



Issues Paper No.01 of 2015

**A Review of the Ombudsman Act
[CAP 252]**

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

Submissions Close on the 26th 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.

The office is located at the Melitco House in the centre of Port Vila, Vanuatu.

Address: PO Box 3380

Port Vila, Vanuatu

Telephone: +678 33620

Email: lawcommission@vanuatu.gov.vu

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 **26th 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 AND BACKGROUND

The term 'Ombudsman' was originally used in Sweden in the 19th century to refer to officials appointed by the King to inspect and report on the complaints of civil cases, armed services and operation of the courts and judicial services. It developed from concerns in "situations where decisions by departments directly affecting individuals were taken without any statutory requirement of a hearing by a tribunal or at an inquiry". The term ombudsman in its literal sense meant "agent" or "representative".¹

This system of investigation was eventually adopted by the English speaking world through New Zealand. Within the Pacific region, Fiji was the first to set up an Ombudsman office in 1970, followed by Papua New Guinea (PNG) in 1975 and the Solomon Islands in 1978.²

The International Bar Association defines 'Ombudsman' as, "an office established by Constitution or statute, headed by an independent, high-level, public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employers, or who acts on his own motion, and has the power to investigate and recommend corrective action and issue reports"³. The Ombudsman provides assistance in the form of information, mediation or recommendations to the relevant authority.

The Republic of Vanuatu gained Independence in 1980, with a Constitution that includes entrenched individual rights and freedoms, an independent judiciary and a democratically elected government. The Constitution also includes a provision for an Ombudsman. However, even though the idea of an Ombudsman's office was entrenched in its 1980 Constitution⁴, Vanuatu's first Ombudsman was only just appointed in 1994, fourteen years after Independence⁵. Furthermore, the office did not commence operation until after the enactment of the *Ombudsman Act* in 1995. Since then, the Office of the Ombudsman has exposed misconduct, corruption and mismanagement within the Government and public sector, testament of its role as a 'government watchdog'. It is important that the

¹Mareva Betham Annandale 'A Comparison and Contrast of the Role of the Ombudsman in Vanuatu and Samoa: Who, what & how can they investigate?' (1997) 1 *Journal of the South Pacific Law* <http://www.usp.ac.fj/index.php?id=13077> (Accessed 18/11/14)

² Ibid

³ C Ferris, B. Goodman and G. Mayer, *Ombudsman Committee of the International Bar Association- Brief on the Office of the Ombudsman*, (1980) 2

⁴ Above n1

⁵ Edward R. Hill, (2003) 'The Vanuatu Ombudsman' <http://press.anu.edu.au/wp-content/uploads/2011/05/ch0447.pdf> (Accessed 18/11/14)

Ombudsman be seen as a neutral Office, of high integrity and equipped with the expertise and courage to tackle issues which may not be politically popular.⁶

In 1997, the old *Ombudsman Act* was repealed and a new *Ombudsman Act* was debated in Parliament in 1998 and passed into law in January 1999.

The new Act differed from the original Act in several ways:

- i) First, a mediation function was included in an attempt for complaints to be resolved through consensual rather than adversarial approach.
- ii) The second major change was that the public were encouraged to approach the department, body or person that they wished to make a complaint about, before approaching the Ombudsman Office.

Although it is an Independent Body, the concept of a 'government watchdog' is limited to the Ombudsman's jurisdiction provided by statute, such as where the Judiciary and President (of the Republic of Vanuatu) are not subject to the Ombudsman's scope of inquiry⁷. Further, the Ombudsman does not have powers to investigate Private Companies or Agencies that the Government is not a shareholder in. The Ombudsman's impartiality is further challenged by inquiries into the Ombudsman's statutory powers such as the power to directly contract staff.

In August 2004 the '*Ombudsman Act* and *Leadership Code* Review Committee' released a report highlighting the shortfalls of the Act and proposed recommendations for amendments.

This issues paper serves to highlight areas requiring further improvements, in the overall Review of the *Ombudsman Act* [Cap 252]. It also aims to discuss issues faced by the Ombudsman's Office.

⁶ Above n5

⁷ *Constitution of the Republic of Vanuatu*, Article 62

Issue One: Qualifications and Conditions for Employment

Article 61 of the Constitution of Vanuatu provides for the appointment and disqualification of the Ombudsman while Article 65 provides that the Ombudsman is to be independent in the exercise of his functions. Furthermore, while the Constitution provides for the establishment and appointment of the Ombudsman, Part 2 of the *Ombudsman Act* provides for the qualifications and conditions of the employment of the Ombudsman. With regards to the Ombudsman's appointment, this falls under section 3 of the *Ombudsman Act* which states that the President appoints the Ombudsman after consultation with the Prime Minister, leaders of the political parties and the different chairmen of different parties namely; the National Council of Chiefs, local government councils, Public Service Commission and the Judicial Service Commission. Section 8 outlines the termination of the appointment of the Ombudsman.

With regards to the educational qualification that is required of an Ombudsman, the Act states that the Ombudsman must be a person who has an appropriate academic qualification and suitable experience in the public or private sector. In addition, the Ombudsman must also have knowledge, understanding and appreciation of the culture, traditions and values of Ni-Vanuatu and have high integrity and competence.

In comparison, section 4 of PNG's *Organic Law on the Ombudsman Commission* is more specific in that it provides that one of the qualifications that the Ombudsman must have is administrative or legal qualifications and experience. Samoa is even more specific. Two of its criteria that sets it apart from Vanuatu is the Ombudsman must have extensive knowledge or experience in the principles of human rights, relevant domestic and international human rights law along with good governance and public administration.⁸

Further in Vanuatu, the President is not obligated to follow the advice or even to obtain a consensus from the mentioned leaders in the appointment of the Ombudsman. The process provided for by the Constitution is simply a consultation process that takes place before the appointment.⁹

In PNG, its Ombudsman's office differs slightly to that of Vanuatu in that it uses a Commission rather than a single office-holder to exercise the

⁸*Ombudsman (Komesina o Sulufaiga) Act 2013* (Samoa)

⁹*The McDowell Report*, 24 January 2002, 10

constitutional powers.¹⁰ It consists of a Chief Ombudsman and two additional Ombudsmen, appointed by the Head of State, “acting with, and in accordance with, the advice of an Ombudsman Appointments Committee.” This Committee consists of the Prime Minister (Chairman), the Chief Justice, the Leader of the Opposition, the Chairman of the appropriate Parliamentary Committee and the Chairman of the Public Service Commission. The Head of State must act in accordance with the Ombudsman Appointments Committee and not simply use it as part of the consultation process.

In Samoa, it follows a similar procedure to that of Vanuatu. The Ombudsman is an officer of Parliament and is appointed by the Head of State on the recommendation of Parliament. The Ombudsman’s appointment is for the duration of 3 years and he or she can be reappointed. Factors that can lead to the removal of the Ombudsman from office are disability, bankruptcy, neglect of duty or misconduct.¹¹

Questions:

1. Should the term ‘appropriate academic qualification’ be better defined?
2. Should the Act clearly state out that the Ombudsman should be an indigenous ni-Vanuatu as opposed to a foreigner or a naturalized citizen?
3. Should the consultation process in appointing an Ombudsman be redefined so that the consensus of the parties provided under the Act, must be taken into consideration?
4. Should there also be an age limit for any Ombudsman candidate, provided for under the Act?

¹⁰Paclii, *The Ombudsman Commission of Papua New Guinea* <http://www.pacii.org/pg/OC/main.htm> (Accessed 26/01/2015)

¹¹ ‘Roles and functions of Ombudsman and current complaint mechanisms in Pacific Islands’ http://pacificombudsman.org/publications-resources/Roles_and_functions_ombudsman.pdf (Accessed 2/02/2015)

Issue Two: Function of the Ombudsman

In Vanuatu the general functions and powers of the Ombudsman are stipulated in Part 3 of the *Ombudsman Act of 2006*. The Ombudsman also has constitutional mandates provided for in Part 2 under Chapter 9 of the Constitution of Vanuatu. Article 62 (1) of the Constitution states that the Ombudsman has the constitutional obligation to carry out investigations into the conduct of any person or bodies on receiving complaints from any aggrieved person or from a representative or family member, or receiving complaints from request of the Ministers, Members of Parliament and other statutory bodies¹².

Sub Article (2) of Article 62 provides for the jurisdiction of the Ombudsman in carrying out its inquiries. The Ombudsman's jurisdiction is limited to investigating and reporting on the conduct and practices of the government, its agencies and officials and that includes; all public servants, public authorities and ministerial departments. However the Ombudsman is not mandated to investigate the President of the country, the Judicial Service Commission, the Supreme Court and other judicial bodies¹³.

Questions:

5. Should Article 62 (2) of the Constitution be amended to allow the Ombudsman to enquire into the administrative conduct of the President, Judicial Service Commission, the Supreme Court and other judicial bodies?
6. Should the procedures and process be provided for in the *Ombudsman Act*?
7. Should the term 'administrative conduct' also be defined clearly in the Act

In comparison with other regional countries, the *Ombudsman Act* of Samoa clearly provides that the Ombudsman must not inquire on matters

¹²Above n7

¹³ Above n7

before a court or pending judicial proceeding but may do so where there is an unreasonable delay of Court proceedings¹⁴.

In the Solomon Island, the functions of the Ombudsman are provided for in the Constitution and its *Ombudsman (Further Provisions) Act [Cap 88]*. Article 97 (4) of its Constitution provides that the Ombudsman does not have any power to question or to review any decision of the judges, Magistrate or the Courts registrars in regards to their judicial functions¹⁵. These provisions are supported by section 5 (3) of its *Ombudsman (Further Provisions) Act*. The Constitution further provides that the Ombudsman is not allowed to inquire into the Governor General, or personal staff of the Governor, and the Director of Public Prosecution or any person acting under the authority of the Director of Public Prosecution¹⁶.

The current *Ombudsman Act* of Vanuatu provides the Ombudsman the jurisdiction to inquire into conducts of persons, government agencies and private companies such as Union Electrique du Vanuatu Limited (UNELCO) where the government has a beneficial interest in. The Act further extends the Ombudsman's jurisdiction to inquire into 'any defects in any law or administrative practice in any alleged case or suspected discriminatory practises by government agencies'¹⁷. Section 11(1) (d) and (e) of the Act also allows the Ombudsman to inquire into alleged cases or suspected breach of leaders as defined under the *Leadership Code* and Article 67 of the Constitution¹⁸.

The Ombudsman also has the jurisdiction to investigate in alleged cases or suspected discriminatory breaches of companies by leaders and leaders have been defined by the *Leadership Code*. The definitions of leaders include directors of companies or corporate bodies which the government own shares and have interest in that company or body¹⁹. In 1997 the former Ombudsman investigated an alleged breach committed by the Board of Directors of Air Vanuatu (Operations) Limited, and this was taken all the way to court in the case of *Virelala vs Ombudsman [1997]*

¹⁴ Above n8, s35

¹⁵ *Constitution 1978* (Solomon Islands) http://www.paclii.org/sb/legis/consol_act/c1978167/ (Accessed 4/02/2015)

¹⁶ Ibid

¹⁷ *Ombudsman Act [Cap 252]*(Vanuatu)s 11(1)(a)(b)(c) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed 4/02/2015)

¹⁸ Ibid s 11 (1) (d)(e)

¹⁹ *Leadership Code Act [Cap 240]* (Vanuatu) s 5 (i) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed 4/02/2015)

VUSC 35²⁰. On the other hand, the Ombudsman does not have the jurisdiction under the Act and the *Leadership Code* to investigate into alleged breaches or discriminatory cases by leaders of Non-government agencies and private companies which the government is not a shareholder or have any interest in. However all private companies that are incorporated under the *Companies Act [Cap 191]* are under the responsibility of the Vanuatu Financial Service Commission for supervision and regulation. The Commission also looks into any breaches of the Act allege by the companies or its directors. In the *Companies Act*, section 169 states that in regards to the inspection of the company's affair the Minister of Finance may appoint inspectors to investigate the company's affairs and provide reports to the Minister as to whether the business is operating in a fraudulent or unlawful manner²¹. The Act also provides detailed procedures of carrying out investigations, producing reports, evidence and undertakes civil proceedings against the company or entities incorporated under the Act.²² The Minister also has the authorised power conferred under the Act to file winding up petition under section 217 as a consequence of the investigation reported by the appointed inspectors²³.

Questions:

8. Should the Ombudsman increase its scope of investigation to include Non-government bodies, private companies and corporate bodies which the government does not own any shares or beneficial interest in?
9. Or will this duplicate or overlap with the current statutory functions of the authorised inspectors and investigators under the *Companies Act*?

In Australia and New Zealand apart from the Parliamentary Ombudsman, an association of Ombudsmen called the Australian and New Zealand Ombudsman Association (ANZOA) has been established under the

²⁰*Virelala v Ombudsman* [1997] VUSC 35 <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/1997/35.html?stem=&synonyms=&query=judicial%20and%20service%20and%20commission%20and%20ombudsman> (Accessed 5/02/2015)

²¹*Companies Act* [Cap 191] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/ca107/ (Accessed 5/02/2014)

²² *Ibid*

²³ *Ibid*

*Associations incorporations Act 1981 of Victoria*²⁴. The primary role of this Ombudsmen Association is to oversee decisions made within private sector industries to ensure that consumers are not treated unfairly by the act, decisions and recommendations made by the industry bodies²⁵. For instance the industry-based Ombudsman members in Australia include the Energy & water ombudsman in all the Australian States and the Public Transport Ombudsman Victoria²⁶. The New Zealand industry based Ombudsmen include the Banking Ombudsman Scheme, Office of the Electricity and Gas Complaints Commissioner and Insurance & Saving Ombudsman Scheme²⁷.

In New Zealand, the functions of the Ombudsman are contained in five legislations²⁸. Section 13 of the *Ombudsman Act* provides for the Ombudsman to investigate any decisions, recommendations made by any of its government departments and statutory bodies provided in Part 1 and Schedule 1 of its Act²⁹. The Ombudsman also has the jurisdiction to investigate the Crown Law office. The Crown office provides legal advice and representation services to the government in areas of criminal, public and administrative law³⁰. The Act also provides for the protection of the name or the use of the Ombudsman's name. It states that no person may use the name of the Ombudsman with any business or any service, or hold him or herself to be an Ombudsman without prior written consent of the Chief Ombudsman³¹. By way of comparison, in Vanuatu there is an Ombudsman pursuant to the *Ombudsman Act* and a Land Ombudsman established under the *Land Reform (Amendment) Act 2013*. The Land Ombudsman was appointed by the Judicial Service Commission and operates independently³². The core function of the Land Ombudsman

²⁴Australia and New Zealand Ombudsman Association 'The Australia and New Zealand Ombudsman Association (ANZOA) is the peak body for Ombudsman in Australia and New Zealand' <http://www.anzoa.com.au/> (Accessed 5/02/2014)

²⁵ Mai Chen Partner, Chen Palmer New Zealand Public Law Specialists " Does New Zealand's Ombudsmen Legislation need Amending after (almost) 50 years?" <http://www.chenpalmer.com/assets/Uploads/News-PDFs/OMBUDSMEN.pdf> (Accessed 5/02/2015)

²⁶ Above n24

²⁷ Above n25

²⁸These five legislations include: *Ombudsman Act 1975, Official Information Act 1982, Local Government official and Meeting Act 1987, Crimes of Torture Act 1989 and Protected Disclosures Act 2000* <http://www.ombudsman.parliament.nz/about-us/legislation> (Accessed 19/02/2015)

²⁹*Ombudsman Act 1975* (New Zealand)

<http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM431123.html> (Accessed 19/02/2015)

³⁰Crown Law Office Te Tari Tue o te Karauna <http://www.crownlaw.govt.nz/> (Accessed 19/02/2015)

³¹Above n29

³²*Land Reform Act (Amendment) Act 2013* (Vanuatu) http://www.paclii.org/cgi-bin/sinodisp/vu/legis/num_act/lra2013197/lra2013197.html?stem=&synonyms=&query=land%20and%20ombudsman (Accessed 5/02/2015)

under the Act is to investigate into complaints from upset custom land owner or indigenous citizens regarding the process of registering land lease³³.

Questions:

10. Should Vanuatu follow the example of New Zealand law to have a protection clause of the use of the name Ombudsman?
11. Should this be incorporated into the current *Ombudsman Act*?

Practically, the Ombudsman Office uses all its powers under the Act to exercise its functions and push forward its recommendations to the authorised government institutions and bodies. However by forcing unpalatable decisions on politicians, this may lead to lack of political will to implement the Ombudsman's recommendations.

Questions:

12. Apart from the defects in functions of the ombudsman outlined previously what other defects are there?

³³Above n32

Issue Three: Complaints and Proceedings

Division 1 – Procedures, Division 2 – Disclosures, Division 3 – Action after enquiry completed

Discretion to Investigate Complaints

The Ombudsman, under the *Ombudsman Act* has been given the power and discretion to investigate into complaints received by his office from the public. Section 18 of the *Ombudsman Act* caters for discretion to investigate complaints and provides that if a complaint has been lodged with the Ombudsman, the Ombudsman has the authority to agree to enquire or decline to enquire into the matter based on the standards set out under the law.³⁴

From section 18 (1) (a)-(e) of the Act, it is stated that before the Ombudsman can investigate or enquire into any matter, he or she must be satisfied that the complaint is of sufficient interest for him or her to look into.³⁵

Sub-section (2) of section 18 states that if a person has not complained to the government agency about the conduct before lodging a complaint to the Ombudsman, then the Ombudsman may have the power to decline from enquiring into such matter.³⁶

Furthermore, section 19 (a) prohibits the Ombudsman from enquiring into matters that had been previously dealt with by the Ombudsman.³⁷

It is a questionable and arguable matter when it comes to the reasoning of such provisions. The provisions seem wide which may or can allow the Ombudsman to avoid investigations on the basis of being bias or socially, culturally or politically influenced. The provisions in a way can drastically reduce a person's right to relief under the Ombudsman's powers.

Within the Pacific context, section 5 of the *Ombudsman's Act* of Solomon Islands provides the Ombudsman the power to investigate a matter in any case in which a complaint is made alleging that a person or body of persons has suffered injustice in consequence of that action. The Ombudsman can also investigate a matter if invited to do so by any

³⁴ Above n17

³⁵ Above n17

³⁶ Above n17

³⁷ Above n17

Minister or any member of parliament or if the Ombudsman considers it desirable to do so of his own motion.³⁸

Section 18 of the *Ombudsman Act* of Samoa provides discretion to the Ombudsman to investigate any administrative decisions which affects a person in the personal capacity made by any Ministry or organisation, any officer when carrying out a power or function. The Act also provides the discretion to investigate complaints even if the complaint may not on its face be against any administrative decision. Section 19 of the Act provides the discretion to investigate matters that are referred to by the parliamentary committees or the Prime Minister.³⁹

Questions:

13. Should the Ombudsman be given this discretion, given that these provisions are too wide and can be used by the Ombudsman to avoid investigation?
14. Should section 18 of the Act be amended to allow the Ombudsman power to investigate into any matter that is before him/her?
15. Should section 18 (2) be amended to allow enquiry into matters that have already been dealt with by the Ombudsman?
16. Should the public be obliged to inform the person or body his or her complaint is about before approaching the Ombudsman?
17. Would this communication to the person or body the complaint is about, allow (and give time) to that person/body to suppress any relevant information or evidence regarding the matter and coach their witnesses before investigation takes place?

Evidence Issues

Section 22 of the *Ombudsman's Act* of Vanuatu deals with the issues surrounding evidence and how evidence can or may be collected. Section 23 caters for failure to comply with a notice of obtaining evidence and

³⁸ *Ombudsman (Further Provisions) Act 1996* (Solomon Islands)

³⁹ Above n8

section 24, power to enter premises. It became apparent that when dealing with all of the evidence issues under the Act, there were loop holes that were identified which need to be addressed.

Admissible Evidence

Section 22 (7) of the *Ombudsman Act* states that no statement made by, or answer given to a person in the course of any enquiry by the Ombudsman is admissible in evidence against that person in any court proceedings except on the trial of that person for perjury or in proceedings under Part 6 of the *Leadership Code*.⁴⁰ PNG's *Organic Law on the Ombudsman Commission* shares the same view.⁴¹

The complaint must be referred together with relevant supporting documents, which must include, a complaint signed by the complainant, defendant's defense signed by the defendant, a sworn statement from the investigator stating that he or she made an interview with the defendant, a sworn statement from the Ombudsman including a formal direction by the Ombudsman to commence prosecutorial proceedings for offences (s.52 of the *Ombudsman Act*) and other required documents.

This raises the question of how evidence collected through the Ombudsman's investigative process can be made admissible in Court. Currently the Ombudsman investigations are directed towards the production of Public Reports. However, along this process, the Ombudsman may refer cases of investigation to the Public Service Commission, if the action is contrary to the *Public Service Act* or to the Commissioner of Police and the Public prosecutor if the case is of a criminal nature and requires criminal proceedings for disciplinary actions.⁴²

The Solomon Islands *Ombudsman Act* does not have anything to do with admissible evidence except under the privilege of witnesses' clause, section 13. Sub section (2) states that an answer given to the Ombudsman or a statement made by any person to the Ombudsman shall not be admissible in evidence against that person in any civil or criminal proceedings.⁴³ Samoa's *Ombudsman Act* is of the same view.⁴⁴

⁴⁰ Above n17

⁴¹ Above n17 s18 (6)

⁴² Above n17 s31

⁴³ Above n17

⁴⁴ Above n17 s45 (2)(a)

Questions:

18. Should a statement or answer given to a person in the course of any enquiry by the Ombudsman be admissible in evidence against that person in any court proceedings?
19. Should the admissibility of the enquiry of the Ombudsman be limited only on trial for perjury or in proceedings under Part 6 of the *Leadership Code*?
20. Should the issue of admissibility be only addressed under the privilege of witness clause and not elsewhere in the Act?

Objecting to disclosure of evidence

Section 23 and section 49 create ways for the Ombudsman to force a person to disclose information for an investigation. If a person, in good faith, believes the Ombudsman is not entitled to the information, the only way to resolve the issue is for the Ombudsman to prosecute and for the person to defend him or herself.

Section 12 (4) provides the Solomon Islands Ombudsman power to issue a warrant to apprehend any person who wilfully avoids producing or disclosing information and bring such person before him. Sub section (5) (b) allows the Magistrates Court power to order such person to be detained in custody until such time as he can be brought before the Ombudsman.⁴⁵ Section 13 of the Act caters for privilege of witnesses.

Questions:

21. If a person objects to the Ombudsman requiring the disclosure of evidence, should the *Ombudsman Act* allow that person to apply to the Supreme Court for a ruling on whether the Ombudsman is entitled to require the information (and therefore the information must be produced)?

⁴⁵Above n17

Penalties for failure to disclose information

The laws regarding the consequences of failing to disclose information to the Ombudsman overlap and are inconsistent.

Section 23 of the *Ombudsman Act*, states that any person who has been served with a notice under section 22 is liable for a fine (up to VT100.000) if they fail or refuse to comply. Section 23 also enables the Ombudsman to ask the Court to require the person to appear before the Court or to furnish the information.⁴⁶

Section 49 of the Act seems to be overlapping with section 23 in that it provides for any person who has been given a notice under section 22 to attend as a witness or to produce documents before the Ombudsman is guilty of an offence if the person without sufficient excuse fails or neglects to comply (Penalty: VT100.000 or imprisonment for 6 months or both).⁴⁷

Section 30 of the *Organic Law on the Ombudsman Commission* of PNG provides a penalty of K500.00 (VT 20.000 equivalent) or imprisonment for three months to any person who fails to attend or produce documents. Section 31 of the Act holds a person guilty of an offence if the person for any reason refuses to be sworn or give evidence before the commission, penalty of which amounts to K500.00 (VT 20.000) or imprisonment for three months.⁴⁸

The *Ombudsman (Komesina o Sulufaiga) Act 2013* of Samoa has gone a little bit further in distinguishing an individual from a body corporate when it comes to offences. Section 59 of the Act states that a person commits an offence if they fail to attend and provide documents to the Ombudsman after being summoned and are liable to a fine not exceeding 200 penalty units or to imprisonment for a term not exceeding 6 months for an individual and a fine not exceeding 500 penalty units for a body corporate.⁴⁹

Section 60 states that an individual is liable to a fine not exceeding 100 penalty units for refusing to give evidence for any reason and a fine not exceeding 500 penalty units to a body corporate.⁵⁰

⁴⁶ Above n17

⁴⁷ Above n17

⁴⁸ *Organic Law on the Ombudsman Commission 1998* (Papua New Guinea)

⁴⁹ Above n8

⁵⁰ Above n8

Questions:

22. Should section 23 and section 49 offence provisions be merged?
23. Should the potential for a term of imprisonment be retained?
24. Should the VT100.000 be changed (increased or reduced)?

The distinction between evidence which indicates a breach of the *Leadership Code Act* and evidence which does not

The investigation powers in the *Ombudsman Act* govern inquiries under the *Ombudsman Act* and under the *Leadership Code Act*. The provisions create two separate sets of rules. One set of rules is with regards to information or evidence relating to alleged breaches of the *Leadership Code Act*, and a set of more restrictive rules is for other information or evidence. According to a review conducted by the Review Committee of the Ombudsman, the Review Committee found that:

- The two sets of rules are intermingled and are difficult to discern.
- It is much easier for the Ombudsman to obtain information which indicates a breach of the *Leadership Code Act*.
- There was no obvious reason for imposing so many restrictions on the Ombudsman's requests for information that are not related to alleged breaches of the *Leadership Code*.⁵¹

Questions:

25. Should the Act be amended to provide that the Ombudsman be governed by a single set of rules concerning what information may be compelled in the course of an investigation?
26. Should the rules governing Ombudsman's requests for information indicating a breach of the *Leadership Code* apply to all information requested? (that is, disclosure should not depend on whether the information is privileged, confidential or personal, or whether any consent has been obtained to its disclosure).

⁵¹Republic of Vanuatu, Review of the Ombudsman Act and Leadership Code Review Committee, August 2004, 18

Secrecy and disclosure by the Ombudsman

Sections 26 and 27 of the *Ombudsman's Act*, deal with issues surrounding maintaining the secrecy and the disclosure of restricted or prohibited information.

During an inquiry, the Ombudsman is presently not permitted to share evidence with the police who may have an interest in the same information for their own criminal investigation, even though evidence from an Ombudsman inquiry can later be used to prosecute offenders. However, sub section (3) of section 26 states that for the purpose of conducting an enquiry or making a report, the Ombudsman may disclose matters as in his or her opinion ought to be disclosed in order to properly investigate the matter or to establish grounds for his or her conclusions and recommendation.⁵² Section 20 of the *Organic Law on the Ombudsman Commission of Papua New Guinea*,⁵³ sections 44 and 55 of the Samoan law⁵⁴ and sections 4 and 11 of the Solomon Islands law share the same view with that of Vanuatu.⁵⁵

Questions:

27. Should the Ombudsman be permitted to disclose to police information obtained in the course of an inquiry relating to possible criminal offences (apart from breaches of the *Leadership Code Act*)?
28. Should there be a clear process spelled out for this in order to maintain the independency of the Ombudsman?

Public Prosecution and Police Commissioner on Ombudsman Report or Investigation

The Constitution of the Republic of Vanuatu under Article 63 deals with the findings and reports of the Ombudsman and sub Article (4) caters for legal proceedings with regard to matters investigated by the Ombudsman.⁵⁶ However, the Constitution does not expressly state the functions or procedures of involvement of the Public Prosecutor and Police Commissioner on Ombudsman's report or investigation.

⁵² Above n17

⁵³ Above n48

⁵⁴ Above n8

⁵⁵ Above n38

⁵⁶ Above n7

Section 31 of the *Ombudsman Act* caters for power to refer criminal cases to the Police Commissioner and the Public Prosecutor for prosecution.⁵⁷ Although the Act provides the Police and the Prosecution power to prosecute criminal cases, it fails to clearly provide the procedures as to how referral of matters are investigated and investigation of such cases may be carried out in order to avoid duplication. The current practice of dealing with criminal cases is a lengthy and time consuming process and often results in a duplication of work amongst the Ombudsman, Police and the Public Prosecutor.

In the current practice, the Ombudsman may forward its investigation to the Public Prosecution to prosecute if the case is of sufficient evidence to go before the Court. The Prosecution in some instances may refer the case back to the police to investigate the matter again thoroughly in order to establish the actus rea and mens rea before submitting it back to the Public Prosecution for prosecution.

In some cases where the Public Prosecutor decided not to prosecute on the Ombudsman's report, the reasons for not doing so are to be published in the National Gazette. However, there have been instances of Prosecution or, indeed, published reasons not to prosecute. This brings into question the utility of the current enforcement regime. Section 51 looks at the Contempt of the Ombudsman where people failed or refused to do what the Ombudsman wants them to do.⁵⁸

Questions:

29. Should the law clearly spell out the procedure or process of referring cases to the Police and or the Public Prosecutor?
30. Should the Commissioner of the Police investigate why the Public Prosecutors don't want to prosecute and give reasons?
31. Should the Public Prosecutors delay in prosecuting a case required by the Ombudsman be investigated by the Police Commissioner?
32. Should the reasons of why cases not being prosecuted by the public Prosecutor are disclosed?

⁵⁷ Above n17

⁵⁸ Above n17

33. If no reasonable ground of delay is found then, can that be Contempt to the Ombudsman's Investigation?
34. Should the Ombudsman put a time limit on the Police Commissioner and the Public Prosecutors to investigate and prosecute the Ombudsman's report, taking into consideration the *Limitation Act* to deal with a specific type of offence?

Ombudsman and Power to Prosecute

The Ombudsman under the *Ombudsman Act*, has been given the power to conduct investigation into corruption cases within government agencies and the power to refer cases (criminal cases) to the police or the Public Prosecutor for prosecution. However the Act does not provide specific power or powers to the Ombudsman to prosecute its own cases that need to go before the Courts.

On that note, the Constitution of Vanuatu under Article 55 states that the function of prosecution shall vest in the Public Prosecutor, who shall be appointed by the President of the Republic on the advice of the Judicial Service Commission.⁵⁹The Constitution has only given the Public Prosecutor and none other the power to prosecute.

Given the problems with regards to the unclear process of investigating matters and the process of referring such matters, and in some cases failure to prosecute matters, it raises the questions of whether or not the cases of corruption can be prosecuted by the Ombudsman.

Section 33 (d) of the Samoan *Ombudsman Act* of 2013 deals with the functions of the Ombudsman with regard to Human Rights. Sub-section (d) of section 33 provides the power to involve or participate in judicial proceedings as a friend of the Court or as a party.⁶⁰

Questions:

35. Should the Ombudsman/Ombudsman's office be allowed the power to prosecute its own cases in order to avoid duplication of task between the police, the public prosecution and the Ombudsman in the course of fighting corruption?

⁵⁹ Above n7

⁶⁰ Above n8

36. Should the Constitution and the *Public Prosecutors Act* be amended to cater for the Ombudsman to prosecute cases of corruption?
37. Would it be possible for an arrangement to be made where the Public Prosecutor can assign one of his/her prosecutor to help out with the Ombudsman's cases?

Issue Four: Immunities

Section 41 of the *Ombudsman Act* provides that when staffs of the Ombudsman carry out their work, they have immunity unless they have acted in bad faith. However, the protection of this section does not cover the negligence of the Ombudsman, his or her officers and employees and is therefore contrary to the conventional notion of vicarious liability of employers.⁶¹

Furthermore, while this section provides for the immunity for the Ombudsman's staff, it makes no mention of any protection for witnesses. In cases where a government employee wishes to report their supervisor for any misconduct that falls under the Ombudsman's powers to investigate, the employee is often hesitant to do so for fear of any reprisal for their actions. In the 2004 report, the Review Committee recommended that immunity section should be extended to also cover contractors retained by the Ombudsman but it does not go so far as to also cover witnesses.

In PNG, its *Organic Law on the Duties and Responsibilities of Leadership* that was created to implement its *Leadership Code* as provided in its Constitution, not only provides immunities to its staff but also to witnesses. Witnesses and persons appearing before the Ombudsman Commission, other authority or a tribunal have the same privileges and immunities as witnesses and persons appearing before the National Court and are also entitled to conduct money, expenses and allowances at the same rates and conditions as witnesses appearing in civil actions before the National Court.⁶² Conversely, while immunity is provided for the Ombudsman Commission member and staffs, actions that they carry out must be done or made bona fide and without negligence or they will be held liable.⁶³

In Australia, the *Public Interest Disclosure Act* came into effect on 15 January 2014. This Act was created as a scheme to encourage public officials to report suspected wrongdoing in the Australian public sector. Under this Act, all Australian Government agencies, Commonwealth companies and public authorities have responsibilities. The Commonwealth Ombudsman is responsible for promoting awareness and

⁶¹Above n17

⁶²*Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea)
<http://www.ombudsman.gov.pg/legislation/organic-law-on-the-duties-responsibilities-of-leadership?showall=&start=6> (Accessed 5/2/2015)

⁶³Ibid

understanding of this Act and also its monitoring and reporting on its operation to Parliament.⁶⁴ With regards to protection, a person who makes a disclosure will be kept confidential as far as practicable. A person's identifying information can only be disclosed with the person's consent unless it is authorized by the Act itself. A person who makes a disclosure will also have immunity from civil, criminal and administrative liability (including disciplinary action). The Act also makes it a criminal offence to take or threaten to take a reprisal in terms of discriminatory treatment, termination of employment or injury against a person because of their disclosure. However this protection and immunity only applies where the public official complies with the Act, as in if they make a disclosure to a person who is not authorized to receive it, then their disclosure will not be covered.⁶⁵

Questions:

38. Should the *Ombudsman Act* include and clearly state that the Immunity section does not apply to negligent actions that were carried out by the Ombudsman's staff in the course of their work?
39. Should the *Ombudsman Act* also follow PNG and Australia's lead in providing protection for its witnesses or people who want to make a disclosure?

⁶⁴ Commonwealth Ombudsman 'Public Interest Disclosure Scheme'
<http://www.ombudsman.gov.au/pages/pid/> (Accessed 27/01/2015)

⁶⁵ Commonwealth Ombudsman 'The Public Interest Disclosure Act 2013- what's it all about?'
http://www.ombudsman.gov.au/docs/fact-sheets/Ombudsman_PID_Fact_SheetA.pdf (Accessed 27/01/2015)

Issue Five: Officers and Other Staff of the Ombudsman

An important aspect as an Ombudsman would be with regards to its independence. The Ombudsman's office must be independent in all its functions and an Ombudsman having the sole power to appoint and remove staff is one provision that would help increase an Ombudsman's independence.⁶⁶

Under the current *Ombudsman Act*, the Ombudsman's staffs are appointed by the Public Service Commission. This means that they are appointed, disciplined, promoted and paid according to the provision of the *Public Service Act*. The process that is taken to appoint a new staff is often long and has resulted in the Ombudsman's office budget being decreased due to lack of staff. This also somewhat affects the Ombudsman's staff's ability to diligently pursue their duties, especially if it is a case involving the Public Service Commission, for fear of biasness, retribution or diminished career aspects.⁶⁷ In addition, they can be transferred in and out of the Ombudsman office for employment with other branches of the Public Service.⁶⁸ The first *Ombudsman Act* of Vanuatu in 1995 provided for the independence of the Ombudsman to hire his or her own staff but this was later amended in 1998.

In PNG, the Ombudsman Commission appoints its own officers and it does this after consultation with the National Public Service.⁶⁹ In New Zealand, the Chief Ombudsman has the power to appoint his or her own staff as well.⁷⁰

Hong Kong, on the establishment of its Ombudsman's office in 1989, had staffs that comprised mainly of civil servants that were taken or borrowed from other Government departments. However, this arrangement was seen as a compromise to its independence and as a result, the Hong Kong *Ombudsman Ordinance*⁷¹ was amended to safeguard the integrity and independence of the office. The Ombudsman was given full power over its administrative, financial and operational activities and this included the power to recruit its own staff on terms and conditions determined by him.

⁶⁶ Dean M Gottehrer 'Fundamental Elements of An Effective Ombudsman Institution- Plenary Session II: Developing the Working Methods and Tools of the Ombudsman'
http://www.theioi.org/downloads/934ch/Stockholm%20Conference_15.%20Plenary%20Session%20II_Dear%20Gottehrer.pdf (Accessed 5/02/2015)

⁶⁷ Above n9, 20

⁶⁸ Above n9, 20

⁶⁹ Above n48

⁷⁰ Commonwealth Ombudsman 'Australasia and Pacific Ombudsman Region Information Manual' (2009) 81

⁷¹ Ibid

More importantly, the Ordinance stated that the Ombudsman shall not be regarded as a servant or agent of the Government.⁷²

Questions:

40. Should the Ombudsman be given back the power to appoint his or her own staff?
41. Should there be measures set out on this power so as to avoid biasness?

⁷² Above n70

Issue Six: National Human Rights Committee

Human Rights Commissions are National Human Rights Institutions (NHRI) which may be established by legislation or Constitution as an independent statutory institution whom promote and protect human rights in a country⁷³. A question posed by the Asia Pacific Forum of National Human rights Institution team on a scoping mission in 2011 was whether or not Vanuatu needed a National Human Rights Institution. The participants in the meeting expressly stressed the need for establishing a National Human Rights Institution and called for the Government to continually support for public consultation for a National Human Rights Institution for Vanuatu⁷⁴. At the end of the scoping mission, the two options put forward with regards to a National Human Rights Institution for Vanuatu were : (1) Whether Vanuatu should create a separate and independent institution headed by a Human rights commission or; (2) whether there should be an extension of an existing statutory body to include a human rights mandate⁷⁵.

The Constitution is the supreme law of Vanuatu and Part I of the law sets out the legal framework that deals with human rights. These fundamental rights and freedoms are for everyone despite their race, place of origin, religious or traditional beliefs, political opinion, language and sex. These are expressly provided for under Article 5 (1) (a-k) of the Constitution⁷⁶. Sub Article (2) of Article 5 further outlines that these fundamental rights of an individual may be protected under the law and Article (6) provides for the enforcement of these fundamental human rights. All individuals are entitled to apply to the Supreme Court to seek for a possible legal remedy for the infringement of a fundamental right.

In regards to the International Conventions and Treaties, Vanuatu has signed and ratified four of the nine core Human Right conventions namely; Convention on Elimination and Discrimination Against all Women (CEDAW), International Convention on Civil and Political Rights (ICCPR), Convention on the Rights of a Child (CRC), and Convention of the Rights of Person with Disabilities and Optional Protocol (CRPD)⁷⁷. In May 2009, Vanuatu's Universal Periodic Review team presented the country's

⁷³ Asia Pacific Forum Advancing Human Rights in our Region 'Republic of Vanuatu scoping mission on a National Human Rights Institution' 19-23 September 2011.

⁷⁴ Ibid

⁷⁵ Ibid.

⁷⁶ Above n7

⁷⁷ Human Rights Council- Universal Periodic Review

<http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights12May2009AM.aspx> (Accessed 4/01/2015)

progress in regards to the implementation of these international Human Rights laws before the Human Rights Members in New York⁷⁸. Some of the human rights issues that were raised included the serious problem with detention centers, equal rights of women, men and young children and increased social protection.

Although, it is not expressly provided for as one of the functions of the Ombudsman under the *Ombudsman Act* and there are no specific procedures for human rights matters under the Act, human rights complaints are considered as normal traditional complaints of maladministration, abuse of powers and language. In the absence of a national legislation or regulation to establish such a statutory body, the office of the Ombudsman is an existing institution which indirectly deals with breaches of human rights issues alleged by government institutions and agencies.

Questions:

42. Is it necessary for Vanuatu to have a Human Rights Commission?
43. Should the office of the Ombudsman be the statutory institution to cater for and oversee the Human Rights Commission?
44. Should it be legally formalized under the *Ombudsman Act*?

Currently the Ombudsman is undertaking three main responsibilities which, includes investigating complaints alleged by government institutions and agencies. The complaint against the government bodies and agencies are complaints against leaders for abusing their powers, maladministration and language complaints.

Questions:

45. Should these Ombudsman's' responsibilities and functions be extended to include breaches of human rights issues by government departments, statutory bodies and agencies?

⁷⁸ Above n77

46. Should the *Ombudsman Act* [Cap 252] provide specific procedures with regards to dealing with these issues?
47. Should the Act also further promote and protect human rights?

There is no legislation which provides specific and detailed procedures for dealing with human rights matters in the country.

In the region, Samoa is an example of a hybrid National Human Right Institution in the Pacific that has combined with the Ombudsman Office. In June 2013, Samoa amended its *Ombudsman Act* to allow for the establishment of a National Human Rights Commission as part of the Office of the Ombudsman⁷⁹. In carrying out its traditional functions of maladministration and abuse of powers, the Ombudsman has the additional role of promoting and protecting human rights in Samoa. According to Samoa's current *Ombudsman Act* the Ombudsman is the chairman of the Human Rights Commission and has the responsibility under section 33 of the Act to inquire and report on alleged violation of human rights. The Ombudsman may also participate in judicial proceedings in regarding to human rights issues⁸⁰.

Questions:

48. Should Vanuatu follow Samoa's approach in establishing its own Human Rights Commission within the Office of the Ombudsman?
49. Should the government of the day take into account increasing the capacity of the Ombudsman Office to cater for this change?
50. Should it be expressly provided for under the *Ombudsman Act* for the Ombudsman to carry out judicial proceeding in human rights cases as in Samoa?

Australia, New Zealand, Fiji have established their own Human Rights Commission. PNG had presented its 2007 Final Option paper on the

⁷⁹Above n8

⁸⁰Above n8

establishment of their Human Rights Commission before the United Nation General Assembly in May 2011⁸¹. However its draft legislation bill for establishing the National Human Rights Institution of PNG is still to be debated before their parliament⁸². The Chief Ombudsman of PNG supports the establishment of PNG's National Human Rights Institution and has assured that the Ombudsman Commission will work together with the law enforcement bodies to promote and protect human rights⁸³.

In Fiji, Article 5 of its former Constitution provided for a Human Right Commission to be established under the *Human Rights Decree 2009*⁸⁴. The Commission will continue to be recognized as the Human Rights and Anti-Discrimination Commission. The procedures of carrying out investigation and after investigation in regards to human rights complaints received by the Commission are expressly provided under the *Human Rights Decree*⁸⁵. The Commission is also mandated under the *Decree* to arrange a Conciliation conference between the parties and to use the most appropriate methods to settle the matter. Where the matter has not reached settlement between the parties, or when the alleged party fails its obligation under the terms of settlement, the presiding commissioner may advise the complainant the legal rights to proceed on the matter before a Court of law. However the presiding Commissioner may also appear before the Fiji's High Court or Court of Appeal in relation to human rights and discriminatory cases⁸⁶.

Questions:

51. Should Vanuatu's laws and regulations of establishing the National Human Rights commission follow the Fiji approach but be redefined to suit the country's environment and resources?

⁸¹United Nations General Assembly 'National Report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1 Papua New Guinea' (9 May 2011) http://lib.ohchr.org/HRBodies/UPR/Documents/session11/PG/A_HRC_WG.6_11_PNG_1_E.pdf (Accessed 5/02/2015)

⁸² Ibid

⁸³Asia Pacific Forum 'PNG set to establish Human Rights Commission' (17 December 2007) <http://www.asiapacificforum.net/news/png-set-to-establish-human-rights-commission.html> (Accessed 5/02/2015)

⁸⁴Constitution (Fiji) <http://www.pacii.org/fj/Fiji-Constitution-English-2013.pdf> (Accessed 6/02/2015)

⁸⁵Human Rights Decree 2009(Fiji)http://www.pacii.org/fj/promu/promu_dec/hrcd2009280/(Accessed 6/02/2015)

⁸⁶ Ibid

Currently, the Ombudsman Office of Vanuatu is under-staffed and has an insufficient budget to undertake this new mandate for human rights.

Questions:

52. Should Vanuatu establish a separate institution of National Human Rights?
53. What government ministry is appropriate to govern such an institution?
54. Should it be established as a statutory body?
55. By which legislation should it be governed under?
56. And should this National Human Rights Institution investigate breaches of human violation alleged by both Government and Non-Government institutions and agencies?

Other Laws

The *Ombudsman's Act* is the principal Act established by the Constitution of Vanuatu specifically to expose misconduct, corruption and mismanagement within the government and public sector in order to maintain transparency and accountability. The Act establishes an Ombudsman to officially head by way of independency, the office of the Ombudsman in the country.

Whilst considering the notion of reviewing this Act, it raised the question of whether or not it would be necessary and appropriate to take into consideration along with this review a number of Acts that tie in with this principal Act.

The Ombudsman has the power under the Act to investigate complaints against public officials and offices as well as to an extent, private companies.⁸⁷ Even though the Act does not specifically define private companies, the current practice that is carried out by the Ombudsman's office is it can investigate companies where the government has an interest. The question whether or not the Ombudsman can or may investigate into such private companies and private companies as a whole depends entirely on how the *Companies Act* of Vanuatu and the *Ombudsman's Act* collaborate or agree.

Furthermore the Ombudsman also has the power to refer matters of interest (criminal matters) to the Police Commissioner and the Public Prosecutor for prosecution.⁸⁸ Processes and procedures of which are not clear, raises issues such as time lapse due to lengthy process and so forth. The question to answer is whether or not the three legislations (*Police Act*, the *Public Prosecutor Act* and the *Ombudsman Act*) agree with each other or not and if not, then whether or not they should work collaboratively in the future.

The *Leadership Code* and the *Representation of Peoples Act* of Vanuatu both deal with a whole lot of issues surrounding leaders and how leaders are politically elected in the country. The *Ombudsman Act* as a principal Act caters for how to deal with mostly the conducts of leaders and other relevant issues. And the question then is whether or not these three legislations agree with each other.

The Constitution under Article 61 to 65 caters for the appointment of the Ombudsman, his or her enquiries and how to carry out his or her enquiries, the findings and reports of the Ombudsman as well as the independency of the office of the Ombudsman.⁸⁹ Whilst considering

⁸⁷ Above n17

⁸⁸ Above n17

⁸⁹ Above n7

reviewing the *Ombudsman's Act*, obviously the Constitution of the Republic of Vanuatu should also be carefully taken into consideration.

Questions:

57. Would it be appropriate to also review the other laws and their amendments mentioned to allow for collaboration amongst those with the principal law (*Ombudsman Act*)?