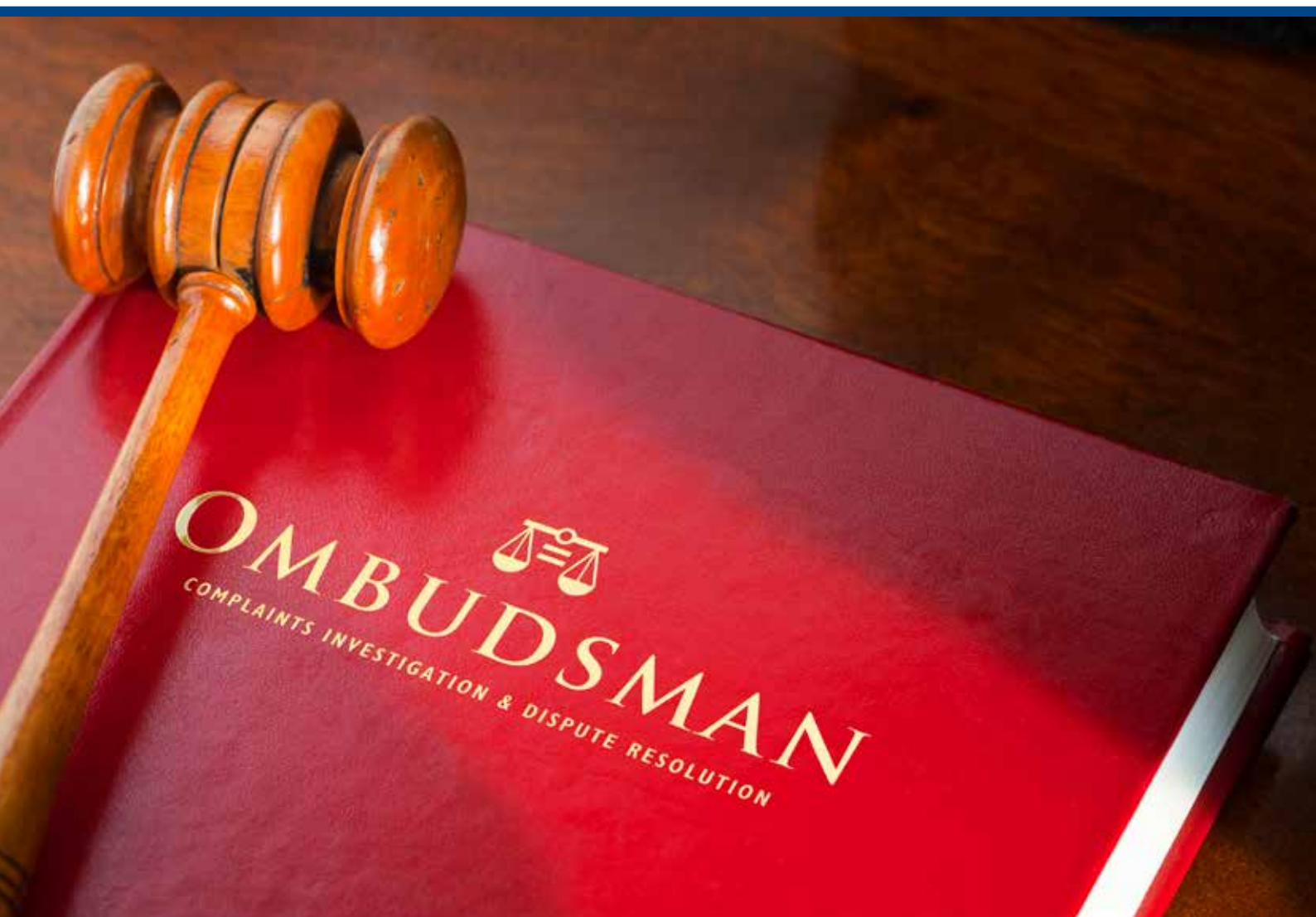




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# Ombudsman schemes and effective access to justice: A study of international practices and trends

October 2018

Julinda Beqiraj, Sabina Garahan and Kelly Shuttleworth



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# Executive summary

Access to justice is both a fundamental right in itself and a precondition for the enjoyment of other rights. Its conceptualisation requires the inclusion of dispute resolution mechanisms as part of both formal and informal justice institutions, especially in the wake of increasing awareness of the limitations of courts and tribunals as redress mechanisms. Against this background, this report seeks to identify existing and emerging worldwide practices and trends in the development and use of the ombudsman structure, to bridge the gaps created by formal, expensive and lengthy dispute resolution processes.

Ombudsman offices either operate within a general remit or focus their mandate on specific groups (eg, women, children or consumers), or sectors (eg, finance, banking, competition or telecommunications), and can address complaints from individuals, as well as act to investigate, review and address individual or systemic violations or maladministration.

The report's main findings, some of general application and some referring specifically to the examined areas, show that:

1. Ombudsman schemes have become a significant and permanent feature of legal systems across the world in recent decades, with the model developing from a constitutional accountability tool to an independent complaints mechanism widely used in the private sector.
2. Most ombudsman schemes use the inquisitorial model of dispute settlement, with alternative dispute resolution (ADR) methods, such as mediation and arbitration, also being employed within various models. The classical model involves a structure headed by an individual, while alternative models incorporate the development of a business code of practice, generally operated by the industry itself for members and clients, and accompanied by a dispute resolution mechanism (typically, conciliation or arbitration). By reason of the diversity of schemes, close attention should be paid to their substantial characteristics – although certain schemes may ostensibly possess the characteristics of an ombudsman structure: (i) independence; (ii) impartiality in conducting inquiries and investigations; and (iii) confidentiality (in accordance with the American Bar Association (ABA) definition), the body may operate under a different name. By contrast, schemes that bear the label of ‘ombudsman’ may lack one or more of these characteristics.
3. For ombudsman structures to be fully effective, citizens from all backgrounds and with differing needs must be both aware of, and comfortable using, ombudsman services. Research conducted for this report has shown that many ombudsmen have a strong appreciation of the challenges faced by certain groups in accessing their services and have taken steps to ensure that these difficulties are adequately handled without impacting on the quality of justice.
4. Ombudsman bodies dealing with corruption in the public sphere are operational in multiple jurisdictions. In order to properly check government and other public authorities' behaviour, such institutions need to be able to challenge corruption in a transparent and effective way.

5. Private sector ombudsmen, whether established by parliament, government or the industry they seek to regulate, were a later development compared with their public sector counterparts, with the model being established in the late 20th century. In line with consumerism and the unprecedented expansion of regulation, private sector ombudsmen have spread rapidly to offer consumers new paths for their complaints. The effectiveness of some company-run in-house ombudsman services, in particular, shows the relevance and potential of non-state funded ombudsmen where companies are able to develop bespoke complaints and dispute settlement models on the back of enhanced technology and online dispute resolution (ODR) platforms.
6. As more services have been digitised, the sectors they fall into have necessarily been redefined, resulting in a substantially increased remit for the authorities that regulate telecommunications and data transfer, most notably including internet services. The proliferation of data protection laws globally has led to the creation and empowerment of more data ombudsmen to monitor compliance, handle complaints and increase transparency. The imbalance of power between social media platforms and their users is vast, with stark information asymmetry and largely opaque business practices, as well as a marked tendency for social media platforms to move towards monopolisation of the market. As citizens become more aware of their data privacy rights and potential breaches thereof, data privacy could become a key future field of practice for ombudsmen and a worthwhile one in which to undertake public information campaigns.
7. Further research into the transparency and public accountability of ombudsman practices is required in order to determine whether or not such structures are generally meeting their stated aims of providing justice in an open and impartial manner.
8. The International Bar Association (IBA), with members who represent industry as well as consumers, enjoys a privileged position in sharing, supporting and promoting best practice guidelines in this sphere on the basis of the empirical evidence and review of existing academic and industry research collected in this report. The IBA also has a role to play in developing standards in this sector. The last conceptualisation of the essential features of an ombudsman was outlined by the IBA in its *Standards for the Establishment and Operation of Ombudsman Offices* in 2001 (building on the IBA's Ombudsman Resolution of 1974). Because the practice of ombudsman offices has changed vastly since 2001, updated guidelines would be both important and timely. The IBA has long been engaged in raising awareness on how ombudsman schemes fit into the wider regulatory framework that aims at developing and implementing cost-effective justice models, and is thus uniquely placed to develop, and possibly adopt, best practice guidelines.

# Chapter 1: Introduction

## 1.1 Context: The ombudsman institution and access to justice

The World Justice Project's 2018 Rule of Law Index shows that fundamental human rights have diminished in almost two-thirds of the 113 countries surveyed on the status of the rule of law around the world. At the same time, 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels' is one of the global goals set out by the international community in the 2030 United Nations Agenda for Sustainable Development. Access to justice, as encapsulated in Goal 16, is both a fundamental right in itself and a precondition for the enjoyment of other rights.

As in previous reports, we use a comprehensive concept of access to justice that embraces, among other aspects, access to dispute resolution mechanisms as part of both formal and informal justice institutions.<sup>1</sup> Where violations of rights occur, redress mechanisms typically include courts and tribunals. These are, however, often formal, expensive, slow and generally limited to considering individual cases. There is, therefore, a quest for, and great interest in, alternative or complementary justice mechanisms that address individual complaints (redress function) and also tackle systemic violation practices (redress/prevention function).

One of the most familiar schemes is that of an ombudsman that sits separately from the executive and judiciary – with either a general remit or a focused mandate on specific groups (eg, women, children or consumers) or sectors (eg, finance, banking, competition or telecommunications) – and can address complaints from individuals, and act to investigate, review and address individual or systemic violations or maladministration. The ombudsman is thus an institution that belongs to the category of informal justice processes, which is distinct from the justice system implemented through the courts. Although, traditionally, ombudsman offices have played a role in the context of administrative justice, which is concerned with good decision-making by government officials and the rights of citizens to challenge decisions affecting their rights or legitimate expectations effectively, more recently, they have also experienced exponential use in the private sector.

While the ombudsman model dates back as far as 3000 BC, when officials in **China** and **India** would receive complaints from individuals and provide redress, the modern notion of an ombudsman office stems from **Sweden**, which, in 1809, created a system whereby an official called the *justitieombudsman* would be appointed to look into citizens' complaints and report to Parliament. The model was then adopted in other Scandinavian countries: **Finland** in 1917 and **Denmark** in 1954.

In 1962, **New Zealand** became the first English-speaking country to introduce such an institution. The New Zealand Act has served as a model for ombudsman legislation in virtually all English-speaking common law jurisdictions that have embraced the concept. The ombudsman concept thenceforth rapidly expanded on a global scale, effectively since the 1960s.

The term 'ombudsman' has been variously translated into English as 'defender of', 'spokesman for', 'attorney for', 'grievance representative' or 'entrusted person', or as 'an officer of parliament entitled to investigate the administration and report back to parliament'.

Source: Anand Satyanand, 'The Ombudsman Concept and Human Rights Protection' (1999) 29 Victoria University of Wellington Law Review 19; Arthur Maloney, 'The Ombudsman Idea' (1979) 13 University of British Columbia Law Review 380; A N Patterson, 'The Ombudsman' (1963) 1 University of British Columbia Law Review 777.

1 See Julinda Beqiraj, Lawrence McNamara and Victoria Wicks, *Access to justice for persons with disabilities: From international principles to practice*, International Bar Association, October 2017.

There is a variety of institutional and jurisdictional arrangements, operational methods and decision-making processes related to ombudsman offices across numerous jurisdictions. This report focuses on ombudsman schemes whose mandate has a strong link with economic and social rights that are directly relevant to poverty reduction, economic growth and development. The study assesses the practices of multi-area ombudsman offices ensuring government accountability and sector-specific ombudsman schemes in three relevant areas – financial services, consumers and telecommunications – with models ranging from that of a ‘mediator’ to that of a ‘guarantor of rights’.

The report is part of a research project commissioned by the International Bar Association (IBA) Access to Justice and Legal Aid Committee (the ‘Committee’). The Committee has previously undertaken research into general barriers to, and solutions for, achieving access to justice; legal aid for the accused in criminal cases; redress for victims of violence; access to justice for children; and access to justice for persons with disabilities.<sup>2</sup> As a core ingredient of the rule of law, access to justice allows people to have their voices heard and is an essential enabler of social and economic development. The Bingham Centre for the Rule of Law, as an independent research institute devoted to the study and promotion of the rule of law worldwide, conducted the research and writing for the Committee, with the Committee participating in the process by way of proposing topics, supplying some data, providing comments on earlier drafts of the report and involving its membership and other IBA members in the collection of best practices.

The Committee’s goals in commissioning this work are to:

- understand and raise awareness of how ombudsman schemes fit into the wider regulatory framework that aims at developing and implementing cost-effective justice models;
- identify those characteristics that make certain ombudsman models particularly successful and may have a tangible impact on poverty reduction, growth and development, including for vulnerable groups; and
- provide a valuable tool for lawyers, practitioners and civil society organisations involved in the design of justice sector reforms.

In this way, the report forms part of the Committee’s ongoing activities of gathering, publicising and coordinating information from around the world on barriers to access to justice in different jurisdictions, and ways in which these barriers can be overcome.

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<sup>2</sup> Reports are available at [www.ibanet.org/PPID/Constituent/AccessToJustice\\_LegalAid/Projects.aspx](http://www.ibanet.org/PPID/Constituent/AccessToJustice_LegalAid/Projects.aspx) accessed 6 August 2018.



## 1.2 Aims

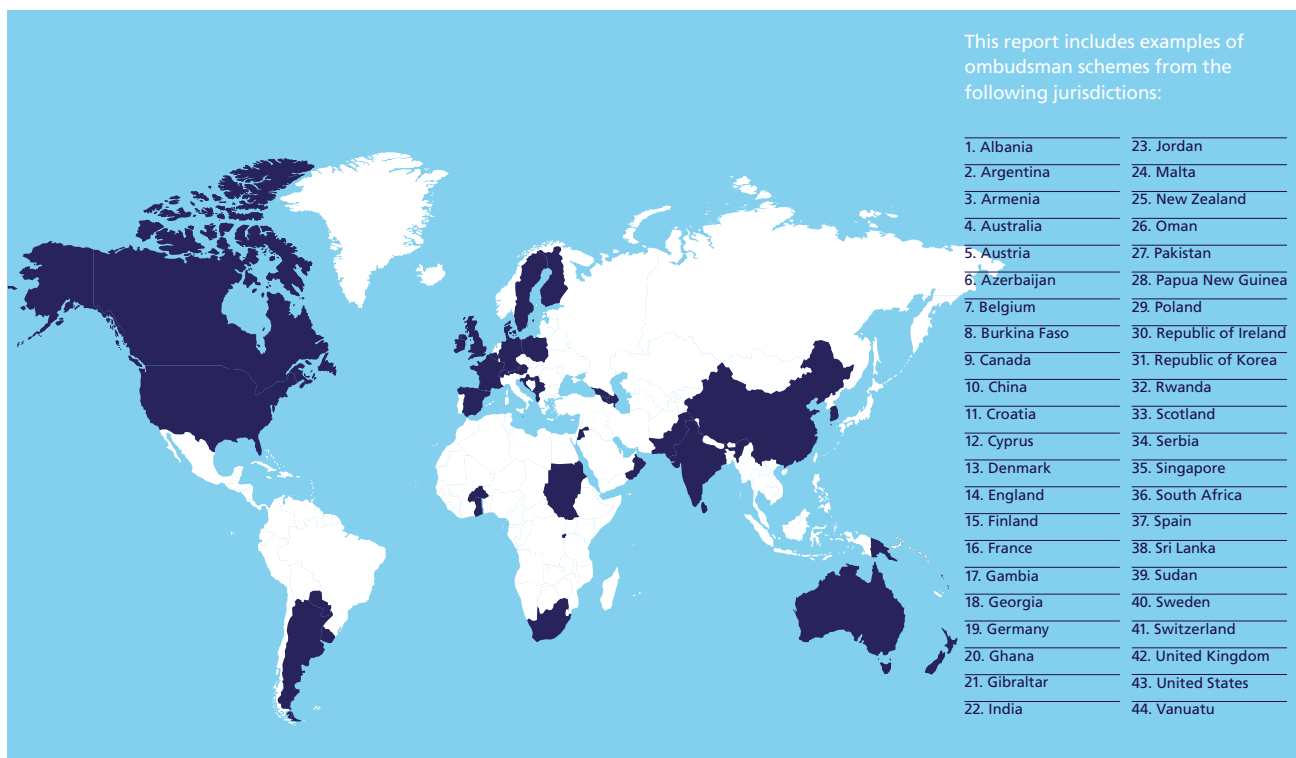
A study of differing ombudsman practices from across a range of legal systems and contexts, and an analysis of the powers and effectiveness of such systems, provides a timely opportunity to assess the role of ombudsman offices in providing access to justice for citizens.

In line with the goals identified above, the report aims to:

- assess the main challenges to the effective realisation of the mandates of these bodies in terms of efficiency, effectiveness and transparency;
- identify best practices of ombudsman offices from a wide range of states;
- explore the impact of ombudsman practices on individual rights; and
- review the effect that the introduction of ombudsman offices has had on access to justice overall.

## 1.3 Methodology

The report draws on an extensive desk-based review of ombudsman schemes across several jurisdictions, primarily analysing information provided by the offices themselves (eg, in annual reports). In its final chapter, the report also identifies key issues to be explored regarding the use of ombudsman schemes in the future.



Broader lists of ombudsman offices are available at:

- International Ombudsman Institute Directory 2018: [www.theioi.org/pdf/all-regions/2](http://www.theioi.org/pdf/all-regions/2); and
- financial services ombudsman schemes (banking, investments, insurance, credit, financial advice and pensions): [www.networkfso.org/links.html](http://www.networkfso.org/links.html).

## **1.4 Report structure and further resources**

The introduction in Chapter 1 places ombudsman offices in their context, and explains the aims and methodology of the report. Chapter 2 provides the relevant background on types and categories of ombudsman schemes. Chapter 3 analyses multi-area ombudsman schemes aimed at ensuring government accountability in providing public services. Chapter 4 covers specific sectors and ombudsman practices, in particular, financial services, consumers and telecommunications. Finally, Chapter 5 reflects on challenges and lessons for the future.

The report is available online from the websites of the IBA Access to Justice and Legal Aid Committee and the Bingham Centre for the Rule of Law.

# Chapter 2: Types and categories of ombudsman schemes

## 2.1 Positioning ombudsman services within the justice system

As already noted, ombudsman schemes can be broadly considered as part of administrative and civil justice.<sup>3,4</sup> They offer a form of alternative dispute resolution (ADR) that allows citizens to resolve their complaints about public services, or goods and services provided in the private sector. Ombudsman schemes have become a significant and permanent feature of legal systems across the world in recent decades, with the model developing from a constitutional accountability tool to an independent complaints mechanism widely used in the private sector.

Building on the Swedish model of an ombudsman as a dispute resolution mechanism outside the court system, the IBA identified, in the early 1970s, three salient features of this model:

‘[a]n office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports’.<sup>5</sup>

As mentioned earlier, the classical ombudsman model has undergone major developments in the course of its transplantation into a wide range of jurisdictions. First, the scope of an ombudsman’s mandate has expanded from purely redressing maladministration by government institutions to also considering whether human rights violations have taken place, with the purpose of remedying relevant power imbalances and enabling individuals to effectively enjoy economic and social rights. Respect for human rights is now seen to be an ‘intrinsic element’ of good administration.<sup>6</sup>

Second, as emerging markets developed, consumerism surged and a continuous liberalisation and privatisation of public services took place. Against this background, the ombudsman model was transposed from the public sector to the private sector, aimed at the protection of citizens against the undertakings of institutions such as banks, insurance companies and media companies.<sup>7</sup> Two developments have taken place in this regard. On the one hand, a number of independent bodies have been established by law as part of the regulatory framework of markets that were subject to privatisation (eg, energy, telecommunications and banking). On the other hand, the industries themselves have developed codes of conduct and ombudsman schemes to boost consumer confidence and maintain consumer trust.

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3 Mike Adler, ‘The Rise and Fall of Administrative Justice: A Cautionary Tale’ (2012) 8(2) *Socio Legal Review* 31.

4 Naomi Creutzfeldt, ‘What Do We Expect from an Ombudsman? Narratives of Everyday Engagement with the Informal Justice System in Germany and the UK’ (2016) 12(4) *International Journal of Law in Context* 437.

5 Ombudsman Committee, International Bar Association Resolution, Vancouver: International Bar Association, 1974.

6 Benny YT Tai, ‘The Hong Kong Ombudsman and Human Rights Protection Revisited’ (2000) 17 *Asia Pacific Law Review* 95; Milan Ambrož, ‘The Mediating Role of the Ombudsman in the Protection of Human Rights’ (2005) 14 *International Journal of Social Welfare* 145; see also Emily O’Reilly, ‘Protecting Rights and Freedoms’ (2003) 7 *International Ombudsman Yearbook* 24.

7 Najmul Abedin, ‘Conceptual and Functional Diversity of the Ombudsman Institution: A Classification’ (2011) 43(8) *Administration and Society* 896.

Third, as the report shows, most ombudsman structures employ the inquisitorial model of dispute settlement, with ADR methods, such as mediation and arbitration, also being used within various schemes. Thus, while the classical model involves a structure headed by an individual, alternative models incorporate the development of a business code of practice, generally operated by the industry itself for members and clients, and accompanied by a dispute resolution mechanism (typically, conciliation or arbitration). Under the classic model, recommendations rather than binding conclusions are handed down,<sup>8</sup> while private sector ombudsmen can occasionally impose binding decisions on organisations that form part of their membership.<sup>9</sup>

Thus, in less than 50 years, a broad range of models of ombudsman institutions have emerged with varying structural, organisational, operational, functional and conceptual features, as recognised by the American Bar Association (ABA) in its *Standards for the Establishment and Operation of Ombudsman Offices*.<sup>10</sup> The

ABA identified three essential characteristics of an ombudsman: (1) independence; (2) impartiality in conducting inquiries and investigations; and (3) confidentiality. As the practice of ombudsman offices has significantly changed since 2001, two points of caution should be raised. Certain schemes (including industry-based regulatory schemes) may possess these characteristics, but may operate under a different name, such as the Anti-Corruption and Civil Rights Commission in the Republic of Korea or the Protector of Citizens of the Republic of Serbia. Moreover, schemes that are called ‘ombudsman’ may lack one or more of these characteristics.

More broadly, basic distinctions can be made between:

- ombudsman institutions operating at different levels of government, such as central/national government, state/provincial government, local government, and international or regional organisations;
- a ‘general purpose ombudsman’ whose jurisdiction extends to the administrative acts of most agencies in central, state/provincial or local government, and a ‘special purpose ombudsman’ that looks at a single area of concern, such as issues relating to children, prisoners and elderly people; and
- publicly established ombudsmen (ie, independent authorities established by law or other public act) and private sector ombudsmen that are industry or corporate funded to deal with the complaints or grievances of the clientele groups.<sup>11</sup>

In reviewing 2,775 responses to surveys from users of ombudsman services in **Germany** and the **United Kingdom**, Naomi Creutzfeldt found that an ombudsman is expected to fulfil four key roles:

- interpreter: help understand what the complaints process is all about;
- advocate: hand over the problem;
- ally: share the responsibility; and
- instrument: have the right tools to help.

The unifying factor of all four functions is the role they play in redressing the power imbalance between the ‘small’ individual and the ‘big’ company.

Source: Naomi Creutzfeldt, ‘What Do We Expect from an Ombudsman?’ See n 4 above.

8 See n 4 above.

9 *Ibid.*

10 American Bar Association, *Standards for the Establishment and Operation of Ombudsman Offices*, 2001 <https://bit.ly/2O1pZoj> accessed 6 August 2018.

11 Roy Gregory and Philip Giddings (eds), *Righting Wrongs* (IOS Press 2000).

However, regardless of these distinctions, an overriding consideration is that of the open and transparent functioning of ombudsman structures. By way of an example, the British and Irish Ombudsman Association's Criteria for the Recognition of Ombudsman Offices<sup>12</sup> sets out four elements for openness and transparency that have wide application in this sphere:

1. members of the public and other stakeholders should know why the ombudsman scheme exists, what it does and what to expect from it, and should derive confidence in the scheme's decision-making and management processes;
2. information available in the public domain should include a clear explanation of the scheme's legal constitution, governance and funding arrangements;
3. the method of appointment, jurisdiction and powers of the ombudsman should be publicly known; and
4. the ombudsman should be able to publish anonymised reports of investigations (eg, in annual reports).

Respect for these broad principles would help contribute to processes that citizens view as an effective avenue of remedy, thereby embedding them firmly in the civil and administrative justice landscape.

Although some ombudsman offices record the number of complaints about them, it is unclear whether this is done with the aim of improving public accountability or simply as a performance indicator.

The **Hong Kong** Ombudsman provides a good practice example in this regard because it notes complaints concerning procedures (eg, the time taken to complete an investigation) separately from complaints pertaining to the conduct of staff members.

Source: Asian Development Bank, *Strengthening the Ombudsman Institution in Asia: Improving Accountability in Public Service Delivery Through the Ombudsman*, 2011, 204 <https://bit.ly/2AsMxMD>; Office of the Ombudsman, Hong Kong, Handling of Complaints <https://bit.ly/2n0QChG>.

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<sup>12</sup> British and Irish Ombudsman Association, Schedule 1 to the Rules, Criteria for the Recognition of Ombudsman Offices <https://bit.ly/2O09QQ1> accessed 6 August 2018.

# Chapter 3: Multi-area ombudsman offices ensuring government accountability

As bureaucracies have grown in size and complexity, there has been an increased need to ensure that citizens can, where necessary, seek effective administrative justice remedies against governmental authorities. Ombudsman schemes have had a crucial role in this sphere, having the potential to offer a cheaper, quicker and, overall, more accessible way to challenge government action as compared to bringing an action before the courts. The ombudsman institution has thus been welcomed as one that restores the balance between the citizen and the state. Ombudsman offices have a key role to play in ensuring accountability, provided they operate with independence and transparency, as discussed in Chapter 2.

The European Ombudsman provides an example of a structure that contributes to the goals of government accountability on a supranational level. The ombudsman reviews the conduct of European Union agencies, bodies and institutions, both on her own initiative and following individual complaints. This includes monitoring the transparency of these bodies. For instance, in February 2018, following a detailed inquiry, the ombudsman concluded that the practices of the Council of the EU that limit the scrutiny of draft EU legislation constitute maladministration, which has the effect of weakening citizens' rights to hold their elected representatives to account.<sup>13</sup>

## 3.1 The ombudsman office and human rights protection

As noted in Chapter 2, one important development for the ombudsman office has been the extension of its jurisdiction from supervising potential maladministration practices to addressing human rights infringements. As a response to expensive and lengthy court proceedings, the ombudsman institution fills an important gap within the justice system. Building on this increasingly pivotal role, the ombudsman office is now widely recognised as being capable of making a significant contribution to human rights protections, both at the individual and wider societal levels. Ombudsmen are able to

The names of general purpose ombudsman offices vary across jurisdictions:

- **Argentina:** Defensor del Pueblo de la Nación
- **Armenia:** Human Rights Defender
- **Burkina Faso:** Médiateur du Faso
- **Cyprus:** Commissioner for Administration and Human Rights
- **France:** Le Défenseur des droits
- **Ghana:** Commissioner on Human Rights and Administrative Justice
- **Gibraltar:** Public Services Ombudsman
- **Republic of Korea:** Anti-Corruption and Civil Rights Commission
- **Serbia:** Protector of Citizens of the Republic of Serbia
- **Sudan:** Public Grievances Chamber

Source: *International Ombudsman Institute Directory 2018* <https://bit.ly/2NYK6mK>.

According to Transparency International, a global anti-corruption movement, the ombudsman office is one of the 'key pillars' of a governance system. Transparency International's *Best Practices for Ombudsmen* highlights the need for ombudsmen to function in a framework that ensures their impartiality, ensuring equal access to the office's services as well as an absence of conflicts of interests.

Source: Sofia Wickberg, 'Best Practices for Ombudsmen', Transparency International 2013 <https://bit.ly/2LW6j7E>.

<sup>13</sup> European Ombudsman, *Ombudsman says Member States must open up their opaque negotiations on EU laws*, 2018 <https://bit.ly/2KeqI2U> accessed 6 August 2018.

provide flexible remedies tailored to the citizen, taking into account individual circumstances. From a wider perspective, they can also effect wholesale positive change.

International bodies such as the UN, the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe (CoE), as well as other regional bodies, have lent support to the introduction of ombudsman institutions as a democratic means of protecting human rights. For instance, the CoE's Committee of Ministers recommends that EU Member States that have an ombudsman consider empowering the office 'to initiate investigations and to give opinions when questions of human rights are involved'.<sup>14</sup> In October 1991, at the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (the predecessor of the OSCE) in Moscow, 'the participating States recognise[d] their common interest in promoting contacts and exchange of information among Ombudsman and other institutions entrusted with similar functions of investigating individual complaints of citizens against public authorities' (Article 29).<sup>15</sup> Several ombudsman offices have taken up investigative functions and hand down opinions, as well as engage in or undertake consultative processes as necessary. For example, the Anti-Corruption and Civil Rights Commission of the Republic of Korea hands down opinions to the heads of public institutions, and Ireland's Ombudsman for Children conducts consultations with young people.

A starting point for public ombudsman standards inevitably revolves around the requirement of independence. While private sector ombudsmen must also remain immune from external pressures, this prerequisite is heightened yet further where complaints against the government are concerned and individual human rights are at stake. To maintain a level of public trust and thus function as institutions that aggrieved citizens have confidence in, public service ombudsmen must be free to hand down decisions as they see fit without government interference. This is demonstrated by the frequency with which ombudsman bodies focusing on corruption in the public sphere appear across jurisdictions. In order to act as a proper check on government and other public authorities' behaviour, such institutions need to be able to challenge corruption in a transparent and effective way.

The research by Naomi Creutzfeldt, mentioned earlier, has found that individuals turning to public sector ombudsman offices for the resolution of their disputes primarily seek accountability of the public body whose actions are at issue. By contrast, private sector ombudsmen are expected to provide swift dispute resolution, possibly involving financial compensation. This is to be expected because private bodies most often affect socio-economic rights, while governmental action has the capacity to breach a much broader range of human rights.

### *In focus: Role of ombudsman offices in the UN framework*

The UN has specifically highlighted the role of the ombudsman in the promotion and protection of human rights, including through a series of resolutions adopted by the General Assembly.<sup>16</sup> The latest resolution adopted by the General Assembly on 19 December 2017 recognised and welcomed

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14 Council of Europe, Committee of Ministers, Recommendation No R(85)13 of the Committee of Ministers to Member States on the Institution of the Ombudsman (adopted 23 September 1985) <https://bit.ly/2mYjret> accessed 6 August 2018.

15 OSCE/Office for Democratic Institutions and Human Rights (ODIHR), *Ombudsman and Human Rights Protection Institutions in OSCE Participating States: OSCE Human Dimension Implementation Meeting October 1998* <https://bit.ly/2v5CZIF> accessed 6 August 2018.

16 Latest Resolution adopted by the General Assembly on 19 December 2017 [on the report of the Third Committee (A/72/439/Add.2)] 72/186; see also Resolution 65/207 of 21 December 2010, Resolution 67/163 of 20 December 2012, Resolution 69/168 of 18 December 2014 and Resolution 71/200 of 19 December 2016.

the ‘rapidly growing interest throughout the world in the creation and strengthening of the Ombudsman, mediator and other national human rights institutions, and... the important role that these institutions can play, in accordance with their mandate, in support of national complaint resolution’. In line with the general principles outlined above, the resolution highlights the importance of the autonomy and independence of ombudsman offices, and their role in promoting good governance in public administration.

Besides according them with strong constitutional and legislative frameworks, Member States are also encouraged to provide sufficient financial means for the effective functioning of ombudsman structures.

### 3.2 Access to ombudsman service

For ombudsman structures to be fully effective, citizens from all backgrounds and with differing needs must be both aware of, and comfortable using, ombudsman services. This requires heightened sensitivity when ensuring accessibility for ethnic and language minority groups, including those living in geographically remote locations, minors and persons with disabilities. This must be taken into consideration throughout the complaints process, from the very starting point of information provision to presenting the final outcome in an understandable and accessible format. As research conducted for this report has shown, many ombudsmen have a strong appreciation of the challenges for certain groups in accessing their services and have taken steps to ensure these difficulties are adequately handled.

People seeking to use the services of an ombudsman office may have a wide range of access needs, whether they wish to write to the ombudsman, speak to the ombudsman on the phone or physically access the office. They may also require assistance in preparing the documents required for a full and

The UN Paris Principles are the international benchmarks against which national human rights institutions (NHRIs) can be accredited by the Global Alliance of National Human Rights Institutions.

The Paris Principles broadly divide NHRIs into three groups:

- human rights commissions;
- ombudsmen; and
- specialised national institutions designed to protect the rights of a particular vulnerable group.

The Paris Principles emphasise that NHRIs should be given ‘as broad a mandate as possible’ and be independent from the executive branch.

NHRI structures vary considerably. Although most are structured as human rights commissions, ombudsman institutions are also popular, especially in the Americas, where six of nine respondents to a survey were ombudsman institutions. The ombudsman model is also common in Eastern Europe and in Commonwealth of Independent States (CIS) countries.

*Source:* Principles relating to the Status of National Institutions (The Paris Principles) (1993) <https://bit.ly/2M9HJNP>; United Nations Development Programme (UNDP)-Office of the United Nations High Commissioner for Human Rights (OHCHR), Toolkit for collaboration with National Human Rights Institutions, 2010 <https://bit.ly/2KaoTEk>; OHCHR, Survey of National Human Rights Institutions: Report on the Findings and Recommendations of a Questionnaire Addressed by NHRIs Worldwide, 2009 <https://bit.ly/2LOgoDM>.

The Ombudsman of Western **Australia** has implemented several measures to improve the accessibility of its services, including:

- using a national relay service to provide accessibility to those with hearing impairments;
- a five-year Disability Access and Inclusion Plan;
- training complaint handling officers in cultural awareness and cross-cultural communications; and
- implementing a Regional Accessibility and Awareness Program, which includes a regional visits programme.

*Source:* Ombudsman of Western Australia, Community Accessibility <https://bit.ly/2v3Z3gn>.



proper assessment of their complaint. To this end, ombudsman offices may have dedicated sections of their websites or trained officers to handle the complaints process in these cases in a fair and efficient manner. For instance, the Parliamentary and Health Ombudsman in England has a two-minute video and three posters on its website aimed at explaining its complaints process to people with a learning disability, while the UK Financial Ombudsman Service (FOS) trains relevant staff members in equality issues relating to service accessibility.

Owing to, on the whole, lower standards of economic and social conditions, as well as lack of legal empowerment, it is particularly important to ensure that ethnic and linguistic minority groups are able to access ombudsman services. Ombudsman offices should therefore ensure that they take any necessary additional steps to grant access to vulnerable groups, for instance, by translating relevant information into minority languages or providing interpretation where required. They should also make sure that remote communities are aware of the availability of ombudsman services and how to use them.

### *In focus: Individuals at risk of torture and inhuman or degrading treatment*

In many countries, ombudsman offices operate as National Preventive Mechanisms against torture and other cruel, inhuman or degrading treatment or punishment (NPMs) following ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading

In 2016, the **Spanish** Ombudsman made 101 visits to custodial facilities, a significant increase on the previous year. This was a result of an increased number of follow-up visits monitoring the implementation of prior recommendations and seeking to ascertain any further issues.

Ombudsman officers conduct the visits with the assistance of specialist experts in forensic medicine, psychiatry or psychology as necessary – ‘in addition to evaluating the infrastructure, legal counsel, visiting arrangements, communications and surveillance methods, other issues are appraised, such as healthcare, therapeutic and psychological assistance and, ultimately, the utmost respect for human rights’.

Source: Spanish Ombudsman, *Spain’s National Preventive Mechanism against Torture: Annual Report 2016*, <https://bit.ly/2OynZVJ>.

Treatment or Punishment (OPCAT). As part of this mandate, ombudsmen undertake preventive work in the form of monitoring and visits to places of detention, institutions and any other facilities where individuals are deprived of their liberty. Their aim is to review the conditions of detention in the facilities in order to detect whether people risk facing, or already face, torture and inhuman or degrading treatment. Evidently, being deprived of liberty places individuals at a particularly strong risk of mistreatment and heightens the need for independent ombudsman offices to provide protection.

### *In focus: Children*

As highlighted by the 2016 IBA report on *Children and Access to Justice: National Practices, International Challenges*,<sup>17</sup> access to justice is central to the protection of the rights of children; it is especially important for protection from discrimination, violence, abuse and exploitation, and for ensuring children’s best interests in all actions involving or having an impact on them. For this reason, ombudsman structures from a range of jurisdictions focus specifically on the rights of children.

17 Julinda Beqiraj and Lawrence McNamara, *Children and Access to Justice: National Practices, International Challenges* (Bingham Centre for the Rule of Law Report 02/2016), IBA, October 2016.

Ombudsman offices therefore have an important role to play in providing access to justice for children and young people. This includes enabling children to make complaints themselves, as well as allowing an adult to file a complaint on behalf of a child. The ability to bring a case before a court or tribunal usually hinges on a minimum age of 18, and those below that age can only bring a legal claim if represented by a parent or guardian. In addition, courts can often be intimidating settings for children, particularly where they are at the heart of the dispute. Ombudsman offices, instead, provide a way for children's grievances to be heard in an easily accessible way, especially because most complaints can be filed electronically or over the phone, and do not tend to entail complex procedures.

In the aforementioned report on children and access to justice, a survey response from a Polish respondent emphasised the role and contribution of the Polish Ombudsman for Children. Due to its strong independence and broad powers, the ombudsman was said to have positively

influenced the situation of children in Poland and increased the protection of their rights. For instance, pursuant to section 3 of the Act on the Ombudsman for Children's Rights, the ombudsman, a constitutional body of state authority, provides special care and assistance to children with disabilities. The ombudsman can also participate in Constitutional Court proceedings concerning children's rights, file a cassation against a final and binding court judgment, and participate in pending juvenile proceedings.<sup>18</sup>

### *In focus: Persons with disabilities*

The IBA Committee and Bingham Centre for the Rule of Law have also previously conducted research on the barriers to access to justice faced by persons with disabilities and recommended ways in which those barriers can be overcome. The 2017 report, *Access to justice for persons with disabilities: From international principles to practice*, highlights that 15 per cent of the global population experiences some form of disability and, as a result, suffers disproportionate socio-economic marginalisation, resulting in poorer levels of health and medical treatment, a lower quality of education, limited

The Parliamentary Ombudsman of **Finland** has on its website a specialised section aimed at explaining its procedures to children and young people who wish to make a complaint. As well as handling complaints, the Ombudsman also conducts inspections in institutions such as schools, children's homes and care institutions for children and young people.

Source: Parliamentary Ombudsman of Finland, *The Parliamentary Ombudsman supervises children's rights* <https://bit.ly/2M5qtsW>.

**Ireland's** Ombudsman for Children conducts consultations with young people, placing them at the centre of its mandate. For example, in 2017, the Ombudsman began a consultation to note the experiences of young people receiving inpatient mental health care and treatment. This had the aim of allowing young people to point out the changes they feel would improve support for young people in this area.

Source: Ombudsman for Children, *Ombudsman for Children launches 'Take My Hand' Young People's Experiences of Mental Health Services*, 2018 <https://bit.ly/2KdZ9a2>.

The Parliament of **Azerbaijan** has adopted recommendations and suggestions made by the Commissioner for Human Rights (Ombudsman) of Azerbaijan as regards the improvement of the national legislative framework on children's rights. Notably, the recommendation of the Commissioner led to the creation of the State Committee on Family, Women and Child Issues in 2015.

In addition, the Commissioner operates a 24-hour hotline dedicated to receiving complaints on child rights that are investigated immediately, and has a specialist adviser on child rights.

Source: The Commissioner for Human Rights of the Republic of Azerbaijan, *Child Rights Protection* <https://bit.ly/2mZn5Vo>.

18 Directorate General for Internal Policies, *Country Report on Poland for the Study on Member States' Policies for Children with Disabilities*, European Parliament 2013, 16 <https://bit.ly/2AteCDH> accessed 6 August 2018.

employment opportunities and generally broad-ranging restrictions on community participation. Barriers to access to justice further exacerbate these existing issues, making ombudsman offices particularly important tools in allowing the voices of persons with disabilities to be heard and in triggering positive change.

Article 33 of the UN Convention on the Rights of Persons with Disabilities (CRPD) on national implementation and monitoring requires states to set up a focal point within government for the implementation of the Convention, as well as a framework encompassing one or more independent mechanisms to promote, protect and monitor implementation. Such independent mechanisms may include ombudsman offices.

The Mental Disability Advocacy Center (an international human rights organisation) provides helpful examples of the 'promote, protect and monitor' paradigm, and thus of the tasks that ombudsman offices can undertake in this field:

- promote: provide training and information to policymakers on how to prevent abuses in the future;
- protect: handle individual complaints on an alleged grave or systemic violation of the CRPD; and
- monitor: conduct a general inquiry into allegations.

Source: UN Convention on the Rights of Persons with Disabilities adopted and opened for signature, ratification and accession by General Assembly Resolution 61/106 of 13 December 2006, entry into force 3 May 2008; Mental Disability Advocacy Center, *Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities*, 2011, 42 <https://bit.ly/2vmFvTT>.

An interview conducted with the office of the **Croatian** Disability Ombudswoman in 2015 revealed that the office does not adopt a formal mediation role. Nonetheless, after gathering the requisite information and reviewing arguments from both parties, it 'actively takes the side of the party whose rights have been violated... and informs the other party "this practice is discrimination"... and tries to be constructive, proposing solutions'.

Source: Lorna McGregor, Rachel Murray, Shirley Shipman and Hélène Tyrrell, *National Human Rights Institutions in Europe and Dispute Resolution: A Mapping* <https://bit.ly/2LSFDES>.

The Public Defender of **Georgia** assessed the implementation of state employment programmes intended for persons with disabilities in the State Employment Programmes for Persons with Disabilities Monitoring Report. The monitoring carried out by the Department of the Rights of Persons with Disabilities of the Public Defender's Office demonstrated that despite a number of programmes and the country's stated commitment to ensuring equal employment opportunities for persons with disabilities, the lack of effective mechanisms, safeguards, practical support and enforcement mechanisms constitutes a significant barrier to this aim.

The Public Defender therefore made numerous recommendations intended to remedy these problems.

Source: Public Defender (Ombudsman) of Georgia, *State Employment Programmes for Persons with Disabilities Monitoring Report*, 2017 <https://bit.ly/2LEVJfz>.

**Austria's** Volksanwaltschaft (People's Advocate) undertakes visits and monitors institutions for people with disabilities, including long-term care institutions for people with disabilities and disability day centres. The aim of these visits is to prevent any form of exploitation, violence or abuse, in compliance with the UN CRPD.

Source: Volksanwaltschaft, Preventive Human Rights Monitoring <https://bit.ly/2vrTJdC>.

The Parliamentary and Health Ombudsman, which investigates complaints made against government departments and the NHS in **England**, has made available on its website a two-minute video, as well as three posters, aimed at explaining the complaints process to people with a learning disability. It also offers 'BrowseAloud' software, which can read webpages aloud for persons with visual impairments.

Source: Parliamentary and Health Service Ombudsman, *Information for people who have a learning disability or want Easy Read information* <https://bit.ly/2M58YZP>.

## In focus: Minority groups

Similarly, ethnic and racial minorities, migrants and indigenous peoples often face obstacles to access to justice stemming both from formal legal discrimination as well as informal discrimination or stigmatisation. The ombudsman decision-making process should thus be particularly sensitive when dealing with alleged violations of minority group rights, and should take into consideration structural factors relevant to the background of the complaint.

The Parliamentary Ombudsman of **Finland** issued a reprimand to the Population Register Centre for failing to introduce the full Sami alphabet into its Population Information System. The Deputy-Ombudsman investigated the matter following a complaint that an individual's daughter could not enter her name with its correct spelling into the system. It was subsequently also impossible to record the name correctly on official documentation, including a passport.

The Deputy-Ombudsman found that the correct entry of the name was essential to realising the rights of the Sami people to maintain their culture and preserve their identity. Following the complaint, the Population Register Centre took steps to introduce the appropriate set of characters into its information system.

Source: Parliamentary Ombudsman of Finland, *The Population Register Centre neglected the rights of the Sami* <https://bit.ly/2NYGeCh>.

In 2016–2017, the **Scottish** Public Services Ombudsman adjusted its service for users whose first languages were British sign language, Chinese, Lithuanian and Polish.

Source: Scottish Public Services Ombudsman *Annual Report 2016-17* <https://bit.ly/2LOWAoA>.

**Australia's** Commonwealth Ombudsman has conducted several investigations into the accessibility of services for indigenous Australians, such as the accessibility and use of indigenous language interpreters by government agencies, and accessibility of the Disability Support Pension for remote indigenous Australians.

These have found that access to interpreters is lacking, with key issues including the lack of awareness of the need to use interpreters, the absence of 'on demand' telephone interpreting services and a shortage of accredited interpreters. In addition, indigenous peoples living in rural and remote areas face particular challenges in preparing applications for the Disability Support Pension, including surpassing the evidential burdens.

Source: Commonwealth Ombudsman, *Accessibility of Indigenous Language Interpreters*, 2016 <https://bit.ly/2LBZd9f>; Commonwealth Ombudsman, *Department of Human Services: Accessibility of Disability Support Pension for remote Indigenous Australians*, 2016 <https://bit.ly/2OujyLo>; Commonwealth Ombudsman, *Indigenous Publications* <https://bit.ly/2Kfu4mq>.

## 3.3 The ombudsman office and allegations of corruption in the public sector

Transparency International's Corruption Perceptions Index (the 'Index') shows that most countries worldwide are making little or no progress in ending corruption. The Index, which ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople, uses a scale of 0 to 100, where 0 denotes 'highly corrupt' and 100 'very clean'.

In June 2017, the **Jordanian** Integrity and Anti-Corruption Commission received a complaint from an employee of a government department who had been fired after filing a complaint including allegations of corruption against the head of the department. The Witness and Informants Protection Unit carried out an investigation and concluded that there was a causal link between the filing of the complaint and the individual's dismissal. The unit was able to prove that the head of the department had committed the offence of abusing a whistleblower, which resulted in the head agreeing to reinstate the employee.

Source: Integrity and Anti-Corruption Commission, *An Employee*, 2017 <https://bit.ly/2vp3mIV>.

In **Albania**, the role of the People's Advocate is set out in Article 60 of the Constitution, which provides that '[t]he People's Advocate defends the rights, freedoms and lawful interests of individuals from unlawful or improper actions or failures to act of the organs of public administration'. These include complaints related to the judicial reform process which also covers a vetting process of judges' assets – to clear them against allegations of corruption – handled by a mixed national/international commission.

Source: Albanian Constitution Approved by the Albanian Parliament on 21 October 1998, Article 60.

In 2017, the Index concluded that more than two-thirds of countries score below 50, with an average score of 43.<sup>19</sup>

As mentioned previously, ombudsman offices need to be able to challenge corruption in a transparent and effective way if they are to be able to subject government and other public authorities' behaviour to proper levels of scrutiny. In recognition of this, several countries have an ombudsman office focused on allegations of corruption in the public sector. For instance, China has implemented the Macao Commission against Corruption, Jordan the Jordanian Integrity and Anti-Corruption Commission, and the Republic of Korea the Anti-Corruption and Civil Rights Commission. Most anti-corruption ombudsmen are to be found in Asia and Africa. Further examples include Gambia, Ghana, Papua New Guinea, Rwanda and Vanuatu.<sup>20</sup> In this field, effective challenge to government action within independent and transparent frameworks is of crucial significance.

These specific bodies can adopt a horizontal approach when tackling corruption by going beyond a review of individual cases to also engaging in general oversight, investigation and provision of information to the public. Anti-corruption ombudsmen have the benefit of being able to bring about change at a wider level and thus conduct an ongoing 'audit' of public behaviours that are brought to light through individual complaints, as well as through their own investigations. The wide ambit of ombudsman activities therefore contrasts with the review of individual claims that takes place before courts and tribunals, which can generally only make determinations relevant to a particular case (except for class actions in some jurisdictions).

The World Bank has recognised the role that ombudsman institutions have to play in this field, noting that anti-corruption ombudsmen 'have a specific mandate to curb corruption', with their functions including 'overseeing the conduct of senior public officials, collecting and reviewing assets and income declarations, investigating instances of alleged or suspected corruption, and educating and informing the public regarding issues related to corruption'.

Source: The World Bank, Governance & Public Sector Management, 2016 <https://bit.ly/2KeHjUf>.

The Anti-Corruption and Civil Rights Commission of the **Republic of Korea**, which comprises both ombudsman and anti-corruption functions, handles complaints relating to illegal or unfair practices of administrative agencies, as well as to rights infringements and grievances resulting from a lack of appropriate policies and systems.

It operates what it calls an 'Institutional Improvement System', through which it makes recommendations and hands down opinions to the heads of public institutions. These focus on the improvement of statutes, systems or policies that the Commission examines over the course of its complaints handling procedures. It also recommends institutional improvements in anti-corruption by analysing the occurrence of acts of corruption. The Commission monitors the implementation of its recommendations by checking and reviewing follow-up measures taken by public institutions. In the context of individual complaints, once the Commission hands down a decision, administrative agencies are required to report on how they are implementing the necessary changes within 30 days of receiving notification of the decision. The Commission thus provides a good example of how ombudsman functions can be deployed effectively in the fight against corruption.

Source: Anti-Corruption and Civil Rights Commission, *Investigating & Handling Civil Complaints*, 2016 <https://bit.ly/2KdpRPW>; Anti-Corruption and Civil Rights Commission, *Institutional Improvement System*, 2016 <https://bit.ly/2n0SMhi>.

19 Transparency International, *Corruption Perceptions Index* 2017, 2018 <https://bit.ly/2BJaDBF> accessed 6 August 2018.

20 The World Bank, Governance & Public Sector Management, 2016 <https://bit.ly/2KeHjUf> accessed 6 August 2018.

# Chapter 4: Sector-specific ombudsman schemes

This chapter analyses sector-specific ombudsman schemes, first, reviewing the financial sector by considering financial services ombudsman schemes, the ADR methods employed therein, as well as insurance ombudsmen; second, assessing consumer ombudsman bodies and evaluating – through the lens of EU consumer law – their effectiveness in dealing with customer complaints and online purchases; and finally, examining telecommunications ombudsmen, their role in improving accessibility and issues surrounding data privacy.

Private sector ombudsmen tend to be set up in one of the three following ways:

- statutory: established by statute, granting them a compulsory jurisdiction over specified types of (usually regulated) businesses (eg, financial and legal);
- underpinned by statute: certain types of businesses must be covered by an ombudsman scheme that meets specified minimum criteria (eg, property and energy); and
- voluntary: established voluntarily (sometimes after pressure from governments or consumers) by a particular trade association, but with independent governance.

Source: British and Irish Ombudsman Association, Submission to the Leveson Inquiry, 2012 <https://bit.ly/2KcDZcw>.

## 4.1 Financial services

Financial services ombudsmen are able to provide remedy where financial inequality of arms would otherwise be stark, and where, in certain matters, individuals would face exorbitant court fees. Moreover, ombudsman schemes provide a viable alternative when legal claims cannot be filed unless they attain a certain financial level.

The banking industry, in particular, epitomises the importance of redressing the power imbalance between large institutions and citizens – the hallmark of the ombudsman office. Public trust in banking services has been significantly lowered following worldwide financial crises, making the possibility of effectively challenging the actions of institutions that a vast number of citizens make use of on a daily basis, and often mistrust, especially crucial.

Importantly, the ombudsman structure can operate as a ‘systematic audit’ by ultimately bringing about changes in banking practice.<sup>21</sup> As mentioned in Chapter 2, two different ombudsman models have developed: one involving independent bodies established by law as part of the public regulatory framework of markets that were subject to privatisation, and one established by the banking sector

The **UK** Financial Ombudsman Service (FOS) was set up by Parliament to sort out complaints between financial businesses and their customers. In 2017–2018, the FOS received 17,256 new complaints about payday loans – an increase of 64 per cent. Over the past several years, the Ombudsman has noted the increase in the number of people turning to the service after experiencing trouble having borrowed money.

The Ombudsman has raised concerns that some lenders aren’t doing enough to ensure people’s borrowing is sustainable, or aren’t responding constructively to customer concerns. Because even those in positions of financial stability can quickly become vulnerable, the Ombudsman has recommended that financial businesses become proactive in helping individuals to anticipate potential risks to their money.

Source: Financial Ombudsman Service, *Annual Review 2017/2018* <https://bit.ly/2AtJGD6>.

The Ombudsman for the Banking System of the **Serb Republic** has concluded that users of banking services are not sufficiently aware of their rights in this sphere. However, in a positive development, it has reported a general improvement in the levels of cooperation of banks with the Ombudsman.

Source: Banking Agency of Republika Srpska, *Report on Operations of the Ombudsman for the Banking System of Republika Srpska for the period January 1 – December 31, 2015* <https://bit.ly/2OyvEDd>.

21 Nadja Tollemache, ‘Taking the Ombudsman Concept into the Private Sector: Notes on the Banking Ombudsman Scheme in New Zealand’ (1996) 26 *Victoria University of Wellington Law Review* 223.

itself, consisting of codes of conduct and ombudsman schemes incorporating a dispute resolution mechanism (typically conciliation or arbitration) to boost consumer confidence and maintain clientele trust. Research on dispute resolution systems in Europe, in particular, has shown that the resolution of disputes between consumers and businesses usually involves external ombudsmen or dispute resolution schemes that form a part of business codes of practice. The dispute resolution function is thus ‘attached’ to a code of practice, which tends to be operated by a trade association for its members. Such codes then allow trade associations to enforce self-regulatory pressure on their members and open relevant ‘code investigations’.<sup>22</sup>

The banking sector has the capacity to impact economic and social rights in a particularly negative way through decisions that are made on an often automated basis. For instance, a bank’s refusal to open a client account can hinder access to housing or other crucial services where banking details are required. If individuals are unable to open bank accounts, this can then make it impossible for them to receive their salary, and may drive them to working in unregulated structures that agree to provide an often exploitative salary in cash rather than through a bank transfer. There are further concerns that arise as regards fair lending practices in the credit sphere.<sup>23</sup> To increase public trust in the sector, in-house ombudsman-type procedures are often made available. However, both in-house and public bodies may be necessary in certain cases to expose abusive practices.

Industry funding helps to encourage early resolution and compliance with standards, thus creating a positive self-regulatory environment without necessitating public spending. Industry-funded

In **Belgium**, Ombudsfm – the Ombudsman in Financial Conflicts – is an independent non-profit organisation established by the main association in the banking and financial sector.

In 2017, Ombudsfm noted an increase in the number of complaints over the previous year, mainly concerning payments and payment accounts. In 2017, more than in the previous year, banks had recourse to the clause in their general conditions allowing them to end the contractual relationship without having to provide justification for doing so. Despite being a lawful step to take, this has created wide misunderstanding and frustration among complainants. In these situations, Ombudsfm is able to explain the legality of the bank’s decision to the individual.

Ombudsfm is involved in conciliation and mediation but its recommendations are not binding on the parties. Each party remains free not to follow such opinions/recommendations and can, if need be, bring the matter before a court.

Source: Ombudsfm, *Rapport annuel 2017* (Annual report 2017) <https://bit.ly/2O0fdym>; Ombudsfm, *Ombudsman for financial services* <https://bit.ly/2AD2znt>.

A Royal Commission is **Australia’s** highest form of public inquiry on matters of public importance, disposing of statutory powers of investigation. Royal Commissions are established by the government to gather information on a subject of public interest which is within their legislative powers. The Commission is required to present its findings in a report and make relevant recommendations.

On 14 December 2017, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was established in Australia. Pursuant to its terms of reference, the Commission is undertaking an inquiry as to whether, among others, any conduct by financial services entities might have amounted to misconduct, and any conduct, practices, behaviour or business activities by financial services fall below community standards and expectations.

As of 13 July 2018, the Commission had received 7,337 public submissions.

Source: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry <https://bit.ly/2DCtkIU>; The University of Melbourne, *Royal Commissions and Public Inquiries, 2018* <https://bit.ly/2vmaLT6>.

The **Finnish** Financial Ombudsman Bureau has a preventive as well as a redress function, providing advice on financial issues before an individual buys a product or service, including information on relevant laws and procedures.

Source: Financial Supervisory Authority, *Financial Ombudsman Bureau (FINE)* <https://bit.ly/2Oy7cBR>.

22 Naomi Creutzfeldt-Banda, ‘The origins and evolution of consumer dispute resolution systems in Europe’ in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar Publishing 2013).

23 David Skanderson and Dubravka Ritter, *Fair Lending Analysis of Credit Cards*, Discussion Paper: Payment Cards Center 2014 <https://bit.ly/2KeQ8xD> accessed 6 August 2018.

schemes can impose a levy on the member businesses, recoup case fees from them or both.<sup>24</sup> The levy may vary in accordance with the size of the business (as with the UK Financial Ombudsman Service (FOS)). This raises questions as to whether larger businesses that

financially contribute more to the ombudsman bodies of which they are members wield more influence than smaller entities. Consumers have expressed concerns over industry funding and the effect of varying levels of financial contributions by their membership. In a 2017 report presented to the All-Party Parliamentary Group on Consumer Protection in the UK, a response to a consumer survey termed an ombudsman office ‘a members’ club funded by subscription from its members’ which is ‘unlikely to find against a member, especially a big player’.<sup>25</sup>

The issue of who industry-funded structures ultimately end up serving – service users or industry bodies – is one that has been addressed in the literature. For instance, the Australian Medical Association has urged that private health insurance serve the needs of consumers rather than industry shareholders<sup>26</sup> in a way that prioritises policyholders’ individual needs over profit-based interests. The experience of the industry-funded consumer arbitration schemes in Canada has also revealed the risk of domination and control by traders, which can hamper the independence and impartiality of an ombudsman office. Another cause for concern is the ‘repeat player effect’, where traders repeatedly finding themselves before the same arbitrators start to familiarise themselves with the arbitrators’ methods of working and accordingly select the arbitrator most likely to provide them with a favourable outcome.<sup>27</sup> These concerns also carry across to ADR schemes set up within the framework of an ombudsman office (further explored below).

Nevertheless, maintaining a strong governance structure that keeps the ombudsman independent from industry should be sufficient to alleviate any concerns in this respect. It is for this reason that the matters of transparency and independence of ombudsman offices are dealt with at various points throughout this report. Examples of strong governance structures include governance by boards comprised of an independent chair and equal numbers of directors with consumer and industry backgrounds.<sup>28</sup> Enshrining an ombudsman’s mandate in law or regulation further enhances its legitimacy and effectiveness.<sup>29</sup>

As regards the transparency of financial services ombudsman schemes, the International Network of Financial Services Ombudsman Schemes (the ‘INFO Network’), the worldwide association for such

Is access to banking ombudsmen always free of charge?

The Financial Ombudsman of **Cyprus** requires a payment of €20 before a complaint can be reviewed.

The **Danish** Financial Complaint Boards charges a complaint fee of DKK200, which is returned if the consumer is successful in full or in part, if the consumer withdraws the complaint or if the Complaint Board cannot consider the complaint.

Source: The Law Relating to the Establishment and Operation of a Single Agency for the Out of Court Settlement of Disputes of Financial Nature of 2010 <https://bit.ly/2vpQmMP>; The Danish Financial Complaint Boards, Submitting a complaint <https://bit.ly/2mXiMKf>.

24 Feliksas Petrauskas and Aida Gasiūnaitė, *Alternative Dispute Resolution in the Field of Consumer Financial Services*, Mykolas Romeris University, 2012 <https://bit.ly/2LIuFm8> accessed 6 August 2018.

25 Martin Lewis, Will Barnes and Kirsty Good, *Sharper Teeth: The Consumer Need for Ombudsman Reform*, MoneySavingExpert 2017 <https://bit.ly/2LF2eFU> accessed 6 August 2018.

26 Australian Medical Association, *AMA Submission - ACCC Report to the Senate on Private Health Insurance*, 2017 <https://bit.ly/2mY9gXd> accessed 6 August 2018.

27 Consumer Council, *Advocating for Establishing a ‘Consumer Dispute Resolution Centre’ to Achieve Triple Wins in Consumer Dispute Resolution for Hong Kong*, 2016 <https://bit.ly/2M8fuPw> accessed 6 August 2018.

28 Australian Government, *Final Report: Review of the Financial System External Dispute Resolution and Complaints Framework*, 2017, 10 <https://bit.ly/2v3pUtb> accessed 10 August 2018.

29 Gabriel Davel, *Regulatory Options to Curb Debt Stress*, CGAP 2013, 16 <https://bit.ly/2Oty9Xk> accessed 10 August 2018.



bodies, suggests that a financial services ombudsman scheme should:

1. pay due regard to the overall public interest in planning and day-to-day operations;
2. consult about its scope, procedures, business plans and budgets; and
3. publish a report at least once a year, explaining work carried out.<sup>30</sup>

### *In focus: ADR methods in financial services ombudsman schemes*

As previously outlined, banking ombudsman schemes use a variety of ADR methods when dealing with complaints, including arbitration, mediation or a combination of processes. Agreement-

#### **Arbitration**

The **German** Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)) is an autonomous public law institution subject to the legal and technical oversight of the Federal Ministry of Finance. It is funded by fees and contributions from the institutions and undertakings under its supervision.

BaFin offers the services of an arbitration board free of charge for the consumer. The board handles disputes involving credit institutions or financial services providers that do not fall within the scope of any private, recognised dispute resolution entity. The board is an official consumer dispute resolution entity pursuant to section 14 (1) of the German Injunctions Act.

Source: Federal Financial Supervisory Authority, Arbitration Board at BaFin <https://bit.ly/2LWzwQd>.

#### **Mediation**

In 2017, the Government of Ireland merged the offices of the Financial Services Ombudsman's Bureau and the Office of the Pensions Ombudsman to form the Financial Services and Pensions Ombudsman (FSPO). The FSPO, an independent public body, has been in operation since 1 January 2017. It is funded by levies on financial services providers and by a grant from the government.

In 2017, the then-Financial Services Ombudsman of Ireland reported that mediation, through telephone, email and meetings, had become the first and preferred option for complaint resolution. The following case study demonstrates the effectiveness of this form of ADR:

'During Áine's absence from work due to a stress-related mental health issue, her provider discontinued income protection payments on the grounds that she was fit to return to work which was contradicted by Áine's employer's doctor. At the time of mediation, Áine was attending a mental health service as an in-patient. Following mediation, and on the basis of further medical evidence provided, the provider reversed its decision and backdated payments to the date on which they had been discontinued, providing her with an interim payment to ensure she could continue her treatment as an in-patient.'

Source: Financial Services Ombudsman, *Annual Review 2017* <https://bit.ly/2M6arPv>.

#### **Two-step dispute resolution process**

The Financial Industry Disputes Resolution Centre Ltd (FIDReC) specialises in the resolution of disputes between financial institutions and consumers. FIDReC incorporates the operations of the Insurance Disputes Resolution Organisation (IDRO) and the Consumer Mediation Unit (CMU) of the Association of Banks in **Singapore**. FIDReC was created by Singapore's financial sector, 'to make its services more professional, transparent, customer focused and service oriented'. It commenced its mandate on 31 August 2005.

The dispute resolution process of the Singapore Financial Industry Disputes Resolution Centre involves Stage 1 (mediation) and Stage 2 (adjudication).

##### Stage 1: Mediation

The complaint is at first handled by FIDReC's Case Manager. The parties are encouraged to resolve the dispute in an 'amicable and fair manner'. Where appropriate, the Case Manager acts as a mediator.

##### Stage 2: Adjudication

Where the dispute is not resolved through mediation, the case is then heard and adjudicated by a FIDReC Adjudicator or a panel of adjudicators.

An adjudication case fee applies at this stage (\$250 for the consumer and \$500 for the financial institution). The amount of \$200 may be refunded to either the claimant or the institution following the case adjudication.

Source: The Financial Industry Disputes Resolution Centre Ltd, *Dispute Resolution Process* <https://bit.ly/2AovOde>.

30 INFO Network, *Effective Approaches to Fundamental Principles*, 2014 <https://bit.ly/2O3bO26> accessed 10 August 2018.

based approaches include mediation and negotiation, while decision-based approaches include adjudication, arbitration and expert determination. There are, in addition, certain approaches that cannot be categorised within either group. These include conciliation and early neutral evaluation, which adopt an evaluative approach, seeking to help the relevant parties arrive at their own outcome without having a formal decision imposed on them. Research shows that evaluative approaches tend to be preferred.<sup>31</sup> This falls in line with general research on mediation, which demonstrates that criticisms of the process increase the more it is institutionalised and the less the parties exercise informed consent.<sup>32</sup>

ADR methods in the ombudsman sphere are likely to raise the same concerns and create the same benefits as in other areas. Nonetheless, in the ombudsman context it is especially vital to ensure that ADR processes remain accessible to vulnerable groups, with due consideration of the factors outlined in Chapter 3 as regards individuals at risk of torture and inhuman or degrading treatment, children, persons with disabilities and minority groups, among others.

While some financial services ombudsman offices focus on particular aspects of financial services, such as banking or insurance (the main topics of review in this section), others deal with financial services generally. Below, examples are provided of the various methods used by ombudsman schemes and their scope for reviewing complaints.

#### *In focus: Insurance services*

Within the financial services context, there are often separate, dedicated ombudsman offices to deal with complaints made against the insurance sector. The insurance industry provides a clear example of an industry that typically employs the industry-led ombudsman model, regulating itself rather than falling within the oversight of public bodies.

One of the earliest insurance ombudsmen to be instated was the Swiss Insurance Ombudsman, created in 1972 by the Swiss Insurance Association. In Germany, although discussions around the creation of an insurance ombudsman had been taking place since the 1970s, the insurance industry only created an ombudsman in 2001. In the UK, the original insurance ombudsman, the Insurance Ombudsman Bureau, was a private enterprise created voluntarily in 1981 by three leading insurance companies. It has been asserted that the motivating factor behind this was the recognition that ‘providing a high standard of customer care was both ethically desirable and commercially advantageous’.<sup>33</sup> Insurance complaints in the UK are now covered by the FOS.

A pertinent example of how transparency can be maintained in this operational context stems from the UK FOS, which was established by Parliament through the Financial Services and Markets Act 2000 to provide an out-of-court mechanism for resolving complaints that consumers and financial services providers have been unable to resolve themselves. The FOS is the largest ombudsman service in the world;<sup>34</sup> it receives, annually, 1.2 million inquiries from consumers, 500,000

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31 Chris Gill, Jane Williams, Carol Brennan and Carolyn Hirst, *Models of Alternative Dispute Resolution (ADR): A report for the Legal Ombudsman*, Queen Margaret University 2014 <https://bit.ly/1pmTPqh> accessed 10 August 2018.

32 Charlie Irvine, Rachel Robertson and Bryan Clark, *Alternative Mechanisms for Resolving Disputes: A Literature Review*, Health Professions Council 2010, 12 <https://bit.ly/2v2NSok> accessed 10 August 2018.

33 Peter J Tyldesley, ‘The Insurance Ombudsman Bureau – The Early History’ (2003) 39 *Journal of Insurance Research and Practice* 34.

34 Natalie Ceeney, ‘Financial Ombudsman: Can We Help You?’ *BBC News*, 2012 <https://bbc.in/2KdzvC8> accessed 6 August 2018.

of which are pursued as formal complaints.<sup>35</sup>

The FOS recently conducted a review of its strategic approach to transparency issues over a one-year period. Importantly, it sought the input of an independent third party, Lord Hunt of Wirral, to discuss relevant points with stakeholders and make recommendations.<sup>36</sup>

Third-party input is a vital resource to draw on in this field, as it is likely to further service users' beliefs in the openness and transparency of ombudsman activities in a much firmer way than internal self-assessment.

Sending clear signals to stakeholders that its operations are open to independent scrutiny contrasts with the approach of many ombudsman institutions, which tend to be

more inward-facing in the review of their own actions and policies.

Payment Protection Insurance (PPI) has dominated the work of the **UK** FOS, with PPI policies having been sold alongside mortgages, loans and credit cards since the 1990s. The UK Financial Services Authority began imposing fines for PPI mis-selling in 2006, and the scandal escalated in 2008, when it was reported that one in three PPI customers had been sold 'worthless' insurance. Following successful court cases, the PPI scandal continued to grow, and PPI accounted for 74 per cent of new cases handled by the FOS from 2012–2013. It had become the most complained about product ever by the end of that year. To date, banks have paid out £30bn in compensation to consumers, and by the end of 2016/2017 the FOS had received over 1.6 million complaints about mis-sold PPI.

Sources: Financial Ombudsman Service, *Annual Review 2016/2017*, 2017 <https://bit.ly/2s01AqW>; McGagh M, *PPI becomes most complained about product ever*, Citywire 2012 <https://bit.ly/2mt3sF7>.

Insurance ombudsmen in **India** made newspaper headlines in early 2018, as the head positions at all 17 of the regional offices were vacant for a period of over four months, with some having been vacant for two or three years. It was reported that a backlog of 6,000–7,000 cases had built up during this time. This was criticised as creating a situation in which the first defence against insurance mis-selling was 'missing when needed the most', India's insurance market experiencing a period of rapid growth and predicted to be worth \$280bn in 2020.

Source: Saxena R, *India's Front Line Against Insurance Mis-Selling Is Missing*, Bloomberg 2017 <https://bit.ly/2mZY24s>; Saraswathy M, *Insurance Ombudsman offices go headless, complaints pile up*, Moneycontrol 2018 <https://bit.ly/2Jx0qIT>.

The Federal Insurance Ombudsman in **Pakistan** undertook a public information campaign in 2016–2017, including using social media and print adverts, as well as proactively involving the insurance industry. The Ombudsman also has a short message service (SMS) service, aimed at increasing accessibility to its processes. The annual report attributed the increase in the number of complaints to the success of the campaign in heightening awareness of the Ombudsman.

Source: Federal Insurance Ombudsman, *Annual Report 2016-17*, <https://bit.ly/2OucoxH>.

## 4.2 Consumers

As previously noted, private sector ombudsmen – that is, ombudsmen who regulate private sector behaviour, whether established by parliament, government or industry – were a far later development than their public sector counterparts, with the model being established in the late 20th century. In line with consumerism and the unprecedented expansion of regulation, private sector ombudsmen have spread rapidly to offer consumers new paths for their complaints. Importantly, most ombudsman systems are free for consumers, thereby helping to fulfil their aim of providing accessible justice.

The ombudsman institution plays a particularly useful role as a tool for guaranteeing effective access to justice in relation to small claims disputes. National courts across the world have become increasingly ineffectual in handling small consumer claims, due to the high cost of proceedings, delays, stretched resources, and the relative inaccessibility of the court system. A Eurobarometer survey on consumer empowerment conducted in 2011 found that only two per cent of European

35 Dorota Leczykiewicz and Stephen Weatherill, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Bloomsbury Publishing 2016).

36 Financial Ombudsman Service, *Policy Statement: Our Strategic Approach to Transparency* <https://bit.ly/2v1Sn2o> accessed 6 August 2018.

consumers who encounter problems bring these before a court.<sup>37</sup> This is clearly an impediment to effective access to justice for aggrieved consumers; ombudsmen can play an important role in this regard.

A study conducted in 2012<sup>38</sup> examined the typical claims submitted to ombudsmen across European countries, and highlighted that these claims can be very small. For example, in France, the Médiateur de la Fédération Française des Sociétés d'Assurances (FFSA) handled many cases valued at around €100 and some as low as €5. Despite the frequently low value of these cases, unresolved claims represented

0.4 per cent of the EU gross domestic product (GDP) in 2014.<sup>39</sup> Low-value claims are particularly suited to resolution by an ombudsman structure because many jurisdictions impose a minimum value required to file a claim before the courts. Even where there is no minimum limit, court and tribunal fees reduce or eliminate the economic advantage of pursuing the sum at stake.

### *In focus: The ombudsman model under EU consumer law*

Private sector ombudsmen can now be found in every EU Member State,<sup>40</sup> although in notably differing forms, and are recognised as a key way to support and enhance the 'health' of the European Single Market. To facilitate a degree of harmonisation, the EU introduced a major piece of legislation, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on ADR for consumer disputes. Under this directive, the EU aims to build a comprehensive network of consumer dispute resolution (CDR) bodies that can decide every type of consumer-to-business breach of contract dispute, excluding various healthcare and education matters. The directive sets out a series of quality requirements and a regulatory mechanism to control CDR bodies.

The ADR regulations are complemented by Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes. This created a single pan-EU online dispute resolution (ODR) platform, which aims to facilitate, in particular, cross-border CDR claims. While the effectiveness of the platform in dealing with customer complaints will be

The most commonly reported consumer complaints vary with the remits and markets in which the consumer ombudsmen operate, as well as their internal methods of categorisation. A selection of the most frequent are as follows:

- According to the **UK's** ombudsman services, the most common consumer complaints raised by a long margin were 'claims process – product replacement', followed by 'faulty goods or service' and 'poor customer service'.
- For consumer ombudsmen in **Poland**, there were 223,779 cases related to traditional sale of goods. The products to which most consumer complaints pertained were: clothing and footwear (83,401); audio/video equipment and household appliances (46,093); and interior fittings (23,807).
- The Consumer Goods and Services Ombud in **South Africa** reported that 37 per cent of the complaints received concerned goods, and that the most commonly complained about sectors were 'satellite and telecommunications', 'clothing retail', and 'fitness'.
- **Oman's** Public Authority for Consumer Protection has repeatedly reported 'cars agencies & their services' as the most commonly complained about sector, followed by 'electrical & electronics devices' and 'cars garage'.
- The Competition and Consumer Protection Commission in the **Republic of Ireland** was contacted most about 'telecommunications', 'vehicles/personal transport', and 'clothing/footwear/accessories'.

Sources: Ombudsman Services, *Annual Activity Report for: The Consumer Ombudsman, July 2016 – June 2017* <https://bit.ly/2v2hoe2>; Office of Competition and Consumer Protection, *A Busy Year for Consumer Ombudsmen 2018* <https://bit.ly/2zW2gnp>. The Consumer Goods and Services Ombud scheme, *Annual Report 2016/17* <https://bit.ly/2AvpkJO>; The Public Authority for Consumer Protection, *Annual Statistical Report of 2016, 2017* <https://bit.ly/2vjyHG5>; Competition and Consumer Protection Commission, *Annual Report 1 January 2016 – 31 December 2016* <https://bit.ly/2vmeu32>.

37 Special Eurobarometer, *Consumer Empowerment*, 2011 <https://bit.ly/2LSIDSX> accessed 6 August 2018.

38 Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt, *Consumer ADR in Europe* (Hart Publishing 2012).

39 Christopher Hodges, Naomi Creutzfeldt and Sonia MacLeod, 'Reforming the EU Consumer ADR Landscape: Implementation and its Issues' (2014) *The Foundation for Law, Justice and Society* 2.

40 See n 22 above.

dealt with below, suffice to say at this stage that it is becoming apparent that CDR is becoming ‘the major, if not exclusive pathway’ for the resolution of consumer-to-business disputes across Europe.<sup>41</sup>

As noted in respect of financial services, there has also been a drive in this sector to develop effective dispute resolution services from the business sector, which recognises the benefits of this approach. In many jurisdictions, ombudsmen report back to businesses on patterns and trends in handled complaints, helping them to tackle endemic problems internally and improve their overall customer service standards. Consumer confidence is crucial to a successful business, and effective ADR methods have become increasingly recognised as necessary to building and maintaining consumer trust.

As opposed to a single national body, there are currently 371 regional and municipal consumer ombudsmen in **Poland**, which conduct nearly half a million counselling sessions with consumers annually.

However, the President of the Office of Competition and Consumer Protection (Urzędu Ochrony Konkurencji i Konsumentów (UOKiK)), a central authority of the state administration, Marek Niechcial, has raised concerns about the consistency of this model, with each district having an individual ombudsman, as there have been significant discrepancies in terms of their activity: ‘How is it possible that in one medium-sized province capital, the consumer ombudsmen gave advice to consumers on 348 occasions in a single year, whereas in another, similar city that figure was as much as 8565? Consumers from all across the country must enjoy the same, high degree of protection’.

Source: Office of Competition and Consumer Protection, *A Busy Year for Consumer Ombudsmen*, 2018 <https://bit.ly/2zW2gnp>.

### *In focus: Online purchases*

The online world of trade and e-commerce has expanded at a remarkable rate. In 2017, an estimated 1.66 billion people worldwide purchased goods online, increasing from 1.52 billion the previous year. Global e-retail sales additionally amounted to \$2.3tn in 2017, and projections show that this could rise to \$4.48tn by 2021.<sup>42</sup> A key trend in the use of ombudsman services to handle customer complaints is the development of ‘consumer activism’.<sup>43</sup>

This can be partially attributed to the digital shopping experience, which enables consumers to lodge enquiries and complaints with retailers at almost any time, with social media opening up new, direct channels of customer service. Online, consumers are empowered by the accessibility of both information and alternative choices for products. Consumer polling has revealed that the role ombudsmen can play is significant, as 34 per cent of individuals said that they would be more likely to trust a company that is signed up to an ombudsman scheme.<sup>44</sup>

As with any market, this requires effective means for the resolution of consumer complaints, yet it poses unique problems and questions over the applicable law, due to its cross-border nature. It is precisely this aspect of online trade that has brought digitised dispute resolution mechanisms to the forefront in this sphere.<sup>45</sup> ODR methods range from online communication methods, such as Skype, to a regulator service using multiple technologies in the resolution of a dispute.<sup>46</sup>

As noted above, at the EU level, in pursuing the aim of a digital single market, the Online Dispute Regulations were introduced, and came into force in January 2016. This involved the creation of an

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41 See n 22 above.

42 Statista, *Online-Shopping and E-Commerce worldwide: Statistics & Facts* <https://bit.ly/2kKqnJ2> accessed 6 August 2018.

43 The Deloitte Consumer Review: The growing power of consumers (2014) <https://bit.ly/2fL2e6x> accessed 6 August 2018.

44 Ombudsman Services, *Consumer Action Monitor* (March 2018) <https://bit.ly/2LS3p41> accessed 6 August 2018.

45 Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe: Civil Justice Systems* (Hart Publishing 2012).

46 Thomson Reuters, *The Impact of ODR Technology on Dispute Resolution in the UK*, 2016 <https://tmsnrt.rs/2v72WBe> accessed 6 August 2018.

interactive website, available in all official EU languages, to act as a single point of entry for traders and consumers. The website also includes links to the relevant, nationally approved ADR bodies. A potential advantage of ODR is that consumers may prefer no face-to-face contact, as with the transaction at the root of their complaint.<sup>47</sup>

In **Malta**, the percentage of consumers who shop online has doubled over the past six years. Of those, as many as 94 per cent have purchased or accessed a product across borders in the EU and would be able to have recourse to the EU ODR portal. In response to this trend, the Malta Competition and Consumer Affairs Authority has focused its education campaign on rights for consumers when they shop online, including organising a half-day seminar on Online Shopping on World Consumer Rights Day in 2016.

Source: Malta Competition and Consumer Affairs Authority, *Annual Report 2016* <https://bit.ly/2AtNm7S>.

The Online Dispute Regulations make it mandatory for online traders to include an easily accessible electronic link to the EU's ODR website on their sales platform, as well as to provide consumers with a direct email address, as opposed to a contact form. In its first two years, the platform processed over 50,000 complaints and had over 4 million visitors.<sup>48</sup> The volume of complaints and the number of connected dispute resolution bodies in each country have both steadily increased since implementation, with France currently having the most connected bodies, at 67, and Germany having received the most consumer complaints, at over 16,000.<sup>49</sup>

While the impact of the ODR platform is difficult to assess, the European Commission's Consumer Conditions Scoreboard (the 'Scoreboard') reported a 'breakthrough increase in consumer confidence in online shopping' in 2016. It noted that, for the first time since the Scoreboard data had been collected, consumers expressed a strong increase in trust in buying goods and services from other EU countries. This was viewed as a major step towards the attainment of a digital single market in the EU.<sup>50</sup>

Company-run in-house ODR services seem particularly well-suited to higher-volume, lower-value cases, especially where the cost of involving neutral third parties cannot be justified. They have had greatest success where the dispute resolution platform is connected to feedback on review sites to act as an incentive for traders. The eBay example shows the relevance and potential of non-state funded ombudsman (or guarantor) schemes where companies are able to develop bespoke complaints and dispute settlement models on the back of enhanced technology and ODR platforms.

eBay's in-house Resolution Centre has gained praise and prominence as a pioneer in the sector. It is a tiered ODR system, where buyers and sellers first try to settle their disputes through assisted negotiation software while the sum at issue is frozen by PayPal. If the dispute cannot be resolved, it is escalated to the Resolution Services team for a decision. eBay's ODR system resolves over 60 million cases per year, with 80 per cent of these being resolved without human intervention. These are mostly concerned with the following problems: (1) the buyer did not receive items within the estimated delivery date; or (2) the item received was wrong, damaged or different from the seller's description.

eBay's system has notably inspired calls from the Civil Justice Council in the **UK** for a new, internet-based court service.

While eBay's Resolution Centre is an example of an industry-led dispute resolution procedure, it can arguably play the role of an effective and neutral party when it comes to a dispute. This is because eBay is uniquely positioned, neither selling nor holding an inventory, but rather primarily facilitating the transaction between the seller and buyer.

Source: Centre for Socio-Legal Studies, Oxford, *The Hidden World of Consumer ADR: Redress and Behaviour* (Centre for Socio-Legal Studies 2011) <https://bit.ly/2NYfxi0>.

47 Chris Gill, Jane Williams, Carol Brennan and Carolyn Hirst, *Models of Alternative Dispute Resolution (ADR): A report for the Legal Ombudsman*, Queen Margaret University 2014 <https://bit.ly/1pmTPqh> accessed 6 August 2018.

48 European Commission, *Online Dispute Resolution platform* <https://bit.ly/2mZvifs> accessed 6 August 2018.

49 CEF Digital, *Uptake of Online Dispute Resolution*, 2018 <https://bit.ly/2NYeEoU> accessed 6 August 2018.

50 European Commission, *Consumer Conditions Scoreboard: Consumers at Home in the Single Market 2017 edition*, 2017 <https://bit.ly/2uT8ArJ> accessed 6 August 2018.

## 4.3 Telecommunications

With the shift from the industrial age to what is now commonly termed the ‘information age’, the telecommunications market has achieved growing significance. In this process, services such as television programming and print publishing have been digitised to become ‘physically reducible’ to data transmissible over networks.<sup>51</sup> As these services have moved online, the sectors they fall into have necessarily been redefined, resulting in a substantially increased remit for bodies regulating telecommunications providers, notably those offering internet services.

The workload of telecommunications ombudsmen is undergoing a related significant shift. In October 2016, worldwide internet usage by mobile and tablet devices exceeded that by desktop for the first time, and the upwards trend has continued without any signs of abating. As a result, telecommunications ombudsmen globally are finding that an increasing percentage of their work is related to mobile communications and broadband usage, with landline, fixed-line services and even mobile voice services decreasing proportionally. For example, the Australian Telecommunications Ombudsman reported that ‘internet services’ constituted 40.4 per cent of the complaints they received from 2016–2017,<sup>52</sup> and in 2017 the Médiateur des communications électroniques in France saw complaints related to internet and combined services increase one per cent on the previous year to now constitute 38 per cent of their litigation work.<sup>53</sup>

### *In focus: Improving accessibility*

The growth in the capabilities, reach and proliferation of information and communication technologies (ICT) has been a critical driver of socio-economic change worldwide. It has transformed how governments, businesses and citizens interact and behave, and offers new and innovative ways to address development challenges. The key obstacle that remains for the telecommunications sector is that of accessibility, with billions of individuals still outside of the reach of internet providers, and many without mobile phones. There are now more than four billion people around the world using the internet,<sup>54</sup> constituting 52 per cent of the world’s population.<sup>55</sup> More than three billion people use social media each month, with nine in ten people accessing the platforms through mobile devices.<sup>56</sup> However, there is a substantial digital divide between countries and regions, and between developed and developing countries.

The importance of internet access has been recognised by the UN and is an integral part of its Sustainable Development Goal (SDG) agenda adopted in September 2015. At a 2015 meeting of the UN General Assembly, the then UN Secretary-General Ban Ki-moon drew attention to the stark divides in accessibility and highlighted the centrality of ICT to UN commitments, stating that ‘[i]n 2015, we embarked on a journey – a journey of climate action, a journey of sustainability, a journey of prosperity for all the nations and communities sharing this one planet. ICTs and the internet

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51 Irene Wu, ‘Who Regulates Phones, Television, and the Internet? What Makes a Communications Regulator Independent and Why It Matters’ (2008) 6(4) *Perspectives on Politics* 769.

52 Telecommunications Industry Ombudsman, *2016–2017 Annual Report* <https://bit.ly/2NYM7iR> accessed 6 August 2018.

53 Le Médiateur des communications électroniques, *Highlights 2017: Global Vision, Activity Report 2017* <https://bit.ly/2LSN7aW> accessed 6 August 2018.

54 We Are Social, *Global Digital Report 2018* <https://bit.ly/2Fx8urq> accessed 6 August 2018.

55 Mike Kujawski, *Global Internet Statistics for 2018*, Medium 2018 <https://bit.ly/2M6Oi3F> accessed 6 August 2018.

56 We Are Social, *Global Digital Report 2018* <https://bit.ly/2Fx8urq> accessed 6 August 2018.

must help drive this journey'.<sup>57</sup> While there is no SDG focused specifically on ICT or the internet, an omission that has been criticised by organisations such as The Internet Society,<sup>58</sup> it is explicitly mentioned in four of the SDGs. The most significant of these is Goal 9 on industry, innovation and infrastructure, which has among its targets '[increasing] access to information and communications technology and [striving] to provide universal and affordable access to the internet in least developed countries by 2020'.<sup>59</sup>

Governments, businesses, civil society and citizens should work together towards the attainment of the SDGs, including Goal 16 on access to justice.<sup>60</sup> In pursuit of this aim, a number of telecommunication ombudsmen have launched projects to increase accessibility, particularly in remote and rural areas, as shown in the boxes below.

The Telecom Regulatory Authority of **India** (TRAI) organised 85 Consumer Outreach Programmes across the country during 2016–2017. These aimed to reach out to telecom consumers and other stakeholders of the telecom industry, and to create awareness of TRAI's initiatives in protecting consumer interests. They were held in conjunction with regional workshops for capacity building of TRAI-registered Consumer Advocacy Groups and more general consumer education.

Source: Telecom Regulatory Authority of India, *Annual Report 2016-17* <https://bit.ly/2LQufGx>.

Maithripala Sirisena, the President of **Sri Lanka**, ran on an election manifesto that included a pledge to provide free Wi-Fi to the whole of Sri Lanka. In April 2015, Sirisena launched the 'Free Wi-Fi for Regional Towns' programme, as authorities simultaneously unveiled free Wi-Fi zones in 100 towns across the country. The Telecommunication Regulatory Commission of Sri Lanka (TRCSL) is spearheading the programme, which provides free access to the internet up to 100 MB per citizen per month. The programme was launched with the rural youth particularly in mind, and the Director-General of the TRCSL has stressed the integral importance of the internet in opening up opportunities for business, education and political engagement.

Source: Telecommunication Regulatory Commission of Sri Lanka, The President unfolded the 'Free Wi-Fi for Regional Towns', 2015 <https://bit.ly/2KbolEp>.

In 2015, the **Australian** Telecommunications Industry Ombudsman (TIO) launched a toolkit aimed at organisations working in remote indigenous communities. The resources aim to increase the awareness of people in remote communities of the existence of the TIO as a scheme able to help them with the resolution of a problem with their landline, mobile or internet service provider.

The TIO provides the following case study of their outreach programme in action:

'Later, the TIO travelled to Walgett to take part in a legal roadshow and visited the nearby remote Indigenous communities of Gingie and Namoi. Both communities have about 20 houses each and are about 10 minutes' drive from Walgett. Gingie has no mobile reception so residents rely heavily on landlines.

In Walgett, where almost half the population is Indigenous, the TIO met with service providers including the shire council, Mission Australia, Centrelink, the Department of Prime Minister and Cabinet, the Aboriginal medical service, the Dharriwaa Elders Group, and the Walgett Shire Council.

The service agencies all welcomed our presented our Telco rights toolkit, which aims to increase awareness of our service in remote Indigenous communities.

The TIO developed its Telco rights toolkit over the past two years and it will be progressively distributed to remote Indigenous communities nationally.

Local elders were impressed with the kit and said they would help to distribute it through their communities. The TIO also provided consumers with information promoting the Do Not Call Register. The elders told us that many Indigenous people receive unsolicited marketing calls and few know that they can sign up to the register'.

Source: Telecommunications Industry Ombudsman, *Outreach update*, 2015 <https://bit.ly/2M6QOa3> accessed 6 August 2018.

57 United Nations, *Countries adopt plan to use Internet in implementation of Sustainable Development Goals*, 2015 <https://bit.ly/2OyDrAX> accessed 6 August 2018.

58 The Internet Society, *The Internet and Sustainable Development: An Internet Society contribution to the United Nations discussion on the Sustainable Development Goals and on the 10-year Review of the World Summit on the Information Society*, 2015 <https://bit.ly/2NZVHSK> accessed 6 August 2018,

59 United Nations Development Programme, *Sustainable Development Goals* <https://bit.ly/2d4dcA4> accessed 6 August 2018

60 United Nations Development Programme, *Sustainable Development Goals* <https://bit.ly/2d4dcA4> accessed 6 August 2018.



## *In focus: Data privacy*

In 2018, data protection was thrust into the spotlight in an unprecedented manner. In April 2018, Facebook revealed that as many as 87 million users could have had their personal information shared with the political consultancy and data mining company, Cambridge Analytica.<sup>61</sup>

The role of ombudsman schemes in this area has thus far been marginal, even where explicitly provided for as under the EU-US Privacy Shield deal. However, the implementation of the EU General Data Protection

Regulation (GDPR) in May 2018 and the increasing enactment of data protection laws globally have led to the creation and empowerment of more data ombudsmen to monitor compliance, handle complaints and increase transparency. The imbalance of power between social media platforms and their users is vast, with a stark information asymmetry,<sup>62</sup> largely opaque business practices, as well as a marked tendency for social media platforms to move towards monopolisation of the market. As citizens become more aware of their data rights and potential breaches, this could be a key future field of practice for ombudsmen and a worthwhile one in which to undertake public information campaigns.

The **EU-US** Privacy Shield is a framework for the transfer of EU citizens' personal data to the US. On 5 July 2018, the European Parliament voted in favour of a resolution that was critical of the US for failing to ensure 'adequate protection' of the transfer of EU personal data within this framework, citing in particular the improper use of 2.7 million EU citizens' Facebook data by Cambridge Analytica. If the US fails to comply with the recommendations by 1 September 2018, the deal may be suspended by the European Commission.

A key area highlighted for improvement was the Privacy Shield Ombudsman, a role intended to act as an arbiter for any data-related complaints from EU citizens. The European Parliament criticised the lack of a permanent appointment to the role, lack of information on the role and lack of clarification on its relationship with the intelligence service.

Source: European Parliament, *Suspend EU-US Data Exchange Deal, Unless US Complies by 1 September, say MEPs*, 2018 <https://bit.ly/2IXcX85>.

The Centre for Effective Dispute Resolution (CEDR) provides ADR services for the **UK** communications industry through the Communications & Internet Services Adjudication Scheme (CISAS). In doing so, it is required to meet Ofcom's 'approval criteria', which include transparency; Ofcom is the UK's government-appointed Competent Authority and regulator of the communications industry. Key steps taken by the CEDR to comply with its obligations in this regard include sharing all evidence and submissions with both parties in all cases, and sending fully-reasoned written decisions to parties at the same time.

Source: Centre for Effective Dispute Resolution, *How does CEDR meet Ofcom's approval criteria?* <https://bit.ly/2mYePvK>.

The long-awaited 2018 draft Data Protection Bill in **India**, drawn up by the Justice Srikrishna Committee, is expected to propose a 'data ombudsman' to adjudicate complaints between data principals and data fiduciaries, including on the right to be forgotten. The delays plaguing the Committee, and previous failures to implement a framework, are testament to the difficulty of legislating in this area.

Source: Suprita Anupam, 'Justice Srikrishna Committee to Finally Table Data Protection Bill Report, But It's Only Half the Battle Won' *Inc42*, 2018 <https://bit.ly/2Of0eo7>.

The **Finnish** Data Protection Ombudsman was established in 1987 as an independent, expert organisation. The Ombudsman is appointed by the Finnish Government, and its primary duty is to provide direction and guidance, as well as supervise compliance with data protection legislation. The Data Protection Ombudsman functions as the 'lead supervisory authority' under the GDPR, and is a member of the European Data Protection Board. With the implementation of the GDPR, its workload and remit has significantly increased and it has been supplied with additional resources, including multiple Deputy Data Protection Ombudsmen.

Source: Ministry of Justice, Finland, *The Finnish Data Protection Board* <https://bit.ly/2n0mq6m>.

61 Olivia Solon, 'Facebook says Cambridge Analytica may have gained 37m more users' data', *The Guardian* (London, 4 April 2018) <https://bit.ly/2E1jw22> accessed 6 August 2018.

62 Wolfie Christl, *How Companies Use Personal Data Against People*, Cracked Labs 2017 <https://bit.ly/2vrS3Jf> accessed 6 August 2018.

# Chapter 5: Improving the role of ombudsman schemes in providing access to justice: Challenges and lessons for the future

As the analysis in this report has shown, ombudsman schemes are a key instrument in access to justice for citizens wishing to bring complaints about either public or private bodies in a wide range of fields. Key findings and considerations on their role are as follows:

- As with any body taking on increasing importance, new challenges arise in the consideration of how best to employ their services as well as maintain them at a high level of independence and transparency. Many ombudsman institutions publish extensive information on their operations, notably through annual reports and policy statements. However, because these documents are prepared by the ombudsman structures themselves, it is important going forward to obtain information on the transparency of their practices from external bodies. It has therefore been suggested that a legal framework enshrining the independence and impartiality of ombudsman offices is crucial. Adequate funding, wide investigative powers and enforcement remedies also have a key role to play in maintaining their independence.<sup>63</sup> A suggested improvement to the transparency of an ombudsman office and its operations is engagement of the media;<sup>64</sup> this is also a development requiring further monitoring and research.
- Close attention should be paid to the substantial characteristics of the different schemes – although certain institutions (including industry-based regulatory schemes) may ostensibly possess the characteristics of an ombudsman structure: (1) independence; (2) impartiality in conducting inquiries and investigations; and (3) confidentiality (in accordance with the ABA definition), the body may operate under a different name. By contrast, schemes that bear the label of ‘ombudsman’ may lack one or more of these characteristics.
- Of particular relevance to ombudsmen is their role in providing an easily accessible platform for citizens and consumers to present their grievances. These will not always be well-founded; indeed, many of the annual reports reviewed for this report provide statistics on the number of complaints deemed inadmissible. It is therefore inevitable that complaints made about the functioning of ombudsman offices will be made, making vital the importance of a reasoned determination as to whether a complaint pertains to the substantive findings of the ombudsman, or to an alleged deficiency in the ombudsman’s operations. The complaint must then be handled accordingly.
- Wider research is needed on the effectiveness and quality of justice imparted by ombudsman offices, and in particular the extent to which this has filled the gap created by increasingly expensive, formalistic and inaccessible formal systems of justice. This will require a review of whether ombudsman structures are succeeding in avoiding these drawbacks and keeping up with the changing operational landscape and needs of their service users. As previously highlighted in

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63 Raquel Aldana-Pindell, ‘An Emerging Universality of Justiciable Victims’ Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes’ (2004) 26 *Human Rights Quarterly* 605, 685.

64 Asian Development Bank, *Strengthening the Ombudsman Institution in Asia: Improving Accountability in Public Service Delivery through the Ombudsman*, 2011, 158 <https://bit.ly/2AsMxMD> accessed 6 August 2018.

a research report by Queen Margaret University in Edinburgh, although it is difficult to discern issues relevant to all ombudsman schemes across various sectors, there are some considerations that apply to the majority of schemes. Thus, the extent to which a scheme provides accessibility, accountability and effectiveness in the delivery of its operations is relevant regardless of its area of focus.

- Looking to the future, the increasing enactment of data protection laws globally has led to the creation and empowerment of more data ombudsmen to monitor compliance, handle complaints and increase transparency. The field of data privacy could prove a key future area for the operation of ombudsman schemes, particularly as the imbalance of power between social media platforms and their users is marked. The legal community can play an important role in undertaking public information campaigns to educate citizens on data privacy rights and in instances where these might have been breached.
- The IBA, with members who represent industry as well as consumers, enjoys a privileged position in sharing, supporting and promoting best practice guidelines in this sphere on the basis of the empirical evidence and review of existing academic and industry research collected in this report. The IBA also has a role to play in developing standards in this sector. The last conceptualisation of the essential features of an ombudsman was outlined by the ABA in its *Standards for the Establishment and Operation of Ombudsman Offices* in 2001 (building on the IBA's Ombudsman Resolution of 1974). As the practice of ombudsman offices has changed vastly since 2001, updated guidelines would be both important and timely. The IBA has long been engaged in raising awareness on how ombudsman schemes fit into the wider regulatory framework that aims at developing and implementing cost-effective justice models, and is thus uniquely placed to develop and possibly adopt broad best practice guidelines.

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