EISA gratefully acknowledges the generous financial support for this project from the Swedish International Development Agency (Sida), Harare and the Royal Danish Embassy (DANIDA), Pretoria.

PROMOTING THE EFFECTIVENESS OF DEMOCRACY PROTECTION INSTITUTIONS IN SOUTHERN AFRICA

THE OFFICE OF THE OMBUDSMAN IN LESOTHO

Motlamelle Anthony Kapa

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BY

MOTLAMELLE ANTHONY KAPA

2009
PREFACE

This research report is the culmination of a project that EISA embarked on over three years, from 2007 to 2009, focusing on ‘Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa’. The project, one of the components of a regional programme guided by the theme ‘Consolidating Democratic Governance in the SADC Region: Phase II’, has received financial support from the Swedish International Development Cooperation Agency (Sida) regional office in Harare, Zimbabwe, and the Royal Danish Embassy in Pretoria, South Africa. The seven elements of this regional programme are:

- Election quality
- Institutions of governance
- Gender equality and electoral processes
- SADC regional governance architecture
- The EISA annual symposium
- Regional resource centres
- The EISA democracy encyclopaedia

The overarching thrust of the programme is to improve governance architecture in Southern Africa, with a view to nurturing and consolidating democracy and sustaining peace and political stability, which are the key prerequisites for sustainable development and the eradication of poverty.

The focus of this regional programme is consistent with EISA’s vision of ‘an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment’. The primary goal is to enhance the quality of electoral processes, improve the capacity of key national and regional institutions that are central to the achievement of democratic governance in the SADC region, and help to reverse gender imbalances in political participation and representation. The specific objectives of the programme are to:

- improve the quality of elections, with a view to advancing democratic governance;
- enhance the effectiveness of selected governance institutions;
• improve gender equality in the realm of governance;
• promote democratic governance and political integration through the SADC Organ on Politics, Defence and Security and its strategic plan, SIPO;
• expand and deepen the knowledge base in relation to democratic governance in the SADC region.

The aim of this particular project is to contribute to enhancing the institutional effectiveness of governance institutions.

Conventionally, studies of and research relating to the state and governance have tended to focus on the traditional arms of government – the executive, the legislature and the judiciary – and the separation of powers among them, with some attention paid to the bureaucracy or civil service. This focus has reduced the role of the state in governance to these organs of government, to the exclusion of other equally important statutory bodies established by the government itself, namely the democracy protection institutions (DPIs).

Although the establishment of DPIs is one of the more effective methods of promoting democratic governance in the SADC region, these institutions have received little attention in the existing policy and academic discourse on democracy and governance. With this research project EISA aims to fill this lacuna in the democracy and governance debate in Southern Africa by restoring these institutions to their rightful place.

DPIs are those statutory institutions established by governments specifically to protect democratic governance. They may be enshrined in the country’s constitution, supported by legislation, or created by legislation. The constitutional provisions and enabling legislation reinforce their significance in governance architecture at the national level.

At the continental level, the African Union (AU) has also come to realise and recognise the importance of DPIs to the promotion of democratic governance. Article 15 of the African Charter on Democracy, Elections and Governance, which was developed with technical assistance from EISA and was ultimately adopted by the AU Heads of State Assembly in Addis
Ababa, Ethiopia, in January 2007, specifically elaborates principles and best practice relating to DPIs.

This article commits AU member states to:

- establish public institutions that promote and support democracy and constitutional order;
- ensure that the independence or autonomy of the said institutions is guaranteed by the constitution;
- ensure that these institutions are accountable to competent national organs;
- provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.

The principles represent a clear commitment by African governments to strengthening the DPIs and promoting their institutional effectiveness. The aims are admirable, but, as the English aphorism goes, the proof of the pudding is in the eating. It is one thing for African governments to make such commitments, it is quite another to translate them into practice. In other words, as this report will illustrate, African governments do not always ‘walk the talk’. Put somewhat differently, few African countries practise what the African Charter on Democracy, Elections and Governance preaches.

In 2008 EISA analysed three democracy protection institutions that are central to the achievement of democratic governance in the SADC region. These were: the Office of the Ombudsman, national human rights institutions (NHRIs), and electoral management bodies (EMBs) in 14 SADC member states. The analysis, which was guided by a list of questions, revealed different stages of institutional development in each country and established that the remit of the institutions differs from one country to another.

In 2009 the focus of the project shifted from the normative aspects addressed in the first stage to an assessment of the performance, effectiveness, independence and relationships of these institutions to other arms of government, other democracy protection institutions, and civil society,
within their operating environment. Empirical research was conducted by researchers in each country between March and July 2009 into two institutions – the Office of the Ombudsman and the national human rights commission – in the eight countries: Botswana, Lesotho, Malawi, Mauritius, Namibia, South Africa, Tanzania and Zambia.

Conventionally, the Office of the Ombudsman is established to protect the people against violations of human rights, the abuse of power by public institutions, error, negligence, unfair decisions and maladministration, in order to improve public administration with a view to making governments responsive to people’s needs and public servants more accountable to members of the public. This office has emerged as an important avenue for individual complaints against the actions of public authorities.

Typically, national human rights institutions are mandated to protect and promote human rights. A number of countries have established NHRIs which use the Ombudsman concept. The genesis of NHRIs lies in a resolution passed in 1946 by the United Nations Economic and Social Council inviting member states to consider the desirability of establishing local information groups or human rights committees to serve as vehicles for collaboration with the United Nations.

In 1991 delegates to the first International Workshop on National Institutions for the Promotion and Protection of Human Rights agreed on the Paris Principles, which were adopted a year later. The Paris Principles are a set of broad general standards which apply to all NHRIs, regardless of their structure or type. They are adopted by NHRIs and endorsed by the UN Commission on Human Rights and the UN General Assembly. Among the main principles are that the NHRI must:

- be independent and be guaranteed by statute or the constitution;
- be autonomous from government;
- be plural and diverse in its membership;
- have a broad mandate based on universal human rights standards;
- have adequate powers of investigation;
- have sufficient resources to carry out its functions.
The mandates of these two DPIs to address administrative and executive impropriety and ensure the respect and promotion of human rights suggest that they play an important role in exercising oversight over the executive and in promoting democracy, human dignity, and the rule of law. The overall objective of this research project, therefore, was to investigate the extent to which they have translated their mandate into action, thereby advancing and protecting democracy. The research examined the performance of the two institutions with regard to the following: legal framework, the effectiveness of institutional governance, independence, resources, and interaction with the other arms of government, the public, and non-state actors.

In July 2009 EISA convened a one-day policy dialogue forum during which senior officials of the 12 DPIs covered in the research, as well as the researchers, came together to deliberate on the findings. Thereafter, the researchers refined their reports, taking into account the input of the DPI officials. The culmination of the research project is eight country reports, in which the political, operational and resource conditions and constraints under which these institutions function are analysed.

The mere presence of offices of the Ombudsman and NHRI in the SADC region is, in itself, an encouraging step, although not all SADC countries have these institutions in place. Where they do exist they do so in a variety of forms, with different nomenclatures, and each has its own character.

I acknowledge with gratitude all those whose input resulted in the successful implementation of the project. First and foremost, EISA’s Executive Director, Denis Kadima, who contributed immeasurably to the conceptualisation of the regional programme on consolidating democratic governance in the SADC region, of which the DPI project is a part. I am grateful too to Ebrahim Fakir, Manager of Governance Institutions and Processes at EISA, for guiding the research process and editing the reports, thereby ensuring their quality. Without the selfless commitment and dedication of the project coordinator, Catherine Musuva, this project would not have seen the light of day. I take my hat off to her for her hard work.

The project would not have succeeded without the dedication of our research associates, based in the eight countries, who conducted the fieldwork. I
am equally indebted to the officials and staff of the democracy protection institutions, who supported the project with information and participated in the policy dialogue, and to the various respondents who willingly supplied the researchers with additional insights.

It would be remiss of me not to extend a special word of thanks to Professor Kader Asmal, former member of the South African Parliament and former Cabinet minister, who is currently a professor of law at the University of the Western Cape and who, despite his busy schedule, graced our multi-stakeholder dialogue workshop with his presence giving a thought-provoking and insightful keynote address on DPIs and setting the scene for what proved to be a lively discussion among the participants. I am pleased to report that some of Professor Asmal’s ideas and thoughts have found a place in the reports.

Various other colleagues at EISA played their own distinctive roles in supporting this project and their contributions deserve acknowledgement. They are Kedibone Tyeda, Nkgakong Mokonyane, Maureen Moloi, Jackie Kalley, Alka Larkan, Oliva Fumbuka, Edward Veremu, Dipti Bava, Wallen Chidawanyika and Usha Kala. Our editor, Pat Tucker, and typesetter, Sue Sandrock, have done a marvellous job controlling the quality of our publications, for which we are hugely thankful.

Finally, I am profoundly grateful to our partners, Sida Regional Office in Harare, Zimbabwe, and the Royal Danish Embassy in Pretoria, South Africa, for their generous financial support.

In conclusion, I hope and trust that this research report will assist policy-makers to identify areas of organisational and institutional reform in order to improve the effectiveness, efficiency and responsiveness of DPIs and, in the process, deepen and entrench democratic governance in the SADC region.

*Dr Khabele Matlosa*
*Programmes Director-EISA, Johannesburg*
*September 2009*
ABOUT THE AUTHOR

**Motlamelle Anthony Kapa** is a lecturer in the Department of Political & Administrative Studies, National University of Lesotho. He holds a Master’s Degree in Political Science from the University of Toronto, Canada and is currently a PhD candidate at Rhodes University, South Africa. His PhD thesis seeks to understand the relationship between the institution of chieftainship and the elected councils in Lesotho. He has published articles in a number of journals on topics such as elections and electoral systems, coalitions, civil society, local government, and foreign policy.
ACKNOWLEDGEMENTS

Every research project is a challenging, rewarding and educative enterprise and this one is no different. I thank heartily the Electoral Institute of Southern Africa (EISA) for contracting me to do this important study and for funding it. In particular, I thank Dr Khabele Matlosa, EISA’s Research Director, for inviting me to take part in this project.

I thank also the other members of the EISA team for making logistical arrangements for us to travel to Johannesburg for the methodology workshop which preceded this study and for organising the policy dialogue at which we discussed the findings of our studies with the chief executive officers of the DPIs, as well as making our stay there pleasant.

I also acknowledge the people who made the study a success by agreeing, despite their work schedules, to be interviewed. They are: the current Ombudsman; the former and founding director general of the Directorate on Corruption and Economic Offences; a member of the Police Complaints Authority; the chief legal officer and head of the Human Rights Unit in the Ministry of Justice and Human Rights; the governance advisor at the Irish Embassy; the human rights officer at the Lesotho Council of Non-Governmental Organisations; the community trainer, democracy and human rights officer, and the good governance officer of the Transformation Resource Centre; the director and the research officer of the Media Institute of Southern Africa-Lesotho; reporters for Public Eye, Moeletsi oa Basotho and the editor of Leselinyana la Lesotho. Finally, the assistant to the Ombudsman deserves to be acknowledged for making available to me all the material I needed in the form of workshop reports, special and annual reports of the Ombudsman to Parliament, and other invaluable documents used in this project.
ABBREVIATIONS

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<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tr>
<td>BNP</td>
<td>Basotho National Party</td>
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<td>CBL</td>
<td>Central Bank of Lesotho</td>
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<td>DCEO</td>
<td>Directorate on Corruption and Economic Offences</td>
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<td>DDPR</td>
<td>Directorate on Disputes Prevention and Resolution</td>
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<td>DPIs</td>
<td>Democracy Protection institutions</td>
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<td>EISA</td>
<td>Electoral Institute of Southern Africa</td>
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<td>IEC</td>
<td>Independent Electoral Commission</td>
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<td>LCD</td>
<td>Lesotho Congress for Democracy</td>
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<td>LCN</td>
<td>Lesotho Council of Non-Governmental Organisations</td>
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<td>LHDA</td>
<td>Lesotho Highlands Development Authority</td>
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<td>LHWP</td>
<td>Lesotho Highlands Water Project</td>
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<td>MISA</td>
<td>Media Institute of Southern Africa</td>
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<td>NCA</td>
<td>National Constituent Assembly</td>
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<td>PCA</td>
<td>Police Complaints Authority</td>
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<td>PSC</td>
<td>Public Service Commission</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>TRC</td>
<td>Transformation Resource Centre</td>
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EXECUTIVE SUMMARY

This report presents the findings of a study of the effectiveness as a democracy watchdog of the Office of the Ombudsman in Lesotho. The research was conducted using both primary and secondary sources.

The secondary sources were the official documents and reports of the Office of the Ombudsman to Parliament (both Annual Reports and Special Reports), academic journal articles and texts, newspapers, and the relevant provisions of the Constitution and other legislation.

The primary data were sourced through interviews and discussions the researcher held with the Ombudsman, the former director-general of the Directorate on Corruption and Economic Offences (DCEO), a sitting member of the Police Complaints Authority (PCA), the chief legal officer and head of the Human Rights Unit in the Ministry of Justice and Human Rights, the governance advisor at the Irish Embassy, and ten other respondents selected from civil society organisations.

The researcher asked the first category of respondents to reflect on issues relating to the collaboration, or lack thereof, between these democracy protection institutions, while the latter was requested to assess the performance of the Ombudsman in his five mandated areas: combating maladministration, dealing with injustice in the public service, protection of human rights and freedoms, fighting corruption, and environmental protection.

The study finds that the office has been effective in the first three areas and less so in the last two. This is attributable largely to severe resource constraints and a complete lack of autonomy in terms of control over the budget voted for the office by Parliament and the powers of the office to recruit its own staff. Thus, in this regard, the office is effectively just another department of government.

Although the constitutional and legal provisions provide for the Ombudsman to be answerable to Parliament, his independence is potentially in doubt, given that he is a de facto appointee of the executive. However,
there is no evidence that he has not acted independently in carrying out his constitutional and legal mandate, at least thus far. The executive does not support him sufficiently in his efforts to have the relevant administrative agencies comply with his recommendations, yet such compliance is essential to his effectiveness.

In order to enhance the effectiveness of the office the method of appointing the Ombudsman must change. The office must also be decentralised, adequately resourced and legally empowered to ensure that its recommendations, decisions, and determinations are implemented. Its mandate must be broadened to cover the whole of the public service and the private sector to ensure more protection of citizens’ rights. Effective co-ordination and a clear division of roles must be established among the office of Ombudsman, the DCEO, and the PCA to ensure that they operate more effectively as democracy watchdogs. Lastly, and most importantly, Lesotho should, as sign of its commitment to democratic constitutional rule, sign, ratify and domesticate the African Charter on Democracy, Elections and Governance, which was adopted by the African Union, of which Lesotho is a member, on 30 January 2007.
INTRODUCTION

Forms of democracy protection institutions (DPIs) have been established in many democracies to deepen and ultimately consolidate democracy. Prominent among these institutions is the two-centuries-old position of Ombudsman, which has its historical roots in Scandinavia.

The institutions appear under different appellations – ombudsman, public protector, and human rights commission – in different national constitutions and enabling legislation in the Southern African Development Community (SADC) region. However, the objectives are the same in all countries, namely, to promote and protect democracy and constitutionalism.

At the continental level the African Union (AU) adopted, though rather belatedly, on 30 January 2007, in Addis Ababa, Ethiopia, the African Charter on Democracy, Elections and Governance. Article 15 of this Charter specifically commits member-states to establishing public institutions that promote and support democracy and constitutional order, ensuring that their independence or autonomy is guaranteed by their respective national constitutions and providing them with the necessary resources to perform their assigned functions efficiently and effectively (African Union 2007, p 17).

Yet, of the 53 AU member-countries only two (Ethiopia and Mauritania) have signed, ratified, and acceded to the Charter; 27 have only signed it; and 24, including Lesotho, have not even signed this important instrument (www.africa-union.org).

The Electoral Institute of Southern Africa (EISA), recognising the significance of DPIs and the potential they have to strengthen democracy on the continent, has commissioned, as a pilot project, a regional study, the main purpose of which is to assess the capacity, regulatory framework, and performance of DPIs in eight countries in the SADC region. This report on the Office of the Ombudsman in Lesotho, is one element of that study.
Guided by the research design drafted by EISA and adopted by the researchers contracted from each of the countries involved at a methodology workshop held at Birchwood Hotel, Johannesburg, on 7 February 2009, the report covers the following: the methodology; the conceptual and historical framework; the contextual background; the constitutional and legal framework; institutional governance and effectiveness; the interaction of the Ombudsman with the various players, viz, the government, other DPIs, the public and non-state actors; findings; conclusion; and policy recommendations.
METHODOLOGY

The study adopted a qualitative approach of data generation and analysis, using secondary and primary sources. Secondary data included the Ombudsman’s Annual and Special Reports to Parliament as well as relevant documents, local newspapers, academic texts and journal articles, and appropriate legislation and constitutional provisions. The primary data came from interviews and discussions conducted by the researcher with 15 respondents representing their respective organisations, all of which have some form of interaction with the Office of the Ombudsman, as well as with the Ombudsman himself. Among these respondents were: the former and founding director-general of the Directorate on Corruption and Economic Offences (DCEO), a sitting member of the Police Complaints Authority (PCA), the chief legal officer and head of the Human Rights unit in the ministry of Justice and Human Rights, and the governance advisor at the Irish Embassy.

There were two reasons why the researcher interviewed the former director-general of the DCEO rather than the current holder of the office. The first was that he was responsible for establishing the office and was thus in the best position to provide information about the directorate, the second was that his successor was out of the country on the day set aside for the interview.

The legal mandates of the DCEO and the PCA overlap with that of the Ombudsman and the main object of these discussions was to understand how these three institutions collaborate and/or interact in carrying out their mandates and how the work of the other two agencies affects the effectiveness of the Ombudsman.

The researcher also had discussions with respondents selected from key civil society organisations, using purposive and snowball sampling techniques. These respondents are the human rights officer in the Lesotho Council of Non-Governmental Organisations (LCN); the community
trainer in the Transformation Resource Centre (TRC), who is working on issues relating to the human rights of communities affected by the Lesotho Highlands Water Project (LHWP); and two other officers in the same organisation, namely, the democracy and human rights officer and the good governance officer.

Lastly, the researcher interviewed purposively selected respondents from the media – the director and research officer of the Media Institute of Southern Africa (MISA), one reporter from the Public Eye newspaper, two from the Catholic Church-owned Moeletsi oa Basotho, and the editor of the Lesotho Evangelical Church-owned Leselinyana la Lesotho. The Moeletsi oa Basotho and Leselinyana la Lesotho are Sesotho language weeklies, while Public Eye is an English weekly. All the reporters interviewed have covered stories related to the activities of the Ombudsman.

The discussions with the above respondents involved them responding to questions about their assessment of the performance of the office of the Ombudsman in relation to its constitutional and legal mandate areas – protecting human rights, combating maladministration and injustice in the public sector, environmental protection, and curbing corruption. The respondents also assessed the level of independence of the Ombudsman in discharging his mandate and the institutional capacity of the office and suggested ways in which the effectiveness of the office might be enhanced. Before delving into the specific context of Lesotho and the key findings, it is prudent to reflect briefly on the genesis of the concept and institution of the Ombudsman.
Democratic systems of government have, among their key pillars, the doctrine of the separation of powers among the main arms of the state, namely, the legislature, the judiciary, and the executive. In addition, they have checks-and-balances mechanisms to curb any forms of excesses in their interaction. These checks and balances are, however, not sufficient safeguards of public interest and human rights. They operate in a very general way, thereby leaving without adequate protection against bureaucratic agencies the very society they are working for. Consequently, other public institutions are required specifically to promote and protect democratic governance, which is founded, *inter alia*, on good governance, respect for human rights, and adequate service provision. The institution of the Ombudsman has been found to be the best remedy for administrative excesses.

What is an Ombudsman? The concept has its origins in Sweden, where the first office of this nature was established in 1809 (see, eg, Fowlie 2008; Van Roosbroek & Van de Walle 2008; Erbe & Sebok 2008; Ambroz 2005; Kampekete 1996). The idea later became popular in other Scandinavian countries – Finland, Norway, Denmark – and, since the 1960s, has moved beyond Scandinavia (Van Roosbroek & Van de Walle 2008, p 288). Although there may be no consensus among commentators about the precise meaning of the term, both academics and professionals define it as denoting a public official whose main function it is to protect citizens’ rights against encroachment by the executive branch of the state. The term is derived from ‘medieval Germanic tribes’ and refers to:

an independent, objective investigator of people’s complaints against government agencies and other organizations, both public and private sectors. After a fair, thorough review, the Ombudsman decides if the complaint is justified and makes
recommendations to the organization in order to resolve the problem.
Forum of Canadian Ombudsman www.ombudsmanforum.ca.whatis_-_e.asp.

The primary concern and focus of the Ombudsman is administrative fairness. Fowlie (2008, p 17) makes this point clearly, noting that the institution is concerned with fair treatment of the public by state agencies. The term was originally used to refer to ‘a third party whose task was to collect fines from remorseful culprit families and give them to the aggrieved families of the victims’ (Kircheiner, cited in Ambroz 2005, p 145). Although it assumed different names as it ‘travelled around the world’ (Van Roosbroek & Van de Walle 2008, p 288) the institution’s chief value is that it helps curb administrative excesses of the executive branch of government. Van Roosbroek & Van de Walle (2008, p 288) aptly capture the primary mandate of the institution when they write:

The objective of the Ombudsman has been to provide a fast, effective, and user-friendly way of protecting citizens against maladministration, which has been deemed necessary because of impact of governments on citizens’ lives.

There are generally three types of Ombudsman, defined according to the mode of their appointment and the scope of their mandate. The three types are: classical/legislative (appointed by the legislature either at national or sub-national level), executive (appointed by the executive), and organisational (appointed by a particular organisation). A key feature distinguishing the classical/legislative from the executive Ombudsmen is that the former are ‘located outside the structure of the agency they oversee, and receive complaints from external users of the service provided by the agency’ (Fowlie 2008, pp 19-20).

This report focuses on the classical/legislative and executive Ombudsmen because of their mandate – to protect citizens against abuse of power by the administrative agencies of the state. The propensity of administrative agencies to abuse power has been recognised by, among others, Julius Nyerere, the first President of Tanzania, who noted:
The nature of our economic problems in Tanzania demands that many officers of the government, the party and law, should be entrusted with great powers over individuals. At the same time our recent history and the educational backwardness of the majority of our people means that automatic checks on abuse of power are non-existent. To the people in our villages and scattered homesteads of our country, it is the policeman, the magistrate, or the government officer who represents government in their everyday life. And in the district and regional headquarters, it is the district and effective power in the manner which affects the lives of our fellow citizens. Only by entrusting real responsibility to such people can our nation be transformed. But we have to recognise that these powers can be and have been abused. And the sufferers are the people on whose behalf government is and should be conducted [emphasis added].

Julius Nyerere quoted in Maine 2004, p 58

Thus, Ombudsmen’s offices are established to perform several democracy protecting functions such as receiving and responding to public complaints against administrative agencies of government, thereby making such agencies accountable for actions which impinge on human rights; acting as a corrective mechanism for any violations or omissions; framing state-citizens relations (Ambroz 2005, p145); making appropriate recommendations to relevant public authorities designed to improve public service provision; and acting as an alternative to the complicated, expensive, and sometimes inaccessible judiciary (Van Roosbroek & Van de Walle 2008, p 288). They also serve as an effective and cost-free conflict resolution mechanism in a ‘non-adversarial environment’ (Fowlie 2008, p 450). The Ombudsman’s office investigates cases brought before it speedily and at no cost to the public. It also relies on informal procedures, which do not require the services of a lawyer (Abedin 2006, p 221).

To be properly suited to discharge these functions, however, the office of the Ombudsman must have a number of features. These are identified by Gregory (2000, p 100) as:
- visibility and accessibility;
- credibility, which encapsulates impartiality, independence, adequate judicial remit, adequate investigative powers, appropriate standards of appraisal of administrative practices, and action on investigated matters;
- effectiveness in terms of adequate remedial action, securing compliance with recommendations, and speedily handling of cases;
- accountability;
- personal qualities of office holders;
- appropriate political and governmental environment.

Maine adds that the Ombudsman complements the judiciary in dispensing administrative justice and acts as a custodian of citizens’ rights. In a way, therefore, the Ombudsman is ‘another lawful and constitutional device for the improvement of … citizen’s rights’ (Maine 2004, p 61). Normally the office of the Ombudsman is provided for in national constitutions and enabling Acts of Parliament, which also define its mandate, powers, and specific functions.

Cognisant of the above general concepts this report regards Lesotho’s Ombudsman in terms of the definition contained in the Constitution and the enabling Act (see below) together with its broad democracy protection functions. Whether or not the definition is adequate is not an issue for this report.

In Lesotho all the incumbents of the office of Ombudsman have been men. For this reason, not through insensitivity to gender issues, I use in this report and where appropriate the term ‘he’ rather than ‘she’. Below I provide the contextual, constitutional, and legal frameworks for the Ombudsman institution in Lesotho and highlight some issues that may impinge on its effectiveness. This is done through the use of secondary data, supplemented by empirical data, which will be provided in the subsequent section.
Upon attaining political independence from Britain on 4 October 1966 Lesotho enjoyed a multiparty democracy for five years until the democratic order was interrupted by the then Basotho National Party (BNP) administration, which annulled the 1970 election results, declared a state of emergency, and seized power. The pre-1970 political order made no provision for DPIs, including the office of the Ombudsman. What followed these developments was the establishment of an authoritarian regime, which lasted until 1986, when it was ousted by the military. The military junta ruled the country for the next seven years (1986-1993) under what was called Order Number 4 (a new political framework), which provided no room for any democratic institutions.

Succumbing to sustained pressure from civil society organisations from within and the donor community from outside the country, the military regime created, in terms of the Government Gazette Extraordinary 1990, a National Constituent Assembly (NCA) composed of all the major players in the kingdom’s politics between 1990 and 1993 to draft a new Constitution (Machobane 2001, p 124). The new Constitution contained important provisions, prominent among which was the introduction of the Ombudsman. It was up to the winners of the second democratic election to introduce the institution.

Having won the 1993 transitional poll with an overwhelming majority, sweeping up all 65 parliamentary seats and turning the National Assembly into an effective one-party Parliament, the newly elected Basutoland Congress Party (BCP) government, under Prime Minister Ntsu Mokhehele, elected to adhere to the constitutional provision and institutionalise democratic rule in the country.

Lesotho’s first Ombudsman, H M Nt’saba, was appointed on 15 October 1993 by King Moshoeshoe II, acting in accordance with the advice of
Mokhehle\textsuperscript{2} and three years before the appropriate Act was passed by Parliament in 1996, an indication of the importance of the institution to the new government. Indeed, Nt’saba was instrumental in shaping the Act, having visited numerous countries in which such institutions were already operating (Nt’saba 1994, p1).

Lesotho’s current prime minister, Pakalitha Mosisili, has described the office of the Ombudsman as an institution designed to ‘strengthen democracy and the democratic process in Lesotho by providing checks-and-balances in support of good governance’ (Mosisili 2000, p 12).
Lesotho’s Ombudsman has as its constitutional and legal frameworks ss 134 and 135 of the national Constitution 1993 and the Ombudsman Act No 9 of 1996. Below I highlight the key provisions of the Constitution and the Act, which spell out the mandate, powers, duties and limitations of the office.

Section 134 (1) of the Constitution provides that:

There shall be an Ombudsman who shall be appointed, subject to the provisions of subsection 2, by the King acting in accordance with the advice of the Prime Minister for a term not exceeding four years.

Sections 134(2) and 142(5)-(7) spell out the conditions under which the incumbent of the office of the Ombudsman may be removed from office:

A person holding the Office of Ombudsman may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be removed except in accordance with the provisions of subsection (3).

Subsection (3) referred to above stipulates that s 142(5) to (7) of the Constitution, which applies to the Auditor-General, shall also apply to the Ombudsman. These sections are worth quoting in full. Subsection 5 reads:

The Auditor-General [and the Ombudsman] shall be removed from office by the King if the question of his removal from office has been referred to a tribunal appointed under subsection (6) and the tribunal has recommended to the King that he ought to be removed for inability as aforesaid or for misbehaviour.
Subsection (6) provides that:

If the Prime Minister presents to the King that the question of removing the Auditor-General [Ombudsman] under this section ought to be investigated, then:

a) the King shall appoint a tribunal which shall consist of a Chairman and not less than two other members selected by the Chief Justice from among persons who hold or have held high judicial office; and

b) the tribunal shall enquire into the matter and report on the facts thereof to the King and recommend to him whether the Auditor-General [Ombudsman] ought to be removed under this section.

Subsection (7) provides that:

If the question of removing the Auditor-General [Ombudsman] has been referred to a tribunal under this section, the King, acting in accordance with the advice of the Prime Minister, may suspend, the Auditor-General [Ombudsman] from the exercise of the functions of his office and such suspension may at any time be revoked by the King, acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the King that the Auditor-General [Ombudsman] should not be removed.

The above constitutional provisions attempt to secure the tenure of office of the Ombudsman and the Auditor-General. This is done by making their removal from office an elaborate process, which involves a high-powered tribunal consisting of reputable judicial officials, a commendable effort, which enhances the independence of the two offices. The powers and functions of the Ombudsman are listed in s 135 (1) of the Constitution, which provides that the Ombudsman may:

a) investigate action taken by any officer or authority referred to in subsection (2) in the exercise of the administrative functions of that officer or authority in cases where it is
alleged that a person has suffered injustice in consequence of that action;

b) perform such other duties and exercise such other powers as may be conferred on him by an Act of Parliament.

Subsection (2) sets out the scope of operation of the Office of the Ombudsman in terms of which departments it is empowered to investigate. These are set out in detail in s 9(1) of the Ombudsman Act 1996. They are all departments of government and their members; any local government authority and its members or officers; any statutory corporations, their members and officers.

However, according to s 19(1) of the Ombudsman Act the Office of the Ombudsman does not have the power to investigate: the King, Parliament, the Cabinet; courts of law, statutory tribunals, or the Public Service Commission. However, s 19(2) of the Act empowers the Ombudsman ‘to investigate the courts of law, statutory tribunals and the Public Service Commission for failure to perform or for unreasonable delay in the performance of their functions’. To date, however, none of these has been investigated.

The Ombudsman is further required by s 135(3)(b) of the Constitution to deliver written annual reports to Parliament, while s 17 of the Act empowers the Ombudsman to make special reports to Parliament in cases where there has not been compliance with his recommendations or in matters of ‘urgent nature and of public interest’. The Ombudsman’s jurisdictional mandate covers five broad areas, namely, injustice and maladministration in the public service; corruption, violation of fundamental human rights and freedoms, and environmental protection (Ombudsman Act 1996 s 6). Maqutu (2000, p 44) observes that the jurisdiction of the Ombudsman is ‘too wide’ and that unless he is sufficiently resourced he may not cope with it. In terms of s 6(1) of the Ombudsman Act, the office sources its staff from the general public service.

It is clear from the above constitutional and legal provisions that Lesotho’s Ombudsman fits the *executive model*, by virtue of the fact that the
appointment is made by the King in consultation with the prime minister. Mahao (1996, p 42) notes the potential danger of this arrangement, commenting that ‘the prime minister is the *de facto* appointing authority’ and that ‘the Lesotho Constitution-framers seem to have taken the view that the mode of appointment is not essential to the autonomy of the institution’. Yet, he rightly continues, ‘it needs not be overemphasised that plural democracy envisaged in the Lesotho Constitution 1993 is at odds with philosophical underpinning of a one-party or no-party state’ such as those of Tanzania during Julius Nyerere’s rule and Museveni’s Uganda. Akokpari (2000, p 28) shares this view and sees the mode of appointment of Lesotho’s Ombudsman as turning the institution effectively ‘into a *de facto* institution of government’, with no autonomy.

The office, which operates in terms of three-year strategic plans, is currently executing the second of these plans, the first having been concluded in 2008, has limited capacity and autonomy to carry out its mandate effectively, struggling as it does with challenges in terms of financial, human and material resources. In his 2004 report, the current Ombudsman, S S Mafisa (2004a, p 56), warned that ‘it is vitally important that an important democracy institution like the Ombudsman be sufficiently resourced so as to do its job satisfactorily’. He noted, further, that human and financial resource constraints had prevented it from being able to ‘market itself sufficiently to the public’ (Mafisa 2004b, p 56). All these factors may undermine its institutional and functional independence.

The office operates with a very limited budget (M6-million – approximately $750000 – for the 2008/2009 fiscal year), most of that going on staff salaries, with almost nothing left for its ambitious outreach programmes. As a result, the office depends on donor funding, notably from the Irish Embassy, which has supported its Consolidation of Democracy and Good Governance Programme since 2004.

The embassy, recognising the need for adequate transport, has also taken the unusual step of supplying a four-wheel-drive vehicle for the office. Another problem for the office is that it is forced to rely on the Public Service Commission (PSC) to recruit its staff instead of conducting its own
recruitment, a dependence that has led to delays in the appointment of necessary staff, thereby inhibiting the functioning of the office, leaving it with too many cases and too few staff to handle them.

Until 1997, for example, according to the then Ombudsman, the office had only two investigators. He does not, however, indicate the optimum number required to carry out investigations effectively. (Nt’saba 1999, p2). Recently the office has not been able to fill the post of information officer, left vacant after the departure of the incumbent, a factor that has had a negative effect on its publicity campaign. The fact that the PSC does not involve the Ombudsman’s office in the selection process means that those personnel selected are not necessarily appropriate for the job. There are also delays in filling vacant positions. Chibwana (2004, p 77) believes the Ombudsman should have the power to appoint his own members of staff to ensure their independence and protect them from superiors in the public service whom they may have to investigate.

Currently the office has nine investigators when the number required to do the job effectively is an estimated 13. An example of the inadequacy of the personnel resources is the case of communities affected by the Lesotho Highland Water Project (LHWP), where a single investigator must handle more than 200 complaints from individuals and witnesses in 46 villages. In other areas, the office is expected to carry out regular inspections of government hospitals, prisons, and police cells throughout the ten administrative districts of the country, a job it can only do by selecting a few examples as samples.

The fact that the office does not have an effective record management system leads to difficulties in assessing its handling of cases. Although it does have computers, these are not used optimally to provide full records of past cases. These records are contained only in individual Annual Reports submitted to Parliament so establishing the exact number of cases that have passed through the office is a tedious process involving digging through all the Annual Reports.

Another problem is that despite the fact that Parliament passes the office’s budget, it is not free to use the budget, its finances are controlled by the
government. The effect of this arrangement is that the government is able
to cut the budget or to direct funds intended for the office to activities
outside its core mandate. In this regard, the Ombudsman cites the case
in which the government, without consulting the office, cut 2 per cent
from an already limited budget and directed it to HIV/AIDS-related
activities.

The implication of this inability to recruit its own staff and control its
budget is that the office is not as autonomous as it should be.
Another problem is limited working space, which means that investigators
must share offices, an arrangement that compromises the confidentiality
of discussions between investigators and those bringing their complaints
to the office, a situation with discomfits many complainants.
INSTITUTIONAL GOVERNANCE AND EFFECTIVENESS

The office has no special institutional governance arrangements of its own, nor does it have internal conflict resolution mechanisms. Only the Ombudsman is a statutory officer; all other officers are civil servants governed by the general public service laws. On his own accord, and in keeping with the general policy of government on gender equity, the Ombudsman has placed female officers in senior management positions, three of them occupying the positions immediately below that of the Ombudsman himself. The law prohibits the Ombudsman from sources of income other than his salary, thus avoiding any possible conflict of interest in discharging his duties (Ombudsman Act 1996 s 3 (a)).

The laws establishing the Ombudsman’s office are very clear, providing a workable and comprehensive framework for the support and empowerment of the office, yet, from its inception, the success or effectiveness of the Ombudsman has been circumscribed by the very nature of the institution – that is, that its determinations/decisions are not binding.

If the agencies it investigates do not cooperate its only recourse is to make a Special Report to Parliament, which debates it and either endorses or rejects the Ombudsman’s recommendations. To date the Ombudsman has submitted four Special Reports, two of which have been resolved successfully.³

The office successfully lobbied Parliament for the establishment of a Portfolio Committee on the Ombudsman to ensure that the agencies involved comply with its recommendations. Parliament now sets up, when appropriate, ad hoc committees to consider Special Reports submitted by the office.

The office uses both formal and informal methods to deal with cases brought before it, with most of them handled informally, an approach
that involves mediation. This approach is not only more effective than a more formal one, it is preferred by both the complainants and the agencies involved. The latter opt for it because it saves them from exposure to potentially embarrassing public scrutiny, while the former prefer it because it results in speedier resolution of their cases.

After the hearings the Ombudsman recommends remedial action and sets a deadline for action to be taken. The office follows up the cases until they are concluded and sends reminders when recommendations are not implemented.

While some Annual Reports are missing and there is no consolidated report reflecting the number of cases that were successfully resolved, those reports that are available indicate that between its establishment in 1996 and 18 March 2009 the office received 6 076 complaints about administrative agencies of the state. The figure breaks down as follows: corruption 50, human rights 28, environmental protection 0, injustice 1 094, maladministration 1 140, and unclassified 3 764 (Records of the Office of the Ombudsman).

One fact that is clear, though, is that the facility seems only to be used by public servants – the number of complaints from the general citizenry appears to be insignificant, in fact, virtually non-existent. The complaints recorded include unfair dismissals, delays in the release of terminal benefits (benefits due to any state employees who leave the employ of government), errors in the calculation of terminal benefits, denial of promotion, unfair transfers of public servants from one government ministry to another, and denial of allowances due to public servants for acting appointments.

Complaints that were beyond the jurisdiction and mandate of the Ombudsman were referred to the appropriate authorities for action. Overall it appears that, since its creation, the office has, according to Mafisa (2004, p 52) ‘focused exclusively on the eradication of maladministration, with other mandate areas left in the background’. He observes that no cases of corruption have been reported to the office because ‘people are not eager to report these for fear of reprisals by the culprits’ (Mafisa 2004, p 52).
The office also investigated cases in which some members of the Correctional Services staff in the administrative district of Quthing tortured and violated the human rights of inmates and made reports and recommendations to the relevant authorities (Mafisa 2007; Sekoati 2009, p 2).

At the time of writing this report the prison authorities had not implemented the recommendations. Similarly, the Ombudsman has carried out a number of inspections at the Queen Elizabeth II referral hospital, revealing shocking information about conditions, including the state of the building, the state and availability of equipment, staffing, drugs, and so on. In this case, too, the recommendations have not been implemented. The Ombudsman writes:

The situation at this hospital invokes a sense of despair. The basic essential equipment is just not there. Sadly, often times it runs out of drugs and suppliers are not prepared to assist on account of the poor record of the ministry in the settling of bills. Almost every section is under-staffed and the current professional personnel is overworked, demoralized, frustrated and demotivated. The buildings are in an indescribable state of disrepair and the general surroundings portray a picture of some place other than a referral health institution situated in the heart of the capital city and entrusted with the provision of a sound health service. When one walks around the hospital and enters the various sections of the institution, one cannot help having a distinct feeling that Lesotho’s (our) entire hospital sector is about to fall flat on its face.

Mafisa 2004, p 2

Somewhat awkwardly and uncharacteristically, he lashes out at the Minister of Health, concluding his report with the following:

I am concerned about the complacency I discern in the upper echelons of the Ministry of Health regarding my previous reports. I hardly need to emphasise that an elected
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representative of the people has a duty to rise to the occasion. Being an elected representative of the voters is about service rather than status; about giving rather than receiving. A Minister is required by law and nature of his responsibility to direct, co-ordinate and supervise the activities of the ministries and government departments (including parastatal that fall under his/her ministry). In a democratic society like Lesotho, a minister is individually accountable for the administration of the ministry he/she is entrusted with. The public expect him/her to be constantly on the alert and conscious of this position. If he does not rise to the occasion, he will undoubtedly be judged as having betrayed the trust that the public has entrusted in him.

Mafisa 2004, p 19.

The office uses a number of instruments to measure its success. The first is a notebook kept at the reception desk, in which people are asked to record their comments. Judging from the comments in this notebook, members of the public are generally satisfied with the work of the office.

Secondly, members of the public are asked to write letters stating how they judge the Ombudsman’s performance. The public response in this regard, too, has largely been positive.

Thirdly, in 2007 the office engaged an independent consultant to conduct a survey aimed at gauging the opinions of the people on three key issues – visibility, accessibility and effectiveness. This is the only independent assessment the office has embarked on to date. The survey revealed that respondents rated the office ‘poor to moderate’ with regard to visibility and poor with regard to accessibility. Its effectiveness was considered ‘moderate to excellent’ (Ntlafalang Consultants 2007, p xi).

The level of accessibility remains poor. The main problem is that the office is physically located in the capital, Maseru, with no branches in the other nine administrative districts of the country. Consequently, people have to come to Maseru from all over the country to lodge their complaints, thereby incurring huge transport costs. To minimise
the costs and inconvenience to the general public the office has made efforts to meet them halfway by receiving complaints from the people at public gatherings (lipitso) and public hearings in remote areas of the country. However, the people in the capital have relatively easy access to the office.

The nature of the complaints brought before the Ombudsman, mainly within his mandate – administrative injustice, maladministration, and human rights violations, makes it clear that people have realistic expectations and an appreciation of the role of the office.

The legislation makes no provision for action by members of the public if they are dissatisfied with the work of the Ombudsman. However, the fact that the office is answerable directly to Parliament gives the public the opportunity to report to individual members of Parliament (MPs) about the conduct of the Ombudsman. They can also take decisions to the High Court for review. Thus far, apart from some powerful agencies such as the Central Bank of Lesotho and the Lesotho Highlands Development Authority, there have been no complaints necessitating the use of these avenues.
INTERACTION AND RELATIONSHIP WITH THE GOVERNMENT – THE EXECUTIVE, PARLIAMENT, AND THE JUDICIARY

One of the measures of the strength of the office of the Ombudsman is the nature of its relationship and interaction with the three arms of government – the executive, the legislature and the judiciary. In Lesotho the relationship between the executive and the office are not what they should be; there continues to be a problem with enforcing the Ombudsman’s determinations and recommendations.

It is the responsibility of Cabinet to ensure that there is compliance by all agencies with the Ombudsman’s recommendation, yet this has not been the case. In fact, it appears that the executive frustrates the efforts of the Ombudsman’s office. Even the Prime Minister has not been very helpful in this regard, observing in Parliament during the debate on one of the Special Reports that ‘bringing one case to Parliament, instead of many, wastes the precious time of Parliament’ (interview with the Ombudsman).

The Ombudsman has recommended to Cabinet that the law should be amended to: (a) give the people the right to take their cases to the High Court if the administrative agencies refuse to comply with his determinations, (b) increase the powers of the Ombudsman to investigate the private sector, as human rights violations also occur in this sector, and (c) give the Ombudsman the power to seek declaratory orders from the High Court if administrative agencies of the state fail to comply with his recommendations. Although these recommendations were made as far back as 2005, Cabinet has failed to act on them.

In another effort to seek support and cooperation from key players in Lesotho’s administration the office organised a series of meetings and workshops for almost all levels of the public service.

The objectives of a workshop held in 2004 for principal secretaries – the
heads of government ministries and chief accounting officers – and chief executives of parastatal organisations were:

- to improve the public service and delivery of public services;
- to enhance the relationship between the Office of the Ombudsman and government ministries, departments and parastatal organisation;
- to ensure ministerial cooperation in conducting investigations and in the implementation of recommendations.

The outcome of this workshop has not been positive; many principal secretaries still do not comply with the recommendations of the Ombudsman. The Ombudsman recognised ‘a lot of laxity’ in the human resources cadre of the public service. This manifested itself in a number of areas, including delays in doing the paperwork necessary to advise the relevant authorities about the situation in different departments, delays in processing terminal benefits for those leaving the public service, and allowing the overpayment of public servants. Separate workshops to deal with these issues (Mafisa 2007, pp 25-27) were held for principal secretaries and for human resources officers. The outcome of the former, as reflected above, was not positive; that for the latter was positive.

Parliament, unlike the Cabinet, has maintained a good relationship with the Ombudsman’s office, something that may be attributable to the workshops the office held for MPs after elections, though it has not yet done this for those who entered Parliament after the February 2007 elections. The objectives of a workshop held in 2004 were:

- to familiarise all members of Parliament with the workings of the Ombudsman in a democratic Lesotho;
- to review the role of Parliament in enhancing the effectiveness of the office in fostering good governance;
- to review the relationship between the Office of the Ombudsman and Parliament and foster good relations between the two institutions;
- to explore possibilities and lay foundations for the establishment of a Parliamentary Select Committee on the Ombudsman.¹
Despite these efforts there is a need to continue improving understanding between the two institutions. There is no clear relationship between the office and the judiciary and no workshops have been organised for the judiciary. This is not unexpected, for the Constitution and the Ombudsman Act do not provide for any clear working relationship between the two bodies. If Cabinet had accepted the Ombudsman’s recommendation (c) above the relationship between the Ombudsman and the judiciary might have been strengthened, thereby enhancing the effectiveness of the Ombudsman.
INTERACTION WITH OTHER DEMOCRACY PROTECTION INSTITUTIONS

As the voice of the voiceless and an avenue through which the people have a say in matters of governance that affect them, the Office of the Ombudsman has constitutional and legal powers to receive complaints from the public as well as to investigate, of its own accord, any matters that fall within the scope of its mandate. In this way it is unique. However, there are two other democracy protection institutions in Lesotho, the Police Complaints Authority and the Directorate on Corruption and Economic Offences (DCEO). The Prevention of Corruption and Economic Offences Act 1999, which establishes the DCEO confers power on the directorate ‘to investigate suspected cases of corruption and economic crime and matters connected therewith or incidental thereto’.

Section 3 (1) of the Act reads:

There is established a Directorate to be known as the Directorate on Corruption and Economic Offences which shall consist of a Director, two Deputy Directors and such other officers of the Directorate as may be appointed.

Section 4 of the Act provides for the appointment of the director of the DCEO by the Prime Minister. It further provides that the director can be removed from office by the Prime Minister acting on the recommendation of a tribunal, which is also appointed by the Prime Minister.

The mandate and work of the DCEO and the PCA overlap with those of the Ombudsman. The legal mandate of the DCEO is to fight corruption in all its forms by examining the systems of government ministries and departments to detect any loopholes that may create the conditions for corruption; to investigate corruption cases and prosecute the offenders in collaboration with the office of the Director of Public Prosecutions, and to assist other government agencies in preventing corrupt activities and behaviour.
It also educates the public about corruption and its effects on national development. Although there is no provision for formal collaboration between the Ombudsman and the DCEO they have agreed informally and in principle that the DCEO should focus only on cases of economic corruption. The Ombudsman has occasionally referred corruption-related cases to the DCEO, and vice-versa.

The mandate of the PCA, which was established under s 22 of the Police Service Act 1998, also overlaps with that of the Ombudsman. The PCA is composed of a chairman and three other members, who are appointed by the police authority on terms and conditions prescribed by the authority. In terms of s 22(3) of the Police Act:

The Police Complaints Authority shall have responsibility for investigating and reporting to the Police Authority on any complaint referred to it by the Police Authority of the Commissioner [of Police], which is a complaint from a member of the public about the conduct of a member of the Police Service.

Although the PCA has been established to deal exclusively with cases relating to the conduct of police officers, the Ombudsman continues to receive and work on cases involving the police and, as with the DCEO, there is no collaboration between the PCA and the Ombudsman.

Funded from the same source, the Consolidated Fund of the state, the three bodies compete for resources, a factor which impinges on their effectiveness as democracy protection institutions.

In addition to the DCEO and the PCA there are efforts afoot to establish a human rights commission. Cabinet approved, in 1995, the establishment of such a commission, whose objective would be to complement the primary role of government as a responsible agency for promoting, protecting, and reporting on human rights.

The mandate of such a commission would be to effectively promote public awareness and increase public education about civil, economic, political,
social, and cultural rights. It would be empowered to investigate human rights violations in all places of detention and recommend appropriate remedies or take appropriate action (Records of the Ministry of Justice and Human Rights).

In 2007, more than 12 years after the Cabinet approved the establishment of such a commission, a Bill was drafted by an external consultant, but this is yet to be submitted to legal draftspersons and tabled before Parliament. Although the commission was to have been established before the end of March 2009 the process has been delayed because consultations have not yet been completed.

The government intends the commission to complement the work of similar democracy protection institutions in African countries such as Ghana, South Africa, and Uganda. The Ministry of Justice and Human Rights has consulted with these countries to see what lessons it can learn from them and adopt a suitable model for Lesotho.
INTERACTION WITH PUBLIC AND NON-STATE ACTORS

The Office of the Ombudsman cannot carry out its mandate effectively unless the general public and other non-state actors are aware of what it does. Recognising this, and acknowledging both the role the public and the non-state sector can play in assisting the office to achieve its goals and the fact that the Ombudsman concept is a novelty in Lesotho, the office has made several attempts to publicise and popularise itself. It has embarked on nation-wide public awareness campaigns in the form of public gatherings, known locally as *lipitso*, for ordinary citizens throughout the country. The main target of these campaigns is poor, powerless, and voiceless citizens living in remote rural areas.

The office also uses both print and electronic media for publicity purposes and to report to the public on the cases it has handled and their outcomes. To this end, the office has used state-owned Television Lesotho and Radio Lesotho to report its determinations on the cases brought before it. Lesotho Television captured live the determination in the case involving an employee of the Central Bank of Lesotho (CBL), who, the office determined, had been unfairly denied a promotion and must be promoted (Hoeane 2009, p 9). At the time of writing the official had not yet been promoted in line with the Ombudsman’s determination. Instead, the CBL had applied to the High Court of Lesotho for a review of the determination.

The office has bought an exclusive column, titled ‘Monamoli’, the Sesotho term for Ombudsman, in the Catholic Church-owned *Moeletsi oa Basotho* newspaper, in which it publicises its activities. In one of these columns, for example, the office published the findings of its enquiry into the delay/refusal by the appointed liquidator to pay the termination benefits of former employees of the now defunct parastatal, the Co-op Lesotho Ltd (*Moeletsi oa Basotho* 5 March 2009). The case has been successfully resolved and the complainants have been paid. The *Public Eye* also carried
a story about the Ombudsman ordering the LHDA to pay compensation amounting to M72 786.84 (approximately US$9 098) to an individual whose property it destroyed (Hoeane 2009, p 2). At the time of writing the LHDA had yet to comply.

The office has put in place a number of other strategies to boost public trust and confidence. It has allocated investigators, normally based at its headquarters, to the country’s administrative districts, which they visit at least three times a year. It also distributes pamphlets and calendars to members of the public. Although there is provision for an information officer, whose primary responsibility is to publicise the office, the position in currently vacant.

Non-state actors (non-governmental organisations – NGOs – and the media) collaborate with the office to differing degrees. In 2004 the office held a workshop for NGOs and the media to ‘establish a closer relationship between the media, NGOs and the Office of the Ombudsman in order to increase the public awareness of their human rights and publicise the existence, functions and activities of the Office of the Ombudsman’. The result was increasing cooperation with the NGO sector in general and the media in particular in terms of making public the activities of the Ombudsman. In general, the respondents describe their collaboration with the Ombudsman as satisfactory.
KEY RESEARCH FINDINGS: THE PERFORMANCE OF THE OMBUDSMAN AND THE CHALLENGES CONFRONTING THE OFFICE

This section sets out the views of the respondents, which support the issues raised in the secondary data and constitute the key findings of the study. Asked to reflect on the performance of the Ombudsman in terms of carrying out his constitutional and legal mandate and the challenges confronting the office, respondents expressed a variety of views, but were generally positive.

They were almost unanimous that the Ombudsman has done very well in the mandated areas of protection of human rights and combating injustice and maladministration in the public sector, citing the number of cases the Ombudsman has handled as a clear sign of achievement. Some credited the person of the current Ombudsman, not the office itself, with this success, arguing that during the tenure of the first Ombudsman the office was virtually unknown, not only by the general public but by the media.

The current Ombudsman has changed that by holding workshops for members of civil society and inviting the media to cover his activities. Two respondents go further, commenting with approval on the column in *Moeletsi oa Basotho*, mentioned above. The fact that the column is in a Sesotho newspaper, say these respondents, gives less educated, poor, rural residents the opportunity to learn about the office and to use it to solve problems they may encounter in their daily interaction with the executive machinery of government. Not all of the respondents were sure, however, that complaints from ordinary citizens about poor service provided by government agencies was a direct result of these publicity campaigns.

With regard to corruption and environmental protection, however, the respondents tell a completely different story, agreeing that in these areas the Ombudsman has not been visible. Some cite well-known areas in the
capital, Maseru, where pollution levels are escalating by the day. Among these is the Thetsane industrial area, where water used by textile firms is simply spilled into a donga, which flows very close to residential areas. The donga, which leads to the Mohokare River, which forms a border between Lesotho and South Africa, is known locally as ‘Mabolou’ or ‘Blue River’ because of the colour of the water, which indicates the level of pollution.

Another pollution problem is in the T’sosane area, where almost all the garbage from the city is dumped and burnt, emitting large quantities of smoke, which spread over the nearby villages. The respondents argue that the Ombudsman should have acted to prevent this pollution, but he has not.

Widespread corruption is another critical area where, in the views of the respondents, the Ombudsman has had little success.

While acknowledging the achievements of the Ombudsman, as reflected above, the respondents observe that the office struggles with a number of challenges. The first relates to the constitutional and legal powers conferred on the Ombudsman and the scope of his mandate. They question the logic of excluding some public offices and the private sector from the scrutiny of the Ombudsman, believing that all public offices have the propensity to violate citizens’ rights. They maintain that a number of human rights violations occur in the private sector, and the exclusion of this sector from investigation denies the majority of the poor the free services offered by the Ombudsman’s office.

Another serious drawback, they observe, is the fact that the office of the Ombudsman does not have the power to enforce its recommendations, determinations, or decisions. The agencies involved rarely comply with the decisions and the office receives limited support from the executive. If it had the power to enforce its decisions, its work would bear more and better fruit, respondents believe.

The question of the independence of the Ombudsman is also a source of concern, given that he is appointed by the very executive that he is
expected to police and investigate. It is believed that this situation leaves the incumbent susceptible to political interference and/or influence. Two respondents were adamant that whether or not the Ombudsman acts independently of the executive depends on his personal integrity, so different incumbents may behave and act differently in their relations with the executive.

That said, however, there has been no clear evidence of the Ombudsman giving in to political pressure from the executive. He appears to have been very forthright in his criticism of some government departments, as reflected, for example, in his Statutory Inspection Report on Queen Elizabeth II Hospital, and lashes out at the Minister of Health for ignoring previous reports on the conditions obtaining there.

The current Ombudsman, in the respondents’ view, has demonstrated his independence by investigating and making determinations against powerful organisations such as the Central Bank of Lesotho and by making these public, despite the bank’s protestations. They surmise that subsequent Ombudsmen may succumb to political pressures from the executive, thereby bringing the office into disrepute and eroding public trust.

Some respondents argue, however, that the Ombudsman must desist from playing a direct role in party politics lest he taint his image (and that of the office) as an impartial arbiter on public issues. Section 1(b) of the Ombudsman Act 1996 provides that the Ombudsman shall not ‘take an active part in political affairs’. These respondents point out that the Ombudsman contested the ruling party’s primary election in the run-up to the 2007 general election and a by-election in Pitseng, while in office, but lost to his competitor. This is corroborated by Sello Maphalla, former Lesotho Congress for Democracy (LCD) MP for Hlotse Constituency and current Lesotho Workers Party (LWP) MP (Public Eye 18 June 2009, p 16).

Some respondents pointed out the absence of formal cooperation or a clear division of work between the Ombudsman and the DCEO and the PCA. Like the Ombudsman, the DCEO is under resourced, with only three
investigators; half the number it is estimated it needs. This, combined with the complexity of corruption cases and the length of time required to investigate them, means the DCEO struggles with the same problems as, if not more than the Ombudsman.

The scarcity of resources, respondents felt, raises serious questions about the government’s level of political will and commitment to the mandates of the three institutions. Closely related to resource constraints is the fact that the Office of the Ombudsman is currently highly centralised so that many people, especially those living in remote rural areas, find access a problem.

Finally, respondents noted the limited autonomy of the office in terms of budget control and staff recruitment. They cite the fact that the budget is controlled by the Ministry of Finance and that the office relies on the general public service for staff recruitment. The limited budget, in their view, hampers the efforts of the office to embark on effective and wide-ranging public awareness campaigns and to inspect effectively areas such as prisons, police cells, and hospitals.
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CONCLUSION

Using both primary and secondary data this report assesses the effectiveness of the Office of the Ombudsman in Lesotho in terms of the achievement of its core mandate. The general conclusion is that, despite the challenges posed by resource constraints, the office has done fairly well in terms of fighting maladministration and injustice in the public service and protecting human rights. It has also mounted a series of outreach programmes to make itself known to the public, thanks to a financial contribution from the Irish Embassy. All these achievements are attributable to the personal efforts of the current Ombudsman rather than to the office itself. If he leaves the office at the end of his contract there is no guarantee that these successes will be sustained.

The constitutional and legal provisions relating to the appointment of the Ombudsman do not guarantee fully the independence of the office, whose institutional governance arrangements are no different from those of the government bureaucracy. Its staff is governed by the general public service laws, and its finances are controlled by the government through the Ministry of Finance, an arrangement that undermines the autonomy of the office.

Although it was relatively unknown at its inception, the office has improved its visibility by collaborating closely with different sectors of society, both state and non-state. Yet it still faces several challenges.

The recommendations below are aimed at enhancing the effectiveness of the office in light of these challenges.
12

POLICY RECOMMENDATIONS

Given the above challenges the Ombudsman and the respondents make a number of recommendations which, if effected, would strengthen the office and turn it into a more effective democracy protection institution.

The first of these recommendations is that Parliament should amend the Constitution and the Ombudsman Act to change the way in which the Ombudsman is appointed. The appointment process should include civil society and opposition parties to ensure more independence and public confidence in the office. Giving Parliament the power to appoint the Ombudsman would put an end the anomaly whereby he is appointed by the executive, yet answers to Parliament.

Parliament should make necessary amendments to the Ombudsman Act to give the office more autonomy to appoint its own staff and control its budget. This would ensure that it gets the right staff in the right numbers and uses its funds exclusively for its core mandate.

Parliament should also amend the Constitution and the Ombudsman Act to broaden the scope of the Ombudsman’s mandate to cover the private sector and the other offices in the public sector. The benefit of this would be that the office would be able to offer a free service to all people whose rights are being or may be violated.

The office should be empowered, through amendments to the Constitution and the Ombudsman Act, to ensure that its decisions/determinations and recommendations are enforceable in the same way as those of the country’s Directorate of Dispute Prevention and Resolution, whose decisions are binding on employers and employees alike in labour related matters.

Cabinet should ensure that the office is provided with adequate human, financial, and material resources to enable it to carry out its mandate effectively.
Effective mechanisms must be put in place to coordinate the mandates and division of work among the Ombudsman, the DCEO, the PCA, and the envisaged Human Rights Commission, thus putting an end to the current lack of clarity about the roles performed by these important agencies and to improve their effectiveness.

The services of the office must be decentralised to promote easy access by the majority of the people, especially those in remote rural areas. Here again, Cabinet should play a leading role. Finally, the government of Lesotho should sign, accede to, and ratify the African Charter on Democracy, Elections and Governance, to which it committed itself when the Charter was adopted in 2007.
ENDNOTES

1 Purposive sampling refers to a research sampling technique in which researchers select respondents on the basis of their knowledge of the topic, while, when using the snowball technique, researchers do not know the respondents to be selected, and rely, for their selection, on others who may know the appropriate respondents.


3 See, for example, the Special Report submitted to Parliament by the Ombudsman regarding Mr Akwazi Diabaa, a teacher and head of department at Siloe High School, who was demoted without a hearing. The Ombudsman had recommended that he should be reinstated but the school authorities refused to comply with the recommendation. Parliament endorsed the recommendation (see Kingdom of Lesotho, Seventh Parliament, National Assembly Daily Hansard [Official Report], Fourth Meeting, First Session, Wednesday 29 October 2008).


5 Most of the Ombudsman’s Annual Reports reflect this.

6 Workshop on Working to Uphold Human Rights and Deepen the Tenets of Democracy, Maseru Sun Cabanas, 28 October.
REFERENCES


Forum of Canadian Ombudsmen. 2009. ‘What is an Ombudsman?’ Available at http://www.ombudsmanforum.ca/whatis_e.asp.


Moeletsi oa Basotho, 5 April 2009.


Interviewees
Mr S S Mafisa, Lesotho’s current Ombudsman
Mr B Matsoso, Founding Director-General of the Directorate on Corruption and Economic Offences
Ms M Tau, member of the Police Complaints Authority
Ms M Mohasi, Human Rights Officer and Co-ordinator, Lesotho Council of Non-Governmental Organisations.
Mr T Mat’sasa, Director, Media Institute of Southern Africa (Lesotho)
Mr T Matjama, Research and Publicity Officer, Media Institute of Southern Africa (Lesotho)
Mr M Lenka, Community Trainer, Transformation Resources Centre
Mr M Seqhee, Good Governance Officer, Transformation Resources Centre
Ms M Mofubelu, Parliamentary Affairs Officer, Transformation Resources Centre
Mr M Mohlalisi, Editor, Leselinyana la Lesotho
Messrs A M Thamae and P Khohlokoane, reporters, Moeletsi oa Basotho
Ms L Nyaka, Reporter, Public Eye
Ms P Chabana, Chief Legal Officer and Head of Human Rights Unit, Ministry of Justice and Human Rights
Mr T Phakisi, Governance Advisor, Irish Embassy.
# APPENDIX

## Questionnaire

### A. General

1. How long has your institution been in existence? How and why was it established?

2. Please provide a description of your understanding of your institution’s constitutional/legal mandate. Does it include a right of initiative?

3. What role or function does your institution perform that is not carried out by other institutions, whether in government or civil society?

4. What other democracy protection institutions exist in your country? How does your institution relate to them?

5. In what way, if any, does the role and function of your institution overlap with or potentially overlap with that of the other democracy protection institutions?

6. Does the founding legislation provide a clear, workable and comprehensive legal framework that supports and empowers the institution to successfully fulfil its core mandate?

7. What outcomes do you strive for in order to realise the constitutional/legal mandate set out in 1 above? How often do you engage in strategic planning?

8. What have been / are the major constraints facing your institution and how have these impacted on its ability to achieve its mandate?

### B. Institutional effectiveness

9. What mechanisms are in place to deal with public complaints, to follow through on such complaints and to successfully resolve them?

10. How many cases/ complaints have been brought to you over the last year?

11. How many of these were resolved? How many are outstanding and what are the reasons for this?

12. How do you measure and assess your own effectiveness? What instruments do you use for monitoring and evaluation purposes?

13. Have you carried out any external evaluation looking at the successes or otherwise of your functions?

14. Do you produce annual reports? If so, are they publicly available?
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<td>15.</td>
<td>What strategies do you employ in carrying out public outreach and ensuring public trust of your institution?</td>
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<td>C. Independence</td>
<td></td>
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<td>16.</td>
<td>How do you view your relationship with the executive and parliament?</td>
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<td>17.</td>
<td>How do you view your relationship with political parties (both ruling and opposition)?</td>
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<tr>
<td>18.</td>
<td>What legal and other mechanisms are in place to ensure and strengthen the institution’s independence?</td>
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<td>19.</td>
<td>Who is your institution accountable to?</td>
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<td>20.</td>
<td>What is the extent of collaboration and coordination of the work carried out by your institution and similar / related work carried out by other institutions of a similar nature?</td>
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<td>21.</td>
<td>What safeguards exist to protect your institution from political encroachment?</td>
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<td>D. Institutional governance</td>
<td></td>
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<td>22.</td>
<td>What are the institutional governance arrangements in your institution? Are these arrangements clearly set out and do they allow for a smooth running of the institution? Do you embrace gender issues? What suggestions do you have to improve institutional governance arrangements?</td>
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<tr>
<td>23.</td>
<td>Is there a clear, logical and workable division between the members of your institution appointed by President (on advice of the National Assembly) and the Secretariat?</td>
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<td>24.</td>
<td>Does your institution have mechanisms in place to deal with internal conflict in your institution? If yes, what are these mechanisms and are they effective?</td>
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<td>25.</td>
<td>What mechanisms are in place for Chief Executive Officers, Chairpersons and commissioners to disclose and / or seek permission for private / commercial / financial interests or involvement as well as membership in any organisation? Are such mechanisms effective or sufficient to ensure transparency and avoid conflict of interest?</td>
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<td>E. Interaction with the public and non-state actors</td>
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<td>26.</td>
<td>What is the extent of collaboration and coordination of the work carried out by your institution and similar / related work carried out by non-state actors?</td>
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<td>27.</td>
<td>What was the intended relationship between your institution and the public? To what extent has this relationship been realised?</td>
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<tr>
<td>28.</td>
<td>Does your institution have mechanisms in place to deal with complaints by the public about the work done by your institution or the failure to attend to issues?</td>
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29. How accessible are the offices of your institution to the public?

30. What kind of complaints do the public bring to you?

31. Do the public have a sufficient appreciation of your role and mandate?

32. Are public expectations of your institution realistic/ unrealistic?

### F. Resources

33. Is your institution funded through a designated ministry / government department or through the consolidated fund voted directly by parliament?

34. Please give an indication of your budget allocation, additional funding and expenditure over the past five years.

35. Please illustrate the budget process followed by your institution, including the process of allocation of funds.

36. Please provide detailed information of the remuneration packages for office-bearers and Commissioners.

37. Are the current budgetary and administrative arrangements sufficient to ensure autonomy of democracy protection institutions?

38. To what extent are the resources allocated to your institution directly spent on meeting its key responsibilities?

39. What are the resource constraints faced by your institution?

40. How does this hamper the work of your institution?
EISA is a not-for-profit and non-partisan non-governmental organisation which was established in 1996. Its core business is to provide technical assistance for capacity building of relevant government departments, electoral management bodies, political parties and civil society organisations operating in the democracy and governance field throughout the SADC region and beyond. Inspired by the various positive developments towards democratic governance in Africa as a whole and the SADC region in particular since the early 1990s, EISA aims to advance democratic values and practices and to enhance the credibility of electoral processes. The ultimate goal is to assist countries in Africa and the SADC region to nurture and consolidate democratic governance. SADC countries have received enormous technical assistance and advice from EISA in building solid institutional foundations for democracy. This includes: electoral system reforms; election monitoring and observation; constructive conflict management; strengthening of parliament and other democratic institutions; strengthening of political parties; capacity building for civil society organisations; deepening democratic local governance; and enhancing the institutional capacity of the election management bodies. EISA was formerly the secretariat of the Electoral Commissions Forum (ECF) composed of electoral commissions in the SADC region and established in 1998. EISA is currently the secretariat of the SADC Election Support Network (ESN) comprising election-related civil society organisations established in 1997.

VISION
An African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment

MISSION
EISA strives for excellence in the promotion of credible elections, participatory democracy, human rights culture, and the strengthening of governance institutions for the consolidation of democracy in Africa
VALUES AND PRINCIPLES
Key values and principles of governance that EISA believes in include:

- Regular free and fair elections
- Promoting democratic values
- Respect for fundamental human rights
- Due process of law/rule of law
- Constructive management of conflict
- Political tolerance
- Inclusive multiparty democracy
- Popular participation
- Transparency
- Gender equality
- Accountability
- Promoting electoral norms and standards

OBJECTIVES

- To enhance electoral processes to ensure their inclusiveness and legitimacy
- To promote effective citizen participation in democratic processes to strengthen institutional accountability and responsiveness
- To strengthen governance institutions to ensure effective, accessible and sustainable democratic processes
- To promote principles, values and practices that lead to a culture of democracy and human rights
- To create a culture of excellence that leads to consistently high quality products and services
- To position EISA as a leader that consistently influences policy and practice in the sector

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- Technical Assistance
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