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**ACCOUNTABILITY POLICY BRIEFS**

**A comparative overview of the Legislative Framework for administrative oversight agencies in Commonwealth countries**

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## **A comparative overview of the Legislative Framework for administrative oversight agencies in Commonwealth countries**

### **1. Introduction**

The demand for legislations aimed at promoting transparency and imposing accountability upon the government and public authorities has gained momentum in recent times. The proposed Lokpal Bill and the Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of their Grievances Bill, 2011, aim at creating anti-corruption and grievance redressal systems that will inquire into complaints pertaining to maladministration and service delivery. The discourse on the proposed laws may benefit from an exposition of laws on the subject in other jurisdictions. Of course, the systems that have evolved in each are linked to the political, social, and other realities of a nation and cannot be borrowed without a regard for the situation in India. With this in mind, this brief looks at the legislative framework pertaining to oversight agencies or ombudsman in select Commonwealth countries such as Australia, New Zealand, Pakistan, South Africa, and United Kingdom, whose mandate entails investigating complaints against administrative action of the government and its agencies.

### **2. Independence**

Independence, fairness, confidentiality, and accessibility are key ingredients of a credible ombudsman.<sup>1</sup> Independence depends on the mode of establishment, composition, tenure, removal process, powers, autonomy to appoint staff, and financial autonomy. The processes adopted by an ombudsman must be fair and transparent and must inspire confidence. Confidentiality of proceedings must also be ensured in order to protect the identity of the complainants. In this section, we examine the provisions of the different oversight agencies in this context.

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<sup>1</sup> Dean M. Gottehrer & Michael Hostina, “Essential Characteristics of a Classical Ombudsman”, at <http://www.usombudsman.org/documents/PDF/References/Essential.PDF>; Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System*, Transparency International, 2000, Chapter 10-Ombudsman at p.84.

## **2.1. Establishment**

**Australia:** The offices of the Commonwealth Ombudsman and Deputy Commonwealth Ombudsmen in Australia have been constituted under the Ombudsman Act, 1976. The office of the Ombudsman has also been established at the sub-national level in some States including New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia and the Northern Territory. The office of the Commonwealth Ombudsman falls under the portfolio of the Department of Prime Minister and Cabinet.<sup>2</sup> The Ombudsman reports to the Special Minister of State and along with other oversight agencies are referred to informally as the “integrity branch of government”.<sup>3</sup>

**New Zealand:** The office of the Ombudsman in New Zealand has been created under the Ombudsmen Act, 1975. The Chief Ombudsman is an officer of Parliament and reports to the Speaker of the House.

**Pakistan:** The office of the Wafaqi Mohtasib (Ombudsman) has been created through a Presidential Order.<sup>4</sup> As per Article 3(3) of the Presidential Order, which establishes the Ombudsman in Pakistan, she/he must perform functions and exercise powers “fairly, honestly, diligently and independently of the executive.” The order mandates all executive authorities to “act in aid of the Mohtasib”.

**South Africa:** In South Africa, the office of the Public Protector is a creature of the Constitution.<sup>5</sup> Section 181(2) of the South African Constitution emphatically states that the

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<sup>2</sup> Australasia and Pacific Ombudsman Region Information Manual, 2009, p.1 at [http://www.ombudsman.gov.au/docs/APOR-Manual\\_20091009.pdf](http://www.ombudsman.gov.au/docs/APOR-Manual_20091009.pdf)

<sup>3</sup> Australasia and Pacific Ombudsman Region Information Manual, 2009, p.1 at [http://www.ombudsman.gov.au/docs/APOR-Manual\\_20091009.pdf](http://www.ombudsman.gov.au/docs/APOR-Manual_20091009.pdf)

<sup>4</sup> Pakistan - The office of Wafaqi Mohtasib (Ombudsman) has been created through a Presidential Order passed in 1983. This is in the nature of an order passed by an executive authority.

<sup>5</sup> Article 181 of the South African Constitution provides for the Public Protector. The functions and powers have been further elaborated upon in the Public Protector Act, 1994. The legal framework related to the Public Protector can be accessed at

<http://www.pprotect.org/legislation/docs/CONSTITUTIONAL%20&%20LEGISLATIVE%20MANDATE%20OF%20THE%20PUBLIC%20PROTECTOR.pdf>

Public Protector is independent and is subject only to the Constitution and the law. Further, Section 181(4) expressly bars interference in the functioning of the Protector by any person or the State.

**United Kingdom:** The Parliamentary Commissioner for Administration and Health Service Ombudsman (Parliamentary and Health Service Ombudsman) has been established under the Parliamentary Commissioner Act, 1967 and the Health Service Commissioners Act, 1993. The Ombudsman is an “independent crown servant”<sup>6</sup> and an officer of the House.

As is evident from this discussion, the oversight authorities in New Zealand, Australia, and United Kingdom have been established through Parliamentary legislation. In South Africa, the office of the Public Protector is provided for in the Constitution. However, in Pakistan the ombudsman is a creature of a Presidential Order and not an Act of Parliament. This mode of establishment runs the risk of compromising the independence of the ombudsman, for the office is dependent on the executive for its existence, and thus accountable to the executive. The Commonwealth Ombudsman is also required to report to executive authorities.

## ***2.2. Composition & Appointment Process***

**Australia:** In Australia, the Commonwealth Ombudsman is appointed by the Governor-General and the Deputy Ombudsman is designated by the Minister. Parliament has no role to play in the appointment process. The Ombudsman can be removed from office by the Governor General based on an address praying for removal, passed by each House of Parliament.

**New Zealand:** The Chief Ombudsman and Ombudsmen in New Zealand are appointed by the Governor-General on the recommendation of the House of Representatives. The Ombudsmen can be removed or suspended from office by the Governor-General based on

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<sup>6</sup> Parliamentary and Health Service Ombudsman, “Governance”, <http://www.ombudsman.org.uk/about-us/our-role/governance>

an address from the House of Representatives. Grounds for removal include “inability to perform functions, bankruptcy, neglect of duty, or misconduct”.

**Pakistan:** The Mohtasib is appointed by the President. He/ She can also be removed by the President on grounds of misconduct or incapability of performing duties due to physical or mental incapacity. The Mohtasib can challenge the removal by requesting for an open public evidentiary hearing before the Supreme Judicial Council. The Order is silent on the appointment process.

**South Africa:** The Public Protector (PP) in South Africa is appointed by the President based on the recommendation of the National Assembly. Appointments are made through a committee with proportionate representation of members of all parties represented in the Assembly. The committee nominates a person for the position of PP. The Assembly then approves the recommended person through a resolution supported by at least 60% of the members of the Assembly. In 1994, the Assembly enacted the Public Protector Act, to detail the functions and powers of the Public Protector. The Act also provides for the appointment of a Deputy Public Protector. The Deputy Public Protector’s primary responsibility is to provide assistance to the PP. In addition, the Deputy Public Protector is expected to discharge functions when the PP is unable to do so or the office is vacant.

The Public Protector can be removed from office based on a finding by a committee of the National Assembly, that either of the grounds of misconduct, incapacity, or incompetence are applicable. Thereafter, the Assembly must adopt a resolution calling for the person’s removal.

**United Kingdom:** The Parliamentary and Health Service Ombudsmen in the United Kingdom are appointed by the Queen and selected and approved by the House of Commons

with the agreement of the Prime Minister.<sup>7</sup> The Ombudsmen can be removed from office on grounds of misbehaviour based on such a motion from both Houses of Parliament.

Except the Public Protector Act in South Africa, none of the other legislations prescribe any qualifications for the Ombudsman. According to the South Africa Act, the Public Protector must be a citizen who:

- Is a fit and proper person to hold office,
- Is a High Court Judge or who has for a period of 10 years (cumulative) been an advocate/ attorney who has lectured in law at a university, or has specialised knowledge of or experience in administration of justice, public administration or public finance, or
- Has been a Member of Parliament.
- Is a person with a combination of these experiences for a cumulative period of at least 10 years.

To illustrate, the current PP, Advocate Thulisile (Thuli) Nomkhosi Madonsela, has over 20 years of experience as a human rights and constitutional lawyer and served as a technical adviser to the National Assembly in drafting the Constitution.<sup>8</sup>

### ***2.3. Operational and Financial Autonomy***

Most of institutions, with the exception of Australia and Pakistan, have been vested with substantial operational autonomy with regard to appointment of staff.

**New Zealand:** The Chief Ombudsman has the authority to appoint necessary officers and employees required to discharge their obligations.

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<sup>7</sup> Statement of Responsibilities between the Parliamentary and Health Service Ombudsman and the Cabinet Office, HM Treasury, Department of Health, and Ministry of Justice, at p.1  
[http://www.ombudsman.org.uk/data/assets/pdf\\_file/0010/1513/2011-Cabinet-Office-Statement-of-responsibilities.pdf](http://www.ombudsman.org.uk/data/assets/pdf_file/0010/1513/2011-Cabinet-Office-Statement-of-responsibilities.pdf)

<sup>8</sup> Profile of Advocate Thulisile (Thuli) Madonsela: Public Protector-RSA,  
[http://www.pprotect.org/about\\_us/profile\\_public\\_protector.asp](http://www.pprotect.org/about_us/profile_public_protector.asp)

**Pakistan:** The Mohtasib does not have the authority to appoint staff and it is the President who appoints them in a manner prescribed by the Federal Government. The Mohtasib can, however, appoint advisers, consultants, bailiffs, commissioners and experts or ministerial staff.

**South Africa:** The Public Protector can appoint staff. In addition, he/she can seek assistance from “officers in the Public Service seconded to the service of the Public Protector”.

**United Kingdom:** The Parliamentary Commissioner can appoint its own staff but requires the approval of the Cabinet Office as to numbers and conditions of service.<sup>9</sup>

As mentioned earlier, the success of an oversight institution depends both on its financial independence as well as sufficiency of funds. If the financial reins are exclusively in the hands of the government, it is possible that the Ombudsmen may be denied funds necessary for them to exercise their mandate. While this is a problem in most countries under review, it is sharpest in Australia. In fact in 1998, Philippa Smith, the outgoing Commonwealth Ombudsman of Australia commented that “it appears the Government does not want to fund a fully effective Ombudsman’s office.”<sup>10</sup> A similar concern over funding was also voiced by Commonwealth Ombudsman, Allan Asher, who had to resign under controversial circumstances in October 2011.<sup>11</sup>

In New Zealand, the Ombudsmen’s office receives funds through a Parliamentary appropriation. However, the Chief Ombudsman recently stated that the office is in “crisis”

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<sup>9</sup> Section 3(1), Parliamentary Commissioner Act, 1967 and Statement of Responsibilities between the Parliamentary and Health Service Ombudsman and the Cabinet Office, HM Treasury, Department of Health, and Ministry of Justice, 2009, p.4, at [http://www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0012/3405/Statement-of-responsibility-August-2009.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0012/3405/Statement-of-responsibility-August-2009.pdf)

<sup>10</sup> Commonwealth Ombudsman, The comments and reflections of the outgoing Ombudsman, <http://www.ombudsman.gov.au/media-releases/show/7>

<sup>11</sup> Opening Statement – Commonwealth Ombudsman Allan Asher Additional Estimates, 17 October 2011, [http://www.ombudsman.gov.au/files/additional\\_estimates\\_opening\\_statement\\_17\\_oct\\_2011.pdf](http://www.ombudsman.gov.au/files/additional_estimates_opening_statement_17_oct_2011.pdf)

due to insufficient funds and that the lack of investigators was preventing it from investigating as many as 300 cases.<sup>12</sup>

Lack of funds has also impaired the effective functioning of South Africa's Public Protector's office, as it does not have enough resources to deal with the caseload.<sup>13</sup> Despite being an institution provided under the Constitution, it depends on the Department of Justice and Constitutional Development for funds.<sup>14</sup>

The financial statement of the office of United Kingdom's Parliamentary and Health Service Ombudsman stated that their budget for 2010-2011 was not fully utilised but this did not impact their service delivery or functioning.<sup>15</sup>

### **3. Investigative powers and Functions**

The jurisdiction of each institution has been clearly laid down in law. The mandate of most includes an investigation into reported maladministration by government departments and organisations. Table 1 below describes in detail the investigative powers of each institution.

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<sup>12</sup> Adam Bennett, "Bulging backlog creating a 'crisis' in Office of the Ombudsman, *New Zealand Herald*, 15 February 2012, at [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10785726](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10785726)

<sup>13</sup> Glynnis Underhill, "Protector's cash hopes", *Mail & Guardian*, 24 February 2012, <http://mg.co.za/article/2012-02-24-protectors-cash-hopes>

<sup>14</sup> The Institute for Accountability in South Africa, "Funding the Public Protector", [http://www.ifaisa.org/Funding\\_the\\_Public\\_Protector.html](http://www.ifaisa.org/Funding_the_Public_Protector.html); Glynnis Underhill, "Protector's cash hopes", *Mail & Guardian*, 24 February 2012, <http://mg.co.za/article/2012-02-24-protectors-cash-hopes>

<sup>15</sup> Parliamentary and Health Service Ombudsman, Summary Financial Statements for the year ended 31 March 2011, <http://www.ombudsman.org.uk/annualreport/finance>



### 3.1. What can be investigated?

**Table 1: Investigative powers**

	<b>What can be investigated?</b>	<b>Who can be investigated?</b>
<b>Australia</b>	<ul style="list-style-type: none"> <li>• Administrative action</li> <li>• Complaint which was raised with the Department or authority, but in the Ombudsman's opinion no redress or inadequate redress was provided.</li> <li>• Investigations transferred by the Information Commissioner under the Freedom of Information Act, 1982.</li> </ul>	<ul style="list-style-type: none"> <li>• Government agencies and services</li> <li>• Federal Police</li> <li>• Defence Force</li> <li>• Department of Immigration and Citizenship</li> <li>• Postal Industry</li> <li>• Taxation Office</li> <li>• Commonwealth Service Providers - persons who have entered into a contract with the government for the purpose of providing goods or services for or on behalf of the government. It also extends to persons who have been contracted by the Commonwealth service provider for the above stated purpose</li> <li>• Corporate entities established for a public purpose</li> <li>• Commonwealth controlled companies</li> </ul>
<b>New Zealand</b>	<ul style="list-style-type: none"> <li>• Administrative action</li> <li>• Complaints pertaining to denial of information, mode of making the information available, or withholding of information by the Ministers of the Crown, Central and local government departments and organisation,</li> </ul>	<ul style="list-style-type: none"> <li>• Central government departments and organisations.</li> <li>• Local government organisations</li> <li>• Prisons and other places of detention</li> <li>• Minister of the Crown (limited to their decisions under the Official Information Act)</li> </ul>
<b>Pakistan</b>	<p>Maladministration which includes decisions and actions which are:</p> <ul style="list-style-type: none"> <li>• contrary to law or a departure from established practice</li> <li>• perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory</li> <li>• based on irrelevant grounds</li> <li>• based on corrupt or improper motives</li> <li>• reflect neglect, delay, inefficiency and ineptitude</li> </ul>	<ul style="list-style-type: none"> <li>• Ministry, Division, Department, Commission or office of the Federal Government</li> <li>• Statutory body, corporation or other institution established or controlled by the Federal Government.</li> </ul>
<b>South Africa</b>	<ul style="list-style-type: none"> <li>• Maladministration</li> <li>• Abuse of power</li> <li>• Unfair, capricious, discourteous or improper conduct</li> <li>• Undue delay by a person performing a public function</li> <li>• Administrative decisions</li> <li>• Improper or dishonest acts</li> <li>• Improper or unlawful enrichment or advantage</li> </ul>	<ul style="list-style-type: none"> <li>• Government at any level.</li> <li>• Person performing a public function</li> <li>• Institutions in which the State is the majority or controlling shareholder</li> <li>• Public entities</li> </ul>
<b>United Kingdom</b>	<p>Maladministration that has resulted in injustice</p>	<ul style="list-style-type: none"> <li>• Government departments</li> <li>• Corporations and unincorporated bodies listed in Schedule 2.</li> </ul>

## Highlights

- The Ombudsmen in New Zealand have been additionally vested with the task of investigating and reviewing decisions made by Ministers and government departments under the Official Information Act and the Local Government Official Information and Meetings Act, 1987. They can also investigate complaints pertaining to the administrative conduct of state sector agencies related to the implementation of the United Nations Convention on the Rights of Persons with Disabilities<sup>16</sup>, and inspecting/ monitoring the treatment of persons in places of detention.<sup>17</sup> In order to prevent jurisdictional overreach, the Act requires the Ombudsman to refer complaints that relate to a matter that falls within the jurisdiction of other authorities, such as the Privacy Commissioner, Health and Disability Commissioner and the Inspector-General of Intelligence and Security, or consult with them on who should take up the matter.
- All the authorities other than the Parliamentary Commissioner, United Kingdom, can inquire into matters on their own without waiting for a complaint to be filed before them. The Parliamentary Commissioner can investigate a matter only if a member of the House of Commons refers the matter to the Commissioner with the consent of the person making the complaint. This restriction is not placed on complaints pertaining to health services. Observers of the Parliamentary Commissioner view this as a major drawback as it is cumbersome and causes delays in the investigation process.
- In some countries, a matter can also be referred to the Ombudsmen for investigation. For instance, any Committee of the House of Representatives or the Prime Minister can refer a matter for investigation to the New Zealand Ombudsmen. The Mohtasib in Pakistan can investigate maladministration based on a complaint or a reference by the President, the Federal Council or the National Assembly or on a motion by the Supreme Court or a High Court.

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<sup>16</sup> Office of the Ombudsmen, Disabilities Convention, <http://www.ombudsmen.parliament.nz/index.php?CID=432439>

<sup>17</sup> Office of the Ombudsmen, Monitoring places of detention, <http://www.ombudsmen.parliament.nz/index.php?CID=100117>

### **3.2. What cannot be investigated?**

**Australia:** The Commonwealth Ombudsman cannot investigate action taken by Ministers, intelligence agencies, and Justice or Judge of a court or chief executive officer of a court exercising powers or performing functions of a judicial nature. Service matters concerning persons employed with the Australian Public Services and privileged parliamentary proceedings also cannot be investigated. The Ombudsman, however, has discretion with respect to investigation in the following matters:

- Complaints filed after 12 months from the day on which the complainant came to know about the matter.
- Complaints that are trivial, frivolous, vexatious, not in good faith or do not show that the complainant had a sufficient personal interest in the subject-matter of the complaint, or if investigation is not warranted.
- If the Department or authority concerned has not been approached or if it has been the complainant has not informed the Ombudsman that redress has not been granted or that it was inadequate.
- If the complainant has a right to cause the action to be reviewed by a court or tribunal and it is a reasonable option.

**New Zealand:** The Ombudsmen cannot investigate administrative acts or decisions taken by Ministers, police, legal advisers to the Crown, counsels for the Crown, and trustees. They also cannot investigate action of members of the military services in matters relating to terms and conditions of service or any order, command, decision, penalty, or punishment given to or affecting a person in his or her capacity as a member of the forces. The Ombudsmen in New Zealand have also been accorded discretionary powers over matters similar to Australia's Commonwealth Ombudsman.

**Pakistan:** The Mohtasib cannot investigate matters that are a) pending before a court or tribunal, b) matters that relate to external affairs or relations with any foreign state or government, military forces, c) service matters of a public servant, and d) complaints that

are anonymous or pseudonymous. She/he has discretion with respect to complaints filed three months after the date on which the complainant came to know of the matter.

**South Africa:** The Public Protector cannot investigate court decisions or performance of judicial functions by a court of law, private individuals, and private companies. The Public Protector has the discretion to investigate complaints filed two years from the occurrence of the incident or matter concerned in special circumstances.

**United Kingdom:** The Parliamentary Commissioner cannot receive complaints directly. She/he can only investigate complaints that have been placed before a Member of Parliament who then refers the matter to them. She/he cannot investigate a) complaints about judges, police, and local authorities, b) action taken by/or with the authority of the Secretary of State for protecting the security of the State or with respect to passports, c) action affecting relations with other governments, d) action related to commercial or contractual transactions for acquisition of land compulsorily, service matters, grant of honours, and e) action by administrative staff of any court or tribunal in their judicial capacity cannot be investigated.

The Commissioner has discretion over complaints filed 12 months after the day on which the person aggrieved had notice of the matter. The Commissioner may not investigate action with respect to which a person aggrieved has/had a right of appeal, reference or review before a Tribunal or a remedy in a court of law, unless such an option is unreasonable.

### 3.3. Powers of Investigation

Table 2 below details the investigative powers of the different institutions under review:

	<b>Power to require a person to furnish information &amp; documents</b>	<b>Power to issue summons and examine on oath</b>	<b>Receiving evidence on affidavits</b>	<b>Issuing Commissions for examination of witnesses</b>	<b>Power to enter and search premises</b>	<b>Power to punish for contempt</b>	<b>Power to resolve disputes through conciliation, mediation, and negotiation</b>
<b>Australia</b>	✓	✓			✓		
<b>New Zealand</b>	✓	✓			✓		
<b>Pakistan</b>	✓	✓	✓	✓	✓	✓	
<b>South Africa</b>	✓	✓			✓		✓
<b>United Kingdom</b>	✓	✓		✓			

The powers of the Commonwealth Ombudsman, the New Zealand Ombudsmen, the Mohtasib, and the Parliamentary Commissioners are restricted. If the Attorney-General certifies that disclosure of certain information or documents would be opposed to public interest, the Commonwealth Ombudsman and the New Zealand Ombudsmen will not be able to require a person to answer questions or furnish documents in relation to that

matter. The reasons on the basis of which Attorney General can make such a certification have been specified in the Acts and include grounds, such as, it may prejudice the security, defence, or international relations of the State, or may entail disclosure of Cabinet deliberations or in the case of Australia involve disclosure of communication between a Minister and a Minister of State that could prejudice relation.

In the United Kingdom, under the Parliamentary Commissioner's Act, a person cannot be required to give information or documents, or answer questions relating to proceedings of the Cabinet. Further, a person cannot be compelled to give evidence that he could not have been compelled to produce in civil proceedings before a court. In Pakistan, the President can allow a claim of privilege with respect to information or documents on the ground that it is a State secret. No such restrictions have been placed on the powers available to the Public Protector.

### **3.4. Consequences of non-compliance with powers exercised by the authorities**

Penalties are the primary mechanism through which the agencies under consideration can ensure compliance with orders. The specific powers of each agency vary by country and are detailed below:

**Australia:** The Ombudsman can make an application to the Federal Court of Australia to direct compliance. To do this, the Ombudsman is mandated to inform the Minister about the reasons for making such an application before approaching the Federal Court. Refusal or failure to appear before the Ombudsman, take oath, furnish information, answer questions, or produce documents is punishable with a fine of \$1,000 or imprisonment for three months. The defense of reasonable excuse can be invoked by the defendant.

**New Zealand:** In New Zealand, a person who without lawful justification or excuse, willfully obstructs, hinders or resists an Ombudsman or fails to comply any lawful requirement, makes any false statement, misleads or attempts to mislead an Ombudsman

or makes a false representation about the authority he holds under the Act, is liable to a fine not exceeding \$200.

**Pakistan:** The Mohtasib has been empowered to punish any person who abuses, interferes with, impedes or obstructs the process or disobeys any order of the Mohtasib. Acts done to scandalise or ridicule the office of the Mohtasib or to prejudice matters are also punishable. The Mohtasib can exercise powers available to the Supreme Court for imposing punishment for contempt. The Act clarifies that comments made in good faith and in public interest on the working of the Mohtasib or his office after the completion of the investigation will not constitute contempt. An appeal against a contempt order will lie before the Supreme Court. The Mohtasib can also refer the matter to the appropriate authority for disciplinary action.

**South Africa:** The Public Protector Act prohibits insult of the Public Protector or the Deputy Public Protector and anything in connection with an investigation which would have amounted to contempt of a court of law. A person convicted of contempt can be punished with a fine of up to R40000 or imprisonment up to 12 months or both. Refusal to comply with a search warrant, or to take oath, answer questions or give false answers is also an offence with the same penalty.

**United Kingdom:** If a person obstructs the Commissioner or any other officer of the Commissioner in the performance of functions or is guilty of an act or omission during an investigation which would amount to a contempt of court, the Commissioner can certify the offence to the Court which will then decide the matter of contempt.

## **4. Steps after Investigation**

### **4.1. Report and Recommend**

**Australia and New Zealand:** If the investigation reveals that action taken was contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, or was based on an

unreasonable, discriminatory, or unjust legal provision, the Commonwealth Ombudsman as well as the New Zealand Ombudsmen can do the following:

- Send a report to the Department or authority concerned.
- Send a report directly to the Minister concerned with his/her opinions and recommendations.
- Recommend steps that should be taken to rectify, mitigate or alter the effects of a decision or action. Or recommend steps for cancellation or modification of the decision, legal reform, or any other measure to remedy the situation.
- A request can also be made to the Department to inform the Ombudsmen within a specified time of the action that will be taken on the matter.

If no action is taken by the Department within a reasonable time after the report and recommendations were sent, the Ombudsman can send the report along with comments of the Department if any to the Prime Minister and also forward it to the House of Representatives.

The Commonwealth Ombudsman can also have a further discussion with the principal officer of the Department or authority for resolution of the matter. The complainant must be informed about the outcome of the investigation.

The recommendations made by the New Zealand Ombudsmen are binding when they relate to information laws. Pursuant to their functions of investigating and reviewing decisions related to denial or withholding of information, if it is found that the complaint can be sustained, the New Zealand Ombudsmen can send their recommendations and opinion to the relevant authority. A “public duty to observe that recommendation will be imposed” upon the Department, Minister, or local authority from the 21<sup>st</sup> working day after it was made unless the Governor-General passes an order or the local authority passes a resolution directing otherwise.

**Pakistan:** The Mohtasib can make recommendations to the department concerned if the matter amounts to mal-administration. He/she can recommend that the department



consider the matter further, modify or cancel the decision, initiate disciplinary action against the public servant, dispose the matter within a specified time, or any other steps. The department must inform the Mohtasib about the action taken on recommendations or reasons for not complying with them. If based on the reasons, it appears that maladministration did not take place; the recommendations may be modified after giving the complainant an opportunity to be heard. The response received from an agency on a matter must then be transmitted to the authority which had referred the matter to the Mohtasib. A special report can also be sent to the President if the Mohtasib is of the opinion that maladministration has resulted in injustice to the person aggrieved and is unlikely to be remedied. The Mohtasib can also recommend the initiation of disciplinary or corrective action against errant officers. If there is a "Defiance of Recommendations", the matter may be referred to the President, who can direct the agency to implement the recommendation. The report sent by the Mohtasib will also go on the personal file or Character Roll of the public servant responsible for defiance after she or he has been given an opportunity to be heard. A person aggrieved by a decision or order of the Mohtasib can make a representation to the President within 30 days from the decision.

**South Africa:** The Public Protector can also make recommendations to the appropriate authorities for redress of a matter. She or he can also submit a report on a particular investigation to the National Assembly if it is in public interest to do so or if it requires urgent attention.

**United Kingdom:** The Parliamentary Commissioner has to send a report to the relevant member of the House of Commons irrespective of whether an investigation was conducted or not. The investigation report is also sent to the principal officer of the department or authority concerned and the officer against whom the complaint has been made. If the Commissioner is of the view that maladministration resulted in injustice or that a person complained against has failed to perform a duty and that injustice or failure will not be remedied, she or he can place a special report before each House of Parliament.

### **Recommendation for initiation of prosecution**

The laws pertaining to the Mohtasib and Public Protector expressly authorises them to make a recommendation for initiation of prosecution against the errant officers. This option has not been expressly stated in the laws related to the other authorities.

**Pakistan:** If the Mohtasib is of the opinion that a public servant or functionary has indulged in an act that warrants criminal proceedings, she/he can refer it to the appropriate authority for action within a specified time.

**South Africa:** If before, in the course of, or after investigation, the Public Protector is of the opinion that an offence may have been committed by any person, he or she can bring it to the attention of the relevant authority for prosecutions.

### ***4.2. Compensation***

Only two of the five authorities have the power to award compensation.

**Pakistan:** The Mohtasib can award reasonable compensation to an agency, public servant, or other functionary if the complaint against them is found to be false, frivolous or vexatious. Reasonable costs or compensation can also be awarded to a complainant for loss or damage suffered due to mal-administration which is to be recovered from a public servant, functionary, or agency. In cases involving payment of illegal gratification, misappropriation, criminal breach of trust or cheating, the Mohtasib can order the payment to be credited to the government.

**South Africa:** The Public Protector can with the specific or general approval of the Minister of Finance order payment from State funds of expenses incurred by a person in the course of or in connection with the investigation.

### ***4.3. Conciliation, mediation or negotiation***

The Mohtasib and Public Protector have the authority to perform a conciliatory role in resolving grievances. The other laws do not have such provisions.

**Pakistan:** The Mohtasib has been given the authority to “informally conciliate, amicably resolve, stipulate, settle or ameliorate any grievance”.

**South Africa:** The Public Protector has been authorised to resolve disputes through alternate resolution methods such as conciliation, mediation, or negotiation. She or he can also advise the complainant about appropriate remedies that may help resolve the matter.

### ***4.4. Bar on jurisdiction of courts***

In some countries, a bar has been placed on the jurisdiction of courts. In New Zealand, the proceedings or decisions of the Ombudsmen cannot be challenged, reviewed, quashed, or called in question in any court, except on the ground of lack of jurisdiction. In Pakistan, a bar has been placed on the jurisdiction of courts to question the validity of action taken or orders made by the Mohtasib. Further, no court can grant an injunction or stay on the proceedings before the Mohtasib. However, in Australia if a question arises between the principal officer of a department and the Ombudsman over the exercise of powers or performance of functions by the latter, either of them can apply to the Federal Court of Australia for a determination of the question.

## **5. Conclusion**

As is evident from the discussion, while the institutions described in this brief have similar mandates, they enjoy varying degrees of independence. All the institutions studied are largely recommendatory bodies and have several restrictions on their jurisdiction. In India, instead of one authority that will look into allegations of corruption as well as inquire into maladministration, two distinct structures have been proposed. The Lokpal is expected to

inquire into allegations of corruption and the authorities proposed under the Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of their Grievances Bill, 2011 (Grievance Redressal Bill) will provide redress for maladministration and denial of the right to public services. The Lokpal envisaged under the Lokpal and Lokayuktas Bill (Lokpal Bill) has a narrow mandate but broad jurisdiction and powers.

Some of the key distinctions between the authorities proposed and the ones studied above are:

- The Prime Minister and other Ministers are not completely excluded from the jurisdiction of the Lokpal. The Lokpal Bill lays down the procedure to be followed in case of an inquiry in a matter against the Prime Minister.
- The Lokpal is not a recommendatory body and is empowered to direct investigation, initiation of departmental proceedings, or any other appropriate action. It can supervise the investigation and can initiate prosecution in the Special Court if the findings disclose the commission of an offence under the Prevention of Corruption Act, 1988. The Public Grievance Redressal Commissions under the Grievance Redressal Bill can impose penalties, award compensation, and also direct public authorities to comply with the Citizens Charter.
- The qualifications of the office bearers and appointment processes in the Bills have been etched in order to safeguard against political appointments.
- The financial independence of the office of the Lokpal is secured by requiring that all expenses be charged upon the Consolidated Fund of India. However, this is not the case with the Public Grievance Redressal Commissions. The Commissions also have to depend on the government for officers and employees and have not been vested with operational autonomy in this regard.

Although there are several disagreements with the government's version of both Bills, based on a comparative review of the legislative framework, the institutions envisaged under the two Bills appear to be on a stronger footing than a majority of the institutions referred to in this article. What emerges is that, in order to be effective, the government

must not interfere with or control their functioning. This can be secured to some extent by including an express provision in both the Bills prohibiting such interference along with the consequences for breach. Further, like the Lokpal, the financial independence of the Public Grievance Redressal Commissions must also be fiercely safeguarded by requiring that all expenditures are charged upon the Consolidated Fund of India.

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