued to anyone not entitled to read the confidential material.
- *Keeping the complainant appropriately informed:* The complainant is appropriately informed of the investigation's progress throughout the process.

*c. Observing fairness in the investigation procedures*

The Ombudsman should also be aware of informal requirements that pertain to the range of general rules and requirements of best practices to which he must subdue his investigation. In this regard the Ombudsman should take into account that, e.g. in order to obtain information about the contents or foundation of general policies, he should address himself to the government's top authority and not to the government official of a lower rank.

The Ombudsman should also carefully verify the contents of the written draft of a report of a verbally rendered statement together with the person who has compiled it before ruling the report to be definite. This can be achieved by communicating the draft report to the person so the latter can verify and approve the contents, eventually including remarks that the Ombudsman may accept.

It is also very important for the Ombudsman to ensure that all the results of his investigation and of his factual findings are definitively settled. In order to achieve this he may send, prior to the final report, a note containing an extensive account of the procedure that has been taken into consideration throughout the investigation and of the results and his findings, to the authority concerned as well as to the complainant, requesting them to provide any comment they may have on the contents of the note within a specific period.

By doing so the Ombudsman complies with his informal obligation to inform authority and officials against whose interests the investigation may result, about the allegations against them and give them an opportunity to respond.

The investigating Ombudsman should be aware of the fundamental rights of the person, who is the subject of the complaint, to be informed about the case against them and to have access to the information concerning his or her person or behaviour.

*d. The gathering of evidence*

The investigating Ombudsman and his assisting investigator(s) have the task to ascertain the facts and factual circumstances which are the topic of allegations raised by complainants. The Ombudsman and investigator do this by gathering evidence in an investigation, such as:

- recollections of the complainant, witnesses and other persons;
- evidence from information holders (paper, audio-, visual information holders);
- evidence delivered by experts (technical reports);
- site inspection, observation and other site orientation.

Assessing evidence begins with gathering it, determining its relevance and deliberating about what needs to be done and considered in order to prove or disprove the allegation(s) of the complainant.

Observation of the rules of evidence is required in order to achieve the ascertainment of the facts and circumstances under investigation.

The direct purpose of the Ombudsman investigation, being an administrative investigation, is to serve as an instrument to see if allegations can be proved or disproved. Allegations may be proved in accordance with the standard of proof that counts in administrative investigations, which is proof “on the balance of probabilities”: an allegation must be more probable than not.

This standard of proof is also known as the "preponderance of evidence", which is the standard required in most civil cases. The standard is met if the proposition is more likely to be true than not true. Effectively, the standard is satisfied if there is greater than 50% chance that the proposition is true. Lord Denning in *Miller v. Minister of Pensions* described it simply as "more probable than not". [References: Miller v Minister of Pensions (1947) 2 All ER 37; Woolmington v DPP (1953) AC 462.

In civil litigation the standard of proof is either proof by a preponderance of the evidence or proof by clear and convincing evidence. Both are lower burdens of proof than 'beyond a reasonable doubt', which is the burden of proof in criminal proceedings. Criminal trials employ a higher standard of proof because criminal defendants often face the deprivation of life or liberty if convicted.

## **8. Closing the investigation and preparing the report**

The Ombudsman Act of a state may stipulate that once an investigation is closed, the Ombudsman shall file a report containing his findings and his judgement. The Ombudsman's decision is based on his findings. He shall also determine whether or not the government authority acted properly in the matter under investigation. The report may include relevant recommendations.

The report should be sent to the complainant, the administrative authority and, where appropriate, to the official or public official concerned.

A version of the report that does not reveal the identity of individuals may be made public and should also be sent to the Parliament and further on to other interested recipients. The case may be closed by publication of the report.

## **9. Some tips with regards to the Ombudsman investigation**

I would like to conclude this lecture with some tips regarding best practices in Ombudsman investigation that I have gathered and formulated here at random, without any particular order:

- Good investigations begin with good planning. Ensuring that the planning is well done will have a major influence on the ultimate success of the investigation. Good planning of an investigation also helps the Ombudsman think through vital issues such as gathering information and evidence at the one hand and resources and capacity at the other hand. Good planning promotes efficiency and effectiveness. The planning should also counter undue delay.
- Ombudsman investigations, including those of the investigators of his office, should also obviously be conducted in an independent, impartial, fair and objective manner; even erroneous appearance in this regard must be excluded.
- Be careful with uninvited informants; they may have wrong and hidden interest or they might be sent by someone with a wrong and hidden interest.
- It is imperative to maintain for each case under investigation a central file, holding all records of the investigation, ranging from phone calls to reports.
- The investigation file must be kept in a central and secure place in order to prevent unauthorised access, losses and alteration and to maintain confidentiality and internal accessibility.
- Ask open-ended questions in interviews and allow the interviewee to tell his/her story without limiting an answer by the question's nature (e.g. 'yes or no?').
- The Ombudsman should also observe the desire of complainants, informants, witnesses or other persons involved to have their identity kept confidential; the Ombudsman should conduct a special procedure in order to ensure the anonymity of an informant who needs that. The Ombudsman must have registered the identity of the anonymous informant and that must be known.
- During interviews, try to pin down the denying interviewee to a statement of his or hers against which you possess true contradictory information, by triggering with your questions from the interviewee also surrounding denials and so prevent the interviewee to 'escape' with evasions from the locked statement when you finally confront him/her with the true information. In doing so you can show in the report that the interviewee is not telling the truth about his/her conduct.
- Prior to a particular interview, the investigating Ombudsman should have a short briefing with his assistant, who will file the report of the Ombudsman's interview, in order to ensure that the assistant will know in advance what kind of information the Ombudsman would like to acquire from the interview to be. In doing so the Ombudsman ensures that his assistant will not spend time and energy during and after the interview in making and filing notes that do not regard key information. This will facilitate the Ombudsman's correcting task.

## **10. Closing remarks**

In this lecture it was, according to its title, all about the investigation aspects of the ombudsman role.

But, as you all know, not every complaint requires investigation. The majority of concerns and allegations raised by complainants will be able to be resolved at an informal level by intervention or through other processes such as mediation. The latter will be one of the promising topics of this Conference. I welcome that.

I wish you all a very pleasant and fruitful further participation at this well-prepared conference.

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Thank you, ladies and gentlemen