



**Issues Paper No.2 of 2015**  
**LEADERSHIP CODE ACT [CAP 240]**

*You are invited to make a submission or comment on this Issues Paper.*

**Submissions Close on the 26<sup>th</sup> of March 2015**

## **About the Vanuatu Law Commission**

The Vanuatu Law Commission was established on 30 July 1980 by the *Law Commission Act* [CAP115] and was finally constituted in 2009.

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## **Making Submissions**

Any public contribution to an inquiry is called a submission. The Vanuatu Law Commission seeks submissions from a broad cross-section of the community as well as those with a special interest in a particular inquiry. Comments and submissions from the public are welcome.

The closing date for submissions is on the **26<sup>th</sup> of March 2015**. There are a range of ways that a submission can be made and you can respond to as many or as few questions and proposals as you wish. You can write a submission, send an email or fax, or ring the Commission and speak to one of our staff.

You must indicate in your submission whether you wish your submission to be confidential as in the absence of such an indication your submission will be treated as non-confidential.

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## **Introduction & Background**

The Vanuatu Law Commission received a reference from the office of the Ombudsman requesting the office to carry out a further review of the *Leadership Code Act* [CAP 240]. The reason behind the request was that the current legislation was outdated and unsatisfactory.

The form of Leadership Code present within the Constitution is very weak and it makes recourse for the punishment of offenders. Leaders who breached the code can be investigated but not prosecuted could proceed. In September 1996, the Vanuatu Parliament decided to debate the Leadership Code Bill but at the last minute it was deferred again until December 1996. In August 1998, the Leadership Code was finally passed.

The *Leadership Code Act* [Cap 240] was introduced for the sole purpose of complementing the *Ombudsman Act*. It was created to give effect to Chapter 10 of the Constitution by providing for a Leadership Code to assist in the governing of the conduct of leaders throughout Vanuatu<sup>1</sup>.

*"(1) Any person defined as a leader in Article 67 has a duty to conduct himself in such a way, both in his public and private life, so as not to –*

- (a) Place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;*
- (b) demean his office or position;*
- (c) allow his integrity to be called into question; or*
- (d) endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu."*

This issues paper is one of two papers that have been developed to assist the Law Commission to comprehensively review the *Ombudsman Act* and *Leadership Code Act*. The two papers have been written with the sole purpose of bringing forward the issues regarding these two pieces of legislation for public consultation and discussion.

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<sup>1</sup> Part 1 Preliminary; Purpose, *Leadership Code Act* [Cap 240] (Vanuatu).  
[http://www.paclii.org/vu/legis/consol\\_act/lca131](http://www.paclii.org/vu/legis/consol_act/lca131) (Accessed 4/12/2014)

Accordingly, this paper will be divided into seven parts that will discuss in detail each part of the *Leadership Code* Act and the issues that have arisen regarding each part.

It is important to consider the following issues;

- Definition of leaders and other terms;
- Duties of leaders;
- Breaches of the Leadership Code ;
- Annual Returns
- Investigation and Prosecution of Leaders
- Punishment of Leaders
- And other relevant laws.

This paper will highlight sections in the *Leadership Code* that may require reform, including more definitions for terms to be more precise; the obligations that leaders must have in order to continue in office; how and when should annual returns be filled out and who should be reminding leaders to do so and so forth are all issues that have been brought to light in this issues paper.

## **ISSUE ONE: Definition of leaders and other terms**

### **Definition of Leaders**

In most countries within the Pacific region the *Leadership Code* was introduced to hold public officials accountable. For this legislation to become effective, definitions had to be put in place to assist the law makers to define what a leader is and other definitions that needed to be put in the law to allow for its effective implementation<sup>2</sup>.

Leaders are generally defined as a person who leads or has authority to direct. *Article 67 of the Constitution of the Republic of Vanuatu* defines leaders as:

- the President of the Republic;
- the Prime Minister; and
- other Ministers;
- members of Parliament
- and such public servants, officers of Government agencies and other officers as may be prescribed by law.

With regards to the *Leadership Code Act*, leaders are defined according to their position in any public or government agency. The definition of leaders in this Act covers everyone in the senior level or positions from within the communal councils to the Government Ministries and Departments<sup>3</sup>. This includes the Attorney General, Commissioner of Police and Ombudsman, who are usually the investigators behind maladministration and misconduct within the Government.

Article 26 of Papua New Guinea's (PNG) Constitution, seems to be more precise in defining leaders by limiting the definition to only those that are the heads of any public office. Article 26 states that leaders include, all members of Parliament, members of provincial assemblies and local government office holders, heads of public service departments, personal staff of the Governor General and the leader of the opposition and deputy

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<sup>2</sup>John T D Wood, 'Leadership Codes and Corruption Prevention- A comparative analysis on the utilisation of an LCC or similar type institution in Pacific countries and the appropriateness of an ICAC type body' (RAMSI Accountability Programme 2004).

<sup>3</sup> Communal Council and Government Ministries and Departments are some of the areas where leaders are defined to, as stated in section 5 of the *Leadership Code Act* [CAP 240].

leader of the opposition, Ambassadors and senior diplomatic and consular personnel, commanders and commissioners of the police and military forces, constitutional offices such as judges and magistrates, and all heads of or members of the boards or other controlling bodies of statutory authorities<sup>4</sup>. The definition in PNG's Constitution appears to be narrowed to only those who are considered Members of Parliament which includes the Prime Minister and the heads of government ministries and departments which in Vanuatu are referred to as Directors or Director Generals, Commissioners.

Unlike PNG's Constitution, public servants and public officers are also included in Vanuatu and Solomon Island's definition of leaders and it makes it difficult to identify who exactly is a leader in a public office. Generally, with the current definition provided in the *Leadership Code Act*, everyone working in both government and public sectors are defined as leaders.

In the report compiled by the Ombudsman review committee in 2004, it was recommended that the definition of 'Leaders' should be expanded to include the categories of public servants. This is because some of the Public Servants have escaped disciplinary action for a breach of the *Leadership Code* mainly because their position is not covered by the code. The proposed paper also suggests that the definition should also be expanded to include all private citizens serving as board members<sup>5</sup>. Therefore, in a broader sense everyone will be considered as leaders both in government and public sectors.

## QUESTIONS

1. Should the definition of 'leaders' be narrowed to include only political leaders and National Council leaders so as to give effect to the act, having those excluded under this definition ( Public Servant), monitored and investigated by the Public Service Commission?
2. Or should the definition include the categories of public servants and also private citizens who are on government boards/ commissions?

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<sup>4</sup> Article 26 of the *Constitution of the Independent State of Papua New Guinea 1975*.

<sup>5</sup> Republic of Vanuatu, '*Report of the Ombudsman Act and Leadership Code Review Committee*', (August 2004) .

The Ombudsman, Attorney General and Police Commissioner are usually the leading investigators in all matters within the Public and Government Ministries. Since they can also be investigated under this act, they are likely to refuse taking active investigation against other leaders under the *Leadership Code Act* due to fear and anxiety that investigated leaders might object and refute claims and begin to question their work<sup>6</sup>.

## Corruption

In Vanuatu there is no clear definition for corruption provided under section 4 of the *Leadership Code Act*<sup>7</sup>. According to the definition provided by the World Bank, corruption is defined as,

*"...the abuse of public office for private gain; public office is abuse when an official accepts, solicits, or extorts a bribe. It is also abuse when private agents give or offer bribes to circumvent public policies and process for competitive advantage and profit. Public office can also be abused for personal benefits even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues. Corruption can also take place among private sector parties, yet interface with and affect public sector performance: for example, collusion among bidders to a public procurement with the intent to defraud the state can seriously distort procurement outcomes"*<sup>8</sup>

With regards to the type of act or action that could amount to corruption, Transparency International gives a list of actions that could be considered as corruption<sup>9</sup>. For instance are some of the areas that can be categorized as corruption are; treason, illegal foreign transaction, smuggling, privatization of public funds, larceny and stealing, misappropriation, forgery, misuse of funds, abuse of power, bribery and graft, perversion of justice, none performance of duties, unauthorized sale of public offices, public property and public licenses, conflict of interest<sup>10</sup> and many other more.

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<sup>6</sup> Ibid.

<sup>7</sup> *Leadership Code Act* [Cap 240] ( Vanuatu). [http://www.paclii.org/vu/legis/consol\\_act/lca131](http://www.paclii.org/vu/legis/consol_act/lca131) (Accessed 4/12/2014)

<sup>8</sup> John T D Wood, Above no2.

<sup>9</sup> Transparency International the global coalition against corruption , [http://www.transparency.org/whoweare/organisation/fags\\_on\\_corruption/2/](http://www.transparency.org/whoweare/organisation/fags_on_corruption/2/) (Accessed 11/12/2014)

<sup>10</sup> Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System*, TI Source Book 2000

3. Should the *Leadership Code* include in its section a clear definition on corruption to make it more understandable to the people and the leaders especially?

## **Conflict of Interest**

The *Leadership Code* provides for the conditions where a leader can be said to have a conflict of interest<sup>11</sup>:

*“(1) A leader has a conflict of interest in a matter if the matter relates in any way to:*

*(a) Property the leader directly or indirectly owns or controls; or*

*(b) Property owned or controlled, directly or indirectly, by a member of the leader’s close family; or*

*(c) Property in which the leader has a beneficiary interest of any kind, whether through a trust or otherwise.*

*(2) A leader has a conflict of interest in a matter if the leader or a member of the leader’s close family, could benefit directly or indirectly from a decision on the matter, except as a member of a community or group”*

Section 24 also state’s that:

*“A leader who has a conflict of interest in relation to a matter must not act in relation to the matter, or arrange for someone else to act in relation to the matter, in such a way that the leader or a member of his or her close family benefits from the action”*

In this section, leaders are not to act in any matter if they have an interest in the matter. A leader is also not permitted to arrange for someone else to act on their behalf that would in any benefit the leader or the leaders close family.

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<sup>11</sup> Above no7, section 7, [http://www.pacii.org/vu/legis/consol\\_act/lca131](http://www.pacii.org/vu/legis/consol_act/lca131) (Accessed 4/12/2014)

Section 16, of this act also stipulates that a leader who has a personal business interest in a matter which they are dealing with and that it is likely to have a conflict of interest, must disclose in writing that interest. Sub-section 2(a) of s.16, also states that a leader who has an interest in a matter must declare his or her interest to the other members of the council or body before the matter is dealt with by that same council or body.

In comparison section 6 of Papua New Guinea's *Organic Laws on the Duties and Responsibilities of Leaders*, states:

*"(1) A person to whom this Law applies who fails to reveal to the Ombudsman Commission and the appropriate authority the nature and extent of his interest, or the interest of an associate, in a matter with which he has to deal in his official capacity is guilty of misconduct in office".*

The Solomon Islands *Leadership Code* also has a similar provision which states that a leader who has an interest in a matter must disclose his or her interest in which the commission may advise the Prime Minister to make regulations relating to the disclosure of interest by Leaders<sup>12</sup>.

With regards to PNG's code and the Solomon Islands code, leaders who have an interest in a matter must relate or reveal their interest to the Ombudsman Commission or the appropriate authority. However, in Vanuatu's *Leadership Code*, leaders are to reveal their interest to other members of the council or body.<sup>13</sup> For example, if a leader is a member of a tender board and they have an interest relating to any matters that come before the board, then he or she must disclose their interest. Moreover, if the member is a Minister and has a direct or indirect interest in a matter that will be going before the Council of Ministers, he or she must make his interest known to the Council, and then that Minister cannot be present during the discussion nor be allowed to vote on the matter<sup>14</sup>.

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<sup>12</sup> Solomon Islands Leadership Code (Further Provisions) (Cap 86) S16 (1), [http://www.paclii.org/sb/legis/consol\\_act/lcpa366/](http://www.paclii.org/sb/legis/consol_act/lcpa366/) (Accessed 3/12/2014)

<sup>13</sup> Above no.7, section 16 (a) (b) (c) (d).

<sup>14</sup> Above no.7, section 16 (2) (a) (b) (c).

4. Should the Ombudsman be monitoring reports of conflict of interest matters to ensure that Section 16 is in effect?
5. Should the Leader reveal his interest to the Ombudsman and not the body he is a member of?
6. Should the Ombudsman be the person responsible to have conflict of interests matters reported to?

## Undue Influence

There is no clear definition in the Act for the term “undue influence”. However the *Leadership code provides for a breach using the term in section 22;*

*“A leader must not exercise undue influence over, or in any other way bring pressure to bear on, a person who is another leader, any other person holding public office, as to influence, or attempt to influence, the person to act in a way that is in breach of this code or improper or illegal or against the requirements of the Act under which the person appointed or contrary in any other way to the requirement of the persons office or position.”<sup>15</sup>*

Therefore, if the *Leadership Code* does not provide for a definition, but is able to stipulate a breach using the term undue influence, it would only make sense that a definition be provided to make it more understandable, as the term is used usually when someone uses their power or authority in an unfair way in order to influence a legal decision<sup>16</sup>.

7. Should the *Leadership Code* cater for a clear definition of the word undue influence?

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<sup>15</sup> Above no.7, section 22.

<sup>16</sup>Cambridge Dictionaries Online, English definition of “undue influence”, <http://dictionary.cambridge.org/dictionary/business-english/undue-influence> (Accessed 2/12/2014)

## Qualification of a Leader (Educational level)

Qualification of a leader has been an issue since independence when leaders were elected to their position in either public sector or government offices<sup>17</sup>. The issue of qualification usually concerns the level of education. The *Leadership Code Act* does not provide for this matter as to its definition or any criteria as to how people will be selected as a leader. The definition of a Leader is someone who leads or commands a group, organization, or country, a member of the government officially responsible for initiating business in Parliament<sup>18</sup>. A leader should be a person who is able to guide and inspire<sup>19</sup> others. Education is very important for a leader, as it leads a country into a bright future as well as allow for the country to prosper<sup>20</sup>.

8. Should leaders appointed into government offices be required to have at least a satisfactory level of education? Such as a tertiary education?

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<sup>17</sup> Interview with Alain Molgos, Leadership Director, Ombudsman office of Vanuatu (Port Vila, 11 February 2015).

<sup>18</sup> Oxford Dictionaries Online, Definition of *leader* in English, <http://www.oxforddictionaries.com/definition/english/leader> (Accessed 2/12/2014)

<sup>19</sup> Collins Dictionaries Online, 'leader', <http://www.collinsdictionary.com/dictionary/english/leader> (Accessed 2/12/2014)

<sup>20</sup> Educational Qualification for Politicians, <http://blog.oureducation.in/educational-qualification-for-politicians/>, (Accessed 2/12/2014)

## **ISSUE TWO: Duties of Leaders**

In Vanuatu leaders have the duty and responsibility to act and behave in a manner that is both professional and ethical at all times. According to the Act under section 13 (1) a leader must<sup>21</sup>;

- a) Comply with and observe the law;*
- b) Comply with and observe the fundamental principles of leadership contained in Article 66 of the Constitution;*
- c) Comply with and observe the duties and obligations and responsibilities established by this Code or any other enactment that affects the leader; and*
- d) Not influence or attempt to influence or exert pressure on or threaten or abuse persons carrying out their lawful duty.*

If a leader is viewed as breaching the code then they would be in contravention of section 13 of the Act, and Article 66 of the Constitution which states that

- (1) Any person defined as a leader in Article 67 has a duty to conduct himself in such a way, both in his public and private life, so as not to –*
  - (a) place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;*
  - (b) demean his office or position;*
  - (c) allow his integrity to be called into question; or*
  - (d) endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu.*

- (2) In particular, a leader shall not use his office for personal gain or enter into any transaction or engage in any enterprise or activity that might be expected to give rise to doubt in the public mind as to whether he is carrying out or has carried out the duty imposed by sub article (1)”*<sup>22</sup>.

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<sup>21</sup> Above no.7

<sup>22</sup> Article 66 of the *Constitution of the Republic of Vanuatu*.

The *Leadership Code* Act requires that leaders appoint people on merit, give official business priority and disclose personal interest<sup>23</sup>. There are additional disclosure requirements for Ministers. A person who becomes a leader in an area where she or he has business interests is required to separate themselves of those interests where a conflict could arise<sup>24</sup>.

Currently the Ombudsman office is not at full capacity to handle such a task of this magnitude. To cater for such a task, as setting up a Leadership Tribunal, would require the government's commitment to such a task.

### **QUESTIONS**

1. Should there be a Leadership Tribunal set up to determine allegations of abuse of office by leaders?

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<sup>23</sup> John T D Wood, Above No.2

<sup>24</sup>Above No.7, section 13.

## **ISSUE THREE: Breaches of Leadership Code**

### **Categorization Aspect**

'We must reject the idea that every time a law's broken, society is guilty rather than the lawbreaker. It is time to restore the ... precept that each individual is accountable for his actions.' (Ronald Reagan)

And that individuals need to be held accountable for their actions whether beneficial or not, such actions are a direct attributable consequence. Such actions are then measured against societies moral concept coupled with the legal framework of what is regarded as good or bad. Breaches may be branded as 'bad actions' depending on the context of which it is being applied.

A breach in its strictest and narrowest sense could be defined as the act of failing to perform one's agreement, breaking one's word, or otherwise actively violating one's duty to the other. Thus breaches as such being outlined in an Act could be regarded as preventative measures indirectly obligating relevant institutional bodies, offices or individuals to abide by. Such mechanisms must be avoided all together whilst an individual is carrying out its duties within the scope of their employment. Leadership Codes were adopted into the Pacific as a mechanism to establish the accountability of public officials<sup>25</sup>.

The *Leadership Code* has outlined specific breaches which leaders could be held accountable under, specifically sections 19 to 30 with other correlated sections in the Act. They are also selectively mentioned under part 2 of the Act as well as a few other relevant sections outlined under part 4. The Breaches mentioned in the Act are somewhat generalized across the board and not categorized according to the veracity of each breach.

A statement was made in a brief compiled by the Principal Investigator within the Ombudsman's office in relation to recommendations made by a Review Committee with regards to categorizing less serious breaches and serious breaches<sup>26</sup>. The brief basically outlined the need for categorizing the breaches as it was believed some breaches warranted a less extensive punishment than others<sup>27</sup>.

The breaches outlined in the *Leadership Code* Acts of the three individual Melanesian countries namely Papua New Guinea, Solomon Islands and

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<sup>25</sup>John T D Wood, Above No.2, page 5.

<sup>26</sup>Jerry Boe, Review of Ombudsman governing legislation (The *Constitution*, *Ombudsman Act* [CAP 252], *Leadership Code Act* [CAP 240]), (June 2014).

<sup>27</sup>ibid

Vanuatu showed an extensive similarity across the board between the three respective legislations<sup>28</sup>. Samoa, like the three mentioned Melanesian countries, takes a similar approach. The conduct of individuals primarily those in the public sector and those that fall within the scope of the government are mandated by the *Public Service Act 2004*. Part 4 of the Act specifically provides for the values, principles and code of conduct for those in the public service serving under the government of Samoa.

The brief<sup>29</sup> mentioned above suggested that less serious breaches be dealt with by an allocated disciplinary tribunal whereas for serious breaches the criminal justice system would take its due course and prosecute those responsible<sup>30</sup>.

## QUESTIONS

1. Should the breaches be categorized according to serious and less serious breaches?
2. What kinds of alleged breaches of the *Leadership Code* should be considered less serious?
3. What kinds of alleged breaches of the *Leadership Code* should be considered serious?

## Tribunals

Tribunals in the modern era play an important role when it comes to dealing with issues between individuals as well as respective official institutions. They play a pivotal role in developing as well as implementing guiding principles already set in place by a rule of law. They act as an independent body<sup>31</sup>.

Papua New Guinea with its approach to dealing with such breaches regardless of the seriousness of the offence has established various tribunal bodies to deal with various matters relating to different offices. This is clearly provided for under section 27 of the *Organic law on the Duties and Responsibilities of Leadership* and further clarifications as to which tribunal is to deal with which matter is provided for under section 179 and 180 of the *Constitution of the Independent State of Papua New Guinea*. Thus Papua New Guinea has introduced a model whereby breaches within respective

<sup>28</sup>John T D Wood, Above No.2, pages 27-29.

<sup>29</sup> Above No.26

<sup>30</sup>Above No.4

<sup>31</sup>Professor Kim Lovegrove FAIB, *Tribunals explained along with their strengths and weaknesses*, <http://www.lslawyers.com.au/elibrary/tribunal-book> (Accessed 14/01/2015).

offices are being dealt with accordingly with the relevant tribunal provided under the Constitution<sup>32</sup>. The role of the establishment of a Tribunal or Tribunals is to consider cases and determine appropriate actions to be taken against Leaders charged with minor Code breaches<sup>33</sup>.

Australia has set up an array of tribunals to deal with various issues relating to government decisions. Within the state of Victoria they have both an administrative and civil tribunal. The administrative tribunal focus and deal mainly with executive actions of government whereas the civil tribunals focus mainly on resolving issues relating to private disputes<sup>34</sup>.

A report compiled in 2004 by a review committee saw the committee agreeing with creating a leadership tribunal to determine alleged breaches of the *Leadership Code Act*. The report based its reasoning upon recommendations made by a former legal officer attached with the then Ombudsman office. The 2004 report advocates for the need for creating two main tribunals one solely to deal with alleged breaches done by public servants and another to deal with those whom do not fall under the scope of public servants such as Ministers and statutory body heads<sup>35</sup>. Furthermore as suggested in the report, the need for setting up the tribunals is primarily because it would be practical and evidential difficulties in prosecuting leaders under the current provisions would not be possible<sup>36</sup>.

As outlined the brief<sup>37</sup> compiled by the Ombudsman's office the proposed system to be followed was that once reports were to be produced by the Ombudsman and referrals made to the Public Prosecutor it is from there that it would be determined as to whether or not there was in fact a breach. Where there was a serious breach, the standard of proof that would be used would be that the proof would have to be beyond a reasonable doubt. For less serious offences, the standard of proof would be the balance of probabilities<sup>38</sup>. Once a fine line is drawn clearly differentiating a less and serious breach then referrals may be carried out accordingly to either a criminal court or a tribunal.

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<sup>32</sup>Section 27 of the *Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea)

<sup>33</sup>The Ombudsman Office (Vanuatu), Ombudsman Legislative Proposal Policy Paper Attachment 4: Changes to the Leadership Code Act (The Code), 2014.

<sup>34</sup>The Hon. Justice Garry Downes AM. 'Tribunals in Australia: Their Roles and Responsibilities', *Australian Law Reform Commission's Journal Reform* Issue 84, Autumn 2004.

<http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/tribunals.htm> (Accessed 14/01/2015)

<sup>35</sup>Above No.5

<sup>36</sup>ibid.

<sup>37</sup> Above No.26

<sup>38</sup> Office of the Ombudsman, Issues Paper 1: *The Leadership Code Act*, (Submission summary of recommended changes proposed by the 'Ombudsman Act and Leadership Code Review Committee' (August 2004)), (8 December 2009).

4. Should there be a tribunal set up to deal with less serious breaches?
5. Would it be practical to have two separate tribunals to deal with public servant issues and those whom are not public servants?
6. For alleged serious breaches of the Leadership Code should they be prosecuted before the criminal courts?

## **ISSUE FOUR: Annual Returns**

An annual return in simple layman terms could be defined as a yearly statement which gives essential information about a firm's composition, activities, and financial position, and which must be filed by every active incorporated or registered firm with an appropriate authority. Within an annual report there are a few key essential components which need to be detailed out in a prescribed format<sup>39</sup>.

Vanuatu<sup>40</sup> like the Solomon Islands<sup>41</sup> both have general provisions within their respective Acts obligating leaders to file annual reports. In Solomon Islands it is not referred to as annual reports but rather is called a statement of assets. Evidently leaders of both countries are obligated to provide such reports.

Samoa has taken a slightly different approach in that instead of having a general provision under one Act obligating leaders to file annual reports it has bestowed such responsibility under each ministries/departments and this is mandated by their respective acts. For example under section 25 of the *Land Transport Authority Act 2007* the Land Transport Authority is required to provide an annual report to the Minister responsible by the end of each financial year but no later than 30<sup>th</sup> October<sup>42</sup>. Moreover under section 57 of the *Ombudsman (Komesina o Sulufaiga) Act 2013* it specifically obligates the Ombudsman of the day to prepare an annual report each year regarding operations and financial matters of the Ombudsman for the preceding year, and is to be submitted to the Speaker of Parliament for tabling<sup>43</sup>.

Vanuatu's *Leadership Code* clearly stipulates that leaders are obliged to file annual returns of their assets and liabilities. In principle, this is a useful means of demonstrating transparency on the part of leaders, providing a basis for inquiries into any unexplained accumulation of wealth. The

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<sup>39</sup><http://www.businessdictionary.com/definition/annual-return.html>

<sup>40</sup> Part 4 of the *Leadership Code Act* [CAP 240] (Vanuatu) caters for Annual returns and clearly states under section (1) that every leader must complete an annual return for the preceding year setting out details of leader's assets and liabilities in accordance with the form in the schedule.

<sup>41</sup> Part 2 of the *Leadership Code (Further Provisions)* [CAP 86] provides for leaders having to provide a statement of assets. With criteria's which need to be met clearly set out in the Act.

<sup>42</sup> section 25 of the *Land Transport Authority Act 2007* (Samoa),  
[http://www.paclii.org/ws/legis/consol\\_act/ltaa2007308/](http://www.paclii.org/ws/legis/consol_act/ltaa2007308/) (Accessed 12/1/2015).

<sup>43</sup> section 57 of the *Ombudsman (Komesina o Sulufaiga) Act 2013*,  
[http://www.paclii.org/ws/legis/consol\\_act/oosa2013295/](http://www.paclii.org/ws/legis/consol_act/oosa2013295/)  
(Accessed 12/1/2015)

*Leadership Code Act* purports to create such a system but this does not seem to work as current filed annual returns do not seem to contain all relevant details which could be used.

A prior report produced in 2004 purported that there were several problems with the particular section dealing with Annual Returns<sup>44</sup>. A few key problems which were highlighted were:

- Some returns were filed late
- Some were not filed at all
- Failure by the Clerk of Parliament to publish lists of returns in the Gazette as required, and
- Failure to investigate Leaders who have failed to file returns.

The report implied that the Clerk of Parliament was not the proper person to be given responsibility for collecting returns because the Clerk was deemed a leader therefore there was the possibility of conflict of interest. In addition there were not sufficient administrative staffs to carry out the required job, and the register included information from people who submitted returns but who was not Leaders Furthermore the Clerk wrongly reported that some Leaders had failed to comply with their reporting obligations, even though they had in fact submitted a return<sup>45</sup>.

## **QUESTIONS**

1. Should the Ombudsman be given the responsibility for collecting annual returns, publishing lists of who has/has not filed returns, and investigating leaders who do not file returns?
2. Should Leaders be required to submit returns in the form of sworn statutory declaration (so that knowingly filing a false document would include a possible criminal charge of perjury)?
3. Should the Ombudsman have the power to waive the s31 (3) requirement on Leaders to file returns for family members 'where feasible'- subject to the Ombudsman being able to later request such a return?
4. Should s33 be amended to make it an offence for Leaders to knowingly file a return which is false or incomplete in a material particular?

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<sup>44</sup>Above No.38

<sup>45</sup>ibid.

5. Should leaders who breach s.33 (fail to file an annual return) be subject to a criminal trial? Or should disciplinary proceedings apply?

## **ISSUE FIVE: Investigation and Prosecution of Leaders**

This part of the paper discusses in depth the process in which the Ombudsman ,who is the investigator into allegations of breaches of the *Leadership Code*<sup>46</sup> carries out his role in determining what is to be done with the reports after the investigations into the allegations is complete. The Ombudsman will then decide as to whether the allegation amounts to a criminal misconduct and the matter will be referred to the Public Prosecutor and the Commissioner for Police<sup>47</sup>. The Ombudsman must also provide a copy of the report to the Prime Minister<sup>48</sup>. In order for the Ombudsman reports to be considered they must follow this process and this is considered to be quite a lengthy process. The reason being that the Ombudsman must rely on the Public Prosecutor to draw a conclusion from the report submitted to them and if it warrants further investigations then the Public Prosecutor must forward this report to the Police Commissioner to commence investigations<sup>49</sup>. The Public Prosecutor will then make a decision as to whether to proceed with the matter depending on whether the Ombudsman report was sufficient or wait for the Police investigation to be completed, and then the Public Prosecutor will decide if there is a case to proceed. Where the Public Prosecutor decides not to proceed with the case, then he or she must notify the Prime Minister and give reasons for his or her decision. This is then published in the official gazette<sup>50</sup>.

The reason for the long period as mentioned earlier for these reports to be considered is when the Ombudsman reports are sent to the Public Prosecutor, the Public Prosecutor has three (3) months to consider whether there are sufficient grounds to prosecute the matter<sup>51</sup>., If the Public Prosecutor is of the view that the complaint is vexatious, frivolous or trivial, then he has the right to dismiss the complaint and not take it to court<sup>52</sup>. However, if the Public Prosecutor decides there is sufficient grounds to prosecute then initial proceedings must commence within one month of

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<sup>46</sup> Above No.7, section 34.

<sup>47</sup> Ibid.

<sup>48</sup> Part II, Article 63 (2) of the *Constitution of the Republic of Vanuatu*.

<sup>49</sup> Above No.7, section 35.

<sup>50</sup> Above No.7, section 37

<sup>51</sup> Ibid

<sup>52</sup> ibid

deciding to prosecute the leader<sup>53</sup>. If the Public Prosecutor is unable to commence proceedings within the one month, then they must notify the Prime Minister and seek an extension from the Prime Minister for a further three months due to the case being complex and this must be published in the official gazette<sup>54</sup>. Despite the Public Prosecutor being given a further three month extension this does not guarantee the Public Prosecutor will commence proceedings against the leader, therefore will have to publish a notice before the end of the second three month extension for discontinuing the matter<sup>55</sup>.

In Solomon Islands this process is somewhat different in that a Commission is established and any person can make a complaint to the Leadership Commission<sup>56</sup>. The Leadership Commission also the power not to continue with an investigation if the complaint is trivial, frivolous and vexatious, too long and delayed or it does not fall under the provisions of the *Leadership Code* and *Constitution*<sup>57</sup>. The investigation is conducted in private and any or all information obtained can be from persons whom the Commission considers may be able to assist<sup>58</sup>. The Leadership Commission in carrying out its investigation's has the same powers as that of a Magistrates court. This power allows the Commission to call upon witnesses and compel them to give evidence, order witnesses to attend and give documentary evidence before the Commission and they can also issue punishments for witnesses for being in contempt of court<sup>59</sup>. The Commission does not necessarily need to hold a hearing to hear the evidence, but usually calls the person being investigated or their legal representative to be heard before the Leadership Commission. Furthermore if a witness appears before a Commission and gives false evidence, he or she can be held liable and be prosecuted for perjury under the *Penal Code*<sup>60</sup>.

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<sup>53</sup> Above No.7, Section 38

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> *Solomon Islands Leadership Code (Further Provisions)* [CAP 26], Section 18.

[http://www.paclii.org/sb/legis/consol\\_act/lcpa366/](http://www.paclii.org/sb/legis/consol_act/lcpa366/) (Accessed 4/12/2014)

<sup>57</sup> Ibid

<sup>58</sup> *Solomon Islands Leadership Code (Further Provisions)* [CAP 26], Section 19.

[http://www.paclii.org/sb/legis/consol\\_act/lcpa366/](http://www.paclii.org/sb/legis/consol_act/lcpa366/) (Accessed 4/12/2014)

<sup>59</sup> Ibid

<sup>60</sup> Ibid

In the case of PNG, their process is similar to that of the Solomon Islands, where an Ombudsman Commission is set up in place to receive and investigate complaints<sup>61</sup>. However, the Ombudsman Commission can refer a complaint to the Public Prosecutor, where there is evidence of misconduct in office of the person in question<sup>62</sup>. The PNG law also provides provisions where the Commission have the power to not proceed with an investigation after the Commission has decided that the complaint is frivolous, vexatious and trivial<sup>63</sup>. The only difference between the Solomon Islands Leadership Code is that PNG's Leadership Code is also given the power to discontinue an investigation if the Ombudsman Commission does not have sufficient resources to be able to carry out the investigation<sup>64</sup>.

For Vanuatu's *Leadership Code*, the Ombudsman is the person responsible to carry out investigations into complaints against a leader and the Ombudsman also has the discretion to proceed or not proceed with a complaint<sup>65</sup>.

## **Conduct of Proceeding**

Section 39 of this Act states the ways in which different offences or breaches of this Act should be conducted in proceedings. The main objective of this provision is to carry out how leaders are to be prosecuted if they are charged under the *Leadership Code*. Once a leader is charged they will be tried in a criminal court<sup>66</sup>. If the state goes further to recover any assets that a leader may have obtained, and then the procedures the Public Prosecutor must follow is to apply to the court seeking an order to seize the property and to have the property forfeited to the state. An order may also be given for a leader to pay a penalty fine equivalent to the benefit the leader received<sup>67</sup>.

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<sup>61</sup> *Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea), section 18 (1). [http://www.paclii.org/pg/legis/consol\\_act/olotdarol528/](http://www.paclii.org/pg/legis/consol_act/olotdarol528/) (Accessed 4/12/2014)

<sup>62</sup> *Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea), section 17 (d). [http://www.paclii.org/pg/legis/consol\\_act/olotdarol528/](http://www.paclii.org/pg/legis/consol_act/olotdarol528/) (Accessed 4/12/2014)

<sup>63</sup> *Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea), section 18 (3) (a) (b) (c). [http://www.paclii.org/pg/legis/consol\\_act/olotdarol528/](http://www.paclii.org/pg/legis/consol_act/olotdarol528/) (Accessed 4/12/2014)

<sup>64</sup> *Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea), section 18 (d). [http://www.paclii.org/pg/legis/consol\\_act/olotdarol528/](http://www.paclii.org/pg/legis/consol_act/olotdarol528/) (Accessed 4/12/2014)

<sup>65</sup> *Ombudsman Act* [Cap 252](Vanuatu), section 18. [http://www.paclii.org/vu/legis/consol\\_act/oa114/](http://www.paclii.org/vu/legis/consol_act/oa114/) (Accessed 4/02/2015)

<sup>66</sup> Above No.7, section 39 (1).

<sup>67</sup> Above No.7, section 39(2), section 45 (1) (a) (b).

In the Solomon Islands, matters concerning misconduct are dealt with by the High Court and prosecuted by the Director of Public Prosecutions. If the Director of Public Prosecutions does not commence proceedings on matters referred to by the Commission, the Director of Public Prosecutions must provide a statement to the Commission of the reasons for not proceeding with the case and this statement is to be known only to the Commission<sup>68</sup>.

In PNG the Ombudsman Commission would refer its matter to the Public Prosecutor and in so doing the Public Prosecutor shall refer the matter to the appropriate tribunal<sup>69</sup>. This tribunal will then make its own enquiries into the matter and if the tribunal is of the view that this leader is in breach of misconduct, then he will make the proper recommendations to the appropriate authorities for dismissal or for further penalties to be imposed. The tribunal must also announce its decision to the public<sup>70</sup>. Once the announcement is made public, a copy of the tribunal's judgment must be sent to the Speaker of Parliament, the National Executive or in the case of a Judge, Magistrate or Lawyer and a copy to the Judicial and Legal Services tribunal<sup>71</sup>. Interestingly PNG uses separate tribunals who have the power to deal with matters of misconduct by leaders<sup>72</sup>. However, the PNG Leadership Tribunal comprises of a Supreme Court judge and 3 Magistrates.

The advantage of using a tribunal is that a tribunal views matters or cases from an inquisitorial view point rather than from an adversarial stand point. The important aspect of this tribunal would be that it be impartial, and conduct its proceedings openly in accordance to the rules of fairness and natural justice. It would also allow for right of appeal in the Supreme Court on a matter of law, if there was any doubt in the decision of the tribunal.

This would mean that the Ombudsman would submit its report to the Leadership Tribunal and those reports would be made public as long as protection is provided in accordance to natural justice. In conducting its

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<sup>68</sup> *Solomon Islands Leadership Code (Further Provisions)* [CAP 26] section 23.

[http://www.paclii.org/sb/legis/consol\\_act/lcpa366/](http://www.paclii.org/sb/legis/consol_act/lcpa366/) (Accessed 4/12/2014)

<sup>69</sup> *Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea), section 27.

[http://www.paclii.org/pg/legis/consol\\_act/olotdarol528/](http://www.paclii.org/pg/legis/consol_act/olotdarol528/) (Accessed 4/12/2014)

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Ibid

matter before the Tribunal the Tribunal would be assisted by very high level prosecutors.

The Public Service Commission disciplinary board would be ideal as they deal with disciplinary matters regarding Public servants. However we must note that the Public Service Commission cannot deal with members of Parliament, political appointees, heads of constitutional or statutory bodies who are alleged to have breached the Code, so who would be a body appropriate to hear and handle all complaints or allegations of breaches to the Leadership Code.

**Question:**

1. Should section 39 be amended to allow for the establishment of a Leadership Tribunal?
2. Do you think the reports that the Ombudsman submits to the Leadership Tribunal be made public?
3. Who would provide the prosecutors, the Public Prosecutor or Prosecutors trained from the Ombudsman office?
4. Should the tribunal be comprised of only members from the judiciary?

## **ISSUE SIX: Punishment of Leaders**

Studies have shown that those who utilize the idea of employing a performance contingent reward and punishments seem to be more effective than those who do not as it has been argued that punishment plays a prominent role in theoretical models of leadership<sup>73</sup>.

Apart from rewarding leaders with various contingencies, preventative measures must also be set in place in order to prevent leaders from side tracking and engaging in activities that would be detrimental to what is required of them by law. A key aspect of penalizing leaders would be that it would show other leaders as well as the general public that certain actions which are not lawful will not be tolerated and offenders will be punished.

In Vanuatu the *Leadership Code Act* outlines the Punishment of Leaders under part 6 of the Act. Section 40 (1) states a leader who is convicted of a breach of section 19, 20, 21, 22 ,23,24,26 or 27 is liable of a fine not exceeding five million or an imprisonment of a person not exceeding 10 years<sup>74</sup>. Sections that fall under this part cater for and provide for other punishments which leaders may be liable under or may face should they breach certain sections of the Act.

The Solomon Islands *Leadership Code (Further Provisions)* [CAP 86] under part 4 caters for enforcement and penalties. The Act itself is administered by the Leadership Code Commission and they may initiate their own investigations into alleged breaches or in respect of an individual or office and may carry out investigations on alleged misconducts.

Sections that come under part 6 of the *Leadership Code Act* <sup>75</sup> focus mainly on the various types of punishments and detail the various types of punishment a leader may face should they breach certain sections of the act. Discussions below will deal with minor issues surrounding the sections under part 6 of the Act.

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<sup>73</sup> Philip M. Podsakoff, William D. Todor and Richard Skov, *The Academy of Management Journal* Vol. 25, No. 4 (Dec., 1982), pp. 810

<sup>74</sup>Above No.7

<sup>75</sup>ibid

## Hardship

The hardship that is being discussed here is with regards to section 49 where it is stated that “Before making an order under section 45 or 46, the Court may take into account any hardship that would be caused to a person other than the leader. However there is no definition provided for ‘hardship’.

### QUESTIONS

1. Who is a person other than leader?
2. Should ‘hardship’ be given a specified meaning so as to clarify what it constitutes, whether it is financial hardships or employment related hardships?

## Ministers Discretion

Discretion is generally defined as the quality of behaving or speaking in such a way as to avoid causing offence or revealing confidential information<sup>76</sup>. In the *Leadership Code Act*, leaders are given the discretion to make regulations in accordance to this Act. Section 51 of the *Leadership Code Act*, has vested in the Minister a power to make regulations. Its section reads:

*“The Minister may make regulations, not inconsistent with this Act, for all matters required or necessary to give effect to this Act”*

In other countries such as Solomon Islands there is also provision that provides for the Minister who is the Prime Minister to make regulations to carry into effect the provisions of the Act<sup>77</sup>. This is also similar for PNG where the Head of State prescribes regulations that is not inconsistent and in accordance with the law<sup>78</sup>.

However, in Vanuatu’s case the discretion vested on the Minister in this section is to make regulations. This could be implied that the Minister is obliged to make only regulations. Therefore, their discretion is only limited to making regulations.

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<sup>76</sup> Oxford Dictionaries Online, Definition of *discretion* in English.

<http://www.oxforddictionaries.com/definition/english/discretion> (Accessed 2/12/2014)

<sup>77</sup> *Solomon Islands Leadership Code (Further Provisions)* [CAP 26] section 26.

[http://www.paclii.org/sb/legis/consol\\_act/lcpa366/](http://www.paclii.org/sb/legis/consol_act/lcpa366/) (Accessed 4/12/2014)

<sup>78</sup> *Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea), section 41.

[http://www.paclii.org/pg/legis/consol\\_act/olotdarol528/](http://www.paclii.org/pg/legis/consol_act/olotdarol528/) (Accessed 4/12/2014)

3. Should each government Minister be obliged to make regulations accordingly with the *Leadership Code Act* to give more effect to this legislation apart from giving them the discretion whether to include provisions of the Act or not?

## Penalties

Most fines and imprisonments work alongside each other although at times they may seem to be a bit too excessive or are not implemented to their full extent. Though some of which may have been implemented notable leaders at times may retract on the enforcement of certain penalties<sup>79</sup>.

A good example of the point made above was in the case of *Public Prosecutor v Sope Maautamate*<sup>80</sup> whereby Mr Barak Tame Sope Maautamate the former Prime Minister was convicted by the court under the *Penal Code Act* for two counts of forgery on 19 July 2002. In accordance with the *Leadership Code Act* that he should also be charged under section 27 of the *Leadership Code*, in addition to the sentence he received under the *Penal Code Act* and was sentenced to 3 years in Jail. But later in November of the same year Mr. Sope was pardoned by former president at that time of the offences he was convicted of due to medical reasons<sup>81</sup>.

Various countries within the Pacific region like Vanuatu have also included general penalty sections within their relevant legislations in regards to leaders who breach respective leadership codes. The 1978 *Constitution of the Solomon Islands* under section 94(4) provides a general statement to the effect that any person whom the leadership code applies to, violates such conduct will be considered as guilty of misconduct in office<sup>82</sup>. In the Solomon Island leaders are expected to file financial returns with the Leadership Code Commission and those whom fail to do so may be subject

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<sup>79</sup> A classic example was from the incidents detailed in the Public Report on the Alleged Breach of Leadership Code by Mr Barak Tame Sope Maautamate, 3rd August 2004

<sup>80</sup> [2002] VUSC 46; Criminal Case No 010 of 2002 (19 July 2002)

<sup>81</sup> Public Report on the Alleged Breach of Leadership Code by Mr Barak Tame Sope Maautamate, 3<sup>rd</sup> August 2004.

<sup>82</sup> *Constitution of the Solomon Islands*

to a fine<sup>83</sup>. More over in Papua New Guinea according to a paper prepared by John T D Wood a programme Director for the RAMSI Accountability Programme it was highlighted that leaders who breached the leadership could be either reprimanded, fined, suspended from office, dismissed from office or could be imprisoned<sup>84</sup>.

4. Are the fines and imprisonment terms provided for under section 4, too excessive?
5. Would it be realistic to expect leaders to be able to pay such fines??
6. Should there be a provision preventing Presidents or Prime Ministers from pardoning convicted leaders?

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<sup>83</sup> Above No.2

<sup>84</sup> Above No.2

## **Other laws**

The *Leadership Code Act*, being the primary focus of this issues paper, has highlighted a few key significant areas in the Act which need to be addressed and amended. This particular Act was enacted in order to give effect to chapter 10 of the Constitution by providing for a Leadership Code to govern the conduct of the leaders of the people of Vanuatu<sup>85</sup>.

The issues paper has underlined vital areas that would need to be addressed and amended within the Leadership Code so as to render it more effective and fitting with current circumstances. However amending the current Act would mean amending any other correlating relevant acts. As a provisional guideline outlined in the New Zealand Law Commission Legislation Manual Structure and Style it clearly states that it is important to be aware that an amendment to one enactment may well affect other enactments, and consequential amendments may also be necessary<sup>86</sup>.

It should also be noted that the *Ombudsman Act* is somewhat the parent act which ties in and complements the *Leadership Code Act*. The two issues paper being compiled are both complementary to each other with one discussing issues relating to the *Ombudsman Act*<sup>87</sup> and the other addressing issues relating to the *Leadership Code Act*<sup>88</sup>. The *Ombudsman Act* issues paper highlighted some key legislation's which needed to be amended as well in order for the new amendments to the *Ombudsman Act* to work well alongside other legislations as well as their respective amendments. Some of the key legislations which needed to be amended as well apart from the *Leadership Code Act* and the *Ombudsman Act* were the *Representation of Peoples Act*, *Companies Act*, *Police Act*, *Public prosecutor's Act* and the *Constitution*<sup>89</sup>.

Furthermore apart from the afore mentioned Acts one other important Act that also needs to be amended in order to coincide with any new amendments to the *Leadership Code* would be the *Public Service Act* [CAP 246].

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<sup>85</sup> Section 1 of the Leadership Code [CAP 240]

<sup>86</sup> <http://www.nzlii.org/nz/other/nzlc/report/R35/R35-Appendix-2.html> (Accessed 10/02/2015)

<sup>87</sup> Issues Paper No.01 of 2015: A Review of the *Ombudsman Act* [CAP 252]

<sup>88</sup> Issues Paper No.02 of 2015: A Review of the *Leadership Code Act* [CAP 240]

<sup>89</sup> Above no.3, page 31.

In order to allow the disciplinary board provided for in the Act the power to deal with alleged breaches by public servants whom fall under the scope of leaders and are mandated by the *Public Service Act*. The public service commission disciplinary board would only be able to deal with less serious breaches committed by public servants.

### **QUESTIONS**

1. Should the *Public Service Act* be amended to allow the disciplinary board to take on the additional role of dealing with less serious alleged breaches done by public servants whom fall under the scope of a leader?
2. What other necessary Acts should also be amended to cater for any amendments carried out on the Leadership Code?