

Bill No. 19 of 2021

OMBUDSMAN BILL, 2021
(*Published on 11th June, 2021*)

MEMORANDUM

1. A draft of the above Bill, which is intended to be presented to the National Assembly, is set out below.

2. The object of the Bill is to repeal and re-enact with amendments the Ombudsman Act (Cap. 02:12) to, amongst other things, expand the functions and powers of the Ombudsman to protection and promotion of human rights.

3. Part I provides for the short title, interpretation of terms and an application provision.

4. Part II provides for the continuation of the office of the Ombudsman and the appointment of the Ombudsman. It further provides for the oath to be taken by the Ombudsman, as well as disqualification, tenure and vacation of office.

5. Part III introduces new provisions dealing with the functions and powers of the office of the Ombudsman.

6. Part IV deals with complaints, and provides for complaints to be made by personal representatives where a complainant is for some reason unable to act for himself or herself, and it further provides for investigations. Under this Part, the Ombudsman is required to inform a complainant of his or her decision not to investigate or to discontinue investigations. Provision has also been made for investigations as well as assistance and cooperation between Government, public authorities and other bodies.

7. Part V provides for miscellaneous provisions such as protection from liability of the Ombudsman staff, offences, regulations and savings and transitional provisions.

KABO N. S. MORWAENG,
Minister for Presidential Affairs,
Governance and Public Administration.

ARRANGEMENT OF SECTIONS

SECTION

PART I – *Preliminary*

1. Short title and commencement
2. Interpretation
3. Application

PART II – *Continuation of Office of Ombudsman and Appointment of Ombudsman*

4. Continuation of office of Ombudsman
5. Appointment of Ombudsman
6. Disqualification for appointment as Ombudsman
7. Oath to be taken by Ombudsman
8. Tenure of office of Ombudsman
9. Vacation of office

PART III – *Functions and Powers of Ombudsman*

10. Functions of Ombudsman
11. Discharge of functions of Ombudsman
12. Powers of Ombudsman

PART IV – *Complaint and Investigation*

13. Manner of making complaint
14. Lodging of complaint
15. Complaint to be made by personal representative
16. Matters not to be investigated
17. Ombudsman to inform complainant of progress of matter
18. Conduct of investigation
19. Staff to perform their functions without undue influence etc.
20. Procedure in respect of investigation
21. Evidence
22. Proceedings after investigation

PART V – *Miscellaneous Provisions*

23. Administrative expenses
24. Protection from liability
25. Confidentiality
26. Annual report and special report
27. Offences

28. Regulations
 29. Repeal of Cap. 02:12
 30. Savings and transitional provisions
- SCHEDULE

A BILL
— entitled —

An Act to make provision for the continuation of the Office of the Ombudsman, for the powers and functions of the Ombudsman, the investigation of administrative actions taken on behalf of Government, the protection and promotion of human rights, the investigation of human rights violations, and for matters incidental thereto and connected therewith.

Date of assent:

Date of commencement:

ENACTED by the Parliament of Botswana.

PART I – Preliminary

Short title and commencement

1. This Act may be cited as the Ombudsman Act, 2021, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Interpretation

2. In this Act, unless the context otherwise requires —

“Cabinet” means the Cabinet established by section 44 (1) of the Constitution;

“complainant” includes a person who lodges a complaint on behalf of another person;

“complaint” means a complaint made under Part IV of the Act;

“department of Government” includes —

(a) all Ministries and entities of the central Government, whether they are located outside or within Botswana;

(b) all parastatals, statutory organisations, local authorities; and

(c) any other entity which performs a public function;

“human right” means a fundamental right or freedom provided for in the Constitution;

“Ombudsman” means the Ombudsman appointed in terms of section 5;

“private entity” means a voluntary organisation, non-governmental organisation, political party, charitable institution, society, association, company, partnership, club, trust or any other person or organisation which is not a public body; and

“repealed Act” means the Ombudsman Act repealed under section 29.

Application

3. The provisions of this Act shall apply to a department of Government and to a private entity.

*PART II – Continuation of Office of Ombudsman and
Appointment of Ombudsman*

- 4.** (1) The office of the Ombudsman as established in the repealed Act shall continue to exist as if established under this Act. Continuation
of office of
Ombudsman
- (2) The office of the Ombudsman shall consist of the Ombudsman, such Deputy Ombudsmen and other staff of the office as may be appointed.
- (3) The office of the Ombudsman shall be a public office and accordingly, the provisions of the Public Service Act shall apply with the necessary modifications to the office and the officers thereof. Cap. 26:01
- 5.** (1) The Ombudsman and the Deputy Ombudsman shall be appointed by the President, after consultation with the Leader of the Opposition in the National Assembly and the Speaker of the National Assembly. Appointment
of Ombudsman
- (2) A person shall not be qualified to be appointed Ombudsman or Deputy Ombudsman unless he or she is qualified to be appointed to the office of a Judge of the High Court.
- (3) Where the Ombudsman or a Deputy Ombudsman dies, resigns, ceases to hold office, is removed from office or is unable to perform the functions of his or her office, the President shall, after consultation with the Leader of the Opposition in the National Assembly and the Speaker of the National Assembly, appoint a person to act as the Ombudsman or a Deputy Ombudsman until the appointment of a substantive Ombudsman or a Deputy Ombudsman.
- (4) The Ombudsman appointed in terms of this section shall be the accounting officer.
- 6.** A person shall not be qualified to be appointed as an Ombudsman or a Deputy Ombudsman if he or she is a — Disqualification
for appointment
as Ombudsman
- (a) holder of an office in a political party;
- (b) candidate for election as a member of the National Assembly;
- (c) member of the National Assembly;
- (d) member of any local authority;
- (e) member of *Ntlo ya Dikgosi*; or
- (f) holder of any other public office.
- 7.** An Ombudsman, a Deputy Ombudsman or an officer of the office of the Ombudsman shall not enter upon the duties of his or her office unless he or she has taken and subscribed such oath or affirmation in the form set out in the Schedule — Oath to be taken
by Ombudsman
- (a) in the case of the Ombudsman and a Deputy Ombudsman, before the President; and
- (b) in the case of any other officer, before the Ombudsman.
- 8.** A person holding the office of Ombudsman shall vacate that office at the expiration of five years from the date of his or her appointment, and shall be eligible for re-appointment for only one further term of five years. Tenure of
office of
Ombudsman

B.146

Vacation of office

9. The provisions of section 97 (2) to (5) of the Constitution shall, with necessary modifications, apply to the removal from office of the Ombudsman and Deputy Ombudsman.

PART III – Functions and Powers of Ombudsman

Functions of Ombudsman

10. (1) Subject to the provisions of this section, the Ombudsman may investigate any action taken by or on behalf of a —

(a) department of Government, in the exercise of administrative functions of that department —

(i) in any case where a complaint is made to the Ombudsman by a person who claims to, or

(ii) on his or her own motion where he or she considers it necessary to investigate the action on the ground that a person has or may,

have sustained injustice or unfair treatment in consequence of maladministration in connection with the action so taken; or

(b) department of Government or private entity —

(i) in any case where a complaint is made to the Ombudsman by a person who claims to, or

(ii) on his or her own motion where he or she considers it necessary to investigate the action on the ground that a person has or may,

have sustained violation of his or her human rights in consequence of the action so taken.

(2) The Ombudsman may take appropriate action to call for the remedying, correction and reversal of instances specified in subsection (1) through fair, proper and effective means, including —

(a) mediation, arbitration, negotiation, conciliation and compromise between the parties concerned; and

(b) causing the complaint and a finding on it, to be reported to the principal officer of any department of Government or a private entity and to a person who is established to have taken or authorised the action in question.

(3) The Ombudsman shall —

(a) educate the public on maladministration and human rights by such means as the Ombudsman may determine, including publication, lectures, workshops and symposia;

(b) implement a continuing programme of research, education and information to enhance respect for human rights and to increase awareness and promote a human rights culture;

(c) advise Government on the ratification and implementation of human rights treaties and conventions;

(d) promote compliance with national laws that protect and promote the enjoyment of human rights;

(e) assist Government to monitor, address and report on human rights concerns at national and international level;

- (f) collaborate with civil society organisations, non-governmental organisations, regional and international organisations in promoting human rights; and
- (g) make recommendations and proposals to competent authorities, for the amendment and reform of laws, policies and administrative practices to bring them into conformity with Botswana's international human rights obligations.

11. In the discharge of his or her functions under this Act, the Ombudsman shall not be subject to the direction or control of any other person or authority and the proceedings of the Ombudsman shall not be called into question in any court of law.

Discharge of
functions of
Ombudsman

12. (1) For purposes of performing his or her functions under this Act, the Ombudsman shall have the power —

Powers of
Ombudsman

- (a) to, in his or her discretion, determine the nature and extent of an investigation; and
 - (b) subject to the provisions of any law regulating the privileges or immunities of any person or institution provided for in any law —
 - (i) to enter into and inspect any building or premises or any part thereof, and to make such enquiries therein or thereon, and put such questions to any person employed thereon or who finds himself or herself in or on that building or premises in connection with the matter in question, as the Ombudsman may deem necessary in connection with that investigation,
 - (ii) to access all books, vouchers, other documents, money, stamps, securities, forms having a face or potential value, equipment, stores and other movable goods in the possession or under the control of any such person, and which the Ombudsman deems necessary to inquire into or to investigate in connection with such investigation, and
 - (iii) to request particulars and information from any person which the Ombudsman may deem necessary in connection with that inquiry or investigation;
 - (c) to issue subpoenas requiring attendance of any person before the Ombudsman and the production of any document or record relevant to any investigation by the Ombudsman;
 - (d) to question any person in respect of any subject matter under investigation before the Ombudsman; and
 - (e) to require any person to disclose truthfully, any information within his or her knowledge that is relevant to any investigation by the Ombudsman.
- (2) If any person subpoenaed as a witness under subsection (1) (c) fails to attend or to produce any document or any other thing pursuant to the subpoena and he or she is unable to give a reasonable excuse for the default, he or she shall be guilty of an offence.

PART IV – *Complaint and Investigation*

Manner of making complaint

13. (1) A complaint made under this Act may be made by any individual or a body of persons, whether corporate or unincorporated.

(2) A complaint to the Ombudsman shall be made in writing or orally.

(3) Where a complaint is made in writing it shall be signed by the complainant or his or her representative.

(4) Where a complaint is made orally, the person to whom the complaint is made shall reduce the complaint into writing and the complainant shall append his or her signature to the complaint.

(5) Where the complainant cannot or is unable to write, the writing made under this section shall be read over, interpreted and explained to the complainant, by the person to whom the complaint is made, in a language the complainant understands and the complainant shall approve the writing by making a thumbprint to such writing.

(6) Notwithstanding any law to the contrary, where a complaint is written by a person in custody, or by a patient in a hospital, is addressed to the Ombudsman, it shall be immediately forwarded unopened and unaltered to the Ombudsman by the person for the time being in charge of the place or institution where the writer of the complaint is in custody or of which he or she is a patient.

Lodging of complaint

14. (1) Subject to the provisions of this section, a complaint is considered lodged in any case where –

(a) the complaint is made to the Ombudsman by a member of the public –

(i) who claims to have sustained injustice in consequence of maladministration, or

(ii) who claims to have sustained a violation of his or her human rights and freedoms, in consequence of any action taken by or on behalf of a department of Government or a private entity, being action taken in the exercise of functions of that department or private entity; or

(b) the complaint is referred to the Ombudsman, with the consent of the person who made it, by –

(i) a member of the National Assembly,

(ii) a member of any local authority,

(iii) a *Kgosi*, or

(iv) any organisation on behalf of a complainant,

with a request to conduct an investigation thereon.

(2) In determining whether to initiate, continue or discontinue an investigation under this Act, the Ombudsman shall, subject to this section, act at his or her own discretion, and any question on whether a complaint is duly made under this Act shall be determined by the Ombudsman.

(3) Without prejudice to the provisions of subsection (2), the Ombudsman may refuse to initiate or may discontinue, any investigation if it appears to him or her that the —

- (a) complaint is frivolous or vexatious or is not made in good faith;
- (b) person aggrieved has no sufficient interest in the subject matter of the complaint; or
- (c) making of the complaint has, without reasonable cause, been delayed for more than 36 months.

15. Where any person by whom a complaint might have been made under this Act has died or is for any reason unable to act for himself or herself, the complaint may be made by his or her personal representative or by a member of his or her family or any other individual or body of persons, whether corporate or incorporate, with the authority to represent him or her.

Complaint to be made by personal representative

16. (1) The Ombudsman shall not investigate any action taken in respect to any of the following —

Matters not to be investigated

- (a) matters that affect external relations or dealings between the Government of Botswana and an international organisation or the government of another State;
- (b) the conduct of civil or criminal proceedings in any court, judicial tribunal or quasi-judicial body;
- (c) the grant of honours, awards or privileges within the prerogative of the President; or
- (d) a matter relating to the exercise of the prerogative of mercy by the President in accordance with section 53 of the Constitution.

(2) Except as provided in this Act, the Ombudsman shall not conduct an investigation into any action in respect of which the person aggrieved has or had —

- (a) a right of appeal, reference, or review to or before a tribunal constituted by or under any law in force in Botswana; or
- (b) a remedy by way of proceedings in any court of law.

(3) Notwithstanding the provisions of subsection (2), the Ombudsman —

- (a) may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if he or she is satisfied that in the particular circumstances it is not reasonable to expect him or her to resort or to have resorted to it; and
- (b) shall not in any case be precluded from conducting an investigation in respect of any matter by reason only that it is open to the aggrieved person to apply to the High Court for redress under section 18 of the Constitution.

17. (1) Where a complaint or request for investigation is duly made in accordance with the provisions of this Act, the Ombudsman shall inform the complainant of the progress or conclusion of the matter.

Ombudsman to inform complainant of progress of matter

(2) Where the Ombudsman makes a determination that he or she is precluded by section 16 from investigating any matter, he or she shall, within 14 days of making such a determination, inform the complainant in writing, stating the reasons for such determination.

B.150

Conduct of investigation

18. (1) In conducting an investigation under this Act the Ombudsman shall observe the rules of natural justice but shall not be bound by any legal or technical rules of evidence applicable to proceedings before the courts.

(2) The proceedings under subsection (1) shall be conducted informally and expeditiously.

(3) The Ombudsman shall, after considering the nature of the investigation, determine whether to conduct proceedings in camera or in public.

Staff to perform their functions without undue influence, etc.

19. An officer of the office of the Ombudsman shall perform his or her functions without fear, favour or prejudice, and a person or authority shall not interfere with or exert undue influence on such officer in the exercise of his or her powers or in the performance of his or her functions.

Procedure in respect of investigation

20. (1) Where the Ombudsman proposes to conduct an investigation under this Act, he or she shall afford to the principal officer of a department of Government or to the private entity who is alleged to have taken or authorised the action in question, an opportunity to comment on any allegations made to the Ombudsman in respect thereof.

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

(3) Where the Ombudsman has reasonable grounds to suspect that the information obtained under subsection (2) would be relevant to —

(a) the functions of any investigatory authority; or

(b) any investigation being conducted by any investigatory authority, the Ombudsman shall disclose the information to that investigatory authority.

(4) For purposes of this section, “investigatory authority” means an authority empowered by an Act of Parliament to investigate or prosecute unlawful activities.

Evidence

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

(2) For the purposes of any such investigation —

(a) the Ombudsman shall have the same powers as the High Court in respect of the attendance and examination of witnesses, including the administration of oaths and the examination of witnesses abroad, and in respect of the production of documents;

(b) no obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to persons in the public service imposed by any law in force in Botswana shall apply to the disclosure of information for the purposes of any investigation under this Act; and

(c) the State shall not be entitled in relation to any such investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed in legal proceedings.

(3) A person shall not be required or authorised by virtue of this section to furnish any information, answer any question, or produce any document relating to proceedings of Cabinet or any committee thereof.

(4) For purposes of subsection (3), a certificate issued by the Secretary to the Cabinet with the approval of the President shall be conclusive.

(5) The Attorney General may give notice to the Ombudsman, with respect to any document or information specified in the notice, that in his or her opinion the disclosure of that document or information would be contrary to the public interest in relation to defence, external relations or internal security.

(6) Where a notice is given under subsection (5), nothing in this section shall be construed as authorising or requiring the Ombudsman or any member of his or her staff to communicate to any person for any purpose, any document or information specified in the notice.

(7) Subject to subsection (2), a person shall not be compelled, for the purposes of any investigation under this Act, to give evidence or produce any document which he or she could not be compelled to give or produce in proceedings before the High Court.

22. (1) After conducting an investigation under this Act, the Ombudsman shall send a report of the investigation to the principal officer of the department of Government or to the private entity concerned.

Proceedings
after
investigation

(2) Where the Ombudsman is of the opinion that injustice has been caused to the person aggrieved in consequence of maladministration or violation of his or her human right, the Ombudsman shall make such recommendations as he or she thinks fit to remedy the injustice caused, and may specify the time within which the injustice shall be remedied.

(3) If there is failure or refusal to implement the recommendations of the Ombudsman within the specified time the Ombudsman may for –

(a) maladministration proceedings, prepare and submit to the National Assembly a report in accordance with section 26, detailing the failure or refusal to implement its recommendations; or

(b) human rights proceedings, bring an action before a court and seek such remedy as may be appropriate for enforcement of its recommendations.

PART V – *Miscellaneous Provisions*

Administrative expenses

23. (1) The administrative expenses of the office of the Ombudsman, including such expenses and allowances as are authorised by the provisions of this Act, shall, to such amount as may be sanctioned by National Assembly, be paid out of the Consolidated Fund.

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

(3) The provisions of subsection (2) shall not apply to Government departments and private entities.

Protection from liability

24. No action shall be brought against the Ombudsman, Deputy Ombudsman or any member of staff of the office of the Ombudsman in respect of any act or thing done or omitted to be done in good faith in the exercise of his or her duties under this Act.

Confidentiality

25. (1) Subject to the provisions of section 26, the Ombudsman or any officer of the Ombudsman's office shall observe and preserve the confidentiality of all matters coming before the Ombudsman, and such confidentiality shall subsist even after the termination of their terms of office or their mandates.

(2) A person to whom confidential information is revealed through working with the Ombudsman shall not disclose that information to any other person unless he or she is required to do so in terms of any written law or for purposes of any judicial proceedings.

(3) Any member or any other person who contravenes the provisions of this section commits an offence and is liable to a fine not exceeding P2 000, or to imprisonment for a term not exceeding six months, or to both.

Annual report and special report

26. (1) The Ombudsman shall lay before the National Assembly, an annual report concerning the discharge of his or her functions.

(2) Notwithstanding the provisions of subsection (1), the Ombudsman may at any time make a special report to the National Assembly on the findings of any particular investigation if —

(a) he or she deems it necessary, or

(b) he or she deems it to be in the public interest.

(3) The report referred to in subsection (2) shall include —

(a) the nature and extent of the inquiry and the investigation;

(b) the defects and deficiencies, if any, which in his or her opinion exist in the administration of the concerned matter; and

(c) the action or steps taken to remedy, rectify, correct or reverse the injustice suffered.

(4) The report referred to in subsection (2) shall be laid before the National Assembly.

(5) Any report made by the Ombudsman shall be open to the public, unless the Ombudsman is of the opinion that exceptional circumstances require that the report be kept confidential.

(6) If the Ombudsman is of the opinion that exceptional circumstances require that a report be kept confidential, the Ombudsman shall state the reasons therefore in the report, and the report shall be dealt with as a confidential report in the National Assembly.

(7) For purposes of this section, “exceptional circumstances” exist if the publication of the report is likely —

- (a) to endanger national security or prejudice national interest;
- (b) to be prejudicial to any other investigation or pending investigation;
- (c) to disturb peace, order or good government; or
- (d) to have a negative effect on the efficiency or effectiveness of the Ombudsman.

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

27. Any person who —

- (a) hinders, obstructs, molests, interferes with or exerts undue influence on the Ombudsman, a member of staff of the office of the Ombudsman;
- (b) provides false or misleading information or evidence to the Ombudsman or any member of staff of the office of the Ombudsman on any matter, knowing such information or evidence is false or who recklessly provides an answer or explanation, or omits information, knowing that because of the omission, the information is misleading;
- (c) intimidates or victimises a person who gives information, or evidence or assistance to the Ombudsman;
- (d) fails to comply with any request or direction of the Ombudsman, made in terms of this Act; or
- (e) contravenes the provisions of this Act, or any requirement made in terms of this Act, or any notice or information issued by the Ombudsman in terms of this Act for which a penalty is not provide for,

commits an offence and is liable to a fine not exceeding P5 000, or to imprisonment for a term not exceeding five years, or to both.

28. The Minister may make regulations prescribing anything under this Act which is to be prescribed or which is necessary or convenient to be prescribed for the better carrying out of the objects and purposes of this Act.

29. The Ombudsman Act is hereby repealed.

Offences

Regulations

Repeal of
Cap. 02:12

B.154

Savings and
transitional
provisions

30. (1) Any subsidiary legislation made under the repealed Act, and in force immediately prior to the coming into operation of this Act shall, in so far as such legislation is consistent with the provisions of this Act, continue to be in force as if made under this Act.

(2) Any legal proceedings which, before the coming into operation of this Act, were pending shall be continued or enforced by or against the office of the Ombudsman in the same manner as they would have been continued or enforced before the coming into operation of this Act.

(3) Any investigations commenced under the repealed Act shall continue as if made under this Act.

(4) Any decisions made under the repealed Act shall be binding as if they were made under this Act.

(5) Any disciplinary proceedings which, prior to the coming into operation of this Act, were pending shall be continued as if they would have been continued before the coming into operation of this Act.

(6) The administrative structures of the office of the Ombudsman in existence under the repealed Act immediately before the commencement of this Act shall, to the extent that their continued existence is not inappropriate or inconsistent with this Act, continue in existence.

(7) Any person who is an officer or employee of the office of the Ombudsman immediately before the coming into operation of this Act shall continue in office for the period for which, and be subject to the conditions under which, he or she was appointed.

SCHEDULE

OATH/AFFIRMATION
(section 7)

Ombudsman and Deputy Ombudsman

I, do swear/solemnly, sincerely and truly declare and affirm that I will faithfully and diligently discharge my duties and perform my functions, and will well and truly serve the Republic of Botswana in the office of, that I will do justice in accordance with the Constitution of Botswana as by law established and in accordance with the laws and usage of Botswana without fear or favour, affection or ill-will and that I will preserve and observe confidentiality in all matters coming to my knowledge through working in the office of the Ombudsman, unless I am required to do so in terms of any written law, or for purposes of any judicial proceedings.

So Help Me God

Officers employed in the Office of the Ombudsman

I, do swear/solemnly sincerely and truly declare and affirm that I will faithfully and diligently discharge my duties and perform my functions, and well and truly serve the Republic of Botswana in the office of and that I will preserve and observe confidentiality in all matters coming to my knowledge through working in the office of the Ombudsman, unless I am required to do so in terms of any written law, or for purposes of any judicial proceedings.

So Help Me God

