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THE OFFICE OF THE OMBUDSMAN IN BOTSWANA

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PART A. INTRODUCTORY COMMENTARY

1 Introduction

Botswana is one of the few African countries that is yet to establish a fully-fledged national human rights commission specifically mandated to deal with human rights issues in accordance with the United Nations' Principles Relating to the Status of National Institutions (The Paris Principles). At present, Botswana's Office of the Ombudsman is said to be responsible for issues concerning the promotion and protection of human rights. A weak argument has been made in this regard that the Office has the mandate to perform the functions of a human rights institution established in accordance with the Paris Principles and that it does in fact do so.

However, the absence of a national human rights commission remains both surprising and yet unsurprising. It is surprising because one would have imagined that Botswana, a country of good standing in Africa for its record of human rights protection, would long have seen the necessity of establishing such an institution. It is unsurprising, however, for much the same reason: the presumption appears to have been that, given the country's relatively good human rights record, there is little need for a national human rights commission.

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Many have lamented the absence of such an institution in Botswana and the changes it would be likely to bring to the protection of human rights. Indeed, it is safe to conclude that consensus has been reached by all stakeholders (i.e. civil society and government) on the need to establish at least one such institution: in an effort to address the lacuna in the promotion and protection of human rights in the country, the government took a decision to enhance the human rights mandate of the Office of the Ombudsman.

In his State of the Nation (SONA) address during the First Session of the 11th Parliament of Botswana on 14 November 2014, then President, His Excellency Lieutenant-General Seretse Khama Ian Khama, said:

Madam Speaker, Government is committed to implementing its obligations under the international human rights instruments it is party to, and the promotion of the rights of its citizens. We have taken the decision to establish an institution that will address issues of human rights. In this connection legislation amending the Ombudsman Act and establishing a hybrid institution that will address issues of maladministration and human rights will in the near future be brought to the National Assembly.¹

While great dissatisfaction has been voiced about the government's decision merely to augment the mandate of the Office of the Ombudsman rather than set up an independent human rights commission, it seems that plans are nevertheless under way to implement the decision.²

This chapter thus looks at the role the Office of the Ombudsman plays promoting and protecting human rights in Botswana and at the factors that enhance or impede its effectiveness in doing so. After this introduction, section 2 discusses the history of the Office's establishment, while section 3 examines its legal nature and mandate. This examination also considers the extent to which the establishment of the Office is in compliance with the Paris Principles, given that it is touted as a human rights institution. Section 4 makes some concluding remarks.

1 State of the Nation Address by His Excellency Lt Gen Seretse Khama, available at <https://bit.ly/2xl9cpF>, paragraphs 169-17.

2 A National Human Rights Symposium was convened by the government from 20-21 November 2018 at which where this government decision was made known to stakeholders. It was also announced that the Ombudsman's Act was being reviewed in line with this decision. See Botswana Daily News, "Botswana to Establish a Human Rights Body", available at <http://www.dailynews.gov.bw/news-details.php?nid=46166> (accessed 10 May 2019).

2 Establishment of the Office of the Ombudsman

Regarding the history of the establishment of the Office of the Ombudsman, Nsereko notes that:

[a]s far back as 1982 a Presidential Commission on Economic Opportunities recommended the establishment of an Office of “Public Commissioner” to address public complaints of “inefficiency, delay malpractice on the part of the Government officialdom” ... As was originally envisaged by the Commission, [the] primary function is to investigate citizen complaints against any injustice sustained at the hand of public officials.³

The Ombudsman Act of Botswana came into force on 1 December 1997, its main purpose being “to make provision for the appointment and functions of an ombudsman for the investigation of administrative action taken on behalf of the government, and for purposes connected therewith”.⁴ The Office of the Ombudsman was thus established as an institution responsible for dealing with issues of maladministration in the context of any administrative action taken by or on behalf of the government.⁵ Once the actions of a public official occasion an injustice of any sort, the Office of the Ombudsman is mandated to investigate such an act with a view to resolving the dispute or complaint that is brought to the Ombudsman.⁶ As Fombad and Sebudubudu explain, the jurisdiction of the Office of the Ombudsman is based on the “existence of an injustice in consequence of maladministration”.⁷ The Office is said to be modelled on “the Swedish institution of *Justitieombudsman* that was created in 1809 ... [and] refined in Denmark where an Office of the Ombudsman was established in 1953”.⁸

It is therefore apposite to point out that the Office of the Ombudsman was never explicitly mandated to deal with issues of human rights

3 DDN Nsereko, *Constitutional Law in Botswana*, 2nd ed, Gaborone, Pula Press (2010), p 211; further see generally EK Quansah, “The Ombudsman Arrives in Botswana: A Note on the Ombudsman Act, 1995”, 39 *Journal of African Law* (1995), p 222; CM Fombad, “The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act, 1995”, 27:1 *Journal of Southern African Studies* (2001), pp 57-77.

4 Ombudsman Act, preamble.

5 Ombudsman Act, section 3(1).

6 Ombudsman Act, section 3(1)(a)-(b).

7 CM Fombad and D Sebudubudu, “The Framework for Curbing Corruption, Enhancing Accountability and Promoting Good Governance in Botswana”, in CM Fombad (ed), *Essays on the Law of Botswana*, Cape Town, Juta Publishers (2007), pp 86-96.

8 See note 3, p 211.

violations in Botswana. The *raison d'être* for the establishment of the Office was to address issues relating to injustice occasioned by public officials when carrying out their administrative functions.⁹ This notwithstanding, the Office of the Ombudsman is portrayed as performing the functions of a national human rights institution (NHRI). Accordingly, it should perhaps be assessed in the light of the Paris Principles, though it cannot be claimed that the Office was established in accordance with these principles, given the nature of its mandate as mentioned above (and discussed more fully below).

3 The nature of the Office of the Ombudsman

As noted, the Office of the Ombudsman was created for the purpose of addressing issues of maladministration; however, it is also described as an institution responsible for the promotion and protection of human rights in Botswana. Before assessing the basis of this conclusion, it is necessary to deal briefly with the provisions of the Ombudsman's Act that concern the powers and functions of the Office. In particular, sections 3(1) and (2) of the Act establish the following key functions of the Office of the Ombudsman:

- the Office of the Ombudsman may investigate any act taken by or on behalf of a government department or other authority to which the Act applies, such as local authorities;
- such an action shall be one taken by an official in the exercise of administrative functions of that department or authority; and
- the Office of the Ombudsman may investigate any complaint made by a member of the public who claims to have sustained injustice in consequence of maladministration.

The Office of the Ombudsman is precluded from investigating certain matters that are listed by the Act as falling outside its investigative mandate. Accordingly, it is precluded from dealing with or investigating complaints if, *inter alia*, the following circumstances apply to them:

- the aggrieved person has a right of appeal, reference or review to or before any lawfully established tribunal;¹⁰
- a person may approach the courts to seek resolution of the dispute in issue;¹¹
- the complaint concerns diplomatic matters;¹²

9 *Ibid*, p 210.

10 Ombudsman Act, section 3(2)(a).

11 *Ibid*, section 3(2)(b).

12 *Ibid*, section 4(a).

- the complaint concerns action taken for the purposes of protecting the security of the state or investigating crime, including action taken with respect to passports for either of those purposes.¹³

From these provisions, one can make three observations about the powers and functions of the Office of the Ombudsman. First, the Office is conferred with investigative powers as per the provisions of the Act. The Act has no further provisions that characterise the Office as anything more than an investigative body.

Secondly, the mandate of the Office is limited in that sections 3 and 4 of the Act provide for instances where the Office is precluded from investigating or is at liberty not to investigate a matter that has been reported. These limitations fall into three categories.

In the first are instances where the Ombudsman can refuse to investigate a matter because it is trivial, vexatious or was not reported on time.¹⁴ This is sound, and appears to ensure that the Office is not inundated with minor matters or matters that could not be resolved due to the passage of time.

In the second category are instances where the person alleging to have suffered an injustice arising from an administrative act has the option of approaching any tribunal or court for redress. The Ombudsman's Act hereby achieves two things: it indicates that judicial and quasi-judicial mechanisms (tribunals) should be given priority in issues of maladministration; and it ensures that the Office remains an administrative body as it is not called upon to make decisions involving issues of law, decisions that may otherwise be referred to the courts for further resolution, appeal or review – in other words, the decisions of the Ombudsman remain purely administrative and are seldom reviewed on the basis that they were wrong.

In the third category of limitations are matters that concern the executive's exclusive functions regarding national security and diplomatic relations – limitations that, on the face of it, are appropriate in that they prevent the Ombudsman from interfering in matters of high-level policy.

The third observation is that the Ombudsman may initiate an investigation in situations even where limitations of the second type above are present.¹⁵ An investigation, that is to say, can be initiated despite the

13 *Ibid*, section 4(b).

14 *Ibid*, section 3(5).

15 *Ibid*, section 3(3)(a).

availability of a remedy to an aggrieved citizen and where it is unreasonable to expect that the individual should or would resort to that remedy. Furthermore, the fact that it is open to an individual to approach the High Court for redress under section 18 of the Constitution (which relates to redress for contraventions of the provisions protecting fundamental rights and freedoms) does not preclude the Ombudsman from initiating an investigation.¹⁶ The latter qualification is dealt with in detail below.

From the above, it is clear that the functions of the Botswana Ombudsman are limited to investigating maladministration on behalf of a government department or other authority to which the Act applies. This is in consonance with the purpose for which the Act was promulgated by Parliament, and was confirmed as the position of the law by the High Court in *Ofentse Lepodisi & Another v Attorney-General & Another*:

The typical duties of an Ombudsman are to investigate complaints and referrals and make recommendations for remedying the injustice caused if he or she considers it necessary to do so ... As will have been noted from the above provisions, the thrust of the provisions concern remedies which are not available to those who complain that they had suffered from wrongful acts by a public body or official, which may be best described as “non-legal” remedies.¹⁷

The next issue to consider is the context within which the Office of the Ombudsman is said to be empowered to investigate and deal with complaints regarding human rights. First, there are scholars who assert that the traditional role of ombudsmen has widened over time to include the promotion and protection of human rights.¹⁸ Ayemi, for instance, argues that it does not matter how the institution was established and that ombudsmen “are as much human rights bodies as they are institutions for the advancement of administrative justice”.¹⁹

Secondly, the fact that the Office of the Ombudsman is allowed to investigate matters even in instances where an individual, pursuant to section 18 of the Constitution, can approach the High Court for redress

16 *Ibid*, section 3(3)(b).

17 Case No MAHLB-000234-11 (unreported), p 23.

18 BV Tigerstrom, “The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights” (1998), p 2; M Stephen and L Fallberg (eds), “Protecting Patients’ Rights: A Comparative Study of the Ombudsman in Healthcare”, *The International Ombudsman Yearbook* (2004), pp 3-56.

19 VO Ayeni, “Ombudsmen as Human Rights Institutions”, 13(4) *Journal of Human Rights* (2014), pp 498-511.

has been interpreted as giving it the mandate to deal with human rights issues.²⁰ Though not manifestly wrong, this is an extremely broad interpretation of section 3(3)(b) of the Act. As previously noted, an ordinary interpretation of this provision is simply that the Ombudsman is not precluded from investigating a matter because of the fact that an aggrieved person can approach the High Court for redress. The provision merely acknowledges the overlap between injustice occasioned by an administrative action and a violation of an individual's constitutional rights. In any case, it was clearly not the lawmaker's intention that the provision be interpreted so broadly.

3.1 The mandate of the Ombudsman

It is worth reiterating that the Office is mandated to investigate allegations of acts of injustices occasioned by maladministration; connected to that investigative mandate is a promotional mandate that allows it to engage in educational activities. It is not clear to what extent the Office deals with human rights reports and cases or what their nature is, given that it was never specifically mandated to handle such matters. If one were to go by the Office's interpretation of its mandate, one would conclude that it does indeed have a protective and promotional mandate as envisaged by the Paris Principles; however, the Office does not receive and preside over petitions, as is the case with other NHRIs established pursuant to these principles.

Such an understanding of the mandate of the Office of the Ombudsman is derived from a consideration of the totality of the Act's provisions. Specifically, section 8 of the Act provides that upon concluding his or her investigation and making a finding as to the commission of any injustice, the Ombudsman shall send a report of these findings and the recommendations thereto to the principal officer of the department or authority concerned.²¹ From a reading of section 8 of the Act, it appears that the injustice should be in consequence of maladministration.

20 Generally, human rights in Botswana are actionable in terms of section 18 of the Constitution of Botswana as read with sections 3-16 of the Constitution. Section 18(1) of the Constitution of Botswana provides: "If any person alleges that any of the provisions of section 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress".

21 Section 8 of the Act provides: "(1) After conducting an investigation under this Act, the Ombudsman shall send a report of the results of the investigation to the principal officer of the department or authority concerned and if he is of opinion that injustice

What is clear from the foregoing is that the Ombudsman, after conducting an investigation, makes a recommendation as to what he or she thinks is fit for remedying the injustice caused. In the event that the recommendation is not acted upon, all the Ombudsman does is submit a special report to the National Assembly. Neither the Act nor any other law prescribes how the National Assembly should deal with this report. In other words, it is under no obligation to implement and/or enforce the Ombudsman's recommendations; the department or authority concerned is also under no such obligation.

The provision in section 8 is not couched, for example, in a similar way to comparable provisions in the Constitution of South Africa, which were interpreted by the Constitutional Court in *Economic Freedom Fighters & Others v Speaker of the National Assembly & Others*.²² In that matter, the Court held that the failure by President Jacob Zuma to comply with the remedial action taken against him by the Public Protector in her report was inconsistent with section 83(b) of the Constitution as read with sections 181(3) and 182(1)(c) of the Constitution and was consequently invalid. Section 182(1)(c) of the Constitution of South Africa gives the Public Protector the power, as regulated by national legislation, "to take appropriate remedial action" in the exercise of her powers. In Botswana, there is no such provision, or a provision to the same effect, in either the Constitution or the Ombudsman's Act.

3.2 The independence of the Ombudsman

The Office of the Ombudsman is envisaged as an independent entity that monitors the acts of public servants and other authorities in the discharge of their functions. The expectation that it should be an independent institution is borne of the fact that similar institutions the world over are deemed free of government or executive influence. Unfortunately, this is not necessarily so. As is the case with many such institutions, the independence of the Office of Ombudsman is undermined by weaknesses in its framework of enabling legislation and a lack of political will to ensure the success of the institution. Furthermore, the practice of incumbent

has been caused to the person aggrieved in consequence of maladministration, he shall make such recommendations as he thinks fit for remedying the injustice caused.
(2) Where the Ombudsman has made a recommendation under subsection (1) and within a reasonable time thereafter no action has been taken which appears to him adequately to remedy the injustice, he may lay before the National Assembly a special report".

22 2017 (3) 580 CC.

office-holders itself sometimes erodes the independence and effectiveness of the institution.

On the face of it, section 9(1) of the Ombudsman's Act guarantees the independence of the Office by explicitly providing that "[i]n the discharge of his functions, the Ombudsman shall not be subject to the direction or control of any other person or authority and no proceedings of the Ombudsman shall be called in question in any court of law". The Act's guarantee of independence includes, by necessary extension, independence when exercising the self-imposed human rights mandate. Save for the fact that the Ombudsman shall submit annual reports to the President about the discharge of his or her functions,²³ there is no expectation that he or she is to be given direction or orders by any government official. This provision, in short, would give one the impression that the Office of the Ombudsman is indeed independent.

However, its independence may be undermined by the substantive application of section 7(5) of the Act.²⁴ This provision gives the Attorney-General the power to stop the Ombudsman from conducting investigations by issuing a notice that in his or her opinion, the disclosure of documents or information by the Ombudsman would be contrary to the public interest in relation to military defence, foreign affairs and internal security. In the event that the Attorney-General does this, the Ombudsman may not communicate any such information or document in the exercise of his or her duties. In section 7(4) the same applies to the proceedings of cabinet or any of its committees. All these provisions demonstrate the limitations that exist on the ability of the Office of the Ombudsman to conduct its investigations in terms of the Act.

Furthermore, the Ombudsman is designated as a Public Officer under the Public Service Act (PSA). A reading of the provisions of the PSA and Ombudsman's Act brings to light that the Office is subject to the supervision of the Permanent Secretary to the Office of the President, given that the Ombudsman is listed in the schedule as one of the offices to which the PSA applies. Section 8(1) and (2) make it clear that the Permanent Secretary to the President, who is the head of the public service, is

23 Ombudsman Act, section 9(2).

24 Section 7(5) reads: "The Attorney-General may give notice to the Ombudsman, with respect to any document or information specified in the notice, that in his opinion the disclosure of that document or information would be contrary to the public interest in relation to defence, external relations or internal security; and where such a notice is given nothing in this section shall be construed as authorising or requiring the Ombudsman or any member of his staff to communicate to any person for any purpose any document or information specified in the notice".

“[r]esponsible for the administration of the public service”, which includes the Office of the Ombudsman.

There thus seems to be tension between section 9(1) of the Ombudsman’s Act and section 8 of the PSA, which gives the Permanent Secretary to the President administrative powers over the entire public service, including the Ombudsman. Employees of the Office of the Ombudsman are hence subject to the PSA and its regulations and, by implication, to the administrative control of the Permanent Secretary to the President. Because the Ombudsman is not a direct creature of the Constitution, he or she lacks specific protection under the Constitution of Botswana. Both statutorily and practically, the Ombudsman is not as independent as one would have assumed and as section 9 of the Act would purport to be the case.

Thus, on a plain reading of the PSA and with due regard to the Ombudsman Act, the Ombudsman is not fully independent since he or she is subject to the control of the Permanent Secretary to the President, who, as a member of the executive, is a subordinate to the President in terms of section 47 of the Constitution.

3.3 The appointment and tenure of the Ombudsman

The independence of the Ombudsman is undermined significantly by the position of the law regarding the appointment of persons to this position. In terms of section 2 of the Ombudsman’s Act, the Ombudsman is appointed by the President after consultation with the Leader of Opposition (LOO) in the National Assembly. “Consultation” implies that the President is not compelled to heed the opinion of the Leader of Opposition, as such opinion is not binding on the President.

In contrast, section 193(4) of the South African Constitution provides that “[t]he President, on the recommendation of the National Assembly, must appoint the Public Protector ...”. Section 2 of the Ombudsman’s Act also differs from the constitutional provision dealing with the appointment of judges in Botswana. This stipulates that “[t]he other judges of the High Court shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission”.²⁵

25 Constitution of Botswana, section 96(2); the courts of Botswana recently grappled with the question whether or not the President is bound by the advice of the Judicial Service Commission (JSC) in the *Law Society of Botswana & Another v the President of Botswana &*

Unlike the case in these constitutional provisions, the appointment of the Ombudsman is a matter for the President alone, which flies in the face of the purported independence of the Ombudsman. There is thus no known process for the appointment of an Ombudsman other than the usual one in which the Office of the President simply announces a new appointment.

This clearly falls short of the requirements set out by the Paris Principles on the composition of national institutions dealing with human rights. Such institutions are expected to comply with principles of pluralism that apply to “the instances in society that are involved in human rights work at the national level”.²⁶ The Ombudsman was not created on the thinking that it would be required to comply with such standard, since it was not established in the first place as a human rights institution; nevertheless, the standard is applicable because the Office has assumed the mandate of dealing with human rights issues in Botswana.

As regards qualifications for appointment to the position of Ombudsman, the Act does not set out any. Instead, it sets several grounds that disqualify someone from being appointed as Ombudsman. Section 2(3) of the Act provides that members of the National Assembly, members of local authorities, candidates for election as a member of the National Assembly or local authority, and specially elected members to those bodies are disqualified from being appointed as Ombudsman.

The absence of clear qualification requirements is clearly contrary to the Paris Principles as well as to the principles of ensuring transparency and accountability during the process of appointing persons to such institutions. In the end, the absence of such clear qualifications allows the President to appoint whomsoever he or she wants to appoint to that office and irrespective of considerations of merit.

With regard to tenure, the Act provides that a person shall hold an office for a term of four years,²⁷ but it appears that in practice the Ombudsman can be appointed for more than one four-year term of office. A person’s removal from office is regulated by section 2(6) of the Ombudsman’s Act, which provides that the provisions of the Constitution

Others CACGB-031-16 (unreported), in which the court held that the President was not entitled to turn down the recommendation of the JSC and must follow its advice at all times.

26 Paris Principles.

27 Ombudsman Act, section 2(5).

as regards the removal of judges are equally applicable to the removal of the Ombudsman.

Section 2(6) does not go further to indicate how the Ombudsman is to be removed, considering that the provisions of the Constitution are tailor-made to suit the removal of judges from office. To the extent that there is lack of clarity as regards the removal of the Ombudsman from office, the security of tenure of the Ombudsman is potentially problematic. It is also necessary to point out that, to date, the provisions of section 2(6) of the Act have not been brought to life as there has never been an instance where the Ombudsman had to be removed from office.

3.4 The human and financial resources of the Office of the Ombudsman

One of the key indicators of the autonomy of institutions like the Ombudsman their financial independence. This is also a requirement under the Paris Principles in that they provide that an NHRI is expected to be financially independent. The reason for this, clearly, is to ensure that the institution is free from executive influence by way of control of finances. However, limited financial resources have greatly affected the overall effectiveness of the Office of the Ombudsman.

As far as financial autonomy is concerned, section 13 of the Act provides that:

[t]he administrative expenses of the [O]ffice of the Ombudsman, including such expenses and allowances as are authorized by the provisions of this Act shall, to such amount as may be sanctioned by Parliament, be paid out of the Consolidated Fund.

This provision presupposes that the Ombudsman is in control of his or her budget and able to allocate the finances availed by the state in a manner he or she considers appropriate. However, budget proposals for the Office of the Ombudsman are presented before the National Assembly by a minister who is a member of the executive branch of government. The National Assembly then decides how much the Ombudsman is to be granted for administrative expenses.

The Ombudsman's operational effectiveness may be further diluted, in part, by the fact that, insofar as human resource matters are concerned, the decision-maker is the Permanent Secretary, who is the head of the Public Service. As mentioned, the Office of the Ombudsman falls within the category of institutions under the direction and supervision of the

Permanent Secretary of the Office of the President. The Ombudsman's Act does not provide for human resource issues. In other words, it does not have a provision that governs the Ombudsman and his or her staff insofar as employment and/or labour issues are concerned. For example, it does not provide for the qualifications that are needed for people to be engaged by the Office of the Ombudsman. Necessarily, the staff contingent would have to be made up of people from varied backgrounds who possess the complementary skills that are required for the Office to function effectively.

In particular, as already noted, the Act does not also make provision for the qualifications of the Ombudsman. It sets out the grounds for disqualification,²⁸ but does not make stipulate what professional skills and knowledge appointees need to have. The inaugural Ombudsman was a lawyer by training, as was his successor, but not so with the third Ombudsman. She was a not a lawyer, although her successor in turn – the current Ombudsman – is, again, a lawyer.

The lack of a requirement that the Ombudsman be a trained legal professional was a subject of dispute in the *Ofentse Lepodise* case,²⁹ in which it was argued that the core duties of the Ombudsman and the director of management and legal services did not involve the exercise of technical expertise and skills in the discharge of their duties. Although they both possessed legal qualifications, it was argued that were excluded from being paid a scarce-skills allowance as they were not performing the duties of the skill in question, as required by the Public Service Management Directive No 2 of 2008 on Attraction and Retention Policy.

This policy introduced a scarce-skills allowance for certain groups in the public service. Lawyers, judges “and other legal professionals” on a specified salary scale were listed as eligible and initially enjoyed the scarce-skills allowance, but that was discontinued by Public Service Management Directive No 5 of 2010, which sought to exclude those officers whose core duties did not involve the daily usage of the skill acquired during their training.

Representatives of the affected group took this directive to the High Court on review and succeeded. Judge Mothobi observed that the practice

28 In terms of section 2(3)3 of the Act, “[a] person shall not be qualified to be appointed as Ombudsman if he is a member of the National Assembly, a member of any local authority, a candidate for election as a member of the National Assembly or a local authority nominated as such with his consent”.

29 See note 17.

of appointing an Ombudsman with a legal background should be encouraged even though it is not a statutory requirement. He stressed that this would obviate the need for the Ombudsman to approach the Attorney-General, who, as the government's principal legal advisor, may be well acting for or advising the government department under investigation.³⁰ Judge Mothobi noted furthermore that the appointment of lawyers to the Office of the Ombudsman is appropriate, given that officials in this institution have the same powers – as regards disclosure of evidence, summoning of witnesses, examining witnesses, administration of oaths and production of documents – as judges of the High Court.³¹

Judge Mothobi proceeded to conclude that, from his reading of the Act, the work carried out by the Ombudsman was “professional work requiring special knowledge to be understood”.³² While the President is entitled to appoint a non-lawyer as Ombudsman, Mothobi J correctly points out that such an appointment is not conducive to the proper implementation of the Ombudsman's Act. The fact that it remains an open possibility for a non-lawyer to be appointed is therefore one of the several weaknesses in the Act.

Furthermore, section 15 of the Act provides that “the Minister may make regulations for the purpose of carrying into effect the provisions of this Act and for prescribing anything which is required to be prescribed under this Act”. It is not clear who the envisaged minister is because the Act has no definition clause, nor does it state anywhere else who this minister is. Since the coming into force of the Act in 1997, there has never been any regulation which would apply to staff within the Ombudsman's office. The conditions of service of the staff in the Office of the Ombudsman are as set out under the Public Service Act and related documents.

At the time of writing, the Office of the Ombudsman is said to have a staff complement of about 100 people. They are based in Gaborone – which serves as the headquarters and is located in the southern part of the country – as well as in Francistown, in the north-central parts, and in Maun, in the north-western. It is also reported that the Office has about 25 investigators. In a context where this overall staff complement has to serve a population of a little more than two million, there is no indication that deliberate efforts are made to engage experts thoroughly trained in human

30 *Ibid*, pp 31-32.

31 *Ibid*, pp 31-32.

32 *Ibid*, pp 37-38.

rights law. However, the fact that the Office engages a substantial number of lawyers does alleviate this possible shortage to some degree.

3.5 Accessibility and relations with civil society

As mentioned, the Ombudsman has offices in Gaborone, Francistown and Maun. These are cities and towns which could be said to be points of convergence for citizens living in the wider regions adjacent to them. There is evidence to suggest that the Office is accessible, seeing as many complaints have been lodged with it over the years. The Office also travels across the country to disseminate information to the populace, in addition to which it has a Facebook page entitled *Ombudsman – Botswana*. On this page, the Office informs the public of, inter alia, the results of its investigations.

These efforts have increased the visibility of the Office and made people aware that it can offer redress for injustices they have suffered. Furthermore, it has a cordial relationship with civil society in general but particularly so with the Law Society of Botswana.

3.6 Public accountability

The Paris Principles require that, to be effective, an NHRI should be independent yet exhibit a certain degree of accountability.³³ In essence this means that the Office of the Ombudsman should not only hold other institutions accountable but be accountable itself with regard to its operations, financial dealings and adherence to the rules in its establishing law and documents related thereto. The Office, that is to say, is not exempt from complying with the various standards the government has set.

It has been rightly pointed out that “[b]esides legal financial accountability to the government and/or parliament, a NHRI also needs to find ways to be accountable to the public; in particular to those groups and individuals in society who are most vulnerable”.³⁴ Consistent with this principle and the fact that the Office of the Ombudsman is governed by the provisions of the PSA, section 6 of this Act speaks to the issue of accountability.

33 M Mehyar, “NHRIs’ Independence and Accountability: The Eighth Arab-European Human Rights Dialogue” (2013), available at <https://bit.ly/2XiMutb> (accessed 4 May 2019), p 7.

34 *Ibid*, p 8.

In setting out general principles and standards of public service, section 6(1)(b) provides, *inter alia*, that the employees of the Ombudsman shall “utilize Government resources at their disposal in an efficient, responsible and accountable manner”. Similar expectations are set out by the National Vision, the Public Service Charter, and codes of conduct for public officers. Section 7 of the PSA goes on to provide for the applicable human resource management standards; accordingly, among other things, any recruitment by the Ombudsman shall not be discriminatory in any manner or fashion.

For the Office of the Ombudsman to be accountable to the public, its processes and procedures have to be visible, transparent, consistent and rational. As such, the Office publishes annual reports of its financial position as well achievements for the year. The report is made available to the public and represents an attempt to ensure that the Office is accountable to the public. It is unfortunate that, over and above the minimal attention that the media and other government departments give these reports, the Ombudsman is not more proactive in publicising them.

By contrast, the Ombudsman’s special reports are not made available to the public at all as they may amount to a naming-and-shaming of non-compliant government departments. As noted, special reports come about as a result of a government or relevant authority’s failure to take remedial action as suggested by the Ombudsman.³⁵ The absence of public dissemination in such cases is a great shortcoming as it is inconsistent with the principles of transparency and accountability to which the Office of the Ombudsman is expected to adhere. The special reports should be made available to the public as they speak to the issue of compliance with the recommendations of the Office of the Ombudsman. Indeed, it is on the basis of the statistics and other information in the special reports that the public could glean whether or not the Ombudsman is indeed as effective as he or she purports to be.

4 Conclusion

Botswana’s political leadership seems to think that the Ombudsman has the mandate to handle disputes or matters related to human rights, whereas this is not the case, as this chapter has demonstrated. Clearly, its mandate is instead the narrower one of enhancing good governance in the delivery of government services. The Ombudsman has neither the broad mandate nor competence to deal with human rights issues; his or her

35 See generally Ombudsman’s Act, section 8(2).

independence from the government is suspect; and the institution lacks adequate investigative and remedial powers. It thus fails on most, if not all, of the criteria that the Paris Principles require an entity to meet so as to qualify as a human rights institution. It is just as well the government has decided to revise the Office's mandate and equip it with powers more appropriate for dealing with human rights violations.

However, numerous local actors are not in favour of this approach of enhancing the human rights mandate of the Office of the Ombudsman, and have called instead for the establishment of a separate, independent body with a clear mandate to promote and protect human rights in Botswana. The need for such an institution is not based on the presence of colossal violations of human rights, as might be the case in other parts of Africa. It arises rather from the fact that Botswana simply has no institution mandated to perform the functions of a national human rights commission established in accordance with the Paris Principles. On the whole, there is no reason why the country should not establish one, since this would very probably improve the protection of human rights.³⁶

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

The only institution that plays the role of an NHRI in Botswana is the Office of the Ombudsman. Even so, this is on the basis only of a very generous interpretation of the powers of the Ombudsman contained in section 3 of Chapter 2 of the Ombudsman Act. It states as follows:

- 3(1) Subject to the provisions of this section, the Ombudsman may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority, in any case where –
 - (a) a complaint is made to the Ombudsman by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken;
 - (b) the complaint is referred to the Ombudsman, with the consent of the person who made it, by the President, a Minister or any member of the National Assembly with a request to conduct an investigation thereon; and
 - (c) in any other circumstances in which the Ombudsman on his own motion considers it necessary to investigate the action on the ground that some person has or may have sustained such injustice.
- (2) Except as provided in this Act, the Ombudsman shall not conduct an investigation into any action in respect of which the person aggrieved has or had –
 - (a) a right of appeal, reference, or review to or before a tribunal constituted by or under any law in force in Botswana; or
 - (b) a remedy by way of proceedings in any court of law.
- (3) Notwithstanding the provisions of subsection (2), the Ombudsman –
 - (a) may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if he is satisfied that in the particular circumstances it is not reasonable to expect him to resort to or to have resorted to it; and
 - (b) shall not in any case be precluded from conducting an investigation in respect of any matter by reason only that it is open to the aggrieved person to apply to the High Court for redress under section 18 of the Constitution (which relates to redress for contraventions of the provisions for the protection of fundamental rights and freedoms).
- (4) In determining whether to initiate, continue or discontinue an investigation under this Act, the Ombudsman shall, subject to the proceeding provisions of this section, act in accordance with his own discretion; and any question whether a complaint is duly made under this Act shall be determined by the Ombudsman.
- (5) Without prejudice to the provisions of subsection (4), the Ombudsman may refuse to initiate, or may discontinue, any investigation if it appears to him that –
 - (a) the complaint is frivolous or vexatious or is not made in good faith;

- (b) the subject matter of the complaint is trivial;
 - (c) the person aggrieved has no sufficient interest in the subject matter of the complaint; or
 - (d) the making of the complaint has, without reasonable cause, been delayed for more than 12 months.
- (6) The authorities other than departments of Government to which this Act applies are –
- (a) any authority empowered to determine the person with whom any contract or class of contracts shall be entered into or on behalf of the Government of Botswana; and
 - (b) such other authorities as may be prescribed.
- (7) For the purposes of this Act, the Judicial Service Commission and the Public Service Commission shall not be regarded as departments of Government.
- (8) Where any person by whom a complaint might have been made under this Act has died or is for any reason unable to act for himself, the complainant may be made by his personal representatives or by a member of his family or other individual suitable to represent him.
- (9) Except as provided in subsection (8) a complaint shall not be entertained unless it is made by the person aggrieved himself.
- (10) Where a complaint or request for an investigation is duly made in accordance with the provisions of this Act and the Ombudsman decides not to investigate the action to which the complaint or request relates or to discontinue an investigation of that action, he shall inform the person or body of persons who made the complaint or request of his decision.