STRUCTURING THE MALAYSIAN OMBUDSMAN OFFICE
Structuring the Malaysian Ombudsman Office

The Center to Combat Corruption and Cronyism
# TABLE OF CONTENTS

1. INTRODUCTION ................................................................................................................................... 1

2. IMPROVING UPON THE PUBLIC COMPLAINTS BUREAU (PCB) .................................................. 4
   Structure, functions, and powers of the PCB ...................................................................................... 4
   Areas of improvement for the current PCB framework ....................................................................... 8
   Streamlining complaints management mechanisms ........................................................................... 8
   Lack of independence .......................................................................................................................... 9

3. DETERMINING THE OMBUDSMAN’S MANDATE ............................................................................. 11
   General functions ............................................................................................................................. 11
   Defining “maladministration” ........................................................................................................... 13
   Identifying “public servants” ............................................................................................................ 19
   Administration of the Whistleblower Protection Act 2010 ................................................................. 27

4. SYNERGISING THE OMBUDSMAN WITH EXISTING OVERSIGHT INSTITUTIONS .................. 29
   Malaysian Anti-Corruption Commission (MACC) ............................................................................ 30
   Human Rights Commission of Malaysia (SUHAKAM) ...................................................................... 32
   Enforcement Agency Integrity Commission (EAIC) .......................................................................... 33
   Independent Police Conduct Commission (IPCC) ............................................................................. 36
   Proposed restructuring of Malaysian oversight mechanism network ............................................... 38
   Constitutional power of Parliament under Article 140 ....................................................................... 46
   Recommended powers for officers of police oversight mechanisms ................................................ 48
   Overly broad nature of cross-sector oversight mechanisms ............................................................... 50

5. LEGISLATIVE BASIS AND ADMINISTRATIVE POSITIONING OF THE OMBUDSMAN ........ 56
   Placing the Office of the Ombudsman under Parliament ................................................................. 58
   Establishing the Ombudsman as a constitutional body ..................................................................... 62

6. JURISDICTION ...................................................................................................................................... 67

7. STRUCTURAL INDEPENDENCE: SELECTION, APPOINTMENT, AND REMOVAL .................... 71
   Selection of potential candidates ....................................................................................................... 73
   Appointment of nominees .................................................................................................................. 75
   Procedure and grounds for removal .................................................................................................. 77

8. POWERS OF INVESTIGATION ............................................................................................................ 79
   Initiation of investigations ................................................................................................................ 80
   Power to examine persons, and unimpeded access to documents & premises ................................... 82
   Operational autonomy ...................................................................................................................... 85
   Power to create subsidiary legislation ............................................................................................ 85
   Power to compel cooperation .......................................................................................................... 88

9. POST-INVESTIGATION PROCESS ..................................................................................................... 90
   Should the Ombudsman be conferred enforcement powers? .............................................................. 91
   Reporting duties .................................................................................................................................. 99
   Standing to institute legal proceedings ............................................................................................... 101

10. CASE STUDY: DENIAL OF THE RIGHT TO EDUCATION IN SMK TAUN GUSI ..................... 105

11. CONCLUSION ...................................................................................................................................... 111

BIBLIOGRAPHY ........................................................................................................................................ 114
ABBREVIATIONS

ADB – Asian Development Bank
EAIC – Enforcement Agency Integrity Commission
IPCC – Independent Police Conduct Commission
IPCMC – Independent Police Complaints of Misconduct Commission
MACC – Malaysian Anti-Corruption Commission
OECD – Organisation for Economic Co-operation and Development
PCB – Public Complaints Bureau
PCPC – Permanent Committee on Public Complaints
PDRM – Royal Malaysia Police (Polis Diraja Malaysia)
PFC – Police Force Commission
PMD – Prime Minister’s Department
PSC – Parliamentary Select Committee
SUHAKAM – National Human Rights Commission of Malaysia (Suruhanjaya Hak Asasi Malaysia)
UNODC – United Nations Office on Drugs and Crime
YDPA – Yang di-Pertuan Agong
1. INTRODUCTION

The concept of government accountability has gained increasing importance alongside the strengthening of democratic ideals worldwide over the past century. Members of the public are no longer content with the paternalistic treatment afforded to them by governments in the past, and now demand answers for conduct and decisions they deem unacceptable. An important part of this wave of administrative law reform is the introduction of public sector ombudsman institutions – beginning in its modern form in Sweden in 1809, and eventually spreading across the world over the twentieth century.¹ Reif defines the ombudsman as:

“...a public sector institution, preferably established by the legislative branch of government, to supervise the administrative activities of the executive branch. The ombudsman receives and investigates impartially complaints from the public concerning the conduct of government administration... The general objectives of the ombudsman are the improvement of the performance of the public administration and the enhancement of government accountability to the public... the

ombudsman operates as another check on the power of the executive/administrative branch... The ombudsman is a mechanism which enhances transparency in government and democratic accountability, with the result that it assists in building good governance in a state."\(^2\)

A key reform championed by the Anwar Ibrahim administration in 2023 was the establishment of an Ombudsman as a federal statutory body tasked with managing and investigating complaints against the public service. The Ombudsman Bill was initially slated to be tabled in Parliament in October 2023\(^3\) after several consultation sessions with relevant stakeholders, but has been delayed pending re-evaluation of its scope, function and role.\(^4\)

This paper sets out a proposal by the Center to Combat Corruption and Cronyism (C4 Center) to structure the Malaysian Ombudsman office. The first few chapters deal with the Malaysian context and the space which the Ombudsman shall occupy. The Ombudsman must be established in a manner that builds upon the work that has been done thus far by the Public Complaints Bureau and synergises with existing oversight mechanisms, and these chapters contain suggestions to ensure that the institution complements the network of administrative oversight that exists today.

The latter chapters incorporate a set of proposals derived from international best practice. Heavy reliance is placed upon the

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Council of Europe’s *Principles on the Protection and Promotion of the Ombudsman* (Venice Principles) of 2019, which has been described as “the most comprehensive set of constitutional and legal principles relating to ombudsman to date, drafted to be applicable to different legal and political systems”; and Dean M. Gottehrer’s *Ombudsman Legislative Resource Document*, an Occasional Paper published by the International Ombudsman Institute as a “checklist” for newly established ombudsman offices based on a review of international ombudsman legislation. Both documents contain extensive details on the manner in which an independent and effective Ombudsman could be structured, and should be used as additional guidance on elements not addressed in this paper. Extensive reference is also made to various national constitutions obtained from the resources published by the Constitute Project at constituteproject.org.

The recommendations contained within this report require major legislative and institutional reforms that demand strong political will and public support. However, it is hoped that these ideas would be taken into consideration when drafting the Ombudsman Act in order to chart a new course for Malaysian democracy and good governance. With the introduction of the Ombudsman, the Government has the opportunity to revolutionise administrative oversight in Malaysia.

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2. IMPROVING UPON THE PUBLIC COMPLAINTS BUREAU (PCB)

Presently, the Malaysian equivalent of an Ombudsman is the Public Complaints Bureau (PCB), which has reported a high degree of success in resolving public complaints based on data published in its Annual Reports. Therefore, it is worth examining the structure of the PCB and the powers it currently possesses in order to identify key areas of improvement as well as elements that are worth replicating for the proposed Ombudsman.

2.1 STRUCTURE, FUNCTIONS, AND POWERS OF THE PCB

In 1971, the PCB was established as a body under the General Planning Division (Bahagian Perancangan Am) of the Prime Minister’s Department (PMD). In his speech on 23 July 1971, then-Prime Minister Tun Abdul Razak explained that the PCB was meant to ensure the public could make complaints regarding their difficulties and receive assistance where necessary, which would fulfil the


long-standing need for a closer relationship to be formed between
the Government and the public. Furthermore, he noted that due to
the expanding scope of the Government’s work, instances where
the public would feel that an injustice has been committed against
them were occasionally unavoidable. Therefore, the PCB would
serve as a channel for them to bring such complaints to the atten-
tion of the Government, acting as a ‘watchdog’ to ensure efficient
and just administration.9

Today, the PCB remains stationed under the PMD and largely
serves the same purpose – a monitoring body (badan pemantau)10
to ensure cases of maladministration are resolved appropriately
by government entities. According to the PMD General Circular
No. 2/2022 on the Improvement of Handling Public Complaints,
complaints should generally be channelled directly to the relevant
government agency for further action, whereas the PCB merely
monitors the manner in which these complaints are handled. In
particular, the duties of the PCB include:

1. Receiving complaints from individuals who remain dissatis-
fied after raising their complaints to the relevant government
agency (termed “2nd-tier complaints”);
2. Investigating and coming up with recommendations of prop-
er corrective or preventive actions for the relevant government
agency;
3. Monitoring the performance of the complaint resolution pro-

[9] National Archives of Malaysia, Ucapan-ucapan Tun Haji Abdul Razak bin Hussein 1971 (Tun
[10] Prime Minister’s Department, Pekeliling Am Bil. 2/2022 (General Circular No. 2/2022),
p. 3.
cess in all government agencies through periodic inspections, audits, and “mystery shopping”; and
4. Researching and recommending improvements in the provision of public services and complaint handling.\textsuperscript{11}

Additionally, the PCB may opt to refer complaints or cases to the Permanent Committee on Public Complaints\textsuperscript{12} (PCPC), which is chaired by the Chief Secretary to the Government and comprises several high-ranking officials including the Director-General of the Public Service, the Secretary-General of the Treasury, and the Chief Commissioner of the Malaysian Anti-Corruption Commission (MACC).\textsuperscript{13} According to the PMD General Circular No. 2/2022, the role of the PCPC is as follows:

1. Determining policies regarding the complaints management system;
2. Considering and making determinations on reports/cases of public complaints which are referred to them by the PCB; and
3. Directing public departments/agencies to take remedial action to resolve complaints/cases referred to them.\textsuperscript{14}

The PCB takes a soft approach to resolving maladministration by placing the onus on government departments and agencies

\textsuperscript{11} ibid, pp. 7 – 8.

\textsuperscript{12} Jawatankuasa Tetap Pengaduan Awam in Malay.

\textsuperscript{13} Prime Minister’s Department, Pekeliling Am Bil. 2/2022 (General Circular No. 2/2022), p. 8.

\textsuperscript{14} ibid, p. 9.
to adequately resolve complaints and set out best practices and standards. The non-coercive nature of the PCB’s authority is exemplified in a letter published on Malaysiakini on 22 March 2010 by the then Director-General of the PCB, Dr. Tam Weng Wah, stating that:

“Although, admittedly, the PCB does not have any explicit power or authority to instruct or compel government departments and agencies to change a decision or action based on the outcome of the investigation, the PCB does carry an implicit authority by virtue of being an agency under the Prime Minister’s Department. This simply means that government departments and agencies cannot easily ignore matters that are brought to their attention by the PCB.”

Conversely, the PCPC is expressly empowered to direct relevant government bodies to take corrective action in response to public complaints received against them, which ensures compliance with the recommended remedial measures where the soft power of the PCB proves insufficient to compel action.

2.2 AREAS OF IMPROVEMENT FOR THE CURRENT PCB FRAMEWORK

2.2.1 STREAMLINING COMPLAINTS MANAGEMENT MECHANISMS

Presently, an individual who wishes to make a complaint against a government department/agency may opt for one of several bodies, such as the Enforcement Agency Integrity Commission (EAIC), the Independent Police Conduct Commission (IPCC), the Malaysian Anti-Corruption Commission (MACC), and the Human Rights Commission of Malaysia (SUHAKAM). However, there remain limitations in terms of each individual body’s powers. Chiefly, each body is highly specialised and can only receive complaints within their statutory mandates. This introduces a level of complexity for a layperson to determine where exactly their particular complaint ought to be channelled.

To an extent, this is alleviated by the existence of the Public Complaints Management System (more commonly known as Sistem Pengurusan Aduan Awam or SISPAA) – an integrated “one-stop” online complaints submission portal pioneered by the PCB and envisioned as the primary complaints management system used by all government entities. Nevertheless, there still does not exist a singular centralised portal for all complaints to be submitted as some government bodies continue to retain their own individual complaints systems. This complicates the management of complaints, as evidenced by the PCB itself which notes that one of the internal weaknesses it faces includes the large

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variety of sources and channels through which complaints are received, which presents difficulty in coordination. The ongoing approach, as seen from the PCB’s Annual Reports, tends to focus on voluntary uptake by these bodies. Introducing, by way of statutory mandate, the Ombudsman as a central authority for receiving complaints against government agencies and departments could assist in addressing this issue.

Furthermore, there remains significant overlap of functions in the current system. The PCB monitors all public agencies both at the federal and state levels and manages complaints against them all. Yet in addition to that, the EAIC also receives and manages complaints against various “enforcement agencies”, whereas the IPCC is focused solely upon the Royal Malaysia Police. This duplication of functions results in unnecessary expenditure of public funds, which could be ameliorated by granting the Ombudsman a comprehensive mandate and the jurisdiction to manage all public complaints of maladministration against government officers.

2.2.2 LACK OF INDEPENDENCE

It is noteworthy that the PCB is not an independent statutory body established by way of an Act of Parliament, but merely a body which derives its authority from circulars issued by the PMD. This means that every aspect of the PCB’s structure, jurisdiction and powers are susceptible to alteration by the government of the day at any given time. Further, the PCPC (which possesses the authority to compel remedial action) is chaired by the Chief Secretary to the Government, i.e. the most senior member of the Malaysian

[17] ibid, p. 18.
civil service itself.

This lack of independence could have a negative effect on both the actual efficacy of the PCB as well as its credibility and trustworthiness in the public eye. The opacity of bureaucracy remains impenetrable to most laypersons due to the unelected nature of the civil service, which is why Ombudsman institutions hold such importance in modern democratic systems – they are often the only avenue (aside from judicial review in the courts, which may be unavailable or unrealistic due to non-justiciability of certain issues, financial expense, or long waiting periods) for members of the public to get redress when discontent with the services they have received. As former British Columbia Ombudsman Stephen Owen notes:

“...[c]ourt proceedings are inappropriate for the resolution of the high proportion of concerns that arise from simple misunderstandings and errors that invite quick resolution by an independent party acting informally but with authority. Further, there is often no legal remedy for the unfair impact of the legitimate exercise of discretion by public administrators.”

Hence, having an Ombudsman with functions and powers established by statute and which lies outside the direct control of the Government would assist in ensuring protection from executive interference as well as in improving public perception and confidence.

3. DETERMINING THE OMBUDSMAN’S MANDATE

3.1 GENERAL FUNCTIONS

The Government has indicated that the Ombudsman shall be a federal statutory body responsible for managing complaints related to maladministration and studying the factors causing such complaints to arise as well as measures to prevent future recurrence.\(^{19}\) In this regard, the Ombudsman is envisioned as a non-confrontational body that functions non-coercively, instead of yet another enforcement agency. C4 Center generally agrees with this position, as the fundamental purpose of ombudsman institutions is to “make bureaucracy operate in a reformist mode.”\(^{20}\) The only exception to this may be the granting of exceptional punitive powers under limited circumstances pertaining to obstruction of the investigative process, as discussed further below in Chapter 8.3.2.

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\(^{19}\) Derived from the proposal document titled “Cadangan Penubuhan Ombudsman Malaysia” (Proposal on Establishment of the Malaysian Ombudsman) disseminated to CSOs at a consultation session organised by the Legal Affairs Division of the Prime Minister’s Office on 8 May 2023.

This concept of the “dual-purpose ombudsman”, which defends individual rights on a case-by-case basis and encourages administrative reform and good governance on a wider scale, is one which the Malaysian Ombudsman should aspire to inculcate. The institution must not merely be an avenue for alternative dispute resolution for those who do not want to resort to judicial remedies, but one which is able to prescriptively influence civil service policies on every level of government. Therefore, the Ombudsman should have the duty to conduct research and analysis on measures to prevent maladministration and ways to improve public service delivery, as well as to share such findings with relevant stakeholders and the general public, in a manner similar to other oversight institutions such as MACC and SUHAKAM.

However, one must not lose sight of the forest for the trees – the Ombudsman is primarily a complaints management body, and it would be meaningless to place wider duties upon its shoulders if the individual complainants do not feel that their complaints are being addressed adequately. Some measures which have been implemented by the PCB previously and which should be continued by the Ombudsman include establishing a standard operating procedure setting out timelines for preliminary responses to queries and final resolution of complaints, and publishing statistics regarding the successful resolution of complaints (and the time

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[22] Malaysian Anti-Corruption Commission Act 2009, Section 7(c), (d) and (e).
[23] Human Rights Commission of Malaysia Act 1999, Section 4(1)(a) and (b).
[24] Under the existing Standard Operating Procedure of the PCB, regular or “BIASA”-type complaints must be resolved within 15 working days, whereas complex or “KOMPLEKS”-type complaints must be resolved within 365 days inclusive of public holidays, see Prime Minister’s Department, Pekeliling Am Bil. 2/2022 (General Circular No. 2/2022), pp. 11, 15-16.
taken for resolution) in their Annual Reports.

The Ombudsman should also follow the existing ambit of the PCB, which focuses solely on managing 2nd tier complaints i.e. complaints which have first been made to the relevant department/agency and are now transmitted to the Ombudsman due to inadequate resolution. This would serve as a sifting mechanism, where the relevant government department/agency can attempt to remedy complaints first without immediately resorting to the Ombudsman and thereby overburdening the office’s resources. It would also allow for less complex complaints to be resolved more expeditiously by the department/agency itself without the Ombudsman having to get involved.

3.2 DEFINING “MALADMINISTRATION”

The classical model of ombudsman institutions involves a core mandate of managing citizens’ complaints against public administration and mediating such disputes between citizens and administrators.\(^{25}\) This function serves to address instances of “maladministration” \textit{simpliciter} (which falls short of gross violations of human rights or corruption). “Maladministration” is a concept which has been deemed to be “difficult to define”, but may be summed up as “administrative action (or inaction) based on or influenced by improper considerations or conduct.”\(^{26}\) In this regard, the following potential grievances have been described as


being within the scope of ombudsman institutions’ oversight:

“...injustice, failure to carry out legislative intent, unreasonable delay, administrative error, abuse of discretion, lack of courtesy, clerical error, oppression, oversight, negligence, inadequate investigation, unfair policy, partiality, failure to communicate, rudeness, maladministration, unfairness, unreasonableness, arbitrariness, arrogance, inefficiency, violation of law or regulation, abuse of authority, discrimination, errors, mistakes, carelessness, disagreement with discretionary decisions, improper motivation, irrelevant consideration, inadequate or obscure explanation, and all the other acts that are frequently inflicted upon the governed by those who govern, intentionally or unintentionally.”27

In setting out the scope of the PCB’s oversight, maladministration is defined as “any action taken or not taken by a public body towards a complainant which does not comply with guidelines, standard operating procedure of the public body or in violation of any law which empowers the public body.”28 The current categorisation of complaints received by the PCB29 also provides some guidance as to the nature of complaints which may fall within the remit of the Malaysian Ombudsman i.e. what may be properly classified as instances of maladministration within the Malaysian context:

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[28] Prime Minister’s Department, Pekeliling Am Bil. 2/2022 (General Circular No. 2/2022), p. 6.

i) Delayed or lack of action;
ii) Failure of enforcement;
iii) Non-compliance with stipulated procedures;
iv) Unsatisfactory quality of service;
v) Lack of public facilities;
vi) Unfair action;
vii) Misconduct by public officials;
viii) Abuse of power;
ix) Policy failure.

Additional guidance may be gleaned from the scope of the “classical mandates” granted to other ombudsman institutions worldwide, i.e. those addressing maladministration simpliciter:

i. **Australia – Ombudsman Act 1976**

The Ombudsman Act 1976 established the Commonwealth Ombudsman (which oversees Australian federal government entities and prescribed public sector organisations). According to Section 15(1) of the Act, the Ombudsman may take further action where an action of a Department or prescribed authority has one of the following characteristics:

- contrary to law;
- unreasonable, unjust, oppressive or improperly discriminatory (whether being in accordance with a rule of law, a provision of an enactment or a practice or not);
- based either wholly/partly on a mistake of law or fact;
- otherwise, in all the circumstances, wrong;
- where a discretion ary power had been exercised for an
improper purpose/irrelevant grounds;
- where irrelevant considerations were taken into account, or relevant considerations were not taken into account; or
- where a person should have been furnished with particulars of the reasons for the decision, but they were not furnished with such particulars.

ii. **Hong Kong – Cap. 397 The Ombudsman Ordinance**

Section 2 of the Ombudsman Ordinance defines “maladministration” generally as “inefficient, bad or improper administration”, including the following:

- unreasonable conduct, including delay, discourtesy and lack of consideration for a person affected by any action;
- abuse of power or authority (including any discretionary power), including any action which is unreasonable, unjust, oppressive, or improperly discriminatory (despite being in accordance with practice) or based wholly/partly on a mistake of law or fact; or
- unreasonable, unjust, oppressive, or improperly discriminatory procedures.


The Ombudsman Act of 1989 has several provisions which set out the Philippine Ombudsman office’s mandate and role as an oversight body. For instance, Section 13 on “Mandate” stipulates that the Ombudsman shall act on complaints filed against officers/employees of the Government or government-owned/controlled
corporations, “in every case where the evidence warrants in order to promote efficient service by the Government to the people.” Section 15(1) on “Powers, Functions and Duties” further elaborates that the Ombudsman shall have the power, function, and duty to, *inter alia*, investigate and prosecute any act/omission of a public officer or agency “when such act or omission appears to be illegal, unjust, improper or inefficient.”

Other jurisdictions have opted not to define the term, preferring a more flexible approach to delineating their ombudsman offices’ jurisdiction. During the second reading of the Parliamentary Commissioner Bill in the UK House of Commons in 1966, the Office of Parliamentary Commissioner which the Bill sought to establish was described as resembling the Nordic Office of Ombudsman in that it was “designed to protect the individual citizen against bureaucratic maladministration.”

The Bill itself did not contain an exhaustive definition of what could amount to maladministration. It was acknowledged that the sort of maladministration which the Commissioner could investigate would not extend to policy (which remained a matter for Parliament) or “discretionary decision, properly exercised, which the complainant dislikes but cannot fault the manner in which it was taken”. However, it was also noted that “[a] positive definition of maladministration is far more difficult to achieve”, but qualities which could be subsumed thereunder included “bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on.”

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[31]  ibid, col. 51.
Similar approaches are seen under New Zealand’s Ombudsman Act 1975 and the Ombudsman Act 2000\textsuperscript{32} of Alberta, Canada – which state in general terms (under Sections 13(1) and 12(1) respectively) that the Ombudsman may investigate any decision, recommendation, act, or omission “relating to a matter of administration and affecting any person or body of persons in [their] personal capacity.”

In Malaysia, given that the proposed Ombudsman shall sit alongside other oversight bodies to monitor administrative acts and decisions, having a clearer delineation of their respective mandates is imperative to prevent overlap of functions and the risk of these bodies “passing the buck” back and forth amongst each other. This issue is discussed further in Chapter 4 below, but at this point it is worth mentioning that the Ombudsman generally should not interfere with the merits of any act or decision (as government officers and departments should have some degree of discretion in the performance of their duties) and should focus primarily on procedural non-compliance or inadequacy. One exception to this could be where the said act or decision is “unreasonable, unjust, oppressive or improperly discriminatory” despite being technically compliant with the relevant procedures or regulations, in line with the overarching function of the Ombudsman office as a means of improving public administration and ensuring the complaints of members of the public are resolved appropriately.

\[32\] RSA 2000, c O-8.
3.3 IDENTIFYING “PUBLIC SERVANTS”

In electoral democracies like Malaysia, executive function is divided between the elected and temporary political government and the unelected “permanent” civil administration. The former faces direct public accountability via the ballot box i.e. if a particular administration conducts itself in a manner that does not align with the expectations of the electorate, (ideally) they may be voted out and lose their hold on the reins of government during periodic free and fair elections – a control mechanism termed “vertical accountability”. However, the structure of bureaucracy persists through changes of government, and as a result, the civil service is not held to account for failures in governance and public service delivery in the same way political leaders are.

The bureaucracy is therefore deemed to be “the universe of the ombudsman”, as the Ombudsman provides an opportunity for the public to raise their grievances against members of the public service, thereby granting them the opportunity to participate in administrative governance. This is an example of “horizontal accountability”, where state oversight institutions check upon and control the actions of other public agencies and branches of government. Horizontal accountability mechanisms can provide various forms of accountability, e.g. “[a]dministrative accountability reviews the expediency and procedural correctness of bureaucratic acts … financial accountability subjects the use of public money by state officials to norms of austerity, efficiency, and propriety;
... legal accountability monitors the observance of legal rules; and constitutional accountability evaluates whether legislative acts are in accordance with constitutional rules.\(^{35}\)

It is necessary to ascertain the scope of the “public service” in Malaysia in order to clearly establish the ambit of the Ombudsman’s functions and identify who should fall under the office’s supervision. In this regard, Part X of the Federal Constitution sets out the Public Services of the nation, which are enumerated under Article 132(1) as follows:

- the armed forces;
- the judicial and legal service (which does not include judges of the Federal Court, the Court of Appeal or the High Courts pursuant to Article 132(3)(c), or the Attorney General or State legal advisers pursuant to Article 132(4)(b));
- the general public service of the Federation;
- the police force;
- the joint public services established under Article 133 i.e. joint federal-state services established under federal law, such as the Joint Service for Islamic Affairs Officers established under the Joint Service (Islamic Affairs Officers) Act 1997;
- the public service of each State; and
- the education service.

These branches are the constituent parts of the Malaysian public service which could be incorporated into the Ombudsman’s mandate. However, certain branches may be excluded therefrom if there are sufficient justifications, e.g. if the police force is already overseen by a specialised independent oversight body such as the IPCC, or where issues of unconstitutionality might arise due to a federal body exercising supervisory authority over the public services of States – both of which are discussed further below.

Federal statutory bodies – such as MACC, SUHAKAM, the Federal Land Development Authority (FELDA), and the Inland Revenue Board of Malaysia (IRBM) – should also be included within the scope of the Ombudsman’s mandate because officers of these bodies corporate are not strictly considered to be part of the public services under the Federal Constitution, despite also carrying out what are ostensibly public duties. Many of the incorporating statutes do include provisions which deem officers of these bodies as “public servants”, some specifically using the definition of “public servant” set out under the Penal Code. On this subject, the Federal Court in the case of *Mohd Khir Toyo v. Public Prosecutor* stated the following:

“[70] There is no definition of “officer’ in the Code. But s. 21(i) of the Code provides that “the words ‘public servant’ denotes... every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty” (emphasis added). Accord-

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[37] [2015] 8 CLJ 769 (FC).
ingly, every officer in the service or pay of Government, which “includes the Government of Malaysia and of the States and any person lawfully performing executive functions of Government under any written law” (see s. 17 of the Code) or remunerated by fees or commission for the performance of any public duty is a public servant (Lim Kee Butt v. PP [1953] 1 LNS 47; [1954] 1 MLJ 35, per Matthew CJ, delivering the judgment of the court, who cited Nazamuddin v. Queen Empress ILR 28 C 344).

[71] “The test to determine whether a person is a public servant is (1) in the service or pay of the Government and (2) whether he is entrusted with the performance of an public duty” (Ratanlal & Dhirajlal, The Indian Penal Code 34th edn at p. 29)...

However, not all incorporating statutes of statutory bodies include provisions of this nature – which creates potential inconsistency if the Ombudsman legislation does not specifically address the matter. Furthermore, the definition of “public servant” under the Penal Code generally would not apply beyond the ambit of that statute, that is, beyond the scope of criminal law. In order to ensure officers of statutory bodies are placed under the purview of the Ombudsman’s oversight, the Act should include a provision to this effect that incorporates the definition of “statutory body” as stated under Section 2 of the Statutory Bodies (Accounts and Annual Reports) Act 1980 i.e. “any body corporate, irrespective of the name by which it is known, that is incorporated pursuant to the provisions of federal law and is a public authority or an agency of the Government of Malaysia but does not include a local authority and a body corporate that is incorporated under the Companies Act 1965”.
In addition to these, there is a compelling argument for the Ombudsman to also be granted jurisdiction over privatised public utility providers. The policy shift towards privatisation of public services in Malaysia can be traced back to the 1980s during former Prime Minister Mahathir Mohamad’s administration, culminating with the 1991 Privatisation Master Plan\textsuperscript{38} which envisioned that the transferral of government services to the private sector would reduce administrative and financial burdens upon the Government, stem bloating of public sector personnel, as well as improve efficiency and private entrepreneurship by promoting competition.\textsuperscript{39} Some key examples of such private entities in Malaysia include the following:

1. Electricity suppliers licensed under the Electricity Supply Act 1990, such as Tenaga Nasional Bhd;

2. The various water supply and sewerage services licenced under the Water Services Industry Act 2006, such as Pengurusan Air Selangor Sdn Bhd and Indah Water Konsortium Sdn Bhd; and

3. Providers of network facilities and services licensed under the Communications and Multimedia Act 1998, such as Telekom Malaysia Bhd.

Despite the professed ideals, a major potential flaw of entrusting the private sector with functions of a public nature is that “unlike the public sector, whose stated objective is to serve the interest of the public, the priority and mandate of private corpo-

\textsuperscript{[38]} Accessible at the Private Public Partnership Unit website at <https://www.ukas.gov.my/my/component/edocman/pelan-induk-penswastaan>.

Determining the Mandate

Rations are to ensure profitable and growing businesses. Private companies answer to their shareholders, not to the taxpayers, and they are usually outside the ambit of formal accountability mechanisms of the state, including the ombudsman.

Principle 13 of the Venice Principles also indicates a recognition of this matter, stating that “[t]he mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities.”

Presently, the PCB is one of the only Asian accountability institutions (another being Japan’s Administrative Evaluation Bureau) which are conferred express jurisdiction over the private sector. The PMD’s General Circular No. 2/2022 (which currently governs the functioning of the PCB, see above in Chapter 2.1) implies the body’s role vis-à-vis private corporations, simply stating that “complaints regarding private parties shall be transmitted directly to the relevant authority which governs the particular service or industry” e.g. the Energy Commission which regulates

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[43] Prime Minister's Department, Pekeliling Am Bil. 2/2022 (General Circular No. 2/2022), p. 7.
energy supply services\textsuperscript{44} or the National Water Services Commission which regulates water supply and sewerage services.\textsuperscript{45} Previous Public Administration Development Circulars (issued by the Chief Secretary to the Government i.e. the head of the public service) were far more explicit on this matter, wherein the definition of a “public complaint” was described as “complaints by the public regarding their dissatisfaction towards any governmental administrative action including privatised agencies and institutions which form a monopoly and supply public utilities which are considered to be unfair, unlawful, including misconduct, misappropriation or leakages, abuse of power, maladministration etc.”\textsuperscript{46}

The sizeable role played by the private sector in Malaysian public service delivery creates a gap in accountability in the event of inadequacy or malfeasance in the provision of services, especially where the decentralization of authority to private actors is not accompanied by appropriate grievance resolution mechanisms. As observed by Carmona et al.:

“The traditional concept and role of the ombudsman has been more reactive than active in nature. With the current developments in Asia brought about by new public management, there is a need for ombudsmen to play a more proactive role in matters of public service delivery. Thus, a government decision to delegate the delivery of a public service to the private sector should not exclude a role for the ombudsman... when-


\textsuperscript{[45]} Suruhanjaya Perkhidmatan Air Negara Act 2006, Section 15.

ever the provision of a public service is transferred to the private sector, the government should make a conscious effort (especially at the policy level) to strengthen accountability mechanisms. Effective grievance redress should be a key component of all private sector arrangements involving public service delivery.”

Therefore, the Ombudsman should also incorporate the PCB’s authority over privatized public service providers within its mandate, thereby continuing its unique standing as a leader among Asian ombudsman institutions. Another ombudsman institution which could be considered as an example is the Ombudsman of Argentina (Defensor del Pueblo de la Nación Argentina) – according to Articles 16 and 17 of Law No. 24.284 (1993), private entities that provide public services are included within the jurisdiction of the Ombudsman’s office, which has “permitted the Defensor to investigate complaints against privatized public utility companies.” In the interest of clarity, especially given the extensive ecosystem of Malaysian government-linked companies, it would be best to set out an exhaustive list of the applicable private entities in a Schedule to the primary Act or under subsidiary legislation thereto. Furthermore, as the Ombudsman is meant to focus on managing 2nd tier complaints, the relevant regulatory bodies of these industries must still serve as the first point of contact for complainants.


3.4 ADMINISTRATION OF THE WHISTLEBLOWER PROTECTION ACT 2010

Based on a report by the Organisation for Economic Co-operation and Development (OECD) on “The Role of Ombudsman Institutions in Open Government”, 16% of the 94 ombudsman institutions worldwide surveyed include whistleblower protection as part of their mandate.\(^{49}\) In the same report, the OECD stated the following on the role that ombudsman institutions have in this regard:

“OIs play a pivotal role, facilitating the disclosure and investigation of these wrongdoings in the public administration and furthermore, contribute to building trust in public institutions and the overall democratic process... Their specific functions may include providing counselling, orientation and information to citizens and public officials who are willing or have already made a protected disclosure, to promote public awareness and understanding, as well as to monitor its correct operation in order to allow for continuous improvements. Furthermore, several OIs deliver training programmes to public authorities that are in charge of handling public interest disclosures.”\(^{50}\)

For example, Section 30 of the New Zealand Protected Disclosures (Protection of Whistleblowers) Act 2022 stipulates that the Ombudsman may provide information and guidance on matters regarding whistleblower protection to any person, especially


\(^{50}\) ibid (emphasis added).
to “disclosers” who have made or are considering making a “protected disclosure”. The Act goes on to empower the Ombudsman to take over (Section 33), review and guide (Section 35) investigations of protected disclosures by public sector organisations.

This is important for Malaysia, as a major gap in the Whistleblower Protection Act (WPA) 2010 is the lack of an independent oversight body tasked with the administration of the whistleblower protection mechanisms, e.g. handling disclosures, deciding on the revocation of protection, and providing support services and information to whistleblowers.\(^{51}\) As a newly constituted independent oversight body, the Ombudsman may be well situated to fill this gap as the entity entrusted with the administration and functions of the WPA 2010, and should be considered as an important figure in reforming the said Act. This is certainly a proposal which would require further deliberation, but it is an avenue worth exploring – instead of creating numerous new bodies, strategically placing key functions in the hands of existing independent ones would restrain additional public expenditure and bureaucratic bloat.

In any event, the range of channels through which disclosures of improper conduct may be received under the WPA 2010 should be expanded to include the Ombudsman as well to allow the office to confer whistleblower protection upon persons who come forward to them as well.

\(^{51}\) See further: Fadiah Nadwa Fikri, “Gaps in the Act: A Legal Analysis of Malaysia’s Current Whistleblower Protection Laws”, C4 Center (December 2021); Christopher Leong, “A critical look into the Whistleblower Protection Act 2010”, Policy Ideas No. 37, IDEAS (February 2017).
4. SYNERGISING THE OMBUDSMAN WITH EXISTING OVERSIGHT INSTITUTIONS

Aside from the PCB, oversight upon executive functions is currently handled by various bodies with differing mandates and spheres of power, including:

i. the Malaysian Anti-Corruption Commission (MACC);
ii. the Human Rights Commission of Malaysia (SUHAKAM);
iii. the Enforcement Agency Integrity Commission (EAIC); and
iv. the Independent Police Conduct Commission (IPCC).

When structuring the framework of the Ombudsman, it is imperative to consider the space which it shall occupy, i.e. in tandem with these existing oversight mechanisms, so that the Ombudsman may work synergistically with them in order to maximise efficiency and minimise duplication of functions and wastage of resources. As mentioned above, ombudsman institutions traditionally deal with the management and resolution of public complaints against government entities. However, many ombudsman institutions also handle complaints on a broader range of matters, such as access to information, human rights,
children’s rights, prevention of torture, anti-discrimination, and whistleblower protection. Some of these fields do fall within the ambit of existing Malaysian oversight institutions, and these areas of overlap may give rise to the possibility for integration, streamlining and restructuring. Enacting the Ombudsman Act provides the Government with the opportunity to now reassess and build upon this network of accountability mechanisms.

This Chapter aims to provide a general summary of the status quo, and where relevant to the establishment of the Ombudsman, potential reforms to other bodies are included (particularly regarding the EAIC and the IPCC). It must be noted that there currently are inadequacies in the structure and functions of all the institutions set out below (especially with regards to independence and autonomy), which must eventually be reformed as well.

4.1 MALAYSIAN ANTI-CORRUPTION COMMISSION (MACC)

Established under the MACC Act 2009, the MACC is an anti-corruption body primarily tasked with receiving and investigating reports of any “offence under this Act”, as well as detecting and investigating suspected offences under this Act or attempts and conspiracies to commit such offences. In addition to the corruption offences set out under Part IV of the MACC Act 2009, Section 3 of the Act also defines “offence under this Act” to include “prescribed offences”, which itself is defined as encompassing

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bribery-related offences under Acts such as the Penal Code, the Customs Act 1967, the Election Offences Act 1954, and attempts, abetments, and criminal conspiracy to commit any of them.\textsuperscript{54}

The ambit of the MACC’s duties is wide, encompassing any person in connection with the suspected commission of a corruption offence. In other words, the MACC’s role is not merely supervisory upon governmental entities, as offences under the MACC Act 2009 (and many other “prescribed offences”) are not targeted at public officials alone. The powers and functions of the MACC are uniquely crime-focused, as can be seen in Sections 7 (functions of MACC officers including detection and investigation of reported and suspected offences), 10 (which confers the powers and immunities of police officers under the Police Act 1967 and the Criminal Procedure Code to officers of the Commission to varying degrees depending on their rank), and 29 (powers of investigation include those under the Criminal Procedure Code). Further, MACC officers are empowered to intercept communications\textsuperscript{55} and order surrender of travel documents.\textsuperscript{56} This sort of power is distinctive among Malaysian oversight institutions, as no other body is conferred anything equivalent to it under their governing statutes.

Ancillary functions of the MACC are enumerated under Section 7 of the MACC Act 2009, which include:

1. Examining the practices, systems and procedures of public bodies (including the Federal and State Governments, local/
statutory authorities, registered societies and trade unions\textsuperscript{57} to facilitate discovery of corruption offences and securing revisions thereto if deemed fit;

2. Instructing, advising and assisting any person (upon request) on ways to eliminate corruption;

3. Advising heads of public bodies of changes in practices, systems, and procedures necessary to reduce the likelihood of the occurrence of corruption; and

4. Educating about and fostering public support against corruption.

\textbf{4.2 HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)}

The Human Rights Commission of Malaysia (HRCM) Act 1999 established Malaysia’s own National Human Rights Institution (NHRI), widely known as SUHAKAM. It is tasked with the protection and promotion of human rights\textsuperscript{58} in Malaysia, and in furtherance of this goal, SUHAKAM may inquire into allegations of infringement of human rights either based on its own motion or a complaint made by aggrieved persons/group of persons.\textsuperscript{59} Where the inquiry discloses any such infringement, it has the power to “refer the matter, where appropriate, to the relevant authority or

\textsuperscript{57} ibid, Section 3.

\textsuperscript{58} Defined under Section 2 of the Human Rights Commission of Malaysia Act 1999 as referring to “fundamental liberties as enshrined in Part II of the Federal Constitution”, read together with Section 4(4) of the same Act which states that “regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution” for the purposes of the Act.

\textsuperscript{59} Human Rights Commission of Malaysia Act 1999, Sections 4(1)(d), 4(2)(c) and 12(1).
person with the necessary recommendations”. SUHAKAM is not granted any sort of enforcement or punitive power of its own to compel remedial action where any infringement is disclosed.

Other functions and powers of SUHAKAM are provided for under Section 4 of the HRCM Act 1999, and include:

1. Promoting awareness of and providing education regarding human rights;
2. Advising and assisting the Government in formulating legislation and administrative directives and procedures; and
3. Providing recommendations to the Government regarding the subscription or accession of international human rights instruments.

### 4.3 ENFORCEMENT AGENCY INTEGRITY COMMISSION (EAIC)

The EAIC was established under the EAIC Act 2009, and as its name suggests, its primary function is to investigate misconduct committed by officers of enforcement agencies. Section 1(4) of the EAIC Act 2009 stipulates that the Act specifically applies to enforcement agencies as prescribed in the Schedule. Thus, the EAIC only has jurisdiction to investigate complaints against the enforcement agencies listed in the Schedule to the EAIC Act 2009, which includes the Immigration Department, the Royal Customs Department, the National Registration Department, and several Enforcement Divisions of Federal Ministries.

According to Section 23 of the EAIC Act 2009, any person may

[60] ibid, Section 13(2).
make or refer a written complaint of misconduct against an enforcement agency/officer to the EAIC. “Misconduct” is defined by Section 24 of the EAIC Act 2009 and includes any act/inaction by enforcement officers which is contrary to written law, is unreasonable, unjust, oppressive, improperly discriminatory, committed on improper motives, irrelevant grounds or irrelevant considerations, or the failure to disclose grounds or to comply with legal rules and procedure. The Complaints Committee\(^6^1\) shall then conduct a preliminary investigation in order to determine the nature of the misconduct and whether a full investigation into the complaint is warranted.\(^6^2\) Based on the findings of the Complaints Committee, a full investigation may be commenced by the EAIC itself if misconduct within the ambit of Section 24 is disclosed. Otherwise the complaint may be forwarded to either an appropriate Disciplinary Authority (if a disciplinary offence is disclosed) or the MACC (if an offence under the MACC Act 2009 is disclosed).\(^6^3\) The EAIC may also commence investigations into alleged misconduct where it would be in the public interest to do so.\(^6^4\)

Once the investigations have been completed, the EAIC may either refer its findings to the appropriate Disciplinary Authority (if the misconduct constitutes a disciplinary offence) or the Public Prosecutor (if the misconduct constitutes a criminal offence), or record its finding and inform the complainant if the complaint is

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\(^{6^1}\) A subordinate Committee established by the EAIC pursuant to Section 16 of the EAIC Act 2009.

\(^{6^2}\) Enforcement Agency Integrity Commission Act 2009, Section 25.

\(^{6^3}\) ibid, Sections 26 and 27

\(^{6^4}\) ibid, Section 28.
not substantiated. In other words, the EAIC has no enforcement powers of its own – its role in respect of dealing with complaints is purely investigative.

The Commission’s other functions are set out under Section 4 of the EAIC Act 2009, as follows:

1. Formulating and implementing mechanisms for the detection, investigation, and prevention of misconduct by enforcement officers;
2. Providing for the auditing and monitoring of particular aspects of the operations and procedures of enforcement agencies;
3. Assisting the Government in formulating legislation or recommending administrative measures for the promotion of integrity and abolishing misconduct amongst enforcement officers;
4. Studying and verifying infringement of enforcement procedures and making necessary recommendations relating thereto; and
5. Making site visits to the premises of enforcement agencies and making necessary recommendations relating thereto

[65] ibid, Section 30.
4.4 **INDEPENDENT POLICE CONDUCT COMMISSION (IPCC)**

The IPCC was recently established pursuant to the IPCC Act 2022 as an oversight body tasked with receiving and investigating complaints of misconduct against members of the police force. The body has yet to become fully functional as at the time of writing, with the Home Ministry informing Parliament on 16 November 2023 that the Commission is scheduled to begin fully functioning in early 2024 pending the appointment of Commissioners.\[66\] Unlike the previously mooted Independent Police Complaints of Misconduct Commission (IPCMC) which was contemplated as exercising disciplinary authority over the police force, the IPCC only possesses investigative powers and makes recommendations to other bodies for further action regarding complaints.

The Complaints Committee of the IPCC receives any complaint made against a member of the police force,\[67\] which it shall investigate and then classify in accordance with the categories set out under Section 25 of the IPCC Act 2022. If the complaint involves corruption offences, offences under any other written law, or any act regulated under Section 96 and 97 of the Police Act 1967 (Police Regulations and Standing Orders respectively), it shall be referred to the MACC, the relevant authority, or the Head of Department responsible for that particular member of the police force respectively.\[68\] The IPCC only investigates complaints in-

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\[67\] Independent Police Conduct Commission Act 2022, Section 24.

\[68\] ibid, Section 25(a), (b) and (d) respectively.
volving “misconduct” as defined under Section 22 of the IPCC Act 2022, i.e. any act/inaction which is contrary to written law, unreasonable, unjust, oppressive, or improperly discriminatory, or committed on improper motives, irrelevant grounds or irrelevant considerations, other than any act regulated under Sections 96 and 97 of the Police Act 1967. Additionally, any incident involving sexual crime, grievous hurt, or death against any person in police detention or custody shall also be referred to the IPCC by the police force itself.\(^{69}\)

When tabling the IPCC Bill in Parliament on 26 July 2022, then Home Minister Datuk Seri Hamzah Zainudin noted that the bill was drafted to complement the framework of the Federal Constitution, specifically Article 140 that establishes the Police Force Commission (PFC) which is tasked with, inter alia, exercising disciplinary control over members of the police force. The IPCC was therefore envisaged as an entity tasked solely with investigation, whereas the duty to perform disciplinary action would be retained by the PFC.\(^{70}\)

Aside from investigating complaints and making recommendations of proper disciplinary action to the PFC, the IPCC is also empowered to and tasked with performing the following:\(^{71}\)

1. Promoting integrity within members of the police force, and advising the Government and making recommendations on

\[^{69}\] ibid, Section 26.


\[^{71}\] Independent Police Conduct Commission Act 2022, Sections 4 and 5.
appropriate measures to be taken to accomplish that;
2. Advising the Government on the enhancement of the well-being and welfare of members of the police force; and
3. Visiting police stations, police quarters, lock-ups, and detention centres to make necessary recommendations.

4.5 PROPOSED RESTRUCTURING OF MALAYSIAN OVERSIGHT MECHANISM NETWORK

As mentioned above, many of the areas covered by these oversight institutions overlap with the mandates of other ombudsman institutions worldwide. Therefore, when coming up with a proposed structure for a Malaysian Ombudsman, it is worth considering whether any of these existing institutions could/should be dissolved and its functions reassigned to the Ombudsman. This evaluation must be conducted with this central consideration in mind: are the functions of each existing institution too broad for the Ombudsman to manage alone in addition to its core mandate, taking limitations in resources and organisational expertise into account? In other words, would the roles be managed more effectively if split between two separate institutions, or would the overlap be so egregious that retaining both institutions would clearly be a waste of resources due to duplication of functions?

At the outset, it bears mentioning that the jurisdiction of the Ombudsman should be restricted to maladministration *simpliciter* alone (as explained above), and where investigations disclose any sort of criminal offence, the case should be transmitted to the relevant agency instead (such as the MACC or the police) – in a manner
similar to the EAIC or IPCC.

Firstly, the MACC and SUHAKAM should remain untouched as separate institutions, subject to further reforms to increase their independence and efficacy in carrying out their functions. As explained above, the MACC serves a role similar to the police force – focused on the detection and investigation of suspected criminal offences – and is granted extraordinary powers befitting such a role. Given that ombudsman institutions generally do not function as enforcement agencies, placing the mandate of “anti-corruption” under the Ombudsman would essentially defang the MACC and only result in a reduction of institutional ability to tackle the scourge of corruption. As Reif has observed:

It can be argued that the nature of anti-corruption work demands that it be backed up by coercive power with enforceable sanctions. In this respect, the United Nations Development Programme has been critical of ombudsman institutions which have been given corruption-fighting mandates, stating that “they are seldom a way to uncover large-scale systemic corruption, and most have no authority to initiate lawsuits.” Following this line of argument, the ombudsman should only be considered as a supplement to an anti-corruption commission.\(^\text{72}\)

SUHAKAM on the other hand is an important and established NHRI with worldwide recognition, having consistently received A-status accreditation for its compliance with the Paris Principles\(^\text{73}\)


\[^{73}\] A set of guidelines on the structuring, role, and functions for national human rights institutions.
as of 26 April 2023 by the Global Alliance of National Human Rights Institutions (GANHRI). It has various functions beyond simply investigating complaints of human rights violations, including regional and international engagements and advocacy. Hence, it would be inappropriate to dissolve SUHAKAM and assign these myriad functions to the Ombudsman, which may be unable to manage such a wide range of roles and responsibilities adequately.

The EAIC and IPCC, on the other hand, may be better suited to be subsumed under the aegis of the Ombudsman. Both institutions fit with the concept of a “dual-purpose ombudsman”, with a primary focus on investigating complaints against officers of government agencies and a secondary role of crafting policy recommendations. Both institutions also are well-integrated into the larger ecosystem of oversight mechanisms, as any complaints which disclose criminal offences are to be transmitted to other relevant bodies. They are intended to focus primarily on issues of plain misconduct without elements of criminality, which fits with the traditional conception of ombudsman institutions as well.

Table 1 summarises the different elements of the definition of “misconduct” under the EAIC Act 2009 and IPCC Act 2022, along with selected excerpts regarding the ambit of the Ombudsman offices in Australia and Hong Kong from the relevant legislation as discussed above. An examination of the exact phrasing used in the EAIC and IPCC Acts shows the significant overlap with the definitions of maladministration in the Australian and Hong Kong legislation, which indicates that the EAIC and IPCC’s functions

mirror those accorded to Ombudsman offices in other jurisdic-
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Table 1: Summary of elements of the scope of “maladministration” envisioned by various legislation

Thus, C4 Center recommends the following:

1. the EAIC should be dissolved and its functions placed under the mandate of the Ombudsman; and
2. the IPCC (as established under the IPCC Act 2022) should be replaced with an independent body tasked solely with oversight and exercise of disciplinary control of the police force. An adequate version of this was set out under the now withdrawn IPCMC Bill (DR 25/2019).
In essence, the EAIC merely replicates the role of the Ombudsman on a far smaller scale, and the Ombudsman could easily be tasked with oversight of the enforcement agencies listed under the Schedule to the EAIC Act 2009. The list of “enforcement agencies” enumerated under the Schedule to the EAIC Act is also incomplete and further adds to users’ confusion, as a prospective complainant must now identify whether a particular agency is deemed an “enforcement agency” specifically within the ambit of the EAIC Act when making a complaint.

The definition of “enforcement agency” under Section 2 of the Act covers any Ministry, Department, Agency, or other body or subsidiary component thereto which is either conferred with enforcement functions under written law or having enforcement powers. This definition alone would suffice, if not for the limitation placed upon it by Section 1(4), making it so that the EAIC only has jurisdiction over the enforcement agencies named in the Schedule. This leads to some glaring omissions (such as the Malaysian Prison Department, which does not fall under EAIC supervision at all despite having the important power of custodial care), as well as some odd inconsistencies (such as the Land Public Transport Agency not being listed in the Schedule despite having enforcement powers pursuant to the Land Public Transport Act 2010, and even though the analogous Commercial Vehicles Licensing Boards of Sabah and Sarawak are included).

Further, in order for the EAIC to retain relevance after the introduction of the Ombudsman, agencies which fall under its jurisdiction would have to be carved out of the Ombudsman’s oversight, creating unnecessary complexity in the entire framework.
Thus, placing all “enforcement agencies” under the supervision of the Ombudsman would lead to greater ease for complainants and assist in streamlining the complaints channelling process, thereby improving efficacy as well. Completely abolishing an agency which has existed for over a decade is admittedly a bold proposition, but retaining the EAIC alongside an Ombudsman would be counterproductive and the resources expended on both could be better utilised to expand the infrastructure of one.

This would also contribute towards the Government’s present fiscal consolidation efforts – by transferring existing budget allocations for the PCB and EAIC (which have been estimated at RM15.36 million and RM9.15 million respectively for operational expenditure in 2024, according to the 2024 Estimated Federal Expenditure report published by the Ministry of Finance to a single institution, the overall federal expenditure incurred for the sole purpose of addressing maladministration could be reduced. The potential for similarity and redundancy between the Ombudsman and other supervisory agencies such as the EAIC was even acknowledged recently in Parliament by Minister in the Prime Minister’s Department (Law and Institutional Reform), Dato’ Sri Azalina Othman Said.

Yet even though the same arguments could be presented in favour of dissolving the IPCC and assigning its functions to the Ombudsman as well, there are important justifications for retaining a specific oversight institution tasked with complaint

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management and disciplinary control for the police force:

1. The proviso to Article 140(1) of the Federal Constitution enables Parliament to pass legislation to empower an authority other than the Police Force Commission to exercise disciplinary control over members of the police force; a provision not found under any other Article pertaining to the Service Commissions under Part X. This creates the opportunity for an independent body tasked with oversight and investigation of police misconduct to also exercise disciplinary control, instead of issuing recommendations alone;

2. International best practice on police oversight mechanisms suggests that such bodies should possess investigative powers equivalent to those granted to members of the police force themselves, which may be too far-ranging for the Ombudsman's general functions overseeing other government agencies. and

3. International reviews and studies have indicated that broad-based commissions which oversee the entire public sector are insufficient to tackle the resource-intensive and specialist task of investigating police misconduct.

It is important to emphasise that this is not an endorsement of the IPCC (as established under the IPCC Act 2022) at all, due to its numerous deficiencies. Rather, this is a recommendation for oversight of the police force to be excluded from the ambit of the Ombudsman's functions, and for another independent institution

[77] Previously detailed by the C4 Center in its press statement “IPCC Bill’s passing a step closer to a police state” dated 08.08.2022, available at https://c4center.org/ipcc-bills-passing-a-step-closer-to-a-police-state-c4-center.
to be granted that duty instead. A discussion on the exact parameters of such an institution is beyond the scope of this report, but C4 Center suggests that the Government should reassess the IPCC Act 2022 in tandem with the drafting of the Ombudsman Act.

4.5.1 CONSTITUTIONAL POWER OF PARLIAMENT UNDER ARTICLE 140

Article 140(1) of the Federal Constitution establishes the Police Force Commission, and reads as follows:

“There shall be a Police Force Commission whose jurisdiction shall extend to all persons who are members of the police force and which, subject to the provisions of any existing law, shall be responsible for the appointment, confirmation, emplacement on the permanent or pensionable establish, promotion, transfer and exercise of disciplinary control over members of the police force:

Provided that Parliament may by law provide for the exercise of such disciplinary control over all or any of the members of the police force in such manner and by such authority as may be provided in that law, and in that event, if the authority is other than the Commission, the disciplinary control exercisable by such authority shall not be exercised by the Commission; and no provision of such law shall be invalid on the ground of inconsistency with any provision of this Part.”

The wording of this proviso is not contained under any other provision setting out the other Service Commissions, which indicates that the framers of the Federal Constitution recognised a unique need to provide for the option to take disciplinary matters
out of the purview of the Police Force Commission. As explained in the United Nations Office on Drugs and Crime (UNODC) “Handbook on police accountability, oversight and integrity”, it is the police force’s “monopoly on the use of force and the power to arrest and detain that place the police in a unique and sensitive position within the democratic State, so that adequate control mechanisms are required to ensure that these powers are consistently used in the public interest.”

The problem with purely internal review is clear – the police cannot be expected to police themselves. Placing disciplinary control in the hands of the Police Force Commission, which includes the Minister charged with responsibility of the police (i.e. Minister of Home Affairs) and the officer in general command of the police force (i.e. the Inspector General of the Royal Malaysia Police) gives rise to a conflict of interest, where the Commission itself may have a vested interest in maintaining the public image of the police force. The Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on police oversight mechanisms states the following on the matter:

“Internal police disciplinary mechanisms can be inadequate, not just because they might be poorly structured or under-resourced, but because by their nature they are susceptible to bias. Where police are allowed to effectively police themselves, as in any system of purely internal accountability, there is a strong temptation to “look after one’s own”...”

External civilian oversight of the police can, where set up appropriately, be an important complement to these other mechanisms, and can help fill the gaps in a country’s system of accountability by avoiding some of the inherent or likely inadequacies of other mechanisms.”

Hence, C4 Center maintains that the Government was initially on the right track with the initial IPCMC Bill, which took oversight, disciplinary control, and punishment completely out of the hands of the police force. The IPCC in its current state is inadequate to accomplish its stated goals due to its inability to unilaterally enforce its recommendations after investigating a complaint or case. There is therefore a pressing need for an independent external oversight mechanism to handle these matters. Given that Parliament has the constitutional power to designate an independent authority to exercise disciplinary control over the police force in particular, this option should be exercised in order to reintroduce the IPCMC or a body with analogous powers and functions.

4.5.2 RECOMMENDED POWERS FOR OFFICERS OF POLICE OVERSIGHT MECHANISMS

International best practice on establishing police oversight mechanisms dictate that in order for such mechanisms to be effective, they should be created and operate according to certain general principles, including adequate powers to comprehensively investigate allegations of police misconduct. In this regard, the Special Rapporteur Report on police oversight mechanisms stipu-

lates that “[t]he strongest mechanisms can be given quasi-police investigator or prosecutor powers.” Examples of such systems include the South African Independent Complaints Directorate, where designated members are authorised to exercise all investigatory powers of police officers (including investigating crime scenes), and the powers of arrest, search and seizure; and the Police Ombudsman of Northern Ireland which has “all the powers and privileges of a constable”, including evidence collection and forensic analysis. The report also noted that “[w]ithout auxiliary powers, a mandate which empowers an external oversight agency to undertake investigations is often rendered meaningless.”

Therefore, an effective Malaysian police oversight agency should have equivalent investigatory powers to the police force itself, in particular those prescribed under the Criminal Procedure Code, e.g. powers of search and seizure, forfeiture, access to computerized data and interception of communications. Police oversight agencies investigate issues of police misconduct which, due to the nature of police work, carries the potential for criminality (similar to the role of the MACC as explained above) which necessitates such broad powers. However in contrast, such far-reaching powers would not be necessary for most investigations into maladministration in the civil service, which is the sole ambit of the Ombudsman's functions (given that any case/complaint which discloses a criminal offence or corruption should be transmitted to other bodies – see above). As discussed above, PCB statistics in-

[80] ibid, para. 37.
[81] ibid, paras 37 – 38.
[82] ibid, para. 38 (emphasis added).
dicate that most complaints received revolve around matters such as delay/failure to take action, failures in enforcement, procedural non-compliance, or unsatisfactory quality of service.\footnote{Categories derived from PCB Annual Reports, available at https://www.pcb.gov.my/bm/infomedia/penerbitan/laporan-tahunan.} Therefore, granting quasi-police powers to officers of the Ombudsman would be disproportionate to their functions – further justifying the establishment of a separate police oversight body.

\subsection*{4.5.3 OVERLY BROAD NATURE OF CROSS-SECTOR OVERSIGHT MECHANISMS}

External police oversight mechanisms worldwide may either be exclusively dedicated to police oversight, or which oversee the police force as part of a broader mandate.\footnote{Philip Alston, “Study on police oversight mechanisms”, 28.05.2010, A/HRC/14/24/Add.8, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/14/24/Add.8, para. 26.} However, it has also been acknowledged that oversight bodies which have a “cross-public sector role” may lack the focus and resources necessary to adequately tackle police misconduct. In setting out the fundamental criteria necessary to establish an effective independent oversight model, the UNODC notes that:

"Mandates need to be realistic and fair, and powers and resources must be adequate to fulfil those mandates. Some existing bodies have narrow mandates and limited powers, thus jeopardizing their credibility; others have excessively broad mandates that stretch their capacity to the limit."

\textbf{In the case of bodies that oversee the entire public sector, resources}
may not be primarily allocated to police oversight. Similarly, some oversight bodies have a broad mandate focusing on all integrity-related issues (including corruption and human rights). Again, this may lead to certain areas being heavily prioritized.\(^{85}\)

This exact issue has been heavily debated in New South Wales, where the Independent Commission Against Corruption, established in 1989 with a cross-public sector role, has been criticised for lacking the focus and resources to deal adequately with the specific issue of police corruption. It has also been noted that “[i]nvestigation of the police is a specialized job”, and “should a broad-based commission be introduced, there would still be a need to separate the investigation of police misconduct as it is a special and difficult investigative area.”\(^{86}\) Due to widespread and entrenched corruption and abuses of power in the New South Wales Police, the Wood Royal Commission was set up to investigate issues of corruption and misconduct within the New South Wales police service and to advise on remedial processes. Following its investigations, the Commission called for the establishment of a “new, purpose-built agency, with a specific focus upon the investigation of serious police misconduct and corruption”\(^{87}\) – which led to the creation of the Police Integrity Commission in 1996, tasked solely with the prevention, detection, and investigation of serious police misconduct.


Drawing from the experience of New South Wales, the Government should avoid saddling the Malaysian Ombudsman with the resource-intensive tasks of detecting and investigating police misconduct as well as making determinations on disciplinary proceedings and punishments for police officers. To illustrate this point, reference should be made to EAIC statistics of complaints received by the commission which show how complaints made against the Royal Malaysia Police (PDRM) far outnumber those made against any other enforcement agency. Table 2 below sets out the statistics of complaints made to the EAIC against all the enforcement agencies it oversees over the past 6 years, from 2018 to 2023 (as of April 30th).
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Royal Malaysia Police (PDRM)</td>
<td>477</td>
<td>742</td>
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<td>742</td>
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<td>41</td>
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<td>20</td>
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<td>10</td>
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<td>16</td>
<td>10</td>
<td>14</td>
<td>8</td>
<td>3</td>
<td>60</td>
<td>1.44</td>
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<td>National Anti-Drugs Agency (AADK)</td>
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<td>11</td>
<td>13</td>
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<tr>
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<td>3</td>
<td>13</td>
<td>19</td>
<td>9</td>
<td>5</td>
<td>0</td>
<td>49</td>
<td>1.18</td>
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<tr>
<td>National Registration Department (JPN)</td>
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<td>9</td>
<td>12</td>
<td>3</td>
<td>9</td>
<td>2</td>
<td>46</td>
<td>1.10</td>
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<tr>
<td>Department of Labour (JTK)</td>
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<td>9</td>
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<td>8</td>
<td>6</td>
<td>3</td>
<td>43</td>
<td>1.03</td>
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<tr>
<td>Volunteers Department of Malaysia (RELA)</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>17</td>
<td>2</td>
<td>0</td>
<td>30</td>
<td>0.72</td>
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<tr>
<td>Department of Environment (IAS)</td>
<td>2</td>
<td>5</td>
<td>8</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td>24</td>
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<tr>
<td>Malaysian Maritime Enforcement Agency (APMM)</td>
<td>1</td>
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<td>5</td>
<td>6</td>
<td>1</td>
<td>23</td>
<td>0.55</td>
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<tr>
<td>Ministry of Health (KKM), Enforcement Division</td>
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<td>7</td>
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<td>0</td>
<td>1</td>
<td>14</td>
<td>0.34</td>
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<td>0</td>
<td>2</td>
<td>4</td>
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<td>1</td>
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<td>1</td>
<td>0</td>
<td>8</td>
<td>0.19</td>
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<tr>
<td>Department of Fisheries (DOF)</td>
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<td>0</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>7</td>
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<td>Civil Aviation Authority of Malaysia (CAAM)</td>
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<td>0</td>
<td>2</td>
<td>0</td>
<td>3</td>
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</tr>
<tr>
<td>AGENCY</td>
<td>2018</td>
<td>2019</td>
<td>2020</td>
<td>2021</td>
<td>2022</td>
<td>2023 (as of April 30th)</td>
<td>TOTAL</td>
<td>PERCENTAGE OF TOTAL COMPLAINTS, 2018 - 30.04.2023 (%)</td>
</tr>
<tr>
<td>---------------------------------------------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------</td>
<td>------------------------</td>
<td>--------</td>
<td>------------------------------------------------------</td>
</tr>
<tr>
<td>Commercial Vehicles Licensing Board (LPKP) of Sabah and Sarawak</td>
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<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0.05</td>
</tr>
<tr>
<td>TOTAL</td>
<td>578</td>
<td>924</td>
<td>931</td>
<td>911</td>
<td>626</td>
<td>197</td>
<td>4167</td>
<td>100.00</td>
</tr>
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</table>

Table 2: Summary of complaints received by the EAIC against enforcement agencies for the years 2018 – 2023 (as of April 30th)\(^88\)

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\(^88\) Statistics for the years 2018 to 2020 are derived from the EAIC’s Annual Report 2020, for the years 2021 and 2022 via email inquiry to the EAIC (response received on 30.06.2023), and for the year 2023 from the EAIC’s website at https://www.eaic.gov.my/en/data-statistics/statistics/complaints accessed on 05.06.2023.
Figure 1 below further illustrates the sheer disparity in complaints made against PDRM as compared to any other agency – almost 80% of the total number of complaints made were against members of the police force, whereas all but 2 of the other agencies make up less than 2% each. This further strengthens the argument for an independent body focused solely on managing complaints against members of the police force.

Figure 1: Chart of total complaints received by the EAIC from 2018 to 2023 (as of April 30th) divided by agencies
5. LEGISLATIVE BASIS AND ADMINISTRATIVE POSITIONING OF THE OMBUDSMAN

As a body tasked solely with oversight upon Executive power, it would be prudent to place the Ombudsman under the Legislature rather than having it subordinated to the very administrative agencies it seeks to monitor. However, this is a complicated proposal as the Malaysian Parliament today no longer has a “Parliamentary Service” separate from the public service, ever since the repeal of the Parliamentary Service Act 1963 vide Constitution (Amendment) Act 1992. This Act previously allowed for the appointment of members of staff of the Houses of Parliament who were independent from the public service, with appointments jointly decided upon by the Speakers of both Houses. Presently there seems to be no legislative footing to allow for the appointment of “Officers of Parliament” who are accountable to Parliament alone and who are responsible over matters such as budgeting and staffing. This indicates the pressing need for the re-introduction of a Parliamentary Service separate and independent of the public service, which would be empowered to govern the affairs of Parliament autonomously and would thereby be able to set up offices such as the Ombudsman under its auspices.
Placing the Ombudsman under Parliament is preferable as it would add to the overall legitimacy of the office as an independent body capable of addressing maladministration issues without fear or favour. It would fortify the goal for no party to unduly influence or direct whether a particular complaint should be acted upon, the manner in which investigations are conducted, and the priority which should be accorded to a particular complainant. The usual measure of placing oversight institutions under government administration, with the power of creating governing regulations granted to the Prime Minister or Cabinet Ministers, would result in a greater risk of executive interference as it shall effectively make the Ombudsman a part of the same bureaucracy it seeks to monitor. Thus, even though this proposal would require a significant level of political will due to its unprecedented nature within the Malaysian legal structure, it should be seen as a fundamental element of the office.

Additionally, in establishing the Ombudsman, the Government could opt either to introduce it by way of an ordinary Act of Parliament (creating a statutory body), or via a constitutional amendment (thereby entrenching the Ombudsman as a constitutional institution). The consequences of the respective legislative procedures are discussed below.

5.1 PLACING THE OFFICE OF THE OMBUDSMAN UNDER PARLIAMENT

Gottehrer notes that “[a]n Ombudsman who acts as an officer of a legislative body and is independent of the organizations reviewed is more difficult for others to control.” An example of this is the Ombudsman of New Zealand – described as an “independent Officer of Parliament” who is “not part of the Government” and whose staff “are not public servants and are independent from the Government”. This sort of structure ensures that the Ombudsman is truly independent of the departments and agencies it investigates, which ensures both public confidence and institutional capacity and efficacy.

In his Ombudsman Legislative Resource Document, Gottehrer proposes the following sample provision that may be incorporated into Ombudsman legislation:

“Principle 2. The Ombudsman is an officer of the legislative branch of government.

Sample language: The Ombudsman is appointed by the legislative body to exercise the powers and perform the duties assigned under this law.”


[91] New Zealand Ombudsman Act 1975, Section 3(1).


He goes on to comment that making the Ombudsman an officer of the legislature strengthens their independence, as one generally does not investigate those who appoint them “because of the conflict inherent in such an arrangement.” Therefore, the Malaysian Ombudsman Act should define the Ombudsman as an Office of Parliament as well. For example, the Ombudsman Act 1975 of New Zealand includes the following wording under Section 3:

“1. There shall be appointed, as officers of Parliament and Commissioners for Investigations, 1 or more Ombudsmen.
2. Subject to the provisions of section 7, each Ombudsman shall be appointed by the Governor-General on the recommendation of the House of Representatives.”

Other states which have constitutions which establish the national Ombudsman (albeit with different names) as a legislative office include:

a. Antigua and Barbuda – Article 66(1) of the 1981 Constitution (“Establishment, appointment, functions etc. of Ombudsman”)

“There shall be an officer of Parliament who shall be known as the Ombudsman who shall not hold any other office of emolument either in the public service or otherwise nor engage in any occupation for reward other than the duties of his office.”

[94] ibid.
b. Argentina – Article 86 of the 1853 Constitution

“The Defender of the People is an independent body created within the ambit of the National Congress, which shall operate with full functional autonomy, without taking orders from any authority. Its mission is the defense and protection of human rights and other rights, guarantees and interests protected by this Constitution and by the law, against deeds, acts, and omissions of the Administration, and the review of the exercise of public administrative functions.”

c. South Africa – Article 181 of the 1996 Constitution (“Establishment and governing principles”, placed under Chapter 9 titled “State Institutions Supporting Constitutional Democracy”)

“1. The following state institutions strengthen constitutional democracy in the Republic:
   a. The Public Protector.
   ...
   2. These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
   3. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
   4. No person or organ of state may interfere with the functioning of these institutions.
   5. These institutions are accountable to the National Assembly,”
and must report on their activities and the performance of their functions to the Assembly at least once a year."

However as stated previously, this arrangement may be more difficult to attain in Malaysia due to the lack of precedent or statutory basis for any independent offices to be established under the Parliamentary structure. None of the provisions under the Federal Constitution expressly allow for the creation of such an institution, and the Standing Orders of the Dewan Rakyat and the Senate only provide for the creation of Select Committees which consist of the members of the House/Senate respectively. This might not in fact pose an issue, as illustrated in the case of New Zealand, which has 3 “Officers of Parliament” (the Ombudsman, the Controller and Auditor-General, and the Parliamentary Commissioner for the Environment) despite there being no express provision allowing for this under the Constitution Act 1986. The establishing legislation for each of the Offices simply defines them as being “Officers of Parliament”. However, replicating this approach in Malaysia may prove to be an administrative impossibility due to the lack of a Parliamentary Service to independently manage matters such as funding and staffing.

It bears repeating that international best practice mandates clear structural separation between the Ombudsman and the government of the day and the public service, and for the Ombudsman to have a direct relationship with Parliament and be subject to its [95] Standing Orders of the Dewan Rakyat, SO 82 and Standing Orders of the Senate, SO 74.
authority alone. Considering this state of affairs and in the interest of preserving institutional independence, establishing the Ombudsman as an Office of Parliament requires the enactment of the Parliamentary Service Act as a prerequisite. It is promising then that the current Government has indicated a strong interest in reinstating the Parliamentary Service Act, and the C4 Center recommends that these two Acts should therefore be drafted in tandem.

5.2 ESTABLISHING THE OMBUDSMAN AS A CONSTITUTIONAL BODY

Although the Government currently seems to envision the Ombudsman as a statutory body introduced by way of an Act of Parliament, there are clear justifications for entrenching the office within the Federal Constitution itself, like the offices of the Auditor General or the Election Commission. Unlike Acts of Parliament which may be repealed or amended by a simple majority vote in the Dewan Rakyat, constitutional provisions require at least a two-thirds majority vote to be passed – which would pro-

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[98] Derived from the proposal document titled “Cadangan Penubuhan Ombudsman Malaysia” (Proposal on Establishment of the Malaysian Ombudsman) disseminated to CSOs at a consultation session organised by the Legal Affairs Division of the Prime Minister's Office on 8 May 2023.

[99] Federal Constitution, Article 105.

[100] ibid, Article 114.
tect the Ombudsman’s structure and powers from being altered too easily by the government of the day (who would at the very least hold a simple majority due to the nature of the Malaysian Westminster model of Parliament). In explaining how “[m]aximising the independence of the ombudsman government, especially the executive branch, is crucial for its effectiveness”, Reif notes that institutional independence requires that “the framework law should be a statute rather than an executive decree, and extra protection is given by enshrining the office in the constitution.”

Gottehrer’s Ombudsman Legislative Resource Document sets out a sample constitutional provision which may be used as a template:

“Principle 1. The Office of the Ombudsman is established and its purposes are set out in the jurisdiction’s Constitution.

Sample language: The Office of the Ombudsman is established as a legislative officer of (name of the jurisdiction). The Ombudsman is the legislative body’s representative to endeavor to ensure that injustice is not committed by the public administration against the individual, that public administration has the highest standards of competence, efficiency and justice in the administration of laws and that human rights are protected and promoted.

The Ombudsman shall be chosen by a two-thirds vote of the legislative body and serve a term of (number) years. The Ombudsman shall be eligible for reappointment and shall serve until a qualified successor is appointed. The Ombudsman receives and investigates complaints as pro-

vided in law.”

The Venice Principles also support this idea, with Principle 2 stipulating that “[t]he Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level.”

A similar call was made for the MACC to be entrenched as a constitutional commission named the Independent Anti-Corruption Commission (IACC), by the Malaysian Bar, C4 Center and several other civil society organizations in their Joint Memorandum for the Reform of the MACC. Excerpts from the Report of the Federation of Malaya Constitutional Commission 1957 (also known as the Reid Commission Report) on the establishment of independent service commissions to govern the branches of the public services – the present day Service Commissions provided for under Part X of the Federal Constitution – were cited in support of this proposal. In this regard, the Reid Commission stated the following, thereby recognising the importance placed upon independent and entrenched bodies to govern the public service:

“The first essential for ensuring an efficient administration is that the political impartiality of the public service should be recognized and safeguarded. Experience has shown that this is best secured by recognizing...


the service as a corporate body owing its allegiance to the Head of State and so retaining its continuous existence irrespective of changes in the political complexion of the government of the day. The public service is necessarily and rightly subject to ministerial direction and control in the determination and execution of government policy, but in order to do their job effectively public servants must feel free to tender advice to Ministers, without fear or favour, according to their conscience and to their view of the merits of a case...

Accordingly, we have made provision in Part X of the draft Constitution for the permanent existence of these three Commissions. If the Commissions are to perform their functions in the manner contemplated by the Report, we think that it is essential that they should be completely free from Government influence and direction of any kind.”

On this basis, the Joint Memorandum goes on to extrapolate that the “independence and inviolability of the intended IACC can only be guaranteed by giving it a constitutional foundation... by giving it a head and a composition of commissioners that are divorced from influence, whether over or otherwise, by the other branches of government, particularly the executive.” The same rationale can also be applied to the Ombudsman, especially since, like the aforementioned Service Commissions, its intended function is to oversee the public services. A provision establishing the Office of the Ombudsman could be inserted into Part X of the Fed-


eral Constitution on Public Services, alongside the other Service Commissions which regulate branches of the public service (e.g. the Public Services Commission, Education Service Commission, and the Judicial and Legal Service Commission – discussed further below in Chapter 9).

Establishing the Ombudsman as a constitutional body could also assist in resolving some key complications which would impact its ability to effectively carry out its mandate – by also introducing two ancillary constitutional amendments in tandem:

- Taking “disciplinary control” out of the purview of the respective Service Commissions and vesting it with the Ombudsman instead; and
- Expressly conferring investigative and enforcement jurisdiction over state public services to the Ombudsman as well.

Both these options are explored in depth below, but at this juncture it is sufficient to note that introducing the Ombudsman as a constitutional body would allow the Government greater room to expand the role of the office – as the limitations imposed by the constitutional framework could be shifted to accommodate these new proposals. This sort of setup would also cement the Ombudsman’s permanence and independence as an entrenched central figure in Malaysian government and protect the office from interference by bad faith actors moving forward.
6. JURISDICTION

As alluded to above, the issue of the Ombudsman having supervisory authority over the State public services stipulated under Article 132(1)(g) of the Federal Constitution could be a major point of contention in the establishment of the office. Before explaining further, it is important to set out some context based on an examination of the present functions of the PCB. Table 3 summarises the number of complaints made against Federal and State/Local Government departments for the years 2016 to 2021, based on statistics published by the PCB.

<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints against Federal ministries/agencies</th>
<th>Complaints against State governments (including local authorities)</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage (%)</td>
</tr>
<tr>
<td>2016</td>
<td>3,894</td>
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<td>2017</td>
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<td>2021</td>
<td>6,381</td>
<td>61.03</td>
</tr>
</tbody>
</table>

Table 3: Summary of complaints received by the PCB against Federal and State agencies for the years 2016—2021

[106] The information is derived from the PCB’s Annual Reports for the years 2016-2017, 2018, 2019, 2020, and 2021.
These statistics show that complaints against State Government departments and agencies consistently make up around two-fifths of the total amount received by the PCB, which indicate that the Ombudsman – if it is meant to take over the PCB’s role – must also ensure that it has sufficient powers to handle such cases as well. The credibility of the Ombudsman hinges upon its ability to adequately address the complaints submitted to it, and this would be severely impacted if the institution’s ability to manage cases differs depending on the source of the complaint. The governing legislation should not make a distinction in this regard, as it is important for the proposed Ombudsman to have the same powers when dealing with complaints against both Federal and State Governments/local authorities.

However, it may be unconstitutional for the Ombudsman (being a federal agency created by Parliament) to be conferred supervisory authority over the public services of the States. According to the State List under the Ninth Schedule of the Federal Constitution, the States have jurisdiction over local governments outside the Federal Territories\(^{107}\) and the machinery of the State Governments themselves.\(^{108}\) Therefore, it is uncertain whether Parliament has the legislative competence to establish a statutory body which conducts investigations into officers/departments of the State Governments and local authorities. The Federal List under the Ninth Schedule does confer legislative power over the Part X Commissions,\(^{109}\) but this may not extend to a newly constituted

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\[^{107}\] Federal Constitution, Ninth Schedule, para 4 of List II (State List).

\[^{108}\] ibid, para 7 of List II (State List).

\[^{109}\] ibid, para 6(b) of List I (Federal List).
agency which also seeks to exercise supervisory powers over the public service. In particular, the jurisdiction of the Public Services Commission established pursuant to Article 139 of the Federal Constitution does not extend to the public services of every state – it only covers the general Federal public service and the states of Malacca, Penang, Negeri Sembilan and Perlis. Every other state has its own State Public Services Commission which handles the public service (including matters of disciplinary control) independently.

It is arguable that the functions of an Ombudsman office do not interfere with the “machinery of Government” (the exact term used under the Ninth Schedule) per se, and that there might be no legal barrier to a federal agency investigating and making recommendations for corrective and preventive measures to State Governments and local authorities – so long as it does not go to the extent of mandating subsequent courses of action. This of course is a question of constitutional interpretation, which would ultimately have to be determined by the courts if ever disputed.

Alternatively, lawmakers may have to depend upon the examples provided by other nations with federal structures such as Australia or Canada, which distinguish between the federal-level and state-level Ombudsmen, each dealing with their respective public services. This would mean that the Ombudsman Act currently being drafted must be restricted to managing complaints against every other branch of the public service aside from the State public services, pending the creation of state-level equiva-

[110] See Article 139(1) and (2) of the Federal Constitution, and the list of State Public Service Commissions on the Public Services Commission website at https://www.spa.gov.my/spa/laman-utama/spa-negeri.
lents by all State Legislative Assemblies. Notably, the Sarawak State Legislative Assembly has already passed a Bill establishing a state Ombudsman in November 2023. If this option is chosen, the federal Ombudsman could then act as a coordinating body between the state offices to share best practices and harmonise efforts to improve public administration throughout the country.

In any event, if the federal Ombudsman does indeed intend to receive and manage complaints against public officials from the State Governments and local authorities, it must ensure that it creates and maintains effective lines of communication and cooperation with the State bureaucracies and Public Service Commissions to enable it to conduct its investigations comprehensively and for its recommendations to be implemented promptly and holistically.

7. STRUCTURAL INDEPENDENCE: SELECTION, APPOINTMENT, AND REMOVAL

Appointments to the oversight institutions mentioned above are generally made by the Yang di-Pertuan Agong (YDPA) on the advice of the Prime Minister. Based upon Article 40(1A) of the Federal Constitution, this effectively mandates the YDPA to act in accordance with such advice. C4 Center strongly opposes the use of this manner of appointment for the Ombudsman as well, as it would inhibit the potential for the Ombudsman to be set up in a manner which “foster[s] independence and create[s] a broad base of legislative and public support.” The selection of the members who sit on the Ombudsman should not be done by the leader of the Executive as this clearly creates a conflict of interest, and runs contrary to the vision of the Ombudsman being a wholly independent oversight body. The Asian Development Bank (ADB) makes the following observations on this matter:

“In New Zealand...the ombudsman is appointed not by the government but through a unanimous resolution of Parliament. This removes the

ombudsman from the dynamics of day-to-day politics, partisan activity, and any chance of patronage...

Collective appointment of the ombudsman, usually by parliament, is considered a prerequisite for real empowerment of the institution...

In the majority of Asian countries, however, the ombudsman is appointed by executive order, usually by the president on the advice of the prime minister or by the governor on the advice of the chief minister of the province, as in India and Pakistan. The process of selection, nomination, and appointment can turn out to be counterproductive because of perceived political interference, as happened in El Salvador. Such cases of appointments by nomination without parliamentary oversight pose a challenge to Asian ombudsmen...

The mode of ombudsman appointment continues to be the measure of the institution’s independence. In Sweden, the government-appointed ombudsmen are considered to be less independent than the parliamentary ombudsman, who is acknowledged to be fully independent. There seems to be a case for institutionalizing the appointment of the ombudsman beyond nomination and selection by the chief executive.”

Therefore, C4 Center proposes that the selection and appointment process should be handled primarily by Parliament, in order to prevent actual or perceived undue influence upon the process by the Executive.

7.1 SELECTION OF POTENTIAL CANDIDATES

It is suggested that a Parliamentary Select Committee (PSC) should be created to consider the appointment of members of the Ombudsman, and that the PSC should be entrusted with the role of sifting through potential candidates and selecting those who shall be nominated for appointment. In order to maximise the pool of potential candidates, it is also proposed that public calls for applications be instituted as an integral part of the selection process. This shall also prevent the selection by the members of the PSC from being restricted to a limited pool of known individuals who may have gained a name for themselves through politics or the public service, thereby increasing the opportunity for the most talented and capable individuals to be chosen. Further, PSCs are required to reflect the balance between political parties within the Dewan Rakyat,¹¹⁴ which ensures that the selection process is as politically neutral as possible.

This proposal is supported by international best practice. Gotttehrer’s Ombudsman Legislative Resource Document recommends that the selection committee should “advertise for applicants for the position”, and that the “names and résumés of all applicants are open to the public.” He goes on to explain that the selection process is an important control which the legislature has upon the office, and that choosing the right persons is important for the success of the institution, hence “[p]ublic advertising and review of the qualifications of candidates is one means to foster strength in the final

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¹¹⁴ Standing Order 82 of the Standing Orders of the Dewan Rakyat.
candidate for the office.”\textsuperscript{115}

Principle 7 of the Venice Principles also recommend the inclusion of a public call in the selection procedure, which is “public, transparent, merit based, objective, and provided for by the law.”\textsuperscript{116} In its report on Protection, Promotion and Development of the Ombudsman Institution, the Council of Europe praises the Belgian legislation governing its Federal Ombudsman as an example of “legislative provisions related to the process of selection and appointment of the Ombudsman that are designed to promote independence.”\textsuperscript{117} In its Federal Ombudsmen Act of 1995, Article 3 stipulates that “an open invitation to submit applications to renew the board of federal ombudsmen” shall be conducted at the end of the previous ombudsman’s term of office. Similarly, the Ombudsman of Malawi is appointed pursuant to nominations “received from the public by way of a public advertisement”.\textsuperscript{118} Another example of how public advertising is implemented in a selection and appointment process is the method of appointment of Special Procedure mandate holders and members of Expert Mechanisms of the United Nations Human Rights Council.\textsuperscript{119}

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\textsuperscript{[117]} Council of Europe, Protection, Promotion and Development of the Ombudsman Institution (September 2019), p. 27.

\textsuperscript{[118]} Article 122(1) of the Malawi Constitution of 1994.

\end{flushleft}
In order for this proposal to be feasible, the requirements/qualifications for appointment should also be clearly stipulated under the governing statute. According to the Venice Principles, the essential criteria in this regard are “high moral character, integrity and appropriate professional expertise and experience”,\textsuperscript{120} and the Ombudsman shall not, during their term of office, “engage in political, administrative or professional activities incompatible with [their] independence or impartiality.”\textsuperscript{121} Whichever characteristics are selected as the minimum necessary features to hold the office should comply with these general principles, and must be expressly stated within the relevant legislation. Once again, this is an unprecedented procedure within Malaysia, but it is one which would have immense benefits for the capabilities and expertise of the individuals heading the Ombudsman.

### 7.2 APPOINTMENT OF NOMINEES

Once the PSC has nominated the candidates to be recommended for appointment to the Ombudsman, the matter should be placed before the Dewan Rakyat to be voted upon. Gottehrer’s \textit{Ombudsman Legislative Resource Document} suggests that a majority vote of at least two-thirds of the full legislative body should be required for a successful appointment, because the support of a large majority “increases the likelihood of choosing a well-respected, fair and impartial person with broad support and diminishes

\begin{footnotesize}
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\item[\textsuperscript{120}] Council of Europe, European Commission for Democracy through Law (Venice Commission), \textit{Principles on the Protection and Promotion of the Ombudsman Institution (03.05.2019)}, CDL-AD(2019)005, Principle 8
\item[\textsuperscript{121}] \textit{ibid}, Principle 9.
\end{itemize}
\end{footnotesize}

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the chances of choosing a candidate with a political agenda.”  
A simple majority may be too low of a hurdle to cross, given that under the Malaysian Westminster parliamentary system, the government of the day is by definition the party/coalition which holds a majority of seats in the Dewan Rakyat. Therefore, requiring a higher degree of affirmative votes would reduce the possibility of a partisan candidate being pushed through despite resounding rejection by opposition Members of Parliament.

Examples of such mechanisms include the Albanian People’s Advocate, who requires the support of three-fifths of all members of the Assembly;\(^{123}\) the Maltese Ombudsman/Commissioner for Administrative Investigations, who is appointed by the President acting in accordance with a resolution of the House of Representatives supported by the votes of not less than two-thirds of all members of the House;\(^{124}\) and the Timor-Leste Ombudsman, who requires an “absolute majority” vote of the National Parliament.\(^{125}\) Requiring a unanimous vote may be too ambitious and could result in parliamentary gridlock, hence the target should be a two-thirds majority vote.


\(^{123}\) Article 61 of the Albanian Constitution of 1998.

\(^{124}\) Section 3 of the Maltese Ombudsman Act [Cap 385].

\(^{125}\) Article 27 of the Timor-Leste Constitution of 2002.
7.3 PROCEDURE AND GROUNDS FOR REMOVAL

The Government has indicated that a PSC also should consider the removal of members of the Ombudsman, which would be appropriate for the reasons stated above. However, it has also been proposed that the decision to remove members of the Ombudsman should be done by the YDPA.\footnote{Derived from the proposal document titled “Cadangan Penubuhan Ombudsman Malaysia” (Proposal on Establishment of the Malaysian Ombudsman) disseminated to CSOs at a consultation session organised by the Legal Affairs Division of the Prime Minister’s Office on 8 May 2023.} It is unclear whether this proposal places the determination within the YDPA’s personal prerogative, or if this is another discretion effectively accorded to the Prime Minister by virtue of Article 40(1A), but either option would diminish the independence of the Ombudsman. C4 Center strongly recommends that this power should instead be placed under Parliamentary vote as well, for the reasons stated above. In effect, the PSC should, after considering the grounds upon which the removal is based, bring its recommendations on the matter before the Dewan Rakyat, who should then vote upon the removal with the same requirement of majority votes as for appointment.

This is supported by Gottehrer’s Ombudsman Legislative Resource Document as well, which recommends that the governing legislation should only allow for removal for “cause specified in the Act by a two-thirds majority vote of the legislative body that appointed the Ombudsman” or if the Ombudsman opts to resign “by a letter to the presiding officer of one of the legislative bodies.”\footnote{Dean M. Gottehrer (March 1998), Ombudsman Legislative Resource Document, Occasional Paper #65, IOI, Alberta, Canada, p. 6 (Principle 12 of “Legislative Act Provisions”).} Possible causes could include matters such as breach of their oath
of office, inability, infirmity of body or mind or for any other cause which prevents them from properly discharging the functions of their office (reference in this regard could be made to the grounds for removal of judges under Article 125(3) of the Federal Constitution and the Judges Code of Ethics). Gottehrer also notes other provisions used by various jurisdictions worldwide, which include bankruptcy and accepting posts incompatible with the office.\textsuperscript{128}

The Venice Principles echo this idea, stipulating under Principle 11 that the Ombudsman shall be removed only based upon “an exhaustive list of clear and reasonable conditions established by law” which “relate solely to the essential criteria of “incapacity” or “inability to perform the functions of office”, “misbehaviour” or “misconduct”, which shall be narrowly interpreted. Thus, the governing legislation of the Ombudsman must expressly stipulate the grounds for removal, which must have a high threshold and be limited to widely accepted and recognised causes, to ensure that the office is not affected by political threats or attacks.

\textsuperscript{128} ibid.
8. **POWERS OF INVESTIGATION**

In order to facilitate the primary function of the Ombudsman office as a complaints management body, it must be granted a sufficiently broad scope of investigative powers to permit the Ombudsman to obtain all information it may require in the course of investigating the complaints or information it receives. In this regard, reference may be made to Principle 16 of the Venice Principles, which lists the following powers of investigation:

- Discretionary power, on their initiative or as a result of a complaint, to investigate cases with due regard to available administrative remedies;
- Entitlement to request the co-operation of any individuals or organisations who may be able to assist in the investigation, and the power to interview or demand written explanations of officials and authorities;
- A legally enforceable right to unrestricted access to all relevant documents, databases, and materials, including those which might otherwise be legally privileged or confidential; and
- Unhindered access to buildings, institutions, and persons, in-
including those deprived of their liberty.¹²⁹

This provides a basic framework of the ideal scope of the Ombudsman's capabilities, which should be unambiguously set out under the governing Act. These ideas are further explored below.

### 8.1 INITIATION OF INVESTIGATIONS

It goes without saying that investigations into potential instances of maladministration would usually be initiated pursuant to a complaint received from a member of the public. However, the Ombudsman's functions should not be restricted by a formality of requiring an official complaint to be made first before it may begin investigating, given that failures in public service delivery often are widely reported through news channels and social media. Therefore, in addition to the Ombudsman's power to investigate cases following a complaint, it must also have the express authority to commence investigations upon their own motion where it lies within the public interest to do so.

In addition to this, the Ombudsman must also be expressly granted the discretion to decide not to proceed with investigation of a complaint or to cease an initiated investigation. This is necessary to allow the Ombudsman the freedom to decide how to utilise its resources in the pursuit of its ultimate goals in the most effective manner, thereby preventing wastage. Gottehrer lists several circumstances when the Ombudsman may decide not to pursue an investigation, including the following:

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• Considering all circumstances of the complaint further investigation is unnecessary or not warranted;
• Ombudsman office resources are insufficient for adequate investigation;
• Investigation would serve no useful purpose; and
• The complaint or one substantially like it has been previously investigated.  

Other appropriate circumstances could be where a complaint falls outside of the Ombudsman’s mandate, or where a complaint is already being managed/investigated by another oversight body. However, a complaint should not be rejected simply because the complainant does not have a personal or vested interest in the subject matter of the complaint. The requirement for standing should be made permissive in support of collective or representative complaints which are made on behalf of a group of aggrieved persons.

Ultimately, this discretion should be exercised based on the fundamental consideration of public interest, and where a determination is made not to proceed on a particular complaint, sufficiently particularised written reasons must be transmitted to the complainant to uphold transparency.

8.2 POWER TO EXAMINE PERSONS, AND UNIMPEDED ACCESS TO DOCUMENTS & PREMISES

The governing Act must also grant the Ombudsman mandatory powers to summon and examine any person who may assist with its investigations. Gottehrer says the following on this requirement:

“The Ombudsman and members of the staff to whom the power has been delegated may administer oaths. A person under oath who provides oral or documentary information under this provision shall be accorded the same privileges and immunities extended to witness in the courts of this jurisdiction and shall also be entitled to be accompanied and advised by counsel while being questioned. If a person refuses to comply with the summons or subpoena, the Ombudsman may seek enforcement in (the appropriate court of the jurisdiction).”

This sort of power is already presently conferred on other oversight bodies. For example, Section 30 of the MACC Act 2009 empowers officers of the Commission to order any person’s attendance for the purpose of oral examination where it would assist in the investigation into the offence, or to furnish a written statement made on oath or affirmation setting out information which would be of assistance in the investigation into the offence. The wording of the Section clearly renders these orders/written notices


[133] ibid, Section 30(1)(c).
mandatory, and non-compliance is deemed a criminal offence.\footnote{ibid, Section 30(10) and Section 36(4).}

Similarly, Section 8 of the Commissions of Enquiry Act 1950 grants Commissioners the power to examine all persons as deemed necessary or desirable,\footnote{Commissions of Enquiry Act 1950, Section 8(a).} to require the evidence of any witness to be made on oath, affirmation or by statutory declaration,\footnote{ibid, Section 8(b).} and to summon any person in Malaysia to attend any meeting of the Commissioners to give evidence or be examined as a witness.\footnote{ibid, Section 8(c).} Further, the Commissioners are also empowered under the same Section to issue a warrant of arrest to compel the attendance of any person who fails to comply with a summons to attend.\footnote{ibid, Section 8(d).}

Drawing from these provisions as examples, there are 3 primary recommendations for the Ombudsman’s power to examine persons:

1. Unimpeded authority to summon and examine any person for the purpose of aiding with investigations;
2. The ability to administer oaths or affirmations in accordance with the relevant laws, so that the truthfulness of witness testimony may be corroborated where necessary; and
3. The ability to compel compliance with summons/orders, which may necessitate punitive measures for non-compliance as well (discussed further in Chapter 8.3.2 below).

\footnotesize{[134] ibid, Section 30(10) and Section 36(4).
[135] Commissions of Enquiry Act 1950, Section 8(a).
[136] ibid, Section 8(b).
[137] ibid, Section 8(c).
[138] ibid, Section 8(d).}
In addition to obtaining oral evidence, the Ombudsman must also have full and unrestricted access to all relevant documentary evidence which may assist with their investigations, e.g. books, accounts, records, and computerised data of any government department or agency. It is worth noting that a major obstacle to this dimension of the Ombudsman's investigative powers would be the continued existence of laws which prevent disclosure of government information/documents, such as the Official Secrets Act 1972 (which broadly allows for any official document, information or material to be classified as an “official secret”, and thereby criminalises disclosure or communication of such material) and Section 203A of the Penal Code (which makes it a criminal offence for public officials to disclose any information or matter they obtain in the performance of their duties or the exercise of their functions).

Impeding access to government information, documents or records would inhibit the Ombudsman’s core purpose of investigating maladministration within the public service, thus this existing situation must be reworked when delineating the Ombudsman's powers. In an ideal scenario such repressive laws ought to be amended or repealed, but at the very least, the Ombudsman’s powers of investigation should be expressly defined as superseding any other written law – which would ensure that the Ombudsman's investigations are not hampered by a mere inability to access relevant information.

In a similar vein, the Ombudsman should also be granted power to access premises which may be exercised on their own initiative. This should be contrasted with the power granted to the IPCC under Section 5(2)(b) of the IPCC Act 2022, which states
that the Commission may “visit any place and premises such as police stations, police quarters, lock-ups and detention centres by giving early notice to the relevant Head of Department”. Requiring the issuance of advance notice to the very entity sought to be investigated could negate the entire purpose of the site inspection, as it creates the opportunity for evidence to be removed, obscured, or destroyed. Therefore, the Ombudsman’s power to inspect premises cannot be predicated upon giving any form of prior notice.

**8.3 OPERATIONAL AUTONOMY**

**8.3.1 POWER TO CREATE SUBSIDIARY LEGISLATION**

Bearing in mind the proposals above to ensure as much structural separation as possible between the Ombudsman and the Executive, a problem arises with regarding to the drafting and passing of subsidiary legislation to govern the functioning of the Ombudsman. Gottehrer notes that the Ombudsman should be enabled to “adopt, promulgate, amend and rescind rules and regulations required for the discharge of the Ombudsman’s duties, including procedures for receiving and processing complaints, conducting investigations, and reporting findings, conclusions and recommendations.” He goes on to explain that primary legislation cannot cover everything, and therefore the Ombudsman needs the power to write rules, regulations, policies and procedures for the operation of its office.¹³⁹

As stated above, the parent Acts of most other oversight institutions empower either the Prime Minister or a Cabinet Minister

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to make regulations to govern the functioning of each of them.\textsuperscript{140} However, this cannot and should not be replicated for the Ombudsman as well, as it would impugn the independence and autonomy of the institution. Instead, guidance should be obtained from an examination of the Rules Committee under the Courts of Judicature Act (CJA) 1964, the Bar Council under the Legal Profession Act (LPA) 1976, and the Inland Revenue Board under the Inland Revenue Board of Malaysia (IRBM) Act 1995.

Section 17 of the CJA 1964 empowers the Rules Committee to make rules of court, which shall be laid before the Dewan Rakyat for approval by way of a resolution.\textsuperscript{141} This Committee shall consist of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the High Courts in Malaya and Sabah and Sarawak, a Judge from each of the aforementioned courts, as well as the Attorney General, the Chief Registrar of the Federal Court, three advocates, and a representative of the Ministry of Law.\textsuperscript{142} This system clearly prioritises representatives from within the entities which are governed by these rules in their functions: the judiciary and legal practitioners. Although there is a representative of the Executive therein, this should be seen not as an incursion into a separate branch of Government, but instead an example of collaboration and shared expertise between the Judiciary and the Executive. Furthermore, the final decision lies with the Legislature, thereby ensuring a comprehensive system of checks and balances.

\textsuperscript{140} See Section 71 of the MACC Act 2009, Section 54 of the EAIC Act 2009, Section 46 of the IPCC Act 2022, and Section 22 of the HRCM Act 1999.

\textsuperscript{141} Section 17(5) of the Courts of Judicature Act 1964.

\textsuperscript{142} ibid, Section 17(2).
Conversely, Section 77 of the LPA 1976 empowers the Bar Council to make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors with the approval of the Attorney General. The same section also allows the Attorney General to make any modifications to these rules as deemed necessary. This setup clearly shows the subordination of the Bar Council to the Executive in this regard, which cannot make rules to regulate its own profession without Executive approval. Similarly, the power of the Inland Revenue Board to make regulations under Section 34 of the IRBM Act 1995 is also circumscribed by the requirement for ministerial approval.

The power of the Ombudsman to make subsidiary legislation “for the purpose of carrying out or giving effect to the provisions of the Act” must not be restricted by requiring Executive approval before it may be passed. A Committee similar to the Rules Committee under the CJA 1964 should be established instead, and members of the Executive (such as a representative of the Legal Affairs Division) may be included so that their input and opinions may be contributed to the drafting of these regulations. The autonomy of the Ombudsman must be prioritised in this regard, and in no event should the institution’s functions be controlled by the very administrative entities it oversees.
8.3.2 POWER TO COMPEL COOPERATION

Although ombudsman institutions worldwide typically operate in a supervisory and non-coercive manner, it is suggested that the Malaysian Ombudsman must possess an equivalent to the power exercised by the current PCPC in order to ensure compliance and cooperation by government agencies and bodies with its processes.

According to the ADB, non-compliance with the orders of the Ombudsman is not unheard of and poses a challenge to the independence of the Ombudsman. In its report on “Strengthening the Ombudsman Institution in Asia”, the situation in Azerbaijan is used as a cautionary tale, where some officials under investigation gave untruthful, superficial, and delayed responses to queries, or even none at all. Therefore, in order to mitigate the possibility of these sorts of challenges from impeding the functions of the Ombudsman, the institution must be empowered to compel action where necessary. Principle 17 of the Venice Principles reflects this as well, stating that “[t]he Ombudsman shall have the legally enforceable right to demand that officials and authorities respond within a reasonable time set by the Ombudsman.”

This ability to compel cooperation could take various forms, some of which have been mentioned above i.e. full and unimpeded authority to examine persons, and unrestricted access to documents and premises. These powers must be legally enforceable, hence the governing legislation must use the term “shall” in pro-


[144] ibid, pp. 68 – 69.
visions setting out the Ombudsman's powers – to clearly indicate their mandatory nature. Further, the legislation must also grant the Ombudsman the option to obtain court orders such as warrants and subpoenas to enforce their own orders in the event of exceptionally stubborn officers or departments who refuse to comply.

Additionally, non-cooperation with the Ombudsman's investigations could be criminalised as well, with potential sentences of fines or imprisonment (as incorporated in the MACC Act 2009, explained above). These exceptional punitive powers should not be exercised wantonly and ought to be an option of last resort, and the onus should remain upon government agencies to comply with all investigative procedures. However, a holistic legislative framework must anticipate all possibilities, and therefore the Ombudsman should be granted these powers in order to facilitate its functions and effectively manage situations of inordinate delay, insufficient compliance with orders, or deliberate obstruction of or interference with ongoing investigations.
9. POST-INVESTIGATION PROCESS

An important issue to consider is the question of what happens after the Ombudsman concludes an investigation, as a common critique levelled against several of the existing oversight institutions (SUHAKAM, EAIC, IPCC) is that they lack teeth due to their inability to enforce their findings. Indeed, this is not an unfounded statement: for instance, in 2019 SUHAKAM expressed its concern and disappointment at the Government’s “lack of action and seriousness” in implementing the recommendations contained within its Report on the National Inquiry into the Land Rights of Indigenous People in Malaysia published in 2013, stating that the Government was “too slow” in implementing recommendations submitted almost 6 years prior.\textsuperscript{145} In this Chapter, the suitability of conferring enforcement powers upon the Ombudsman shall be discussed. Further, other key follow-up measures are also considered: reporting and negotiating with the bureaucracy and instituting legal proceedings on behalf of complainants.

9.1 SHOULD THE OMBUDSMAN BE CONFERRED ENFORCEMENT POWERS?

As explained above, ombudsman institutions tend to serve a primarily supervisory function i.e. only issuing recommendations and acting as a mediator and conciliator between the public and the Government. This issue is important in determining the scope of the Malaysian Ombudsman’s powers after an investigation is concluded, as traditionally ombudsman institutions worldwide do not possess enforcement powers (e.g. to punish errant officers or to compel performance of particular actions) to implement their recommendations. Reif describes the general post-investigation process as follows:

“After an impartial and objective investigation, the ombudsman makes a determination whether there has been improper conduct. The ombudsman may determine that the government entity or bureaucrat has acted appropriately, i.e. within the law and in a fair manner. However, if misconduct is uncovered by the investigation, the ombudsman has the power to make recommendations for changes to administrative practice and policy to terminate the administrative problem. Many ombudsmen also have the power to make recommendations for changes in laws. Also, the ombudsman has reporting duties. In specific investigations, the ombudsman reports to the complainant, the government and, if recommendations are not implemented by the administration, the ombudsman can report on the matter to the legislature. Further, the ombudsman has the duty to make an annual report to the legislature on the activities of the office, and some ombudsmen can issue special reports..."
In particular, a specific constitutional problem arises in respect of granting the Ombudsman punitive powers over public officers who are found to have acted inappropriately. Presently, the Federal Constitution generally grants the Part X Service Commissions the duty to “exercise disciplinary control over members of the service or services to which its jurisdiction extends.”\textsuperscript{147} Thus, the federal Public Service Commission and the State equivalents, as well as the Armed Forces Council,\textsuperscript{148} the Judicial and Legal Service Commission,\textsuperscript{149} the Police Force Commission,\textsuperscript{150} and the Education Service Commission\textsuperscript{151} (which govern their respective services), are constitutionally empowered to manage matters of discipline among the various categories of public servants who would fall under the Ombudsman’s purview. Therefore, granting the authority to penalise public servants to the Ombudsman’s office would constitute a usurpation of these Service Commissions’ constitutional powers, without a constitutional amendment to balance these contradictions.

As mentioned above, if the Ombudsman is introduced by way of a constitutional amendment, accompanying amendments could be made to Part X to take “disciplinary control” out of the


\textsuperscript{147} Federal Constitution, Article 144(1).

\textsuperscript{148} ibid, Article 137(1).

\textsuperscript{149} ibid, Article 138(1).

\textsuperscript{150} ibid, Article 140(1).

\textsuperscript{151} ibid, Article 141A(1).
purview of the Service Commissions and vested in the Ombudsman instead. However, this brings a unique challenge: Article 144(5B) of the Federal Constitution allows for the establishment of Boards to exercise all powers and functions of the Public Services Commission or the Education Service Commission (including that of disciplinary control), as well as Appeal Boards to adjudicate any appeals by persons aggrieved by the decisions of the aforesaid Boards. Thus, in addition to the Public Services Commission itself, disciplinary control of the general public service of the Federation, joint services, and the public services of Penang, Malacca, Negeri Sembilan and Perlis is concurrently exercised by a hierarchical series of Disciplinary Boards and Appeal Boards, with their specific jurisdictions assigned based on the classification of the particular officer. A similar framework is also established for the Education Service Commission.

This demonstrates the resource-intensive nature of exercising disciplinary control over the public services which, if granted to the Ombudsman, may cause the office to deviate from its primary focus of investigation towards the management of disciplinary hearings and appeals – after all, fundamental principles of natural justice would require officers to obtain a fair hearing before any punishment may be meted upon them. Furthermore, this entire set of tiered structures would have to be abolished and then recreated under the structure of the Ombudsman, adding to the budgeting and staffing requirements. The extensive scope of such

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a reform does not seem justifiable for the purposes sought to be achieved. Concurrent disciplinary control may be conferred to the Ombudsman while the Service Commissions retain their power as well, but this would not be ideal in the event of conflicting opinions between both entities and would further complicate the administrative process of disciplinary hearings and appeals.

Similarly, even if the Ombudsman's recommendations include alterations to government policies and procedures, it may not be ideal for the office to be empowered to unilaterally compel the implementation of these recommendations. Firstly, the Ombudsman may not be privy to considerations beyond the scope of the individual department/agency which might be relevant in determining whether the recommendations ought to be implemented, such as budgetary restraints or larger policy concerns. Yet even if they are aware of these matters, there may exist a need to balance competing interests. In such situations, it is best for the Executive to be afforded a degree of discretion in making the final decision as the Ombudsman might not be the most qualified entity to do so.

Given that the Ombudsman already has such a wide range of bodies to supervise, it is not ideal to place further tangential duties upon them. It would be best to maintain and strengthen the Ombudsman's duty as an investigative supervisory institution, in line with the orthodox structure of ombudsman institutions internationally, while ensuring that the Government/Service Commissions may still be held accountable in the event of failures. To this end, one option could be to introduce a statutory requirement for the Government/Service Commissions to provide sufficiently particularised written reasons where the Ombudsman's recom-
Recommendations are not completely fulfilled. These written responses could then be included in the Ombudsman’s final reports, which may then be published and shared with the complainant and other stakeholders.

Reif notes that a “hallmark of the ombudsman is that the office does not have the power to make decisions that are legally binding on the administration – the executive/administrative branch is free to implement, in whole or in part, or ignore the ombudsman’s recommendations.” She goes on to observe that a common criticism arising therefrom is that the institution lacks “power to make legally binding decisions.”154 Nevertheless, there are several counterpoints in favour of the Ombudsman’s soft, non-coercive nature – which has been deemed “optimal in the context of its working environment”.155 Owen explains this as follows:

“It may be that this inability to force change represents the central strength of the office and not its weakness. It requires that recommendations must be based on a thorough investigation of all facts, scrupulous consideration of all perspectives and vigorous analysis of all issues. Through this application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future. If genuine change is


[155] ibid.
to take place as a result of ombudsman action, the office must earn and maintain the respect of government through its reasonableness. Without this, it will be at best ignored and, at worst, ridiculed.”

Schedler makes the distinction between two elements of political accountability provided by regulatory state institutions: “answerability” (which is defined as “the power given to an institution to ask “accountable actors” to give information on their decisions and to explain the facts and the reasons upon which these decisions are based”) and “enforcement” (which covers punishments and other negative sanctions to reproach improper acts). Based upon this binary categorisation, Reif opines that the Ombudsman’s ability to conduct thorough and impartial investigations, analyse cases based on considerations of legality and justice, recommend changes in law and policy, and engage in discussions with the Government on areas of improvement go beyond mere “answerability accountability”, even if the office does not possess enforcement powers per se.

Further, she argues that a distinction should be made between enforcement and compliance – where the focus is on the latter, “it is

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possible to look not only at the effectiveness of mechanisms to obtain enforcement of the law (the “sticks” approach), but also at approaches or incentives that engender voluntary conformity with the law (the “carrots” approach).” In this regard, the Ombudsman generally serves as a mechanism of cooperative control, which is “facilitative and proactive, using advice and persuasion, wherein the actors confer and dialogue to try to obtain the desired result and change behavior” – in contrast to coercive control, which is “reactive, and...imposed by unilateral decision.”

Further academic support is provided by Hertogh, who critically evaluates the following hypothesis: “[b]ecause of the legal force of their decisions, court rulings lead to a greater policy impact than the reports and recommendations by the ombudsman, which, after all, are not legally binding.” Based on an analysis of several empirical studies on the policy impacts of the administrative court and the National Ombudsman in the Netherlands, he found that “court decisions, which are legally binding, sometimes have only a limited effect on the policies and behavior of government agencies”, and “[b]y contrast, the ombudsman’s reports and recommendations, which lack legal force, can be fairly successful in influencing administrative action in the long run.” Although he stops short of making a definitive statement on which approach is better, Hertogh does note that the “cooperative control” generally employed by the Ombudsman “allows for more dialogue”,

[159] ibid, p. 30.


[161] ibid, p. 52 – 53.

[162] ibid, p. 61.
“make[s] it easier for officials to derive general rules”\textsuperscript{163} “explicitly considers the practical consequences” of the implementation of reports and recommendations,\textsuperscript{164} and prevents defensive reactions by government agencies (such as finding technical loopholes and not fully obeying decisions).\textsuperscript{165} He concludes with the following:

“\textit{Considering the previous discussion and the findings from the exploratory empirical study, it is likely that the cooperative style of control of the ombudsman generates more policy impact than does the coercive style of administrative courts. Cooperative control will probably lead to fewer ambivalent decisions than coercive control; cooperative control may produce less policy tension; and cooperative control will cause fewer defensive reactions than will coercive control.}”\textsuperscript{166}

The purpose of the Ombudsman therefore transcends individual grievances, envisioning broader reforms on a systemic level instead. It is for this reason that turning it into another enforcement agency may dampen the full potential which the office could achieve through utilisation of soft power and recommendations for best practices. After all, if the Malaysian Ombudsman was allowed to directly enforce its own recommendations, it would merely function as another court or tribunal i.e. systems which already exist and yet, still face challenges in effecting lasting and proactive change within the bureaucracy. Thus, creating a new institution with a wholly unique approach to fostering good governance could

\textsuperscript{163} ibid.

\textsuperscript{164} ibid, p. 62.

\textsuperscript{165} ibid, p. 62 – 63.

\textsuperscript{166} ibid, p. 63 (emphasis added).
be a useful addition to the Malaysian oversight framework.

9.2 REPORTING DUTIES

Once an investigation is concluded, the Ombudsman should produce an initial report setting out its findings and recommendations, which should then be transmitted to the individual agency itself (for further action), the complainant (in the interest of transparency) as well as any relevant supervisory body (such as the Service Commissions or Ministries). This initial report should contain all facts and considerations relied upon by the Ombudsman in coming to its conclusion, so that all parties are able to understand the office’s reasoning. However, this should not be the end of the matter. The governing legislation should set out a timeline for the agency to submit a sufficiently particularised written response to the initial report, detailing the measures it has taken/plans to take in order to implement the Ombudsman’s recommendations, or – if it is unable/unwilling to do so – sufficiently detailed grounds for such inability/unwillingness. At this stage, the Ombudsman must employ a follow-up mechanism by way of its soft powers: either by requiring periodic updates on the status of implementation in the case of the former, or by entering into negotiations with the bodies to attempt to reach a workable solution in the event of the latter.

Once the complaint has been adequately resolved, or if the agency remains unable/unwilling to adequately implement the recommendations, the Ombudsman’s “final remedy for correcting flawed practices when agencies refuse to implement recommen-
dations is to publish criticism and recommendations.” Thus, a final report should be produced by the Ombudsman – containing all the contents of the initial report, as well as details of the follow-up measures undertaken and all written responses submitted by the agencies/supervisory bodies. These final reports should then be submitted to Parliament, specifically the PSC tasked with overseeing the Ombudsman’s functions. Specifically in instances where recommendations were not adequately implemented, the PSC may then seek to ensure the relevant agencies/supervisory bodies account for their decisions e.g. by ordering the attendance of witnesses and production of documents, and raising questions to Ministers during parliamentary sittings to answer for these failures.

The final reports should also be published to the public at large, following the examples set by the Irish Ombudsman, which publishes a quarterly casebook on its website which includes the complaints it has dealt with, or the Ombudsman of the Czech Republic, which has a search engine on its website where individual cases can be found (albeit with anonymised data, thereby respecting privacy and data protection rights).

In support of its core mission of promoting good governance, integrity and accountability, the Ombudsman generally should

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also be required to be as transparent in its functions as possible. As the OECD notes, “transparency and integrity policies and practices of [Ombudsman institutions] aim to enhance the institution’s openness and thereby contribute to accountability.”\textsuperscript{171} Some other recommendations from the OECD Report which could be implemented, both in order to strengthen the credibility of the Ombudsman and to serve as a guide for other institutions as well are as follows:

1. Publication of guiding documents (vision, mission, strategy/action plan), finances (audit reports) in easily understandable formats on publicly accessible channels; and
2. Utilising social media to communicate decisions, announcements, press statements, and answering public queries.\textsuperscript{172}

### 9.3 **STANDING TO INSTITUTE LEGAL PROCEEDINGS**

In addition to reporting, some ombudsman institutions worldwide are also conferred with standing to institute legal proceedings under certain circumstances, each with varying degrees of power. Some examples are as follows:

- The Federal Ombudsman of Austria (\textit{Volksanwaltschaft}) is empowered under Articles 148(e) and (f) of the Austrian Constitution to apply to the Constitutional Court for a review of the legality of federal laws, or interpretation of legal

\textsuperscript{[171]} ibid, p. 12.

\textsuperscript{[172]} ibid, p. 12 – 16.
provisions where differences of opinion arise between the Ombudsman and the Federal Government/Ministers;\textsuperscript{173}

- The Commission on Human Rights and Administrative Justice of Ghana may bring court proceedings for remedies to terminate offending actions/conduct or to abandon/alter offending procedures, and to restrain the enforcement of legislation if the offending action/conduct is sought to be justified by legislation which is unreasonable or \textit{ultra vires};\textsuperscript{174}

- The Public Defender of Jamaica provides support to complainants who are found to have suffered an injustice or constitutional infringement, such as access to professional advice, legal aid and representation (with expenses borne by a special fund administered by the Public Defender).\textsuperscript{175} However, the Public Defender themselves does not go to court to obtain redress for the complainant;

- The Ombudsman of Peru (\textit{Defensor del Pueblo}) is entitled to bring before the Constitutional Court unconstitutionality actions against rules with the force of law and compliance actions for the protection of the constitutional and fundamental rights of individuals and communities, and may initiate or participate in administrative proceedings to represent a person or group for the defence of their constitutional and fundamental rights;\textsuperscript{176} and

- The Ombudsman of Thailand may, if it is of the opinion that

\textsuperscript{173} Constitution of Austria, Articles 148(e) and (f).


\textsuperscript{175} Public Defender (Interim) Act 2000 of Jamaica, Section 15.

a law, regulation or action of a public official/agency violates the Constitution, submit the case and an opinion to either the Constitutional or Administrative Court for a decision, which are then constitutionally mandated to decide the case without delay.\textsuperscript{177}

The Malaysian Ombudsman should similarly be granted legal standing under its governing statute to directly resort to the courts on behalf of complainants where there is a clear violation of fundamental liberties occasioned as a result of maladministration, or where the nature of the complaint necessitates reliance upon the coercive power of the judiciary (e.g. if mandatory resolution is needed in order to ensure justice is served, or if laws have been contravened). In such instances, the soft diplomacy of the Ombudsman may prove insufficient to adequately resolve the specific grievance – hence the office should be granted the option to call for binding injunctive orders against the offending officer/agency, through the judicial review procedure.

Of the examples presented above, it is submitted that the Peruvian and Thai Ombudsman offices might present the most suitable models for the Malaysian Ombudsman: their focus on instances of unconstitutionality would act as a sifting mechanism which ensures that only the most egregious instances of maladministration would have to be handled under this power, while also ensuring that unconstitutional rules and policies are halted

from continued implementation pending further review. In order to supplement this role, ancillary amendments to the rules of court for Ombudsman-initiated proceedings could also be made by the Rules Committee\textsuperscript{178} to set out shorter timelines for trial processes and to enable the granting of restorative orders to compensate victims for any losses occasioned by the instance of maladministration.

\footnote{178} See Courts of Judicature Act 1964, Sections 16 and 17.
10. CASE STUDY: DENIAL OF THE RIGHT TO EDUCATION IN SMK TAUN GUSI*

In 2017, the students of Class 4 Sains Sukan (4SS) at SMK Taun Gusi, Kota Belud (one of the ten poorest districts in Malaysia)\textsuperscript{179} were unfortunately left stranded due to their English language teacher’s consistent absences for 7 consecutive months, resulting in nearly the entire class failing their final English examination as well as their Sijil Pelajaran Malaysia (SPM) English examination the following year.\textsuperscript{180} One student described her loss of interest in learning due to the teacher’s absences, leading to a sense of depression knowing that she would not be able to do well.\textsuperscript{181} Worse still, complaints to the school principal went nowhere as he failed to take any reasonable steps to exercise disciplinary control over the truant teacher, and sought to protect the teacher instead of...

* In addition to the cited sources, this Chapter is largely based upon information gathered from a series of discussions held with Amy and Joy (pseudonyms) of the Tiada.Guru Campaign (a non-partisan advocacy group based in rural Sabah focused on combatting misconduct within the Ministry of Education), as well as internal documentation and records of the Tiada.Guru Campaign.


\textsuperscript{180} Rusiah Sabdarin \& Ors v. Mohd Jainal Jamran \& Ors [2023] 8 CLJ 603, [15]-[16].

the students who were being denied their right to education, who were criticised and insulted instead. In order to protect their own rights, several students and a sympathetic whistleblower teacher had to make secret audio-video recordings of the teacher’s absences and their subsequent meetings with school administrators and the principal, all of whom refused to follow Ministry of Education protocols to discipline the truant teacher. Furthermore, it was subsequently revealed during trial that records of the Sabah State Education Department (JPNS) clearly documented the truant teacher’s absences, which showed that the problem should reasonably have been noticed by those higher up within the bureaucracy.

After all else had failed, in December 2020 several of the students launched a civil public interest litigation action at the High Court, naming the teacher Jainal Jamran, the school principal Suid Hanapi, the Director General of Education, the Minister of Education, and the Government of Malaysia as defendants. Among the reliefs sought included declarations that the defendants had breached their statutory duties under the Education Act 1996 and violated the plaintiffs’ constitutional rights under Article 5 read with Article 12 of the Federal Constitution, as well as general, aggravated, and exemplary damages.

A very similar case had been filed in 2018 by another Plaintiff, alleging this same teacher Jainal Jamran had been absent for about 7 months and the principal Suid Hanapi refused to act. However,

[182] ibid.


[184] ibid, para [3].
this 2018 litigation notes that the District Education Officer of Kota Belud, JPNS, and Ministry of Education were each also informed throughout the school year, while each refused to follow their statutory duties under the relevant laws. This litigation is currently in trial at the High Court. Thus far in Court, teachers have admitted to backdating critical evidence and the Director of JPNS (which led the investigation) is a family relative of Jainal Jamran.

Due to court scheduling and the COVID-19 pandemic, the 2020 litigation concluded first. Almost 3 years later on 18 July 2023, the High Court ruled in the plaintiffs’ favour and held that the defendants were liable for breach of statutory duty and negligence, violating provisions under the Public Officers (Conduct & Discipline) Regulations 1993 and the Education Act 1996 as well as the plaintiffs’ constitutional right of access to education under Articles 5(1) and 12. As a result, the plaintiffs were each awarded nominal damages of RM30,000 for the loss of opportunity occasioned by the defendants’ acts, and aggravated damages of RM20,000 for (a) the emotional and/or psychological trauma and injury they suffered; (b) the humiliation caused to the plaintiffs by the principal; (c) the Government’s decision to defend against the suit despite Ministry of Education records proving the teacher’s absences; and (d) the humiliating lines of questioning by the Government lawyers against the Plaintiffs in trial.

Although the plaintiffs were successful at trial in this case, theirs is ultimately a pyrrhic victory - no amount of monetary damages

[185] ibid, para [52] – [55].
[186] ibid, para [75].
[187] ibid, para [76] – [93].
compensation can undo the injuries they suffered as a result of losing their right to education. As the court acknowledged, English is a core subject in the SPM examinations and for enrolment to any tertiary education institution – thus the failures of the education service in this case directly caused the students the loss of opportunity to receive good grades in secondary school and by extension better education in the future.\footnote{ibid, para [88].} It is also noteworthy that typical private litigation of this nature may incur costs of up to RM50,000, and the plaintiffs in this case were lucky to have been able to obtain pro-bono legal representation. Additionally, compensation was only paid to the plaintiffs named in the lawsuit after years of waiting – every other student who faced the same situation got nothing other than media reports that the Government had failed them.

Hence, we might now consider how an Ombudsman office could have helped resolve this case in a more expedient and advantageous manner for all parties.

As explained above, the Ombudsman’s powers of investigation would have enabled the office to compel production of all relevant records and documentation, which would otherwise have to be obtained by the students via a discovery application in a court proceeding. Due to the legal requirement to comply with the Ombudsman’s requests, there would also have been no opportunity for the district and state education departments to ignore their complaints and remain silent – department officers would have had to take notice of the ongoing issue and explain to the Ombudsman why they had not taken any action. Further non-compliance would
result in the imposition of punitive measures, which itself might create enough pressure for the officers to take action to uphold the students right to receive a proper education. The cooperative stance employed by the Ombudsman might also have assisted in coaxing the school principal and/or departments to take effective steps towards resolving the matter, by using persuasive dialogue to facilitate changed behaviour. Although this may seem to be an idealistic outlook, Hertogh’s study above does opine that cooperative control causes fewer defensive reactions than coercive control. Hence, utilising diplomatic skill might have resulted in a resolution which would have helped all the students of 4SS while the issue could still be remedied, instead of the individual plaintiffs alone after the fact.

Of course, if the departments still refused to take any action upon the truant teacher, the Ombudsman might then have engaged with the Education Service Commission and the federal Minister of Education to intervene. The departments’ failures could also have been included in the report published and submitted to the PSC, which may have then continued the questioning of relevant parties to demand justifications for their prolonged failure to address the complaints. These processes would likely take a much shorter period than the lengthy full trial in court, with all the various interlocutory applications further extending the time taken for resolution. Ultimately, although the Ombudsman (under the framework recommended within this paper) would not have the power to compel any government agency to take action, the utilisation of uncompromising investigative powers and negotiations with the Government could have resulted in a quicker and more effective resolution.
In any event, the Ombudsman might also decide to launch a court action against the same parties once it found that a violation of the complainants’ constitutional rights was being committed. At the very least, the complainants would not have to bear the costs of maintaining the lawsuit.
11. CONCLUSION

In short, the proposal to establish an Ombudsman indicates this administration’s clear commitment to upholding principles of good governance in Malaysia. However, the recommendations set out in this report must be incorporated into the office’s structure as well – in order to ensure the Malaysian Ombudsman is equipped to carry out its functions in an effective and efficient manner, while also conforming with international best practice on the subject.

It is important to remember that the Ombudsman shall not act as a panacea which will solve all the problems currently plaguing the Malaysian public service. In order for good governance to be upheld within the bureaucracy and for public service delivery to be provided in a just and equitable manner throughout the nation, comprehensive reviews and overhauls of many different institutions must be undertaken, and a shift in the culture of the public service must be promoted. It is C4 Center’s hope that the Ombudsman shall act as a catalyst for these reforms to be identified and implemented moving forward. Thus, C4 Center strongly urges for the following to be incorporated in the Ombudsman Act and other ancillary legislation:
MANDATE
1. Ensuring the Ombudsman’s functions are focused upon tackling 2nd tier complaints of maladministration in all government agencies and departments at the federal level (including federal statutory bodies) as well as private providers of public services, to the extent possible under the Malaysian constitutional framework.
2. Allowing the Ombudsman to receive disclosures of improper conduct and to confer whistleblower protection under the Whistleblower Protection Act 2010.

INTEGRATION WITH OTHER OVERSIGHT MECHANISMS
3. Dissolving the EAIC and placing oversight of “enforcement agencies” under the purview of the Ombudsman.
4. Placing oversight of the police force outside the ambit of the Ombudsman.

LEGISLATIVE BASIS AND ADMINISTRATIVE POSITIONING
6. Ensuring that the Ombudsman has clear structural separation from the Executive and making it directly answerable to Parliament alone.
7. Reintroducing the Parliamentary Service as an independent service and placing the administration of the Ombudsman under its authority.
SELECTION, APPOINTMENT, AND REMOVAL

8. Appointment and removal of Ombudsman members must be done by way of a majority vote in the Dewan Rakyat, with initial evaluation and selection done by a Parliamentary Select Committee.

9. Introduction of a public call for applicants, to ensure the widest possible pool of qualified candidates.

10. Clearly stipulating qualifications required to hold the office of the Ombudsman and the exhaustive grounds for removal under the Ombudsman Act itself.

POWERS

11. Granting the Ombudsman wide powers of investigation e.g. discretion to commence investigations on their own initiative, the power to request cooperation of any government agency, the power to summon and examine any witness and unrestricted access to all relevant documents and premises for the purposes of investigation.

12. Empowering the Ombudsman to make its own subsidiary legislation to govern its procedures.

13. Granting the Ombudsman power to compel cooperation with its investigative processes.

14. Legally mandating any government agency to provide sufficiently particularised written reasons for any failure to comply with the Ombudsman’s investigations or to implement the Ombudsman’s recommendations.

15. Granting the Ombudsman standing to institute legal proceedings on behalf of complainants where a violation of a fundamental right is found to have been occasioned.
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