



OMBUDS INSTITUTIONS FOR THE ARMED FORCES

A HANDBOOK



Benjamin S. Buckland and William McDermott



DCAF
a centre for security,
development and
the rule of law



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The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is an international foundation whose mission is to assist the international community in pursuing good governance and reform of the security sector. The Centre develops and promotes norms and standards, conducts tailored policy research, identifies good practices and recommendations to promote democratic security sector governance, and provides in-country advisory support and practical assistance programmes. Visit us at www.dcaf.ch

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ICOAF FOREWORD

Ombuds institutions play a crucial role in ensuring that the armed forces operate with integrity and in a manner which is both accountable and transparent. By handling individual complaints, as well as through the exploration of thematic and cross-cutting issues, ombuds institutions help to prevent human rights abuses, eliminate waste and malpractice and contribute to the overall good governance of the security sector.

The International Conference of Ombuds Institutions for Armed Forces (ICOAF)—which brings together ombuds institutions from more than twenty-five states—first met in Berlin in May 2009. Its aim, over the past four years, has been to establish best practice and lessons learned relating to the mandate, powers and functioning of these institutions. As well as bringing together well-established bodies, ICOAF has also actively sought to reach out, both to states with newly-formed institutions, and those that have expressed an interest in creating such a body.

It is in this spirit that, at the second ICOAF conference—held in Vienna in 2010—those assembled mandated DCAF to produce a handbook on ombuds institutions for the armed forces. The aim was to bring together good practices and shared lessons from among ICOAF members and beyond, in a format that would make it a useful tool for both well-established and newly-formed institutions.

The third ICOAF—held in Belgrade in 2011—hosted a breakout session on the handbook on ombuds institutions for the armed forces. While presenting the work done on drafting the handbook by laying out the

context, objectives, scope and draft outline of the handbook, DCAF received valuable feedback from the participants.

As the past, current, and future hosts of the ICOAF conference, it has been our pleasure to assist DCAF in fulfilling this mandate. The handbook they have produced will, we hope, prove to be an essential resource in our own work, as well as that of our many colleagues in sister institutions around the world.

Saša Janković
Protector of Citizens of the Republic of Serbia

Pierre Daigle
Ombudsman for the Department of National Defence and the Canadian Forces

Kjell Arne Bratli
Parliamentary Commissioner for the Norwegian Armed Forces

DCAF FOREWORD

Ombuds institutions for the armed forces are an essential part of any transparent and accountable security sector. As independent and impartial institutions, they play a crucial role in preventing and responding to both maladministration and human rights abuses, whether they affect civilians or members of the armed forces themselves. By receiving and investigating complaints, as well as through reporting on thematic questions and systemic problems, ombuds institutions can have an important impact both on individuals, as well as on the security sector and legislative environment as a whole.

The prevention of maladministration and human rights violations are essential in a democratic society. Their prevention relies, in part, on the existence of a security sector that is both transparent and accountable. Such transparency and accountability can only be guaranteed through the establishment of independent and impartial bodies and the endowing of such bodies with the necessary resources and powers.

When DCAF, in collaboration with a number of ombuds institutions around the world, took the initiative in establishing ICOAF, it was hoped that it would be a forum for open discussion and exchange. In particular, we sought to create a mechanism that would lead to the sharing of best practices and of lessons learned related to the mandate, powers and functioning of these institutions, as there was a conspicuous lack of research and cooperation on this important issue. We also hoped that, by bringing together both well-established and newly formed institutions, the conference could strengthen and enrich the working of such bodies everywhere, as well as provide assistance to states just

taking the first steps towards the creation of such an institution.

The conferences, first in Berlin (2009), then in Vienna (2010) and Belgrade (2011), now in Ottawa (2012), and soon to be in Oslo (2013) and Paris (2014) are an important pillar of this work. The steadily increasing participation and widening regional diversity among the institutions who attend is testament to the forum's value.

Mandated by ICOAF, DCAF has sought to provide two additional tools to the conference. The first of these is the ICOAF website www.icoaf.org which acts as a repository for contacts, information and research about the conferences and the organisations involved.

This handbook, however, represents an altogether more ambitious goal. Through numerous questionnaires, interviews and roundtables, as well as extensive desk research, the authors have sought to bring together good practices and examples from ombuds institutions around the world. With major sections on: History Functions and Models; Complaints; Investigations; and Reporting and Recommendations, it is hoped that this handbook will prove of use to well-established and newly formed institutions alike. The discussion of models will also, it is hoped, be of benefit to those states who are still considering the establishment of such an institution and are seeking guidance on which model may be most appropriate to their particular circumstance. Additionally, I hope that this Handbook will generate greater academic interest on the subject. I am eager to continue our efforts at DCAF to conceptualize and understand the issues at stake, and I hope that ombuds institutions for the armed forces around the world begin to receive the attention and recognition they deserve.

Ambassador Theodor H. Winkler
Director, DCAF

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In addition, the authors are indebted to all those institutions who responded to our two questionnaires and to all those who have taken part in the annual International Conference of Ombuds Institutions for the Armed Forces (ICOAF) in Berlin, Vienna, and Belgrade. The formal and informal discussions that took place at these meetings, as well as the conference reports relating to these events, have been an invaluable source of information.

The authors are also grateful for the work of Alice Lake-Hammond for designing the layout of the handbook, to Belinda Cleeland for providing the cover photograph and to Julia Rubel of Agincourt Press for copy editing the text.

Finally, the authors are indebted to ICOAF as a whole for providing the mandate for this handbook and to the Swiss International Relations Defence (IB V), Armed Forces Staff of the Federal Department of Defence, Civil Protection and Sports for providing generous financial support to this project.

Benjamin S. Buckland and William McDermott

INTRODUCTION



1 INTRODUCTION

This chapter provides an overview of what will be covered in the text that follows. It includes subsections on:

- defining ombuds institutions for the armed forces
- the importance of such institutions
- the aims of this handbook
- the anticipated audience for the handbook
- the methodology used in researching and writing the text
- an outline of the handbook

1.1 Definitions

The subject of this handbook is ombuds institutions for the armed forces. This is a broad term that covers a wide range of institutional models and approaches. The term “ombuds institution” was chosen over the more common “ombudsman” for two main reasons:

1. the term “ombudsman” generally refers to a very specific type of institution, one that closely resembles the original Scandinavian model.¹
2. the term “ombudsman,” while originally a Scandinavian word, is nevertheless not gender neutral in its modern conception.

This handbook covers a broad range of institutions. Under the umbrella of the term “ombuds institution” it includes organisations with a great deal of diversity in their mandates, scope, and functioning. The handbook covers both institutions that have been explicitly given responsibility for human rights promotion and protection² as well as those institutions that focus more on questions relating to maladministration.³ The diversity of models is clearly reflected in the

titles of the institutions discussed below, including: commissioner, inspector general, ombudsman, complaints manager, parliamentary commissioner, people's advocate, and chancellor of justice, among others. Two important characteristics of ombuds institutions are their independence from the bodies they are tasked to oversee and their impartiality in carrying out their duties. By receiving and investigating complaints, ombuds institutions are an important component of any system of independent oversight.

The focus of this handbook, however, is somewhat narrower than ombuds institutions as a whole; the focus here is on ombuds institutions *for the armed forces*. From within the broad group of ombuds institutions this handbook thus limits its focus to those organisations that are united by their common mandate to receive and investigate complaints from within or relating to the armed forces in their respective jurisdictions. "Armed forces" is defined to mean all branches of the armed forces, as well as those executive bodies, such as ministries of defence, that are involved in planning and directing the activities of such forces.⁴

Two examples illustrate this point: The term ombuds institution for the armed forces includes the Serbian Protector of Citizens, a general ombuds institution with broad jurisdiction over many parts of the government, including the armed forces. The definition excludes, however, the Argentinian National Public Defender, also a general ombuds institution but one with no jurisdiction over the armed forces.

For the sake of concision, where the handbook refers to ombuds institutions in the text that follows, it means ombuds institutions with jurisdiction over the armed forces. Where the handbook refers to the individual head of the ombuds institution, the term "officeholder" is used as a catchall regardless of the individual's gender or specific title, such as inspector general, advocate, commissioner, and so forth. Where reference is made to a specific institution, the term "ombudsman" is used when it is part of that institution's title.

1.2 The Importance of Ombuds Institutions for the Armed Forces

Ombuds institutions strive for both independence and impartiality: their effectiveness depends on the maintenance of trust and respect vis-à-vis both the state and the people, including members of the

armed forces.⁵ Indeed, one thing that makes such institutions unique is that they seek to improve the quality of the relationship between the people and the administration by avoiding unnecessary conflicts.⁶ Ombuds institutions are able to leverage their high levels of trust to promote and achieve equitable and flexible solutions for all parties.⁷

Their independence and impartiality make them a crucial element in an overall framework aimed at ensuring the accountability of public authorities, outside of the adversarial environment of the courts. Indeed, ombuds institutions can be preferable to the courts in many situations. In particular, their low barriers to entry (i.e., they are accessible, available without cost to individuals, and informal) make them an attractive alternative in a large number of cases.⁸

More broadly, ombuds institutions for the armed forces are essential to democratic governance as a whole. The UN Commission on Human Rights (now the UN Human Rights Council) adopted a resolution in 2000 that identifies five attributes of good governance: transparency, responsibility, accountability, participation, and responsiveness.⁹ An independent and impartial body, such as an ombuds institution, helps to ensure at least three of these criteria:

- responsiveness (in that it receives complaints directly from its constituents and has the ability to handle the complaints)
- responsibility and accountability (in that it makes recommendations to rectify problems)
- transparency (by publishing reports and thematic studies on different topics relating to the armed forces)

Indeed, an increasing awareness of their importance to democratic governance is one factor that explains the proliferation of ombuds institutions for the armed forces around the world in the past half-century. The existence of a strong and independent ombuds institution, with its ability to receive and address complaints, is one important proxy for measuring democratic governance more generally. As Boris Tadić, President of Serbia, affirmed at the third International Conference of Ombuds Institutions for the Armed Forces (ICOAF) in Belgrade, “complaints are good,” because they indicate that there is public trust in the institution as well as awareness.¹⁰

Ombuds institutions play a valuable role in ensuring that the armed

forces are governed by and act in accordance with the rule of law and with respect for the human rights of both armed forces personnel and the civilians with which they engage. This point was clearly underlined by Hans Born and Ian Leigh in their *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*.¹¹ The role of many armed forces as part of international or multilateral deployments—and the increased possibility that violations of human rights (including of civilians in the country of deployment) will occur—underlines the importance of strong and effective oversight mechanisms able to ensure respect for human rights and the rule of law.

1.3 Aims

This handbook has three principal aims:

1. to support the development of legal and institutional frameworks for ombuds institutions by bringing together and consolidating a range of good practice on the functioning and establishment of such institutions.
2. to compare and contrast different models of ombuds institutions and to highlight the strengths and weaknesses of different models.
3. to make the case for establishing or strengthening ombuds institutions.

In this regard, this handbook identifies good practices undertaken by the diverse range of ombuds institutions. At the conclusion of each chapter, good practices will be extracted that support these aims, and recommendations will be made that are applicable and useful to the widest possible range of institutions.

Furthermore, there is a general lack of practical information on the functioning of ombuds institutions for the armed forces. While a great deal of information can be gleaned from annual or thematic reports of ombuds institutions, as well as from laws and subsidiary regulations, this handbook is the first to bring this information together in one publication.

As such, this handbook is a comprehensive resource that will be of use to both established and new ombuds institutions, as well as to those who make use of their services. It is hoped that future publications and

editions of this handbook will build on and extend the work that has begun here.

1.4 Audience

This handbook is aimed at a broad audience, including: armed forces personnel, civil servants, members of the legislature and the executive, members of the media and civil society, academics, and ombuds institutions of all types. In particular, it is hoped that this handbook will be of particular interest to audiences in states that have recently created, or are considering the creation of, such institutions. It is also hoped that existing ombuds institutions find the good practices of other institutions useful and informative in their work.

1.5 Methodology

This handbook draws upon a number of sources of information. A great deal of material was gathered from academic and other sources and the reports of ombuds institutions. Laws from more than twenty jurisdictions were also examined for good practice. This includes legislation from the majority of participants in the International Conference of Ombuds Institutions for the Armed Forces (ICOAF), as well as legislation from other states that offers notable or interesting examples in a particular area. In 2009 and 2011, two questionnaire-based surveys were conducted of ombuds institutions participating in the annual ICOAF. The first (2009) questionnaire dealt with issues relating to mandates, functions, powers, complaint-handling, follow-up and implementation, and challenges. The second (2011) questionnaire posed questions relating to differences between internal and external complaint-handling mechanisms, armed forces unions and associations, and the role of ombuds institutions in protecting the human rights of armed forces stationed abroad. The authors also conducted a series of informal interviews and discussions with representatives of ombuds institutions in five states, covering a range of different models.

In identifying good practice, the authors chose examples that best represented the three interlinked qualities that are viewed as of most fundamental importance to an ombuds institution: independence, impartiality, and effectiveness. These qualities, which relate to both operational and institutional aspects of ombuds institutions, underpin much of what follows. The handbook does not come down strongly in

favour of one model or way of operating. Instead, it draws upon good practices from a wide variety of cases.

1.6 Outline

The structure of this handbook was designed, firstly, to introduce the models and powers of ombuds institutions and, secondly, to reflect the complaint process as a whole, from the origin of a complaint to its resolution. As such, it is divided into four parts, with Part I dealing with history, functions, and models; and Parts II, III, and IV corresponding to distinct stages of the complaint-handling process: complaints, information gathering, and reporting. It is hoped that this division proves useful to audiences in states seeking to establish an ombuds institution (Part I in particular) as well as in places where such institutions already exist (particularly Parts II, III, and IV). Each chapter identifies and problematises relevant issues and concludes with recommendations drawn from good practice. Individual chapters can be read independently or as part of the whole. To this end, cross-references to related topics are provided where appropriate.

Part I deals with the history, functions, and models of ombuds institutions. Chapter 2 (the first chapter in Part I) deals with the history and legal basis of such institutions. Chapter 3 turns to functions and the different models that have been developed to best perform these functions in different jurisdictions. Chapter 4 examines the various models of ombuds institutions for the armed forces found worldwide. Finally in Part I, Chapter 5 examines the essential topic of independence and covers the different types of independence necessary to the success of ombuds institutions.

Part II turns to the question of complaints more substantively. Chapter 6 examines the administrative issues relating to complaints and how an ombuds institution should handle and process them. Chapter 7 goes on to explore the different types of complaints that ombuds institutions for the armed forces most often encounter.

Part III focuses on investigations, highlighting issues such as: access, collection, and analysis of information relating to investigations. Chapter 8 deals with types of investigations: complaint-based, own-initiative, and systemic, before going on to discuss the scope of investigations.

Chapter 9 builds on the discussion of complaint-handling in Chapter 6 and deals with the investigative process and the relevant steps and techniques involved. Finally in Part III, Chapter 10 deals with the crucial question of access to information by ombuds institutions.

Part IV covers the final stage of the complaint process: reporting and recommendations. Chapter 11 examines reporting and includes a discussion of different types of reports as well as the question of independence in reporting. Chapter 12 focuses on implementation and monitoring of decisions and recommendations and the ways in which ombuds institutions can encourage compliance with non-binding recommendations. Chapter 13 concludes the volume.

Endnotes

1. There are two Scandinavian models: the Swedish/Finnish ombudsman with the power to prosecute and with jurisdiction over the judiciary; and the Danish model, which is the ombudsman most often copied by other jurisdictions.
2. For example, most institutions in Central/Eastern Europe, Latin America, and parts of Western Europe (for example, Sweden, Finland, and Norway).
3. For example, the UK, Ireland, Canada, USA.
4. Some ombuds institutions also have jurisdiction over other forces, including paramilitaries and private contractors.
5. Michael Dodson, "The Human Rights Ombudsman in Central America: Honduras and El Salvador Case Studies," *Essex Human Rights Review* 3, no. 1 (2000): 30.
6. P. Nikiforos Diamandouros, *The Ombudsman Institution and the Quality of Democracy*. Distinguished Speakers Lectures, University of Siena, 2006, 8.
7. Diamandouros, *The Ombudsman Institution*, 9, 17.
8. Leonard F.M. Besselink, "Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: An Overview of Legal and Institutional Issues," in *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World*, by Kamal Hossain, Leonard F.M. Besselink, Haile Selassie gebre Selassie, and E.L.M. Voelker (London: Kluwer Law International, 2001), 2. On the other hand, of course, the ability of courts to make legally binding judgements may make them a more attractive option in some circumstances.
9. Heiner Hänggi, "Making Sense of Security Sector Governance," in Heiner Hänggi and Theodor H. Winkler, eds. *Challenges of Security Sector Governance* (Geneva and Munster: DCAF and Lit Verlag, 2003), 11.
10. Protector of Citizens of the Republic of Serbia, *Protecting the Human Rights of Armed Forces Personnel: Old and New Challenges*. 3ICOAF Conference Report, Belgrade: Office of the Protector of Citizens, 2011, 6.
11. While ombuds institutions with express human rights mandates can clearly work to ensure that human rights obligations are upheld, it is more difficult for ombuds institutions without such express mandates. This can be done if the institution can look to the legality of conduct and if there are human rights laws in place in the country or jurisdiction. See also Hans Born and Ian Leigh, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (Geneva and Warsaw: DCAF and OSCE-ODHIR, 2008).

PART I: HISTORY, FUNCTIONS AND MODELS



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2 ORIGINS

2.1 Introduction

This chapter reviews the history and impetus behind the creation of ombuds institutions for the armed forces in various states. It looks at the main motives or reasons for the creation of such institutions as well as at their legal basis and mandates and the ways in which their mandates differ across jurisdictions. This chapter contains the following subsections:

- Motives
 - Improvement of Existing Complaint-Handling Mechanisms
 - Recalibration of Civil-Military Relations after World War II
 - Transition to Democracy
 - Response to Specific Problems
 - Successful Institution Building
- Legal Basis of Ombuds Institutions
- Good Practice

2.2 Motives

There are a number of distinguishable underlying reasons for the creation of an ombuds institution with jurisdiction over the armed forces. The first is the desire to strengthen civilian and democratic control over the armed forces. The second is to better protect the rights of soldiers by creating more effective mechanisms for complaint-handling and redress. The third is to create an independent quality-control mechanism to oversee the procedures, practices, and policies within the armed forces.¹ Within this broad framework, four more specific motives for the creation of ombuds institutions can be distinguished.

While these do not describe all cases, the broad categories discussed immediately below cover the majority of ombuds institutions currently established.

2.2.1 Improvement of Existing Complaint-Handling Mechanisms

In several instances, the impetus behind the creation of ombuds institutions for the armed forces has been a desire to strengthen and improve existing complaint-handling mechanisms. In Belgium, Ireland, and the United Kingdom (UK), for example, the ombuds institutions that deal with armed forces were set up in response to concerns about the adequacy of existing ad hoc systems for addressing grievances. In Ireland, important stakeholders, such as the representative bodies of service personnel, lobbied for the creation of an independent complaint-handling mechanism, making it clear that there was a lack of confidence in the armed forces' internal procedures for addressing the grievances of service personnel. Their ongoing calls led to the establishment of the Ombudsman for the Defence Forces in 2005.²

A desire to strengthen existing mechanisms and institutions has been the catalyst for the creation of ombuds institutions in many stable democracies. Indeed, the creation of such institutions in places like Sweden or, more recently, in Ireland and Belgium, has been called the "first wave" of ombuds institutions by Roy Gregory. A common thread among these "first wave" examples is the fact that institution building was largely driven by a desire to provide a "fast, effective and user-friendly way of protecting citizens against maladministration ... deemed necessary because of the increasing impact of governments on citizens' lives."³

BOX 2A: Establishment of the Swedish Ombudsman

The Swedish Ombudsman was established more than a century before any of the other institutions and is widely regarded as the progenitor of the ombudsman concept. In 1713, while he was exiled in Turkey, the King of Sweden appointed a Chancellor of Justice to oversee Swedish administration and the judiciary.⁴ In the following years, appointment of the Chancellor shifted from the monarch to the Parliament, and remained a source of conflict until 1809, when the King was deposed and a new constitution was adopted, granting the Parliament—through the Ombudsman—the ability to supervise how the King executed his duties. The rationale of the Constitutional Committee was that an ombudsman controlled by the Parliament was necessary, because the former model was “insufficient to protect the rights of the public given that the Chancellor was answerable only to the executive branch of government.”⁵

The Swedish case set the tone for what would become the key role of the Ombudsman: “to address administrative problems that the courts, the legislature and the executive cannot effectively resolve.” Although, as the four motives below reveal, the circumstances surrounding the establishment of such an institution in Sweden still make it something of an outlier case.⁶

2.2.2 Recalibration of Civil-Military Relations after World War II

A number of ombuds institutions were established as part of efforts to recalibrate civil-military relations after World War II. This occurred in Germany (1959) and was also the rationale underlying the establishment of ombuds institutions for the armed forces in Norway (1952) and in Austria (1955). In these cases, it was considered necessary to establish an independent institution to promote democratic control of the armed forces. Still scarred by recent events, but recognising the need to reconstitute its armed forces, the German Parliament sought to assuage public fears by subjecting the armed forces to greater scrutiny, establishing (through amendment of the Basic Law) a Parliamentary Commissioner for the Armed Forces with far-reaching powers of access and oversight. Similarly, in the Netherlands, when the armed forces were reconstituted after World War II, policymakers saw the need to establish a “quality control” mechanism within the armed forces, and the Dutch Inspector General was thus established by Royal Decree.⁷

2.2.3 Transition to Democracy

A similar process took place in many post-Communist states in Central and Eastern Europe. Here, new democracies saw the need to establish independent institutions to protect the rights of citizens. In Eastern Europe, this was the case in Romania (1997), Poland (1987), Slovenia (1995), and Serbia (2007). It is noteworthy that these post-Communist states, as part of the consolidation of democracy, all opted to create general ombuds institutions with express human rights mandates and with jurisdiction to address issues pertaining to all public services and branches of government.⁸

Likewise, in much of Latin America, ombuds institutions, with express human rights mandates, were created following the ouster of authoritarian regimes in the latter part of the twentieth century. Here, their role was primarily to serve as a check on the power of the armed forces and as a means of guarding against the recurrence of widespread abuses by the security forces. Such institutions were created, for example, in Colombia (1991), Mexico (1990), and Guatemala (1985), often using the Spanish and Swedish institutions as a model.⁹ Because their creation was often tightly linked to a desire to prevent the recurrence of abuses by the armed forces, this role is given considerable prominence within the mandate of institutions in these countries, particularly in comparison to their European counterparts.

The creation of new institutions in Europe and Latin America over this period has been called the “second wave” of ombuds institutions. In contrast to the first-wave ombuds institutions mentioned above, this second wave involved new democracies transitioning towards greater respect for the rule of law, human rights, and governmental integrity. The creation of ombuds institutions in such states can be seen as an effort to “provide a rather valued weapon in the struggle against the recurrence of ‘bad governance’ in states ‘en route’ to liberal democracy from a totalitarian or authoritarian past.”¹⁰

Ombuds institutions in Africa face a similar set of problems. Emile Francis Short, chair of Ghana’s Commission on Human Rights and Administrative Justice, has argued that: “In many of the emerging democracies of Africa ... the checks and balances expected to exist between the various organs of state are weak, the realisation of good governance is still a huge challenge and human rights abuses are

rampant. In many African countries the rule of law is not regularly observed and the arbitrary exercise of state power is rather pervasive. Corruption is rampant and institutionalised.”¹¹

A number of threats to the effectiveness of such second-wave institutions have been identified, including: an insufficient legal basis or even conflicting regulations pertaining to the ombuds institution; legal limitations placed on the office to conduct field and base visits; and the lack of access to classified information.¹² Perhaps more significantly, others refer to the problems of fraud and corruption, which erode public confidence in state institutions and may undermine the integrity of ombuds institutions themselves.¹³ Even in places where the ombuds institution itself is relatively insulated from wider problems, proper implementation of directives and recommendations requires cooperation from other institutions, something that may be difficult or impossible to achieve if the other institutions are compromised by corruption or are otherwise ineffective.¹⁴

2.2.4 Response to Specific Problems

In another group of countries, the establishment of ombuds institutions for the armed forces has been driven by problems or scandals arising from the work of the armed forces. The Canadian Ombudsman for the Department of National Defence and the Canadian Forces was created in 1998 following allegations of serious misconduct by Canadian soldiers deployed to the United Nations peacekeeping operation in Somalia (1992–1993). This led to a commission of inquiry and, eventually, to the establishment of an ombuds institution for the armed forces. In the United Kingdom, the Service Complaints Commissioner was created in 2006 under broadly similar circumstances, following the recommendation of an independent inquiry into the deaths of young recruits at an army base. In both cases, problems arising from the conduct of the armed forces (or of individuals or units within it) precipitated the creation of ombuds institutions mandated to deal exclusively the armed forces.¹⁵

2.2.5 Successful Institution Building

From the cases above, it is possible to identify several cross-cutting themes that underpin many successful institution-building processes. Firstly, an essential ingredient is broad cross-party support for both

the establishment of the institution and the selection of officeholders. The German Parliamentary Commissioner for the Armed Forces, for example, noted the importance of his election by an absolute majority of the Bundestag. Similarly, the Irish Ombudsman reported the importance of the fact that no one had voted against the Ombudsman (Defence Forces) Bill in Parliament.¹⁶ Such support is essential regardless of the way in which an ombuds institution is created, whether by constitutional amendment, bill of the legislature, executive decree, or other means. Secondly, an inclusive process that involves a broad range of stakeholders is useful both in raising awareness of new institutions as well as in building strong support for their establishment. Such stakeholders include not only the armed forces and relevant government departments but also armed forces unions and associations and civil society groups.

2.3 Legal Basis of Ombuds Institutions

States have typically sought to establish a strong foundation for ombuds institutions by enshrining their power in specific legislation or through constitutional amendment. Constitutional amendment, for example, has been the basis for almost all Latin American ombuds institutions, including in Argentina, Bolivia, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela. In Europe, this is the case in Romania, Poland, Germany, and Albania.¹⁷ Specific legislation, on the other hand, forms the basis for ombuds institutions in Bosnia and Herzegovina, Costa Rica, Ecuador, and Panama as well as in Ireland and the UK.¹⁸ Another approach is found in Canada, where the Ombudsman for Canadian Forces and National Defence was established by executive decree in 1998.¹⁹

While it is difficult to make generalisations regarding the advantages or disadvantages of these legal approaches, one advantage of systems that constitutionally establish such a body is that a constitutional foundation underlines the importance of the institution, placing it on a par with other essential state bodies. A second advantage is that, by enshrining its existence in a constitution, its permanence is highlighted. Indeed, such a status may make it substantially more difficult for a legislature to simply do away with the institution by legislative means. Finally, clarifying the role of the ombuds institution within the constitution is an important way of defining its role vis-à-vis other government

institutions that may possess similar functions or powers. This may help to insulate the institution from institutional infighting or attempts to redefine or limit its mandate.

Box 2B: International Standards Relating to Ombuds Institutions

A number of sets of international principles are of relevance to ombuds institutions for the armed forces. The text in this handbook reflects and draws on many of these international standards. They include (among others):

- The UN Principles relating to the Status of National Institutions (Paris Principles),²⁰ which contain detailed standards for national human rights institutions (NHRIs) on a number of areas of relevance, including: composition, funding, functions, and methods of operation.
- The Open Society Institute's draft Global Principles on National Security and the Right to Information,²¹ which contain a number of relevant sections, including one on access to information by oversight institutions.
- The Council of Europe Committee of Ministers Recommendation to member states on the institution of the ombudsman²² and on the establishment of independent national institutions for the promotion and protection of human rights,²³ both of which underline the role of ombuds institutions in encouraging the effective observance of human rights and fundamental freedoms.
- The Council of Europe Parliamentary Assembly Recommendation on The Institution of Ombudsman,²⁴ which details fifteen "characteristics" essential for any ombuds institution to operate effectively.
- The International Ombudsman Association Standards of Practice²⁵ covers: independence, neutrality and impartiality, confidentiality, and informality, among other standards. They include a number of good practices under each of these headings.
- The World Conference on Human Rights, Vienna Declaration and Programme of Action, covers the importance of National Human Rights Institutions and their role in the promotion and protection of human rights. In particular, it deals with: their advisory capacity, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.²⁶

Nevertheless, even in states where the constitution mandates the existence of an ombuds institution, a legislative process is generally required to establish the functions and powers of the body (as is the case in states where the body is established by legislation or executive decree). Neither approach thus immunises the institution from interference, as will be discussed in Chapter 5 on institutional and operational independence.

Several examples illustrate the importance of establishing a strong legal foundation for any ombuds institution, which insulates the institution from efforts to weaken it through bogus reform or political manipulation. Indeed, the establishment of ombuds institutions has often been used by those in power to appease reformers “without threatening entrenched interests.”²⁷ Chapter 5 on institutional and operational independence examines this issue in more detail.

2.4 Good Practice

Process

- Regardless of the specific motives or reasons that lead to the establishment of an ombuds institution for the armed forces, the creation of such an institution should be an inclusive, multistakeholder process that considers the interests and needs of all relevant parties. In particular, such a process may include and consider the views of the armed forces command, service associations, civil society, and other independent oversight institutions.

Legal Basis

- Ombuds institutions for the armed forces should be established on a firm legal foundation. Ideally, the status of the institution should be enshrined in the constitution.

Endnotes

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2. Born *et al*, *A Comparative Perspective*, 4.
3. Roy Gregory in Steven Van Roosbroek and Steven Van de Walle, "The Relationship between Ombudsman, Government and Citizens: A Survey Analysis," *Negotiation Journal*, 2008: 288. Maladministration means poor or failed administration and occurs "if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights." See the website of the European Ombudsman for more details (available at <http://www.ombudsman.europa.eu>).
4. Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff, 2004), 5.
5. Reif, *The Ombudsman*, 6.
6. Born *et al*, *A Comparative Perspective*, 3.
7. Born *et al*, *A Comparative Perspective*, 3.
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9. Lorena Gonzalez Volio, "The Institution of the Ombudsman: The Latin American Experience," *Revista IIDH* (Instituto Interamericano de Derechos Humanos) 37 (2003): 219.
10. Van Roosbroek, "The Relationship between Ombudsman," 288.
11. Emile Francis Short, cited in Reif, *The Ombudsman, Good Governance, and the International Human Rights System*.
12. Katrin Kinzelbach and Eden Cole, *Monitoring and Investigating the Security Sector* (Bratislava: UNDP, 2007), 13.
13. Marten Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution: the Global Perspective," in *The International Ombudsman Yearbook*, ed. the International Ombudsman Institute (Alphen aan den Rijn: Kluwer Law International, 2001), 19.
14. Born *et al*, *A Comparative Perspective*, 15.
15. Born *et al*, *A Comparative Perspective*, 3.
16. German Parliamentary Commissioner for the Armed Forces, *Oversight, Protection and Welfare: The Ombudsman Institutions as Advocates for Military Personnel*. 1ICOAF Conference Report, Berlin: Office of the German Parliamentary Commissioner for the Armed Forces, 2009; Born *et al*, *A Comparative Perspective*, 9–11.
17. Gonzalez, "The Institution of the Ombudsman," 229.
18. The Ombudsman for the Defence Forces of Ireland was created by the Ombudsman Act of 2004; the Services Complaints Commissioner of the UK was established by the 2006 Armed Forces Act (UK AFA). For the Latin American cases, see Gonzalez, "The Institution of the Ombudsman," 229.
19. See Canada, "Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces," and the accompanying *Defence Administrative Orders and Directives* (DOAD), 1998.
20. Adopted by General Assembly resolution 48/134 of 20 December 1993.
21. See the website of the OSI Justice Initiative for more details (available at <http://www.soros.org/initiatives/justice>).
22. Committee of Ministers Recommendation No. R (85) 13 to member states on the institution of the ombudsman.
23. Committee of Ministers Recommendation No. R(97)14 on the establishment of independent national institutions for the promotion and protection of human rights.
24. Council of Europe Parliamentary Assembly, Recommendation 1615 (2003).
25. See the International Ombudsman Association website (available at <http://www.ombudsassociation.org>).
26. UN General Assembly Doc A/CONF.157/23 of 12 July 1993. Art. 36.
27. Dodson, "The Human Rights Ombudsman in Central America," 30.

3 FUNCTIONS

3.1 Introduction

This chapter looks at the major functions of ombuds institutions. The first of these is complaint-handling, which relates to the receipt and processing of complaints. The chapter then turns to the conduct of investigations and the main types of investigations that ombuds institutions carry out. The chapter finally looks at reports and recommendations and the role they play in complaint resolution. This chapter contains the following subsections:

- Complaint-Handling
- Investigations
- Reports and Recommendations
- Good Practice

3.2 Complaint-Handling

An essential function of ombuds institutions is to receive and investigate complaints; another is to identify areas of public administration that are in need of improved performance or greater accountability. Ombuds institutions, however, are not meant to be a substitute for judicial bodies, including those that make up the military justice system. Rather, they seek to supplement judicial institutions, as ombuds institutions generally deal with non-criminal matters and typically offer comparatively lower barriers to entry.¹ The costs and formalities of pursuing a complaint in a court can be rather high, whereas ombuds institutions' services are offered free of charge and are far more informal than a typical court proceeding. Furthermore, ombuds institutions should endeavour to make their services as

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easily accessible as possible by providing a variety of means by which individuals can file complaints (see Section 6.2.2 for more details).

Ombuds institutions for the armed forces are, in the most basic sense, mandated to receive complaints from currently serving members of the armed forces, as well as from non-professional members (such as conscripts) in many cases. Many ombuds institutions may also receive complaints from, among others: veterans; family and friends; and members of the public regardless of their relationship to the armed forces (see Section 6.2.1 for more details).

The complaint process entails a number of steps, including: determining the admissibility of a complaint, offering advice, promptly handling the complaint, keeping all parties informed, and protecting legitimate expectations.² The process should be timely, effective, credible, confidential, and impartial in handling complaints.

Ombuds institutions for the armed forces deal with a wide variety of complaints, many of which can be placed within one of three broad categories: human rights protection, prevention of maladministration, and compliance with criminal and international humanitarian law (see Chapter 7 for more details). While ombuds institutions may deal with a number of additional issues, these categories cover those that are most commonly handled by ombuds institutions for the armed forces.

3.3 Investigations

Closely related to their complaint-handling function is the role of ombuds institutions in investigations. One factor that distinguishes the activities of most ombuds institutions for the armed forces from those of the police or the judiciary is that they are (generally) neither criminal nor adversarial in nature. Indeed, many ombuds institutions are explicitly barred from investigating matters that are already the subject of investigation or examination by military justice or a civilian court (see Section 5.4.1 on deciding which matters and priorities to pursue for more details).³ While some ombuds institutions may investigate matters that involve criminal wrongdoing, the conclusions of investigations conducted by ombuds institutions are generally aimed at producing recommendations; they aim to resolve issues independently and impartially, and to prevent their recurrence, rather than to punish an offender or an individual act of wrongdoing.

Investigations by ombuds institutions can be divided into several main types, including: complaint-based, own-motion, and those dealing with systemic issues (see Sections 8.3–8.5 for more details).⁴ While not all ombuds institutions conduct investigations in the same manner, several common elements are evident, including: fact-finding and establishing that the complaint has merit; alternative dispute resolution or mediation; interviews and other investigative methods, such as inspections and site visits; and drawing conclusions (see Chapter 9 for more details). The conclusions of any investigation then lead to recommendations and any other steps that may be required to ensure that the specific problem is adequately addressed, as well as to prevent its recurrence.

3.4 Reports and Recommendations

The issuing of reports to the concerned parties (including the complainant and the subject of the complaint), to the legislature, and to the public at large is a key function of ombuds institutions; and nearly all such institutions are mandated to produce a regular report on their work and activities. Periodic or ad hoc reports can be used to share information on all aspects of an ombuds institution's work, including complaints (while taking due care to protect the privacy of individual complainants), outstanding and thematic issues, and policy or other recommendations. Reports may also be an important way of publicising recommendations, including where they relate to rectifying, mitigating, or reversing the decision, policy, or law that led to a complaint (see Section 11.2 for more details).⁵

Relating to specific cases or investigations, ombuds institutions may issue reports containing detailed recommendations aimed at rectifying the specific problems relevant to the complaint and to any broader, systemic issues that may have been uncovered during an investigation or inquiry.

Recommendations can serve a number of different functions, including to encourage relevant parties to rectify, mitigate, or reverse the adverse decision, policy, or law that led to a complaint. Recommendations can also suggest reparations, such as payments for harm or formal apologies for mistakes or adverse effects.⁶

Recommendations can be divided into two main types. The first relates to recommendations on specific complaints and their resolution. The second relates to the making of policy recommendations aimed at addressing more systemic issues. The proper implementation of recommendations made by ombuds institutions is central to the effectiveness of these bodies. If the armed forces or other relevant bodies fail to implement or refuse to take notice of recommendations made by ombuds institutions, this may undermine the entire complaint-handling and investigation process.

3.5 Good Practice

Complaint-Handling

- An essential function of ombuds institutions is to receive and investigate complaints and to identify areas of public administration that are in need of improved performance or greater accountability.

Investigations

- Investigations aim to resolve issues independently and impartially and to prevent their recurrence, rather than to punish an offender or an individual act of wrongdoing.

Reporting and Recommendations

- The issuing of reports to the legislature and to the public at large is a key function of ombuds institutions. Recommendations may seek to rectify, mitigate, or reverse the adverse decision, policy, or law that led to a complaint

Endnotes

1. Besselink, "Types of National Institutions."
2. Terhi Arjola-Sarja, "The Ombudsman as an Advocate for Good Administration," in *Parliamentary Ombudsman 90 Years*, by Riitta-Leena Paunio (Sastamala: Vammalan Kirjapaino Oy, 2010), 93–108.
3. See, for example, Ireland, "Ombudsman Act," Section 5; United States "Inspector General Act of 1978," Art. 8(d); and Canada, "Ministerial Directives," Art. 14–15.
4. It is worth noting, of course, that these three "types" overlap in some circumstances and, in addition, that in some cases an ombuds institution is mandated to investigate a complaint brought forth by a member of the legislature or a government minister.
5. United Nations Development Programme, *Guide for Ombudsman Institutions: How to Conduct Investigations*. (Bratislava: UNDP, 2006), 118.
6. UNDP, *How to Conduct Investigations*, 118.

4 MODELS

4.1 Introduction

This chapter looks at the different models of ombuds institution for armed forces. It looks first at institutions integrated within the armed forces, such as inspectors general. It then turns to those with exclusive jurisdiction over the armed forces before examining general ombuds institutions that, nevertheless, have a mandate to receive complaints from armed forces personnel. The chapter concludes with a discussion of cooperation between institutional models. This chapter contains the following subsections:

- Different Models of Ombuds Institutions for Armed Forces
 - Integrated
 - Exclusive Jurisdiction
 - General
- Cooperation between Similar Institutions
- Good Practice

4.2 Different Models of Ombuds Institutions for Armed Forces

There is a rich variety of ombuds institutions that are mandated to address issues arising from and within the work of armed forces. The status and functions of these institutions differ significantly between states and are undoubtedly conditioned by national military traditions, legal systems, and the calibration of civil-military relations, as well as by the question of for whom an institution was initially established. Indeed, the rich variety of such institutions suggests that the spread and development of the ombuds institution has been facilitated by its flexibility as a model.¹ This flexibility has enabled the ombuds institution to be adapted to diverse cultural, constitutional, and legal

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environments. This diversity is well reflected in the titles of these bodies, which include, for example, commissioner, inspector general, ombudsman, complaints manager, people's advocate, and chancellor of justice. In spite of this diversity, the ombuds institutions examined in this research can be grouped into three distinct categories: integrated within the armed forces, exclusive jurisdiction over the armed forces, and general ombuds institutions. There are both advantages and disadvantages to each of these models, which will be discussed in more detail below.

4.2.1 Integrated within the Armed Forces

The first model is integrated within the armed forces itself (usually under the title of inspector-general [IG]). IGs are usually (although not always) serving members of the armed forces and are usually situated within the chain of command. They may thus report to and/or take direction from superior officers. For this reason, this model of ombuds institution may be favoured by the armed forces. Advantages of this model are that IGs may be more receptive to command and control issues and more attentive to the need to protect and promote the operational effectiveness of the armed forces. IGs may also possess specialist knowledge of military life, making them more receptive to military-specific problems and issues. Finally, IGs are commonly deployed alongside other members of the armed forces, making them potentially more accessible for those posted abroad or otherwise remotely. On the other hand, however, such integrated mechanisms may lack independence. Their position within the armed forces may reduce their ability to address controversial issues or pursue investigations that run counter to the interests of the military hierarchy. This may in turn reduce the legitimacy of and undermine confidence in the complaint mechanism in the eyes of the complainants or the public.² Such a system is found, for example, in France, the Netherlands and the United States (US), where the inspector-general of the armed forces has both an advisory and a mediation function; the office also exercises the function of inspector for veterans. Denmark has a similar, although quite unique, model that fits under this heading. It is described in more detail in Box 4C.

Box 4A Origins of the US Inspector General System

The US system of IGs dates back to the American Revolutionary War, when General George Washington appointed Baron Friedrich Wilhelm von Steuben as the first Inspector General of the armed forces. The system was modelled on the French institution, created a century earlier. The original intention of the IG was to improve training and readiness within the then disorganised and unprofessional American armed forces. The IG's first tasks included supervising training and developing common tactics across the force. However, the Continental Congress also saw the new institution as a way of ensuring accountability of armed forces spending, as well as ensuring that the armed forces remained subordinate to democratic control. Early IGs also had a human rights function. When Congress created the IG of the army in 1777, among its four core functions was to ensure that commanders treated their soldiers in a fair and just manner.³

Initially, IGs existed within the armed forces yet outside the chain of command. However, in 1876, the Secretary of War instructed that all field IGs report directly to their commanding general, rather than to their superior IG. This change reflected ongoing tension between commanding officers and civilian authorities regarding IG reporting and their place within the system. This is the system that remains in place today.⁴

4.2.2 Exclusive Jurisdiction over the Armed Forces

The laws of several countries provide for an independent ombuds institution, which has jurisdiction only over the armed forces but is a civilian office, independent of the military chain of command.⁵ An independent armed forces oversight mechanism has the advantage of being able to devote its attention exclusively to military matters, thus developing a specialised knowledge in the field. Its ability to issue public reports strengthens the oversight capacity of other democratic institutions, such as the legislature (by providing them with information to which they may not otherwise have ready access), and ensures greater transparency and accountability of the armed forces. Such institutions can be powerful examples of independent oversight. In addition to having specialist knowledge of military matters, an independent ombuds institution for the armed forces has an advantage in that its independent status gives it credibility in the eyes of complainants, the legislature, and the public. The main disadvantage is that its establishment may be costly and that, for states with small

or inactive militaries, a dedicated office may be unnecessary given the small volume of complaints that may be generated regarding the armed forces.⁶

Examples of such institutions include: the Parliamentary Ombudsman for the Norwegian Armed Forces, the Parliamentary Commissioner for the Armed Forces in Germany, the Austrian Parliamentary Commission for the Federal Armed Forces, and the Ombudsman for the Defence Forces of Ireland. Under this heading can also be included the National Defence and Canadian Forces Ombudsman, although unlike those listed above, this institution is located within the Department of National Defence and Canadian Forces.

Box 4B Parliamentary Commissioner for the Norwegian Armed Forces

The Norwegian Parliamentary Commissioner is an early example of an institution with exclusive jurisdiction over the armed forces. It was established in 1952 by a unanimous decision of the parliament, making it the world's first parliamentary ombuds institution for the armed forces. The Commissioner initially faced scepticism from some within the armed forces who feared that it would undermine the chain of command and military effectiveness. It took several years before the system gained universal acceptance, and early support from the defence minister was essential. One of the Commissioner's first tasks was to educate new recruits on the workings of the system and protect them against arbitrary decisions and injustice.

The Commissioner is head of the Ombudsman's Committee, which comprises seven members. The Commissioner and the Ombudsman's Committee are organs of the Norwegian Parliament and, as such, they are elected by and report to it. As an organ of parliament, the institution is impartial and independent of the Ministry of Defence and of the military authorities. The Commissioner has a mandate to safeguard the rights of all members and former members of the armed forces.⁷

4.2.3 General Ombuds Institutions

In some countries, the armed forces oversight function is subsumed within the mandate of a broader civilian oversight mechanism (such as a general human rights ombuds institution or classical ombudsman), with

a mandate to contribute to the protection of the rights and freedoms of all members of society and to address complaints and concerns relating to all branches of government. In many states, such institutions are extremely important and hold a powerful position within the political system. The Serbian Protector of Citizens, for example, is recognised among the most powerful individuals in the state. Civilian ombuds institutions with a broad mandate of this type have several advantages. First, their broad mandate may make them significant and well-known figures within the political system. Their recommendations may thus be difficult to ignore. Their prominent status also means that the public (including members of the armed forces) are likely to have some understanding of their role and thus be more likely to approach them with problems or concerns. Second, their general mandate ensures that both civilians and members of the armed forces are likely to be treated equally and their interests balanced in any recommendations. Third, the concentration of the ombuds institution's function in one office can also be less costly than having several specialised offices. On the other hand, a civilian ombuds institution may lack specific knowledge and credibility within the armed forces and may fail, due to its broad mandate, to focus attention on the particular problems facing armed forces personnel. Furthermore, insufficient resources devoted to military-specific cases may cause significant delays in the resolution of complaints.

A solution to these problems could be to introduce specialisations within the ombuds institution's office, for example, by appointing a deputy to deal specifically with military affairs.⁸ This is the case in the Philippines and in Sweden, where the ombudsman's work is subdivided into several areas of responsibility, including the armed forces, non-combatant national service, and other cases relating to the Ministry of Defence.⁹

Box 4C Danish Advisory System

Denmark has established an advisory system to provide assistance and advice to soldiers and officers who feel that they have been subjected to discrimination or have been accused of discrimination. The system consists of advisers outside the military chain of command who perform this advisory function alongside their normal assignments. When exercising their advisory function, they report to a chief adviser in the Army's Personnel Command. The advisers provide guidance or, if necessary, assistance in formulating a complaint through the chain of command. The system does not constitute an external/independent complaint process in itself.¹⁰

Table 4A: Types of Ombuds Institutions

Type	Examples ¹¹
Integrated	Australia, Belgium, France, the Netherlands, Slovenia, ¹² USA
General	Australia, ¹³ Colombia, Estonia, Finland, Honduras, Hungary, Mexico, Montenegro, Namibia, the Netherlands, ¹⁴ Poland, the Philippines, Romania, Serbia, Slovenia, Sweden, Timor-Leste
Exclusive Jurisdiction	Austria, Bosnia and Herzegovina, Canada, Germany, Ireland, Norway, UK

4.3 Domestic Cooperation between Ombuds Institutions

In many states, several different institutional models coexist side by side, all with some jurisdiction over the armed forces. In such states, various modes of cooperation exist between relevant institutions. In some cases, legal boundaries and mandates are clearly delineated, which aids smooth cooperation and prevents jurisdictional conflict. This is the case, for example, in the Netherlands, where complaints are first handled internally by the Inspector General of the Armed Forces. If a complaint cannot be resolved internally, the complainant may then go to the National Ombudsman.¹⁵ These institutions closely cooperate through close contacts during investigations, training, workshops, and conferences. As the Deputy National Ombudsman has remarked, it is

always better to resolve the problem within the institution itself and restore trust through personal contacts.¹⁶

The law on the Parliamentary Military Commissioner of Bosnia and Herzegovina goes even further in establishing a ladder of responsibility and in institutionalising cooperation mechanisms. Here, the law stipulates that the Commissioner has a legal obligation to cooperate with the Ombudsman for Human Rights during investigations relating to human rights violations.¹⁷ More generally, the law also requires that the Commissioner shall cooperate with the Ministry of Defence, the Office of the Inspector General of the Ministry of Defence, the Armed Forces, and the Institution of the Ombudsman for Human Rights.¹⁸ This cooperation is further buttressed by legal provisions that stipulate how and when information must be shared between various organisations with potentially overlapping jurisdictions.¹⁹

In many other states, however, jurisdictional lines are less clear, which may result in confusion on the part of those making a complaint or, in the worst case, in outright competition or conflict. On the other hand, overlapping jurisdictions and mandates may help to ensure that there are no gaps into which a potential complaint may fall. A number of states have expressed the view that cooperation between existing institutions could be improved. The Slovenian Human Rights Ombudsman, for example, has noted that cooperation between her organisation and the defence inspectorate (an internal complaint-handling body) is not yet well developed.²⁰ Uniquely, Canada has two ombuds institutions with jurisdiction over current and former members of the armed forces: the Canadian Ombudsman for National Defence and Canadian Forces, and the Veterans' Ombudsman. The Canadian Ombudsman is generally tasked with handling complaints from current armed forces personnel, while the Veterans' Ombudsman, as its name suggests, deals mainly with veterans. While their constituents overlap, the two offices divide their work based on the subject matter of the complaint.²¹

4.4 Good Practice

Models

- Regardless of the specific model chosen, it is important that ombuds institutions be given appropriate powers and resources to carry out their functions.
- Ombuds institutions for the armed forces must be able to act independently of undue influence from the chain of command and the executive.
- Ombuds institutions must endeavour to acquire the specialised knowledge required to perform their functions effectively with regard to armed forces. This may require general ombuds institutions to set up dedicated, specialist bodies with a specific mandate to deal with complaints relating to the armed forces.

Cooperation

- Legal boundaries and mandates should be clearly delineated in order to aid cooperation and prevent jurisdictional conflict.
- In states where several institutions have overlapping mandates, the law may require that they cooperate and stipulate how and when information must be shared.

Endnotes

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2. Hans Born and Ian Leigh, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (Warsaw and Geneva: OSCE, ODIHR, and DCAF, 2008), 230–244.
3. California National Guard, "History of the US Army Inspector-General" (available at http://www.calguard.ca.gov/ig/Pages/History_IG.aspx).
4. Naval Inspector General, "Chapter 1. History of the Naval Inspector General" (available at http://www.ig.navy.mil/about_navinsgen/history.htm).
5. The term "exclusive jurisdiction" does not imply that such bodies are the only ones with jurisdiction over the armed forces.
6. Hans Born and Ian Leigh, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (Warsaw and Geneva: OSCE, ODIHR, and DCAF, 2008), 230–244.
7. See the website site of the Norwegian parliamentary ombudsman for the Armed Forces (available at <http://www.ombudsmann.no/>).
8. Hans Born and Ian Leigh, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (Warsaw and Geneva: OSCE, ODIHR, and DCAF, 2008), 230–244.
9. See the website of Sweden's parliamentary ombudsman (available at http://www.jo.se/Page.aspx?MenuId=38&MainmenuId=12&ObjectClass=DynamX_Persons&Language=en).
10. UK Parliament Select Committee on Defence, *Third Report*, Section 8. External Assurance.
11. Born *et al*, *A Comparative Perspective*, Annex, Responses to Question 1.
12. Here reference is made to the Defence Inspectorate of the Ministry of Defence.
13. Here reference is made to the Australian Commonwealth Ombudsman (also the Australian Defence Forces Ombudsman).
14. The Netherlands has two ombuds institutions with jurisdiction over the armed forces. The IG model is the Inspector General of the Armed Forces, and the General model is the Dutch National Ombudsman.
15. From July 2012, the Netherlands has a special ombudsman for veterans.
16. Protector of Citizens, 3ICOAF Conference Report, 10.
17. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner," Art. 4c.
18. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner," Art. 7.1.
19. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner," Art. 7.1–7.4.
20. Protector of Citizens, 3ICOAF Conference Report, 11.
21. See the website of the Canadian Ombudsman for Veterans' Affairs (available at <http://www.ombudsman-veterans.gc.ca/home-accueil-eng.cfm>). If the complaint pertains to the Department of National Defence, then the Ombudsman for Canadian Forces and National Defence has jurisdiction. When a complaint pertains to the Department for Veterans Affairs, however, it is the Canadian Ombudsman for Veterans' Affairs who has jurisdiction.

5 INDEPENDENCE

5.1 Introduction

This chapter provides an overview of the question of independence and its importance to the work and overall effectiveness of ombuds institutions. In particular, this chapter discusses the three main types of independence (institutional, operational, and personal) and provides examples of good practice in each of these areas. This chapter contains the following subsections:

- Independence
- Institutional Independence
 - Budgeting
 - Security of Position and Tenure of Staff
- Operational Independence
 - Deciding Which Matters and Priorities to Pursue
 - Determine the Manner in Which It Undertakes Its Work
 - Releasing Reports, Making Recommendations, and Addressing the Public
 - Access to Information
 - Hiring External Experts
- Personal Independence
- Good Practice

5.2 Independence

Independence is of central importance to the work of ombuds institutions and is widely argued to be the key ingredient for their effectiveness.¹ As the Council of Europe argued in a 2003 report: “His/her duties are best discharged when acting as an independent, impartial intermediary

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[...] An Ombudsman ought to give the public in general the confidence that there is an impartial ‘watchdog’ holding government and public administration to account.”² Here, the concept of independence is divided into three constituent parts, each of which must be present if an ombuds institution is to be both effective and impartial. These are: institutional independence, operational independence, and personal independence.³

5.3 Institutional Independence

Institutional independence concerns the relationship between ombuds institutions and other state bodies, including those they are mandated to oversee and report to, as well as those that appoint their personnel and from which they receive their funding.⁴ Institutional independence is generally understood to mean that an ombuds institution is independent from the government and, more specifically, that it is not part of any of the bodies that it is mandated to oversee.⁵ Such independence insulates the ombuds institution from conflicts of interest or any undue interference, which may undermine its impartiality and ability to properly investigate complaints. Indeed, many ombuds institutions have underlined the importance of their institutional independence as an essential precondition for effectiveness.

As discussed in Chapter 4, such organisations have a mandate to oversee a diverse array of government agencies and bodies. As a result, their position vis-à-vis other organs of state and government varies across jurisdictions. For example, ombuds institutions with exclusive jurisdiction over the armed forces are generally less concerned about the question of their independence from the legislature or their relationship to other government bodies than ombuds institutions that have a wider mandate to investigate complaints relating to all parts of government.

As such, institutional independence can be approached in two different manners according to the oversight mandate of the body. In Serbia, for example, the ombuds institution has wide jurisdiction to investigate complaints relating to “all bodies and organisations, enterprises and institutions which have been delegated public authority.”⁶ *The Law on the Protector of Citizens* thus provides a robust guarantee of its independence from all other public authorities, stating that “the

Protector of Citizens is independent and autonomous in performance of his/her duties established under this Law and no one has the right to influence the work and actions of the Protector of Citizens.”⁷

The German law on the Parliamentary Commissioner for the Armed Forces clearly establishes this status in the first article in law, stating, “In the exercise of parliamentary control, the Commissioner shall perform his duties as an auxiliary organ of the Bundestag.”⁸ Similarly, the Executive Chairpersons of the Austrian Parliamentary Commission are elected by the National Council, while members of the Commission are nominated by political parties in proportion to their representation on the relevant committee of the National Council. As organs of parliament, these institutions are beholden to report to and be appointed by parliament. Because they were created largely to provide greater democratic oversight of the armed forces, their oversight mandate extends only to the armed forces, not to other government bodies.

Similar questions relate to the advantages and disadvantages of internal versus external ombuds institutions. Because they are often deployed with the armed forces, internal offices, such as inspectors-general, may have an advantage in terms of how immediately they can access troops and receive and investigate complaints. This may allow them to act more quickly and with better knowledge of the context surrounding a complaint. On the other hand, it is possible that, by virtue of their position within military structures, inspectors-general and other internal offices are able to exercise less independence than external offices. Indeed, the Canadian Ombudsman, in his annual report, has argued strongly that the: “[the office] must remain completely independent of the military chain of command and the civilian management structure of National Defence. Independence is absolutely critical to ensure that ‘influence’ (real or perceived) does not taint our actions, findings or recommendations. Only a truly independent Ombudsman, who has no formal ties to the broader organization and no potential conflicts of interest will be trusted and respected by the members of the Defence community and by those whose actions or decisions are being investigated.”⁹

5.3.1 Budgeting

Budgeting and the provision of resources is one area in which the independence of an ombuds institution vis-à-vis other institutions of state is particularly significant. Financial independence means that an ombuds institution obtains and manages its funds independently from any of the institutions over which it has jurisdiction and, furthermore, that such funds are sufficient for the institution to fulfil its mandate.¹⁰

If an ombuds institution has to rely upon an institution whose activities it oversees for funding, this may compromise its independence. There is the inevitable risk that the institution in charge of the budget may restrict resources in order to restrict the ability of an ombuds institution to oversee its activities. As Nili Nabholz-Haidegger has suggested, the financing of an ombuds institution should never be subject to the goodwill of the executive.¹¹ Furthermore, the Irish Ombudsman for the Defence Forces provides an excellent summary of the importance of budgetary independence: “[I]t is not desirable that an ombudsman has to seek resources from the department or institution which is under its jurisdiction, [and] it is not correct for the budget of an ombudsman’s office to be connected to a government department which may be

Box 5A Funding for a Deputy Ombudsman in Poland

The Polish legislature considered the establishment of an ombuds institution with exclusive jurisdiction for the armed forces but the proposal was rejected over concerns about cost. As a compromise, in 2011, the Sejm (the Polish legislature) National Defence Committee supported the idea of appointing a Deputy Human Rights Defender for the armed forces.

It was argued that it would be substantially more cost-effective to make use of existing regulations provided for by the Act on the Human Rights Defender rather than to create a new institution. The Council of Ministers argued that their compromise proposal (to appoint a Deputy Human Rights Defender for the armed forces) would raise the importance of cases relating to the armed forces, while also being more economical than a completely new institution.

During initial work on the State budget, PLN 2.5 million was earmarked for the appointment of a Deputy Human Rights Defender for the armed forces. However, legislators chose not to allocate these funds in the final budget, thus preventing the Human Rights Defender from appointing a Deputy for the armed forces in 2012.¹³

subject to budgetary cuts, thereby having a direct impact on the operation of the ombudsman's work."¹²

Many ombuds institutions have underlined the importance of budgetary independence to the effectiveness of their work.¹⁴ The majority of ombuds institutions have their own budget allocated to them by the legislature. This is the case, for example, in Bosnia and Herzegovina, where "funds for the work of the Military Commissioner and his/her office shall be ensured through the budget of the BiH Parliamentary Assembly."¹⁵ To this end, a separate part of the Parliamentary Assembly budget allocates the funds required for the staff and equipment needed by the office to perform its duties.¹⁶ An example of particular relevance to postconflict states is that of Timor-Leste. Here, the law establishing the Office of the Ombudsman for Human Rights and Justice includes provisions relating to the allocation of funds by the government as well as by outside sources, such as international donors. In this regard, the law stipulates that the office "shall not receive funds from a source and in circumstances that could compromise its independence and integrity and any investigation."¹⁷

While funding through the legislature is the more common approach, because of their status within the defence establishment, some ombuds institutions for the armed forces, including those in Belgium, Canada, the Netherlands, and the United Kingdom, receive their budget from their respective ministries of defence. Some of these institutions have pointed out that this reliance upon the ministry of defence for resources has negative consequences for their independence and the performance of their functions.¹⁸

An example of a case where a lack of budgetary independence has significantly undermined the work of the ombuds institution is that of Honduras. There, despite significant growth in the number of employees and complaints handled by the National Commissioner for the Protection of Human Rights, it still faced substantial budget cuts.¹⁹ Many institutions have underlined similar problems. Ombuds institutions in the Netherlands, UK, Poland, Estonia, Romania, Germany, Serbia, Ireland, and Finland have stated that insufficient resources are the greatest obstacle to their effective functioning.²⁰ In particular, this lack of resources has negatively impacted the ability of ombuds institutions to regularly visit units abroad and hire and retain sufficient numbers of highly skilled staff.²¹

Box 5B: Budgeting Provisions of the Romanian Advocate of the People

An example of good practice in the area of budgeting is that of Romania. That country's Law on the Advocate of the People states that the institution "has its own budget, which is part of the State budget. The annual budget laws may approve a fund at the disposal of the Advocate of the People, for granting financial support."²² The law goes on to outline the procedure by which the content is approved, a process that, importantly, involves extensive input by the Advocate. The law states that "the budget project shall be approved by the Advocate of the People, with the advisory opinion of the Ministry of Public Finances, and must be forwarded to the Government to be included distinctively in the State budget project, to be legislated. The objections of the Advocate of the People, upon the budget project of Government shall be brought to the Parliament for settlement."²³

5.3.2 Security of Position and Tenure of Staff

An additional dimension of institutional independence is the security of the officeholder's position and tenure in office. Provisions to safeguard the independence of the officeholder normally include a legally established tenure of office, clear procedures for the appointment and the potential removal of an officeholder, and a narrowly defined set of criteria stipulating the circumstances under which removal can happen.²⁴ In the large majority of cases, the officeholder has a fixed tenure, which, among other advantages, means the officeholder does not have to pander to particular interests in the hope of getting reappointed. In most states officeholders may be removed from office by the same institution that appointed them, which is most frequently the legislature. One exception to this general trend is the case of Estonia, where only the judiciary may remove the Chancellor of Justice from office, despite the fact that the Chancellor is appointed by Parliament. In states that have integrated ombuds institutions within the armed forces, the officeholder may generally only be removed by the minister of defence.²⁵

The grounds upon which an officeholder may be dismissed are often limited to a strict set of criteria. In the case of the UK, this power is constrained by both administrative practice and law. As with all public appointments in the UK, the Service Complaints Commissioner can only be removed for a breach of principle (the "Nolan Principles") or

professional misconduct; the commissioner cannot be removed for the proper exercise of his or her statutory duties. Similarly, in Finland the Ombudsman may only be removed from office “for extremely weighty reasons” by a two-thirds majority of Parliament, following the opinion of the Constitutional Law Committee (see also Box 5C).²⁶ This is essential to maintaining the independence of the ombuds institution.²⁷ For example, in Honduras, the National Commissioner released several critical reports on the misuse of international aid following a devastating hurricane. In an attempt to silence such criticism, the legislature sought to retroactively reduce the term of the Commissioner, effectively forcing the current officeholder to retire. While the bill failed, due to criticism from the international community and civil society, the event highlighted the pressures that can be applied to an ombuds institution to limit its independence.²⁸

A related point is the question of liability for decisions made by the ombuds institution and its staff. A number of laws specifically state that the officeholder shall not be held responsible for the performance of his or her duties. The Slovenian Human Rights Ombudsman Act is a good example in this regard, stating that: “the Ombudsman shall not be held responsible for the opinion or recommendation given while performing his function.”²⁹ Similarly, in Finland, the Constitution gives the same protections from prosecution to the Ombudsman as it does to Ministers of Parliament.³⁰

5.4 Operational Independence

The second type of independence to be discussed in this chapter is operational independence (this is also sometimes referred to as functional independence). While institutional independence relates to the position of the office vis-à-vis other institutions, operational independence is no less important.

Operational independence includes the freedom for an ombuds institution to undertake the following tasks, without undue interference by other institutions or actors:

- decide which matters and priorities to pursue and investigate them to their conclusion (see 5.4.1);
- access all information necessary for the fulfilment of its mandate, including classified or otherwise confidential information (see Chapter 9 on access to information);³³

- determine the manner within which it undertakes its work (see 5.4.2);³⁴
- hire outside experts;
- make statements directly to the press and public; and
- release reports and make recommendations, free from censorship (see 5.4.3 and Part IV on reporting).³⁵

Box 5C: Statute of the Ombudsman for Human Rights and Justice of Timor-Leste

Article 21 of this law relates to the removal of the Ombudsman from office and states that:³¹

1. The Ombudsman for Human Rights and Justice can be removed from office by a two-third (2/3) majority in the National Parliament, on the grounds of:
 - a. acceptance and performance by the Ombudsman for Human Rights and Justice of an office, function or activity that is incompatible with his or her mandate, as set out under Article 17 above;
 - b. permanent physical or mental incapacity preventing him or her from performing his or her functions, attested by a medical panel under the terms of Article 19.6
 - c. incompetence;
 - d. definite conviction for a criminal offence that carries a prison sentence of less than one year;³²
 - e. acts or omissions in contradiction with the terms of his or her oath.
2. Any motion for the removal from office of the Ombudsman for Human Rights and Justice must have the support of one-fifth (1/5) of the Members of Parliament;
3. The National Parliament shall set up an ad hoc enquiry committee to review and investigate the matter that is the object of the motion for removal.
4. The findings of the ad hoc enquiry committee provided for in the preceding subarticle shall, as soon as possible, be reported to the Ombudsman for Human Rights and Justice, who has the right of appeal to the Plenary. Such appeal shall be dealt with in a plenary session specifically scheduled to take a vote on the removal.
5. The findings of the ad hoc enquiry committee shall not be voted on until the appeal lodged has been reviewed and the Ombudsman for Human Rights and Justice heard.

5.4.1 Deciding Which Matters and Priorities to Pursue

Because ombuds institutions are intended to be a supplement or alternative to judicial processes, almost all states prevent ombuds institutions from examining matters that are under the jurisdiction of the courts (including military justice processes and military police).³⁶

In some states (such as Belgium, Ireland, and the UK) the ability of the ombuds institution to initiate investigations is further restricted by the fact that any investigation must be triggered by an individual complaint. This may prevent the institution from examining more thematic areas of concern or from launching an investigation into matters that may be known about but relating to which no one has yet come forward.

From the perspective of operational independence, best practice, however, is found among the vast majority of states, which grant the ombuds institution the ability to launch so-called “own-motion investigations.” This is the ability to address an issue without a triggering complaint or request.³⁷ The power to launch own-motion investigations is an important measure of independence because, if an ombuds institution can undertake such investigations, it suggests that its activities are not contingent upon the decisions of other actors. Furthermore, an individual complaint may not fully illustrate a wider problem; or some problems (such as bullying or harassment) may inherently discourage complaints in a particular area. Own-motion investigations allow rules or practices to be addressed by the ombuds institution in relation to individuals who are affected but have not complained.

5.4.2 Freedom to Determine the Manner in which It Undertakes Its Work

A second aspect of operational independence is the ability to determine the manner within which work is undertaken. This power relates to administrative decisions such as the period of time the office takes to respond to each case; the allocation of resources among different aspects of the office’s work; and the procedures used by the office to run investigations, interview witnesses, visit places of interest, and so forth.³⁸ This power can, in part, be guaranteed by laws that protect the inviolability of the institution’s offices and the information contained therein. As is stipulated in the law establishing the Ombudsman for Human Rights and Justice for Timor-Leste, “The premises of the Office

shall be inviolable. The archives, files, documents, communications, property, funds and assets of the Office or in possession of the Ombudsman for Human Rights and Justice, wherever located and by whomever held, shall be inviolable and immune from search, seizure, requisition, confiscation or any other form of interference.”³⁹

The most important aspect of this element of operational independence, however, is the ability to pursue investigations to their conclusion, free from the interference of other institutions. For the majority of ombuds institutions, investigations cannot be terminated or suspended by any other body.⁴⁰ However, in a minority of cases, investigations being undertaken by an ombuds institution may, in theory, be suspended or terminated. For example, in the case of Germany, the *Bundestag*'s Defence Committee may suspend or terminate an ongoing investigation being undertaken by the Parliamentary Commissioner for the Armed Forces.⁴¹ Likewise, in the Netherlands the Minister of Defence has the right to suspend or terminate an investigation of the ombuds institution for the armed forces.⁴² Similarly, in Canada, the Minister could issue general policy directives affecting the activities of the Ombudsman that could, in theory, suspend an investigation.⁴³ In Belgium, the prerogative to suspend or terminate an investigation lies with the judiciary.⁴⁴ While in theory these institutions may halt the work of the relevant ombuds institution, in practice this has never happened.⁴⁵ Furthermore, such measures commonly require written notification, which can be made public, thus limiting their likely use to exceptional circumstances. Even in this minority of states then, it can be said that ombuds institutions retain the crucial power to conduct independent investigations.

5.4.3 Releasing Reports, Making Recommendations, and Addressing the Public

A third aspect of operational independence is the ability to follow through on investigative findings by releasing reports and making recommendations. Most ombuds institutions are mandated to release annual reports to the public as well as individual reports to government bodies such as the legislature, the ministry of defence, or the executive; and they should be obliged to do so. More importantly, however, this power relates to the ability to release special reports and make recommendations on specific cases or thematic areas on the institution's own initiative.

A corollary of the power to make reports and recommendations is the ability to do so free from legal or other liability for doing so. The Romanian law on the Advocate of the People, for example, states in this regard that “The Advocate of the People and his Deputies are not legally liable for the opinions or acts performed complying with the law, while exercising their duties provided for in the present law.”⁴⁶

In addition to making formal reports, ombuds institutions often have the power to address the media or public directly and independently when they feel it is necessary. This may be, for example, to publicise an important case or decision or to draw attention to non-compliance with a request on the part of the armed forces or another government body. Such a power (limited only by appropriate safeguards) is essential to the exercise of freedom of information and free speech more generally.

For more information on this area, see Section 11.3 on independence in reporting.

5.4.4 Access to Information by Ombuds Institutions

A fourth aspect of independence is the ability to access all information that the ombuds institution sees as relevant for the fulfilment of its mandate. Without proper access to information, free from restrictions, an ombuds institution would not be able to effectively carry out its work. The fact that an ombuds institution has been established is no guarantee of accountability. Indeed, an ombuds institution without proper access to information may do little more than provide a false sense of accountability, transparency, and public confidence. For more information on this area, see Chapter 10 on access to information.

5.4.5 Hiring External Experts

A final aspect of independence relates to the use of outside experts. In addition to having powers relating to hiring permanent staff, ombuds institutions may have the power to hire external experts on an ad hoc basis when, for example, they are dealing with highly technical matters. The German Parliamentary Commissioner, for example, has the power to hire external experts to give evidence.⁴⁷

5.5 Personal Independence

Throughout Section 4, the question of independence from other state bodies and the accompanying obligation these bodies have to refrain from interfering with the ombuds institution has been discussed. It is also important for the individuals within the office to be perceived to be impartial, neutral, independent, effective, and accountable by those with whom the ombuds institution is mandated to work.⁴⁸ This independence is partially guaranteed by the fact that officeholders are commonly appointed by a majority of the legislature. Many states, however, have taken further steps to ensure that the officeholder has what is referred to here as “personal independence.”

Such independence allows the ombuds institution to assess the government critically and to voice such criticism even if it may offend those in power. As such, personal independence requires that the officeholder abstain from actions that are dictated by personal interests or motives, as well as from activities that could be perceived as giving rise to a conflict of interest.⁴⁹ While the concept of personal independence may seem more abstract than the questions of institutional and operational independence discussed above, laws on ombuds institutions have, nevertheless, sought to approach the matter in a number of different ways. In the Netherlands, for example, the National Ombudsman Act contains a very broad provision stating that “The Dutch National Ombudsman shall not hold any position which is incompatible with the proper performance of his official duties or with his impartiality and independence or with public confidence therein.”⁵⁰ Similarly, in Serbia, the Law on the Protector of Citizens forbids the protector from “holding public office, performing other professional activities or anything else that might influence his/her independence and autonomy, which includes being a member of a political organization.”⁵¹

Beyond the general provisions contained in Dutch and Serbian law, states have elsewhere enumerated a number of categories of prohibited activity for officeholders.⁵² These include:

- holding political office (in the national legislature or local government);⁵³
- other professional activities (including, for example, leadership or employment in a trade union, association, foundation, or religious organisation);⁵⁴ and
- employment in the civil service.⁵⁵

The question of political affiliation is more contested. Some states stipulate that the officeholder may not be a member of a political party⁵⁶ to avoid any appearance of partisanship. Other states, however, make membership of a political party a requirement, believing that it is better for such affiliations to be publicly known.⁵⁷ Some states also stipulate that the officeholder must have “sufficient experience and qualifications,”⁵⁸ as well as that no person who has been convicted of a criminal offence may hold the office.⁵⁹

Box 5D Efforts to Undermine the Independence of the El Salvador Procurator

In El Salvador, the President agreed to create the Procurator for the Defence of Human Rights (PDDH) as part of the 1992 Peace Accords without agreeing to implement broader security sector reforms.⁶¹ However, because investigations by the PDDH quickly began to draw attention to serious rights violations by the government, the legislature sought to undermine the institution through so-called “reform” efforts, culminating in the replacement of the Procurator with an individual sympathetic to the party in government, who further undermined the office by replacing professional staff with party appointees.⁶²

Under his tenure, public trust in the Procurator dropped noticeably and the number of complaints handled dropped exponentially (from eighty-five resolutions per month to thirty-one in six months).⁶³ The situation led to the ending of cooperation and partnerships with the UNDP and other international organisations, seriously affecting the office’s funding and undermining its ability to continue work (see Section 4.2.1 on budgetary independence). Despite these setbacks, the PDDH has become increasingly successful in recent years and is now hailed as “one of the lasting accomplishments of the peace process.”⁶⁴

The question of whether a member of the armed forces may serve as head of an ombuds institution is also contested. Because Inspectors General are situated within the chain of command, they are frequently armed forces personnel. This means that they are likely to have high levels of trust among members of the armed forces and the institutional knowledge required to most effectively carry out their work. On the other hand, allowing current or former armed forces personnel to hold positions within an ombuds institution may be problematic if the personal independence of the officeholder is compromised by the

officeholder's significant ties to those he or she is tasked to oversee. The US deals with this potential problem by ensuring that its highest level IG (the Inspector General of the Department of Defence) is always a civilian.⁶⁰ An alternative to such a requirement is perhaps a "cooling off period" before and after which an officeholder may not have served or serve again in the armed forces.

5.6 Good Practice

Institutional Independence

- Ombuds institutions for the armed forces should be independent from the government and of the bodies that they are mandated to oversee.
- The independence of ombuds institutions should be guaranteed by law and, where applicable, the constitution.
- Ombuds institutions should obtain and manage their funds independently from any of the institutions over which they have jurisdiction.
- Ombuds institutions should be allocated secure and sufficient funds for the fulfilment their mandates.
- The officeholder should have a legally established tenure of office.
- Clear procedures should exist for the potential removal of an officeholder from office; and a narrowly defined set of criteria may exist in law that stipulates the circumstances under which this can happen.
- The officeholder should not be held legally liable for any opinions or acts performed complying with the law, while exercising their duties provided for by law.

Operational Independence

- Ombuds institutions should have the freedom to decide which matters and priorities to pursue and the freedom to investigate them to their conclusion.
- Ombuds institutions should possess the ability to launch so-called "own-motion investigations."
- Ombuds institutions should be able to determine the manner in which they undertake their work.
- No other body should have the power to terminate or suspend ongoing investigations being undertaken by the ombuds institution.

- The ombuds institution should have the power to release reports and to make recommendations on specific cases or thematic areas, free from censorship and legal or other liability for doing so.
- Ombuds institutions should have the power to address the public and the media.
- Access to information is essential to the work of ombuds institutions and unrestricted access should be guaranteed by law.
- Ombuds institutions should have the power to hire or otherwise engage external experts on an ad hoc basis.

Personal Independence

- The officeholder should abstain from actions that are dictated by personal interests or motives.
- The officeholder may not hold any position that is incompatible with the proper performance of his or her official duties, or with his or her impartiality and independence or with public confidence therein.

Endnotes

1. Hans Born and Ian Leigh, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel* (Warsaw and Geneva: OSCE, ODIHR, and DCAF, 2008), 237; Marten Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution: the Global Perspective," *International Ombudsman Yearbook*, 2001, 8–10; Reif, *The Ombudsman, Good Governance, and the International Human Rights System*.
2. Parliamentary Assembly of the Council of Europe, *The Institution of the Ombudsman* (Strasbourg: CoE, 2003).
3. Oosting, "Protecting the Integrity," 9–10.
4. Besselink, "Types of National Institutions," 3–4.
5. Reif, *The Ombudsman, Good Governance, and the International Human Rights System*, 15; Oosting, "Protecting the Integrity," 9; Parliamentary Assembly of the Council of Europe, "The institution of the ombudsman," D 14. (i)..
6. Serbia, "The Law on the Protector of Citizens," Art. 1.
7. Serbia, "The Law on the Protector of Citizens," Art. 2.
8. German Law on the Parliamentary Commissioner for the Armed Forces, Section 1, Art. 1.
9. Ombudsman for the Department of National Defence and the Canadian Forces, *Defending Fairness. 2007-2008 Annual Report*, (Ottawa, 2008).
10. Oosting, "Protecting the Integrity," 9–10.
11. Nabholz-Heidegger, D. (iii).
12. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 51. Ireland.
13. This text is based on correspondence with the office of the Polish Human Rights Defender.
14. Born *et al*, *A Comparative Perspective*, Annex, Germany and Romania's response to Question 44; Sweden's response to question 54.
15. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 2.4.
16. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 12.2.
17. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 11.4.
18. Born *et al*, *A Comparative Perspective*, Annex, responses to question 43: UK; Question 51 and 54: Ireland. The UK Commissioner made it clear, however, that their funding model had never constituted a threat to the institution's independence.
19. Dodson, "The Human Rights Ombudsman in Central America: Honduras and El Salvador Case Studies," *Essex Human Rights Review* 3, no. 1 (2000): 35.
20. Born *et al*, *A Comparative Perspective*, Annex, Question 52–53.
21. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 53 by the Netherlands and the UK.
22. Romania, "Law no. 35 from 1997 On the Organisation and Functioning of the Institution of the Advocate of the People," Art. 36.1.
23. Romania, "Law on the Advocate of the People," Art. 36.2.
24. Oosting, "Protecting the Integrity," 10. Parliamentary Assembly of the Council of Europe, *The institution of ombudsman*, para. 7, iii.
25. Born *et al*, *A Comparative Perspective*, Annex, Question 45.
26. Finland, "The Constitution of Finland," 11 June 1999 (731/1999), entry into force 1 March 2000, Section 38.
27. Oosting, "Protecting the Integrity," 10.
28. Dodson, "The Human Rights Ombudsman in Central America," 38.
29. Slovenia, "Human Rights Ombudsman Act," Art. 20.
30. Finland, "The Constitution of Finland," 11 June 1999 (731/1999), entry into force 1 March 2000, Sections 114, 115, 117.

31. Statute of the Ombudsman for Human Rights and Justice of Timor-Leste, Art. 21.
32. In cases where the Ombudsman is convicted of a criminal offence carrying a prison sentence exceeding one year or where the Ombudsman is actually imprisoned, the Ombudsman is automatically removed from office. See Statute of the Ombudsman for Human Rights and Justice of Timor-Leste, Art. 19.5.
33. Aidan Wills and Benjamin S. Buckland, "Access to Information by Intelligence and Security Service Oversight Bodies," DCAF-OSF Working Paper, 2012.
34. Oosting, "Protecting the Integrity," 10.
35. Oosting, "Protecting the Integrity," 9.
36. See, for example, Canada, "Ministerial Directives," Art. 14–15.
37. Reif, *The Ombudsman, Good Governance, and the International Human Rights System*, 3.
38. This power may be subject to reasonable limits to ensure consistency and fairness in the handling of complaints, for example.
39. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 18.7.
40. Born *et al*, *A Comparative Perspective*, Annex. These institutions are Sweden, Poland, Norway, Austria, Romania, Slovenia, Serbia, Finland, and Ireland.
41. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 47.
42. In the Netherlands this applies to the Inspecteur-Generaal der Krijgsmacht.
43. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 47. In practice this has not happened.
44. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 47.
45. Born *et al*, *A Comparative Perspective*, Annex, Responses from the Netherlands, Canada, Germany, and Belgium.
46. Romania, "Law on the Advocate of the People," Art. 30.
47. German Law on the Parliamentary Commissioner for the Armed Forces, Section 3.1.
48. Oosting, "Protecting the Integrity," 10.
49. Oosting, "Protecting the Integrity," 10.
50. The Netherlands, "National Ombudsman Act," Art. 5.2.
51. Serbia, "The Law on the Protector of Citizens," Art. 9.
52. The PACE Recommendation on the Institution of Ombudsman makes similar recommendations on the need to prohibit ombudspersons from engaging in remunerated activities, para. Iv.
53. Born *et al*, *A Comparative Perspective*, Annex, response by Ireland to question 44.
54. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 17.1; The Romanian law, interestingly, prohibits all professional activity except academic positions or activities in the higher education system.
55. UK Armed Forces Act 2006, Art. 366.3
56. Born *et al*, *A Comparative Perspective*, Annex, response by Estonia to question 44.
57. This is the case, for example, in both Germany and Austria.
58. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 11.
59. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 10.1(b).
60. "No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense." The United States, "Inspector General Act of 1978," §8a.
61. Dodson, "The Human Rights Ombudsman in Central America," 30.
62. Dodson, "The Human Rights Ombudsman in Central America," 40.
63. Dodson, "The Human Rights Ombudsman in Central America," 40–41.
64. Robert Orr, cited in Reif, *The Ombudsman, Good Governance, and the International Human Rights System*, 265



PART II: COMPLAINTS

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6 COMPLAINT PROCEDURES

6.1 Introduction

This chapter provides an overview of complaint procedures (as distinct from types of complaints, which will be discussed in the next chapter). This chapter examines the process by which ombuds institutions receive and process complaints, including within the difficult context of overseas and multilateral missions. This chapter contains the following subsections:

- Accessing Complaint Procedures
 - Who Can Make Complaints
 - Making Complaints
- Processing of Complaints
- Challenges of Multilateral and Overseas Missions
- Good Practice

6.2 Accessing Complaint Procedures

6.2.1 Who Can Make Complaints

A first point worth making here is that complaints are a good thing. They indicate that people are using the system and trust that the ombuds institution is able to address their concerns. Though it may seem counter-intuitive, if an ombuds institution is receiving complaints, it suggests not that the system is broken but rather that the institution is working as designed.

As their name implies, ombuds institutions for the armed forces are, in the most basic sense, mandated to receive complaints from currently

serving members of the armed forces. Generally, this basic right is also extended to non-professional members of the armed forces, such as conscripts. Ombuds institutions in many states, however, go further than this and receive complaints from various other parties. Indeed, as the following paragraphs make clear, there are three main groups that are likely to benefit from the existence of an ombuds institution. While not all of these groups are permitted to file complaints in all jurisdictions, the broadest possible set might include:

- current and former members of the armed forces and their families or friends;
- civilians wronged by the armed forces domestically; and
- civilians in foreign states where the armed forces are stationed or deployed.

The right to submit complaints to ombuds institutions often does not end upon the completion of military service, and a number of states extend this right to veterans. In Ireland, for example, both current and former members of the defence forces may file complaints on behalf of themselves, as well as on behalf of a current or former colleague or a civil servant.¹ Likewise, many states have also extended this right to those in training (i.e., cadets) and, in a smaller number of cases, to those in the process of applying to enter the armed forces (see Box 6A on recruits to the Canadian military).

Some jurisdictions have also extended the right to complain to an ombuds institution to the family (and occasionally friends) of armed forces personnel. This is because they may be directly impacted by decisions made by the armed forces or because they often have access to relevant information. The US IG for example, has cited situations in which a family member would be negatively affected by decisions relating to the salary or benefits of a member of the armed forces: if an individual's pay were delayed it may prevent that person from providing for his or her family. An example of this broader model is Canada, where the right to complain to the Ombudsman is extended to current and former: members of the Canadian Forces, cadets, employees of the Department of National Defence, employees of the staff of non-public funds, applicants to the Canadian Forces, immediate family members of all of the above, and members of other militaries seconded to the Canadian Forces.²

Some institutions also extend the right to complain to all individuals, regardless of their affiliation or otherwise with the armed forces. In some states, this right also extends to groups of individuals and civil society organisations³ or even, in the case of Austria, to all institutions and companies.⁴ Finland goes even further, extending the right to complain to the Ombudsman to “anyone [individual or corporation] who thinks a subject has acted unlawfully or neglected a duty in the performance of their task” regardless of nationality.⁵ Similarly, in Serbia, “any physical, legal, local or foreign person who considers that their rights have been violated by an act, action or failure to act of an administrative authority may file a complaint.”⁶ The question of who can file a complaint is especially pertinent with regard to missions or deployments abroad. In such circumstances, a number of ombuds institutions are able to receive complaints from foreign citizens, as well as from members of foreign armed forces. The Finnish Ombudsman, for example, received a complaint in 2004 from civilians in Kosovo concerning compensation for damages to property used by Finnish peacekeepers.⁷

The issue of anonymous complaints is more contested. The law in some states, such as Albania, Bosnia and Herzegovina, Germany, and Romania, stipulates that complainants must not file complaints anonymously.⁸ This is also the case in Serbia and in Timor-Leste, although here the law provides for some exceptions on the discretion of the officeholder.⁹ In states where anonymous complaints are not possible, it may be useful for the ombuds institution to compare the number of complaints received on a particular subject with anonymous survey data to ensure that the impossibility of making anonymous complaints is not preventing people from coming forward. This has been done, for example, by the UK Service Complaints Commissioner, who compares complaint data annually with the anonymous Armed Forces Continuous Attitude Survey.¹⁰

Finally, it is worth noting that many states place a period of limitation on the filing of complaints. In most states this is twelve months after the incident concerned or, in the case of Serbia, after the relevant activities were last undertaken by the government.¹¹ Several other ombuds institutions provide a caveat that the complaint must be filed within twelve months of the complainant becoming aware of the situation.¹²

Box 6A Access to the Ombudsman by Canadian Recruits

In Canada, around twenty recruits complained to the Ombudsman that they were wrongfully released from the armed forces due to injuries they sustained during basic training at the Canadian Forces Leadership and Recruit School. During an investigation, the Ombudsman found that the Commandant of the school had arbitrarily determined that any recruit who could not participate in training exercises for more than thirty days would be released from training.

The Ombudsman determined that these recruits were given inadequate time to recover from their injuries, and subsequently were not being afforded the same benefits as regular members of the armed forces. The Ombudsman issued recommendations to rectify the situation to ensure that recruits injured in training for the Canadian Forces would be given the same protections as those already in the armed forces, including those who were already injured. The Chief of the Defence Staff accepted these recommendations and corrective action was taken.¹³

Table 6A Who Can Make Complaints

Country ¹⁴	Armed forces personnel	Veterans	Family or friends	Civilians	Other
Austria	x	x	x	x	x ¹⁵
Bosnia and Herzegovina	x		x ¹⁶		x ¹⁷
Canada	x	x ¹⁸	x	x	x ¹⁹
Estonia	x				x ²⁰
Finland	x	x	x	x	x ²¹
France	x	x			
Germany	x	x	x		
Ireland	x	x			
Montenegro	x	x	x	x	
The Netherlands	x	x	x	x	
Norway	x	x	x	x	
Poland	x	x	x	x	x ²²
Romania	x	x	x	x	x ²³
Slovenia	x	x	x	x	
United Kingdom ²⁴	x	x	x	x	x ²⁵

6.2.2 Making Complaints

In regard to receiving complaints, an important underlying principle is ease of access, which relates both to the methods by which persons can access the office as well as to the fact that the services of an ombuds institution should be offered free of charge.²⁶ Most ombuds institutions permit complaints by mail, fax, telephone, email or in person. Many also provide an electronic form on their websites for complaint submissions. For those submitting complaints by phone, some ombuds institutions also provide a dedicated twenty-four-hour hotline,²⁷ with numbers that are well publicised among both armed forces personnel and civilians.²⁸ In some cases, where both internal and external institutions exist, it is first necessary to file a complaint with existing armed forces complaint-handling mechanisms before taking a complaint to an external ombuds institution. This is the case, for example, in Ireland, where the Ombudsman both reviews the substantive issues in the case, as well as the manner in which it was investigated by the military system. In the Netherlands, if a complainant is not satisfied with the way in which the armed forces IG has handled the matter, he or she may also submit a complaint to the National Ombudsman (although the complainant may also contact the Ombudsman directly).²⁹

The advantages of providing multiple and easy-to-use points of access are well illustrated by the case of Finland, where complaints received by traditional methods (i.e., by mail or in person) have remained relatively constant over the past decade. Over the same period, however, complaints received electronically have risen exponentially—a statistic that suggests that lowering barriers to access has allowed people who may not have previously lodged a complaint to do so.³⁰

On the other hand, however, it can be argued that this ease of access has also increased the number of frivolous complaints, something that has caused increased strain on the finite resources of some ombuds institutions. This may be particularly problematic in cases where the institution is obliged to investigate all complaints received by the office, as is the case in Finland.³¹ It is less of a problem in places such as Canada where the mandate provides a specific exception to the obligation to investigate where an allegation is frivolous or vexatious.³² The advent of electronic complaints also has brought increased security concerns for those filing complaints online.³³

Box 6B Treatment of Female Armed Forces Recruits in Poland

The Polish Commissioner for Civil Rights Protection conducted an investigation after receiving a number of complaints relating to the treatment of female armed forces recruits. In particular, complaints were made regarding medical examinations for recruits that did not properly respect their rights. As a result of the Commissioner's recommendations, national measures were taken (including training of recruitment organisers and issuing guidelines) to eliminate the irregularities described by complainants.³⁴

6.3 Processing of Complaints

Alongside the Irish and US examples highlighted in the boxes in this section, it is worth highlighting two fundamental aspects of complaint processing: timing and referrals. Here, the concept of good administration is vital in the provision of services to complainants. Good administration entails offering advice, promptly handling the complaint, and protecting legitimate expectations.³⁵ It concerns the proper functioning of the office itself as well as its overall speed, effectiveness, and fairness in handling complaints.

Box 6C The US Department of Defense (DoD) IG Complaint Process

In relation to the coordination of overlapping jurisdictions and processes, the example of the US DoD IG is instructive. The IG first determines if an allegation is appropriate for the IG to handle. In many cases there are established means of redress. If these means have not been exhausted, then the matter should be referred to them.

If the IG is the appropriate method of recourse, then the IG must determine which IG is appropriate. There are many different IGs with different mandates, so determining the correct IG at the correct level is important (each organisational unit in the armed forces has a specific IG to whom complaints should first be referred). The IG must be careful not to refer a case to an IG that is unnecessarily high-ranking or too low-ranking to investigate a complaint. If an individual is uncomfortable complaining to their closest IG for whatever reasons (such as a perceived lack of independence) they may elevate the complaint to a higher-ranking IG.

See Box 9C on the US DoD IG Investigation Process.

The laws and mandates governing the complaint processes of a number of ombuds institutions for the armed forces highlight specific time periods within which various steps of the complaint-handling process should be completed. For example, in Canada, the “ombudsman shall attempt, with the full and complete cooperation of all parties, to complete an investigation within sixty days of its commencement.”³⁶ Similarly, in Timor-Leste, the Ombudsman must make a preliminary assessment of the complaint to decide whether to take the case within thirty days of its receipt by the office.³⁷

A corollary of this is that ombuds institutions should keep the relevant parties informed on progress at all stages of an investigation. This ensures that the complainant (as well as those against whom a complaint has been made) is kept fully updated of progress and developments. In Albania, for example, the ombuds institution must notify the complainant within thirty days of receipt of the complaint. Upon conclusion of the investigation, it must notify the complainant of its decision, as well as of any steps taken to rectify the problem.³⁸ Likewise, in France, the Commission must inform the complainant of the decision of the relevant minister within four months.³⁹ In the Netherlands, if the Ombudsman decides not to investigate a complaint, he must notify the complainant and the administrative authority of his decision and reasons for not doing so.⁴⁰

When an ombuds institution decides not to pursue an investigation, the office should ensure appropriate follow-up. This may include, for example, offering help and advice on the alternative means of recourse that may be available to the complainant.⁴¹ This may also require the ombuds institution to refer complaints to another more appropriate authority (e.g., the police if a criminal act has occurred).⁴²

6.4 Challenges of Multilateral and Overseas Missions

Multilateral missions or overseas deployments raise a number of particular problems related to the receipt and processing of complaints. The majority of complaints addressed by ombuds institutions for the armed forces tend to arise from the domestic functions of the armed forces.⁴⁵ However, in Slovenia, Austria, and Norway, 10 percent of complaints arise from deployments of the armed forces overseas, and in Germany, this figure is as high as 30 percent.⁴⁶ These figures are of course

dependent upon the range and extent of the external engagements of the armed forces. Several ombuds institutions have indicated that while they have the right to visit troops abroad, they have never done so, presumably because their states do not have sufficient numbers of troops deployed overseas to justify such a mission or because troops are deployed in sensitive roles.⁴⁷ Other ombuds institutions, such as in the US IG system, are permanently stationed abroad.

Box 6D The Irish Ombudsman for Defence Forces Complaint Process⁴³

In Ireland, members of the Defence Forces must first lodge a complaint through the Redress of Wrongs (RoW)—the Defence Forces' internal complaint mechanism.

When a complaint is filed with the RoW, the Ombudsman is notified and monitors the progress of the complaint as it is handled internally within the Defence Forces.⁴⁴ Although the ODF cannot directly influence the process at this stage, it nevertheless ensures independent oversight of the process by the ODF.

If no decision is taken through the RoW process within twenty-eight days, or if the complainant is not satisfied with the decision of the RoW, he or she may appeal to the Chief of Staff who forwards the complaint to the ODF.

The ODF must then perform a preliminary investigation to ensure that the complaint falls within its jurisdiction. If it does, then the office moves on to investigate the substance of the complaint.

Former members of the Defence Forces, as well as serving members with a complaint against a civil servant, can approach the ODF directly.

See Box 9B on the Irish ODF Investigation Process.

Numerous ombuds institutions have highlighted the difficulties involved in effectively carrying out their mandate in relation to troops stationed abroad. In particular, several institutions have underlined the financial and logistical challenges that addressing complaints in such situations involves. Institutions in Finland, Montenegro, Romania, and Slovenia, for example, noted that they do not have the financial resources

required to investigate complaints made by armed services personnel stationed abroad. Elsewhere, the Canadian Ombudsman is obliged by its mandate to follow a specific process when a complaint involves a unit on an operational deployment. Specifically, the Ombudsman's work must not impede operational missions and, upon receiving a complaint relating to an operational mission, the Canadian Ombudsman must notify the contingent commander and keep him or her informed of the investigation's progress. The contingent commander may also designate a liaison person to provide advice to the Ombudsman on the impact any investigation may have on the operational mission.

Physical distance can also be an obstacle to effective complaint-handling with regard to troops stationed abroad. Some of the methods described above—such as the ability to submit complaints via email or a twenty-four-hour hotline—can mitigate these issues. However, at the same time, troops stationed abroad or in combat environments may not have reliable access to either the Internet or a telephone with which to contact an ombuds institution or to follow up with them once an initial complaint has been made. Because Inspectors General are often situated within the chain of command and can be posted abroad and in combat situations, they may be more capable of handling complaints from personnel stationed abroad or in combat situations by having greater accessibility to armed forces personnel. There is, however, no reason why other types of ombuds institution could not set up such systems, including field offices.

A further challenge relates to situations that may arise in the context of multilateral missions. Several ombuds institutions indicated that they had received complaints from armed forces personnel operating under the command of a national of another country.⁴⁸ This scenario poses some problems, as it remains unclear to whom the complainant would file his or her complaint: the complainant's national ombuds institution or the ombuds institution of the individual subject to the complaint.⁴⁹ Some ombuds institutions have received complaints from armed forces personnel from another country under the command of a national of their own country.⁵⁰ Others have not received complaints, but have reiterated that, if such a complaint were received, they would be able to investigate it.⁵¹ Better cooperation and information sharing between ombuds institutions from different states may help to mitigate this problem. Indeed, the Serbian Protector of Citizens cited

improving cooperation with foreign ombuds institutions as among the most important challenges facing his institution.⁵² Furthermore, the United Nations General Assembly has recognised the importance of greater international cooperation and has encouraged states to develop mechanisms of cooperation between ombuds institutions to coordinate their activities and exchange lessons learned.⁵³

A related issue is the question of how ombuds institutions for the armed forces are able to handle complaints made by civilians of a foreign country.⁵⁴ Several ombuds institutions for the armed forces are able to receive this type of complaint, although only if the complaint concerns a member of the armed forces over which they already have jurisdiction.⁵⁵

6.5 Good Practice

Receipt of Complaints

- States should place no limits on the categories of person or organisation who can make a complaint to an ombuds institution, so long as it relates to an area within the institution's mandate.
- Ombuds institutions should offer their services free of charge and with as few barriers to access as possible.
- Ombuds institutions should provide a wide range of modes through which individuals can file complaints, including, for example, email, post, and a dedicated hotline.

Processing of Complaints

- The ombuds institution should deal promptly with complaints and provide regular feedback to complainants and other concerned parties on the status of their investigations.
- When an ombuds institution decides not to pursue an investigation, the office should ensure appropriate follow-up, such as offering help and advice on alternative means of recourse or by referring complaints to another more appropriate authority.

Challenges of Multilateral and Overseas Missions

- Ombuds institutions should endeavour to adapt to changing armed forces priorities by, for example, developing the capabilities and expertise required to visit and accept complaints from troops stationed abroad or as part of multilateral missions.

- In investigating complaints relating to operational activities, the ombuds institution should endeavour to conduct its work in a manner that does not unduly impede such activities.
- Ombuds institutions should ensure that troops stationed abroad have access to as many means as possible for the submission of a complaint.
- Ombuds institutions may be able to accept and handle complaints made by civilians and members of the armed forces of a foreign country, where the subject of the complaint falls within their jurisdiction.
- Ombuds institutions should be provided with sufficient resources to deal with complaints from members of the armed forces and civilians abroad.

Endnotes

1. Ireland, "Ombudsman Act," Sec. 6.1–6.2.
2. Canada, "Ministerial Directives," Section 12.
3. This is the case, for example, in Albania, "The Law on the People's Advocate," Art. 12; and Romania (Art. 16 of Regulation).
4. Responses based on a questionnaire conducted by DCAF in 2011.
5. Finland, "Parliamentary Ombudsman Act," Art. 2.1 and 2011 questionnaire.
6. Serbia, "The Law on the Protector of Citizens," Art. 25.
7. Responses based on a questionnaire conducted by DCAF in 2011.
8. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 8.2; Albania, "The Law on the People's Advocate," Art. 15; Romania, "Law on the Advocate of the People," Art. 15.2; Germany, Law on the Parliamentary Commissioner for the Armed Forces, Section 8.
9. Serbia, "The Law on the Protector of Citizens," Art. 25; Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 37.3.
10. United Kingdom Service Complaints Commissioner for the Armed Forces, "Annual Report 2010," 2011, 15.
11. See, for example, the Slovenian "Human Rights Ombudsman Act," Art. 32; Serbia, "The Law on the Protector of Citizens," Art. 26.
12. See, for example, Ireland, "Ombudsman Act," Section 6.3.b and Romania, "Law on the Advocate of the People," Art. 15.2.
13. Ombudsman for Canadian Forces and National Defence, "Annual Report 2009-2010," Ottawa, 2010, 8–9.
14. The organisations representing their respective countries are: Austria, the Parliamentary Commission for the Federal Armed Forces; Bosnia Herzegovina, Parliamentary Military Commissioner; Canada, the National Defence and Canadian Forces Ombudsman; Estonia, the Military Ombudsman of the Estonian Defence Forces; Finland, the Parliamentary Ombudsman; France, the Commission of Appeals for the Military (CRM); Germany, the Parliamentary Commissioner for the Armed Forces; Ireland, the Ombudsman for the Defence Forces; Montenegro, the Protector of Human Rights and Liberties; the Netherlands, National Ombudsman; Norway, Parliamentary Commissioner for the Norwegian Armed Forces; Poland, the Human Rights Defender; Romania, the Advocate of the People; Slovenia, the Human Rights Ombudsman; UK, the Service Complaints Commissioner for the Armed Forces.
15. "Institution, company" response based on a questionnaire conducted by DCAF in 2011.
16. In Bosnia and Herzegovina, the Parliamentary Military Commissioner may receive complaints from family but not friends.
17. Complaints to the Parliamentary Military Commissioner can also be made by cadets, as well as third parties (i.e., a legal representative or a designated agent).
18. It should be noted that Canada has a separate Ombudsman for the Department of Veterans' Affairs.
19. Current and former: members of the Department of National Defence and of the Canadian Forces, cadets, employees, employees of the staff of non-public funds, applicants to the Canadian Forces, immediate family members of all of the above, and members of other militaries seconded to the Canadian Forces.
20. "In practice we have proceeded also complaints of family of armed forces personnel, particularly of conscripts" response based on a questionnaire conducted by DCAF in 2011
21. "Anyone (individual or corporation regardless of nationality); letter of attorney can be required if the complainant is not the party of the matter" response based on a questionnaire conducted by DCAF in 2011
22. Constitution of the Republic of Poland, Art. 80.
23. "Any person. (Art. 16 of Regulation)" response based on a questionnaire conducted by DCAF in 2011.

24. It should be noted that the UK Service Complaints Commissioner is not a complaint-handling body. Rather, it supervises the military's own internal complaint process.
25. "Members of Parliament, Welfare Agencies or anyone but the complaint must be about treatment of a serving or former member of the Services" response based on a questionnaire conducted by DCAF in 2011.
26. Albania, "The Law on the People's Advocate," Art. 16; Serbia, "The Law on the Protector of Citizens," Art. 26; Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 7.3.
27. Austrian response to a questionnaire conducted by DCAF in 2011.
28. Estonian response to a questionnaire conducted by DCAF in 2011.
29. Responses based on a questionnaire conducted by DCAF in 2011.
30. Jorma Kuopus, "Towards Electronic Administration," in *Parliamentary Ombudsman 90 Years*, by Riitta-Leena Paunio (Sastamala: Vammalan Kirjapaino Oy, 2010), 180–181.
31. Statement by Raino Marttunen at the 3ICOAF in Belgrade.
32. Ministerial Directive for the National Defence and Canadian Forces Ombudsman, Section 18.
33. Kuopus, "Towards Electronic Administration," 180.
34. Poland, *Summary of Report 2006 of the Commissioner for Civil Rights Protection*, 67–68.
35. Terhi Arjola-Sarja, "The Ombudsman as an Advocate for Good Administration," in *Parliamentary Ombudsman 90 Years*, by Riitta-Leena Paunio (Sastamala: Vammalan Kirjapaino Oy, 2010), 93–108.
36. Canada, "Ministerial Directives," Section 20(2).
37. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 37.2.
38. Albania, "The Law on the People's Advocate," Art. 17c.
39. France, "French National Defence Code, Chapter V : Preliminary administrative appeal," R4125-10.
40. The Netherlands, "General Administrative Law Act," Art. 9.25.
41. Pia Wirta and Jaana Romakkaniemi, "Customer Service at the Office of the Parliamentary Ombudsman," in *Parliamentary Ombudsman 90 Years*, by Riitta-Leena Paunio (Sastamala: Vammalan Kirjapaino Oy, 2010), 185–188.
42. Canada, "Ministerial Directives," Sections 21, 23.
43. Irish Ombudsman for the Defence Forces, Annual Report 2010 (Dublin: Ombudsman for the Defence Forces, 2011), 19.
44. Irish Ombudsman for the Defence Forces, Annual Report 2010, 13.
45. For the ombudsman institutions of Serbia, Belgium, Estonia, Finland, and Sweden, 99 percent or more of the complaints received relate to the domestic activities of the armed forces.
46. Responses to question 25(b); Born *et al*, *A Comparative Perspective*, 7.
47. Responses to question 19(b). These institutions are those of Estonia, Ireland, Serbia, and Slovenia.
48. Born *et al*, *A Comparative Perspective*, Annex, Responses from Germany, Norway, Slovenia.
49. Born *et al*, *A Comparative Perspective*, Annex, Responses from Canada, Finland, France, UK (amongst others).
50. Born *et al*, *A Comparative Perspective*, Annex, Responses from Germany and the UK.
51. Born *et al*, *A Comparative Perspective*, Annex, Responses from Canada, Finland, Netherlands.
52. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 53.
53. United Nations General Assembly, *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights*. A/RES/65/207, New York: UNGA, 28 March 2011. The General Assembly releases a resolution of this type each year.
54. This issue raises a number of difficult jurisdictional questions relating to military justice, status of forces agreements, and international human rights and humanitarian law. While certainly worthy of further exploration they are, however, beyond our competence to examine more properly here.
55. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 33 from Austria, Canada, Finland, Slovenia, the Netherlands.

7

TYPES OF COMPLAINTS

7.1 Introduction

This chapter provides an overview of the most common types of complaints received by many ombuds institutions. Through numerous real-world examples, this chapter seeks to illustrate the ways in which ombuds institutions have intervened to solve a range of different complaints. This chapter contains the following subsections:

- Complaints
- Maladministration
- Human Rights
 - Mistreatment and Discrimination Issues
 - Health Issues
 - Working Conditions
 - Freedom of Association and Expression
- Compliance with Criminal and International Humanitarian Law
- Good Practice

7.2 Complaints

Ombuds institutions for the armed forces deal with a wide variety of complaints, many of which can be placed under the broad umbrella of human rights protection or within the category of prevention of maladministration. This point is underlined by the Law on the Parliamentary Military Commissioner in Bosnia and Herzegovina, which states that the position is established in order to “strengthen the rule of law, protection of human rights and freedoms of armed forces personnel and cadets in the Armed Forces.”¹ Within this framework, complaints have been divided into three broad categories: prevention

of maladministration, protection of human rights, and compliance with international humanitarian law (IHL) and criminal law. While ombuds institutions may deal with a number of issues in addition to those discussed in this section, these categories cover the issues that are most commonly handled by ombuds institutions for the armed forces.

7.3 Maladministration

Maladministration means poor or failed administration and occurs “if an institution fails to act in accordance with the law, fails to respect the principles of good administration, or violates human rights.”² Human rights will be dealt with in the following section. The focus here is on complaints related to contractual and administrative issues and more specifically the failure of the armed forces to respect principles of good administration.³ Within this category, complaints can be further divided into several subcategories. First among these pertains to financial matters, including pay and benefits. Common complaints within this subcategory relate to veterans receiving their pensions on time and at the expected rate, the denial of benefits to those entitled to receive them (such as tuition-free university education, for example), problems with the timing or amount of salary payments, the granting of leave and absence requests, and questions regarding taxation, particularly for troops posted abroad.⁴

Box 7A Pensions for Former Members of the Yugoslav People’s Army

In the Republic of Macedonia, problems have arisen relating to former members of the Yugoslav People’s Army (YPA). The formal Agreement on Succession Issues between the former states of Yugoslavia does not entirely resolve questions relating to the payment of pensions due to former YPA soldiers. On behalf of several such individuals, the Macedonian Ombudsman has taken several steps, including contacting the ministry of labour and social policy, the relevant succession agreement implementing body, and institutions in other states where relevant archives are maintained. Despite these efforts, the issue remains unresolved.

The second subcategory of complaints under this heading relates to recruitment and release or discharge from service. Common complaints within this subcategory concern the unfair rejection of candidates for

employment or undue delays in processing employment applications. For example, within the Canadian Forces, this is the second most common complaint received by the Ombudsman.⁵ Complaints relating to the improper or unfair release of service personnel also fit into this subcategory, as do those relating to the denial of, or undue delays relating to, release. Of particular concern are cases involving the denial of compassionate leave or compassionate status.

The final subcategory of complaints under this heading concerns status and postings. This includes complaints relating to non-selection for promotion, training, or into a desired career track. It also covers concerns that relate to the location of postings and granting of deployment requests.

Box 7B Amending Posting Dates on Compassionate Grounds

A member of the Canadian Forces contacted the Ombudsman regarding a problem with his request to have his date of posting changed. He had requested a posting date that would fall after the end of his children's school year instead of the mid-year or Spring posting date that he had been given. In particular, he complained that the assigned date would be detrimental to his children, who suffered from learning disabilities, as it would mean changing schools mid-term. His attempt to solve the problem internally failed when he was only offered a thirty-day extension. He then contacted the Ombudsman who helped to negotiate a more appropriate posting date that would not affect his children's education.⁶

7.4 Human Rights

The term "human rights" in the context of this handbook refers both to the rights of soldiers as well as to the rights of civilians with whom they interact. With regard to the protection of the rights of soldiers, the subsections below deal with four of the most common types of human rights violations that may occur within the armed forces. Complaints from civilians of foreign states are touched on in Section 6.4 on challenges of multilateral and overseas missions. With regard to complaints by civilians about the armed forces of their own state, examples are few and far between. The Australian Commonwealth Ombudsman reports receiving a number of complaints relating to issues such as noise from weapons ranges and military aircraft. The

Ombudsman also received complaints from civilians about contracting matters and service delivery relating to the armed forces. Given the lack of information available on such complaints, however, the following subsections will focus primarily on the rights of members of the armed forces, rather than on those of the civilians with whom they interact.

Box 7C: Reporting of Sexual Assault in the Australian Defence Forces

A woman complained to the Australian Defence Force Ombudsman about the Department of Defence's failure to investigate her alleged sexual assault by a serving member of the Australian Defence Forces (ADF). The woman reported the incident to the police and the matter was considered in a civilian court where the member of the ADF was acquitted. The ADF member followed procedure by alerting his commanding officer after he was charged with the assault but the commanding officer took no further action, in violation of the relevant instruction on *Management and Reporting of Sexual Offences*. Because it was not a workplace incident, the ADF argued that their internal procedures did not apply. The Ombudsman eventually ruled that, while this was correct, clearer guidance should be given to officers about how to handle such matters in the future.⁷

7.4.1 Mistreatment and Discrimination Issues

One major issue within the broader context of human rights protection by ombuds institutions for the armed forces relates to mistreatment, bias, bullying, harassment (commonly relating to race and sex), and discrimination. In Ireland, for example, such cases make up 27 percent of all complaints to the Ombudsman.⁸ In particular, such issues can result from abuses of power by superiors as well as from harassment or bullying by peers or subordinates. These issues are often difficult to prove. In cases relating to bias or discrimination, abuses of power are often well hidden and difficult to substantiate. A US Department of Defence IG illustrated the difficulty of establishing intent to harm by giving the hypothetical example of a superior working within the rules to disadvantage someone by recommending that they be promoted into a less-desirable position (at a difficult duty-station, for example). In such a case, it would be very difficult to prove that the move was retaliatory because the promotion met established criteria.

Box 7D Discrimination in the Canadian Armed Forces

The Canadian Ombudsman has released findings on the lack of documents, training, and services in both English and French available to armed forces personnel at a specific base. The Ombudsman found that this situation placed certain personnel at a disadvantage and thus inadvertently discriminated against students who only spoke French.⁹

Similarly, cases of bullying or harassment can be difficult to prove where the only evidence is one soldier's word or where a culture of silence or solidarity works to protect malefactors within a unit. Likewise, where a superior officer is the bully, it can be difficult for a subordinate to respond or complain without being charged with insubordination. In the armed forces, sexual and racial discrimination or harassment may be particularly prevalent. With regard to harassment of women or lesbian, gay, bisexual, or transgender (LGBT) members of the armed services, the situation may be exacerbated by the fact that many militaries explicitly exclude such categories of people from their ranks or specific roles therein.

As with other types of complaints, ombuds institutions may need to pay particular attention to the issue of reprisals arising from the fact that a complainant has come forward. Such reprisals may commonly take the form of mistreatment and discrimination, as described above. In this regard, several institutions have put in place measures that guarantee that a person lodging a complaint will not be subject to negative consequences. In Poland, for example, the Human Rights Defender may refuse to disclose names and other personal information relating to a petitioner if she considers it necessary to the protection of their freedom, rights, or interests (or those of a public body).¹⁰

Box 7E Harassment and Bullying within the UK Armed Services

An officer with the UK armed forces contacted the Service Complaints Commissioner regarding her treatment after a complaint she had made was upheld. She had complained of harassment and bullying and, while her complaint was upheld, she was nevertheless given an informal warning by her commanding officer about allowing herself to be bullied in front of junior personnel. She was requesting that the informal warning be withdrawn and that she receive an apology from her commanding officer because the informal warning unfairly shifted blame for the bullying from her colleague to herself. She also argued that, in the circumstances, she had little choice, as walking away from the bullying may have left her open to a charge of insubordination.

The service complaint panel concluded that the tone of the informal warning was censorious and negative. However, they determined that it should not be withdrawn as it no longer held any merit and would not appear on her record. In addition, no apology was given, as this was not a remedy that could be ordered as redress. The Service did, however, amend its guidance with regard to future informal warnings as a result of the complaint.¹¹

7.4.2 Health Issues

A further category of complaints commonly dealt with by ombuds institutions for the armed forces relates to health issues arising from service.¹² In Canada, for example, in 2009–10, 61 of 1203 cases handled by the Ombudsman related to medical problems.¹³ Given the often-dangerous nature of the work undertaken by members of the armed forces, particularly while on deployment, physical and mental health risks are of particular importance. Common issues relate to inadequate treatment and follow-up, especially for conditions requiring long-term treatment and care. In particular, post-traumatic stress disorder (PTSD) has posed a growing problem in recent years for many armed services, which has led to a corresponding rise in complaints to ombuds institutions.

Box 7F Healthcare in the Estonian Armed Forces

In 2010, the Estonian Chancellor released a report upon the conclusion of an investigation conducted on his own initiative into the adequacy of medical care provided to injured armed forces personnel. The Chancellor examined twenty cases where members of the Estonian Armed Forces were injured while on duty and found that, in general, the individuals received at least the minimum care required. However, the Chancellor identified several areas that needed to be addressed. In particular, the Chancellor noted that a detailed code of practice for military operations covering health problems could help to streamline the process of care and ensure that cases were properly documented at the time they occurred. In addition, the Chancellor noted that the services could work to improve communication with the families of injured soldiers and to provide better psychological support to those involved.¹⁴

7.4.3 Working Conditions

A fourth broad category of complaints that are commonly dealt with by ombuds institutions for the armed forces relates to working conditions, including issues such as: inadequate housing and the provision of appropriate equipment (and its prompt repair). The Polish Public Defender, for example, has received a number of complaints relating to the lack of funds available for updating and fixing old or broken equipment, including training equipment and essential safety systems.¹⁵ These complaints were found to relate to a lack of transparency in the division of competence among MoD departments, as well as to budget cuts within the department. Similarly, in Bosnia and Herzegovina, the Parliamentary Military Commissioner received several complaints regarding working conditions at the *Žarko Zgonjanin* barracks. Upon completion of an investigation, the Commissioner issued recommendations and, as a result, the site underwent significant renovations.¹⁶

7.4.4 Freedom of Association and Expression

Ombuds institutions may commonly receive complaints relating to both freedom of expression and association. In particular, they may be asked to deal with complaints relating to restrictions on freedom of expression and association imposed on members of the armed forces. With regard to freedom of expression, such complaints may be related to restrictions on public comments about working conditions

or public dissent relating to military orders and policy. Whereas these activities may be unregulated in the case of civilians, restrictions may be imposed upon serving members of the armed forces.¹⁷ On the subject of association, restrictions are commonly placed on the right of soldiers to strike or form associations to some degree. Most states do not permit members of the armed forces to strike or demonstrate while in uniform or otherwise serving in their official capacity. Others go further and do not allow members of the armed forces any right to associate.¹⁸ Some states even go as far as to not allow members of the armed forces to be members of political parties.¹⁹ It is important that ombuds institutions work within their mandates to ensure the protection of the rights of members of the armed forces.

Box 7G Visitors to Estonian Forces

An inspection by the Chancellor of Justice of Estonia to the Logistics Battalion of the Estonian Defence Forces revealed that conscripts were only permitted to receive visitors for one hour per week. Commanders clarified that one hour per week was the minimum and that it could be extended. However, the Chancellor noted that this possibility was nowhere mentioned and that there were no procedures in place to request such an extension. The Chancellor recommended that clear notice be given to conscripts of their right to more visitor time and that a procedure be developed for requesting such an extension.²⁰

Furthermore, the Chancellor found that the location where conscripts received visitors was in the open air or an unheated shelter which, given the cold location of the base, was inappropriate for receiving guests, particularly during the winter months. The Chancellor recommended that conscripts be able to receive visitors in an indoor, heated room. Battalion Commanders explained that a shortage of space made it impossible to fully comply with this recommendation but that, when necessary, several heated tents would be set up outside for this purpose.

7.5 Compliance with Criminal and International Humanitarian Law

A fifth and final area of complaints that are dealt with by ombuds institutions for the armed forces relate to the monitoring of the armed forces' compliance with criminal law and IHL.²¹

Among ombuds institutions with exclusive jurisdiction over the armed forces, both the German Parliamentary Commissioner for the Armed Forces and the Norwegian Parliamentary Ombudsman for the Armed Forces have competence to monitor compliance with IHL. However, it is more common for general ombuds institutions with express human rights mandates to have such powers. For example, in Timor-Leste, the Ombudsman for Human Rights and Justice has an obligation to “monitor and review regulations, administrative instructions, policies and practices in force or any draft legislation for consistency with customary international law and ratified human rights treaties.”²² This perhaps indicates that monitoring compliance with IHL falls within the broader remit of overseeing public administration, but it is not generally seen as a task of ombuds institutions for the armed forces, particularly as it is generally considered to be the responsibility of military justice systems.

The ability of an ombuds institution to monitor compliance with IHL is particularly relevant in cases where such institutions have competence to oversee military operations and military deployments abroad. Here, the role of ombuds institutions is an essential element of a broader process ensuring the protection and promotion of the rights of armed forces personnel deployed abroad, as well as (more broadly) the rights of civilians and enemy forces with whom they come into contact.

Beyond monitoring compliance with IHL and human rights law, a further (and sometimes controversial) area of work engaged in by ombuds institutions is the investigation of criminal offences. Traditionally, ombuds institutions do not have a mandate to oversee criminal investigations, as this is the responsibility of the judiciary. However, in several Latin American states, ombuds institutions were established to combat government abuses of power, particularly abuses of military power by authoritarian regimes, and, in order to fulfil their mandate and deal with their unique challenges, they were granted exceptionally broad powers (see Section 2.2.3). While no ombuds institutions may charge or try individuals, ombuds institutions in several Latin American states have gone as far as to name both victims and alleged offenders, basing their reports on comprehensive investigations of criminal wrongdoing. These reports have often formed the basis for prosecutions carried out by the judiciary.

7.6 Good Practice

Maladministration

- Ombuds institutions should pay particular attention to complaints regarding contractual issues, given that they are often raised by veterans, conscripts, and new recruits (i.e., those who may not have access to comprehensive internal procedures for complaint or redress). These contractual issues include, inter alia: pay and benefits; recruitment and release; and status and postings.

Human Rights

- Ombuds institutions should pay careful attention to abuses of power, harassment, and bullying (whether by superiors, peers or subordinates), as these abuses are often well hidden and difficult to prove or substantiate.
- Ombuds institutions should protect complainants from reprisals made against them for having come forward.
- Given the physical and mental health risks associated with membership in the armed forces, ombuds institutions may take particular care to ensure that current and former members of the armed forces have access to appropriate healthcare in a timely manner.
- Ombuds institutions should seek to ensure that the workplace conditions of armed forces personnel are appropriate. This includes ensuring that they have access to housing, food, and equipment that is suitable to the tasks they have been assigned.
- Ombuds institutions should work within their mandates to ensure the protection of the rights to freedom of expression and association of members of the armed forces.

Compliance with Law

- Where they have been given competence to do so, ombuds institutions should monitor the armed forces' compliance with IHL. The ability of an ombuds institution to monitor compliance with IHL is particularly relevant in cases where such institutions have competence to oversee military operations and military deployments abroad.

Endnotes

1. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 1.2.
2. See the website of the European Ombudsman for more details (available at <http://www.ombudsman.europa.eu>).
3. Here the handbook does not cover complaints from defence contractors relating to procurement, where the contractor would be expected to go to court instead.
4. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 26: Belgium, Sweden, the Netherlands, UK, Canada, Norway, Poland, Austria, Estonia, Romania, Germany, Slovenia, Serbia, and Finland.
5. Ombudsman for Canadian Forces and National Defence, "Annual Report 2009-2010," Ottawa, 2010, 5.
6. Ombudsman for Canadian Forces and National Defence, "Annual Report 2009-2010," Ottawa, 2010, 10.
7. Australian Commonwealth Ombudsman, *Annual Report 2010-2011*, 97.
8. Irish Ombudsman for the Defence Forces, Annual Report 2010, 15.
9. Ombudsman for Canadian Forces and National Defence, "Annual Report 2009-2010," Ottawa, 2010, 7-8.
10. Poland, *The Act on the Human Rights Defender*, Art. 13.3.
11. United Kingdom Service Complaints Commissioner for the Armed Forces, "Annual Report 2010," 2011, 58.
12. Born *et al*, *A Comparative Perspective*, Annex, Responses to Question 26: Sweden, UK, Canada, Norway, Austria, Estonia, Romania, Germany, Slovenia, Serbia, and Finland.
13. Ombudsman for Canadian Forces and National Defence, "Annual Report 2009-2010," Ottawa, 2010, 5.
14. Estonian Chancellor of Justice, *Kokkuvõte õiguskantsleri analüüsist kaitseväe õnnetusjuhtumite uurimise ja kaitseväelaste sotsiaalsete tagatiste menetluses* (Investigation on Injured Soldiers). Tallinn: Chancellor of Justice, 2010.
15. Polish Human Rights Defender, Summary of Report on the Activity of the Human Rights Defender in 2010. Warsaw: Office of the Human Rights Defender, 2011.
16. *Report on the Work of the Parliamentary Military Commissioner of Bosnia and Herzegovina* for 2011, 10.
17. Hans Born and Ian Leigh, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, (Warsaw and Geneva: OSCE, ODIHR, and DCAF, 2008), 56.
18. See for example, Canada, France, and the United Kingdom.
19. This is the case, for example, in both Finland and Romania.
20. Estonian Chancellor of Justice, *2009 Overview of the Chancellor of Justice* (Tallinn: Office of the Chancellor of Justice, 2010), 32.
21. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 8. Eight states indicated that they monitor compliance with national human rights law and IHL: Sweden, Germany, Poland, Slovenia, Serbia, Finland, Norway, and Estonia.
22. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 24d.



PART III: INVESTIGATIONS

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TYPES OF INVESTIGATIONS

8.1 Introduction

This chapter provides an overview of the several key types of investigations conducted by ombuds institutions. In this regard, it examines complaint-based investigations, as well as investigations that are initiated by the ombuds institution on its own. The chapter also deals with the investigation of systemic issues, which can derive from either type of investigation. Finally, it touches on the scope of investigations. This chapter contains the following subsections:

- Investigations
- Complaint-Based Investigations
- Own-Initiative Investigations
- Systemic Issues
- Scope of Investigations
- Good Practice

8.2 Investigations by Ombuds Institutions

One factor that distinguishes the investigations of most ombuds institutions for the armed forces from those conducted by the police or the judiciary is that they are (generally) not criminal in nature and therefore not aimed at gathering evidence for a prosecution (see Section 7.7). In addition, while ombuds institutions may investigate matters that involve criminal wrongdoing, the conclusions of investigations conducted by ombuds institutions are generally aimed at producing recommendations. They aim to resolve issues independently and impartially and to prevent their recurrence, rather than to punish an offender or an individual act of wrongdoing.

In some cases an ombuds institution may begin an investigation only to discover that a criminal offence may have occurred. In such cases, ombuds institutions will generally refer the case to a prosecutor or other law enforcement body, taking care to ensure that the identities of relevant persons or any other sensitive information are protected. By referring a case to a prosecutor or other law enforcement body, however, an ombuds institution is not necessarily absolved from responsibility for all aspects of the case. The criminal offence may merely be one aspect of the investigation and may not necessarily prevent the ombuds institution from proceeding to investigate those other aspects that continue to fall within its jurisdiction.¹ As stated in Annex B of the Mandate of the Ombudsman for National Defence and Canadian Forces:

An incident, which may give rise to a complaint falling within the mandate of the Ombudsman ... may have more than one aspect. For example, an incident could on its face be an alleged criminal act or a breach of the Code of Service Discipline. This fact alone does not prevent the Ombudsman from responding to a complaint ... [B]oth the Ombudsman and the military police could be engaged in investigations that fall within their respective mandates.

This division of responsibility and the non-criminal nature of the investigations conducted by most ombuds institutions is an important element of their independence and impartiality. For such institutions to be effective, they need to be seen to be protecting the interests of all parties.

Investigations conducted by ombuds institutions generally stem from two sources: complaints and what is commonly referred to as the ombuds institution's "own motion."

8.3 Complaint-Based Investigations

As Chapters 6 and 7 deal extensively with complaints, it is unnecessary to revisit the issue in depth here. A few points, however, are worth making. First, complaints are the main source of information through which ombuds institutions become aware of issues in need of investigation. In a small number of states (such as Belgium, Ireland, and the UK), ombuds institutions may only investigate matters that are triggered by an individual complaint. Second, as has been seen

in Chapter 7, issues in need of investigation are wide ranging and, when access to the ombuds institution is open and easily accessible, complaint-triggered investigations are an effective way of dealing (ex post) with the majority of issues that an ombuds institution is likely to confront.

Box 8A Parental Rights in the Slovenian Ministry of Defence

In 2010 the Slovenian Human Rights Ombudsman received anonymous complaints relating to the rights of parents and pregnant women to more favourable working hours, as stipulated in Article 190 of the Employment Relationships Act. In particular, the act protects both mothers and fathers from the requirement to undertake overtime work when caring for small children.² The complaint was submitted anonymously, as reprisals had been carried out against previous complainants who had identified themselves.

The Ombudsman had focused on the issue in its 2008 Annual Report, and the Ministry of Defence had stated it would make appropriate changes. However, in 2010 the Ministry informed its employees that Article 190 of the Act did not apply to employees in the area of defence. Indeed, the Ministry of Defence has insisted that specific provisions in other laws were more applicable to their employees. The issue remains unresolved.³

8.4 Own-Initiative Investigations

Own-motion investigations (also called “own-initiative,” *motu proprio*, and *ex ante* investigations) are the second main type of investigation that may be carried out by ombuds institutions. Such investigations are those initiated by the ombuds institution without the need for a specific complaint or incident. Such investigative powers are extremely common. The law governing the German Parliamentary Commissioner for the Armed Forces is typical, stating that the Commissioner “shall, on his own initiative and using his discretion, take action when ... circumstances come to his attention which suggest a violation of the basic rights of service personnel or of the principles of *Innere Führung*.”³

Inspections conducted on the institution’s own initiative can be particularly useful with regard to the investigation of systemic problems or thematic issues, as well as problems such as bullying or harassment where victims may be deterred or inhibited from coming forward themselves. This type of proactive approach can also help to raise the profile and awareness of ombuds institutions among service

personnel, as it may commonly involve base and other site visits and inspections. Such visits and investigations give service personnel an important opportunity to discuss any concerns with the ombuds institution outside the framework of a formal complaint (see also Box 9E on site visits).

Own-motion investigations are also important in ensuring that ombuds institutions are able to investigate all issues that come to their attention, regardless of whether or not the source is permitted to make an official complaint. Such investigations can be triggered, for example, by media or other reports, by the friends or family of an affected person, or by requests from members of the legislature or other government agencies. The investigation into inadequate body armour discussed in Box 12A, for example, was initially triggered by a report in the New York Times, which was followed up by a request for an investigation by a Congresswoman.

The ability to conduct investigations into matters that the ombuds institution deems to be relevant to its work, without first requiring a complaint or other trigger, is crucial to maintaining its operational independence and to ensuring that the work does not rely too heavily on the decisions of others.

Table 8A: Ombuds Institutions' Powers to Conduct Own-Motion Investigations

Yes	No
Austria, Canada, Estonia, Finland, Germany, Netherlands, Norway, Poland, Romania, Serbia, Slovenia, Sweden	Belgium, Ireland, the UK ⁵

8.5 Systemic Issues

Own-motion investigations often concern systemic or thematic issues. Systemic issues generally pertain to one of two different types of problems: widespread problems (such as bullying or inadequate equipment), or laws or regulations that are either non-existent, harmful, or misleading. In this way, systemic issues can be distinguished from those arising from the actions of an individual (for example, one person abusing authority or improperly applying regulations). A key attribute

of systemic investigations is that they show evidence of a broader pattern of abuse or wrongdoing.

While addressing the needs of individual complainants is an important part of the role of ombuds institutions, identifying and resolving broader patterns of abuse or wrongdoing is perhaps the area in which they can have the greatest impact. The ability of ombuds institutions to survey issues from a wide perspective puts them in a unique position to identify broader issues existing across the armed forces. A commander, for example, may be aware that several subordinates are concerned with the quality of their military-issue body armour, but the same commander is unlikely to be in a position to discover that numerous armed forces personnel under other commands have the same problem and that it relates to a widespread concern with the standard of issued materiel. The ability of an ombuds institution to identify such cross-cutting issues and armed forces-wide problems is among its greatest assets. The institution should be careful to identify and to recommend solutions that remedy such systemwide complaints. In the case of systemic investigations stemming from individual complaints, the ombuds institution should also take care to provide redress to those who initially filed the complaints.

Investigations into systemic issues arise from both individual complaints and from the institution's own motion. Investigations arising from individual complaints can give rise to the investigation of systemic issues when numerous complaints are received on a similar subject or from a similar demographic or geographic context (see Chapters 6 and 7 for more information). Own-motion investigations, often triggered by inspections and site visits, are a particularly effective method of identifying systemic problems. They can be especially useful:

- when the person affected is unaware that his or her individual problem is not unique,
- where he or she is unable to make a complaint,
- in cases where he or she might be in danger for doing so, or
- with regard to matters that, while important, may not be raised by an individual.⁶

Analysis of complaint data can also be a useful way of identifying systemic issues that require further investigation. The UK Service Complaints Commissioner, for example, collects information in a sex-

disaggregated manner and conducts gender analysis of the complaints they receive. This has allowed the Commissioner to identify marked differences in the types of complaints received from men and women in the different services. It has also served to underline the fact that, in particular, women in the Royal Navy make up a disproportionate number of complainants in relation to their overall representation.⁷ Such analysis can be a key tool in identifying systemic issues of sexual discrimination, sexual harassment, and ill treatment based on sexual orientation.

Relating directly to systemic issues arising from deficiencies in laws and regulations, the Serbian Law on the Protector of Citizens states that the Ombudsman shall “have the power to launch initiatives with the government or national assembly for the amendment of laws or other regulations or general acts if he deems that violations of citizens’ rights are a result of deficiencies of such regulations.”⁸

8.6 Scope of Investigations

There is significant variation in the range of actors and issues related to which ombuds institutions have scope to investigate. This is in part the result of different armed forces structures, security sector traditions, and, of course, geography, which mean that not all states have the full spectrum of possible branches of the armed forces. Most ombuds institutions for the armed forces are mandated to oversee and investigate the army, air force, navy, and military police; many, however, do not have jurisdiction over the coastguard or civilians working for the armed forces.¹⁰ Notwithstanding these exceptions, there is a clear trend of general ombuds institutions being mandated to oversee a broader spectrum of the armed forces; this is to be expected given that these bodies have jurisdiction to investigate matters occurring within the entire spectrum of government agencies.

There is a fine line between limitations on complaint-handling and investigations. Indeed, the same limitation can easily be framed in two different ways: as a limitation on the type of complaints that can be received and as a limitation on the scope of issues that may be subject to investigation. As a result, this section covers similar ground to that discussed in Chapter 6. However, there are some substantive differences. Specifically, some ombuds institutions are required to

Box 8B Mental Health in the Canadian Armed Forces⁹

After receiving numerous complaints regarding the lack of appropriate mental health services at Canadian Forces Base Petawawa, a base that has seen thousands of personnel deployed to Afghanistan, the Ombudsman undertook an investigation of mental health care services provided to Canadian Forces and their families. The investigation was conducted in conjunction with a broader systemic investigation into the Department of National Defence and the Canadian Forces' provision of care for armed forces personnel and their families dealing with post-traumatic stress disorder and other operational stress injuries.

The Ombudsman mounted a comprehensive fact-finding investigation, interviewing dozens of individuals from sectors affected by mental health care, including officers and NCOs, health care professionals, social workers, staff of the Petawawa Family Resource Centre, chaplains, and members of the military chain of command. The interviews identified two central problems: (1) there was an overall lack of mental health care at the base and in the immediate vicinity; and (2) there was a noticeable burnout of military caregivers at all levels. It was clear to the Ombudsman that services were not adequate to care for members of the Canadian Forces, and that care was, in fact, worsening, forcing personnel and their families to travel unreasonably large distances to receive proper care. This was largely a result of the base lacking the appropriate number of staff and resources in comparison to other Canadian Forces Bases. The medical services that did exist were not coordinated and thus did not work cooperatively.

As a result, the Ombudsman made several recommendations. For example, the Ombudsman recommended that, locally, the Canadian Forces should increase care providers, provide greater resources to identify and coordinate local and municipal resources needed for adequate care, and improve coordination and cooperation between existing health care at CFB Petawawa. The Ombudsman also identified several broader systemic recommendations: the Canadian Forces should establish a national organisation to coordinate with relevant bodies to ensure appropriate health care, provide interim solutions while implementing long-term plans, and increase resources for chaplains so they may minister to the needs of personnel and their families.

investigate any issues passed on to them by the minister¹¹ or by a member of the legislature.¹² Likewise, legislation often specifies:

- who can and cannot be investigated by an ombuds institution,
- who is permitted to limit or otherwise curtail an investigation, and
- the procedural and substantive issues that may limit the scope of an investigation.

Because ombuds institutions are intended to be a supplement or alternative to judicial processes, almost all states prevent ombuds institutions from examining matters that are under the jurisdiction of the courts (including military justice processes and military police).¹³ While such restrictions on who can be investigated are often implied by the institution's mandate, they are rarely as explicitly spelt out as they are in Timor-Leste, where a significant portion of the law relates to the question of who can be investigated by the Ombudsman for Human Rights and Justice. In Timor-Leste, the investigative and supervisory powers of the Ombudsman are restricted with regard to both the judicial functions of the courts and the legislative functions of the National Parliament.¹⁴ Here, the Ombudsman is not empowered "to investigate the exercise of judicial functions or challenge a decision issued by a Court or to investigate the exercise of legislative functions, except through the means of monitoring constitutionality; [...] to investigate a matter that is already subject of an act before a Court, and has not yet been determined."¹⁵ The inverse may, however, be possible in that if either party is not satisfied with the resolution reached he or she may then decide to pursue the matter further through the judicial system. Procedures regarding evidence and so forth are not codified in many states, however.

This separation of powers regarding matters before the courts is quite common. However, a significant proportion of institutions are (implicitly or explicitly) permitted to review legislation in cases, for example, where it impacts negatively on the wellbeing of armed services personnel.¹⁶

The other side of this limitation is the question of who has the power to block or prevent investigations planned or already underway by an ombuds institution. Again, there is an explicit and an implicit dimension. In some states (such as Belgium, Ireland, and the UK) restrictions are not

directly stated but exist by virtue of the fact that any investigation must be triggered by an individual complaint. More explicit restrictions exist in places such as Ireland, for example, where the Minister of Defence may request in writing that the Ombudsman refrain from investigating certain subjects for security reasons (although it should be noted that any such request can be appealed to the High Court).¹⁷

The scope of investigations may also be limited on both substantive and procedural grounds. An example of such a procedural restriction (found in Ireland, Romania, Serbia, and Slovenia) is the fact that ombuds institutions cannot investigate issues that are more than a year old. Substantive restrictions vary across institutions but examples of common restrictions include: questions of government policy; regulation; and, as noted above, actions that can, have been, or are currently being reviewed by courts.¹⁸ With regard to government policy the line is, of course, somewhat blurred. Many ombuds institutions, when investigating systemic issues, will inevitably intrude on questions of government policy. The extent to which they are able to do so varies with each institution. Ombuds institutions may also choose not to investigate a complaint if it is unfounded, made in bad faith, vexatious, or frivolous; if the seriousness of the action is manifestly insufficient; if the complainant is not the person who was wronged or has insufficient personal interest in the case; or if the damages have already been redressed.¹⁹

8.7 Good Practice

Investigations

- Investigations should aim to produce recommendations; they should aim to resolve issues independently and impartially and prevent their recurrence, rather than to punish an offender or an individual act of wrongdoing.
- In some cases, an ombuds institution may begin an investigation only to discover that a criminal offence has occurred. In such cases, ombuds institutions should generally refer the case to a prosecutor or other law enforcement body.
- The non-criminal nature of the investigations conducted by most ombuds institutions is an important element of their independence and impartiality.

Complaint-Based Investigations

- In the case of systemic investigations stemming from individual complaints, the ombuds institution should also take care to provide redress to those who initially filed the complaint.

Own-Initiative Investigations

- Ombuds institutions should use own-motion powers to uncover and investigate systemic and thematic problems and issues, particularly where such issues are unlikely to come to light through the normal complaint process.
- Site visits and inspections may be used as an opportunity to discuss the concerns of service personnel outside the framework of a formal complaint.
- Ombuds institutions may have the power to launch initiatives for the amendment of laws or other regulations or general acts deemed to be responsible for violations of citizens' rights.

Systemic Issues

- Ombuds institutions for the armed forces should aim to resolve issues independently and impartially and to prevent their recurrence.
- The investigation of systemic issues is a crucial way for ombuds institutions to identify and resolve broader patterns of discrimination, abuse, or wrongdoing.
- Ombuds institutions should take advantage of their ability to survey issues from a wide perspective in order to identify broader issues existing across the armed forces and to recommend solutions that remedy such complaints systemwide.

Scope of Investigations

- No person or body should have the power to limit or curtail investigations being undertaken by an ombuds institution. If such powers do exist, they should be narrowly drawn and strictly prescribed by law.
- Ombuds institutions should be careful to respect judicial processes and avoid undue interference in the workings of the judiciary, particularly with regard to ongoing cases.
- Ombuds institutions should ensure that any criminal law aspects of an investigation are referred to the appropriate body. This should not, however, absolve the ombuds institution from responsibility for other aspects of the case.

Endnotes

1. UNDP, *How to Conduct Investigations*, 148.
2. See Slovenian Ministry of Labour, Family and Social Affairs, Employment Relationships Act, (Ur. I. RS, No. 42/2002, Ur. I. RS, No. 103/2007), Art. 190.
3. Human Rights Ombudsman of the Republic of Slovenia, *Sixteenth Regular Annual Report for the Year 2010*, Ljubljana, June 2011, p. 91.
4. Germany, "Law on the Parliamentary Commissioner for the Armed Forces," Art. 1.3–1.4 *Innere Führung* is difficult to translate precisely but broadly refers to the organisational structure and management of the German armed forces. Similar laws include: Albania, "The Law on the People's Advocate," Art. 13; Serbia, "The Law on the Protector of Citizens," Art. 24, 32; The Netherlands, "Constitution of the Netherlands," Art. 78a; Canada, "Ministerial Directives," Section 4b; Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 3a; Romania, "Law on the Advocate of the People," Art. 22.1; and the United States, "Inspector General Act of 1978," §8(c)2.
5. Born *et al*, *A Comparative Perspective*, Annex.
6. UNDP, *How to Conduct Investigations*, 25.
7. UK Service Complaints Commissioner for the Armed Forces, Annual Report 2010, p. 18–19.
8. Serbia, "The Law on the Protector of Citizens," Art. 18.
9. See National Defence and Canadian Forces Ombudsman, *Assessing the State of Mental Health Services at CFB Petawawa*, December 2008.
10. The military ombudsman institutions of Canada, the Netherlands, Germany, Ireland, the UK, Austria, and Belgium do not have jurisdiction over the coastguard; and the in cases of Germany, the UK, Austria, and Ireland, they have no mandate to address issues arising from the work of civilians in the armed forces.
11. See, for example, Canada, "Ministerial Directives," Section 4a.
12. See, for example, The United States, "Inspector General Act of 1978," §8a.
13. See, for example, Canada, "Ministerial Directives," Sections 14–15.
14. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 4.1.
15. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 29c–29e.
16. See, for example, Serbia, "The Law on the Protector of Citizens," Art. 18; See also United States Department of Defence Directive 5106.01, Art. 5.14.
17. Ireland, "Ombudsman Act," Section 5.2–5.4.
18. The Netherlands, "General Administrative Law Act," Art. 9.22.
19. See, for example, Canada, "Ministerial Directives," Section 18; The Netherlands, "General Administrative Law Act," Art. 9.23; Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 37.3.

9

THE INVESTIGATIVE PROCESS

9.1 Introduction

This chapter provides an overview of the investigative process. It deals with each of the key stages of an investigation in turn, as well as the ways in which ombuds institutions commonly undertake these tasks. The chapter then goes on to examine different ways in which ombuds institutions acquire information relevant to an investigation. This chapter contains the following subsections:

- Investigations
- Preliminary Steps
 - Fact-finding
 - Rejections and Referrals
 - Planning
 - Early Dispute Resolution
- The Investigation
 - Interviews
 - Inspections and Site Visits
- Concluding the Investigation
- Good Practice

9.2 Investigations

As the previous chapters have made clear, there is a great deal of diversity in the types and models of ombuds institutions for the armed forces worldwide. Within this diversity, however, all ombuds institutions have the power to investigate complaints.¹ Indeed, without the power to investigate complaints and reach conclusions based on such investigations, the role of an ombuds institution is largely meaningless.

It is worth underlining at the outset, however, that, while they conduct investigations, ombuds institutions are distinct from prosecutorial bodies. Their investigations are aimed at producing recommendations rather than at making a criminal case.

Within the diversity of models, it is possible to discern a number of essential elements that make up the investigative process. While not all ombuds institutions conduct investigations in the same manner, these elements nevertheless form the core of the process. They include: fact-finding and establishing that the complaint has merit; alternative dispute resolution; interviews and other investigative methods, such as inspections and site visits; and drawing conclusions. The conclusions of any investigation then lead to recommendations (covered in Part III) and other steps required to ensure that the specific problem is adequately addressed, as well as to prevent its recurrence.

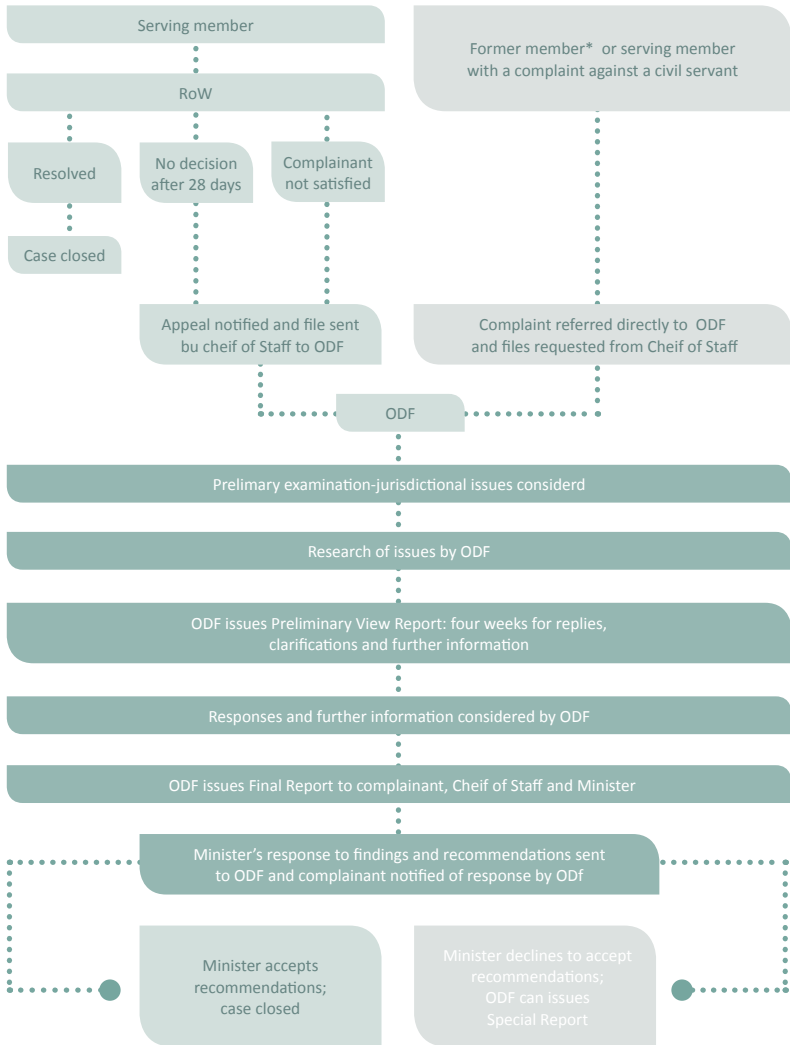
9.3 Preliminary Steps

9.3.1 Fact-finding

When a complaint is received, the first step is to determine whether the complaint falls within the mandate of the institution. This determination is then followed by fact-finding: the first stage of the investigatory process. This involves making a preliminary assessment of the complaint, aimed at determining whether or not any investigation should proceed further or, if not, what other steps may be necessary.

Fact-finding is generally an informal investigation. It can involve calling or writing to those concerned in order to request general information on the case. It may also involve the examination of readily available documents and informal interviews with relevant people.² In taking these steps, the fact-finding process aims to determine a number of things: first, that the complaint has merit and is worthy of a full and proper investigation; second, that the complaint falls within the mandate of the ombuds institution; and, third, that the institution has both the ability and the resources necessary to investigate and resolve it. Any decision for determining if a complaint is justified and merits a full investigation should be based on clear and published criteria.³ Some ombuds institutions also mandate a time limit for the completion of this stage of the investigative process.⁴

Table 9A The Irish Ombudsman Complaint-Handling Process⁵



**A former member can lodge complaints in relation to alleged actions which occurred while he or she was a serving member. The person responsible for the alleged action and the complainant must have been serving members at the time of the alleged action.*

After fact-finding has been completed, most institutions then take one of the several different options available: to reject the complaint; to refer the complaint to a more appropriate body; to plan for a full investigation; or to move to alternative dispute resolution (such as mediation or conciliation).

9.3.2 Rejections and Referrals

When deciding to reject a complaint, ombuds institutions should ensure appropriate follow-up.⁶ In particular, it is important that all relevant parties (particularly the person making the complaint) are promptly and fully notified regarding the reasons for any rejection and, where appropriate, offered help and advice regarding any alternative means of recourse that may be available to them.⁷ Reasons for rejection or referral of a complaint may include a finding that the complaint is manifestly unfounded, or that the complaint falls under the jurisdiction of a more appropriate body or does not fall within the mandate of the ombuds institution. Such a finding may also require the ombuds institution to refer complaints to another more appropriate authority (for example, the police if a criminal act has occurred).⁸

9.3.3 Planning

Upon concluding the fact-finding stage, the ombuds institution may then initiate a planning stage covering two key areas.

First, most ombuds institutions begin by preparing a comprehensive plan to ensure a thorough and complete investigation.⁹ Standardised internal processes are important to determine who is authorised to approve the start of an investigation, as well as which staff are assigned to specific cases and tasks. It can be useful for some staff to build up expertise in institution or issue-specific areas, particularly in general ombuds institutions, where knowledge of the armed forces or of the issues most likely to affect service personnel may not be widespread.

While it will doubtless be modified and expanded as the investigation proceeds, an initial investigation plan will generally seek to identify all the areas in which information is lacking and where questions need to be resolved. This will inevitably begin with the information gathered during the fact-finding stage and cover areas such as: which laws or procedures may have been violated, an initial narrative of the events

in question, and the number and identities of possible victims and perpetrators.

Clearly mapping the information, events, and persons relevant to the case then allows investigators to create a list of individuals who may have knowledge pertaining to the specific case as well as a list of relevant records and files. Gathering these files and arranging interviews with these individuals then becomes the next stage of the investigation.¹⁰ Along with a list of potential interviewees, the investigation plan may include at this stage a preliminary list of questions that need to be asked and possible interview strategies.

The second key element of an investigation plan relates to information management. For most ombuds institutions, this section of the plan usually includes a list of persons who need to be kept informed of the status of the investigation, what they can be told, and a schedule for releasing such information to them. This includes persons subject to the investigation or otherwise external to it but also relates to the internal distribution of information and the sharing of best practices with the ombuds institution itself.

An information management plan may also include strategies for the recording of all relevant information relating to the case, including: what the investigator has done; communications with all parties; and any documents or other evidence obtained.¹¹ These records should be standardised to ensure that the information is easily accessible to appropriate staff within the institution. Planning may also cover procedures and processes for maintaining the security and confidentiality of documents relevant to the case, as well as for archiving and/or destroying them once the case is closed.¹²

9.3.4 Early Dispute Resolution

Once the fact-finding stage of an investigation has been completed, one of the four options available to an ombuds institution (that is mandated to do so) is to eschew a formal investigation and move instead to alternative dispute resolution (such as mediation or conciliation). This last possibility is often the fastest and most efficient way of resolving a complaint, although early resolution methods should be carefully applied. For example, mediation or conciliation may not be appropriate or effective in resolving complaints in situations where the threat of

harm or risk of injury is high, where threats or reprisals are particularly likely, or in cases where power imbalances between the parties may make an equitable settlement unattainable.¹³ This last point may be particularly salient in the case of the armed forces, due to their strongly hierarchical nature.

Mediation is an informal and voluntary dispute resolution process. It aims to identify problems, clarify details and understandings, explore solutions, and, eventually, negotiate a settlement that is satisfactory to all parties.¹⁴ In the mediation process, the role of the ombuds institution is not to represent either side. Rather, the institution must act as an impartial and independent facilitator. The trust of both sides is essential to any successful mediation process.

Mediation can be particularly useful where both sides are willing to sit down and discuss ways to solve the problem. Because of its informality and the fact that it brings both sides together, mediation allows parties to share information and arrive at a solution that is mutually acceptable. It places an emphasis on the parties developing their own solution to the problem, under the supervision of the ombuds institution. It can also be very useful in cases in which the complainant and the subject of the complaint will have to continue working together in future. Mediation can help to diffuse tension and makes it more likely that they can continue to have a working relationship. Mediation is also generally much faster and cheaper than a formal investigation or litigation process; it may thus be the most effective use of time for both ombuds institutions and the parties involved.¹⁵

A successful mediation process may include the following elements:

- The mediation process is voluntary. The ombuds institution should not have the power either to force parties to mediate or to accept an agreement.
- The role of the ombuds institution is to be an impartial and independent facilitator and not to represent either side.
- The mediation process and any documents produced by the process should be private and confidential. Such documents should not be used in any later judicial or other proceedings.
- Once an agreement has been reached, the ombuds institution should formalise the agreement in writing.
- Any mediation may be terminated by: 1) the parties reaching an

agreement; 2) a decision by the ombuds institution that further efforts at mediation are likely to be ineffective; or 3) a decision by either party not to continue with the process.

Mediation is a major part of the work of ombuds institutions for the armed forces in many states. The Netherlands, Ireland, and Belgium, for example, have all highlighted the crucial role that mediation plays in their work.¹⁶ When a successful conclusion cannot be reached through mediation, then the ombuds institution can decide to proceed with a formal investigation. It should be noted that any decision to take part in mediation should not prejudice or otherwise influence any later investigative process.

Box 9A Mediation by the Irish Ombudsman for the Defence Forces

In her 2010 Annual Report, the Irish Ombudsman for the Defence Forces remarked on the significant benefits of early dispute resolution. In particular, the Ombudsman noted that such a mechanism may be particularly useful:

in cases where discussion and an exchange of information may contribute to an understanding from both sides to the matter about the perception of actions or words and how if these are not addressed they can ferment and cause great damage to the persons involved and to the working relationships not only of those directly involved but of the peer group and the working environment.

One tool used by the Ombudsman in pursuing early dispute resolution is the production of a “Preliminary View Report,” which sets out some initial findings and thoughts and is then circulated among relevant parties with a view to them agreeing on a common position and set of recommendations.¹⁷

9.4 The Investigation

The investigation should be aimed at gathering all information required in order to answer the substantive questions posed by the case and to come to an informed decision on its merits. This information-gathering process can involve background research and the gathering of relevant documentation. The two most essential (and also time-intensive) techniques for information gathering, however, are interviews and site visits and inspections.

Box 9B The Irish ODF Investigation Process

When the case is appealed to the ODF, it must examine whether the case falls within its mandate, and whether the case is appropriate for intervention.¹⁸

- a. A detailed investigation is undertaken to ascertain all the facts and the arguments of both sides.
- b. A Preliminary View Report (PVR) is issued detailing the preliminary findings, which allows both sides to review the details and report any clarifications or additional evidence.
- c. After receiving any additional information, the ODF releases a Final Report, which includes recommendations. The report is sent to the Minister for Defence, the Chief of Staff, the complainant, and any other relevant individuals.¹⁹

See Box 6D and Table 9A on the Irish ODF Complaint Process.

9.4.1 Interviews

In the planning stage, the ombuds institution may already prepare a list of interview subjects. This list may include those directly involved, such as the complainant and any subjects of the complaint. It may also include individuals with indirect involvement, such as any witnesses or, in the case of injury or other harm, doctors and medical professionals who may have treated one or several of those involved. The list can also include outside experts not involved in the specific case but with experience of similar cases or events. Interviews can be conducted by phone, in person, or in written form. In cases involving bullying or harassment, for example, particular care may be taken to ensure that interview techniques and procedures are sensitive to the specific needs of the case.

Due to any number of factors, individuals may be reluctant to be interviewed by an ombuds institution. For this reason, some states have granted ombuds institutions subpoena powers, allowing them to compel individuals to testify (see Chapter 10 for more details on such powers).²⁰ Where such powers are not available, ombuds institutions may resort to a number of other methods aimed at compelling an individual to appear before them. If an individual is uncooperative, the ombuds institution may notify an individual's superior or note (or merely threaten to note) his or her lack of cooperation in a report.²¹

One reason that individuals may be reluctant to be interviewed by an ombuds institution is fear of retaliation. In this regard, it is important that ombuds institutions are able to reassure the person concerned that, if retaliation does occur, he or she will be able to take measures against the offending party.

Table 9B Examples of Institutions with Subpoena Powers²²

Power	Institutions
People	Austria, Estonia, Germany, the Netherlands, Norway, Serbia, Slovenia
Documents	Austria, Estonia, Germany, Ireland, ²³ the Netherlands, Norway, Poland, Romania, Serbia, Slovenia, Sweden ²⁴

Conducting an interview as part of an investigation involves some planning. The interviewer may wish to identify relevant questions in advance, as well as to make preparations for the recording of notes or audio.²⁵ Interviews can be structured in a number of different ways, including a conversational structure (which may help to put interviewees at ease) or around a more formal list of questions.²⁶ Whatever the method chosen, interviewers should identify and develop the techniques they find to be most effective and then share these good practices with colleagues to ensure quality control and standardisation of interview practices throughout an institution.

Lastly, it is important to note that all legal rights regarding self-incrimination, representation, and so forth may continue to apply within the context of interviews conducted by an ombuds institution (although, given that these are not legal proceedings per se, the application of such standards may not have the same importance). At a minimum, however, those being interviewed should be afforded the right to respond to any claims, the right to be represented by counsel, and the right to not respond or incriminate oneself.²⁷

9.4.2 Inspections and Site Visits

The ability to initiate inspections and site visits under the ombuds institution's own initiative is an important part of the investigative process. Inspecting the location in which an event occurred can greatly assist in providing greater clarity regarding the events that transpired.

Box 9C The US DoD IG Investigation Process²⁸

After receiving a complaint the IG first undertakes some preliminary fact-finding in order to determine its credibility. If the complaint seems to be well founded, the IG then goes to its directing authority with the evidence it has collected and must receive permission from the commander to start an investigation.

Upon approval, the IG then interviews the individual(s) concerned as well as anyone else who may possess relevant information. The IG differentiates between subjects (those interviewed in relation to administrative problems) and suspects (those questioned in regard to criminal offences).

A decision is made based on a “preponderance of credible evidence” as opposed to the much higher criminal law standard of “beyond reasonable doubt.” This means that decisions by the IG need only be supported by most of the available evidence.

See also Box 6C on the US DoD IG Complaint Process.

Inspections can also be an effective oversight tool with regard to particularly vulnerable sites, such as remote bases or when troops are stationed abroad—locations in which troops may not have the same level of access to complaint processes. By conducting site visits with an appropriately diverse team, an ombuds institution may also encourage members of the armed forces from sexual or ethnic minorities to come forward.

Unrestricted access is an important principle for inspections and site visits. In El Salvador, for example, the Procurator has the freedom to examine any public records and carry out inspections of state offices, including prisons, without prior notice.²⁹ Likewise, in Bosnia and Herzegovina, the Parliamentary Military Commissioner may “visit units and commands of the Armed Forces of BiH and organisational units of the BiH Ministry of Defence at any time and without prior notice.” In both of these cases, the institution is permitted to make unannounced visits. While not all institutions have been granted such powers to make inspections without prior notice, it is particularly beneficial for an ombuds institution to be granted powers of this type, as it ensures that the armed forces do not have the power to “whitewash” events.

Even when conducted with a specific investigation in mind, inspections may have a number of side benefits. First among these is their outreach role. Inspections can allow an ombuds institution to actively seek out complaints from individuals stationed in vulnerable areas, and to be proactive in identifying systemic issues that would not have otherwise been identified. Second, such inspections raise the profile of the ombuds institution among troops who may not have previously been aware of its role and functions. Third, by inspecting sites and bases, ombuds institutions can better identify systemic issues that may be occurring, specifically when they relate to the case being investigated. For example, in Canada, the Ombudsman conducted outreach visits at five Canadian military bases, where it conducted town hall style meetings with personnel and their families. During these visits and outreach events, the Ombudsman received 139 new complaints.³¹ Were it not for these visits, many of the Canadian armed forces personnel may not have had a chance to make their complaints known.

Box 9D Inspections in Estonia

The Estonian Chancellor of Justice has, in recent years, placed particular importance on investigating how conscripts are treated as he is mandated to inspect every three years each of the nine locations where conscripts are stationed. In 2009, the Chancellor inspected four of these locations and identified several points of concern. One of these involved a “system of minuses” which was being used as a sort of punishment system. Conscripts received a “minus” for any infringement of the rules. The Chancellor sought to ensure that this system operates within existing guidelines. He recommended that conscripts be notified as to why they received a “minus” and, when they are reprimanded, that the process follow the Administrative Procedure Act.³²

9.5 Concluding the Investigation

When the investigator obtains sufficient evidence to make a determination, the ombuds institution may decide to conclude the investigation. Laws or guidelines may explicitly state who may make such determinations and whether the officeholder may delegate authority to his subordinates. Often, this process involves the investigator issuing a draft report that is reviewed by the officeholder or the investigator’s supervisors. The final report is then forwarded to the appropriate authorities.³⁴

Box 9E Site Visits by the US DoD IG

A US IG interviewed for this handbook noted the importance, when making site visits and inspections, of setting up in a base location that is already subject to high traffic, such as beside the base post-office or near the cafeteria. In this way, he noted, service personnel were more likely to approach him or his staff without seeming conspicuous. This ensured the confidentiality of the complainant and created an environment more conducive to troops feeling able to make complaints.³³

Ombuds institutions should have clear guidelines regarding how to identify who is at fault and what steps should be taken to remedy the complaint. It is important that each case is handled according to the same method, to ensure equality and impartiality.³⁵ Different standards include: beyond a reasonable doubt (often used for criminal investigations); clear and convincing evidence (there is sufficient evidence to convince someone); preponderance of guilt (most evidence favors a certain finding); balance of probabilities (more evidence favors a certain finding than not). In the US IG system, for example, the preponderance of guilt standard is used.

Upon making a determination, the ombuds institution must notify all concerned parties of the decision and of whatever recommendations the institution has made (see Chapter 12 for more information on recommendations). Some ombuds institutions have explicit instructions and timeframes governing when and how they must notify the different parties involved. In France, for example, the IG must notify the complainant a maximum of one month after it has made its determination. The complainant then has the opportunity to respond to the IG's decision within ten days.³⁶ See Part IV for details regarding the steps that follow.

9.6 Good Practice

Fact-finding

- Institutions should make a preliminary assessment of the complaint aimed at determining whether or not any investigation should proceed further.
- Any decision for determining if a complaint is justified and merits a full investigation should be based on clear and published criteria.

Rejections and Referrals

- Ombuds institutions should notify all relevant parties when rejecting a complaint, including the reasons behind any rejection.
- When rejecting a complaint, ombuds institutions should provide help and advice regarding any alternative means of recourse.

Planning

- A comprehensive plan should be prepared to ensure a thorough and complete investigation, including standard internal processes for starting an investigation and assigning tasks.
- An information management plan should be prepared that covers confidentiality as well as what information is released and how that information is released.

Early Dispute Resolution

- Where possible, ombuds institutions should pursue mediation as an alternative to formal investigations.

Interviews, Inspections, and Site Visits

- Ombuds institutions should seek to speak with all relevant individuals and visit locations relevant to the investigation, particularly vulnerable sites.

Concluding the Investigation

- Clear guidelines should govern who can conclude an investigation and make determinations.
- Clear guidelines should exist regarding how to identify who is at fault and what steps should be taken to remedy the complaint.
- Upon making a determination, an ombuds institution should notify all concerned parties of the decision and of any recommendations the institution has made.

Endnotes

1. The UK Service Complaints Commissioner is a notable exception.
2. UNDP, *How to Conduct Investigations*, 43.
3. UNDP, *How to Conduct Investigations*, 51.
4. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 37.2.
5. Irish Ombudsman for the Defence Forces, Annual Report 2010, 19.
6. See, for example, The Netherlands, "General Administrative Law Act," Art. 9.25.
7. Pia Wirta and Jaana Romakkaniemi, "Customer Service at the Office of the Parliamentary Ombudsman," in *Parliamentary Ombudsman 90 Years*, by Riitta-Leena Paunio (Sastamala: Vammalan Kirjapaino Oy, 2010), 185–188.
8. Canada, "Ministerial Directives," Sections 21, 23.
9. UNDP, *How to Conduct Investigations*, 61.
10. UNDP, *How to Conduct Investigations*, 62.
11. UNDP, *How to Conduct Investigations*, 93.
12. UNDP, *How to Conduct Investigations*, 94.
13. UNDP, *How to Conduct Investigations*, 49.
14. Alabama Department of Industrial Relations, Overview of Mediation (available at http://dir.alabama.gov/docs/law/wc_mediation_overview.pdf).
15. United Nations Ombudsman and Mediation Services, Mediation Principles and Guidelines, 7 July 2010 (available at <https://www.un.org/en/ombudsman/meddivision.shtml>).
16. Irish Ombudsman for the Defence Forces, Annual Report 2010, 7; Born *et al*, *A Comparative Perspective*, 6.
17. ODF, *Annual Report 2010*, 7, 31.
18. Irish Ombudsman for the Defence Forces, Annual Report 2010, 14.
19. Irish Ombudsman for the Defence Forces, Annual Report 2010, 14.
20. UNDP, *How to Conduct Investigations*, 91.
21. UNDP, *How to Conduct Investigations*, 73.
22. In this table we refer to the Netherlands Inspector General
23. Born *et al*, *A Comparative Perspective*, Annex. Ireland's response to Question 13 noted that this power is subject to reasonable exclusions where national security issues arise.
24. Born *et al*, *A Comparative Perspective*, Annex, Responses to Question 13.
25. UNDP, *How to Conduct Investigations*, 77.
26. UNDP, *How to Conduct Investigations*, 70.
27. UNDP, *How to Conduct Investigations*, 87.
28. Based on an interview with a US military IG.
29. Dodson, "The Human Rights Ombudsman in Central America," 38.
30. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 4f. See also section 12.3 on implementation and enforcement for some discussion of dispute resolution.
31. Ombudsman for Canadian Forces and National Defence, "Annual Report 2010–2011," Ottawa, 2011, 21–22.
32. Estonian Chancellor of Justice, *2009 Overview of the Chancellor of Justice* (Tallinn: Office of the Chancellor of Justice, 2010), 30.
33. Interview with a US DoD IG.
34. UNDP, *How to Conduct Investigations*, 111.
35. UNDP, *How to Conduct Investigations*, 108.
36. France, "Ministerial decree dated 23 August 2010, stating the rules applicable to the operation of the Commission of appeal for the forces, and to the review of the preliminary administrative appeals," Art. 6.



10

ACCESS TO INFORMATION

10.1 Introduction

This chapter provides an overview of access to information by ombuds institutions.¹ It touches on both informal and formal powers available to ombuds institutions. The chapter will also examine the various limitations that may be placed on an institution's access to particular types of information. This chapter contains the following subsections:

- Information
- Formal and Informal Powers
 - Requirement to Cooperate
 - Subpoena Powers
 - Informal/Soft Powers
- Limitations on Access to Information
 - Classified and Operational Information
 - Executive Discretion
 - Redress and Appeal
- Good Practice

10.2 Information

Access to information is the lifeblood of ombuds institutions. Without information, it is unlikely that an ombuds institution will be able to properly investigate any issue, whether it arises from a complaint or results from a decision to conduct an own-motion investigation. Furthermore, the lack of access to information will significantly impair an ombuds institution's ability to assess the compliance of the armed forces with the law. Incomplete access to information may even have the negative consequence of providing a false sense of accountability,

transparency, and public confidence.² “The mere existence of ombuds institutions does not guarantee proper scrutiny. Indeed, oversight ‘with blind spots’ can potentially be more harmful than no oversight at all.”³

Access to information is closely linked to the issue of independence, because restrictions on the information available to an ombuds institution imply that it is not at liberty to do what is necessary to conduct a full investigation. With regard to many ombuds institutions, the armed forces and political authorities are legally bound to supply the institution with all requested information, without grounds for refusal.⁴ The section below focuses primarily on access to people, documents, and records (broadly defined).⁵

Access to information may be based on either a *right to request* information or a *right to demand* information. This distinction is highly significant because the armed forces may not be legally obliged to respond positively to *requests* from ombuds institutions and, consequently, they cannot enforce such access. One example in this regard is the Albanian People’s Advocate which has the power to “request explanations” from public institutions and officials.⁶ By contrast, the right to demand access to information implies that the armed forces are required to comply. In order for such access to be effective, the power to *demand* information is essential, supported by appropriate investigative powers and the necessary expertise and resources (the next section covers this topic in more detail). A further distinction relates to whether there is a right to see specific files and documents or only “information” about what they contain. The former gives greater assurance of the effectiveness of the office and of its independence.

10.3 Formal and Informal Powers

A range of formal and informal powers is typically available to ombuds institutions seeking access to information from the armed forces or other institutions. Formal powers typically include statutory requirements that persons cooperate with requests by the ombuds institution, subpoena powers, and the ability to call upon law enforcement bodies for assistance in compelling cooperation or to provide access to sites and facilities. Informal or “soft” powers may include the ability to go to the public, the media, or the legislature with details of any non-cooperation.

10.3.1 Requirement to Cooperate

In the majority of cases, civil servants and members of the armed forces are under an obligation to cooperate with requests for information or interviews by ombuds institutions.⁷ In Serbia, for example, the Protector of Citizens has the “power to interview any employee of administrative authorities when it is of significance for the proceedings he runs.”⁸ Similarly, the Albanian People’s Advocate may access all public institutions, including military units, and interview whomever the Advocate believes to be relevant.⁹

In some cases, there are explicit penalties in law for those who refuse to cooperate with requests made by ombuds institutions. The Guatemalan Human Rights Ombudsman may even request that a civil servant be fired for a failure to cooperate with a formal request.¹⁰ Likewise, civil servants in Ecuador, Nicaragua, and Paraguay may face civil or criminal penalties (such as: fines, bars on public service, referral to the public prosecutor) for any failure to cooperate with an ombuds institution’s investigation.¹¹

10.3.2 Subpoena Powers

Subpoena powers constitute an integral part of an ombuds institution’s ability to effectively conduct an investigation (see Table 9B for a list of institutions with such powers). Individuals may be reluctant to be interviewed by an ombuds institution and may be reluctant to provide access to documents and locations. For this reason, some states have granted ombuds institutions subpoena powers, allowing them to compel individuals to testify. Subpoena powers impose a legal requirement on relevant persons to appear before ombuds institutions or to provide them with specific information when requested to do so. This power may also confer the ability to require that testimony be given under oath or affirmation. This renders any deliberate failure to provide accurate or complete information a criminal offence.¹² Accordingly, ombuds institutions may be able to seek the assistance of law enforcement agencies or the police to enforce such powers. Of course, the mere existence of such powers may be sufficient to persuade individuals and institutions to cooperate—the simple threat of their use is often enough.¹³ Furthermore, the existence of subpoena powers may be particularly useful in relation to hierarchical systems, such as the armed forces. By requiring individuals to cooperate (instead

of seeking willing volunteers), such powers may make it more likely that those in the lower ranks will speak to an ombuds institution, without the fear of reprisal from more senior officers that may otherwise be a consequence of cooperation. Being under subpoena may provide useful “cover” for those who speak out.

The US IG Act of 1978 provides a comprehensive explanation of what subpoena powers entail. According to the Act, the Inspector General may “subpoena the production of all information, documents, reports, answers, records, accounts, papers and other data and documentary evidence necessary in the performance of the functions assigned by this act.”¹⁴ In the Netherlands, the relevant acts make a distinction between the ability to subpoena documents and people. In relation to the production of documents, the General Administrative Law Act stipulates that “parties shall supply any documents in their possession which the Ombudsman has requested in writing.”¹⁵ Regarding the ability to subpoena persons, the National Ombudsman Act confers on the Ombudsman the power to “order that persons who fail to appear despite an official summons to attend shall be brought before him by the police to discharge their obligation.”¹⁶

Subpoena powers can greatly enhance the ability of ombuds institutions to effectively conduct their work and obtain all the information necessary to make a determination in a specific case. It should be noted, however, that such powers are rarely used and should be seen as a last resort. This is not to say, however, that ombuds institutions should not possess them. Often the mere existence of such a power can be enough to compel cooperation.

10.3.3 Informal/Soft Powers

As a final note, it is worth mentioning the usefulness of informal or “soft” powers in obtaining access to relevant persons, places, and documents. Soft power refers to the ability of an institution to obtain a result through cooption and persuasion, as well as by the use of threats. As was mentioned above, for example, the mere existence of a subpoena power may be enough to compel individuals to testify and documents to be produced. Similarly, in cases where an ombuds institution does not have the power to compel individuals to testify, it can seek to persuade someone to cooperate by notifying an individual’s

superiors, noting his or her lack of cooperation in a report or, where appropriate, by notifying the media or public at large (see Chapter 11 for more details on reporting).¹⁷

An instructive example of the use of soft power is the fact that the Irish Ombudsman for the Armed Forces lists specific cases in which their investigations have been blocked or impeded in their annual report.¹⁸ The purpose of such publicity is to draw attention to these instances and, hence, to persuade those in question to cooperate.

10.4 Limitations on Access to Information

It is good practice to place no legal or practical limitations on the ability of an ombuds institution to access any information it deems necessary for the fulfilment of its mandate. This is the case in a number of states, including Serbia, where the Protector of Citizens of Serbia has access to all governmental premises and information, regardless of the degree of confidentiality.¹⁹ The Romanian Law on the Advocate of the People confers similar powers to “access any classified information”²⁰ and, in the US Inspector General system, the IG is “authorized to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which the Inspector General has responsibilities.”²¹

If limitations on access to information are imposed, however, it is of fundamental importance that they be clearly and narrowly defined in law. Furthermore, it is possible to identify three principles that should govern any use of legal provisions permitting the limitation of access to information.

1. The invocation of such clauses should be adequately motivated and accompanied by a detailed written justification.²²
2. Ombuds institutions should be able to apply for judicial review, or refer to the legislature, any decision to invoke a particular limitation (this will be discussed in more detail in Section 10.4.3 on redress and appeal).
3. Ombuds institutions should have and make use of the right to publicise the fact that they have been denied access to information and to explain the impact this has had on their work (see Chapter 11 for more information).

Below, the discussion turns to the two most common categories of restriction on access to information by ombuds institutions: classified information and information relating to ongoing operations; and information withheld at the discretion of the executive. While other restrictions may exist (relating to information generated, for example, through privileged relationships between patients and doctors and lawyers and clients),²³ a more detailed discussion of all possible restrictions is beyond the scope of this handbook.

10.4.1 Classified and Otherwise Confidential Information

Ombuds institutions for the armed forces should have the right to access all information they deem necessary for the fulfilment of their mandate. This includes the ability to access information that is classified or is otherwise confidential (for example, because it relates to ongoing operations). This latter restriction applies in Canada, for example, where the Ombudsman for Canadian Forces “may be denied access to facilities, employees, members or information for only as long as it is justified for operational requirements.”²⁴ Similarly, restrictions relating to the protection of national security information and/or state secrets exist, for example, in Belgium, Norway, Germany, and Ireland.²⁵ It should be noted, however, that, while such limitations exist in several jurisdictions, their formal use remains relatively uncommon.²⁶

Accordingly, it is good practice for an obligation to provide access to ombuds institutions to override any other obligations concerning professional confidentiality or the non-disclosure of classified information.²⁷ It follows that the law should also protect persons from retaliation or punishment for disclosing information to an overseer.²⁸

As a final point, it should be underlined that the ability to access such information may come with certain caveats regarding its use, storage, and further dissemination. Because confidentiality is of utmost importance to their work and their ongoing ability to access such information, ombuds institutions with access to classified or otherwise confidential information should implement appropriate measures and processes for the protection of such information. These may include, inter alia, vetting and security clearances for staff, physical measures for the secure storage of information, and the imposition of appropriate civil and criminal penalties for those found to have improperly disclosed such information.²⁹

10.4.2 Executive Discretion

A common limitation on access to information by ombuds institutions is the existence of laws that permit the executive broad discretion to deny access to information on the grounds of national security.

An example of this type of limitation is found in the law on the Bosnia and Herzegovina Military Commissioner, which states that the requests for information by the Commissioner may be denied by the Minister of Defence in order to protect “confidentiality.” The Minister must then explain his or her reasons to the joint parliamentary committee.³⁰ Similarly, the Dutch National Ombudsman may be denied “entry to certain places if in their opinion entry would be detrimental to the security of the state”³¹ and the Canadian Ombudsman for the Defence Forces “may be denied access to information for reasons of security in accordance with government security policy.”³²

Granting the minister of defence or other executive official a broad margin of discretion in denying requests for information may be particularly problematic given the danger that conflicts of interest may prevent them from using such powers appropriately. In many cases the subject of an investigation is the ministry of defence itself or an official within it. Predictably negative consequences arise when the subject of an investigation has the power to block access to relevant information, where it might be deemed to be damaging or even merely embarrassing.

10.4.3 Redress and Appeal

As was noted above, three broad principles should govern the use of any legal clauses relating to restrictions on access to information, two of which are worth illustrating with examples here: firstly, that any restriction on access should be adequately motivated and accompanied by a detailed written justification;³³ and, secondly, that ombuds institutions should be able to apply for the judicial review of any decision to invoke a particular limitation.

Examples of the first of these principles include the Bosnia and Herzegovina law on the Parliamentary Military Commissioner, which stipulates that the any denial of access to information by the executive must be “made by the Minister of Defence and reasons for denial shall

be explained to the Joint Committee by the Minister.”³⁴ The second principle is well illustrated by the Canadian Ministerial Directive, which notes that the Ombudsman may challenge the government’s stated “justification for preventing access to facilities, people or information, and if he is unsatisfied with the explanations, he may submit a report expressing his concerns.”³⁵

Box 10A Germany: Law on the Parliamentary Commissioner for the Armed Forces

Section 3—Official Powers

In performing the tasks assigned to him, the Commissioner shall have the following powers:

1. He may demand information and access to records from the Minister of Defence and all the Minister’s subordinate agencies and personnel. These rights can only be denied to him in the case of compelling reasons of secrecy. Such denial shall be determined by the Minister of Defence himself or his permanent official deputy; he shall state the reasons for it before the Defence Committee. On the basis of instructions pursuant to paragraph (2) of Section 1 and in the case of a petition based on a complaint by the petitioner, the Commissioner shall have the right to hear the petitioner as well as witnesses and experts. These persons shall be reimbursed pursuant to the Law on the Reimbursement of Expenses and the Remuneration of Witnesses and Experts.³⁶

These laws are illustrative of ways in which laws can be written that mitigate problems stemming both from conflicts of interest (outlined in Section 10.4.2 on executive discretion) and from the use of blanket justifications regarding classified information (outlined in Section 10.4.1 on classified and operational information). Where such limits on access to information exist, these are important safeguards and are essential if ombuds institutions are to be able to pursue investigations to their conclusion.

10.5 Good Practice

Access

- Ombuds institutions should have the power to demand access to any information, supported by appropriate enforcement powers and the necessary expertise and resources.

Powers

- Civil servants and members of the armed forces should be under a legal or contractual obligation to cooperate with requests for information or interview by ombuds institutions; such obligations may be supported by explicit penalties for refusal.
- Ombuds institutions should possess subpoena powers, which impose a legal requirement on relevant persons to appear before them or to provide them with specific information when requested to do so. This power should also confer the ability to require that testimony be given under oath or affirmation.
- Ombuds institutions should have the ability to outline any lack of cooperation in their public reports.

Limitations

- No legal or practical limitations should exist on the ability of an ombuds institution to access any and all information it deems to be necessary for the fulfilment of its mandate.
- If limitations on access to information are imposed:
- They should be clearly and narrowly defined in law.
- The invocation of limitations on access to information should be adequately motivated and accompanied by a detailed written justification.
- Ombuds institutions should to be able to apply for the judicial or legislative review of any decision to invoke a particular limitation.

Endnotes

1. Here this means access to information by an ombuds institution, as distinct from access to information from ombuds institutions (or from the government more generally) by the public, a subject more properly covered in Part IV on reporting and recommendations.
2. South African Ministerial Review Commission on Intelligence in a Democracy in Wills and Buckland, "Access to Information."
3. See Wills and Buckland, "Access to Information."
4. Some limited restrictions may, however, apply with regard to information held by the police or prosecutors. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 15. These include Sweden, the Netherlands, Poland, Austria, Estonia, Slovenia, Serbia, and Finland.
5. For a discussion of access to physical locations see Section 9.4 on investigations.
6. Albania, "The Law on the People's Advocate," Art. 19. It should be noted that the People's Advocate also possesses extensive subpoena powers.
7. According to the 2009 DCAF Survey, the majority of ICOAF participants have such powers. In a limited set of jurisdictions, however, the executive or military may decline requests for information.
8. Serbia, "The Law on the Protector of Citizens," Art. 21.
9. Albania, "The Law on the People's Advocate," Art. 19.1.
10. Gonzalez, "The Institution of the Ombudsman," 239. The Serbian Protector of Citizens also has such powers. See Serbia, "The Law on the Protector of Citizens," Art. 20.
11. Gonzalez, "The Institution of the Ombudsman," 240.
12. See, for example: Australia, Inspector General of Intelligence and Security Act 1986, Sections 18–19.
13. UNDP, *How to Conduct Investigations*, 91.
14. The United States, "Inspector General Act of 1978," §6.
15. The Netherlands, "General Administrative Law Act," Art. 9.31.3.
16. The Netherlands, "National Ombudsman Act," Art. 15.
17. UNDP, *How to Conduct Investigations*, 73.
18. See, for example, Irish Ombudsman for the Defence Forces. Annual Report 2010.
19. Serbia, "The Law on the Protector of Citizens," Art. 21.
20. Romania, "Law on the Advocate of the People," Art. 20.1.
21. The United States, "Inspector General Act of 1978," §6(a)1; Honduras, Nicaragua, and Panama expressly state the ombuds institution's right to receive confidential information, Gonzalez, "The Institution of the Ombudsman," 239.
22. See for example, the German PKGrG Act, Section 6(2).
23. UNDP, *How to Conduct Investigations*, 70.
24. Canada, "Ministerial Directives," Section 24(2).
25. Canada, "Ministerial Directives," Section 24(2).
26. Born *et al*, *A Comparative Perspective*, Annex, Response to question 15(c). Canada and Germany are the only surveyed states that reported having been formally refused access on such grounds.
27. See, for, example, Republic of South Africa, *Public Audit Act*, No.25 of 2004, Sections 15–16.
28. See, for example, Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 8.1.
29. See OSI Draft Principles on National Security and Access to Information.
30. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 4a.
31. The Netherlands, "National Ombudsman Act," Art. 14.
32. Canada, "Ministerial Directives," Section 24(1).
33. See for example, the German PKGrG Act, Section 6(2).

34. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner of Bosnia and Herzegovina," Art. 4a.
35. Canada, "Ministerial Directives," Section 24(3–4).
36. Germany, "Law on the Parliamentary Commissioner for the Armed Forces," Art. 3.



PART IV: REPORTING AND RECOMMENDATIONS

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REPORTING

11.1 Introduction

This chapter provides an overview of the various types of reporting by ombuds institutions, as well as underlines the importance of independence in reporting. This chapter contains the following subsections:

- The Role of Reporting
- Independence in Reporting
- Types of Reporting
- The Reporting Process
 - The Audience for Reports
- Good Practice

11.2 The Role of Reporting

Issuing reports to the legislature and to the public at large is a key function of ombuds institutions, and nearly all such institutions are mandated to produce a regular report on their work and activities. Reports can be used to share information on all aspects of an ombuds institution's work, including statistics and significant details relating to complaints, significant and thematic issues, and policy or other recommendations. Reports may, typically, be annual (or semi-annual). Institutions may also release reports on an ad hoc basis. Ad hoc reports may be case specific, or aimed at addressing thematic issues that have come to the ombuds institution's attention. Such reports are typically released at the conclusion of special or own-initiative investigations. Reports may also be an important way of publicising recommendations, including when they relate to rectifying, mitigating, or reversing the

decision, policy, or law that led to a complaint, even when they are unable to directly compel an institution to comply.¹

Relating to specific cases or investigations, institutions may issue reports containing detailed recommendations aimed at rectifying the specific problems relevant to the complaint and to any broader, systemic issues that may have been uncovered during an investigation or inquiry. The “soft power” of reports is essential in increasing the likelihood that recommendations are complied with, particularly given the fact that ombuds institutions generally lack enforcement powers. The bright light of publicity is a crucial tool in persuading uncooperative institutions and individuals to comply with an ombuds institution’s recommendations. Reports issued during an investigation may even help to persuade non-cooperative officials or institutions to comply with requests for information or access. This last function of reporting is even made explicit in the relevant Canadian Ministerial Directives, which state that the Canadian Ombudsman may challenge the justification for preventing access to facilities, people, or information, and if he is unsatisfied with the explanations, he may submit a report expressing his concerns.²

Reports may also play an important policymaking role. A key part of the mandate of many ombuds institutions is the provision of policy recommendations to the armed forces, the executive, and the legislature.³ This may even include the formulation of recommendations on draft laws.⁴ The provision of these types of recommendations may be in response to requests from the executive or the armed forces, but most ombuds institutions are also able to put forward recommendations on their own initiative. The practice of providing policy recommendations serves a preventative function, as recommendations are designed to encourage reforms to practices which have given rise to both mal- and misfeasance and, thus, to prevent the reoccurrence of these wrongdoings (see Box 12C for examples).

Reports may also serve an important educational function by informing the public and members of the armed forces about their rights and the role ombuds institutions play in the protection of these rights.⁵ Ombuds institutions may be proactive in promoting greater awareness of their institution’s role, and in increasing public trust in the institution more generally, by speaking publicly, distributing information, and

maintaining an informative and up-to-date website, as well as through the issuing of formal reports.⁶ Several ombuds institutions also referred to the wider problem of a lack of understanding among both civilian employees at ministries of defence and members of the armed forces about what an ombuds institution is and what it is mandated to do (particularly in contrast to judicial bodies).⁷ Education campaigns can help to remedy this problem.

11.3 Independence in Reporting

Making their work accessible is essential to the fulfilment of their role in public accountability processes. The ability to release independent reports, free of undue influence from the executive or the military chain of command, is an essential component of independence more generally.⁸ Indeed, it is crucial that ombuds institutions are able to issue public reports that are not censored or delayed by the executive or the bodies that they oversee.⁹

In producing their reports, ombuds institutions must strike a balance between, on the one hand, protecting privacy (particularly of complainants), protecting the integrity of judicial processes, and safeguarding national security and, on the other hand, upholding a public right to freedom of information. In all cases, however, the final decision regarding what information to include in reports should ultimately lie with the ombuds institution itself.¹⁰ As the Irish Ombudsman for the Defence Forces asserts, “the power to issue annual and other reports which are not subject to censorship should never be underestimated as a cornerstone of independence.”¹¹

Having said this, there are clearly good reasons why some information should not appear in public reports. Such information may include, inter alia, private information or information that reveals the identity of complainants, classified information, information relating to ongoing operations, and information relating to ongoing judicial processes (see Section 10.4.1 on classified information for more details). In another subset of states, mandate restrictions may limit what can be included in public reports. This is the case in both Colombia and Venezuela, for example, where the respective ombuds institutions can only make recommendations relating to human rights.¹²

Box 11A Release Procedures in the UK Royal Air Force

An example of a UK single case report relating to release from service concerns a flight sergeant who, after twenty-six years of service, was discharged without an exit interview and without an official letter praising his service, as is standard practice within the Royal Air Force. The complainant felt that his service was overlooked and that ending his service away from his parent station and usual command structure had allowed him to fall through the cracks. Additionally, the lack of an exit interview denied him the possibility to formally communicate concerns he had regarding the management and administration of personnel who were posted away from their parent stations.

The Service Complaints Commissioner forwarded the complaint to the RAF, who agreed that the complainant had been wronged and had not been afforded the recognition merited by his service. The Air Force apologised formally, and the report led to the implementation of a number of changes to address the systemic issues raised as a result of the complaint. In particular, the RAF undertook a thorough review of “parenting procedures,” which identified several areas in need of reform. These lessons were also disseminated to other units who implemented changes to better identify staff who were nearing retirement to ensure that their release process was properly handled.¹³

11.4 Types of Reporting

Reporting may take several different forms: individual case reports, special or thematic reports, and annual reports. The following section provides a brief overview of the different types of reporting methods, while section 11.5 looks in more detail at the reporting process itself.

The most common of these are individual case reports. Typically, ombuds institutions must release reports detailing: the complaint, a summary of their investigative activity, and whatever conclusions they have reached. Such reports are generally created for in-house record-keeping and reference purposes, although specific sections may also be provided to those individuals or institutions directly concerned. However, in cases where reports generate findings with broader relevance (because, for example, they relate to a more systemic issue) or are related to questions of non-compliance, such reports may also include more general recommendations for the armed forces or the executive regarding the prevention of similar occurrences in future.

This brings us to the second major type of reporting: special or thematic reports. Such reports may be produced on the ombuds institution's own initiative or, in some jurisdictions, be requested by another government agency. This is the case in the UK, for example, where the Secretary of State may request special reports to further examine any issues under the aegis of the Commissioner.¹⁴ The general purpose of this type of report is well summarised in the Statute of the Timor-Leste Ombudsman for Human Rights and Justice, which outlines the task of the Ombudsman as to “promote a culture of respect for human rights, good governance and fight against corruption ... [and] to inform the general public and public administration, and disseminate information.”¹⁵ More specifically, this type of report often concerns a systemic or endemic problem relating to the armed forces. The publication of a report drawing on several individual cases can help to draw attention to the wider problem and may result in the system-wide changes necessary to adequately address it (see Box 11B for examples of this type of report).

Box 11B Canadian Special Reports

The Canadian Ombudsman is one example of an institution that has produced thematic reports on a number of issues pertinent to the Ombudsman's mandate. Since 2002, the office has reported on a range of systemic issues including (among others):

- Operational Stress Injuries
- Mental Health Services
- Treatment of Injured Reservists
- Treatment of Veterans
- The Recruiting System
- Unfair Treatment by the Internal Grievance System¹⁶

Periodic reports are the third major form of reporting by ombuds institutions. Such reports are commonly made annually to the legislature and the public at large, and the vast majority of ombuds institutions are mandated by law to produce such periodic reports.¹⁷ The US IG Act of 1978 provides an excellent summary of the purpose and content of such reports, detailing that the reports shall contain a description of problems, recommendations for corrective action, summaries of previous recommendations' progress and other reports made.¹⁸ Other information that may be contained in such reports includes:

- the general activities and new initiatives of the institution;
- financial data; and
- general information about the make-up of the office (e.g., number of staff, growth, and so forth).

The purpose of such reports is to inform the public and the legislature about the activities of the office and to highlight important themes and cases that have occurred during the preceding period. Periodic reports may also be an important platform for the ombuds institution to highlight future plans and suggestions for institutional reform. (See Box 11C on the UK Service Complaints Commissioner for the Armed Forces.) Periodic or annual reports may also be an opportunity to highlight recommendations, including where they relate to the amendment of legislation.¹⁹

Box 11C Recommendations for Improving the Functioning of the Ombuds Institution: The Case of the UK

In the UK, the Service Complaints Commissioner must submit an annual report to the Secretary of State reporting on the efficiency, effectiveness, and fairness with which the system has operated; the work undertaken by the Commissioner that year; and any other aspects of the system or function of the Commissioner.²⁰ In this regard, the Service Complaints Commissioner recommended the following changes in her 2010 report:²¹

Having considered the options for change I recommend that the SCC role is changed to one of an Armed Forces Ombudsman. This will enable the chain of command to retain the primary responsibility for investigating and deciding Service complaints, recognising that dealing efficiently with Service complaints is an integral part of command and exercise of a commander's duty of care to those under command.

The Armed Forces Ombudsman model would focus on holding the Services to account for the proper administration of their processes and the delivery of justice, ensuring that the system was functioning properly and that the most complex, delayed and problematic cases were being given priority and additional scrutiny. Having the backstop of an external appeal to the Ombudsman, albeit with a requirement to meet her criteria of a *prima facie* case of maladministration, should give Service personnel the confidence in appropriate cases, to opt for appeal by the chain of command.

11.5 The Reporting Process

Reporting on specific cases and thematic issues (as opposed to annual reports, which generally summarise these cases and issues) takes place in several stages. A preliminary stage is the taking of informal steps aimed at remedying the situation without the need for a formal report. Such steps may include consultations with those concerned and mediation and discussion aimed at identifying a range of solutions acceptable to both sides.²² It is only when such informal options have been exhausted that the ombuds institution may proceed with the publication of a formal report. With regard to systemic issues such steps may, however, be inappropriate or impractical.

A second stage is notifying and consulting with concerned parties in order to request their reactions and input to a proposed report. For example, the Dutch National Ombudsman is required to give the administrative authority, the person responsible for the action, and the petitioner the opportunity to explain their points of view or make written submissions.²³ Likewise, in Serbia, the Protector of Citizens must notify the complainant and the authority at the beginning and end of proceedings. The administrative authority must then respond to all requests from the Protector within sixty days.²⁴

At this stage, the ombuds institution may also examine precedent and consider questions such as: Has the ombuds institution handled similar cases before?²⁵ What was the resolution? How effective was the resolution? And are there any international precedents that could be followed?

A third stage in the reporting process relates to decisions about what to include in both public and (if necessary) confidential versions of the report. In general terms, reports may include details of the allegations and investigation, relevant background information, and details of relevant legal statutes and precedent. The report may then include an analysis of the case and findings, conclusions, recommendations, and any follow-up or clarifications from all relevant parties received during the consultation process (see stage two above).²⁶ In the Netherlands, for example, the Ombudsman must draft a report upon closing an investigation including findings and decisions, as well as the standards of proper conduct that were breached, where relevant.²⁷ While transparency is of overarching importance, in the case of public

reports, care should be taken to omit information that may be classified or confidential. Care must also be taken to protect the privacy of those involved in complaints and investigations.

A fourth stage relates to the release of the report itself. It should be underlined that ombuds institutions have the freedom to release their reports according to their own schedule and that reports should be made freely available to the public.

11.5.1 The Audience for Reports

The primary audience for reports are concerned parties including (where applicable): the complainant, the subject of the complaint, and any relevant authorities (such as the military chain of command and relevant ministries). Laws in many states deal with the audience for reports in very general terms, stating, for example, that recommendations must be forwarded to all relevant parties and proper authorities.²⁸ Other states, however, list very specific audiences for the reports of ombuds institutions. In France, it is mandated that the Military Appeals Commission must first give “the applicant formal notice of the decision.”²⁹ Likewise, in Romania, the Advocate of the People must “notify in writing the public administration authority, which has violated the complainant’s rights.”³⁰ In Albania, the People’s Advocate must “make recommendations to the higher authority ... [and, where appropriate] to the public prosecutor.”³¹

A second important audience for reports by ombuds institutions is the legislature.³² The US Inspector General Act of 1978, for example, states that a key role of the IG is to “provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.”³³ For some ombuds institutions, reports to the legislature may be an important means of ensuring that their recommendations are complied with—once they are tabled in the legislature or once the government has been asked to act, it may be more difficult for them to be ignored, particularly in cases where the legislature is under an obligation to debate and/or respond to reports received. Such reports may also provide the legislature with an opportunity to enact legislation addressing any systematic problems that have been identified. Many ombuds institutions have an obligation to report to

the legislature on their findings, as well as on administrative details of their work, including the use of funding, methods of work and audits of the organisation.³⁴ Such details are often included in annual reports.³⁵

A final, but no less important, audience for the reports of ombuds institutions is the media and the public at large. As with reports to the legislature, the issuing of public reports may be an important way of ensuring compliance with recommendations and of drawing attention to issues that may not otherwise be open to much public or media scrutiny. In particular such reports may be an opportunity for relevant civil society and other interested public to follow and engage with the work of the ombuds institution. Many ombuds institutions are required to report publicly on their recommendations.³⁶ In Timor-Leste, for example, the Ombudsman for Human Rights and Justice is required to “keep the public informed of the activity and mandate of its Office”³⁷ by “addressing the public directly, issuing communiqués or publishing information on his or her opinions, recommendations and reports on specific cases or on his or her activity.”³⁸ As alluded to above, the audience of reports is particularly salient to the issue of implementation of recommendations. This is an issue that will be discussed in the following chapter.

11.6 Good Practice

Role of Reporting

- Ombuds institutions should produce regular reports on their activities. These include both periodic and ad hoc reports on specific cases or thematic and otherwise important issues.
- Ombuds institutions should issue reports containing detailed recommendations aimed at rectifying the specific problems relevant to the complaint and to any broader, systemic issues that may have been uncovered during an investigation or inquiry.
- The “soft power” of public reports can ensure that recommendations are complied with, particularly where enforcement powers are lacking.
- Ombuds institutions should have the power to issue policy recommendations designed to encourage reforms to practices that have given rise to misfeasance, and thus, to prevent the reoccurrence of these wrongdoings.

Independence in Reporting

- Ombuds institutions should have the power to issue public reports, free of undue influence from the executive or the military chain of command. In this regard, ombuds institutions should have the final say on the content of their reports and should issue reports free from censorship or delay.
- Public reports should strike a balance between upholding a public right to freedom of information and, on the other hand, protecting privacy, protecting the integrity of judicial processes, and safeguarding national security.

Types of Reporting

- Ombuds institutions should release reports detailing specific complaints, summaries of their investigative activity, and whatever conclusions they have reached.
- Reports may also include more general recommendations for the armed forces or the executive regarding the prevention of similar occurrences in future.
- Ombuds institutions may issue reports on their own initiative or, in some jurisdictions, upon request by another government agency.
- Thematic reports should often concern a systemic or endemic problem and aim to provoke the systemwide changes necessary to adequately address it.
- Periodic reports should inform the public and the legislature about the activities of the office and highlight important themes and cases that have occurred during the preceding period, and may also be an important platform for the ombuds institution to highlight future plans and suggestions for institutional reform.

The Reporting Process

- Before issuing reports, ombuds institutions must consult with those concerned and hold discussions aimed at identifying a range of solutions acceptable to both sides. Ombuds institutions should proceed with the publication of a formal report only when such informal options have been exhausted.
- Ombuds institutions should notify and consult with concerned parties in order to request their reactions and input to a proposed report before final publication.
- Reports should include details of the allegations and investigation, relevant background information, and details of relevant legal

statutes and precedent. Reports should also include an analysis of the case and findings, conclusions, recommendations and any follow-up or clarifications from relevant parties received during the consultation process.

- Transparency is of overarching importance but reports should also take care to omit information that may be classified, confidential, or private.
- Reports should be addressed to the complainant, the subject of the complaint, and any relevant administrative authorities.
- Reports to the legislature are an important means of ensuring that recommendations are complied with and should also provide the legislature with an opportunity to enact legislation addressing any systematic problems that have been identified.
- Public reports are an important way of ensuring compliance with recommendations and of drawing attention to issues that may not otherwise be open to much public or media scrutiny.

Endnotes

1. UNDP, *How to Conduct Investigations*, 118.
2. Canada, "Ministerial Directives," Section 24(3–4).
3. Born *et al*, *A Comparative Perspective*, Annex, Responses to question 8: Sweden, Ireland, Belgium, Netherlands, UK, Canada, Serbia, Finland, Poland, Germany, Austria, Norway, and Estonia.
4. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 8. Ombudsman-institutions of Sweden, Serbia, Poland, Finland, UK, Slovenia, Germany, Norway, Austria, Estonia, and Romania indicate that they make recommendations on draft legislation.
5. United Nations General Assembly, *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights*. A/RES/63/169, New York: UNGA, 20 March 2009.
6. Dodson, "The Human Rights Ombudsman in Central America," 35.
7. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 52: Canada.
8. Some ombuds institutions that are appointed by and report to a government minister may have to submit their reports to that minister. Depending on the executive decree/directives, the minister may or may not be instructed to pass the report on to the legislature. This is clearly problematic for independence and accessibility in reporting.
9. Born *et al*, *A Comparative Perspective*, Annex, Response to question 44: Canada and UK; Response to question 52: Germany.
10. Born *et al*, *A Comparative Perspective*, Annex, Response to Questions 32 and 33: In the UK, the Minister may only make such redactions as are necessary to protect national security or individual safety. In practice, there have been no such redactions. The United Kingdom, "The Armed Forces Act, " §339.3; The Minister of Defence of Ireland may also give notice to the ombudsman not to release certain information to the public. Ireland, "Ombudsman Act," Section 10.3.a.
11. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 54: Ireland.
12. Gonzalez, "The Institution of the Ombudsman," 244.
13. United Kingdom Service Complaints Commissioner for the Armed Forces, "Annual Report 2010," 2011, 43.
14. The United Kingdom, "The Armed Forces Act, " §339.4.
15. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 25.1a.
16. See the section on special reports on the website of the National Defence and Canadian Forces Ombudsman (available at www.ombudsman.forces.gc.ca).
17. See, for example, France, "French National Defence Code, Chapter V : Preliminary administrative appeal," R4125-12; Germany, "Law on the Parliamentary Commissioner for the Armed Forces," Art. 2; Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 34.1; Albania, "The Law on the People's Advocate," Art. 26–27; Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner," Art. 5.1; Canada, "Ministerial Directives," Section 38(1); The Netherlands, "National Ombudsman Act," Art. 14; The United States, "Inspector General Act of 1978," §5(a); Romania, "Law on the Advocate of the People," Art. 5.1.
18. The United States, "Inspector General Act of 1978," §5(a).
19. See, for example, Romania, "Law on the Advocate of the People," Art. 5.1.
20. The United Kingdom, "The Armed Forces Act 2006," (c. 52) §14, §339.1.
21. UK Service Complaints Commissioner for the Armed Forces, Annual Report 2010, Chapter 4, p. 76.
22. UNDP, *How to Conduct Investigations*, 116.
23. The Netherlands, "General Administrative Law Act," Art. 9.30–31.
24. Serbia, "The Law on the Protector of Citizens," Art. 29.
25. UNDP, *How to Conduct Investigations*, 116.
26. UNDP, *How to Conduct Investigations*, 125.
27. The Netherlands, "General Administrative Law Act," Art. 9.36.
28. See, for example, Canada, "Ministerial Directives," Section 34; Honduras, Panama, Peru, Colombia,

- Venezuela, and Ecuador, see Gonzalez, "The Institution of the Ombudsman," 244.
29. France, "French National Defence Code" Art. R4125-10.
 30. Serbia, "The Law on the Protector of Citizens," Art. 23.1.
 31. Albania, "The Law on the People's Advocate," Art. 21.
 32. Although reports on individual complaints will generally not be made public or shared with the legislature.
 33. The United States, "Inspector General Act of 1978," §2.3.
 34. Ireland, "Ombudsman (Defence Forces) Act 2004," Art. 11.1.
 35. See, for example, The United Kingdom, "The Armed Forces Act," §339.2; Serbia, "The Law on the Protector of Citizens," Art. 33; Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner," Art. 5.2; Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 28m.
 36. See, for example, Colombia, Ireland, Germany, Estonia, Slovenia, Serbia, and the UK (DCAF Questionnaire, Q.16 and 35) and Gonzalez, "The Institution of the Ombudsman," 239.
 37. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 33.2.
 38. Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 30.

12

RECOMMENDATIONS

12.1 Introduction

This chapter provides an overview of implementation and monitoring of recommendations by ombuds institutions. The chapter deals with the process of making recommendations, as well as with the different types of recommendations ombuds institutions commonly make. It then goes on to examine the question of implementation and enforcement, touching on the various ways in which ombuds institutions seek to ensure their recommendations are complied with. Finally, the chapter examines ways in which the effectiveness of recommendations can be monitored and measured. This chapter contains the following subsections:

- Making Recommendations
 - Complaint-Based Recommendations
 - Review and Recommendations Relating to Policy
 - Legal Review and Recommendations
- Implementation and Enforcement
 - Persuasion and Soft Power
 - Publicity and Reporting Non-compliance
 - Escalation
 - Recourse to the Courts
- Effectiveness of Recommendations
 - Monitoring and Measuring Effectiveness
- Good Practice

12.2 Making Recommendations

A key function of ombuds institutions for the armed forces is making

recommendations to the armed forces, the executive, and the legislature. The ability to make recommendations free from undue influence by other bodies is an essential element of independence. As the Romanian Law on the Advocate of the People states, “[recommendations of the Advocate] cannot be subjected to either parliamentary or judicial control.”¹

Recommendations can serve a number of different functions, including encouraging officials to: rectify, mitigate, or reverse the decision, policy, or law that led to a complaint. Recommendations can also relate to reparations, such as payments for harm or formal apologies for mistakes or adverse effects.²

Many ombuds institutions cite the making of recommendations as a key part of their mandate.³ Recommendations can be divided into two main types. The first relates to recommendations on specific complaints and their resolution. The second relates to the making of policy recommendations aimed at addressing more systemic issues. While recommendations have been divided here into two specific types, ombuds institutions frequently include elements of both in their reports or findings.

As will be discussed below, the proper implementation of recommendations made by ombuds institutions is central to the effectiveness of these bodies. If the armed forces fail to implement or refuse to take notice of recommendations made by ombuds institutions, this may undermine the entire complaint-handling and investigation process. Indeed, one may legitimately question the worth of an ombuds institution whose recommendations are rarely heeded. The essence of accountability is to be both called and held to account. Proper implementation of recommendations is crucial if the second of these criteria is to be fulfilled.⁴

It is important to note here a key difference between ombuds institutions and judicial bodies: the fact that ombuds institutions generally make recommendations rather than legally binding judgements. In this regard, their decisions may not be heeded and may not always result in the desired outcome of the complainant, even if recommendations are later made policy. The strengths and limitations of this model should be made clear to those considering making a complaint.

12.2.1 Complaint-Based Recommendations

The most common type of recommendations made by ombuds institutions relate to the resolution of specific complaints and cases. Many ombuds institutions have identified complaint-based recommendations as being of utmost importance, and most ombuds institutions are required to include some means of redress at the conclusion of each case in which wrongdoing was identified.⁵

Recommendations of this type are generally case specific. In other words, they do not seek to resolve broader policy questions or address systemic issues. While they may, of course, serve as precedent for future decisions, this is not their primary purpose. Recommendations are based on and relate to the specifics of an individual case or situation.

12.2.2 Review and Recommendations Relating to Policy

In addition to complaint-based recommendations, ombuds institutions for the armed forces commonly have the power to review and make recommendations relating to policy and law. The practice of providing policy recommendations and comments on proposed and existing law serves a preventative function. Recommendations are designed to encourage reforms to practices that have given rise to misfeasance and, thus, to prevent the reoccurrence of these wrongdoings. As the Irish Ombudsman for the Defence Forces points out:⁶

An Ombudsman often identifies administrative procedures and practices that are out-of-date, badly administered or in need of reform. Systemic issues which require attention also come to light ... One of the far-reaching benefits of this administrative oversight is that a decision in one case, not only vindicates the Complainant's case, but ensures that the underlying causes are addressed.

An example of this function is the US IG, which is mandated to recommend⁷ and "provide policy direction ... and to conduct, supervise, and coordinate audits and investigations."⁸ Such policy recommendations may be general or targeted at a specific institution or practice. This is the case in many states.⁹ Bosnia and Herzegovina is a typical example. Here, the Commissioner may "issue appropriate recommendations to competent institutions."¹⁰ In some cases, the relevant government agency must respond within a specific time

period, for example in Albania, where the government has thirty days to respond to the People's Advocate's recommendations.¹¹

Box 12A Provision of Inadequate Body Armour to US Troops

At the behest of a Congressional inquiry, the US Department of Defense IG examined DoD procurement policies for body armour.¹² During the investigation, the IG discovered that proper testing was not conducted on nearly 50 percent of the contracts awarded for components of body armour valued at more than \$5.2 billion. Thus, the IG concluded that the DoD could not be assured that the body armour met the appropriate standards.

The IG recommended that the DoD improve and reform its procurement procedures to ensure that all the necessary tests are conducted before accepting the contract. Several follow-up reports were produced by the IG recommending that the body armour in question be properly tested to ensure its battle readiness.¹³

12.2.3 Legal Review and Recommendations

In addition to general policy recommendations, a number of ombuds institutions also have the power to formulate recommendations on draft laws.¹⁴ This power may be exercised in response to requests from the executive or the armed forces, as well as on an ombuds institution's own initiative. For example, such recommendations may be made at the conclusion of complaint-driven and own-motion investigations. The US IG, for example, has the responsibility to "review existing and proposed legislation and regulations relating to programs and operations ... and to make recommendations ... concerning the impact of such legislation or regulations" on the exercise of the IG's mandate.¹⁵

A related power is that of initiating amendments or requesting legal or judicial review of existing law.¹⁶ If a law is leading to violations of human rights, the People's Advocate of Romania, may, for example, recommend that the law be amended or, in more extreme circumstances, request that the Constitutional Court invalidate a particular act.¹⁷ The Serbian Protector of Citizens has the similar ability to propose amendments to laws or other legislative acts if they violate citizens' rights, as well as to initiate proceedings, before the Constitutional Court to challenge the

constitutionality and legality of laws, other regulations, and general acts (see Box 12B on Proposing New Laws for more information).¹⁸

Box 12B Proposing New Laws

In Serbia, the Protector of Citizens has a further power that enables the office to propose new laws, where they fall within the office's mandate. In this regard, the Protector of Citizens has the power:

To launch initiatives with the Government or National Assembly for the amendment of laws or other regulations or general acts, if he deems that violations of citizens' rights are a result of deficiencies of such regulations. He shall also have the power to launch initiatives for new laws, other regulations and general acts, if he considers it significant for exercising and protecting citizens' rights. The Government, or the competent Committee of the National Assembly, shall be obliged to consider the initiatives of the Protector of Citizens. In the process of drafting of regulations, the Protector of Citizens shall have the power to give his opinion to the Government and National Assembly on draft laws and regulations if they concern the issues relevant for the protecting of citizens' rights.¹⁹

12.3 Implementation and Enforcement

Once an ombuds institution has made a recommendation, it is common practice for the law to state that recommendations be responded to within a timely manner. In Romania and Guatemala, for example, the law stipulates that public authorities should act "immediately" to implement the ombuds institution's recommendations.²⁰ In Canada, the law specifies a period of two weeks within which parties to a complaint must respond to adverse comments before final publication, a process that ensures the report considers the views of all parties.²¹ Such articles ensure that recommendations are addressed promptly but also contribute to the likelihood that they will be implemented. A specific time period gives the ombuds institution a benchmark against which compliance by public authorities can be measured. In ensuring that their recommendations are implemented, ombuds institutions have a number of tools at their disposal. These will be discussed in the following subsections.

12.3.1 Persuasion and Soft Power

The first tool at an ombuds institution's disposal is soft power. The high levels of public trust in ombuds institutions may grant them a degree of moral authority that can then be used to persuade public institutions to comply. This power of persuasion should not be underestimated, particularly as so many ombuds institutions can only issue recommendations, rather than binding orders.²²

Box 12C National Commissioner for the Protection of Human Rights in Honduras' Report on Forced Disappearances²⁶

The National Commissioner for the Protection of Human Rights in Honduras began an investigation into the gross human rights abuses committed during the early 1980s by Battalion 3-16, a Honduran military unit that received training from the CIA. The report, "The Facts Speak for Themselves," details the forced disappearances of nearly two hundred people by Battalion 3-16 and other Honduran security apparatuses. These forced disappearances had not previously been acknowledged by the Honduran government.

In creating the report, the Commissioner sought to bring attention to these violations and to bring those responsible for the crimes to justice. The Commissioner also recommended that victims and families of victims be compensated and that legal reforms be implemented to ensure such an occurrence never happen again. Finally, the Commissioner called for greater democratic control of the armed forces, as well as increased education on human rights.

Building relationships and trust with the armed forces and other state bodies is important in this regard. This is particularly so given that lack of cooperation by the armed forces is cited by many ombuds institutions as a major impediment to their effective functioning.²³ If an ombuds institution has forged strong contacts with those bodies with which they frequently interact, it is more likely that their opinions and recommendations will be more highly valued and, thus, quickly implemented. In Serbia, for example, the speed of responses by the Ministry of Defence has improved over time, as mutual understanding has developed between the two institutions. Because the Ombudsman is a relatively new institution, it has taken time for the two institutions to develop a coherent understanding of each other's needs and

expectations. As time has passed, cooperation and responses to inquiries have noticeably improved.²⁴ Mutual understanding can also help an ombuds institution to better anticipate criticism and negative responses from the responding authority and may allow it (ahead of time) to strengthen arguments and ensure conclusions are particularly thorough in cases relating to particularly controversial areas.²⁵ In this regard, it may be good practice to circulate draft reports among those who are tasked with implementing recommendations and allow them to comment before final publication. Ombuds institutions should, however, retain final say over the contents of recommendations.

12.3.2 Publicity and Reporting Non-compliance

A related tool at the disposal of ombuds institutions is the ability to go public in cases of non-compliance with their recommendations. This power is useful in drawing the attention of the public to potentially embarrassing situations of non-compliance. Here, the integrity of the institution and public trust in the ombuds institution can be particularly persuasive. Many ombuds institutions have this power to go public enshrined in their laws or mandates. Ombuds institutions may go about this in several ways: they can issue a special report, include the case in their annual report, convene a press conference, conduct interviews with media, and/or release a public statement, amongst other means.²⁷

Box 12D Publicity by the Irish Ombudsman

In Ireland, if the Ombudsman's recommendations are not heeded, attention can be brought to the matter by making special mention in the annual report.²⁸ This was the case in 2010, for example, when the Ombudsman remarked in the annual report that: "I sincerely hope that 2011 will see a marked improvement in time taken to deliver ministerial responses to my Final Reports, particularly where the findings or recommendations of these Final Reports have important implications for individual Complainants and/or relate to more profound reform in administrative procedures and practices." In the same report, the Ombudsman highlighted a number of problematic areas in which concerns had not been adequately addressed, such as: a lack of access to personnel records, perceptions of bias and unfairness in promotion competitions, and needs for administrative and process changes following recommendations.²⁹

The most common way in which ombuds institutions go about publicising non-compliance is through inclusion of the case in their annual or semi-annual reports. The US IG, for example, is mandated to include in its semi-annual reports “an identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed.”³⁰ Once these reports have been submitted to Congress, they are then made public by the Department of Defense.³¹ Such reports are an important platform for informing both the public and the legislature and are an effective means of drawing attention to those specific cases that require broader publicity. The Irish, German, El Salvadorian, Estonian, British, Romanian, and Slovenian ombuds institutions have all cited their capacity to go public in the event of non-compliance or non-implementation.³² For example, in Romania, the Advocate of the People may “make public these results through the media, with the consent of concerned person or persons.”³³

12.3.3 Escalation

A third tool available to ombuds institutions seeking to enforce compliance with their recommendations is escalation to another body, usually the legislature, the executive, or a superior within the chain of command. The aim of escalation is to persuade another institution to press the armed forces or the executive to implement recommendations issued by an ombuds institution.

Escalation to the legislature is a strategy that institutions in Bosnia and Herzegovina,³⁴ Slovenia, the UK, and Romania are able to employ.³⁵ In Romania, the Advocate may bring an issue before Parliament within twenty days of “the Government’s failure to take measures, regarding the illegality of administrative acts or facts.”³⁶

Escalation to the executive (usually the minister of defence) is a second option able to be employed by a number of institutions, including those in Romania, the Netherlands, Canada, Ireland, France, the UK, and Poland.³⁷ In Canada, “if in connection with any investigation the powers of investigation of the Ombudsman have substantially been frustrated and not supported by the DND or the CF ... the Ombudsman may make a report of the matter to the Minister.”³⁸

A third option in this regard is escalation up the chain of command. This is often the case for ombuds institutions integrated within the armed

forces, such as inspectors general. In the US, for example, the IG “shall expeditiously report suspected or alleged violations ... to the Secretary of the military department concerned or the Secretary of Defense.”³⁹

12.3.4 Recourse to the Courts

A final tool available to several ombuds institutions to compel compliance with their recommendations or findings is applying to the judiciary.⁴⁰ The ombuds institutions of Austria, Romania, Serbia, Slovenia, and Timor-Leste, for example, can in some cases go to court in an effort to enforce their recommendations.⁴¹ Similarly, some institutions may initiate proceedings in court in cases where the legality of an act or regulation is in question. This is the case in Serbia, where the Protector of Citizens may bring cases before the Constitutional Court.⁴²

12.4 Effectiveness of Recommendations

Simply making recommendations is not the end of the ombuds institution’s obligations. As previously mentioned, ombuds institutions do not have enforcement powers. However, as outlined in Section 12.3, they do possess a range of tools for ensuring greater compliance. Accordingly, ombuds institutions bear some responsibility for ensuring that their recommendations are effective, defined here as comprising two elements:

- appropriateness (that a particular recommendation is the right means of achieving the desired result); and
- compliance (that a particular recommendation is implemented in a full and prompt manner).

The following section will examine the techniques and methods by which ombuds institutions may seek to ensure that their recommendations are effective.

12.4.1 Monitoring and Measuring Effectiveness

A preliminary step in ensuring effectiveness is the setting up of comprehensive monitoring and information-gathering processes. It is necessary for an ombuds institution to identify problems and shortcomings with regard to the appropriateness of, and compliance with, their recommendations.

Box 12E Evaluation of Effectiveness by the British Parliamentary and Health Service Ombudsman⁴³

Although the British Parliamentary and Health Services Ombudsman has jurisdiction over the Ministry of Defence rather than the armed forces as a whole, it is nevertheless included here because of its novel use of annual surveys to measure the effectiveness of the institution. As such, it provides a useful model for ombuds institutions more generally.

In particular, the Ombudsman conducted, between May 2010 and April 2011, extensive research on “customer satisfaction.” This research involved 1619 interviews, in which individuals were asked questions relating to their experience with the office and confidence in the institution as a whole. Particular areas of research included: communications and correspondence, timeliness, outcome of complaints, customer service, how people find out about the office, and overall satisfaction.

Through these extensive interviews, they were able to reach a number of conclusions relating to their effectiveness. For example, the office found that 64 percent of complainants were either satisfied or very satisfied with the outcome of their complaint. They were also able to determine that they responded faster to email enquiries and that, on average, they were able to provide a substantive response to enquiries within forty days. The survey also evaluated the quality of their communication with customers, finding that a large majority felt that staff had clearly explained the process to them and that the office was easily accessible and fully understood their complaint.

The majority of ombuds institutions monitor the implementation of the recommendations they issue to the armed forces and the executive. In doing so, they employ a range of monitoring techniques. Most ombuds institutions conduct field or site visits;⁴⁴ hold follow-up discussions with members of the armed forces, such as complainants or commanders;⁴⁵ and arrange follow-up meetings with their defence minister to pose questions on the implementation of their recommendations.⁴⁶ Effective monitoring is essential to ensuring that recommendations are properly and promptly implemented by the armed forces and civilian authorities. Monitoring can also be a very useful tool when used internally—as a way of measuring the effectiveness of the institution.

The importance of gathering data on the effectiveness of

recommendations is reflected in the fact that it is even mandated by some legislation governing how ombuds institutions function. In the UK, for example, the Service Complaints Commissioner must submit an annual report to the Secretary of State reporting on, among other things, “the efficiency, effectiveness and fairness with which the system ... has operated”⁴⁷ (although it should be noted that this auditing function may be unique). Notably, the British Parliamentary and Health Service Ombudsman undertakes annual surveys to measure satisfaction of complainants as well as identifying areas that need improvement (see Box 12E for more information).

Measuring effectiveness is difficult. Nevertheless, several indicators may be useful to ombuds institutions in this regard. The first of these is the rate of response by those institutions to which recommendations are directed. This may allow an ombuds institution to identify those parts of government that consistently fail to implement recommendations (for whatever reason) as well as to compare implementation rates with other similar institutions abroad. Indeed, there is significant variation in the percentage of ombuds institutions’ recommendations that are implemented by relevant stakeholders in different jurisdictions. As indicated in a questionnaire, the implementation rate of recommendations issued by the ombuds institutions varies from total compliance in Serbia, Sweden, Norway, Slovenia, Finland, and Estonia to 71 percent in Canada; 70 percent in the Netherlands and Germany; and 60 percent in Poland.⁴⁸ Low implementation rates, uncovered during monitoring by an ombuds institution, can then inform strategies to improve them.

A second and closely related indicator of effectiveness in recommendations is the time taken by those targeted to respond adequately and take appropriate corrective action. If corrective action is slow it may indicate that relevant stakeholders do not make recommendations by the ombuds institution a priority (although, on the other hand, slow implementation could also mean that the armed forces are undertaking a full and proper review of the situation before proceeding). Even in states with well-established institutions, slow implementation may be a problem. As the Irish Ombudsman reported in 2010, the office had (during the 2009 reporting period) received no follow-up regarding fifteen of thirty-one Final Reports issued by the office (see Box 12D for more information).

12.5 Good Practice

Making Recommendations

- The ability to make recommendations free from undue influence by other bodies is an essential element of independence.
- Recommendations may serve to rectify, mitigate, or reverse the adverse decision, policy, or law that led to a complaint. Recommendations may also include provisions on reparations.
- The proper implementation of recommendations is central to the effectiveness of ombuds institutions.

Complaint-Based Recommendations

- Individual complaint-based recommendations do not usually seek to resolve broader policy questions or address systemic issues.
- Recommendations may include some means of redress, where wrongdoing was identified.

Policy Recommendations

- Ombuds institutions for the armed forces should have the power to review and make recommendations relating to policy and law.
- Recommendations are designed to encourage reforms to practices that have given rise to misfeasance and to prevent the reoccurrence of these wrongdoings.

Legal Review and Recommendations

- Ombuds institutions should have the power to formulate recommendations on draft laws.
- Ombuds institutions may request the legal or judicial review of existing law, if a law is leading to violations of human rights.

Implementation and Enforcement

- Laws that stipulate that public authorities should act expeditiously to implement recommendations, ensure that they are addressed promptly, and contribute to the likelihood that they will be implemented.
- Forging strong contacts with public authorities increases the likelihood that recommendations will be highly valued and quickly implemented.
- Ombuds institutions should have the ability to go public in cases of non-compliance with their recommendations.

- Ombuds institutions may have the ability to seek to enforce compliance with their recommendations by taking the case to another body, such as the legislature, the executive, or a superior within the chain of command.
- Ombuds institutions may initiate proceedings in court in cases where the legality of an act or regulation is in question.

Monitoring and Measuring Effectiveness

- Because effective monitoring is essential to ensuring that recommendations are properly and promptly implemented, ombuds institutions should set up comprehensive monitoring and information-gathering processes.
- Ombuds institutions should seek to identify problems and shortcomings with regard to the appropriateness of, and compliance with, their recommendations.
- Ombuds institutions should monitor several indicators in measuring effectiveness, including the rate of response to recommendations and the amount of time taken to implement them.

Endnotes

1. Romania, "Law on the Advocate of the People," Art. 21.1.
2. UNDP, *How to Conduct Investigations*, 118.
3. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 8. Sweden, Ireland, Belgium, Netherlands, UK, Canada, Serbia, Finland, Poland, Germany, Austria, Norway, and Estonia.
4. Born *et al*, *A Comparative Perspective*, 13. There is an ongoing debate within the accountability literature regarding whether the ability to impose sanctions is essential to proper accountability.
5. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 8. Sweden, Ireland, Belgium, Netherlands, UK, Canada, Serbia, Finland, Poland, Germany, Austria, Norway, and Estonia. A good overview of the purpose of this type of recommendation is found in the Timor-Leste Statute of the Ombudsman for Human Rights and Justice, which states that the Ombudsman has the power "to make recommendations for redress in complaints ... by proposing remedies and reparations; to provide advice including opinions, proposals and recommendations." See Timor-Leste, "The Statute of the Office of the Ombudsman for Human Rights and Justice," Art. 28j, 28l.
6. Born *et al*, *A Comparative Perspective*, 5–6.
7. The United States, "Inspector General Act of 1978," §4(a)3.
8. The United States, "Inspector General Act of 1978," §4(a)1.
9. Canada, "Ministerial Directives," Section 36d; see also Romania, "Law on the Advocate of the People," Art. 21.2; Serbian law even goes as far as giving the Protector of Citizens the power to recommend the dismissal of an official who has violated the rights of citizens, and also to recommend criminal proceedings if necessary; Serbia, "The Law on the Protector of Citizens," Art. 20.
10. Bosnia and Herzegovina, "Law on the Parliamentary Military Commissioner," Art. 4d.
11. Albania, "The Law on the People's Advocate," Art. 22. This is also the case in Bosnia and Herzegovina. See Article 30, Paragraph 1 of the Rules of procedure governing the work of the Parliamentary Military Commissioner of Bosnia and Herzegovina.
12. Inspector General of the United States Department of Defense, *DoD Procurement Policy for Body Armor*, Report No. D-2008-067, Arlington: Inspector General of the Department of Defense, 2008.
13. Inspector General of the United States Department of Defense, *Ballistic Testing for Interceptor Body Armor Inserts Needs Improvement*, Report No. D-2011-088, Arlington: Inspector General of the Department of Defense, 2011; Inspector General of the United States Department of Defense, *DoD Testing Requirements for Body Armor*, Report No. D-2009-047, Arlington: Inspector General of the Department of Defense, 2009.
14. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 8. Ombudsman-institutions of Sweden, Serbia, Poland, Finland, UK, Slovenia, Germany, Norway, Austria, Estonia, and Romania indicate that they make recommendations on draft legislation.
15. The United States, "Inspector General Act of 1978," §4(a)2; see also Serbia, "The Law on the Protector of Citizens," Art. 18.
16. It is usually only human rights ombuds institutions that have the power to start constitutional court actions and administrative court actions. Further, constitutional court actions may be in the context of a complaint to the ombudsman (concrete review) or may not involve a complaint (abstract review). The extent of ombuds institutions powers in this area vary, although constitutional courts/administrative courts and related human rights ombuds institution powers are typically only found in civil law systems.
17. Albania, "The Law on the People's Advocate," Art. 24.
18. Serbia, "The Law on the Protector of Citizens," Art. 18–19; see also Romania, "Law on the Advocate of the People," Art. 13d–13f, 19.
19. Serbia, "The Law on the Protector of Citizens," Art. 18.
20. Romania, "Law on the Advocate of the People," Art. 23.2; Gonzalez, "The Institution of the Ombudsman," 245.
21. Canada, "Ministerial Directives," Section 35(1).
22. This is the case, for example, in Costa Rica, Honduras, Mexico, Panama, and Peru amongst many others; see Gonzalez, "The Institution of the Ombudsman," 244.

23. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 53 by Germany, Romania, and Slovenia.
24. Conversation with staff within the office of the Serbian Protector of Citizens.
25. UNDP, *How to Conduct Investigations*, 134.
26. Leo Valladares Lanza, *The Facts Speak for Themselves*, New York: Human Rights Watch, 1994.
27. UNDP, *How to Conduct Investigations*, 136. In Timor-Leste, for example, the Ombudsman for Human Rights and Justice may “decide to address the public directly or to issue communiqués or publish information on his or her opinions, recommendations and reports on specific cases or on his or her activity.” Timor-Leste, “The Statute of the Office of the Ombudsman for Human Rights and Justice,” Art. 33.2.
28. Ireland, “Ombudsman Act,” Section 7.5.
29. Irish Ombudsman for the Defence Forces, Annual Report 2010.
30. The United States, “Inspector General Act of 1978,” §5(a)3.
31. The United States, “Inspector General Act of 1978,” §5(c).
32. Born *et al*, *A Comparative Perspective*, Annex, Response to Questions 16 and 35; Gonzalez, “The Institution of the Ombudsman,” 245.
33. Romania, “Law on the Advocate of the People,” Art. 26.1.
34. Article 30, paragraph 2 of the Rules of procedure governing the work of the Parliamentary Military Commissioner of Bosnia and Herzegovina.
35. Born *et al*, *A Comparative Perspective*, 13.
36. Romania, “Law on the Advocate of the People,” Art. 25.2.
37. In the UK, the ombudsman institution has a right of unrestricted access to ministers.
38. Canada, “Ministerial Directives,” Section 33.
39. The United States, “Inspector General Act of 1978,” §8(d). In addition, in the Canadian case, the Ombudsman “shall report the matter to the authority responsible for the employee or member, including the Deputy Minister, CDS or the Provost Marshal and the report may contain such recommendations in connection with the matter as the Ombudsman considers necessary.” Canada, “Ministerial Directives,” Section 32(1).
40. While such recourse is available to several institutions, it is not necessarily a stronger form of response. In many cases the ombuds institution is consciously designed to occupy a specific space between parliamentary and judicial redress. In consequence, the absence of legal redress should not necessarily be considered a weakness.
41. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 40. In the case of Slovenia, the ombudsman institution can only turn to the constitutional court.
42. Serbia, “The Law on the Protector of Citizens,” Art. 19.
43. See the Parliamentary and Health Service Ombudsman’s customer satisfaction research (available at <http://www.ombudsman.org.uk/improving-public-service/research/customer-satisfaction-research-may-2010-april-2011/1>).
44. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 35(b). “Field visits” by Austria, Canada, Estonia, Finland, Germany, Netherlands, Norway, Poland, Serbia, Slovenia, Sweden, and the United Kingdom.
45. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 35(b), “Follow-up meetings with members of the armed forces” by Austria, Canada, Estonia, Finland, Germany, Ireland, Netherlands, Norway, Poland, Serbia, Slovenia, Sweden, and the United Kingdom.
46. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 35(b), “Follow-up meetings with the executive/defence minister” by Canada, Estonia, Finland, Germany, Ireland, Netherlands, Norway, Serbia, Slovenia, and the United Kingdom.
47. The United Kingdom, “The Armed Forces Act,” §339.1.
48. Born *et al*, *A Comparative Perspective*, Annex, Response to Question 36. There was no data available for Romania and Belgium.

CONCLUSIONS



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CONCLUSIONS

Rather than recapping all the points and recommendations that have been made in the preceding text, this conclusion will instead seek to draw out cross-cutting issues or themes that run through the text and form the basis of what make ombuds institutions both important and unique. First amongst these is independence, perhaps the most important characteristic of ombuds institutions. Second is that the institution possess the appropriate powers to fulfil its mandate. These two characteristics are interconnected and dependent on each other. Without proper independence, the powers are of little value. Likewise, without the appropriate powers, an independent institution will ultimately be toothless. Both these characteristics can be seen throughout the good practices that have been highlighted here in the conclusion.

Firstly, if an ombuds institution for the armed forces is to be lasting and sustainable it requires the support of all relevant stakeholders from its inception. Without the buy-in of the military command, service associations, civil society, and other independent oversight institutions, it is unlikely that an ombuds institution will be able to function effectively. At the same time, such continuing support cannot be assured. Thus, an ombuds institution needs a solid legal basis (ideally constitutional in nature) guaranteeing both its independence from the government and those it is meant to oversee, as well as the powers necessary to fulfil its mandate.

Secondly, free and open access to complaint-handling procedures underpins the independence of ombuds institutions and is fundamental

to their role in the protection of human rights. It is unlikely that ombuds institutions will be able to effectively fulfil this role if limits are placed on the categories of persons or organisations that can make a complaint, so long as it relates to an area under the ombuds institution's jurisdiction.

Thirdly, and again closely related to the themes of power and independence, is the ability to investigate and resolve issues independently and impartially and to prevent their recurrence. In this regard, many ombuds institutions have the freedom to decide which matters and priorities to pursue and to investigate them to their conclusion. Again, it is unlikely that investigations will be successful if ombuds institutions do not have the power to demand access to any information, supported by appropriate enforcement powers and the necessary expertise and resources. Likewise, an ombuds institution's investigatory powers are likely to be significantly undermined if legal or practical limitations exist on their ability to access any and all information they deem to be necessary for the fulfilment of their mandate.

Finally, the issuing of reports to the legislature and to the public at large is a key function of ombuds institutions. Recommendations seek to rectify, mitigate, or reverse the adverse decision, policy, or law that led to a complaint. It is unlikely that recommendations will be effective if the power to issue public reports is curtailed by the ability of the executive or military chain of command to exercise undue influence on their content or timing. Furthermore, if systemic issues are to be adequately addressed, ombuds institutions should also have the power to make policy recommendations or comment on draft laws.



This handbook examines ombuds institutions for the armed forces and their role in the promotion and protection of human rights as well as in the prevention of maladministration. It compares and contrasts different institutional models to highlight their strengths and weaknesses, as well as seeking to support the development of relevant legal and institutional frameworks by bringing together a range of good practice on the functioning and establishment of such institutions. With key sections on: History Functions and Models; Complaints; Investigations; and Reporting and Recommendations, the handbook is designed to be of use to well-established and newly formed institutions alike.

DCAF is an international foundation whose mission is to assist the international community in pursuing good governance and reform of the security sector. The Centre develops and promotes norms and standards, conducts tailored policy research, identifies good practices and recommendations to promote democratic security sector governance, and provides in-country advisory support and practical assistance programmes. Visit us at www.dcaf.ch. DCAF was mandated by the International Conference of Ombuds Institutions for the Armed Forces (ICOAF) to write this handbook. ICOAF aims to establish best practice and lessons learned related to the mandate, powers and functioning of ombuds institutions. The initiative also reaches out to states that do not have an ombuds institution for the military but have expressed an interest to learn from experiences from other states. To date, representatives of ombuds institutions of more than twenty-five states have participated in the ICOAF initiative. Three ICOAF conferences have taken place in Berlin, Vienna and Belgrade. The fourth ICOAF is planned in Ottawa in September 2012, and the fifth ICOAF will be held in Oslo in 2013. For more information, visit www.icoaf.org

