

## OMBUDSMAN ACT 2004

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**BERMUDA**

**2004 : 32**

### **THE OMBUDSMAN ACT 2004**

Date of Assent: 17 December 2004

Operative Date: 1 May 2005

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SCHEDULE

WHEREAS the office of Ombudsman was established in 2001 by section 93A of Schedule 2 to the Bermuda Constitution Order 1968: and

WHEREAS it is expedient to enact the Ombudsman Act 2004 to prescribe the functions and jurisdiction of the Ombudsman and related matters:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

### **Short title**

1 This Act may be cited as the Ombudsman Act 2004.

### **Interpretation**

2 (1) In this Act, unless the context otherwise requires —

"administrative action" means any action taken by or on behalf of an authority in the exercise of its administrative functions and includes —

- (a) a decision or an act;
- (b) a failure to make a decision or do an act, including a failure to provide reasons for a decision;
- (c) a recommendation;
- (d) any action taken because of a recommendation; or
- (e) a failure to make a recommendation;

"authority" means a department or other body to which this Act applies;

"complainant" means a person who makes a complaint under this Act;

"Constitution" means the Constitution of Bermuda contained in Schedule 2 to the Bermuda Constitution Order 1968;

"Court" means the Supreme Court;

"investigation" means an investigation under this Act;

"maladministration" means inefficient, bad or improper administration and, without derogation from the generality of the foregoing, includes —

- (a) unreasonable delay in dealing with the subject matter of an investigation;

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- (b) abuse of any power (including any discretionary power); or
- (c) administrative action that was —
  - (i) contrary to law;
  - (ii) unfair, oppressive or improperly discriminatory or based on procedures that are unfair, oppressive or improperly discriminatory;
  - (iii) based wholly or partly on a mistake of law or fact or irrelevant grounds;
  - (iv) related to the application of arbitrary or unreasonable procedures; or
  - (v) negligent;

"Ombudsman" means the person for the time being appointed by the Governor to the office of Ombudsman established by section 93A of the Constitution;

"Public Service Commission" means the Commission established under section 81 of the Constitution.

(2) Any reference in this Act to an authority includes a reference to the officers and employees of that authority.

### **Application of Act**

3 This Act applies to the following authorities —

- (a) government departments;
- (b) public authorities;
- (c) Government boards; and
- (d) any other corporation or body —
  - (i) which is established by Act of the Legislature or in any other manner by a Minister; or
  - (ii) whose revenues derive directly from money provided by the Legislature or a fee or charge of any other description authorised by the Legislature.

### **Office of Ombudsman**

4 (1) The Governor shall, in accordance with section 93A of the Constitution, by Instrument under the Public Seal, appoint a person to the office of Ombudsman.

(2) The Ombudsman shall have an official seal.

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(3) The salary of the Ombudsman shall be charged on the Consolidated Fund.

(4) Subject to such exceptions as the Governor acting in his discretion may authorise by directions in writing, the Ombudsman shall not hold any office of profit other than that of Ombudsman or otherwise engage in any other occupation for reward outside the duties of the office of Ombudsman.

### **Functions and jurisdiction**

5 (1) The functions of the Ombudsman are —

- (a) to investigate any administrative action of an authority for the purpose of deciding whether there is evidence of maladministration on the part of the authority;
- (b) pursuant to an investigation, to make recommendations to the authority concerning any administrative action that formed the subject of the investigation and, generally, about ways of improving its administrative practices and procedures; and
- (c) to perform such other functions as may be conferred on him under this or any other Act.

(2) Subject to this Act, the Ombudsman may investigate any administrative action taken by or on behalf of an authority —

- (a) where a complaint is made to him by a person who claims to have been treated unjustly as a result of maladministration arising from or in connection with the administrative action taken by the authority; or
- (b) on his own motion, notwithstanding that no complaint has been made to him, where he is satisfied that there are reasonable grounds to carry out an investigation in the public interest.

(3) The Ombudsman may conduct an investigation notwithstanding a provision in any enactment to the effect that —

- (a) any decision, recommendation or act of an authority shall be final;
- (b) no appeal shall lie in respect thereof; or
- (c) no proceeding of an authority shall be challenged, reviewed, quashed or called in question.

(4) If a question arises about the Ombudsman's jurisdiction to investigate a case, the Ombudsman or complainant may apply to the Court for an order declaratory of the Ombudsman's jurisdiction.

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### **Restrictions on jurisdiction to investigate**

6 (1) Where there is under any enactment a right of appeal or objection to a tribunal or a right to apply to a Court for a remedy in respect of administrative action taken by an authority, the Ombudsman shall not investigate such action —

- (a) until after that right of appeal, objection or application has been exercised and determined; or
- (b) until after the time limit for the exercise of that right of appeal, objection or application has expired.

(2) Notwithstanding subsection (1), the Ombudsman may investigate any administrative action of an authority in circumstances where the complainant has or had such right or remedy, if he is satisfied that in the particular circumstances it is not reasonable to expect the person to resort or to have resorted to it.

(3) This Act does not authorise the Ombudsman to undertake any investigation that relates to any action or matter specified in the Schedule.

(4) The Premier may, by order subject to the affirmative resolution procedure, amend the Schedule to add, delete or otherwise vary any entry therein.

### **Making a complaint**

7 (1) A complaint to the Ombudsman about any administrative action of an authority —

- (a) shall be made by the person aggrieved, but may be made on his behalf by a member of his family or other suitable person if the person by whom the complaint might have made is unable to act for himself;
- (b) may be made orally, electronically or in writing; and
- (c) shall be made within one year after the day the complainant first had notice of the administrative action.

(2) Where a complaint is made to the Ombudsman, he shall record—

- (a) the complainant's name, address and telephone number;
- (b) the subject matter of the complaint; and
- (c) the date when the complaint was made.

(3) Where a person who is detained in custody or otherwise confined in an institution informs the person in charge or another person performing duties in connection with his detention or confinement, that

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he wishes to make a complaint to the Ombudsman, the person so informed —

(a) shall take all steps necessary to facilitate the making of the complaint including the provision of an unsealed envelope; and

(b) without delay, shall send such envelope to the Ombudsman, sealed.

(4) A communication from the Ombudsman to a person confined or in custody as described in subsection (3) shall be forwarded to that person in a sealed envelope.

(5) The Ombudsman shall write to a complainant acknowledging receipt of the complaint.

### **Preliminary inquiries**

8 For the purpose of determining whether to undertake an investigation, the Ombudsman may conduct such preliminary inquiries as he considers appropriate.

### **Decision not to investigate**

9 (1) The Ombudsman may decide not to investigate a complaint if he is satisfied that —

(a) the complainant knew of the administrative action complained against more than one year before the date when the Ombudsman received the complaint;

(b) the law or existing administrative procedure provides a remedy adequate in the circumstances for the complainant and, if the complainant has not availed himself of the remedy, there is no reasonable justification for the failure to do so; or

(c) the complaint is frivolous, vexatious or not made in good faith.

(2) The Ombudsman may decide not to further investigate a complaint if —

(a) the complainant has abandoned the complaint —

(i) by failing to advise the Ombudsman of a current address or a telephone number at which the Ombudsman can contact him; or

(ii) by failing to respond after a reasonable number of attempts by the Ombudsman to contact him;

(b) the complainant withdraws the complaint; or

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(c) the complaint is settled or is successfully dealt with by mediation.

(3) Where the Ombudsman decides not to investigate or further investigate a complaint, he shall notify the complainant and the authority of his decision and give reasons in writing for the decision.

(4) The Ombudsman may indicate with the notification under subsection (3) any other recourse that may be available to the complainant.

### **Mediation**

10 (1) The Ombudsman may decide to deal with a complaint by mediation under this section if he is of the opinion, having regard to all the circumstances of the case, that mediation is suitable in such circumstances.

(2) The Ombudsman may authorise any person appointed under section 18 as a mediator in any mediation.

(3) Participation in the mediation by the authority that is the subject of the investigation and the complainant is voluntary, and any party may withdraw at any time.

(4) The mediator may decide to terminate the mediation at any time and, where he does so, he shall give reasons for his decision.

(5) If an attempt to deal with a complaint by mediation under this section is unsuccessful —

(a) the complaint is to be treated under this Act as if the mediation had not taken place; and

(b) the mediator is excluded from participating as an investigating officer in any subsequent investigation of the complaint.

(6) Anything said or admitted during the mediation and any document prepared for the purposes of such mediation —

(a) shall not be admissible in evidence in any subsequent investigation of the complaint that is the subject of the investigation unless the person who said or admitted the thing, or to whom the document related, consents to its admission; and

(b) shall not be admissible in evidence against any person in any court or at any inquiry or in any other proceedings,

and no evidence in respect of the mediation may be given against any person.

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### **Notice of intention to investigate**

11 (1) If the Ombudsman decides to conduct an investigation he shall, before commencing the investigation, give a senior officer of the authority that is the subject of the complaint and the complainant notice, in writing, under subsection (2).

(2) The notice shall —

- (a) inform the senior officer and the complainant of the Ombudsman's intention to conduct the investigation;
- (b) identify the administrative action that forms the subject of the investigation; and
- (c) inform the senior officer and complainant in general terms of the Ombudsman's powers in respect of an investigation.

### **Investigations**

12 (1) Every investigation by the Ombudsman shall be conducted in private.

(2) When conducting an investigation, the Ombudsman —

- (a) shall not be bound by the rules of evidence but shall comply with the rules of natural justice;
- (b) may obtain information from such persons, and in the manner, he considers appropriate;
- (c) may make such inquiries as he considers appropriate; and
- (d) may, on giving reasonable notice to a senior officer in the authority the subject of the investigation and at any reasonable time —
  - (i) enter upon any premises occupied by the authority and inspect the premises; and
  - (ii) subject to sections 13 and 14, carry out therein any investigation which is within his jurisdiction.

(3) If, during the course of an investigation or thereafter, the Ombudsman is of the opinion that there is evidence of any breach of duty or misconduct on the part of any officer or employee of any authority, or of an offence, he shall refer the matter to an appropriate authority for further consideration.

(4) Where the Ombudsman makes a reference to an appropriate authority under subsection (3), proceedings under this Act with respect to any investigation are stayed pending consideration of the matter by the appropriate authority.

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(5) Subject to the provisions of this Act, the Ombudsman may regulate investigations and proceedings under this Act in such manner as he sees fit.

### **Evidence**

13 (1) Subject to this Act, for the purposes of an investigation the Ombudsman —

(a) may require any officer or member of the authority that is the subject of the investigation, the complainant or any other person who is in his opinion able to provide information or produce documents relevant to the investigation to give such information or produce such documents; and

(b) may summon before him and examine on oath or affirmation any person referred to in paragraph (a).

(2) For the purposes of such investigation, the Ombudsman shall have the same powers as the Court in so far as those powers relate to the attendance and examination of persons (including the administration of oaths or affirmations) and in respect of the production of documents.

(3) The Ombudsman shall not require —

(a) any person to furnish any information or answer any question —

(i) relating to proceedings or deliberations of the Cabinet or any committee of the Cabinet;

(ii) that might prejudice the security, defence or international relations of Bermuda; or

(iii) that might prejudice the investigation or detection of offences;

(b) any person to produce so much of any document as relates to such proceedings or that might prejudice the matters mentioned in paragraph (a);

(c) any Minister or Junior Minister to furnish any information or answer any question.

(4) For the purposes of subsection (3 )(a)(i) a certificate by the Secretary to the Cabinet with the approval of the Premier and certifying that any information, question, document or part of a document so relates shall be conclusive.

### **Protection and privileges of witnesses**

14 (1) Every person shall have the same privileges in relation to the giving of information to the Ombudsman, the answering of questions

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put by the Ombudsman, and the production of documents and things to the Ombudsman, as witnesses have in the Court.

(2) Compliance with any requirement of the Ombudsman under section 13 —

(a) is not a breach of any relevant obligation of secrecy or non-disclosure, or of the enactment or provision by which that obligation is imposed; and

(b) no person shall be liable to prosecution for an offence against any enactment by reason only of that person's compliance with any requirement of the Ombudsman under that section.

(3) Except in proceedings for perjury within the meaning of the Criminal Code in respect of sworn testimony given by a person before the Ombudsman, or for an offence against section 25 or 26 —

(a) no statement made or answer given by any person in the course of any investigation by or proceedings before the Ombudsman shall be admissible in evidence against that or any other person in any court or in any inquiry or other proceeding; and

(b) no evidence in respect of proceedings before the Ombudsman shall be given against any person.

(4) No person shall discriminate against another person in any of the ways specified in section 8 of the Human Rights Act 1981 because that other person —

(a) complains, gives evidence or otherwise assists with the inquiry, investigation or reporting of a complaint or other proceedings under this Act; or

(b) discloses information to the Ombudsman about suspected maladministration on the part of an authority.

(5) Where the Ombudsman has reasonable grounds for believing that any person has contravened subsection (4), he may, with the consent of that person, refer the matter to the Human Rights Commission for consideration.

### **Procedure after investigation**

15 (1) If, at the conclusion of an investigation, the Ombudsman determines that there is no evidence of maladministration on the part of the authority that is the subject of the investigation, he shall record his decision and the reasons in writing and, as soon as is reasonable, notify both the complainant and the authority thereof.

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(2) The Ombudsman may indicate with the notification under subsection (1) any other recourse that may be available to the complainant.

(3) If, at the conclusion of an investigation, the Ombudsman decides that there is evidence of maladministration on the part of the authority, the Ombudsman shall report his decision to the authority and the complainant and make such recommendation to the authority as he sees fit.

(4) Without restricting subsection (3), the Ombudsman may recommend that —

- (a) a matter should be referred to an appropriate authority for further consideration;
- (b) an omission or a delay should be rectified;
- (c) a decision or recommendation should be cancelled or altered;
- (d) reasons should be given;
- (e) a practice, procedure or course of conduct should be altered; or
- (f) an enactment should be reviewed.

### **Authority to notify Ombudsman of steps taken**

16 (1) Where the Ombudsman makes a recommendation to an authority under section 15(3) —

- (a) the authority shall notify the Ombudsman, in writing, within twenty business days of receipt of the recommendation, of the action that has been taken or is proposed to give effect to the recommendation;
- (b) where the authority has taken no action within twenty business days of receipt of the recommendation or does not propose to take any action, the authority shall give reasons, in writing, for failure to implement the recommendation.

(2) The Ombudsman may, if he thinks fit in the circumstances of a particular investigation, in writing, extend the time period specified in subsection (1).

(3) If within the time period specified in this section, the authority —

- (a) fails to notify the Ombudsman of the action that has been taken or is proposed; or
- (b) (i) has taken no action; or

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- (ii) has taken action that in the Ombudsman's opinion is inadequate or inappropriate,

the Ombudsman, after considering any reasons given by the authority, may submit a special report under section 24(2).

### **Adverse comment**

17 (1) The Ombudsman shall not —

- (a) in any recommendation given under section 15(3); or  
(b) in any report made under section 24,

make any statement that is adverse to any authority or person unless that person has been given an opportunity to be heard.

(2) A person to whom subsection (1) applies may be represented at the hearing by a barrister and attorney or any other person.

(3) In this section, "barrister and attorney" means a person admitted and enrolled as a barrister and attorney under section 51 of the Supreme Court Act 1905.

### **Staff**

18 (1) Without prejudice to subsection (2), there shall be appointed to assist the Ombudsman in the discharge of his functions such number of public officers as may be required.

(2) The Ombudsman may, in addition, engage from time to time such technical or professional advisers as he considers necessary to assist him in the discharge of his functions.

(3) Every person appointed under this section is subject to the Ombudsman's direction and control in the performance of functions under this Act.

### **Delegation**

19 (1) Subject to subsection (2), anything that is to be done by the Ombudsman, may be done by a duly authorised member of the Ombudsman's staff.

(2) The delegation of the Ombudsman's functions provided for by subsection (1) does not extend to the expression of an opinion on any accounts, or to the signing or submission of any report under section 24.

### **Ombudsman and staff to maintain secrecy**

20 (1) The Ombudsman and every person appointed under section 18 shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions and shall not communicate

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any such matter to any person except for the purpose of carrying out functions under this Act.

(2) Information or documents obtained by the Ombudsman or persons engaged or employed under section 18 in the course of or for an inquiry or investigation shall not be disclosed except for the purpose of —

- (a) a reference to an appropriate authority under section 12(3);
- (b) a report to the Legislature under section 24; or
- (c) proceedings under section 25 or 26.

### **Privilege**

21 (1) No proceedings, civil or criminal, shall lie against the Ombudsman or any person appointed under section 18 in respect of anything done or omitted to be done or reported or said in the performance or intended performance of their functions under this Act unless it is shown that the Ombudsman or person acted in bad faith.

(2) Neither the Ombudsman or any person appointed under section 18 shall be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to their knowledge in the exercise of their functions under this Act.

(3) Anything said or any information given or any document or thing produced by any person in the course of any investigation conducted by, or proceedings before, the Ombudsman under this Act shall be privileged in the same manner as if the investigation or proceedings were proceedings in the Court.

### **Protection of title**

22 No person other than the person for the time being appointed as the Ombudsman may —

- (a) use the title "Ombudsman"; or
- (b) hold himself out to be the Ombudsman.

### **Appropriation of funds; accounts**

23 (1) All salaries, other than that of the Ombudsman, all allowances and other expenditure payable or incurred under this Act, shall be payable out of money appropriated by the Legislature for the purpose.

(2) The Ombudsman shall be designated as controlling officer in respect of estimates of expenditure approved in relation to the office of Ombudsman.

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(3) The Ombudsman shall cause proper accounts to be kept and maintained of all the financial transactions with respect to the office of the Ombudsman and shall prepare in respect of each financial year, a statement of such accounts in such form as the Accountant General may direct.

(4) The accounts of the Ombudsman shall be audited and reported on annually by the Auditor-General, and for that purpose the Auditor-General or any person authorised by him in that behalf shall have access to all books, records, returns and other documents relating to such accounts.

### **Annual and special reports**

24 (1) The Ombudsman shall, as soon as practicable and in any case within six months after the end of each year, prepare a report on the performance of his functions under this Act during that year.

(2) Where —

- (a) any administrative action that is under investigation is in the opinion of the Ombudsman of public interest; or
- (b) the Ombudsman has made a recommendation under section 15(3) and within the period specified no, or in his opinion no adequate, action has been taken by the authority to remedy the administrative action complained against,

then the Ombudsman may prepare a special report on the investigation.

(3) The Ombudsman shall address and deliver his annual report and any special report made under this section to the Speaker of the House of Assembly, and send a copy of the report to the Governor and the President of the Senate.

(4) Where any part of a report deals with any matter concerning an authority for which a Minister is charged with responsibility, the Ombudsman shall also send copies of that part or those parts of the report to that Minister for his information.

### **Obstruction and contempt**

25 (1) If any person without lawful excuse —

- (a) obstructs the Ombudsman in the performance of his functions under this Act; or
- (b) does any act or makes any omission in relation to an inquiry or investigation under this Act which, if that inquiry or investigation were a proceeding in the Court, would constitute the offence of contempt of Court,

that person commits the offence of contempt under this Act.

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(2) Where a person commits an offence under subsection (1), the Ombudsman may certify the offence to the Court.

(3) Where an offence is certified under subsection (2), the Court may inquire into the matter.

(4) After hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, the Court may deal with him in any manner in which the Court could deal with him if he had committed the like offence in relation to the Court.

### **Offences**

26 (1) A person commits an offence if he does any of the following —

(a) intentionally makes a false statement to, misleads or attempts to mislead the Ombudsman or another person in the exercise of any function or power conferred by this Act; or

(b) discloses information or documents in contravention of section 20.

(2) Any person who commits an offence contrary to subsection (1) is liable on summary conviction to a fine not exceeding \$1,000.

### **Savings**

27 Except as otherwise provided in this Act, nothing in this Act shall be construed as limiting or affecting any right of appeal, objection or other remedy or privilege given to any person by any other law.

### **Transitional**

28 Any complaint or other proceedings in respect of administrative action of an authority to which this Act applies that was filed before the commencement of this Act shall be dealt with under the procedures in operation on the date the matter or proceeding was filed.

### **Commencement**

29 This Act comes into operation on such day as the Premier may appoint by notice published in the Gazette.

## **SCHEDULE**

(section 6(3))

### **ACTIONS NOT SUBJECT TO INVESTIGATION**

1 Administrative action which, by virtue of any provision of the Constitution, may not be inquired into by any court.

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2 Any administrative action taken by the Cabinet or by a Minister or a Junior Minister.

3 Any exercise of the power by the Governor to pardon persons convicted of criminal offences or commute their penalties.

4 Administrative action taken for the purposes of investigating crime or protecting the security of Bermuda.

5 The commencement or conduct of any proceedings, whether civil or criminal, before a court of law or tribunal in Bermuda, including any decision whether or not to prosecute any person for an offence.

6 Any administrative action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters in relation to service in any office or employment in the public service or under any authority.