

TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 20)

EXPLANATORY MEMORANDUM accompanying the National ordinance Ombudsman

1. General section

Article 78 of the Constitution institutes the office of the Ombudsman. Paragraph 4 requires the regulation of the legal position of the ombudsman by national ordinance. The fifth paragraph of this Article requires the regulation of the powers and working methods of the ombudsman. This national ordinance serves that purpose.

Perhaps superfluously, it is noted that the National ordinance Constitutional Court makes use of the power, as laid down in Article 78(6), to mandate another task to the ombudsman. This other task is the initiation of a constitutional assessment of a piece of legislation before the Constitutional Court.

In view of its embedding in the Constitution, the ombudsman is a High Council of State. The ombudsman provides a facility for citizens to submit complaints concerning their handling or treatment by administrative authorities or civil servants to an independent institution. The statutory provision for such a complaints procedure is a generally recognised complement to the legal protection afforded to citizens in a state under the rule of law.

The introduction of the institution of the ombudsman will offer citizens protective possibilities where provisions of administrative law are lacking or where they are not adequate for the problem concerned.

The Island Ordinance Ombudsman of the island territory of Curaçao, as well as a member's Bill for the island territory of Sint Maarten, served as an example for this draft.

Apart from the appointment of the ombudsman, the proposal also provides for the appointment of a deputy ombudsman and an office of the ombudsman. One or more lawyers and administrative employees will work in that office. The growth of the workload of the ombudsman will determine the development of the staffing of his office.

In the long-term budget for the 2008 to 2012 period, a sum of ANG 287,000 per year is reserved for the ombudsman. The 2009 wish-list budget includes a sum of ANG 1,000,000 for the start-up costs for the Council of Advice, the General Audit Chamber, the Ombudsman, the Social-Economic Council and the initial personnel for the Ministries of General Affairs and of Justice. This concerns accommodation, personnel costs, remuneration for the members, etc.

2. Article by Article section

Article 1

The description in paragraph 1 of a number of terms used in the proposal helps to define the scope of the regulation. In that regard, the terms 'body', 'civil servant' and 'conduct' are particularly relevant. The intention of these is that the conduct of all government personnel or entities may be the subject of a complaints procedure in a direct sense.

For the term 'body', a match has been sought with the definition of 'administrative authority' in the National ordinance administrative justice.

The term 'civil servant' is defined more broadly than in the National ordinance substantive civil servants' law. The proposal refers to everyone in the service of the Country, including those under employment contracts.

The term 'conduct' is also broadly defined. Conduct may be directed at realising both legal and actual consequences.

The term 'complaint' also includes reports of conduct that demonstrates breaches of administrative integrity or give rise to suspicions of this.

Article 2

The ombudsman is appointed by Parliament. This confirms the independence of the ombudsman and provides an assurance of his ability to operate independently. Parliament is not dependent

This is an English translation of the Dutch source text.

In the event of any discrepancy between the Dutch language version and the translation, and in case of any disputes, the Dutch version prevails. No rights can be derived from the English translation.

October 2013

on the government in obtaining a recommendation. The vice chairman of the Council of Advice, the President of the Common Court of Justice and the chairman of the General Audit Chamber have the right to make recommendations for the appointment of the ombudsman. This involves three institutions concerning which the ombudsman has no investigative powers, so that the independence of the recommendations is assured as effectively as possible. A recommendation consisting of two persons is deemed to be sufficient.

In addition to strengthening his independence, the appointment of the ombudsman for seven years, with the possibility of a second term of office, is intended to secure the continuity of his service, without this leading to an unalterable situation.

Article 4

In the regulation of incompatibilities, who may or may not be appointed as the ombudsman is less important than which other offices the ombudsman may not hold. Article 3 provides a regulation in that regard. Paragraph 1 lists a number of positions and is consistent with the incompatible positions for Members of Parliament and members of the Council of Advice, among other things. Paragraph 3 includes a standard for the prevention of undesirable secondary positions, which is consistent with the National ordinance General Audit Chamber, among other things.

Articles 5-7

In order to emphasise the independence of the ombudsman, an exhaustive list of the grounds for suspension and dismissal is included. Obviously, Parliament should not take decisions on suspension or dismissal lightly. Moreover, the grounds for this are formulated as objectively and concretely as possible. To the extent that these still contain discretionary elements, they must be applied with the greatest possible care. Dismissal on grounds other than at the ombudsman's own request or on the grounds of the age criterion is an '*ultimum remedium*'. The grounds for dismissal and suspension are consistent with the grounds for the dismissal of members of the General Audit Chamber, and with the procedural regulation of Article 7.

Articles 8, 9 and 10

The office of the ombudsman holds a special place in the administrative system. Furthermore, the ombudsman is not a civil servant, as a result of which the rules regarding the legal position of civil servants do not legally apply to him.

These Articles provide for a regulation of the legal position of the ombudsman. This also implements Article 78(4) of the Constitution.

Articles 12 up to and including 14

The ombudsman has his own office for support. Staffing by one or two lawyers with administrative support is considered for the start-up phase. The size of the office will naturally depend on the development of the office of the ombudsman in society. The staffing is laid down by Parliament, following consultation with the ombudsman and in observance of the regulations on the legal position used by the Country for other civil servants. The job descriptions are related to the legal position. Although the ordinary regulations concerning legal positions apply to the staff of the office, in connection with the independence of the ombudsman, it is provided that they are subordinate to the ombudsman with regard to the performance of their duties. The ombudsman acts as the competent authority for the exercise of the powers concerning legal positioning other than appointment, suspension and dismissal.

Article 12(2) emphasises that Parliament must also give the ombudsman the opportunity to perform his task properly. This means that the ombudsman must have an adequate budget to equip the office well and to be able to conduct the necessary inquiries.

The proper performance of his task also includes the submission of legislation to the Constitutional Court for constitutional assessment. Costs are associated with this task, in relation to the inquiries that must be conducted into the relationship between the relevant piece of legislation and the Constitution. Sufficient capacity must be built into the programme of the office of the ombudsman to be able to conduct these inquiries, in addition to the tasks relating to the complaints procedure.

The Explanatory Memorandum accompanying the National ordinance Constitutional Court

This is an English translation of the Dutch source text.

In the event of any discrepancy between the Dutch language version and the translation, and in case of any disputes, the Dutch version prevails. No rights can be derived from the English translation.

October 2013

assume two to three cases per year. Various factors are of importance here, including the legislative activity of the legislator, Parliament and the government, as well as the propensity to take action of the ombudsman himself.

The notes to the estimate that the ombudsman is required to draw up for the determination of the budget for the upcoming service must express the vision used by the ombudsman.

Article 13 clearly expresses that the ombudsman operates independently of the administrative authorities regarding which he can exercise investigative powers.

Article 14 regulates the replacement of the ombudsman. The office of ombudsman is held by a single person. The choice for the office of ombudsman to be held by a single person is based primarily on the greater freedom and effectiveness that a single holder of office has in the manner of settling complaints. Furthermore, a face that is recognisable to the public makes a substantial contribution to the development of the authority and confidence that the office must enjoy in the society.

The lack of collegial consultation which usually takes place when an office is held by more than one person can be compensated in practice by the appointment of a deputy ombudsman from among the personnel of the office of the ombudsman.

Obviously, as the person with final responsibility, the holder of an office makes his mark on everything concerning the performance of the official duties. Internally, however, a division of tasks can be developed between the ombudsman and his deputy and they must work 'in tandem' in order to promote the most effective possible consultative situation and coordination. In view of the independence of the office, it is desirable that the deputy ombudsman be appointed on the nomination of the ombudsman, for the period for which the ombudsman's term of office continues.

Article 15

In principle, the group of persons entitled to complain has been made broad. In itself, 'everyone' does not entail any restrictions, while also the conduct need not necessarily have taken place against the complainant. This means that the key issue is the conduct, not the complainant. The authority to submit complaints is not automatically unlimited. According to the definition, the conduct must in any event concern a particular matter. This rules out sustained conduct such as policy. Paragraph 2 sets a number of requirements that a complaint must meet. The complainant may receive assistance from the office of the ombudsman in putting a complaint in writing.

Article 16

The ombudsman's core task consists of investigating, on the basis of a complaint, whether particular conduct by a body or, if applicable, by a civil servant, should be qualified as proper or improper. The investigation is described and developed in more detail in Articles 15 and 16.

However, with the application of Article 17, an investigation may also be omitted.

Article 16(2) offers the ombudsman the possibility of making proposals for a settlement in the course of the investigation, in his 'mediating role'. In practice, that mediating role may in fact prove to be extremely important.

An investigation usually leads to a decision of the ombudsman on the conduct on which the complaint is based. If the ombudsman is not able to form a final view on the facts regarding the conduct, he will not hand down a decision.

Pursuant to paragraph 5, the ombudsman may also open an investigation at his own initiative.

An official investigation may be opened if the ombudsman suspects that a particular administrative task is not performed correctly on a structural basis, or if he learns through his own observation or on the basis of reports in society of government action that, for any reason, has not, or has not yet led to the submission of a complaint to the ombudsman.

In addition to handing down a decision on the conduct, the ombudsman may also make a recommendation on a measure to be taken on the basis of the complaint or the decision.

Obviously, a body must justify any departure from such a recommendation explicitly and with care, in order to avoid turning the complaints procedure into a farce.

This is an English translation of the Dutch source text.

In the event of any discrepancy between the Dutch language version and the translation, and in case of any disputes, the Dutch version prevails. No rights can be derived from the English translation.

October 2013

Article 17

The first two paragraphs lay down the criteria on the basis of which the ombudsman is not authorised, or is not required to open an investigation in response to a complaint. The criteria speak for themselves.

One of the principles embedded in this Article is that in principle, the ombudsman is authorised to investigate a complaint, even if provisions are available under administrative law, civil law or criminal law. He need not investigate a complaint if internal complaint proceedings are already in progress with regard to the particular conduct at the relevant body.

The ombudsman must however withdraw if proceedings relating to one of the aforementioned other provisions are in progress, or if such proceedings are commenced pending the investigation of the ombudsman. The principle that the ombudsman is in principle authorised to investigate a complaint, even if other provisions are available, has the effect of lowering barriers for the public. A complainant may, for reasons of his own, not avail himself of an administrative law provision yet still value a decision of the ombudsman.

A decision of the ombudsman regarding a complaint does not prevent a complainant who feels that justice has not been done adequately from addressing the complaint to a court after all.

Article 18

All persons concerned must be given an opportunity to explain their views concerning a complaint. The ombudsman determines whether other persons must also be heard. He has considerable scope for this. All persons concerned may be represented by an authorised representative. This includes the support of an interpreter.

Article 19

The ombudsman is dependent for his operations on the availability of the necessary information. In view of this, a right to information is laid down in paragraphs 1 and 2, or an obligation to provide information is imposed. The obligation to provide information is restricted by the grounds for exception laid down in the National ordinance open government. If, in a given situation, such grounds for exemption are at issue, the body could set a condition that the relevant information may only be provided to the ombudsman in confidence.

Articles 20 and 21

Before the ombudsman closes the investigation and issues the report, the complainant, the body and, if applicable, the civil servant, are given an opportunity to make comments on his findings. The ombudsman notifies the persons concerned of his conclusions and the accompanying considerations by sending the report. The report will be provided to third parties on request, provided that the reports of or references to persons therein are made anonymous.

Article 22

The submission of the ombudsman's annual report and the results of certain investigations to Parliament could help to strengthen its control function.

Article 24

This Article regulates a confidentiality obligation for everyone who is involved in the implementation of the ordinance and is not already subject to a confidentiality obligation on other grounds.

This is an English translation of the Dutch source text.

In the event of any discrepancy between the Dutch language version and the translation, and in case of any disputes, the Dutch version prevails. No rights can be derived from the English translation.

October 2013