

CHAPTER 02:12
OMBUDSMAN

ARRANGEMENT OF SECTIONS

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Act 5, 1995.

An Act 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.

[Date of Commencement: 1st December, 1997]

1. Short title

This Act may be cited as the Ombudsman Act.

2. Appointment and tenure of office of Ombudsman

(1) For the purpose of conducting investigations in accordance with the provisions of this Act there shall be appointed an officer, to be known as the Ombudsman.

(2) The Ombudsman shall be appointed by the President after consultation with the Leader of the Opposition in the National Assembly.

(3) 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.

(4) The Ombudsman shall not perform the functions of any other public office, and shall not, without the approval of the President in each particular case, hold any other office of emolument other than the office of Ombudsman or engage in any occupation for reward outside of his office.

(5) Subject to the provisions of subsection (6), a person holding the office of Ombudsman shall vacate that office at the expiration of four years from the date of his appointment.

(6) The provisions of subsections (2) to (5) of section 97 of the Constitution (which relate to removal of High Court Judges from office) shall, with such modifications as may be considered necessary, apply to the office of Ombudsman.

3. Matters subject to investigation

(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 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 preceding 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 complaint 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.

4. Matters not to be investigated by Ombudsman

The Ombudsman shall not investigate any action or action taken in respect to any of the following-

- (a) matters certified by the President or a Minister to affect relations or dealings between the Government of Botswana and any other Government or any international organisation;
- (b) action taken for the purposes of protecting the security of the State or of investigating crime, including action taken with respect to passports for either of those purposes;
- (c) the commencement or conduct of civil or criminal proceedings in any court;
- (d) action taken in respect of appointments to offices or other employment in the service of the Government of Botswana or appointments made by or with the approval of the President or any Minister, and action taken in relation to any person as the holder or former holder of such office, employment or appointment;
- (e) action taken with respect to orders or directions to the Botswana Police Force or Botswana Defence Force or member thereof;
- (f) the grant of honours, awards or privileges within the gift of the President;
- (g) action taken in matters relating to contractual or other commercial dealings with members of the public other than action by an authority mentioned in section 3(6);
- (h) action taken in any country outside Botswana by or on behalf of any officer representing the Government of Botswana or any officer of that Government;
- (i) any action which by virtue of any provision of this Act or any other enactment may be enquired into by a court of law.

5. Manner of making complaint

(1) All complaints to, and requests for investigation by, the Ombudsman shall be made in writing direct to the Ombudsman.

(2) Notwithstanding the provisions of any other enactment, any complaint made to the Ombudsman by any person who is in legal custody or who is an inmate of any mental hospital or similar institution shall be forwarded unopened to the Ombudsman by the person in charge of the place where the complainant is detained or is an inmate.

6. Procedure in respect of investigation

(1) Where the Ombudsman proposes to conduct an investigation under this Act, he shall afford to the principal officer of any department or authority concerned, and to any other person who is alleged to have taken or authorized the action in question, an opportunity to comment on any allegations made to the Ombudsman in respect thereof.

(2) Every investigation shall be conducted in private but except as provided in this Act the procedure for conducting an investigation shall be such as the Ombudsman considers appropriate in the circumstances of the case.

(3) In conducting an investigation under this section, the Ombudsman may obtain information from such persons and in such manner, and make such enquiries, as he thinks fit, and may determine whether any person may be represented by counsel.

7. Evidence

(1) For the purposes of an investigation under this Act, the Ombudsman may require any Minister, officer or member of any department or authority concerned or any other person who is in his opinion is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such document.

(2) For the purposes of any such investigation the Ombudsman shall have the same powers as the High Court in respect of the attendance and examination of witnesses (including the administration of oaths and the examination of witnesses abroad) and in respect of the production of documents.

(3) No obligation to maintain secrecy or other restriction under the disclosure of information obtained by or furnished to persons in the public service imposed by any law in force in Botswana shall apply to the disclosure of information for the purposes of any investigation under this Act; and the State shall not be entitled in relation to any such investigation to any such privilege in respect of the production of documents or the giving of

evidence as is allowed in legal proceedings.

(4) No person shall be required or authorized by virtue of this section to furnish any information or answer any question or produce any document relating to proceedings of the Cabinet or any committee thereof; and for the purposes of this subsection a certificate issued by the Secretary to the Cabinet with the approval of the President and certifying that any information, question or document so relates shall be conclusive.

(5) 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 authorizing 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.

(6) Subject to subsection (3), no person shall be compelled for the purposes of an investigation under this Act to give any evidence or produce any document which he could not be compelled to give or produce in proceedings before the High Court.

8. Proceedings after investigation

(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 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.

9. Discharge of functions of Ombudsman

(1) In 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.

(2) The Ombudsman shall make an annual report to the President concerning the discharge of his functions, which shall be laid before the National Assembly.

10. Investigation not to affect departmental action

The conduct of an investigation by the Ombudsman shall not affect any action taken by the department or authority concerned, or any power or duty of that department or authority to take further action in respect of any matter which is the subject of the investigation.

11. Privilege of communication

For the purposes of the law of defamation, the publication, by the Ombudsman or by any member of his staff, of any report or communication and the publication to the Ombudsman or to any member of his staff, or to any member of the National Assembly in accordance with the provisions of section 5(1), of any complaint or other matter shall, if made in accordance with the provisions of this Act, be absolutely privileged.

12. Expenses and allowances

The Ombudsman may pay to any person by whom a complaint has been made or to any person who attends or furnishes information for the purposes of an investigation, sums in respect of expenses properly incurred or by way of allowance or compensation for loss of time, in accordance with such scales and subject to such conditions as may be prescribed.

13. Administrative expenses

The administrative expenses of the office 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.

14. Offences

Any person who-

- (a) without lawful justification or excuse, wilfully obstructs, hinders or resists the Ombudsman or any other person in the exercise of his functions under this Act;
- (b) without lawful justification or excuse, refuses or wilfully fails to comply with any lawful requirement of the Ombudsman or any other person under this Act;
- (c) wilfully makes any false statement to, or misleads or attempts to mislead the Ombudsman or any other person in the exercise of his functions under this Act;
- (d) otherwise than in the course of his duty, directly or indirectly, by himself or by any other person, in any manner whatsoever wilfully influences or attempts to influence the decision of the Ombudsman with regard to any complaint made to him or to any investigation made by him,

shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding P200 or to imprisonment for a term not exceeding one year, or to both.

15. Regulations

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.