



OMBUDSMAN AND LEADERSHIP CODE ACT
LEGISLATIVE REVIEW NO.
02/16

All rights reserved.

This publication may be reproduced, as a whole or in part, provided that acknowledgement of the source is made. Notification of such would be appreciated.

October 2016

Authors: Bertha Pakoasongi, Nadya Robert, Gracelyn Tasso and Powrie Vire

Editors: Bertha Pakoasongi, Nadya Robert, Gracelyn Tasso, Sandy Kalo and Powrie Vire

Design and layout: Powrie Vire and Nadya Robert

Printing: Colorite Printers

For further information and request for copies, contact:

Vanuatu Law Commission

Top Floor, Drug Store

PO Box 3380, Port Vila, Vanuatu

Tel:+678 33 620

Email: lawcommission@vanuatu.gov.vu

The Vanuatu Law Commission is grateful to AusAID for their financial support of this review.

ACKNOWLEDGEMENT

This report would not have been possible without the people who gave their time, freely, to participate in this review. We would like to thank the communities and professionals who contributed their valuable thoughts and experiences.

Key stakeholders in Port Vila and Luganville:

The staff in the government administrations, municipalities, non-government organizations, Constitutional bodies and statutory bodies, as listed in Appendix 1

Others:

The staff in the provincial administrations, non-government organizations and government departments in the provinces as listed in Appendix 1. A special thanks to Miranda Forsyth for her contribution and help in also editing this report

The Ombudsman Team:

Kalkot Mataskelekele (Ombudsman), Jerry Boe (Principle Legal Officer)
Velma Karabani (Director, Compliance and Investigation), Alan Malgos (Director, Leadership Code) and all the staff of the Ombudsman office

Vanuatu Law Commission Team:

Bertha Pakoasongi (Secretary), Lessy Joel (Finance & Administrative Assistant)
Powrie Vire (Senior Legal Researcher), Nadya Robert (Senior Legal Researcher) Gracelyn Tasso (Legal Researcher) and Sandy Kalo (Legal Researcher)

BACKGROUND OF THE VANUATU LAW COMMISSION OFFICE

Vanuatu was formerly colonized by the French and British and gained its independence in July 1980.

Upon independence, the Constitution of the Republic of Vanuatu became the supreme law of the land. Other Acts and legislations were also created by the Vanuatu Parliament. Under the Constitution of Vanuatu, all British and French laws including the joint regulations in existence at the time of Independence remained as the national laws of Vanuatu until they were either repealed or amended by the Vanuatu Parliament.¹ Customary law is also part of Vanuatu's legal system as it is recognized by Article 93 of the Constitution.²

At the time these laws were adopted in Vanuatu, a number of them were already antiquated in their original jurisdiction and have been amended and or repealed in their original jurisdictions. For instance currently in Vanuatu, the *Adoption Act 1958*³ which was adopted from the British was repealed in 1976 in England and was replaced with the *Adoption Act 1976 (U.K)*. In 2005 this same Act was repealed and replaced by the *Adoption and Children Act 2002 (U.K)*.⁴

These laws are not applicable in Vanuatu due to the cut off dates in 1976. Furthermore due to limited resources and competing priorities, Vanuatu has not been able to review and reform all these pieces of legislation.⁵

The *Law Commission Act* was enacted in 1980 creating the office of the Law Commission and that of its Secretariat but the office was only formally established in 2009. Prior to this, law reform in Vanuatu was achieved through parliamentary inquiries, ad hoc commissions and various government steering committees.

The *Law Commission Act* of 1980 empowers the office of the VLC to study and keep under review the laws of Vanuatu with a view to recommending reforms and in particular:

- The removal of anachronisms and anomalies;

¹ Alatoi Ishmael Kalsakau, 'The Birth and Rebirth of Law Reform Agencies: The Establishment of Vanuatu's Law Reform Commission,' 11 September 2008,

[http://www.lawcommission.gov.vu/images/pdf/AG's_speech_addressing_the_need_for_a_VLC\(Kalsakau\).pdf](http://www.lawcommission.gov.vu/images/pdf/AG's_speech_addressing_the_need_for_a_VLC(Kalsakau).pdf) (Accessed: 8 August 2016)

² Above n1

³ Adoption Act 1958 (UK) http://www.paclii.org/vu/legis/vu-uk_act/aa1958137/ (Accessed: 8 August 2016)

⁴ <http://www.courtroomadvice.co.uk/adoption-children-act-2002-overview.html> (Accessed: 8 August 2016)

⁵ Above n1

- The reflection in the law of the distinctive concepts of custom, the common and civil law legal systems and the reconciliation where appropriate of differences in those concepts; and
- The development of new approaches and new concepts of the law in keeping with and responsive to the changing needs of Vanuatu Society, of groups within that society and of individual members of that society.

In 2011, the first Secretary to the Commission was appointed and since then the VLC office has gradually grown to a total of six (6) staff. In 2013, a new Commission was appointed and served as members of the VLC for a period of three (3) years as required by the Act.

The *Law Commission Act 1980* was reviewed in 2012 and is currently undergoing another review.

The VLC welcomes and assists individuals, agencies and departments to submit requests for law reform by way of Terms of Reference. From there, an Issues Paper is produced which sets out issues that were identified in the Act by the stake holders and research carried out by the VLC staff. A consultation period then follows where the VLC team conducts consultations on relevant stake holders and the public. Finally a report is produced from all the research and consultation containing recommendations to assist the requesting department or individual to write up their policy paper for reform of the relevant Act.

To date, the VLC has completed ten (10) reviews and produced final reports for each review including the *Ombudsman's Act* and the *Leadership Code* which are currently in the handing over stage.

The reports produced by the VLC and other information about the VLC can be accessed from the Law Commission website: <http://www.lawcommission.gov.vu/>

FOREWORD

The need for reform in Vanuatu was one of the driving factors for the establishment of the Vanuatu Law Commission, as much of the laws had remained relatively unchanged from preindependence and post-independence. Vanuatu has come a long way since independence, and with all developments, arise many challenges. Corruption in public offices has been one of these challenges. The review of the Ombudsman and Leadership Code Act is to provide more detailed recommendations to provisions within the Acts to be able to better monitor, regulate and manage corrupt practices as well as advancing the fight against corrupt practices in Vanuatu.

In 2014 the Vanuatu Law Commission received a request from the Ombudsman's office to review the *Ombudsman Act* together with the *Leadership Code Act*. The reasons provided in the request were that both the legislations were deemed as unsatisfactory and outdated.

The Vanuatu Law Commission considered and approved the review of both Acts and the office of the Secretary began the task of preparing for the review. The office prepared an Issues or Discussion Paper on the topic and started its first phase of the review by carrying out consultations in the outer provinces of Vanuatu.

The second phase of the review was conducted in Port Vila after the return of the VLC team from the provinces. The team had sent out invitations to stakeholders to attend a workshop in November of 2015 where different considerations were presented to the stakeholders to invoke thought when making their submissions on their views of what needed to be changed in the legislations.

It is with great pleasure that I would like to present this report. This report contains the findings and recommendations on areas that needed reform.

I would like to take this opportunity to thank the Ministry of Justice and Community Services, Stretem Rod Blong Jastis (AusAid) project, the Government of Vanuatu, stakeholders and people out in the communities for their contributions towards this review. For without their support this review would not have been possible.

BERTHA PAKOASONGI SECRETARY TO THE VANUATU LAW COMMISSION

TABLE OF CONTENT

i) Acknowledgements..... 3

ii) Background of the Vanuatu Law Commission Office..... 4

iii) Foreword..... 6

iv) Table of Content..... 8

INTRODUCTION..... 10

TERMS OF REFERENCE 11

BACKGROUND OF THE REVIEW..... 12

METHODOLOGY..... 14

Coverage.....

Method.....

Limitation & challenges

EXECUTIVE SUMMARY..... 17

TERMS AND ACCRONYMS..... 21

PART ONE: OMBUDSMAN ACT

PROPER QUALIFICATIONS AND CONDITIONS 24

Appointment of an Ombudsman.....

Academic Qualification of an Ombudsman.....

Age Limit of an Ombudsman.....

Personal Qualities of an Ombudsman.....

Termination of an Ombudsman.....

FUNCTIONS AND POWERS OF THE OMBUDSMAN 44

Scope of Functions and Powers of the Ombudsman - Conducts of the President,
the Judicial Bodies, the Supreme Court and other Judicial bodies.....

Ombudsman Investigation and Private Companies.....	
The Protection of the Name “OMBUDSMAN”	
COMPLAINTS AND PROCEEDINGS	55
Discretion to Investigate Complaints.....	
The Issue of Evidence – Admissible Evidence.....	The
Issue of Evidence – Penalties for Failure to Disclose Information.....	
Secrecy and Disclosure by the Ombudsman.....	
Ombudsman and the Power to Prosecute.....	
IMMUNITIES – WHISTLE BLOWER AND WITNESS PROTECTION	73
Whistle Blower Protection.....	
Witness Protection.....	
OFFICERS AND STAFF OF THE OMBUDSMAN	82
NATIONAL HUMAN RIGHTS	88
PART TWO: LEADERSHIP CODE ACT	
SCOPE OF LEADERS	94
DUTIES AND BREACHES OF THE LEADERSHIP CODE	108
Breaches of the Code.....	
Tribunals.....	
ANNUAL RETURNS	117
INVESTIGATION AND PROSECUTION OF LEADERS	125
THE SEVERITY OF THE PUNISHMENT OF LEADERS	133
Hardship and Person other than the Leaders.....	
Ministers Discretion to make Regulations.....	
Punishment of Leaders.....	
Presidential Pardons.....	
OTHER LAWS	153

LIST OF RECOMMENDATIONS	155
For the Ombudsman Act.....	
For the Leadership Code Act.....	

LIST OF APPENDIXS.....	167
The MacDowell Report.....	
The Independent Review Report 2002.....	
The Review Committee Report of the Ombudsman & Leadership Code Act 2004.....	Annual
Return Form.....	
Six Essential Criteria for an Independent Ombudsman.....	
Consultation List.....	

BIBLIOGRAPHY.....	345
--------------------------	------------

INTRODUCTION

This Report examines issues relating to the *Leadership Code Act* and the *Ombudsman Act*, and makes recommendations for reforms. The main issues considered in this report are the overall procedures of complaints and proceedings and investigations within the Ombudsman’s office and the investigation and prosecution of leaders.

The report also looked into the qualification and conditions for employment of an Ombudsman, the Ombudsman’s functions and the different powers to carry out those functions. It also covers the issue of immunities with specific reference to witnesses, officers and other staff of the Ombudsman, budgetary issues, as well as the issue of whether the National Human Rights Committee should fall within the scope of the Ombudsman.

The report also examines other issues: the definition and duties of leaders, the different kinds of breaches of the Act, the idea of categorizing the different breaches and the establishment and use of tribunals under the Code, the responsibility of submitting annual returns and finally the punishment of leaders.

The Commission had carried out research and consultations on the issues highlighted above and after careful considerations, provide its views and recommendations for possible reforms to the *Ombudsman Act* and the *Leadership Code Act*. The issues under the *Ombudsman Act* are

discussed in the first part of this report followed by that of the *Leadership Code Act* in the second part.

TERMS OF REFERENCE

On the 10th of September 2014, the VLC office received a terms of reference from the Ombudsman's office. Pursuant to section 8 of the *Law Commission Act* [Cap 115] of 1980, the Ombudsman has elected to make this request for the review of the *Ombudsman Act* No. 27 of 1998 [Cap 252] and the *Leadership Code Act* No. 2 of 1998 [Cap 240].

The Purpose of the Review:

- The Vanuatu Law Commission to review the *Ombudsman Act* and the *Leadership Code Act*, and other related laws but not limited to the Constitution Article 62 (2).
- The two legislations were unsatisfactory and outdated.

Reason for Review:

The role of the Ombudsman is to strengthen and entrench good governance so that Government and the State and all its institutions may achieve their purpose in serving the expected social, economic and life needs of the people of Vanuatu. The purpose of the proposed legislative reform is to strengthen the operation of the Office of the Ombudsman so that the office can perform its functions proactively in the interest of good governance.

Considerations:

The Commission in undertaking this review is to consider in particular whether or not the law and practice:

- Can accept new institutions such as the Leadership Tribunal;
- Could allow the Ombudsman the power to hire his or her own officers;
- Could allow the Ombudsman the power to collect Annual Returns;
- Can accept the Ombudsman and its officers engaging in Prosecutorial functions;
- Can accept evidence collected by the Ombudsman during investigations as admissible evidence in a Court, or does the Ombudsman and officers need to adopt more formal procedures of evidence and statement taking from witnesses and; □ Other issues.

The Vanuatu Law Commission has taken into considerations the issues at hand and has accepted to carry out a review on the *Ombudsman and Leadership Code Act* of the Republic of Vanuatu.

BACKGROUND OF THIS REVIEW

The position of Ombudsman was provided for in Vanuatu's Constitution at independence. However, Vanuatu's first Ombudsman was only just appointed in 1994, fourteen years after Independence. The office did not commence operation until after the enactment of the *Ombudsman Act* in 1995.

The *Leadership Code Act* [Cap 240] was introduced after the enactment of the *Ombudsman Act* 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.⁶

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'.⁷ Due to the threats issued to leaders by the Ombudsman at that time, in 1998 the leaders decided to revisit the functions of the Ombudsman and called for changes to be made in

⁶ Part 1 Preliminary; Purpose, Leadership Code Act [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131 (Accessed: 10/05/16)

⁷ Edward R. Hill, (2003) 'The Vanuatu Ombudsman'

<http://press.anu.edu.au/wpcontent/uploads/2011/05/ch0447.pdf> (Accessed: 10/05/16)⁸

The MacDowell Report

the legislation governing the office of the Ombudsman. The changes in the laws (*Ombudsman and Leadership Code Act*) were debated in Parliament in 1998 and passed into laws in January 1999.

The changes made in 1998 removed the power to collect annual returns from the Ombudsman and placed it with the clerk of Parliament. Also a mediation function was included in an attempt for complaints to be resolved through consensual rather than adversarial approach. Another 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.

In 2001 the incumbent Ombudsman felt that more changes were required to the Act and called for a review to be conducted. The result was a report published in 2002 “the MacDowell report”. This report was issued to propose solutions to those problems such as that of an unstable political system, lack of independence, a lack of public awareness of the role of the Ombudsman and budgetary constraints.⁸

The recommendations put forward by the MacDowell report were not acted upon, although the reasons for this are not recorded. In June of 2002, another report was issued. This independent review of the office of the Ombudsman reflected on the MacDowell report and provided further possible recommendations for reform.⁸ However, this report also did result in any changes to be made in the laws governing the Ombudsman.

In August 2004 the ‘Ombudsman and Leadership Code Review Committee’ released another report highlighting the shortfalls of the Acts and proposed recommendations for amendments.⁹ The report again did not result in any changes to be made in either of the two (2) laws.

In 2014 the Law Commission office received another request from the Ombudsman’s office to conduct another review of the legislation governing the Ombudsman. The Law Commission approved the request and issued an issues paper based on the request in 2015. Later in 2015 the Commission carried out consultations and its own research into the issues that were highlighted. The Commission then came up with this report to highlight areas requiring further improvements, and proposed possible amendments to be made to the Acts that are governed by the Ombudsman.

⁸ K.W. Wiltshire, ‘Independent Review of the Office of the Ombudsman’, (2002)

⁹ Republic of Vanuatu, ‘Report of the Ombudsman Act and Leadership Code Review Committee’, (August 2004)

METHODOLOGY

An Issues Paper was distributed in September 2015 prior to consultation. It was based on issues raised in the TOR, consultations with relevant stakeholders and from independent research. The Issues Paper also took into consideration the materials that had been provided by the Ombudsman's office highlighting the issues that it faced.

Coverage

Vanuatu is a small group of archipelago islands that consists of more than 80 islands. The current population as projected by the Vanuatu National Statistics office is 286,715. In the 2009 national census, it was shown that 24.4% of the total population lived in the urban areas, which were mainly Port Vila and Luganville, while the remaining 75.6% lived within the rural areas. The average population density for Vanuatu at that time was 19 people per square kilometre but this varied widely between the provinces. For example, Shefa had 52 people per square kilometre while Torba and Sanma had only 11 people per square kilometre.¹⁰

As is the practice with previous reviews, the VLC team travelled out to the outer provinces to carry out consultations and were not just based in the urban areas. These provinces included Tafea,

¹⁰ Vanuatu National Statistics Office ' 2009 National Population and Housing Census' www.vnsso.gov.vu (Accessed:

Sanma, Penama and Malampa. Due to certain limitations,^{11,12} the team was only able to consult with the offices in the Provincial Headquarters and were not able to travel out to any communities to collect views for this consultation. However the team made sure to speak with some of the Area Secretaries¹³ from each province as they were the ones who came to represent their area's or communities views.

For each province that was visited, there was a range of number of people who attended. The team made an effort to speak to at least a number of Area Secretaries along with the Secretary General or Assistant General. Other governmental and also non-governmental offices such as the Women's Center and Youth Center were consulted. The team began its consultations with the southern province of Tafea and then made its way up to the Northern provinces of Sanma and Penama with Malampa, the central province, being its last stop. An average of 2 days was spent on each island in each province. Arrangements had been made prior to travelling, whereby the first day on each province was spent having a consolidated consultation with certain stakeholders and the second day was used by the team to visit any other offices it may have missed in its initial first day of consultation. The team worked together as one for the first day and then split into pairs to visit the different offices on the second day.

In Tafea province, the team was able to speak to 23 participants over these 2 day period. In Sanma, the team managed to visit and speak to 22. Notably, a branch of the Ombudsman's office had also been set up in Sanma and while the team was not able to reach the person in charge as he was travelling at the time, an officer attended one of the group consultations on behalf of the office. In Penama, there were 21 people who attended the consultations. The team was unable to arrange a group consultation due to limitations on Malampa and so they visited the different offices in pairs. The result was a combination of at least 8 people that the team was able to reach.

Upon the team's return to Port Vila, a one day workshop was organised in November for the stakeholders at the Melanesian Hotel and invitations were sent out to all the different Ministries. The office also invited the Ombudsman's office to partake in this workshop so that they would be able to answer any questions raised by the stakeholders. The turnout of this workshop was around 20 people.

¹¹ /07/2016)

¹² See below "Limitations and challenges".

¹³ Within the provinces that have been mentioned, there are several islands making up this one province. For example, Penama Province is made up of Pentecost, Maewo and Ambae. Within each island itself, different areas have been set up (such as north, south, west and so forth) and an Area Secretary is appointed by the Provincial Government from each of these areas to represent the collective views of these areas. This is not only to do with consultations but any other issues that the Provincial Government wishes to discuss.

Method of Data Collection

In all the provinces, the team used questionnaires throughout the consultations. These questionnaires were formed based on the issues and questions raised in the Issues Paper and then divided into technical and non-technical questions. For the technical ones, these questions were directed to those who had knowledge in these areas (it is reasonable to think that they have knowledge in this area working in their various positions) while the non-technical questions were directed to everyone who attended the consultations.

After each consultations on the different provinces, the team would then get together to compile all the answers that it had gotten throughout that day so as to get a clearer idea of people's views in that province and consolidate all the answers. Based on these answers along with independent research, the team would write up its report.

Limitations and challenges

As with all reviews, there were certain limitations or challenges that the VLC team faced that affected its work. Firstly was the common challenge of funds. Funding for the whole review was provided for by the Ombudsman's office but this funding was not enough to cater for consultations to be carried out in all the provinces in Vanuatu. As a result, the team was not able to visit the most northern province of Torba. Lack of funding also meant that the team was limited to carrying out its consultations only in the Provincial Headquarters as the team could not afford to travel out to the communities to get their views. The period of time spent on each province was also affected as funding only allowed a maximum of 2 days being spent on each island and as such, the number of people and offices that the team could visit was also affected by this. In addition, flight schedules also contributed to this as the team had to plan its consultations around the flight schedules.

Where the team had to travel to another province on a weekend, consultations could not be carried out until Monday as all the offices were closed until then. During this review, the team also faced setbacks with flight delays and had to push back its working time frame for at least 3 days while waiting for the next available flight.

Lack of cooperation was also another challenge that was faced. Despite preparing weeks before travelling out to the outer provinces by scheduling appointments and organising meeting venues, upon arrival in some provinces, it was discovered that no notice had been given at all to the concerned offices about the team's arrival. The team then had to go around the offices individually or wait for a few hours for the offices to be notified and this resulted in a poor turnout as people had not been aware. In some cases, there was no one in the offices as the team was not expected at the time and so the team was only able to speak to a handful of people. For Torba province, the team arranged for the Issues Paper to be sent to its Headquarters and had spoken

with the Secretary General to have them distributed along with the questionnaires so that even if the team was not able to visit them, their views would still be heard. However, after several attempts of trying to get in touch with them about the progress of this approach, the team was not able to get a hold of them due to communication problems.

This lack of cooperation was not only faced in the rural outer provinces but also within the urban provinces. Despite repeated attempts to set up appointments with certain offices, there was no success as these offices never returned the office's phone calls or replied to requests for meetings. For its one day workshop at the Melanesian Hotel, even though the office had sent out over 50 invitations, less than half of that number turned up on the day of the workshop.

There were also clashes with other programs that were currently going on in some provinces that prevented a number of people from attending the consultations. For example in Malampa, during the week that the team visited the province, the Provincial Government was holding its annual meeting and this involved all the Area Secretaries along with the Secretary General. As a result, due to the limited time that the team had on the island, the team was not able to speak to this group of people.

EXECUTIVE SUMMARY

Ombudsman's Act

The Vanuatu Law Commission received a request from the Ombudsman's office to review its Act, the *Ombudsman Act* and the *Leadership Code*. Following consultations covering five provinces, which included Tafea, Shefa, Sanma, Penama and Malampa, the main messages to the VLC were that the Ombudsman's office needed to do more than just publish reports on any complaints it received and investigated.

In carrying out this review, the VLC also took into consideration the findings and recommendations that were put forth by the three reviews that had been carried by independent parties prior to this review. These reviews namely were the Wiltshire Review (2001), McDowell Report (2002) and the Review Committee Report (2004).

With reference to the qualification and conditions for the employment of the Ombudsman, recommendations were suggested for the provision of better and clearer terms in the Act. The Act does not provide for the definition of what an appropriate academic qualification is and whether the Ombudsman should only be an indigenous citizen or whether the post is also open for a naturalized citizen to take up. Furthermore, questions were raised about the consultation process of the appointment of the Ombudsman, raising issues of biasness and 'strings' attached

to the appointment leading to doubts about the Ombudsman's independency and neutral stand. The VLC recommends that the term academic qualification must be better defined; clearly stating what level of academic qualification is needed for the post, whether it be a Degree or a Masters in law, Administrative qualification, Management qualification and so forth. Discrimination is also to be discouraged, making the post available to both indigenous and naturalized citizen to take up. No age limit is to be placed for an eligible Ombudsman and above all, the appointing process of the Ombudsman should be reconsidered and possibly changed.

The second issue at hand looks at expanding the Ombudsman's functions and powers. While the Ombudsman has the jurisdiction to inquire conducts of person, government agencies and private companies such as UNELCO where the government has a beneficial interest, there are certain limits to this power. The current Act does not provide the Ombudsman with the power to investigate private companies that provides public services and also does not have the power to investigate the office of the President, the Judicial Service Commission and other judicial bodies. The VLC recommends for the Act to remain as it is and not extend the power of the Ombudsman to investigate private companies. With regards to the issue of whether or not the Ombudsman should investigate the Judicial Commission and other bodies, the VLC recommends for this issue to be dealt with at a later review due to the need for a wider consultation.

The review found wide support for the Ombudsman to improve his or her office complaints and investigations proceedings. Many people felt that the current process that the Ombudsman was following with regards to receiving complaints, investigating these complaints and then proceeding to take further action was slow and further action needed to be taken to improve this process. Currently the Ombudsman as an independent body carries out its own investigation separately from the Police and the Public Prosecutor. He or she only refers cases to the Public Prosecutor when it is a criminal matter and breaches the *Leadership Code*. When the matter reaches the Public Prosecutor or Police, they carry out their own independent investigations as well and this in itself is considered by many as a very lengthy process. The VLC recommends that the these three main bodies, the Ombudsman's office, the Public Prosecutor and the Police reach an agreement that will help cut down on time with regards to the investigation process along with the prosecution of these cases. In addition, this agreement will also help all the other details and difficulties that the Ombudsman faces in taking its cases all the way to Courts, fall into place. These other details include prosecutorial powers and the admissibility of the Ombudsman's evidence.

A form of protection that should be provided for those reporting or complaining on any matter to the office of the Ombudsman is also another recommendation that was raised during consultation. This is with regards to witnesses that the Ombudsman will use when investigating the matter. The main reason behind this is the People's fear that without any form of protection, complainants and witnesses could be easily intimidated and threatened, leading them to either

withdraw the complaint or refuse to partake in the investigation. The VLC recommends that the Act should have a section to cater for the protection of any person who provides information to the Ombudsman's office.

Consultations also showed that people thought it would be better for the Ombudsman to regain his power to appoint his own staff. The original 1995 *Ombudsman Act* gave the Ombudsman the power to appoint his own staff but this power was removed when this Act was repealed and replaced with the new and current 1999 *Ombudsman Act*. However, those consulted felt that this power should be limited to some extent for fear of its abuse. The VLC recommends that the Ombudsman be restored his power to appoint his or her own staff provided that the rules that he or she follows is similar to that of the Public Service rules.

Since the Ombudsman's office was regarded as an independent body that was responsible for looking into complaints brought to its attention, the issue was also raised of whether it was the right body to deal with human rights issues. More specifically, the question was whether it was the right office which should be responsible for the establishment and operations of a National Human Rights Committee to look into human rights issues. The VLC recommends that the current *Ombudsman Act* must not allow for the Ombudsman to combine his or her work together with human right matters. Instead an independent National Human Rights Commission or Institution is to be established to deal with human rights issues or matters in Vanuatu.

Leadership Code

The Leadership Code was put forward by the office of the Ombudsman for a review in correlation with the *Ombudsman Act* review. The request for review was considered and approved by the VLC as the particular Act was outdated and unsatisfactory. The Act provides for procedures that overlap with other procedures in other pieces of legislations such as the Ombudsman's Act and the Public prosecutors Act which creates difficulties in enforcement and duplication of work.

A thorough analysis of the Act identified six main issues which are as follows:

1. Definition of leaders;
2. Breaches of the Leadership Code;
3. Annual returns;
4. Investigation and Prosecution of Leaders; and
5. Punishment of Leaders.

The first difficulty with the Act is the lack of a clear definition of what constituted a leader. The VLC recommends that the terms provided for in the current *Leadership Code* do not require any reform. Their meaning is to be left for the courts to define according to the rules of interpretation and according to the circumstances of the case.

The second issue that was identified is related to the breaches of the *Leadership Code* which all falls into one category of punishment. These breaches which can be deemed as serious and less serious are all liable for the same punishment. The VLC recommends that the breaches must be sorted into two categories, namely serious breaches and the less serious breaches. The Act will establish an independent Leadership Tribunal and its structures and procedures to deal with less serious breaches. The more serious breaches will be dealt with by the formal courts.

It is an obligation of leaders to file annual reports. The issue with respect to this is that the provision is rarely being implemented. The provision provides the Clerk of the Parliament with the power to collect all annual returns. Annual reports serve the crucial purpose of promoting transparency. However, some leaders do not file annual reports at all while some file annual reports well after it is due.. Failure to file an annual report on time amounts to a breach of the Act. Although this occurrence is common, leaders are rarely penalized. The VLC recommends for the provision which gives the power to the Clerk of parliament to collect annual reports to be repealed. There must be a provision in the *Leadership Code* to authorize the Ombudsman's office to collect annual reports.

Investigation of leaders was another issue that was looked at under the *Leadership Code*. The problem lies in the duplication of processes required for the same matter in the *Public Prosecutors Act*, the *Police Act*, and the *Leadership Code*. The VLC recommends that a MOU will be signed between the Ombudsman's office, the Police and the Public Prosecutor's office to outline procedures that will be followed to ensure that the procedures to investigate and prosecute leaders are synchronized.

Another issue which required change was that relating to punishment of leaders which is provided for specifically in Part 6 of the Act. The question raised here concerns the definitions of terms whether further clarification is required for certain terms under Part 6. The chapter continues with whether or not the Ministers' discretion should be made mandatory and finishes with re-visiting the sections relating to penalties. The VLC recommends that the terms which are not clearly defined will be left for the courts to determine. The Minister's discretion must be removed and be replaced with a mandatory direction for him or her to make regulations. And finally, the fines that are imposed must be increased. Most people are of the opinion that the fines, if increased will provide a better deterrence to leaders not to breach the Act.

And lastly, other pieces of legislations were cited when looking at these issues. The Constitution was considered with respect to the issue of Presidential pardon. This however will only be visited provided there is a Constitutional review. Consideration was also made for the *Police Act*¹⁴ and

¹⁴ *Police Act* [Cap 105] (Vanuatu), http://www.paclii.org/cgi-bin/sinodisp/vu/legis/consol_act1988/pa75/pa75.html?stem=&synonyms=&query=%22police%20act%20%22 (Accessed 12 March 2016)

the *Public Prosecutors Act*,¹⁵ with regards to investigation and prosecution of leaders. Other Acts that were also mentioned were the *People's Representation Act* and the *Interpretation Act*.

Overall, this report contains detailed recommendations that the office of the Ombudsman could use when amending its current *Ombudsman Act* and the *Leadership Code* and serves the purpose of guiding the office of the Ombudsman to produce their own policy paper to reflect what the people want and what will make the Ombudsman's work more effective and efficient.

TERMS AND ACCRONYMS

- *Actus Reus* is the Latin term that is used to describe a criminal Act. Every Crime must be considered into two parts- the physical act of the crime and the mental intent to do the crime (*Mens Rea*).¹⁶
- *CEO* is a Chief Executive Officer.
- *Consultations* refers to the Consultations that were carried out by the Vanuatu Law Commission Team in Vanuatu.
- *Issues Paper* is a summary or outline of a project on which the Commission is working on to provide readers with an opportunity to express views and make suggestions and comments on specific questions.¹⁷
- *K* is the local currency in PNG which is the Kina currency.
- *Komesina o Sulufaiga* is the Ombudsman of Samoa in the Samoan dialect.
- *LCA* means the Leadership Code Act of Vanuatu.
- *Malampa* means one of Vanuatu's 6 provinces which are comprised of the Islands of Malekula, Ambrym and Paama.
- *Mens rea* is the Latin term for the intention or knowledge of wrong doing that constitutes a part of a crim as opposed to the action of conduct of the accused.¹⁸
- *MOU* means a memorandum of Understanding. It is a formal agreement between two or more parties. Companies and organizations can use MOUs to establish official partnerships. MOUs are not legally binding but they carry a degree of seriousness

¹⁵ *Public Prosecutors Act* [Cap 293] (Vanuatu), http://www.paclii.org/vu/legis/consol_act/ppa218/ (Accessed: 2/07/16)

¹⁶ Actus reus,

<https://www.google.com/search?q=actus+rea&og=actus+rea&aqs=chrome..69i57j0l5.1727j0j9&sourceid=chrome&ie=UTF-8#q=acus+reus> (Accessed: 14/07/ 2016)

¹⁷ <http://www.lawreform.ie/publications/issues-papers.428.html> (Accessed: 14/07/2016)

¹⁸ Mens rea,

<https://www.google.com/search?q=actus+rea&og=actus+rea&aqs=chrome..69i57j0l5.1727j0j9&sourceid=chrome&ie=UTF-8#q=mens+rea> (Accessed: 14/07/2016)

and mutual respect, stronger than a gentlemen's agreement.¹⁹ □ *NHRC* means the National Human Rights Committee in Vanuatu.

- *NHRI* means National Human Rights Institution.
- *OLDRL* refers to the Organic Law on the Duties and Responsibilities of a Leader.
- *OLOC* means the Organic Law of the Ombudsman Commission of PNG.
- *Penama* means one of Vanuatu's 6 provinces which are comprised of the islands of Pentecost, Ambae and Maewo.
- *PNG* means Papua New Guinea.
- *Policy paper* means a document which contains a set of ideas or plans that is produced after a study or report is produced and is used as a basis for making decisions, especially in politics, economics or business.²⁰
- *PSC* means the Public Service Commission. It is a Constitutional body with the function to appoint and promote public servants and discipline public servants.²¹
- *Sanma* means one of Vanuatu's 6 provinces which are comprised of the islands of Santo and Malo.
- *Shefa* means one of Vanuatu's 6 provinces which are comprised of the islands in the Sheperd group, Efate and Epi Island.
- *Tafea* means one of Vanuatu's 6 provinces in Vanuatu which is comprised of the islands of Tanna, Aniwa, Futuna, Erromango and Aneityum.
- *The Commission* means the Vanuatu Law Commission.
- *The Constitution* means the Constitution of the Republic of Vanuatu.
- *TOR* means Terms of Reference.
- *Torba* means one of Vanuatu's 6 provinces which are comprised of the islands in the Torres and Banks Group. It is in the northern part of Vanuatu.
- *VLC* means the Vanuatu Law Commission.
- *VT* means the local currency in Vanuatu which is the Vatu currency.

¹⁹ MOU, <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF8#q=mou+AND+definition> (Accessed: 14/07/2016)

²⁰ Policy, <http://dictionary.reverso.net/english-cobuild/policy%20paper> (Accessed: 14/07/2016)

²¹ Article 59 of the *Constitution of the Republic of Vanuatu* 1980, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 14/07/16)

PART ONE: OMBUDSMAN ACT

CHAPTER ONE: PROPER QUALIFICATIONS AND CONDITIONS

Brief Background

Part 2 of the *Ombudsman Act* provides for the Qualifications and Conditions of Employment. Issues have arisen with respect to certain provisions under this Part. The provisions relating to qualification for appointment, conditions of employment and termination of appointment of Ombudsman are specific issues that were identified.

Brief comparison is made of Vanuatu against other countries on these issues. These countries have similar provisions on the topics under discussion and so are relevant to finding an appropriate model to be applied in Vanuatu.

Scope of Chapter

This chapter covers the process by which an Ombudsman is appointed and terminated, the qualifications an Ombudsman should have, whether or not an age limit must be required by law for the Ombudsman and finally the personal qualities of an Ombudsman. Examples are drawn from relevant countries only. The aim is to identify an appointment process that will prevent an Ombudsman from being appointed to serve only one man or a certain group of people's interest and a process whereby the termination of the Ombudsman from office is not to be driven by political influence.

Appointment of an Ombudsman

The current Legislative Framework

In Vanuatu, there is only one Ombudsman heading the office. The process of the appointment of the Ombudsman is provided for by the Constitution and the *Ombudsman's Act*. The Ombudsman shall be appointed after every 5 years by the President of the Republic after consultation with the Prime Minister, the Speaker of the Parliament, the Leaders of the Political Parties represented in parliament, the chairman of the National Council of Chiefs, the Chairman of the Public Service

Commission and the Judicial Service Commission.²² The *Ombudsman's Act* furthermore provides a similar provision in Section 3 (1) that the Ombudsman is appointed under the Constitution for 5 years by the President after consultation with the same parties with the addition of the chairmen of the local government councils.

Problems and Issues

Although the President is required to consult with certain leaders, there is no requirement that the President is bound to follow the advice or even to obtain a consensus from these leaders in the appointment of the Ombudsman.²³ There is no clear meaning on the term “consultation” as is used in this provision, nor has there been any judicial determination on the matter. One issue is whether the term “consultation” should be defined in the legislation.²⁴

Another issue lies in the fact where there is a varying degree of Parliament involvement for the appointment of the Ombudsman or political influence. Due to the involvement of these parties, an Ombudsman is not free to criticise and recommend change for fear of political reprisal. When an Ombudsman is appointed by a person who is heavily involved in political activities, his or her independence may appear to be compromised in the public opinion, even more than it might actually be. This has a negative impact in the persuasive ability of the Ombudsman and the degree of satisfaction which complaints have with investigations and ensuing recommendations.

Other issues include the general rather than specific qualification which makes a person qualified for the position of the Ombudsman. This leaves a wide range of fields to choose from. The Act merely provides the Ombudsman must be a person who:

- (a) has a knowledge, understanding and appreciation of the culture, traditions and values of Ni-Vanuatu people; and
- (b) is of high integrity and competence; and
- (c) has an appropriate academic qualification and suitable experience in the public or private sector; and
- (d) is politically independent; and
- (e) is capable of discharging his or her constitutional duties without fear or favour; and
- (f) is of high standing in the eyes of the community.²⁵

²² Article 61, Constitution of the Republic of Vanuatu http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 22/06/16)

²³ The MacDowell Report

²⁴ Ibid

²⁵ Section 3(3), *Ombudsman Act* [Cap 252] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

An age limit is not provided nor is it necessary to have a medical check to be appointed as an Ombudsman.

Comparison with other Jurisdictions

An Ombudsman is not appointed by Parliament in any of the jurisdiction within the Pacific. It is usually an administrator, (Governor General, Governor, Administrator, Chief Executive or Queens Representative), the Head of State (Samoa) or the King (Tonga) who appoints the Ombudsman. In most of the countries in the Pacific region, the appointment authority acts independently from Parliament to appoint an Ombudsman (the Australian Commonwealth, Papua New Guinea, Tasmania Tonga, Victoria and Western Australia). In PNG the Ombudsman Appointment Committee must be consulted. In other jurisdictions, Cook Islands, New Zealand, the Northern Territory, Samoa and South Australia, the Parliament is involved to varying degrees. In these jurisdictions, the appointment by the Governor or Administrator respectively is made upon recommendation by Parliament. In Queensland, the responsible Parliamentary Committee must be consulted before hand, whereas in New South Wales the responsible Parliamentary Committee while not involved beforehand may veto an appointment.²⁶

In New Zealand and PNG, the law provides for more than one Ombudsman to be appointed, one of these being the Chief Ombudsman. In PNG the institution is termed “Ombudsman Commission” and there are three Ombudsmen with the Chief Ombudsman being in charge of the administration.

In Papua New Guinea (PNG), the Ombudsman Commission 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 is comprised of the Prime Minister who is the chairman, the Chief Justice, the Leader of 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 advice of the Ombudsman Appointments Committee to appoint an Ombudsman.²⁷

Currently, the position of the Chief Ombudsman is still lacking in PNG. In a recent media release, the Prime Minister of PNG was accused of conflict of interest for being in the Appointment committee and that it was taking too long to appoint a Chief Ombudsman. On the Prime Minister’s part, he claimed that the composition of the Appointment Committee included the leader of

²⁶ Micharl Frahm, Ludwig Boltzman, ‘Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice’, Institute of Human Rights, Springer, 2013. P25

²⁷ Article 217, *Constitution of the Independent State of Papua New Guinea 1975*

http://www.paclii.org/cgibin/sinodisp/pg/legis/consol_act/cotisopng534/cotisopng534.html?stem=&synonyms=&q uery=%22conflict%20of%20interest%20%22 (Accessed: 20/05/16)

Opposition, the Chief Justice and the Chairman of the Public Service Commission and thus the Appointment Committee is a very independent body. There is also an acting Chief Ombudsman in place and the Commission is currently functioning.²⁸

In Queensland, another approach is seen that goes beyond the standard processes in most jurisdictions which ensures great transparency, fairness and inclusiveness. The law requires obligatory national press advertisements calling for applications by qualified persons.²⁹ It also requires a consultation process between the Minister and the Parliamentary Committee responsible for the selection process and the appointment of the Ombudsman.³⁰

Consultations

During consultation, 100% of the people that were interviewed stated that a process which is free of political influence would be the most suitable process required for Vanuatu. Another popular view that emerged was that a grading system must be provided for in a schedule in the Act for the appointment to provide the President with guidance in appointing an Ombudsman.

Discussion and Commission's Views

In a Policy paper that was proposed by Ombudsman Alatoa of Vanuatu concerning the qualifications for appointment, specific reference was made for a procedure to be included in the Act detailing how the President will consult with the list of persons regarding a new appointee in the interest of transparency. This process will require the President to oversee a panel that will make recommendations for a new appointee for the post of the Ombudsman in a timely manner and ensure that the appointment is made in a genuinely bi-partisan, cooperative manner. The Ombudsman in the proposal also suggested for clear wordings to be stated in the Act with regards to conditions of employment and a contract. Proper conditions for employment in a contract are to be provided for in the Act and that the provision must not be left too broad as one can use politics to appoint the Ombudsman.

The process of appointment of an Ombudsman in Vanuatu which involves the President consulting with the leaders, including leaders of the national political parties, may be looked at by some as if it is free from political influence. However in a submission by a previous Ombudsman

²⁸ Gorethy Kenneth, PNG PM Assures Ombudsman Will be Appointed, Pacific Islands Report, 6 May 2016, <http://www.pireport.org/articles/2016/06/05/png-pm-assures-ombudsman-will-be-appointed> (Accessed: 11/08/16)

²⁹ Section 58 of *Ombudsman's Act* (Queensland) 2001
<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/O/OmbudsA01.pdf> (Accessed: 9/07/16)

³⁰ Micharl Frahm, Ludwig Boltzman, 'Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice', Institute of Human Rights, Springer, 2013, P147 ³¹

Ibid

of Vanuatu, it was suggested to the Constitutional Review Committee that the appointment of the Ombudsman, even subject to existing requirements could be a very political matter. From these suggestions, recommendations were made for the Constitution to be amended to provide for an Ombudsman Appointment Committee consisting of the Prime Minister, the Chief Justice, the Leaders of Opposition, the Chairman of the Public Service Commission and the Chairman of the National Council of Chiefs. It is questionable however whether applying this process is worth the cost in money, bureaucracy and delay.³¹

The model in PNG uses the Head of State who must act in accordance with the advice of the Ombudsman Appointments Committee. The Appointment Committee consists of the Prime Minister as the Chairman, the Chief Justice, and the Leader of the Opposition and the Chairman of the Public Services Commission.³¹ The Commission reported 961 complaints in 2010 with the largest areas of complaints being entitlements in regard to different administrative areas (131 complaints), destruction of property (84) and terms and conditions of employment (71).³² In their recent paper for reform for the Organic Law on the Ombudsman Commission (OLOC) and the Organic Law on the Duties and Responsibilities of Leaders (OLDRL), there was no concern for this particular issue of the appointment of the Ombudsman. Adopting the process applied in PNG in Vanuatu would require more resources. On the other hand, like in Vanuatu, PNG has yet to also define the term “consultation”.

A better approach is provided for in Queensland although it is lengthy to undergo the processes of calling for applications by qualified persons and the consultation process between the Parliamentary Committee responsible before appointing the Ombudsman. This suggestion is not far-fetched for the situation in Vanuatu as it was also raised during consultation where people interviewed had suggested that the process for the appointment of an Ombudsman must begin by the post being advertised for qualified people to apply for. To decide on the most qualified person for the office, a panel must be the proper body to appoint the most qualified and suitable person.

Therefore, the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the persons involved in the process to appoint an Ombudsman must be well established by defining the term consultation and amending the list of authorities that must advise the Head of State on the most qualified person for the Ombudsman.

³¹ Article 217 (2), *Constitution of the Independent State of Papua New Guinea 1975* http://www.paclii.org/cgibin/sinodisp/pg/legis/consol_act/cotisopng534/cotisopng534.html?stem=&synonyms=&query=%22conflict%20of%20interest%20%22 (Accessed: 20/07/16)

³² Michael Frahm, Ludwig Boltzman, ‘Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice’, Institute of Human Rights, Springer, 2013, P246

Firstly, the term consultation must be worded in a way to require the Head of State to act in accordance with the advice of the authorised persons.

Secondly, the current list of authorities in section 3(1) who are:

- a) the Prime Minister; and
- b) the Speaker of Parliament; and
- c) the leaders of the Political parties represented in Parliament; and

- d) the Chairman of the National Council of Chiefs; and
- e) the Chairman of the local government councils; and
- f) the Chairman of the Public Service Commission and the Judicial Service Commission

must be amended.

The following list must be the new list of authorities: a)

- a) the Prime Minister;
- b) the Chief Justice;
- c) the Leader of Opposition;
- d) the Chairman of the Public Service Commission;
- e) the Chairman of the National Council of Chiefs; and
- f) the Chairman of the Vanuatu Law Commission.

The new list is recommended on the basis that it would limit political influence. There is a representative of the government side which is the Prime Minister, a representative of the Judicial bodies as the Chief Justice, the leader of the Opposition who will always provide scrutinizing views on the decisions made by the government side to allow for a decision to be considered from both the government side and the opposition side. The Chairman of the Public Service Commission will represent views with respect to the service provided to the Public which is the Government, the Parliament and the Public in general. The Chairman of the National Council of Chiefs will represent the views of the Chiefs in Vanuatu while the Chairman of the Vanuatu Law Commission will represent the views of any changes happening in the society.

Thirdly, in the schedule of the Act, a grading system must also be provided to guide the Head of State and the authorised persons when appointing the Ombudsman.

And finally, to begin the process of appointment, there must be a call for application for the post of an Ombudsman who will then be scrutinised according to the guidelines provided for in the Schedule and also by the authorised persons in law.

It is also recommended that a Constitution Review is carried out with reference to Article 61(1) to establish a new Ombudsman Appointment Committee (OAC). The OAC will use the Public Service Commission grading criteria to assess all applicants to arrive at a short list for the position of the Ombudsman. All persons on the short list must be interviewed personally by the OAC. The criteria to be used by the OAC in choosing the final candidate will include the following:

- i) Police Clearance Certificate given by the Police Commissioner; and ii) Certificate of health and Fitness given and signed by the Superintendent of the Vila Central Hospital; and
- iii) Competency in three official languages of Vanuatu; and

- iv) Certificate from the Chief Registrar of the Supreme Court that an applicant is not declared bankrupt.
- v) High skills in Management, Alternate Dispute Resolution and Report Writing.

Academic Qualification of an Ombudsman

There are many different kinds of Ombudsman positions in different kinds of business and institutions. Someone who wants to become an Ombudsman must consider the different kinds of role that these professionals play in an institution.

In most jurisdictions with an Ombudsman in place, there is rarely a requirement for a statutory qualification. This is partly due to the reason that in the original Swedish legislation there was no qualification requirement in the position of an Ombudsman. New Zealand was the first in the region to provide for an Ombudsman and it lacked a provision for a qualification requirement. The same is found in the Queensland jurisdiction where there are no qualification requirements for the Ombudsman³³

Yet in some other jurisdictions, there are educational requirements imposed by statutes. PNG and Western Samoa are looked at with relevance to the educational qualification for an eligible Ombudsman.

Current situation in Vanuatu

In Vanuatu, the Act merely states for the Ombudsman to be a person who:

- has a knowledge, understanding and appreciation of the culture, traditions and values of NiVanuatu People;
- is of high integrity and competence;
- has an appropriate academic qualification and suitable experience in the public or private sector;
- is politically independent;
- is capable of discharging his or her constitutional duties without fear or favour; and
- is of high standing in the eyes of the Community.³⁴

³³ Micharl Frahm, Ludwig Boltzman , 'Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice', Institute of Human Rights, Springer, 2013, P125

³⁴ S.3, *Ombudsman Act* [Cap 252] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

Comparable Jurisdictions

In PNG there are certain qualifications that are required to qualify one for the role of the Chief Ombudsman. The Ombudsman Appointment Committee must deem the Chief Ombudsman as a person of integrity, independence of mind, resolution and high standing in the community. One of the three Ombudsmen must have professional accountancy qualifications and relevant experience. Administrative or legal qualifications and experience are also expected of an eligible Ombudsman in this jurisdiction.³⁵

There is uncertainty though about whether the qualifications for the Ombudsman positions are too prescriptive, hindering the Ombudsman Appointments Committee's ability to appoint the most appropriate persons for the role because of the need to choose people from a relatively limited number of professionals. Suggestions for alternative qualifications could include management expertise, or non-specified tertiary qualifications, and years of the experience in government service delivery or in senior private sector positions.³⁶

In Western Samoa, 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.³⁷

Looking at various jurisdictions, PNG is considering if the jurisdiction should broaden the educational qualification restriction to provide the appointing committee with a wider range of professionals to appoint from. Since Vanuatu still does not have the jurisdiction to deal with cases related to Human Rights, it will not be necessary to have a similar qualification in Vanuatu as applied in Western Samoa.

Consultations

During consultation, 100% of the populace consulted stated that this provision is not clear with respect to the requirement of "academic qualification" and thus the specific academic qualifications must be provided in the Act. 80% of the populace thought that a legal qualification must be a requirement. The other remainder of the population provided no answer.

³⁵ S.4, *Organic Law on the Ombudsman Commission* http://www.paclii.org/cgi-bin/sinodisp/pg/legis/PGconsol_act_1986/cladp3401/index.html?stem=&synonyms=&query=%22organic%20law%20on%20the%20ombudsman%20commission%20%22 (Accessed: 19/07/16)

³⁶ Ombudsman Commission of Papua New Guinea, Discussion Paper - Review of Enabling Legislation November 2014, P13

³⁷ *Ombudsman (Komesina o Sulufaiga) Act 2013* (Samoa), http://www.paclii.org/ws/legis/consol_act/osa2013295/ (Accessed: 11/08/16)

Commission's Views

Most of the criteria listed in section 3(3) are very subjective. This is a problem because It is hard to tell who is of high integrity and competence or politically independent, capable of discharging his constitutional duties without fear or favour. It is equally difficult to determine who has an independent mind and of high standards in the eyes of the community. What one views as being of high integrity, independence of mind and of high standards will vary from the next person. Leaving the provision as it is gives the authority with a wide range of professionals to appoint from.

Therefore, the Vanuatu Law Commission makes the following recommendations:

Recommendations: That this provision of subsection 3 (3) (c) is amended to include but not limited to the following academic qualifications:

- Legal qualification; or
- Administrative qualification; or
- Management qualification; or
- Accounting and auditing qualification.

This provision must also state that a level of bachelor's degree is required but a Master's level and anything beyond this level would be desirable.

Also the suitable candidate must have a minimum of five (5) years in his/her qualified field mentioned above.

Age Limit of an Ombudsman

Age is also an important factor when it comes to a person working in any kind of job. In the international arena, the basic minimum age of work is 15 and not less than 15 and there are only specific conditions that a person less than the age of 15 can be employed in.³⁸ The same is reflected in the *Employment Act* [CAP 160] of Vanuatu.

Australia, PNG and Vanuatu are looked at in this section with regards to age restrictions in the Ombudsman Act. In Fiji and Samoa, age discrimination is prohibited in the Constitutions.³⁹

³⁸ International Labour Organisation, <http://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang-en/index.htm> (Accessed: 28/07/16)

³⁹ P. Imrana Jalal, Legal Protection against Discrimination in Pacific Island Countries, <http://www.equalrightstrust.org/ertdocumentbank/Jalal%20article.pdf> (Accessed: 30/06/16)

Current situation in Vanuatu

The current Ombudsman is in his late 60's.

There is no age restriction in the *Ombudsman's Act* to provide that an Ombudsman is required to be of certain or in a certain age range nor is there a provision to require a medical certificate of a person that is being considered for the position of the Ombudsman.

Comparable Jurisdictions

In Australia, the Age Discrimination Commissioner Susan Ryan stated in March 2016 that age discrimination is a social and economic issue affecting a growing cohort of men and women where people over the age of 45, are considered old and are in fear of losing their job due to the situation where once a person leaves his or her job after the age of 50, it becomes difficult to re-enter the work force.⁴⁰

The Australian Human Rights Commission deals with such issues. For instance where one is refused employment or is dismissed because of his age, the Commission may provide legal advice or education and awareness for the employer to provide proper working environment even for people who are considered old. The *Age Discrimination Act 2004* deals with issues related to human rights, making it unlawful to discriminate on the grounds of age in various places such as work place, education and so on.⁴¹

Queensland which establishes a good model of the Ombudsman Act does not include an age restriction for this particular post.

In PNG a similar discussion regarding age is noted. In the *Organic Law on the Ombudsman's Commission*, a member of the Commission cannot be appointed after he has attained the age of 55. Only on special circumstances can the Head of State act on the advice of the committee to appoint a person above the age of 55 but under no circumstances can these authority appoint a person who is above the age of 60.⁴² In the recent review of this particular Act, it was mentioned that age restrictions have been removed from statutes in other jurisdictions and as such provisions are now seen as discriminating against an individual on the basis of their age.⁴³

Consultations

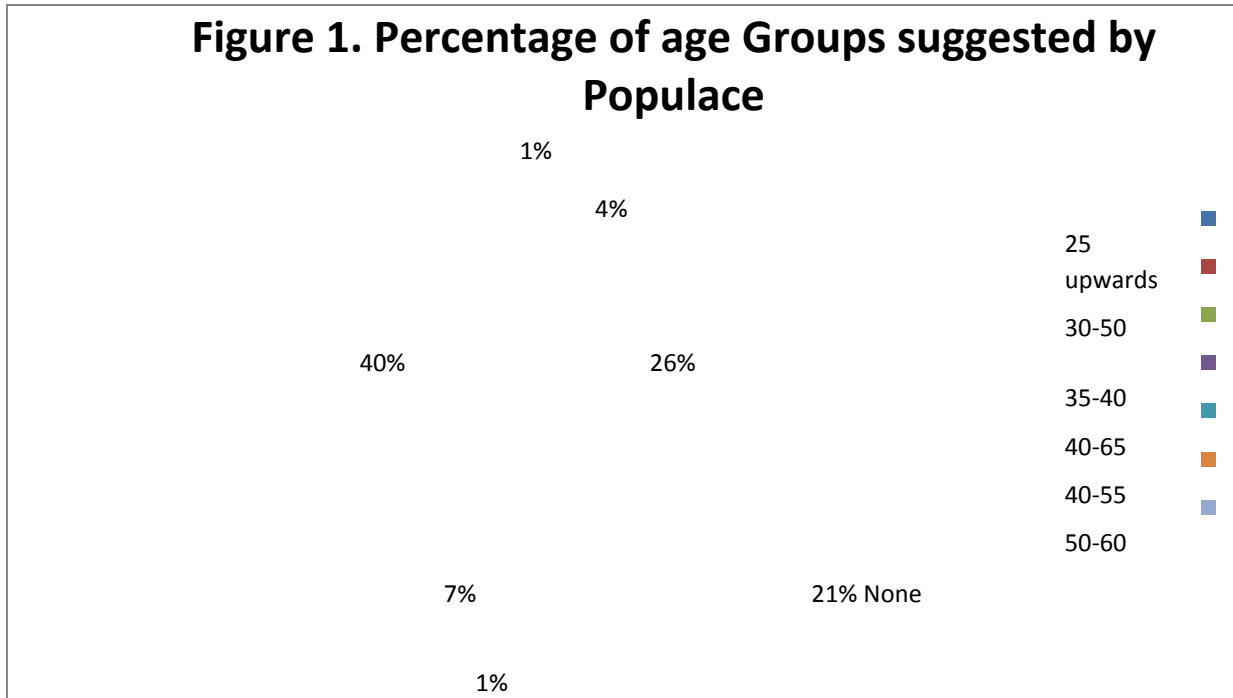
⁴⁰ Jenny Brice, In the modern work place, Age 50 is considered old, <http://www.theage.com.au/comment/time-torectify-costly-age-discrimination-in-the-workforce-20160301-gn73jq.html> (Accessed: 30/07/16)

⁴¹ *Age Discrimination Act 2004* (Australia) <https://www.legislation.gov.au/Details/C2016C00525> (Accessed: 30/16)

⁴² Section 10, *Organic Law on the Ombudsman Commission* (No. 913 of 9998) (PNG).
http://www.paclii.org/pg/legis/consol_act/olotoc362/ (Accessed: 2/07/16)

⁴³ Ombudsman Commission of Papua New Guinea Discussion Paper Review of Enabling Legislation November 2014, P12

During consultations people provided different views. Two main views emerged and is shown in the diagrams below. The first is that there should not be any restrictions listed in the Act for the age of the Ombudsman and secondly that there must be an age restriction and a range of age group was provided.



Each piece of the pie chart above shows the percentage of people interviewed who suggested various age groups for an eligible Ombudsman. 40% of the populace suggested that the Act must not state any age restriction and must be kept open. This is followed by 26% which stated the age of 35-40 years old. 21% is for an age group of 40-65 years of age. 7% is the portion for 50-60 while 4% is for the age of 30-50 years old and only 1% for the age group of 25 years old and upwards. It became clear that where the audience is of a mixed age group beginning from middle aged persons to above the age of 50; the trait would be that no age restrictions must be mentioned in the Act but where there is an audience of a similar age group, the answer would reflect their age group. Among the 40% where the answer is in the negative, the reason is mainly due to the fact that age does not matter, as they believe that wisdom to perform the task does. Hence a newly graduate can perform the task. Even people from retired professions can perform the task with the number of years of experience. With those who commented that a restricted age group must be provided for in the Act, it was mostly on the basis of medical reasons and consequently suggested that a medical condition for one to be of good health to be qualified for this position as it would be costly if the appointee takes up the post only for a short time due to medical reasons.

Commission's Views

Although PNG provides for an age restriction, there is the concern that it invites discrimination on one's age to perform the tasks. With this age restriction in place, a number of people will also be disqualified from the eligibility of the position of the Ombudsman. Hence including a similar provision to restrict the age on an eligible ombudsman may lead to discrimination issues. It is not a common feature in the qualifications of an Ombudsman throughout the region hence it may not be the most crucial part of appointing a qualified Ombudsman.

With respect to the international documents of Human Rights, it is only reasonable to have an age listed in the Act as any age above 18.

Considering the views of people during consultation and the research done, the VLC is of the view that the provision should not provide for an age limit as a qualification condition. However, the Act must provide for a condition relating to good health which requires a medical practitioner's certificate.

Therefore the Vanuatu Law Commission recommends:

Recommendations: That the Act remains this way and not require an age requirement for the position of the Ombudsman. The Act steers clear of age discrimination provided there is no age requirement.

The Act must also include a provision that a qualified Ombudsman must be of good health; hence a presentation of Doctors certificate is proper.

Personal Qualities of an Ombudsman

The personal qualities of an Ombudsman are important to both the ability of the Ombudsman to conduct effective enquiries and to convince people to implement the recommendations. It involves more than integrity. He or she should already have a public profile recognized preferably for independence, honesty, integrity and moral courage. This profile should bring with it a broad perspective and intellect from which a common sense approach to resolving complaints can be applied. The appointee needs to be a good communicator, articulate in the presentation of issues and must be sensitive about the effect on people of maladministration, corrupt officials and denial

of basic human rights. Without this sensitivity, effective communication with complainants may not be possible.⁴⁴

It is an advantageous if an Ombudsman, at the time of his or her appointment has achieved prominence in the society in which he or she operates. This is usually in the fields of law, higher education, diplomacy or other government services. Sir Guy Powles, the first ombudsman in New Zealand had been a successful and highly regarded lawyer, soldier and diplomat at the time of his appointment in 1962.⁴⁵

When considering the qualities of a qualified Ombudsman, consideration must also be drawn to the Constitutional provisions where with respects to any restrictions imposed by law on noncitizens, all persons are entitled to fundamental rights and freedoms without discrimination on the grounds of race, place of origin, language or sex and so forth. All persons are entitled to equal treatment under the law or administrative action. Specific reference is provided that there must be no law that is inconsistent with this sub paragraph in so far as it makes provision for the special benefit, welfare, protection or advancement of females, children and so forth.⁴⁷

Situation in Vanuatu

Being a woman in Vanuatu also has an impact on the work of the Ombudsman. A clear example was shown when the first Ombudsman, a woman who found herself being the subject of a debate where certain persons made an attempt to remove her from her position for criticising men. They claimed that this was prohibited in the Melanesian culture.

The first Ombudsman in Vanuatu was widely regarded by the political class of Ni Vanuatu as a foreigner, over critical of Melanesian values although she was very effective at investigating wrong doings by leaders. This separated the political class and precluded a working relationship between the Ombudsman and Parliament. Among the grassroots she was seen as a crusader, and by some as almost a saviour.⁴⁶

The personal qualities of the Ombudsman are important to the extent that it paints a public perception of the office. The second Ombudsman in Vanuatu entered office in 1999. He had previously been charged with misappropriation of funds arising from his former employment with the National Bank of Vanuatu. The Magistrate Court dismissed the charge at the preliminary hearing which was successfully appealed at the Supreme Court by the Public Prosecutor which in

⁴⁴ Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004), P23

⁴⁵ Ibid 47

Article 5, *Constitution of the Republic of Vanuatu* 1980, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 14/07/16)

⁴⁶ Ibid 49

Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004), P23

turn allowed the Public Prosecutor to re initiate the prosecution. Nevertheless, this was never done. Consequently, the credibility of the office of the Ombudsman had been compromised in relation to his criticism of the Public Prosecutors office. A conflict of interest arises in such situations and can possibly lead to a compromise of the two offices.⁴⁹

Further issues with regards to the first Ombudsman in Vanuatu and the following Ombudsman emerged when certain persons publicly stated in the papers that the first Ombudsman did not execute her functions according to the Melanesian values and was therefore very adversarial compared to the second Ombudsman.⁴⁷

Section 3(3) merely requires the Ombudsman to be a person who has a knowledge, understanding and appreciation of the culture, traditions and values of Ni-Vanuatu people and one who is of high integrity and competence. He or she must be politically independent and is capable of discharging his or her Constitutional duties without fear or favour. He or she must possess the value of high standing in the eyes of the community.

With reference to whether or not the *Ombudsman's Act* of Vanuatu should make reference to the race of a qualified Ombudsman, an example can be drawn to the current Public Prosecutor who is not an indigenous Ni-Vanuatu citizen but a Fijian. The *Public Prosecutors Act* has a Division entitled "Appointment and Qualifications" which makes reference to a qualified Public Prosecutor as one who is admitted as a legal practitioner in Vanuatu and has been admitted for at least 7 years or one who has been admitted to practise as a legal practitioner in Vanuatu or any other Country or countries for a period of or periods in total of, at least 7 years.⁴⁸ His experience is vital here as opposed to his place of origin.

The Constitution of Vanuatu also provides for the fundamental rights and freedoms of individuals. It recognises that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex. However, most notably, these rights are subject to respect for the rights and freedoms of others and to the legitimate public interest

Comparable Jurisdictions

In PNG, the office of the Ombudsman can be held by a PNG non-citizen. However his or her term in the office is only three years whereas a PNG citizen must serve a term of 6 years for the

⁴⁷ Ibid

⁴⁸ Section 6(1), *Public Prosecutors Act* [Cap 293] (Vanuatu), http://www.paclii.org/vu/legis/consol_act/ppa218/ (Accessed: 2/07/16)

Ombudsman post and 5 years for the Chief Ombudsman.⁴⁹ A person is eligible to serve as the Chief Ombudsman if he is considered by the Appointment Committee as a person of integrity, independence of mind, resolution and high standing in the community.⁵⁰

Consultations

This issue of personal qualities of an Ombudsman was raised during consultation when the team asked the people for any other views. 30% of the people interviewed provided answers in relation to the personalities of an Ombudsman. They stated that a person who possesses good personal qualities will perform the functions of the Ombudsman in a successful manner.

Commissions' Views

The benefit of having an indigenous Ni-Vanuatu as an Ombudsman lies in his or her abilities to perform his or her functions with regard to Vanuatu's culture and Custom. However this can pose a hindrance to the work of the Ombudsman due to the custom and cultural views that the role of men and women are different in the society. The fundamental rights of individuals must also be considered when deciding on the personal qualities of an individual for the position of the Ombudsman.

The approach in PNG is to allow indigenous or naturalised citizens and also non PNG citizens to apply for the position of Ombudsman.

After taking into consideration of the personal qualities of the people filling in the position of the previous Ombudsman, the consultation views and the comparisons, it is the view of the Commission that if a similar approach as that applied in PNG is applied in Vanuatu would be an appropriate solution.

Therefore, the Vanuatu Law Commission recommends:

Recommendations: A similar approach as that applied in PNG is to be applied in Vanuatu. A citizen of Vanuatu, which includes naturalised and indigenous citizen, must serve a term of 5 years while a non-citizen of Vanuatu must serve only a period of 3 years.

⁴⁹ S.5, *Organic Law on the Ombudsman Commission* (No. 913 of 9998) (PNG) http://www.paclii.org/pg/legis/consol_act/olotoc362/ (Accessed: 2/07/16)

⁵⁰ Ibid

Termination of an Ombudsman

Termination and removal of the Ombudsman is a crucial component for the independency of the office of the Ombudsman. Without a proper process in place, there is always the risk that the Ombudsman will be removed or terminated on unlawful grounds or by way of political play.

Current Position in Vanuatu

The *Ombudsman's Act* provides that the Ombudsman may be terminated by the President after consultation with the same authority as provided for the Appointment of the Ombudsman on the basis that the Ombudsman is:

- Declared bankrupt; or
- Convicted and sentenced on a criminal charge (not being a traffic offence); or
- Incapacitated from performing his or her duties because of ill health or an accident certified by two medical practitioners, one nominated by the Ombudsman, the other by the President; or
- found to have committed gross misconduct; or □ Declared unfit for office by virtue of misconduct.

The Ombudsman must be given a reasonable opportunity to answer any allegation that was made against him or her before the President decides whether or not to terminate his or her appointment.⁵¹⁵²

The powers provided for in the *Ombudsman's Act* differ to those provided for by the Constitution of Vanuatu. The Constitution provides for the disqualification of the Ombudsman if he is a Member of Parliament, the National Council of Chiefs or a Local Government Council, if he holds any other public office, or if he exercises a position of responsibility within a political party. The Constitutional provisions continue to state that a person shall cease to be Ombudsman if circumstances arise that, if he were not the Ombudsman, would disqualify him for appointment as such.⁵³

There have been situations where there is an attempt to terminate the Ombudsman. This was shown in the case of *The Ombudsman v The Attorney General & Anor.*⁵⁴ There was a petition signed by the Executive to dismiss the Ombudsman from her office and also to repeal the

⁵¹ Section 8, *Ombudsman Act* [Cap 252] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 2/05/16)

⁵³ Article 61 (2)(3), *Constitution of the Republic of Vanuatu* 1980, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 14/07/16)

⁵⁴ (unreported, Constitutional case number 114 of 1997). <http://www.paclii.org/vu/cases/VJSC/1997/41.html> (Accessed: 3/07/16)

Ombudsman Act. The Government at that time sought to dismiss the Ombudsman by way of request made by petition from certain persons as listed in Article 61(1) of the Constitution. By law, the decision falls on the President to dismiss the Ombudsman after consultation with the parties listed in Article 6(1) and he is the authorised person to initiate the process of termination. It is not the listed persons who should initiate the process for termination as was the situation in this case. As a result, the court held that the decision to dismiss the Ombudsman was without basis and thus unlawful.

The *Ombudsman's Act* of 1995, however, after three years of operation and vigorous political opposition, was repealed by Parliament in 1998 and was replaced by the second Ombudsman Act in the same year.⁵⁵

The benefits of establishing proper processes and institutions in the Constitution shone when Mrs. Marie Noelle Patterson, the operating Ombudsman at that time continued to function under the bare Constitutional provisions despite the Ombudsman's Act being repealed.⁵⁶

In Vanuatu, recent activities highlighted the need to have a well-established process in place to prevent termination of the Ombudsman which is not in accordance with the law. For instance in 2015, when the Acting President, Marcelino Pipite of the Republic of Vanuatu pardoned himself and 13 other convicted members of Parliament,⁵⁹ he also allegedly suspended the Ombudsman, Kalkot Mataskelele, who had been legally appointed by the former President Yolu Abbil. This was done on the 10th of October 2015 via a letter that was delivered to the office of the Ombudsman demanding that the Ombudsman be suspended immediately on the basis of gross misconduct. The letter alleges that the Ombudsman provided a special preliminary report against the leaders which was not founded under the *Ombudsman Act* of the *Leadership Code*. Upon this suspension, Mr Pipite then appointed Mr Wilson Iakama as the new acting Ombudsman.⁵⁷⁵⁸

Mr Kelekele however considered the suspension unlawful. He pointed out the relevant provisions in Section 8 of the *Ombudsman Act* that if there was an allegation of gross misconduct, the President or the Acting President should appoint a tribunal to consider the allegations, comprising of the Chief Justice, the Attorney General, a lawyer nominated by the

⁵⁵ Edward R Hill, Ombudsman of Vanuatu Digest of Public Reports 1996-2000, January 2001, www.vanuatu.usp.ac.fj (Accessed: 1/0716)

⁵⁶ E Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004) 59

PP v Kalosil – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/07/16)

⁵⁷ Anita Roberts, Ombudsman suspended, http://dailypost.vu/news/ombudsman-suspended/article_7d4ff788-

⁵⁸ [-5938-87cd-d591ca85d580.html](http://dailypost.vu/news/ombudsman-suspended/article_7d4ff788-5938-87cd-d591ca85d580.html) (Accessed: 29/07/16)

Prime Minister and another nominated by the Opposition. To appoint an acting Ombudsman, the Acting President needs to do so in accordance with Article 61(1) of the Constitution of the Republic of Vanuatu and the process would normally take two to three weeks for the process be finalised and not one day. Mr Kelekele then wrote to the Head of State regarding the matter so that a decision was to be made whether or not the suspension was lawful.⁵⁹

On the 26 of October 2015, when the actual Head of State resumed office, he then revoked and nullified the suspension of the Ombudsman.⁶⁰ Mr Kelekele continued to execute his functions after these series of events as the Court also ruled that actions executed were unlawful.

Comparable Jurisdictions

In all the jurisdictions in the Pacific there is authority for the removal or suspension of the Ombudsman although the process varies. In most places, the Parliament is involved (for example, PNG, Tonga and Vanuatu). There are also various grounds as to why an Ombudsman must be removed from his or her office.

In PNG, the Organic Law on the Ombudsman Commission provides for the disqualifications from office. A person is disqualified from or to remain a member of the Ombudsman Commission if he is:

- a) a member of the Parliament; or
- b) a member of a Provincial Government; or
- c) a member of a Local-level Government Special Purposes Authority; or
- d) an office holder in a registered political party; or
- e) an undischarged bankrupt or insolvent;
- f) of unsound mind within the meaning of any law relating to the protection of the person and property of persons of unsound mind; or
- g) under sentence of death or imprisonment.⁶³

⁵⁹ *Ibid*

⁶⁰ Email from Jerry Boe jboe@vanuatu.gov.vu to Gracelyn Tasso <tgracelyn@vanuatu.gov.vu>, 28 June 2016

⁶³ Section 7, *Organic Law on the Ombudsman Commission* (No. 913 of 9998) (PNG). http://www.paclii.org/pg/legis/consol_act/olotoc362/ (Accessed: 2/07/16)

The Act continues to state that a member of the Ombudsman Commission must not: a) actively engage in politics; or

b) engage either directly or indirectly in the management or control of a corporation or other body of persons carrying on business for profit; or

c) except on leave granted by the Head of State, or because of illness, absent himself from duty for more than 14 consecutive days or more than 28 days in any period of 12 months; or

d) subject to Subsection (3), acquire by way of gift or otherwise, or use or hold in any other manner any interest in, any property of Papua New Guinea or solicit, accept or receive any other benefit in addition to his terms and conditions of employment.⁶¹

Furthermore leaders such as the members of the Ombudsman Commission can be dismissed by the Prosecutor for misconduct in officer under the Leadership Code.⁶⁵ They can also be removed from the office by the Appointments Committee on advice of a tribunal established under the *Organic Law on the Guarantee of Rights and Independence of Constitutional Office Holders*. Under this provision, the Ombudsmen may be removed only for the inability to perform his functions and duties of his office; misbehaviour; or breach of any condition laid down in Organic Law.⁶²

There is a longer process to terminate the Ombudsman in Queensland. To begin the process, the Premier must inform the Ombudsman in writing about the reasons for the intended motion. Following on from this, the Premier must request an address by Parliament and include his or her statement sent to the Ombudsman and the Ombudsman's response. Subsequently, the Premier shall consult the responsible Parliamentary Committee about the motion and obtain agreement from all its members or from a majority of its members other than a majority consisting wholly of members of the political party or parties in government in the Assembly. These elements of procedural fairness guarantee that the Ombudsman cannot be easily removed from the office and also stabilizing the Ombudsman's tenure and strengthening his or her independence.⁶³

⁶¹ Ibid ⁶⁵

Micharl Frahm, Ludwig Boltzman , 'Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice', Institute of Human Rights, Springer, 2013, P238

⁶² Section 7, *Organic Law on the Guarantee of Rights and Independence of Constitutional Office Holders* (No.907 of 9998) (PNG) http://www.paclii.org/pg/legis/consol_act/olotgotraioc552/ (Accessed: 2/0716)

⁶³ Micharl Frahm, Ludwig Boltzman, 2013, Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice, Institute of Human Rights, Springer, P92

Consultations

The issue of the process of termination of the Ombudsman is related to that of the appointment process of the Ombudsman. 100% of the people that were interviewed also stated that like the process to appoint, there must be a proper process to terminate an Ombudsman which must also be free from political influence. All agreed that to amend the Constitution in this regard will require wider consultations.

Commission's Views

A provision for a proper process to terminate the Ombudsman will be beneficial if it is established in the Constitution of the Republic of Vanuatu as provisions are rarely changed compared to other legislations. The Constitution of Vanuatu requires that a bill for an amendment of the Constitution must be supported by more than two-thirds of all members of Parliament with which three quarters of the members are present.

The current established process proved to be a reasonable robust process. Although there were attempts to subvert the legal process in both cases, the court ruled that actions carried in these situations were unlawful.

In Queensland, more steps are required to have an Ombudsman removed from his position. Applying a similar process in Vanuatu would certainly promote fairness but it will require additional resources to amend the current provisions and also in trying to accommodate the new model as that applied in Queensland.

Therefore, the Vanuatu Law Commission makes the following recommendations:

Recommendations: That since the process to terminate the Ombudsman is already well established in the Act, no amendments need to be made to the Act. The current process, although is not an exact replica of other Queensland models, nevertheless promotes fairness.

CHAPTER TWO: FUNCTIONS AND POWERS OF THE OMBUDSMAN

Brief Background

History records models that functions like the modern day Ombudsman but with different names. For instance, about 3000 years ago in China, it was the “Control Yuan” that acts like the Ombudsman whereby the decrees of the emperor are reported by him to the people and the voice of the people are reported by him to the emperor.⁶⁴

In 1713, a Chancellor of Justice was appointed by the king to oversee public officials and ensure that citizens were protected from injustice and arbitrary behaviour. In 1809, the Justice Ombudsman became an officer of Parliament in Sweden with the role to ensure that the laws were adhered to by administrative authorities in Sweden. The jurisdiction of the Justice Ombudsman was to enquire into actions taken by the government administration including the military and the courts. The idea then spread into the western countries in the 1900’s followed by New Zealand appointing its own Ombudsman in 1962.⁶⁵

Vanuatu appointed its Ombudsman with similar functions as that of the Justice Ombudsman in Sweden in 1809. Its functions are stipulated in the Constitution of the Republic of Vanuatu, the *Ombudsman Act* and the *Leadership Code Act*. The first function is investigating any practices of maladministration by the government.⁶⁶ The second function is to safeguard and ensure the observance of three official languages of Vanuatu.⁷¹ The third function is to administer the *Leadership Code*⁶⁷ and finally to serve as a mediator.⁶⁸

Current Problem or Submissions

The general functions and powers of the Ombudsman which is to enquire into the conduct of any person or body⁶⁹ are limited to some extent. Governmental bodies such as the office of the President and some other judicial bodies like the Supreme Court and Judicial Service Commission

⁶⁴ Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004), P14

⁶⁵ Ibid

⁶⁶ Ibid 71

Article 62, *Constitution of the Republic of Vanuatu* 1980, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 14/07/16)

⁶⁷ S.s (11)(e), *Ombudsman Act* 1998 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

⁶⁸ S.13, *Ombudsman Act* 1998 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

⁶⁹ Above n68

are excluded from the investigating power of the Ombudsman. There are also bodies and institutions that although are non-governmental, are supported and funded by Government of Vanuatu or the Government own shares in or beneficial interest in. The Ombudsman requested the Law Commission to explore whether or not the Ombudsman can extend its power to these bodies.

With reference to the functions of the Ombudsman, the issue of the protection of the name of the Ombudsman also emerges. The concern is that the name “Ombudsman” is also used by some other institutions such as the Lands Ombudsman⁷⁰ which might lead to the confusion in the minds of the people as to which institution an Ombudsman might be representing when exercising his functions. The work of the Ombudsman might be affected in this regard.

Scope of Functions and Powers of the Ombudsman – Conducts of the President, the Statutory Bodies, the Supreme Court and Other Judicial Bodies

The current *Ombudsman Act* already provides a wide scope of functions and powers for the Ombudsman. The first main task is to investigate any forms of maladministration practices by the Government.⁷¹ The Constitution of the Republic of Vanuatu states that the power of the Ombudsman to enquire into the conduct of all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies.⁷² This is firmly supported by the *Ombudsman Act*.⁷³

Comparable Jurisdictions

It is the core function of a classical Ombudsman Institution to oversee the administration actions of public bodies. In many jurisdictions, the judiciary is usually outside the Ombudsman’s power to investigate.

In other jurisdictions, it is made clear “that the actions of the administrative nature, i.e. actions of preparatory and follow character without which no proceeding in front of a judge or magistrate can take place, can be the object of control of the Ombudsman Institution.”⁷⁴ These are seen in

⁷⁰ Thomson Marango, Vanuatu’s first Land Ombudsman has been appointed, http://dailypost.vu/news/vanuatu-s-first-land-ombudsman-has-been-appointed/article_cb3ed1da-b7e4-5585-b375-829761b854b1.html (Accessed: 11/07/16)

⁷¹ Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004), P14

⁷² Article 62(2), *Constitution of the Republic Of Vanuatu* 1980

⁷³ S.10, *Ombudsman Act* 1998 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

⁷⁴ Ibid

places such as Samoa, Solomon Islands, Cook Islands, Australian Commonwealth, New Zealand and South Australia.⁷⁵

In the Northern Territory of Australia, the Ombudsman Institution may investigate actions by a tribunal only or a member of a tribunal if the Ombudsman “is satisfied that there has been unreasonable delay by the authority in relation to the action.”⁷⁶ This power is limited to a tribunal only and not an ordinary judiciary.

In Vanuatu, the power to investigate, although exclude the bodies of the President, the Supreme Court, the Judicial Service Commission and other judicial bodies. It only covers the conducts of leaders if is contrary to the *Leadership Code Act*. Judges are not included while the President is included in this definition of Leaders.

In PNG, Judges, Public Prosecutors, Chief Magistrates and personal staff of the Governor General are all subject to the OLDRL⁸² and thus the Ombudsman Commission except for the Governor General. ⁸³ The PNG Constitution, in s.219 provides that the functions of the Ombudsman Commission may investigate to governmental bodies except for the justifiability of a policy of the National Government or a Minister or a provincial government and also to the extent that the policy may be contrary to law or to the National Goals and Directive Principles, Basic Rights or Basic Social Obligation or any Act of Parliament. The Ombudsman Commission is also restricted to not inquire into the exercise of the rule making body by a local government, and also shall not inquire into a decision by a court unless the decision of the court shows an apparent defect in law or administrative practice. This is supported by the *Organic Law on the Ombudsman Commission*.

Consultations

During consultations, all persons interviewed including the Office of the Ombudsman were of the view that the Ombudsman must extent his jurisdictions to the prohibited bodies mentioned by the Constitution. The reason behind this is that all people are under the laws of Vanuatu. Excluding these bodies from the investigating powers of the Ombudsman is inferred by the people that they are above the law. The actions however must only be limited to the administrative matters and not overlap with the judicial decisions carried out by the judicial bodies. With reference to decisions made by the judicial bodies and courts, power must only be exercised to investigate reasons as to why decisions have been unreasonably delayed.

⁷⁵ Ibid

⁷⁶ Ibid

⁸²

Organic Law on the Duties and Responsibilities of Leadership 1998 (Papua New Guinea) http://www.paclii.org/pg/legis/consol_act/olotdarol528/ (Accessed: 11/05/16) ⁸³ Ibid

Commissions' Views

Meaning of Conducts

Although the bodies expressly mentioned in the Act are excluded from the power of the Ombudsman, the conduct of the leaders in these institutions such as the President and those defined by the *Leadership Code* as leaders is not excluded.

It is the view of the Commission that the term “conduct” must be clearly defined. This is to clarify the scope of the term “conduct” and whether or not only the administrative conducts will fall under the jurisdiction of the Ombudsman.

A breach of Parts 2, 3 and 4 of the *Leadership Code* which provides for the duties of leaders, breaches of the *Leadership Code* and Annual Return respectively can also be used as a guideline when determining what conducts of the President and other “leaders” are to fall under the power of the Ombudsman.

Meaning of Consultation in the Ombudsman Act

Equally important is the issue of the President and the Ombudsman whereby the President appoints the Ombudsman after consultation with the authorities and the President being under the power of the Ombudsman for investigation. There is a possibility of a rise of conflict of interest between the President and the Ombudsman. This can be avoided if the term “consultation” is given a meaning as to whether the President must act in accordance with the advice provided upon consultation with the leaders. There is a very slim chance of an Ombudsman being appointed based on his own interest if this process is clearly defined.

Overlapping in the different powers

Moreover, to have the Ombudsman to investigate into the judiciary bodies and their decisions would impact on the separation of the legislative, executive and judicial powers and functions. It may threaten the separation of power and cause an overlap in the functions of the Ombudsman with the judiciary if the Ombudsman can question the decision and actions made by the judiciary bodies where there are inconsistent findings. In a thesis to fulfil the requirements for the degree of the Masters of Laws, Hill researched and wrote about the structural analysis of the Ombudsman of Vanuatu. In this paper, he recommends that this issue can be combatted if the Ombudsman adopts “a policy of not initiating an investigation (and stopping one that has been initiated) where court proceedings in relation to the same matter are underway.”⁷⁷

The Law Commission considers that the recommendation provided by Hill is proper for Vanuatu.

⁷⁷ Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004)

Also after taking into consideration the various models used in other jurisdictions, the views of the people taken during consultation, the VLC sees it fit that the Ombudsman only investigate the administrative actions of the bodies that have been excluded by law from the investigating powers of the Ombudsman.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That to change the powers of the Ombudsman would include an amendment of article 62(2) of Constitution which must be introduced either by the Prime Minister or any other member of Parliament. It also must be supported by the votes of no less than two-thirds of all members of Parliament at a special sitting of Parliament at which threequarters of the members are present.

Although it was agreed by all person that were interviewed that the bodies must be investigated of their administrative actions, the key stakeholders such as the President, the Judicial Service Commission and the Judiciary were not among the group of people that were consulted due to short period available for consultation and the available limited resources. Hence the VLC recommends for this particular issue of the Ombudsman looking into the administrative functions of these bodies and changing the Constitution in Article 62(2) to be looked into in another future review when the Ombudsman Office decides that it is timely for another review of their Acts.

Ombudsman Investigating Private Enterprises

This issue arose in cases where public services⁷⁸ such as the provision of potable water, gas or electricity are provided by private companies but have a history of being provided by the government.⁸⁶ In the United States and the U.K for instance, some health care and prison services have been privatised in the past decades and thus excludes the Ombudsman from investigating their actions in service delivery to the people.⁷⁹ Thus, there is a call to extend the power of the Ombudsman to also cover private enterprises.

⁷⁸ Services which are of general interest to the public which supply the public with essential commodities or essential services ⁸⁶

Micharl Frahm, Ludwig Boltzman , 2013, Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice, Institute of Human Rights, Springer

⁷⁹ Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004)

Current Situation

In 2002, the Vanuatu Government sold its share of the water and electricity company UNELCO which has a monopoly for the commercial generation and distribution of electricity within Port Vila, Luganville and other areas of Vanuatu. Being a private company, it is not under the jurisdiction of the Ombudsman despite its continuing monopoly.⁸⁰ In a report produced by the Ombudsman in 1999, it was shown that the water utility is managed by UNELCO in accordance to an agreement entered into with the Government of Vanuatu in 1993. UNELCO agreed to put itself at the service of the Vanuatu Fire Service in the event of a fire. In the report, the recommendations made by the Ombudsman were mostly directed to the Vanuatu Fire Service and the government of Vanuatu although it was important to also inquire into the conducts of UNELCO.⁸⁹

“An expansion of the role of the Ombudsman into these private bodies would allow for the Ombudsman to compensate for the divestiture of its control in UNELCO by the government and allow for the investigation of complaints into both the monopoly of UNELCO in the commercial sale of water and electricity and into its continuing obligation to play a role in the fire fighting in Vanuatu.”⁸¹ This lack of power to investigate has a negative impact upon consumers as the alternative of individual consumers seeking redress privately is very expensive and timeconsuming. There is also the crucial point that Vanuatu still has no mechanism or precedent in place that would assist in a class action from the consumers against the private bodies and other public bodies.⁸²

Vanuatu is lacking in terms of having the Ombudsman to investigate private companies that provide public service. However there are individual independent bodies to deal with certain bodies that provide service in Vanuatu. The Utilities Regulatory Authority (URA) was established by the *Utilities Regulatory Act No. 11 of 2007* and acts in place of an independent body and has a number of functions. Promoting the consumers long term interest and to increase access to safe reliable and affordable electricity and water services throughout Vanuatu is one of its many functions, particularly, assisting consumers to resolve grievances.⁸³

On another note, the *Companies Act* [Cap 191] which is administered by the Vanuatu Financial Service Commission also makes reference to private companies in that the Minister of Finance

⁸⁰ Ibid 89

Public Report on the Vanuatu Fire Service failure to put out the fire on 6 May 1998 at Paris Shopping, Snoopys, Au Peche Mignon and Frank King Tours, May 12 1999

⁸¹ Above n88

⁸² Above n88

⁸³ Utilities Regulatory Authority,

http://www.ura.gov.vu/index.php?option=com_content&view=article&id=14&Itemid=180&lang=en (Accessed: 11 /07/16)

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 manner.⁸⁴ The main service provided by the Vanuatu Financial Service Commission is to operate an effective and efficient Registry and regulate and supervise the non-deposit taking financial services industry of Vanuatu.⁸⁵

Comparable Jurisdictions

In other jurisdictions, service delivery is looked after by three different bodies. The first is under the jurisdiction of the Ombudsman institution, the second is under the jurisdiction of specialised Ombudsmen and third under the jurisdiction of another independent complaint body which provides its services for free or under the jurisdiction of the Ombudsman himself.⁸⁶

For instance in all of Australia and New Zealand, railway services are under the jurisdiction of the Ombudsman. In the both countries, the Ombudsman can investigate the public universities except in Vanuatu whereby universities are not under the jurisdiction of the Ombudsman. In the case of water supply, the Ombudsman can investigate matters related to water supply in New Zealand. In Queensland, Tasmania and Western Australia, there are specialised public Ombudsmen for the issue of electricity supply or Private industry Ombudsmen in New South Wales, South Australia and Victoria. In New Zealand, a private Electricity and Gas Complaints Commissioner Scheme provides for a complaints mechanism.⁸⁷

Consultations

With reference to whether or not the Ombudsman should enlarge his or her responsibilities to investigate private bodies that deliver public service, 78% of the populace surveyed agreed that the Ombudsman must extent his jurisdiction to also cover the conduct of the private bodies to ensure that consumers are treated fairly.

At the mention of the *Companies Act*⁸⁸ and its power to investigate companies, 43% of the populace that responded was that they prefer that this function is added to the current *Ombudsman's Act* as they think that the institution is there to hear and voice the complaints of the people and fight issues related to corruption. They were of the view that the *Companies Act* is focused more on issues related to companies rather than the interest of the people.

⁸⁴ S.169, *Companies Act* [Cap 191] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/ca107/ (Accessed: 11/07/16)

⁸⁵ Vanuatu Financial Services Commission, <https://www.vfsc.vu/services/> (Accessed: 11/07/16)

⁸⁶ Michael Frahm, Ludwig Boltzman , 'Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice', Institute of Human Rights, Springer, 2013

⁸⁷ Ibid

⁸⁸ *Companies Act* [Cap 191] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/ca107/ (Accessed: 11/08/16)

Commission's Views

It is the view of the Commission that the powers and functions of the Ombudsman must not be extended to include the conduct of Private entities that provide essential public service to the people of Vanuatu. This must be applied to both private bodies that the government owns shares in and those that the government does not own shares in. Where there are independent bodies that have been established to look into specific areas such as the provision of water and electricity supply (URA), there should not be interference with their function and jurisdiction. However in the absences of such independent institutions or mechanism to hear the complaints of the consumers and investigating into the conducts of the utilities providers, other similar bodies such as the URA must be created to hear complaints and investigate matters related to public services provided by these private companies which the government owns shares in. Furthermore the Ombudsman would lack resources in terms of human and financial resource to hear related complains and investigate all private bodies that provides public service.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the Ombudsman Act must remain as it is in that the power of the Ombudsman is not extended to investigate other private bodies that provide public service due to the limited resources available. Where there are complaints of public services provided that the government owns shares in, independent bodies must be established to look into these matters.

The Protection of the Name "Ombudsman"

Although the term 'ombudsman' was first established as a public institution, it is used currently in various specialised issues.⁸⁹ The term stands for independence, accessibility and fast, fair and free procedures. Using the term Ombudsman, a good reputation is associated with it in the Australia Pacific (APOR) region over the last 50 years of their existence.⁹⁰ In the public and private domains, there is usage of the term Ombudsman for specialised functions as well as general functions that relate to public administration. ⁹¹ Others however have specialised Ombudsmen for children, prisons and for the public health sector.⁹²

⁸⁹ Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004)

⁹⁰ Micharl Frahm, Ludwig Boltzman , 2013, Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice, Institute of Human Rights, Springer

⁹¹ Ibid

⁹² Ibid

The rationale behind the protection of the name of the “Ombudsman” is to increase the public confidence in the Ombudsman. Moreover the public cannot get confused or misled by Ombudsman like schemes that do not live up to what the name promises. Once the public is disappointed by any such process, public confidence could decrease.⁹³

Comparable Jurisdictions

In Australia, South Australia and Tonga, the name of the Ombudsman is protected by law. In Tonga however, the term that is equivalent to the term of “Ombudsman” is known as the “Commissioner for Public Relations”. No person other than the person appointed under the law may use the term “Ombudsman” for any internal procedure aiming at the investigation and remedy of complaints. In 2010 the Australian and New Zealand Ombudsman Association (ANZOA) began a campaign which aimed at a better protection of the name in Australia.⁹⁴ In a media release in 2010, the ANZOA sets out six essential criteria that members of the public are entitled to expect of any office described as an Ombudsman.¹⁰⁴

Examples of an industry based Ombudsman in Australia is the Energy and Water Ombudsman where as in New Zealand the industry based Ombudsman includes banking Ombudsman Scheme, Office of the Electricity and Gas Complaints and Insurance and Saving Ombudsman Scheme⁹⁵.

In New Zealand the Ombudsman Act protects the name of the Ombudsman from being abused. It states that no person may use the name “Ombudsman” in relation with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, or herself out to be an Ombudsman. It can only happen on prior written consent of the Chief Ombudsman⁹⁶.

In Vanuatu, there is a Lands Ombudsman established recently with the amendments done to the Land laws.⁹⁷ Besides this, Vanuatu is still lacking in having a protection provision of the term “ombudsman” in law.

⁹³ Ibid

⁹⁴ Ibid ¹⁰⁴

See Appendix

⁹⁵ Australia and New Zealand Ombudsman Association,

http://www.anzoa.com.au/assets/anzoa_mediarelease_essential-criteria-for-use-of-the-term-ombudsman.pdf

(Accessed: 12/07/16)

⁹⁶ *Ombudsman Act* 1975, of New Zealand, section 28(A)

<http://www.legislation.govt.nz/act/public/1975/0009/187.0/DLM430984.html> (Accessed: 11/07/16)

⁹⁷ Thomson Marango, Vanuatu’s first Land Ombudsman has been appointed, http://dailypost.vu/news/vanuatus-first-land-ombudsman-has-been-appointed/article_cb3ed1da-b7e4-5585-b375-829761b854b1.html (Accessed:

11/07/ 2016)

Consultations

After explaining this particular issue to the people being consulted and providing examples, all people were of the view that the Ombudsman Act must have a section to protect the name of the Ombudsman. The 12% who added more comments stated that when those representing the staff of the Ombudsman perform their functions out of office, should bear with them a document that shows that it is the public Ombudsman that authorise them to work on matters required by the Ombudsman himself or herself.

Commission's Views

Taking into consideration the impacts of the use of the term and the views of the people, the Commission is of the opinion that the *Ombudsman Act* in Vanuatu must have a provision that protects the name of the Ombudsman.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the *Ombudsman Act* is amended and includes the provision that states that only persons appointed by the law may use the term ombudsman.

Recommendations: That there is a Constitutional amendment to protect the name of the Ombudsman. It must state that only the Ombudsman as provided for by Article 61 is to use the term "Ombudsman." This must be added in Article 61(4) of the Constitution.

Recommendations: That any person, who uses the term "Ombudsman" without being appointed by law, is liable for a fine or imprisonment time.

Recommendations: That the Land Ombudsman does not follow Article 61 and must be changed. It is recommended that the term be changed to other synonyms such as the "Land Regulator" or "Land Commissioner".

CHAPTER THREE: COMPLAINTS AND PROCEEDINGS

Introduction

This chapter examines the provisions relating to how the office of the Ombudsman carries out its work, namely from when it first receives a complaint and through its different stages until either a report is produced or the matter is taken up by the Police or the Public Prosecutor to Court. There are different steps that are taken during these proceedings and this chapter will be broken down into these different steps.

Discretion to Investigate Complaints

Background

In any democratic country, it is fundamental that the citizens are able to hold their government accountable so they are able to see that government money is being spent lawfully and on the priorities that were agreed by the citizens when they elected that government. A way of complaining about services or misuse of government funds, and a mechanism for using those

complaints to change operations, is an important way for the public to control government actions on a day to day level.⁹⁸

Investigations are commenced by a complaint made by any person or body affected by the action, inaction or decision which is the subject of the complaint.⁹⁹

In Vanuatu's *Ombudsman Act*, it is provided 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.¹⁰⁰ 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.¹¹¹ Furthermore, the Act has also limited the Ombudsman from enquiring into matters that had been previously dealt with by the Ombudsman.¹⁰¹

Current Situation

The
Ombudsman's office
in their
submissions to the
Vanuatu
Law
Commission (VLC)
office,
based on
three
reports
that had

⁹⁸ Pacific Ombudsman Alliance (2013) 'Roles and functions of Ombudsman and current complaint mechanisms in Pacific islands'

http://www.pacificombudsman.org/_data/assets/pdf_file/0013/2434/Roles_and_functions_ombudsman.pdf
(Accessed: 26/04/2016)

⁹⁹ *Ombudsman Act* [Cap 252] (Vanuatu) http://www.pacilii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

¹⁰⁰ Ibid 111

Above n110

¹⁰¹ Above n110

been produced from reviews of the Ombudsm an Office, proposed that the provisions seemed wide and allowed the possibility of the Ombudsm an being able to avoid investigations on the basis of being biased or socially, culturally or politically influenced .
Furthermore, the Ombudsm an should have the additional

discretion
to
investigate a matter
that has
previously
been the
subject of
an
Ombudsman
enquiry
as the
current
Act does
not allow
for this. It
was stated
that while
this power
might be
rarely
needed,
the
Ombudsman
should
have the
power to
review
and report
on
agencies'
failure or
refusal to
accept
Ombudsman
enquiry

recommen
dations.

Comparable Jurisdictions

Similar provisions in comparable jurisdiction are more comprehensive. These jurisdictions include Fiji, Papua New Guinea, Solomon Islands, Cook Islands and Samoa. In all these countries, investigations are commenced by a complaint made by any person or body affected by the action, inaction or decision which is the subject of the complaint. Fiji is the exception as it does not allow complaints to be made by a public body. Furthermore, in all six countries, the Ombudsmen are not obliged to investigate all complaints that are made but have discretion to decline to investigate a complaint on specified grounds, often provided by their governing legislation.¹⁰²

The discretion that an Ombudsman has about whether to investigate complaints or not is universal and a common factor with all the Ombudsmen's office. The factors provided by each governing legislation to allow for this discretion is similar among the 6 countries. These common factors include:

- the complaint being trivial, frivolous, vexatious;
- or not made in good faith;
- there being another available remedy or channel of complaint that could be reasonably used;
- no sufficient interest in the subject matter;
- the complaint being more than 12 months old;
- complaint is not within the jurisdiction of the Ombudsman

Some of these countries have additional factors that help guide the Ombudsmen in exercising his or her discretion.¹⁰³ In PNG, the Ombudsman's discretion also extends to where the complaint has been too long delayed to justify an investigation, if the Commission has matters more worthy

¹⁰² Jennifer Corrin and Don Paterson (eds), *Introduction to South Pacific Law* (2nd ed, 2007)

https://books.google.vu/books?id=BVACHzdm-usC&pg=PA146&lpg=PA146&dq=Introduction+to+South+Pacific+Law,+Ombudsman&source=bl&ots=ScCf5tUOJ&sig=hp5Ro2PMWLcKRubQKPl12Ud8BZA&hl=en&sa=X&redir_esc=y#v=onepage&q=Introduction%20to%20South%20Pacific%20Law%2C%20Ombudsman&f=false (Accessed: 20/04/2013)

¹⁰³ Commonwealth Ombudsman (2009) 'Australasia and Pacific Ombudsman Region Information Manual' http://www.ombudsman.gov.au/_data/assets/pdf_file/0020/26039/apor-manual_20091009.pdf (Accessed: 26/04/2016)

of its attention or if there are insufficient resources.¹⁰⁴In both the Solomon Islands¹⁰⁵ and Vanuatu¹⁰⁶, they have a similar provision where the Ombudsman is not allowed to conduct investigations about private persons, companies or organisations.

Solomon Islands has also gone a step further in providing that the Ombudsman cannot investigate unless the aggrieved person is a resident of Solomon Islands, the complaint relates to an action taken in relation to him while he was present in Solomon Islands or in relations to rights or obligation that accrued or arose in Solomon Islands.¹⁰⁷

In New South Wales, Australia, its Ombudsman's office has a manual for its investigators when it comes to investigating complaints. It details step by step the different processes that the office goes through upon receiving the complaint. It begins with the assessment of a complaint.

While Vanuatu's *Ombudsman's Act* provides that the Ombudsman cannot investigate a matter that has previously been the subject of an enquiry, the other comparable jurisdictions do not have a similar provision. The factors that have been mentioned above are the main factors that dictate whether an Ombudsman can enquire into a matter or not.

Consultations

Within the five provinces that were visited, the Provincial Headquarters, Area Secretaries along with the relevant Government offices were consulted. Over 90% of those consulted were unaware of the provisions within the *Ombudsman Act*, especially with regards to the Ombudsman's discretion to investigate complaints, and the 10% that had some idea of these provisions either worked or had worked at the Ombudsman's office. Once informed of these provisions, all those consulted agreed that while the factors provided for by the Act to guide the Ombudsman's decision when investigating a complaint were sufficient, the Ombudsman's reasons for not investigating a complaint should be made public so that the general populace knew the reasons of the Ombudsman's decision rather than assuming that it was a biased decision.

All those consulted also expressed their agreement that Ombudsman should not be prohibited from investigating into a previous complaint especially when new evidence can arise later on after

¹⁰⁴ *Organic Law on the Ombudsman Commission No. 913 of 9998* (Papua New Guinea) http://www.paclii.org/pg/legis/consol_act/olotoc362/ (Accessed: 10/05/16)

¹⁰⁵ *Ombudsman (Further Provisions) Act 1996* (Solomon Islands) http://www.paclii.org/sb/legis/consol_act/opa349/ (Accessed: 10/05/2016)

¹⁰⁶ *Ombudsman Act [Cap 252]* (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed:10/05/16)

¹⁰⁷ *Ombudsman (Further Provisions) Act 1996* (Solomon Islands) http://www.paclii.org/sb/legis/consol_act/opa349/ (Accessed: 10/05/2016)

the investigation had been closed. This requires the removal of the section in the Act that prohibits the Ombudsman from doing this.

Commission's Views

The VLC understands that given the lack of understanding, knowledge and awareness of the *Ombudsman's Act*, the general public's views and fears of the Ombudsman misusing his or her discretion to decide whether to investigate a complaint or not is understandable. Given that there are already factors set in place in the Act to guide the Ombudsman in using this discretion, it would be difficult for the Ombudsman to misuse this discretion given that this discretion or power has its limitations provided by the Act.

However, the VLC is of the view that the Ombudsman's reasons for not investigating a complaint should be made public so that the public is aware of it if the matter is of public interest or should be communicated to the complainant if it is a confidential matter. The VLC is also in agreement with the findings of the Wiltshire, McDowell and Review Committees reports that the Ombudsman should be given the power to re-investigate matter or issues that it has already investigated, especially when new evidence arises. While the Ombudsman will rarely need to reopen an inquiry, investigations into why recommendations have not been followed should not be barred absolutely but left to the discretion of the Ombudsman. The Ombudsman should have the power to review and report on agencies' failure or refusal to accept Ombudsman recommendations.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the Ombudsman's decision with regards to the use of his or her discretionary power should be made available to the general populace for their better understanding through media outlets such as newspaper only if the matter at hand is of public interest. This does not mean that the general populace should have any influence over the Ombudsman's decisions making but that they have the right to know the reasons behind the Ombudsman's decision especially regarding any matter of public interest. If the matter is of private interest, then the Ombudsman's decision to investigate or not investigate must be communicated to the complainant to maintain confidentiality of the enquiry as required by the Constitution Article 62 (5) and section 28 of the *Ombudsman Act*.

Recommendations: Section 19 (a) should be amended to allow the Ombudsman the power to investigate into any matters that he or she had previously investigated especially in circumstances where new evidence has risen up or in circumstances where previous recommendations have not been acted upon or considered by agencies or leaders. However, a limit with regards to the timing of leaving this open should also be provided for.

Recommendations: Awareness should be carried out to the general populace about the *Ombudsman Act* so that they are aware and well informed of the different sections within the Act.

Evidence Issues: Admissible Evidence

Background Information

As an independent body, the Ombudsman maintains its own independence when carrying out its investigations and does not involve the Police or the Public Prosecutor's office until required to do so at a later stage in its process. As such, evidence collected by the Ombudsman through their investigation cannot be admitted in Courts as the Courts follow the common law rules of evidence and are very strict on the different types of evidence presented before them.

Since the decisions or recommendations made by the Ombudsman after an investigation are not binding on the body or person that the complaint is made against, the rules of evidence used by Court cases do not apply to the majority of administrative and disciplinary investigations.

Section 22 of the *Ombudsman's Act* provides for the Ombudsman obtaining evidence in the different situations that arises during his or her investigation. Section 23 caters for failure to comply with a notice of obtaining evidence and section 24, power to enter premises. Furthermore, as provided by sections 26 and 27, during an inquiry, the Ombudsman is not permitted to share evidence with the police who may have an interest in the same matter or criminal investigation even though the same evidence can later be used to prosecute offenders. The Ombudsman may only disclose matters that are, 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 recommendations.¹⁰⁸

Current Situation

In their submissions, the Ombudsman's office drew attention to the current difficulties they had in the sharing of evidence and case files between their office, the Police and the Public Prosecutor's office because the latter two agencies distrusted evidence collected by the Ombudsman investigators and refused to treat it as 'bona fide' evidence and to take it to Court.

¹⁰⁸ *Ombudsman Act* [Cap 252] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 11/05/16)

Comparable Jurisdictions

While the different legislations within the South Pacific provide guidelines as to the powers that the Ombudsman's office has in obtaining evidence, none make reference to having to adhere to the rules of evidence that is used by the Courts. In all the six mentioned South Pacific countries, the Ombudsman in each respective country has the power to enter any premises which he or she has jurisdiction over to collect and also to hear or obtain information from such persons as he thinks fit. Furthermore, each country also have provisions that state that while witnesses in an Ombudsman investigation can enjoy the same privileges as Court witness, any evidence they give can be used against them if that person is on trial for perjury.

In its *Ombudsman Act*, Samoa has taken a step further by actually stating that in conducting an investigation or inquiry, the Ombudsman is not bound by strict rules of evidence or procedures but must, at all times, conform to the principles of natural justice.¹⁰⁹ Furthermore, in Samoa¹¹⁰, Cook Islands¹¹¹ and Papua New Guinea¹¹², it is expressly stated that the Ombudsman or any of his or her staff member is not allowed to give evidence in a court or in any proceedings of a judicial nature.

In Australia, specifically New South Wales and Victoria, its Ombudsman's office has a manual for investigators when investigating complaints which make reference to evidence collection and also the rules of evidence. It is a requirement that the investigator must have a good understanding of the rules of evidence and relevant standards of proof for if the allegations were to become the subject of legal proceedings, then the evidence collected during the investigation may be used in a court of law. The possibility of an allegation resulting in the institution of legal proceedings should not be unexpected and care can then be taken during the course of investigation to ensure that evidence gathered will not be ruled inadmissible in such proceedings and in accordance with

¹⁰⁹ Subsection(43)(4) *Ombudsman (Komesina o Sulufaiga) Act* 2013 (Samoa)
http://www.paclii.org/ws/legis/consol_act_2015/oosa2013295 (Accessed: 11/05/2016)

¹¹⁰ *Ombudsman (Komesina o Sulufaiga) Act* 2013 (Samoa)
http://www.paclii.org/ws/legis/consol_act_2015/oosa2013295 (Accessed: 11/05/2016)

¹¹¹ *Ombudsman Act* 1984 (Cook Islands) http://www.paclii.org/ck/legis/num_act/oa1984114 (Accessed: 10/05/2016)

¹¹² *Organic Law on the Ombudsman Commission No. 913 of 9998* (Papua New Guinea)
http://www.paclii.org/pg/legis/consol_act/olotoc362/ (Accessed: 10/05/16)

the rules of evidence.¹¹³ Where legal proceedings are foreseeable, the investigation must be conducted in accordance with the established rules of evidence.¹¹⁴

None of the 6 South Pacific countries have an investigations manual and as such, they have no guidelines as to how to make sure evidence collected can be admissible should legal proceedings arise from any complaint.

Consultations

Everyone that was consulted with agreed that there had to be cooperation between the Police, the Public Prosecutor and the Ombudsman's office in sharing evidence and being able to use the evidence provided by the Ombudsman in Courts. Over 80 of the 96 people that were consulted expressed their frustration at how slow the Ombudsman's office seemed in carrying out its work. However it should be noted that this number of people were also unaware of the Ombudsman's working procedures and issues that the office faced especially with regards to evidence. Nevertheless they thought that it would be best if some form of understanding could be reached between the three relevant departments to make the sharing of information easier.

The Vanuatu Public Prosecutor stated that the common law rules of evidence are set in stone with the Courts and as such, evidence obtained through the Ombudsman's methods of investigation cannot be accepted. However a clearer statement can be and should be made as to what kind of evidence is admissible or not admissible in Courts so that this can also be used by the Ombudsman's office when conducting his or her investigations. This statement should also provide some guidelines to the Ombudsman's office regarding the creation of one set of rule that will deal with all the breaches under the *Ombudsman's Act*, including breaches under the *Leadership Code*, and also with regards to better cooperation and information sharing between the relevant departments for a better and more efficient investigative process.

Commission's Views

The VLC is of the view that given the difficulties faced by the Ombudsman in having the evidence it collects, changes should be made to how it collects its evidence so that it can also be used by the Police and the Public Prosecutor. Since the investigators are the ones that are the first to handle a case, especially with regards to collecting evidence, a manual should also be developed for investigators when investigating complaints which make reference to evidence collection and also the rules of evidence. As in New South Wales and Victoria, investigators should be required

¹¹³ Victorian Ombudsman (2007) ' Good Practice Guide: Victorian Ombudsman's Guide to complaint handling for Victorian Public Sector Agencies'

<https://www.ombudsman.vic.gov.au/getattachment/Education/Workshops/Complaint-handling/Complainthandling-good-practice-guide-Dec-2012.pdf.aspx> (Accessed: 12/05/2016)

¹¹⁴ Ibid

to have a good understanding of the rules of evidence and relevant standards of proof if allegations are to become subject to legal proceedings. Investigators should be trained to take care during the course of investigation to ensure that evidence gathered will not be ruled inadmissible in such proceedings and in accordance with the rules of evidence.¹¹⁵

This manual can also serve as a statement as to what kind of evidence is admissible or not admissible in Courts so that this can also be used by the Ombudsman's office when conducting his or her investigations. This manual is to be written up by all three offices, the Police, Public Prosecutor and Ombudsman so that there is better information sharing between these departments for a better and more efficient investigative process.

However, the legal officers of the Ombudsman's office should also be involved during the investigations and the responsible officer should be in constant communication with the investigator to ensure that where legal proceedings are foreseeable, the investigation must be conducted in accordance with the established rules of evidence.¹¹⁶

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: A Memorandum of Understanding (MOU) to be drawn up between the Ombudsman's office, the Police Department and the Public Prosecutor with regards to criminal cases that are to be investigated and taken all the way to the Courts.

Recommendations: In this MOU, a clear procedure is to be set out as to how these 3 departments are to work together to carry out investigation so that there is no duplication of work when the same complainant reaches another department and work is carried out efficiently and in a timely manner.

Recommendations: That Article 62(5) of the Constitution of the Republic of Vanuatu should also be amended to cater for the recommendations provided above. The current Article 62(5) to remain as Article 62(5)(a) and a new sub-article (b) to be inserted to cater only for situations with regards to criminal cases that are to be investigated and taken all the way to the Courts. Sub-article (b) should allow the Ombudsman to have a closer working arrangement or relationship with other agency or institution like the Police Department, Financial Intelligence Unit and the Public Prosecutor's office in terms of processing only criminal cases to the Courts.

¹¹⁵ Above n124

¹¹⁶ Victorian Ombudsman (2007) ' Good Practice Guide: Victorian Ombudsman's Guide to complaint handling for Victorian Public Sector Agencies'

<https://www.ombudsman.vic.gov.au/getattachment/Education/Workshops/Complaint-handling/Complainthandling-good-practice-guide-Dec-2012.pdf.aspx> (Accessed: 12/05/2016)

Recommendations: Considerations should also be given to amend section 28 of the *Ombudsman Act* and sections of the *Leadership Code Act* under its Part 5 to enable the Ombudsman to share information and evidence with other institutions and agencies where appropriate.

Recommendations: A manual should be developed for the Ombudsman’s investigators so that when collecting evidence, they will have a sound knowledge of the rules of evidence and relevant standards of proof if allegations are to become subject to legal proceedings. Investigators should be trained to take care during the course of investigation to ensure that evidence gathered will not be ruled inadmissible in such proceedings and in accordance with the rules of evidence.

Recommendations: The manual should also serve as a statement as to what kind of evidence is admissible or not admissible in Courts so that this can be used by the Ombudsman’s office when conducting investigations.

Recommendations: Considerations should also be given to amend section 22(7) of the *Ombudsman Act* to enable the Ombudsman to collect formal and admissible evidence during the investigation of cases under the *Ombudsman Act* and the *Leadership Code Act*. This amendment, although small, will help revolutionize the administrative and legal organisation of investigations of the office of the Ombudsman.

Evidence Issues: Penalties for Failure to Disclose Information

Background Information

Currently sections 23 and 49 of the *Ombudsman’s Act* seem to be overlapping creating confusion over what exactly are the penalties that are to be applied with regards to the failure to disclose information. Section 23 provides 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 while section 49 states that 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.¹¹⁷

Submissions

The Ombudsman believes that all that is required is a removal of section 23(2) relating to the penalty provision so as to avoid the overlapping and confusion it creates with section 49.

¹¹⁷ *Ombudsman Act* [Cap 252] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 11/05/16)

Furthermore, that the heading of section 49 which currently states ‘Failure to appear etc’ should be changed to read ‘Failure to comply with notice’ bring this in line with section 23 of the Act.

Comparable Jurisdictions

All the 6 South Pacific countries we investigated have provisions that cater for the disclosure of information. In effect, the Ombudsman has the power to require any Minister, officer or member of any department or authority concerned who in his opinion is able to provide information or produce documents or things relevant to the investigation, to produce that information. In Solomon Islands¹¹⁸ and Fiji¹¹⁹, there is no obligation to maintain secrecy or any other restriction upon disclosure of information and the rule of law should not apply to the disclosure of these information. On the other hand, Samoa¹²⁰, Vanuatu¹²¹, Cook Islands¹²² and Papua New Guinea¹²³ provide that where certain information are deemed injurious or contrary to the security, defence of the country, these information cannot be made available to the Ombudsman.

Samoa has gone a step further by distinguishing between an individual from a body corporate by providing a fine not exceeding 200 penalty units or to imprisonment not exceeding 6 months for individuals while a body corporate is to be fined a penalty not exceeding 500 penalty units.

In Australia, the Commonwealth Ombudsman office is the office that overlooks the whole of Australia and it provides that where a person refuses or fails to:

- attend before the Ombudsman,
- to be sworn or make an affirmation,
- to furnish or publish information
- to answer a question or produce a document or record □ to give a report

that person should be penalised \$1000 or imprisonment for 3 months.¹²⁴

¹¹⁸ Subsection 11(2) *Ombudsman (Further Provisions) Act 1996* (Solomon Islands)

http://www.paclii.org/sb/legis/consol_act/opa349/ (Accessed: 10/05/2016)

¹¹⁹ Subsection 16(3) *Ombudsman Decree 1987* (Fiji) http://www.paclii.org/fj/promu/promu_dec/od1987127 (Accessed: 10/05/2016)

¹²⁰ Section 49 *Ombudsman (Further Provisions) Act 1996* (Solomon Islands)

http://www.paclii.org/sb/legis/consol_act/opa349/ (Accessed: 10/05/2016)

¹²¹ Section 25 *Ombudsman Act 1999* (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 11/05/16)

¹²² Subsection 11(2) *Ombudsman Act 1984* (Cook Islands) http://www.paclii.org/ck/legis/num_act/oa1984114 (Accessed: 10/05/2016)

¹²³ Section 19 *Organic Law on the Ombudsman Commission No. 913 of 9998* (Papua New Guinea)

http://www.paclii.org/pg/legis/consol_act/olotoc362/ (Accessed: 10/05/16)

¹²⁴ *Ombudsman Act 1976* (Australia) http://www.austlii.edu.au/au/legis/cth/consol_act/oa1976114/s36.html (Accessed 16/05/2016)

In general, apart from Vanuatu, all the other countries have that one penalty for persons who fail to disclose information to the Ombudsman.

Consultations

Everyone that were consulted with agreed that in order to improve the work of the Ombudsman, all confusion should be dealt with and that one of these sections needs to be removed to address the confusion it creates. They also expressed that the best section to keep is the one with the most severe penalties to reflect the severity of the action and that is preferably section 49.

Commission's Views

The VLC agrees that there should not be any inconsistency in the Act and any overlapping of any sections should be addressed by removing one of these sections and providing clarification where necessary. In this instance, the VLC agrees with the Ombudsman that section 23 (2) should be removed as it is this section that is creating confusion. As expressed during the consultations, the heavier penalty or section should be kept so that it reflects the severity of the actions that are taken in contradiction to this section and there is strict adherence to this section itself.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: Section 23(2) is to be removed and section 49 is to be left to provide for penalties with regards to failure to comply with notice.

Recommendations: The heading in section 49 should be changed to also reflect this change to 'Failure to comply with Notice'.

Secrecy and Disclosure by the Ombudsman

Background Information

In Vanuatu, during an inquiry, the Ombudsman is 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.¹²⁵ However, it is also provided 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

¹²⁵ Sections 26 & 27 *Ombudsman Act* [Cap 252](Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/
(Accessed:10/05/16)

order to properly investigate the matter or to establish grounds for his or her conclusions and recommendation.¹²⁶

Submissions

The views that were raised by the Ombudsman's office with regards to this were similar to the ones they had raised about the admissibility of evidence. Due to lack of understanding and cooperation, there is no sharing of information between the departments and this section contributes to this problem as it is prohibiting the Ombudsman from sharing information unless under certain conditions. In addition, the *Ombudsman's Act* also prohibits the Ombudsman and staff from sharing information during their time of employment at the Ombudsman's office.

Comparable Jurisdictions

All the other Pacific countries, except for Fiji, follow a similar lead. In the Solomon Islands¹²⁷, Cook Islands¹²⁸, Samoa¹²⁹ and PNG¹³⁰, the Ombudsman and all his or her staff are required to maintain secrecy with regards to any and all matters that come to their knowledge while working under the Ombudsman's office. Samoa¹³¹, Cook Islands¹³² and PNG¹⁴⁴ also follow Vanuatu's approach in allowing disclosure of matters for the purposes of an investigation¹³³ on or in order to establish grounds for his or her conclusions and recommendations.

In NSW Australia, its *Ombudsman Act*¹³⁴ provides for information sharing arrangements to be made between two or more relevant arrangements. The circumstances in which information can

¹²⁶ Subsection 26 (3) *Ombudsman Act* [Cap 252](Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

¹²⁷ Subsection 4 (2) *Ombudsman (Further Provisions) Act* 1996 (Solomon Islands) http://www.paclii.org/sb/legis/consol_act/opa349/ (Accessed: 10/05/2016)

¹²⁸ Subsection 18(2) *Ombudsman Act* 1984 (Cook Islands) http://www.paclii.org/ck/legis/num_act/oa1984114 (Accessed: 10/05/2016)

¹²⁹ Section 50 *Ombudsman (Komesina o Sulufaiga) Act* 2013 (Samoa) http://www.paclii.org/ws/legis/consol_act_2015/oosa2013295 (Accessed: 11/05/2016)

¹³⁰ Subsection 20(2) *Organic Law on the Ombudsman Commission* http://www.paclii.org/cgi-bin/sinodisp/pg/legis/PGconsol_act_1986/cladp3401/index.html?stem=&synonyms=&query=%22organic%20law%20on%20the%20ombudsman%20commission%20%22 (Accessed: 19/07/16)

¹³¹ Subsection 50(3) *Ombudsman (Komesina o Sulufaiga) Act* 2013 (Samoa) http://www.paclii.org/ws/legis/consol_act_2015/oosa2013295 (Accessed: 11/05/2016)

¹³² Subsection 18(4) *Ombudsman Act* 1984 (Cook Islands) http://www.paclii.org/ck/legis/num_act/oa1984114 (Accessed: 10/05/2016)

¹³³ Subsection 20(3) Above n142

¹³⁴ Subsection 43(1) *Ombudsman Act* 1974 (New South Wales, Australia) https://www.ombo.nsw.gov.au/data/assets/pdf_file/0019/16561/Information-sharing-arrangement-with-AntiDiscrimination-Board,-Legal-Services-Commissioner,-Health-Care-Complaints-Commission-and-the-PrivacyCommissioner.pdf (Accessed: 27/05/2016)

be disclosed includes situations where a disclosing agency becomes aware that another relevant agency has received a complaint and the information held by the disclosing agency would assist the receiving agency to carry out its functions. In addition, information can also be shared where two or more relevant agencies have overlapping or adjunct jurisdictions and those relevant agencies agree that it is reasonably necessary to share information, regularly or in appropriate circumstances, in order for the disclosing agency and/or receiving agency to carry out its or their functions in an efficient manner.¹³⁵

While all 6 Pacific countries are strict with their provisions on secrecy and disclosure of information, New South Wales has shown another way in which information can be shared between relevant agencies provided that the terms of this agreement is clearly defined and set out so as not to allow the information to be given to the wrong person or agency.

Consultations

As with admissible evidence, everyone expressed the same views. There is reluctance from the three departments to share information as there are no guidelines to establish what kind of information can be shared and no confidentiality clause to protect the sharing of such information. To ensure that the Ombudsman is able to carry out his or her work in a fast and efficient manner, the Ombudsman along with the 2 other relevant departments should look for ways for better and easier information sharing.

Commission's Views

As with admissible evidence, the VLC is of the view that there should be better cooperation and sharing of information between the three relevant departments to ensure that the Ombudsman is able to carry out his or her work in a timely and efficient manner. The section should remain as it is to ensure that the Ombudsman adheres to the requirement that they keep their work secret and not disclose information for the good of public interest. Guidelines should be set up as to what information can be shared and at what stage of the investigations information can or should be shared. Furthermore, provisions should also be made to protect the confidentiality of the sharing of this information.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: Along with MOU that has been recommended for the three departments to allow for sharing of evidence along with ensuring that it can be used as admissible evidence in

¹³⁵ Ibid

court, this MOU should also cater for circumstances where information can and should be shared and at what stage of the investigation information should be shared.

Recommendations: There should also be a confidentiality clause to ensure that the shared information is protected.

Ombudsman and the Power to Prosecute

Background

The original *Ombudsman Act* in Vanuatu enabled the Ombudsman to apply to the Supreme Court for an order giving effect to a recommendation of the Ombudsman where the Prime Minister (or other relevant person or body required to do so) did not respond to the Ombudsman's recommendations with a decision and an indication of what steps were to be taken to deal with the recommendations. However, with the new and current *Ombudsman Act* of 1999, this provision was removed and the Ombudsman's work and power is just limited to making recommendations and producing reports.¹³⁶ Where the Ombudsman has identified a breach of the *Leadership Code* or is of the opinion that the commencement of criminal proceedings or disciplinary actions is justified against any person involved in the subject matter of an enquiry, the Ombudsman must refer the matter to the Public Prosecutor who prosecutes the breach as a criminal offence in court.¹³⁷ In the case of an offence against the *Public Service Act*¹³⁸, the Ombudsman is to refer the matter to the Public Service Commission and the person in charge of the government agency.¹³⁹

Currently as stated above, 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.

¹³⁶ *Ombudsman Act* [Cap 252] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

¹³⁷ Vanuatu Ombudsman's Review Committee (2004) 'Report of the Ombudsman Act and Leadership Code Review Committee'

¹³⁸ *Public Service Act* [Cap 246] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/psa152/ (Accessed: 10/05/16)

¹³⁹ Section 31 *Ombudsman Act* [Cap 252](Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

In some cases where the Public Prosecutor decides 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.

The Ombudsman, under the *Ombudsman Act* has only been given the power to conduct investigations into corruption cases within government agencies and the power to refer criminal cases to the Police or the Public Prosecutor for prosecution. The Act however does not give any prosecutorial powers to the Ombudsman at all. Article 5 of the Constitution of Vanuatu clearly states that any prosecutorial function shall vest in with the Public Prosecutor. This is an exclusive power and no other office holds the same power.

Submissions

One of the difficulties as expressed by the Ombudsman and his office is with regards to seeing their investigation and reports over a certain matter being taken to Court to be prosecuted in a timely manner as provided for by the Act. 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. Also very few cases are prosecuted despite all the Ombudsman reports. The Ombudsman has expressed its desire to have the power to prosecute and take matters or complaints all the way to the Courts instead of just producing reports and recommendations so as to reduce the time it takes for them to finish an investigation.

Comparable Jurisdictions

The other Pacific countries follow a similar path. Where the Ombudsman finds a breach or wrong in his investigations and is of the opinion that the matter needs to be dealt with by the relevant higher authorities, then the Ombudsman usually begins by sending his report to the authority concerned or the principal administrative officer. While some provisions remain vague about who the exact principal administrative officer, such as Cook Islands¹⁴⁰ and Fiji¹⁴¹, other countries such as Samoa,¹⁴² Solomon Islands¹⁵⁴ and PNG¹⁵⁵ provide further provisions that when the principal administrative officer does not respond in one week, then the Ombudsman is to forward his finding and report to the Minister responsible, Prime Minister and the Parliament. In all countries, where the complaint constitutes a criminal offence, the matter is referred to the Public Prosecutor. Overall, none of the Pacific countries have any provisions that give the Ombudsman

¹⁴⁰ Section 19 *Ombudsman Act* 1984 (Cook Islands) http://www.paclii.org/ck/legis/num_act/oa1984114 (Accessed: 10/05/2016)

¹⁴¹ Section 17 *Ombudsman Decree* 1987 (Fiji) http://www.paclii.org/fj/promu/promu_dec/od1987127 (Accessed: 10/05/2016)

¹⁴² Section 28 *Ombudsman (Komesina o Sulufaiga) Act* 2013 (Samoa) http://www.paclii.org/ws/legis/consol_act_2015/oosa2013295 (Accessed: 11/05/2016)

the power to take their reports further to the courts. All the Ombudsman's offices work only to produce and provide recommendations and reports.

In New South Wales, Australia the Ombudsman has entered into agreements with the Police Integrity Commission and the Police Commissioner where the police have to notify the Ombudsman and the Police Integrity Commissioner of certain types of complaints. Police then investigate the complaint, and provide the Ombudsman with an investigation report and all related documents. If the Ombudsman is satisfied with this report and the way the complaint was handled, then the matter can be finalised. If not, then the Ombudsman is able to investigate the complaint itself or the way in which it was dealt with by the Police.¹⁵⁶

The same agreement applies for workplace child protection, where certain government and non-government must notify the Ombudsman of certain allegations against an employee of their agency. As with Police complaints, the Ombudsman can also monitor the progress of investigation and the agency must provide the Ombudsman with any report that is prepared as part of the investigation, as well as any information taken regarding the allegations.¹⁵⁷ Thus it is obvious that while the Ombudsman may be restricted in the powers and functions as provided by its respective Act, it has found other ways to expand this power through reaching agreements with other relevant bodies.

Consultations

Over 90% of those consulted were not aware of the Ombudsman's working procedures, especially the timing of how long it took for the Ombudsman to settle or address a complaint, beginning from when the complaint is first lodged to either its referral to either the Public Prosecutor or the Police or the production of a report. These 90% expressed their frustration at how long it usually takes for an Ombudsman to complete his or her investigation. Notably, even the 10% that were aware of the lengthy process that the Ombudsman goes through, are

¹⁵⁴

Section 16 *Ombudsman (Further Provisions) Act 1996* (Solomon Islands)
http://www.paclii.org/sb/legis/consol_act/opa349/ (Accessed: 10/05/2016)

¹⁵⁵

Section 22 *Organic Law on the Ombudsman Commission* http://www.paclii.org/cgi-bin/sinodisp/pg/legis/PGconsol_act_1986/cladp3401/index.html?stem=&synonyms=&query=%22organic%20law%20on%20the%20ombudsman%20commission%20%22 (Accessed: 19/07/16)

¹⁵⁶

Commonwealth Ombudsman (2015) 'Australasia and Pacific Ombudsman Region Information Manual 2015'
http://www.theioi.org/downloads/i2c9/APOR_Information%20Manual%20on%20OM%20institutions_May%202015.pdf (Accessed: 16/05/2016)

¹⁵⁷

Ibid

adamant that this process needs to be changed as it is hindering the Ombudsman in getting efficient and realistic results.

All those consulted agreed that this process needs to be reviewed and one step that could be taken is yet again, creating a better working relationship and cooperation between the Public Prosecutor, Police and the Ombudsman's office. They also agreed that the Ombudsman should be given some form of power to prosecute their cases, so that they can achieve a more speedy and permanent result, rather than just writing up reports in which their recommendations are not often taken on board by the relevant department.

However as stated by the Public Prosecutor and Solicitor General, prosecutorial power is only vested with the Public Prosecutor and no other office can share the same powers. While this clearly rules out the possibility of the Ombudsman having the power to prosecute, the Public Prosecutor stated that an arrangement could be made between his office and the Ombudsman in either appointing prosecutors within the Ombudsman's office and training them to be able to take cases to Courts or assigning prosecutors from his own office to work with the Ombudsman's office.

Commission's Views

The VLC is of the view that while it is understandable for the Ombudsman to want to have power to prosecute its cases, it clearly goes against the Constitution. However, as suggested by the Public Prosecutor, it would be beneficial for both offices to reach an agreement whereby the Public Prosecutor appoints prosecutors, either from the Ombudsman's office or his own office, to take the Ombudsman's cases all the way to Court.

If the prosecutors are to be appointed from the Ombudsman's office, then continuous training should also be provided for the legal officers to hone their prosecutorial skills.

This would also fall in line with the above recommendations where a MOU is to be signed with the relevant departments for evidence and information sharing.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: Since the Public Prosecutor is the only office that has been given the right to prosecute under the Constitution, the MOU is also to cover an arrangement between the Public Prosecutor and the Ombudsman's office for the Public Prosecutor to give the Ombudsman's office power to prosecute under his guidance. The Public Prosecutor is to either provide officers to help prosecute the Ombudsman's cases or some legal officers from the Ombudsman's office can be

trained to prosecute, depending on the agreement between the two offices. The confidentiality issue must be taken into consideration as well in this instance.

Recommendations: With the right being given by the Public Prosecutor to prosecute, the Ombudsman's office should also make changes on how it collects evidence so it can follow the standard followed by the Courts, which is the common law rule of evidence. This would help in making evidence collected by the Ombudsman's office admissible in court and also cut down on duplication of work by another responsible department. This would also apply to the different sets of rules that the Ombudsman uses to investigate leaders and other complaints brought to his or her attention.

CHAPTER FOUR: IMMUNITIES – WHISTLEBLOWER PROTECTION & WITNESS PROTECTION

Introduction

The concept of immunity or privileges can apply at all levels beginning from having a state being immune from an action or an act of omission, a government agency or an individual being immune from an action or an act of omission. There is a whole range of protection that can be applied. The current *Ombudsman Act* has catered for the protection of its office as well as its staff. However this protection does not cover individual protection such as whistle blowers or witnesses. This chapter examines the issue of Immunity with specific reference to whistle blowers and witness protection as forms of individual protections. These special protections are granted to different categories of people.

Whistle Blower Protection

Background

The term whistle blower in many international jurisdictions, such as the United Kingdom, is understood to describe an employee or worker (an insider) who discloses public interest information, for instance, on corruption, wrongdoing, risk to health and safety.¹⁴³ In other words, whistleblower protection is a legal protection from discriminatory or disciplinary action for employees who disclose to the competent authorities in good faith and on reasonable grounds wrongdoing of whatever kind in the context of their workplace.¹⁴⁴

Anyone can be a whistle blower in any circumstance. It includes stories like that of an individual from the island of Tanna who, in early 2010, blew the whistle on the Police there for allegedly being bribed with kava to issue driver's licenses without following the proper procedure¹⁴⁵. Therefore, strengthening whistle-blower protection measures and anti-corruption agencies is important to combat corruption^{146,147}.

The information of alleged wrongdoing can be classified in many ways, as in violation of company policy or rules, law, regulation, or threat to public interest or national security, as well as fraud,

¹⁴³ United Nations Convention against Corruption. 2015. Resource Guide on Good Practices in the Protection of Reporting Persons <http://docplayer.net/5987329-Resource-guide-on-good-practices-in-the-protection-of-reporting-persons.html> (Accessed: 10/05/16)

¹⁴⁴ Organisation for Economic Co-operation and Development, 2016 Committing to Effective Whistle-blower Protection <http://www.oecd.org/gov/ethics/whistleblower-protection.htm> (Accessed: 10/05/16)

¹⁴⁵ Transparency Vanuatu, 2016

¹⁴⁶ (ADB/OECD Anti-Corruption Initiative for Asia and the Pacific and Anti-Corruption Commission of Timor-Leste.

¹⁴⁷ , Whistle-blower Protection and Strengthening Anti-Corruption Agencies Agenda) <https://www.oecd.org/site/adboecdanti-corruptioninitiative/12thRegionalSeminarAgenda.pdf> (Accessed: 11/05/16)

and corruption. Those who become whistleblowers can choose to bring information or allegations to the surface either internally or externally. Whistleblowers can reach out to the media, government, law enforcements, or those who are concerned but also face stiff reprisal and retaliation from those who are accused or alleged or wrongdoing.

Having a whistleblowers protection is integral to fostering transparency, promoting integrity, and detecting misconduct. Past cases demonstrate that corruption, fraud, and wrongdoing, as well as health and safety violations often occur in organizations. In many cases, employees will be aware of the wrongdoing, but are unable to say anything for fear of reprisals, concern about acting against the organization's culture or lack of confidence that the matter will be taken seriously.¹⁴⁸

The Vanuatu *Ombudsman Act* currently does not have a provision with regard to whistle blowers. The Act however, does allow protection in favor of the Officers stating that neither the Ombudsman nor an officer or employee of the Ombudsman is liable for any act or omission done or ordered to be done or made in good faith and without negligence. It continue to states that no criminal or civil action may be issued against the Ombudsman or an officer or employee of the Ombudsman for anything done, said or omitted by the Ombudsman or the officer or employee.¹⁴⁹

Submissions

It was brought to the attention of the Vanuatu Law Commission (VLC), by the office of the Ombudsman that whistle blowers play a very important role in the course of fighting corruption within a country. Whistle blower protection is an important issue that needs to be addressed by way of legislation in order to combat corruption in all offices throughout the country.

Comparable Jurisdictions

Whistle blower provisions are rarely found in the laws of the countries of the Region. Small island countries in the regions mostly lack the provisions on whistle blower in their respective laws.

The *Public Interest Disclosures Act 2013* of Australia has a provision concerning the protection of whistle-blowers. The Act protects whistle-blowers in the federal public sector and provides immunity from civil or administrative liability (including disciplinary action), for making the disclosure, and no contractual or other right or remedy can be exercised or enforced against anyone for having made such a disclosure. Those who make public interest disclosures have an absolute privilege in proceedings for defamation in respect of it, and no one can contract out of

¹⁴⁸ Organisation for Economic Co-operation and Development, 2016

¹⁴⁹ *S41(1)(2) Ombudsman Act 2006* (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed: 11/05/16)

or terminate any contract on the basis of a public interest disclosure.¹⁵⁰ However, there are exceptions, for instance of a person acting as whistle-blower makes a deliberately false or misleading statement or if their wider disclosure contravenes any publication restrictions, providing they knew about the restrictions and are unable to provide a good reason for making the disclosure in any case.¹⁵¹

Fiji Islands began to pursue the reform of its procurement framework by introducing anticorruption clauses into tender documents, disclosing all selection criteria in the tender documents, and passing comprehensive whistle-blower protection mechanism for at least the area of public procurement¹⁵².

Consultations

In seeking the views of the public on this issue, the Commission asked questions relating to:

- Should the *Ombudsman Act* include a provision to cater for the protection for whistle blowers? Or should whistle blowers be given immunity as well in the course of fighting corruption?

During the consultation 80-90% of the people consulted agreed that the amended Act should cater for the protection of whistle blowers. People argued that a lot of mistreatments or corruptions are evidenced in most of the Government and non-government offices. There is fear when it comes to speaking out on corrupt or wrong action especially when this action was made by a superior within your organisation.

60-70% of the people consulted were of the view that the Act should also provide for some form of penalty if such a provision is breached. The penalty provision must provide for strict and heavy penalty and should be in the form of fine or imprisonment. A suggested figure to be used as a starting point of a fine noted during the consultation was VT50 000. Others suggested that the imprisonment term should start from one year upwards.

¹⁵⁰ *Public Interest Discloser Act* 2013 (Australia) http://www.austlii.edu.au/au/legis/cth/num_act/pida2013295/ (Accessed: 11/05/16)

¹⁵¹ United Nations Convention against Corruption.2015, Resource Guide on Good Practices in the Protection of Reporting Persons <http://docplayer.net/5987329-Resource-guide-on-good-practices-in-the-protection-of-reporting-persons.html> (Accessed: 10/05/16)

¹⁵² Asian Development Bank. 2006, Curbing Corruption in Public Procurement in Asia and the Pacific, Progress and Challenges in 25 Countries <https://www.oecd.org/site/adboecdanti-corruptioninitiative/37575976.pdf> (Accessed: 11/05/16)

Commission's Views

After careful consideration, the Commission feels a need for the amended *Ombudsman Act* to cater for the protection of whistle blowers. The Commission notes that whistle blowers help to better combat corruption and mistreatment in the country. The protection of whistle blowers are essential in terms of safeguarding the public interest, promoting a culture of accountability and integrity in both public and private institutions, as well as encouraging the reporting of misconduct, fraud and corruption wherever it occurs.

Encouraging employees to report wrongdoing ("or blow the whistle"), and protecting them when they do, is an important part of corruption prevention in both the public and private sectors. Employees are usually the first to recognise wrongdoing in the workplace, so empowering them to speak up without fear of reprisal can help authorities both detect and deter violations. In the public sector, protecting whistle-blowers can make it easier to detect passive bribery, the misuse of public funds, waste, fraud and other forms of corruption. In the private sector, it helps authorities identify cases of active bribery and other corrupt acts committed by companies, and also help businesses prevent and detect bribery in commercial transactions.

The Commission agreed to the idea suggested by the a number of stakeholders during the consultation that if the whistle bower issue is considered as an important issue to be addressed by law, then procedures in acquiring a whistle bower protection must be formalised through legislation. In this regard, Australia¹⁵³ would be the best country to look to.

Although there may be other forms of protections which are not spelled out in the current *Ombudsman Act*, the Commission feels the need to incorporate those protections starting with that of the whistle blowers. The Commission also agreed that a provision must also be inserted into the amended Act to deal with the idea of penalising those who are in breach of the provision on whistle bower protection. The penalty must be awarded to any other person apart from a whistle bower as well as the whistle bower himself/ herself.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That consideration should be given to the issue of whistle bower to be included into the amended *Ombudsman Act*.

¹⁵³ *Public Interest Discloser Act 2013* (Australia) http://www.austlii.edu.au/au/legis/cth/num_act/pida2013295/
(Accessed: 11/05/16)

Recommendations: Proper procedures must be set in place by the responsible authorities in order to allow the law to deal with the protection of whistle blowers. The provisions of the *Public Interest Disclosures Act 2013* of Australia could be referred to as an example in this regard.

Recommendations: The Act should protect whistle-blowers in the public sector and provides immunity from civil or administrative liability (including disciplinary action), for making the disclosure, and no contractual or other right or remedy can be exercised or enforced against anyone for having made such a disclosure. Future considerations should also be given to extend this privilege to those that do not fall under public sector as well.

Recommendations: Given the above recommendations, the amended *Ombudsman Act* should also have penalty provisions for enforcement purposes. The penalty provisions should look to penalise any form of harassment made towards any whistle blower. Considerations should also be given to penalise a whistle blower for any form of breach on his or her part.

WITNESS PROTECTION

Background

The term witness refers to a person or someone who hears, knows by personal presence or sees an event, typically a crime or any incident that takes place and be able to testify or give evidence.¹⁵⁴ Witness protection is a protection of a threatened witness or any person involved in the justice system, including defendants and other clients, before, during, and after a trial in the Court of law. This form of protection is given usually during and after an investigation has been made and a case is preceded to Court.

In some countries witness protection is addressed in a separate legislation. For instance in Australia, witness protection is provided for under its *Witness Protection Act* for the purpose of providing protection and assistance to certain witnesses and other persons.¹⁵⁵ In some countries witness protection is catered for in the *Ombudsman Act*.¹⁵⁶ In others, the Act that provides for the protection of witness clearly stipulates for an establishment of an Agency, Board, Committee,

¹⁵⁴ Online dictionary, <http://www.dictionary.com/browse/witness> (Accessed: 10/05/16)

¹⁵⁵ *Witness Protection Act 1995* (Australia) http://www.austlii.edu.au/au/legis/nsw/consol_act/wpa1995248/ (Accessed: 11/05/16)

¹⁵⁶ *Ombudsman Act 1975* (New Zealand) <http://www.legislation.govt.nz/act/public/1975/0009/187.0/DLM430984.html> (Accessed: 11/05/16)

Director, Tribunal and Minister to be responsible in overseeing issues surrounding witness protection.¹⁵⁷

Currently Vanuatu does not have a stand-alone *Witness Protection Act*. The *Vanuatu Ombudsman Act* currently also does not have a provision with regard to witness protection. The Act however, only allows protection in favor of the Officers or staff of the Ombudsman and the Ombudsman himself.¹⁵⁸

Submissions

A proposition was made by the Vanuatu Law Commission after going through the submissions provided to the office by the office of the Ombudsman that the *Ombudsman Act* should allow or consider to some extent the protection of witness especially if the witness has in any way involved with the case or complaint made to the Ombudsman. Witness protection is an important issue as well in the course of fighting corrupt practices therefore should be treated seriously.

Comparable Jurisdictions

Witness protection provisions are found in the laws of few Pacific island countries and in some countries it is provided for in their *Ombudsman Acts*. The majority of the small island countries in the regions however, are yet to provide for such provisions in their legislation.

In New South Wales Australia, witness protection is dealt with in a stand along legislation known as the *Witness Protection Act* of 1995. The law has very clear and specific provisions in terms of the definitions of witness (who is a witness), protection of a witness, protection of witness from identification, witness protection program, proceedings involving person with new identity, and provisions with regard to offences.¹⁵⁹

Protection of witnesses can also happen to persons appearing before bodies outside of the Courts for instance, the Ombudsman Commission or a tribunal. In this regard, the *New Zealand Ombudsman Act* states that every person shall have the same privilege in relation to the giving of information, the answering of questions, and the production of documents and papers and things as witness have in Court.¹⁶⁰ This provision made specific reference to the privileges of witnesses.

¹⁵⁷ *Witness Protection (Amendment) Act* 2012 (Kenya)

<http://www.embuni.ac.ke/images/Docs/KenyaWitnessProtectionAmendAct2010.pdf> (Accessed: 11/05/16)

¹⁵⁸ *Ombudsman Act* [Cap252] (Vanuatu) http://www.pacii.org/vu/legis/consol_act/oa114/ (Accessed: 11/05/16)

¹⁵⁹ *Witness Protection Act* 1995 (Australia) http://www.austlii.edu.au/au/legis/nsw/consol_act/wpa1995248/ (Accessed: 11/05/16)

¹⁶⁰ *s19(5) Ombudsman Act* 1975 (New Zealand)

<http://www.legislation.govt.nz/act/public/1975/0009/187.0/DLM430984.html> (Accessed:11/05/16)

Moreover, the *Organic Law on the Duties and Responsibilities of Leaders* in Papua New Guinea also has a similar provision to that of New Zealand. In its Acts it is stated that 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 Court¹⁶¹.

On the same note, the *Ombudsman Act* of Samoa stipulates that a person has the same privileges and immunities in the giving of information, answering of questions, and production of documents and things as witnesses have in a Court.¹⁶²

Consultations

In seeking the views of the public on this issue, the Commission asked questions relating to:

- Whether or not the amended *Ombudsman Act* should include a provision to cater for the protection of witness? Especially those that may have involved in a case or complaint submitted to the office of the Ombudsman?

What remain to be seen to happen in Vanuatu, in term of corruption prevention, is whether the Vanuatu Government could make the changes to the *Ombudsman Act* by acknowledging and strengthening the issue of witness protection measures.

During the consultation 90-100% of the people consulted agreed that the amended *Ombudsman Act* should cater for the protection of witness. The general consensus was that witnesses or complainant who assisted the Ombudsman in any of its enquiry or investigation should be protected by law.

People argued that witness protection is an essential tool in the fight towards a free and transparent society. Therefore witnesses in this regard should be treated with respect.

It was noted from the consultation that a lot of people like the idea and are willing of becoming a witness. However the only obstacle here is the fear of being threatened, harassed or even assaulted by the accused in which case a family member of a superior in the village as well as office setting.

Some people raised the idea of education. In order to become a witness, one must have an understanding of his or her own right, what he or she must do and what he or she must not do and so on.

¹⁶¹ s38 *Organic Law on the Duties and Responsibilities of Leadership* 1998 (Papua New Guinea) http://www.paclii.org/pg/legis/consol_act/olotdarol528/ (Accessed: 11/05/16)

¹⁶² s45 (1) *Ombudsman (Komesina o Sulufaiga) Act* 2013 (Samoa) http://www.paclii.org/ws/legis/consol_act/oosa2013295/ (Accessed: 11/05/16)

Commission's Views

After careful consideration, the Commission consider the need for the current *Ombudsman Act* to cater for the protection of witnesses or complainants whom in one way or another assisted the Ombudsman in any of its enquiry or investigation in the course of fighting corruption and upholding justice. In the absence of such provision, the risk of using someone as a witness to further a complaint is high.

The Commission is of the view that Vanuatu's current justice system needs to be upgraded to meet the changing need of the society. One of the many ways to help improve the system is through the introduction of the idea of witness protection. Like whistle blower, witness protection is also an essential tool that may provide courage to people to stand for change in the society. A small island country like Vanuatu should seriously consider adopting the idea of having witness protection provision in one of its laws in order to assist the system to justice.

The Commission notes the different levels of protection and the witness immunity from prosecution is very different to a complete witness protection program that involves giving a person a whole new identity. There are huge practical and cost implications of the different levels of protection. Practically in a small island nation like Vanuatu where everyone knows everyone, the whole witness protection program idea would not be a good option to suggest. The Commission in this instance also feared that running a complete witness protection program would be a too costly exercise for the Ombudsman's office and for Vanuatu as a whole therefore is of the view that the amended *Ombudsman Act* should in the mean-time cater for the witness immunity from prosecution. The complete witness protection program is something to consider later on together with the idea of having a separate *Witness Protection Act* for Vanuatu.

The Commission notes section 41¹⁷⁷ of the current *Ombudsman Act* and the call made by stakeholders and is of the view that similar protection provisions be inserted into the amended Act to cater for witness protection. Witnesses should not be liable for any act or omission as well as be protected from any criminal or civil proceedings that are to be issued against them in the course assisting the Ombudsman in its investigation.

¹⁷⁷ s41. Immunities -

- (1) Neither the Ombudsman nor an officer or employee of the Ombudsman is liable for any act or omission done or ordered to be done or made in good faith and without negligence under or for the purposes of the Constitution or this Act.
- (2) Neither criminal nor civil proceedings are to be issued against the Ombudsman, or an officer or employee of the Ombudsman, for anything done, said or omitted by the Ombudsman, or the officer or employee, under or for the purposes of the Constitution or this Act.
- (3) However, subsection (2) does not apply if it is shown that the Ombudsman, or the officer or employee, acted in bad faith

The Commission is also of the view that whilst allowing such a privilege to the witnesses, there should also be provision to guide that kind of privilege. The Commission therefore suggested that a similar provision to that of the current subsection (3) of section 41 be inserted into the amended Act to act as a form of control or as an exception. Subsection (3) of section 41 states that subsection (2) of the current Act does not apply if it is shown that the Ombudsman, or the officer or employee, acted in bad faith.¹⁶³¹⁶⁴

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the amended *Ombudsman Act* should cater for the protection of witness with specific reference to witness immunity from prosecution. Any witnesses disclosing information to the Ombudsman should be protected at all times from any civil or criminal proceedings. A similar provision to that of the current section 41(2) of the Act should be inserted but directed only to the witnesses.

Recommendations: That having given this form of privilege to the witnesses, there should also be a provision inserted to control such a privilege. A similar provision to that of section 41(3) should be inserted into the amended Act but directed only to the witnesses.

Recommendations: That the amended *Ombudsman Act* should cater for the protection of witness outside of Court especially if the witness appear before a Tribunal¹⁶⁵ as suggested further down below. A witness appearing before a tribunal should be given the privilege to give information, answer questions, produce documents and papers and the same immunity and things as witness have in Court. Similar provisions could be seen under the New Zealand, Samoa and Papua New Guinea's Ombudsman's Act.

Recommendations: That the idea of having a complete witness protection program which includes having the witnesses disclosing information to the Ombudsman to be protected at all times from any form of harm (financial and physical harm) shall be left to the Ombudsman's office to consider in the future. Given its current situation, the Ombudsman's office as well as the country as a whole is not practically ready to adopt such a program to address witness protection.

Recommendations: Considerations should also be given to the idea of having a separate *Witness Protection Act* for Vanuatu in the future.

¹⁶³ s41(3) *Ombudsman Act* 1998 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/oa114/ (Accessed:

¹⁶⁴ /05/16)

¹⁶⁵ See Chapter 8 below on duties and breaches of the Leadership Code and the use of tribunals

CHAPTER FIVE: OFFICERS AND STAFF OF THE OMBUDSMAN

Background

The office of the Ombudsman was established in 1994. The first *Ombudsman Act* was passed in 1995 and provided for the independence of the Ombudsman by allowing him/her to directly hire his or her own staff. However in 1998 the power that was given to the Ombudsman to hire his or her own staff was removed and was handed over to the clerk of Parliament. The circumstances leading to the 1998 Act were that political leaders found the first Ombudsman too confrontational and threatening.¹⁶⁶

Since 1995, the Ombudsman's office employed quite a number of staff. The number slowly increased up to almost 30 staffs sometimes during the years 1998 and early 2000s. After the switch in the recruitment process, the Ombudsman's office has experienced a decrease in the number of staffs and this decrease has continued until today.

The office of the Ombudsman is currently comprised of the Ombudsman, a legal counsel, a director of investigations, a director of leadership code, administrative staff and other investigators. The Ombudsman has a head office located in Vila and its branch office located in Santo. Most of the staff works in the head office in Port Vila while the Santo office is structured to cater for a principle investigator who is the officer in charge and a few investigators and support staff.¹⁶⁷ Under the *Ombudsman Act*, the government is obliged to provide sufficient budgeting and staff for the Ombudsman to carry out his or her function.

Submissions

In their submission, the Ombudsman office drew attention to the difficulty of not hiring their own staff. They claimed that the problem faced with the limited number of staff is due to the delay in the recruitment process by the Public Service Commission. The issue with the current recruitment process has been a major concern of the current Ombudsman and those that were before him. The long process and delay of recruitment between the PSC and the Ombudsman has created a lot of problem which present some form of weakness and insufficiency with the system.¹⁶⁸

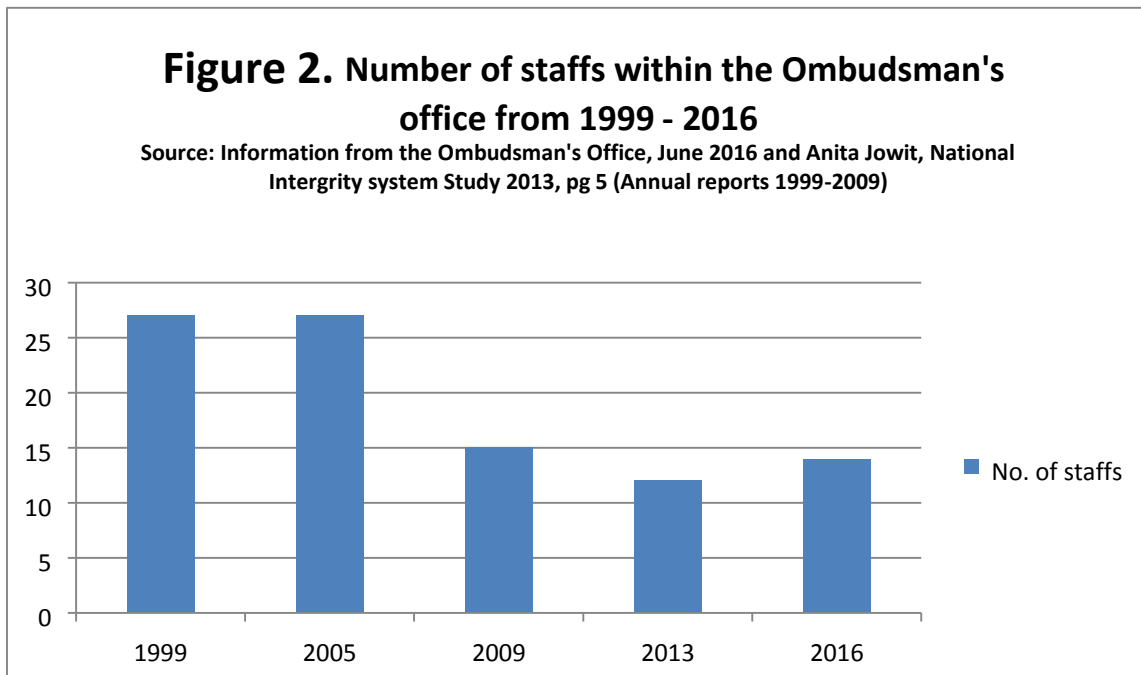
¹⁶⁶ Anita Jowitt, National Integrity System study – Discussion Paper 2, Office of the Ombudsman, pg 7, 2013 <http://repository.usp.ac.fj/8017/1/VanNISombudsman.pdf> (Accessed: 11/05/16)

¹⁶⁷ Interview with Ombudsman, 2015

¹⁶⁸ Interview with Ombudsman, November 2015

Positions at times were offered to candidates but they had found positions elsewhere and declined the offers.¹⁶⁹

Staffing of the office of the Ombudsman has steadily declined over the past years, from a high of almost 30 to only 14 staff today in the head office in Port Vila. The chart below reflects on the number of staffs.



Whilst some previous Ombudsmen have failed to initiate recruitment procedures to utilise their staffing budgets, budgetary issues have recently hindered recruitment. It was reported that in 2011, the Ombudsman's budget was maintained at VT52, 260,931. Three (3) years later and in 2015, the budget was cut down to VT36, 503,195. A difference of VT15, 757,736 was cut in only three (3) years.¹⁷⁰

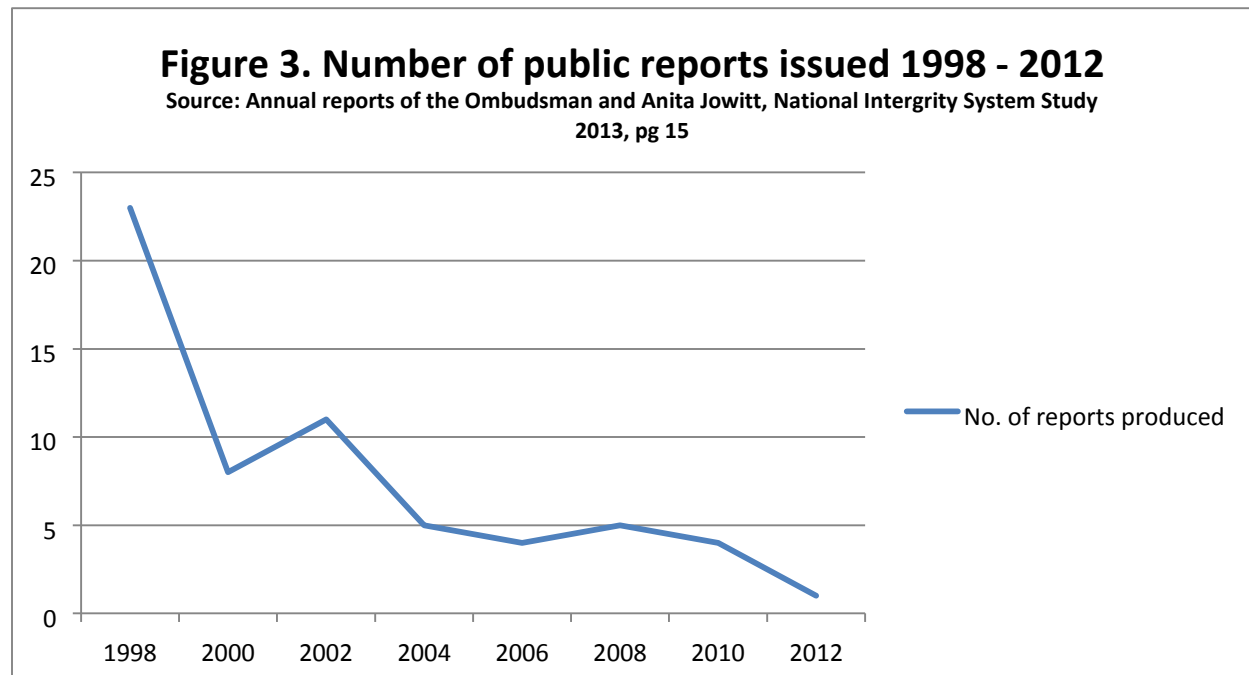
It makes it all the more difficult to recruit when staffs of the Ombudsman resign. The Ombudsman office has to utilise its resources to settle severance allowances and other entitlements leaving behind insufficient funds to effectively carry out its functions.

The trend of budget cuts within the Ombudsman's office has led to the inability to recruit new staffs to fill in the vacant positions of the office's staffing structure. The inability to recruit

¹⁶⁹ Anita Jowitt, National Integrity System study – Discussion Paper 2, Office of the Ombudsman, pg 8, 2013 <http://repository.usp.ac.fj/8017/1/VanNISombudsman.pdf> (Accessed: 11/05/16)

¹⁷⁰ Information from the office of the Ombudsman, May 2016

subsequently affects the number of reports and other jobs that the Ombudsman's office produces every year.



The current Law

Section 43 of the *Ombudsman Act* states that the officers required to assist the Ombudsman in the performance of his or her functions under the Constitution are to be appointed by the PSC after consultation with the Ombudsman.¹⁷¹ The terms and conditions of appointment of the officers are to be determined by the PSC. They are regulated in the same manner as the other members of the Public Service.¹⁷² The rules and provisions of the *Public Service Act* apply to the officers that are appointed, however, the officer are subject to the Ombudsman's control and direction.¹⁷³

Comparable Jurisdictions

In New Zealand, the Chief Ombudsman has the power to appoint his or her own staff (including acting, temporary or casual officers and employees) as well. The chief Ombudsman has the power

¹⁷¹ *Ombudsman Act* [Cap 252] (Vanuatu) http://www.pacii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

¹⁷² Commonwealth Ombudsman (2009) 'Australasia and Pacific Ombudsman Region Information Manual' http://www.ombudsman.gov.au/_data/assets/pdf_file/0020/26039/apor-manual_20091009.pdf (Accessed: 10/05/16)

¹⁷³ s44-46 *Ombudsman Act* 1998 (Vanuatu) http://www.pacii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

to appoint pursuant to s11(1) of the *Ombudsman Act* a deputy Ombudsman and four assistant Ombudsman.¹⁷⁴ The affairs of the Ombudsman's office are kept independent and regulated for under the *Ombudsman Act* of 1975. This system has proven to be effective without delay as only the Chief Ombudsman is responsible for the administration of the office.¹⁷⁵

In Papua New Guinea, the Ombudsman Commission appoints its own officers and it does this after consultation with the National Public Service.¹⁷⁶

On the contrary, in some of the Australian states like South Australia, the Ombudsman is appointed by the Governor on the recommendation of the Attorney General who is the Minister responsible for the administration of the Ombudsman Act. The staffs of the Ombudsman on the other hand are provided to the Ombudsman by the Attorney General who is the Minister responsible.¹⁷⁷

Consultations

In seeking the views of the public on this issue, the Commission asked questions relating to:

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

The general consensus during the consultation on the above by the general public who were consulted was that the Ombudsman should be given back the power to appoint his/her own staff to avoid delay, political or any other interference and other obstacles in the appointment process in order to avoid budget deduction. Many people stressed the need to restore the provision of the 1995 Act on the power to appoint his/her own staff.

A lot of people in the rural areas who were consulted shared a similar view that the Public Service process for appointment is a lengthy process and should not be used to appoint officers of an office such as of the Ombudsman. Having a body like the PSC to recruit candidates sometimes places the wrong person at the wrong place. There is a fear that the PSC recruitment process at times can be influenced by politics. Also a lengthy process of appointment by the PSC resulted in the deduction of the budget of the Ombudsman's office.

¹⁷⁴ s11(1)-(4) *Ombudsman Act* 1975 (New Zealand)

<http://www.legislation.govt.nz/act/public/1975/0009/187.0/DLM430984.html> (Accessed: 11/05/16)

¹⁷⁵ s3(4) *Ombudsman Act* 1975 (New Zealand)

<http://www.legislation.govt.nz/act/public/1975/0009/187.0/DLM430984.html> (Accessed: 10/05/16)

¹⁷⁶ s25 *Organic Law on the Ombudsman Commission* (Papua New Guinea)

http://www.paclii.org/pg/legis/consol_act/olotoc362/ (Accessed: 10/05/16)

¹⁷⁷ Above n196

In terms of measures for recruitment, those that were consulted were of the view that the Ombudsman Office needs to establish strict measures in place for recruitment. There should be a standard criteria set out for recruitment and a clear procedure as to how recruitments are to be made. The recruitment process must be one that must not allow political or any form of interference into the process.

Commission's Views

The present system of recruitment within the Ombudsman's office is seen as a non-effective system that could not benefit the office of Ombudsman. The Commission shared the views made by the Ombudsman that the decline in the number of reports or work of the Ombudsman, decline in the number of staffs as well as its budgetary issue are tied in with the process of recruitment. The Commission sees a need for a change in the recruitment process in order to avoid long delay in terms of recruitment.

The Commission shared the same view with the 2004 Review Committee that as an employer, the Public Service Commission may at any time transfer an employee of the Ombudsman's office to another office if sees fit. The members of the Ombudsman staff are privy to many confidential and secret matters which are acquired during investigations using powers provided by the *Ombudsman Act*. The possession of this information could create conflicts of interest or otherwise appear to compromise the integrity of the person involved.

Also, the Commission considered the notion of independence of the Ombudsman. The Ombudsman shall not be subject to the discretion or control of any other person in the exercise of his functions.¹⁷⁸¹⁷⁹ However the removal of the power to directly recruit its employees introduced in 1998¹⁸⁰ has the potential to limit the independency of the Ombudsman. It creates a possibility that could compromise the investigation done by the staff of the Ombudsman due to fear of those in high offices who have the power over the Ombudsman's staffs as their employees.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the amended *Ombudsman Act* must allow for the Ombudsman to appoint his or her own staff after having consulted the relevant institutions including the Public Service Commission (PSC) of the Republic of Vanuatu. This can be done by restoring the provisions of the 1995 *Ombudsman Act*.

¹⁷⁸ *Constitution of the Republic of Vanuatu* 1980 http://www.pacii.org/vu/legis/consol_act/cotrov406/ (Accessed:

¹⁷⁹ /05/16)

¹⁸⁰ *Ombudsman Act* [252] (Vanuatu) http://www.pacii.org/vu/legis/consol_act/oa114/ (Accessed: 10/05/16)

Recommendations: In doing so, the Ombudsman is to be given full power over its administrative, financial and operational activities which include the power to recruit its own staff on terms and conditions determined by him or her. More importantly, the amended Act should state that the Ombudsman shall not be regarded as a servant or agent of the Government. A manual must be put in place to regulate and safeguard the recruitment process in order to avoid misuse of power by the Ombudsman.

Recommendations: That the Act must clearly provide that the powers of the Ombudsman to appoint staff must be exercised according to strict rules similar to the Public Service rules.

Recommendations: That the current section 43 should be amended to allow the Ombudsman to consult with the Public Service Commission before making any appointments. However, section 43 and other consequential amendments under the Act should give the Ombudsman full power to administrate the Ombudsman office including the power to appoint all staff independently from the Public Service Commission.

Recommendations: That the procedure of appointment of staff shall be made independent, outside of political or any other interference so as to uphold the notion of independency.

Recommendations: That sections 44, 45, 47, 48 and 54 shall require amendment if section 43 is to be amended.

CHAPTER SIX: NATIONAL HUMAN RIGHTS COMMISSION

Background

The term Human right refers to the fundamental rights and freedoms that all human beings are entitled to. Often these rights may include the right to life, liberty, equality, a fair trial and freedom of expression, assembly, freedom from slavery and torture and so forth.

The purpose of human rights, is to protect human agency and therefore to protect human agents against abuse and oppression. Human rights protect the core of negative freedom, freedom from abuse, oppression and cruelty¹⁹⁴.

The current Law

The Vanuatu Constitution for instance makes mention of these rights and freedoms. Part I of the Constitution 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.¹⁹⁵

Sub Article (2) of Article 5 further outlines that these fundamental rights of an individual may be protected under the law¹⁹⁶ and Article (6) provides for the enforcement of these fundamental human rights.¹⁹⁷ All individuals are entitled to apply to the Supreme Court to seek for a possible legal remedy for the infringement of a fundamental right.¹⁹⁸

In terms of the international conventions and treaties, Vanuatu has signed and ratified four human rights conventions to date.¹⁹⁹ Due to the fast growing issue of human rights in the region, a lot of countries have legislated on human right and have set up bodies such as a Human Rights commission, committee or institution to regulate the affairs of human rights in their country. Human Rights commissions, committee or Institutions are established by legislation or Constitution as an independent statutory institution to promote and protect human rights in a country.

¹⁹⁴

Micheal Ignatieff, *The Attack on Human Rights*, 2001 <http://www.michaelignatieff.ca/assets/pdfs/TheAttack.pdf>
(Accessed: 10/06/16)

¹⁹⁵

Article 5(1)(a-k) of the Constitution 1980 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/cotrov406/
(Accessed: 10/05/16)

¹⁹⁶

Article 5(2) of the Constitution 1980 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/cotrov406/
(Accessed: 10/05/16)

¹⁹⁷

Article 6 of the Constitution 1980 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 10/05/16) ¹⁹⁸

Constitution of the Republic of Vanuatu 1980 http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 10/05/16) ¹⁹⁹

Convention Against Torture (CAT), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), (CRC) Convention on the Rights of a Child and Convention on the Rights of Persons with Disabilities (CRPD)

Current situation in Vanuatu

Currently, there is no legislation or office that caters or provides specific and detailed procedures for dealing with human right matters in Vanuatu. The Constitution of Vanuatu under Part I set out only the legal frame work that deals with human rights which are basically the fundamental rights and freedoms of individuals.

A question posed by the Asia Pacific Forum of National Human Rights Institution (NHRI) team on a scoping mission in 2011 was whether or not Vanuatu needed a NHRI. At the end of the scoping mission, the Vanuatu team was given two options, (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 mandate.¹⁸¹

Having these two options in mind, Vanuatu had decided to establish a National Human Rights Committee (NHRC) to come under the Prime Minister's office. This came about after the Council of Ministers approved its establishment in 2013.¹⁸² The NHRC comprises of 8 members representing the Prime Minister's office, Ministry of Justice and Community Services, Ministry of Foreign Affairs and Trade, Ministry of Finance and Economic Management, State Law Office, Vanuatu Law Commission, Civil Society and the National Council of Chiefs. The main functions of this Committee are generally to give advice to the Government on International Human Rights treaties and to implement and ensure compliance by the Government with the treaties that Vanuatu has ratified.¹⁸³

Although the NHRC has been established, its function does not include receiving and looking into matters of human rights breaches.

In the absence of a national legislation to establish an office to look into human rights breaches, the office of the Ombudsman is seen as an existing institution which indirectly deals with breaches of human rights issues alleged by government institutions and agencies. These human

¹⁸¹ Asia Pacific Forum Advancing Human Rights in our Region 'Republic of Vanuatu scoping mission on a National Human Rights Institution' 19-23 September 2011

¹⁸² Interview with Jenny Tevi, Chairperson, National Human Rights committee, 2015

¹⁸³ Ibid

rights complaints are considered as normal traditional complaints of maladministration, abuse of powers and language.

Comparable Jurisdictions

An example of a hybrid NHR Institution that has combined with the Ombudsman office can be seen in Samoa. 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 Ombudsman. In carrying out its traditional functions of investigating maladministration and abuse of powers, the Ombudsman has the additional role of promoting and protecting human rights in Samoa.¹⁸⁴ 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 with regard to human rights issues.¹⁸⁵

The Ombudsman in Victoria has the power to conduct enquires and investigations into the administrative actions taken by Victorian government departments, statutory authorities and local government. Further to his normal responsibilities, the Ombudsman has the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the charter under the Charter of Human Rights and Responsibilities Act 2006.²⁰⁵

The government of Cook Islands has taken a similar view to that of Victoria. The government issued a direction to the office of the Ombudsman to set up a human rights position within the office. The position is to oversee human rights related matter within the Ombudsman's office. However, the position cannot be supported by the budget at that time and no additional funding has been received.¹⁸⁶

Consultations

The Commission in seeking the views of the public on this issue, asked questions relating to:

- Whether or not the Ombudsman should be given additional functions to oversee human rights issues in Vanuatu? or
- Should Vanuatu establish a separate institution of National Human Rights?

¹⁸⁴ *Ombudsman (Komesina o Sulufagiga) Act* of Samoa 2013

http://www.paclii.org/ws/legis/consol_act/oosa2013295/ (Accessed: 8/06/16)

¹⁸⁵ Ibid 205

Commonwealth Ombudsman (2009) 'Australasia and Pacific Ombudsman Region Information Manual' http://www.ombudsman.gov.au/_data/assets/pdf_file/0020/26039/apor-manual_20091009.pdf (Accessed: 4/06/2016)

¹⁸⁶ Above n216

- Should Vanuatu follow Samoa's approach in establishing its own Human Rights Commission within the Office of the Ombudsman? or
- 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 context and resources?

The general consensus reflected in the consultation is that the office of the Ombudsman currently does not have the physical and financial capacity to take on board additional functions in overseeing human rights issues in Vanuatu. It cannot look into the breaches of human rights because it does not have the appropriate expertise or qualified human rights officers. Also, the current budget of the Ombudsman cannot allow the Ombudsman to hire additional staffs which means that it cannot accommodate a separate commission as well as within its office.

Similar concerns were raised in relation to the idea of combining the work of the Ombudsman with that of the Human Rights Commission. People who were consulted felt that combining the work of the Human Rights Commission with that of the Ombudsman would generally overload the Ombudsman.

In relation to whether or not Vanuatu needs a separate office to regulate the affairs of human rights, the stakeholders who were consulted were of the view that a stand-alone office should be established to regulate and oversee human rights issues and abuses within the country. It was confirmed during the consultation by the chairperson of the NHRC in Vanuatu that the NHRC established in 2013 is an interim process awaiting the establishment of a Human Rights Commission for Vanuatu in years to come.

However, around 40% of the stakeholders consulted expressed the view that it would be good to have a similar system as that in Samoa. They felt that the *Ombudsman Act* should be amended to allow for the establishment of a National Human Rights Commission as part of the Office of the Ombudsman. In carrying out its traditional functions, the Ombudsman has the additional role of promoting and protecting human rights in Vanuatu. They felt that the Ombudsman will combine his work with human rights until such time Vanuatu is prepared to have a human rights office of its own.

Commission's Views

In light of the discussions made so far, and the call by stakeholders on this issue, the Commission is of the view that the office of the Ombudsman must be kept separate and independent from any other office including that of human rights. One of the main reasons why it should be separated is to maintain the independency of the office of the Ombudsman and to avoid future conflicts in the line of work.

Budgetary issue is another concern. Budget has been a long standing issue of the Ombudsman and for this reason the Ombudsman's office cannot be allowed an additional function to look into human rights issues. The cuts in the Ombudsman budgets office over the years has made it impossible for the Ombudsman to hire new officers or be given additional responsibilities.

Insufficient staffing is another reason why human rights issues cannot be placed under or merged with the office of the Ombudsman. With a staff of only 14, the working force is already strained and is not enough to be given extra responsibilities. The number of complaints alone in the last 10 years ranges from around 60 to around 200 per year.²⁰⁷ This already has led to the increased workload experienced by the officers of the Ombudsman.

Moreover, the Ombudsman is mandated to fight corruption and to make sure there is transparency and accountability. Human rights are a separate major issue on its own. The Vanuatu government has already taken a step forward in establishing its first ever National Human Rights Committee in 2013 as an interim process with a purpose to report on human rights issues in Vanuatu. This interim process will await the establishment of a human rights commission for Vanuatu. The Commission is of the view that the government should look into funding the establishment of the Human Rights Commission not only to report to the United Nation on the status of the conventions Vanuatu has ratified but to also look into alleged breaches of human rights.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: Given its current capacity both physically and financially (in terms money, human resource and the expertise they need), the office of the Ombudsman cannot be given the additional responsibility of overseeing human rights issues. The idea of incorporating the National Human Rights Commission into the office of the Ombudsman pending the establishment of the National Human Rights Commission would also not be a good idea.

Recommendations: That Vanuatu must have a separate Independent National Human Rights Commission or Institution to deal with the issues and matters of Human Rights in Vanuatu.

Recommendations: That the government having established an interim committee to report on human rights issues in Vanuatu, should consider the establishment of the National Human Rights Commission as one of its priorities. The Commission will then have the power to oversee the Human Rights functions and the overall administration of the Commission.

²⁰⁷ Anita Jowitt, National Integrity System Study, Office of the Ombudsman Discussion paper 2, pg 13, September

2013 <http://repository.usp.ac.fj/8017/1/VanNISombudsman.pdf> (Accessed: 10/05/16)

PART TWO: LEADERSHIP CODE

CHAPTER SEVEN: SCOPE OF LEADERS

Introduction

Leadership Codes were created to provide for checks and balances amongst leaders whose actions were deemed as being corrupt or questionable and were not in the interest of the community.²⁰⁸ In the Pacific, Leadership Codes have been established in Papua New Guinea, Solomon Islands and Vanuatu.²⁰⁹ The focus of this chapter delves deeper into these various regional Leadership Codes and will critically examine the scope of these regulations and compare them with the other countries. Reference will also be made to various articles in Vanuatu's Constitution. Lastly, it will also attempt to redefine certain terms in the Act, as some are deemed as out dated and do not reflect current circumstances.

Submissions

The MacDowell Report was compiled by the Ombudsman office. It compared the Leadership Code of both Papua New Guinea and Vanuatu. It was evident that Vanuatu's Leadership Code was modelled after PNG's and the principles of this Leadership Code are enshrined in the Constitution. It also provided for recommendations that the Ombudsman office be the only office to issue and collect annual returns of leaders and investigate leaders who have falsified their annual returns, this could be done by way of the Ombudsman sending out notices to the public for all leaders that forms are available from the Ombudsman office. The other major recommendation was for Part 5 Investigation and Prosecution of Leaders to be amended to provide for the creation of a tribunal.²¹⁰

Another report was the Wiltshire Independent Review Committee report which was quite comprehensive as it went further to elaborate on how the Public Service Commission should ensure that staffs of the Public Prosecutor's office receive sufficient funds for prosecutors to be able to prosecute more cases.²¹¹ Moreover, it contained recommendations that institutions such as the Police must look into investigating every report the Ombudsman publishes or produces, especially reports where the Ombudsman finds that criminal misconduct has been

²⁰⁸

Wood, J.T.D (no date) *Leadership Codes and Corruption Prevention*. Available at: <https://dfat.gov.au/aboutus/corporate/freedom-of-information/Documents/leadership-codes-corruption-prevention.pdf>

(Accessed: 22/07/16) ²⁰⁹ Gregory Rawlings, 2006, *Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006*, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machinery-leadership-codes-pacific%20.pdf> (Accessed: 12/07/16)

²¹⁰ The MacDowell Report, p.29, p.35

²¹¹ K.W. Wiltshire, 'Independent Review of the Office of the Ombudsman', (2002), p.8

committed. Another recommendation is for the Ombudsman officers to engage more with the Public Prosecutor's office and finally for the establishment of a tribunal.

The Ombudsman and Leadership Code Review Committee Report (2004) provided an in-depth analysis of what changes needed to be made to the Leadership Code Act. A recommendation from the report was for Section 34 to be amended. It would allow for the Ombudsman to investigate a complaint that was deemed to amount to criminal misconduct. The Ombudsman should be able to refer the matter along with supporting evidence to the Police and Public Prosecutor at any stage. Once a criminal investigation commences, the Ombudsman should put their investigation on hold till the matter has been concluded. The next recommendation was for the creation of a tribunal, a recommendation that was also shared by the first two previous reports.

According to the TOR it was suggested that the *Ombudsman Act* and the *Leadership Code* be amended. The Office of the Ombudsman submitted for certain terms to be further defined. Also that there be a clear demarcation of Leaders conducts and which of these conducts were in breach of the Code. Other terms which would be revisited were leader, undue influence, educational level required of a leader and corruption. The idea of Conflict of interest is also discussed.

Background

Articles 66-68 under the Constitution of Vanuatu provides for the establishment of a Leadership Code. It took eighteen years (18) after independence for Vanuatu to formally establish a Leadership Code. It first was enacted in 1998 and within this Act, it stipulated the precise procedural rules and regulations to regulate the conduct of Leaders.¹⁸⁷ The Act was created after repeated calls from the first Ombudsman in Vanuatu but did not originate from the leaders (Members of Parliament). A number of expatriate advisors were involved in its first drafting. There were no formal consultations with the relevant leaders to provide feedback on a clear succinct definition of leaders as well as other terms¹⁸⁸. The purpose of the Act was to provide the Ombudsman with the task of investigating misconduct by leaders in Vanuatu.¹⁸⁹ The Leadership Code is spread over 6 parts which are the:

¹⁸⁷ Gregory Rawlings, 2006, Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machinery-leadership-codes-pacific%20.pdf> (Accessed: 12/07/16)

¹⁸⁸ E Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004)

¹⁸⁹ Ibid

- Part 1: Preliminary
- Part 2: Duties of Leaders
- Part 3: Breaches of Leadership Code
- Part 4: Annual Returns
- Part 5: Investigation And prosecution of Leaders
- Part 6: Punishment of Leaders

Not all Parts will be discussed in this chapter as they are discussed in more detail in the other chapters. Only certain terms and other minor parts will be discussed under this chapter and that were put together in this chapter for convenience.

“Leader”

The Constitution and the Leadership Code provides for the conducts of a leader and the types of people who fall into the realms of a “leader”. These are the:

- President,
- Prime Minister and Ministers,
- Members of Parliament,
- Public servants,
- Officers of government agencies and other officers as may be prescribed by law.¹⁹⁰

However under the *Leadership Code Act* section 5 also spells out leaders as members of the;

- National Council of Chiefs,
- elected and nominated members of local government councils,
- elected and nominated members of municipal councils,
- political advisors to a Minister,
- Director General’s and directors,
- members and Chief Executive Officers of boards of statutory bodies,
- CEO of Secretary Generals of local government councils,
- persons who are directors of companies owned by government,
- Attorney General,
- Commissioner and deputy of Police,
- Solicitor General,

¹⁹⁰ Constitution of the Republic of Vanuatu http://www.pacii.org/vu/legis/consol_act/cotrov406/ (Accessed: 22/07/16)

- Public Prosecutor,
- Public Solicitor,
- Ombudsman,
- Clerk of Parliament,
- Principal Electoral Officer,
- Auditor General,
- Chairperson Expenditure Review committee,
- Chairperson acting in capacity of tenders board,
- members of Public Service Commission,
- members of Teachers Service Commission,
- members of Police Commission, □ members of Electoral Commission, □ Commander of Vanuatu Mobile Force.

The Constitution and the *Leadership Code* limits the definition of leaders only to the core of the political community and to anyone in any high level or management position within government.¹⁹¹

There are issues related to the current provision of leaders. For instance, the term “Political advisor” is not clearly defined. It could mean paid advisors which exist for each cabinet position within the government or could refer to any other advisor whether paid or unpaid. This creates uncertainty in the mind of others with similar posts as to whether or not their conducts will be judged as a leader and in accordance with the Leadership Code.²¹⁷

Furthermore, the Code makes reference to the members of the National Council of Chiefs as Leaders. Still under Part one is the provision on roles of Chiefs which states that “It is the intention of this Code that Chiefs be able to maintain their customary role in connection with the conduct of leaders, so long as that does not conflict in any way with the principles of this Code.”¹⁹² Without any further clarification, it can be contended that all the conducts of custom chiefs’ area also subject to the Leadership Code. There is difficulty as chiefs are not recorded in any written material compared to other titles such as the members of the National Council of

¹⁹¹ Wood, J.T.D (no date) *Leadership Codes and Corruption Prevention*, <https://dfat.gov.au/aboutus/corporate/freedom-of-information/Documents/leadership-codes-corruption-prevention.pdf> (Accessed: 22/07/16) ²¹⁷

E Edward R. Hill, *A structural analysis of the Ombudsman of Vanuatu* (LLM thesis, University of the South Pacific, 2004)

¹⁹² Section 11, *Leadership Code* [cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

Chiefs. Custom chiefs are created on the basis of unwritten custom rules.¹⁹³

Part 3 provides for conducts of leaders which identifies situations or circumstances where a leader can be held liable for breaching the *Leadership Code*. For instance, “A leader must not accept a loan...”¹⁹⁴ and “A leader must not exercise undue influence...”¹⁹⁵ In these provisions however, the terms or breaches are hard to understand or define as there is no proper definition for them and thus are open to any interpretation which lead to further confusion.

Undue Influence

Undue influence for instance is one of these undefined terms which makes it hard for a leader to decide whether his or her conduct falls within the spheres of “undue influence” or not.

The phrase to be given a definite meaning and as a legal jargon would require more time. However for the purpose of this review, a general meaning taken from the context of the Leadership Code in Vanuatu will be discussed.

Section 22 states that undue influence if exercised by a leader is guilty of a breach of the Leadership Code. The doctrine of undue influence first arose in the equity courts using the balance of probabilities and usually resulted in civil remedy such as setting aside of the agreement. The Code however warrants a severe punishment in the criminal arena and the standard of proof required is beyond reasonable doubt.

The concept is rather broad under the sections relating to Undue influence. Subsection 22(1) list persons whom a leader can be held to exert undue influence on and subsection 22(2) continues to state that:

(2) A leader must not influence or attempt to influence or exert pressure or threaten or abuse or interfere with persons carrying out statutory functions.

Subsection 22(2) is too broad in that in some cases, the behaviors listed in Subsection (22) (1) may be covered in this provision. The provision may cover a normal behavior that is legitimately expected of any normal leader. Being a leader, he or she is entitle to use his or her influence over someone listed under Subsection (22) (1) for them to comply with their duties or not to act

¹⁹³ *Leadership Code* [cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

¹⁹⁴ *Ibid*

¹⁹⁵ *Ibid*

outside of it.¹⁹⁶ It is not clear as to what extent the behavior can be termed as legitimate persuasion and what can be seen as undue influence.

The penalty as dictated by section 40 is a fine not exceeding VT 5,000,000¹⁹⁷ or imprisonment for a period not exceeding 10 years.¹⁹⁸¹⁹⁹ Although the penalty is provided for under the Leadership Code Act, it remains with the courts to determine what amounts to be given out in sentencing for undue influence.²²⁵

Education level required of a leader:

Qualification of a leader with reference to the level of education which is required of a leader is not provided. In a news release by Radio New Zealand in March 2012, the then Vanuatu Prime Minister, Sato Kilman said *"Quality education is unequivocally the fastest way to achieve sustainable development"*. Education, he said, can provide opportunities for citizens to achieve economic productivity for themselves, their community and countries. It will improve selfconfidence, self-development and also claiming their rights.²²⁶ Sadly, the *Leadership Code* does not provide for an educational level in which a leader is expected to obtain nor does it provide any criteria as to how people will be selected as a leader.

Whether or not one needs education to become a qualified leader is an interesting question as it implies that one is required to attend college to become a qualified leader. This is lacking in the Code. In some places, people have become successful leaders without obtaining a college degree.²⁰⁰ Thus, if it is required for leaders to obtain a certain level of education, the question remains as to what would be the appropriate education level required of him or her.

Corruption

"The Vanuatu Supreme Court has sentenced fourteen government MP's to jail for corruption" was the heading of an article in the Law Report section in the Australian Broadcasting Network on the 27th of October 2015. In this article, there was discussion between Mrs. Tess Newton

¹⁹⁶ Ibid

¹⁹⁷ Ibid

¹⁹⁸

Ibid

²²⁵

E Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004) ²²⁶

¹⁹⁹ May 2012, Vanuatu leader says education the way to achieve sustainable development, <http://www.radionz.co.nz/international/pacific-news/204542/vanuatu-leader-says-education-the-way-to-achievesustainable-development> (Accessed: 22/07/16)

²⁰⁰ Barry Lenson, 16 November 2012, Should there be a minimum education level for politicians?, <http://www.straighterline.com/blog/should-there-be-a-minimum-education-level-for-politicians/> (Accessed: 22/07/16)

Cain, a lawyer and political analyst in Vanuatu, and a reporter from the Law Report in ABC network. Cain clarified that the 14 MP's were imprisoned having been convicted of bribery. The bribery related to payments made by the leader of Opposition to a number of other MP's in order to secure their support for a motion of no confidence to overturn the then government.²⁰¹ These 14 MP's were convicted according to Section 73 of the *Penal Code*²⁰²²⁰³ which states that:

(1) No public officer shall, whether within the Republic or elsewhere, corruptly accept or obtain or agree or offer to accept or attempt to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity. ²³⁰

In the case of *Public Prosecutor v Kalosil* – Judgement as to verdict [2015] 135; Criminal Case 73 of 2015, the court discussed the term “Corruptly” and to which links closely with bribery. Hence discussions were centered on the acts of corruption and bribery. The Courts quoted section 73 of the Penal Code which states that:

(1) No public officer shall, whether within the Republic or elsewhere, corruptly accept or obtain or agree or offer to accept or attempt to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.

Penalty: Imprisonment for 10 years.”

The Prosecution must prove the following elements:

- That the accused is a public officer
- That he did as a public officer corruptly accept or obtain
- A bribe for himself
- In respect of an act to be done by him □ In his official capacity.

“(2) No person shall corruptly give or offer or agree to give any bribe to any person with intent to influence any public officer in respect of any act or omission by him in his official capacity.

²⁰¹ *PP v Kalosil* – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/08/16)

²⁰² Ibid

²⁰³ *Penal Code* [Cap 135] (Vanuatu) http://www.paclii.org/cgi-bin/sinodisp/vu/legis/consol_act/pc66/pc66.html?stem=&synonyms=&query=%22penal%20code%20%22 (Accessed: 21/08/16)

Penalty: Imprisonment for 10 years."

The elements which the prosecution must prove are:

- That the accused did corruptly give a bribe to a person
- The bribe given by the accused was to a person who is a public officer □ That when the bribe was given it was with intent to influence the public officer □ In respect of any act or omission by the public officer in his official capacity.

The Judge went on to discuss the word "corrupt" in order to have a clear understanding of its meaning in the context of the term in the Penal Code. He referred a similar statutory provision in the case of *Borough Limerick (1869) O'Malley & Hardcastle 260* which states:

*"I am satisfied that where in the formal part of the 2nd section of the Corrupt Practices Act reference is made to offers and promises made before the vote is given, the legislature clearly intended the Court to draw a prima facie reasonable inference from the act done as to the purpose for which it was done, leaving to the other side to rebut that inference if they could. Every forbidden act done for the purpose mentioned in this Act is to be regarded as done for a corrupt purpose, and once shown that a forbidden act is done for any of the purposes mentioned in the Act it immediately becomes a corrupt act, though it would otherwise have been a purely innocent one; that is to say, in some cases the act itself afford ground for reasonable inference of the intention with which the act is done, and there the legislature has not introduced the word "corrupt"; and if the act is simply proved to be done, the Court is allowed to draw from it the ordinary reasonable inference prima facie that it was done for a corrupt purpose. But there are other cases in which the legislature, from some reason or other, appears to have thought the inference not so strong and in these cases it introduces the word "corruptly" for the purpose of showing that it did not intend the ordinary inference or intention to be relied upon... so here, where the legislature has not introduced the word "corruptly", and the actual and reasonable inference from the act is that it was an act done for the purpose contemplated, the legislature has treated it as corrupt without mentioning anything more about it. But in those cases in which it seems to have been intended that the Court should not infer the purpose simply and solely from the act, it has introduced the word "corruptly". The whole proof of **corruption**, as it appears to me, consists in showing that the forbidden act is done for a purpose not innocent according to the Act of Parliament".²⁰⁴*

²⁰⁴ *PP v Kalosil* – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/08/16)

“It does not mean corrupt in the sense that you may look upon a man as a knave or villain, but that it is to be shown that he was meaning to do that thing which the statute forbids”.²⁰⁵

In the case of *R v Dillon* [1982] VR 434, it is further discussed that the agent acts corruptly if he receives a benefit in the belief that the giver intends that it shall influence him to show favor in relation to the principal’s affairs. If he accepts a benefit which he believes is being given to him because the donor hopes for an act of favoritism in return, even though he does not intend to perform that act, he is knowingly encouraging the donor in the act of bribery or attempted bribery. He or she is knowingly profiting from his position of agent by reason of his supposed ability and willingness, in return for some reward, to show favouritism in his principal’s affairs and knowingly putting himself in a position of temptation as regards the impartial discharge of his duties in consequence of the acceptance of a benefit.

Although the Legislation does not explicitly cover the definition of what amounts to the term “Corruption”, the courts have made discussions and contribution as to what actions are covered when using the term. However it can be summarized as actions that were carried out by leaders with the intention of doing that which is forbidden by the statute.²⁰⁶

Conflict of Interest

Among other functions of a leader in Vanuatu, it is a crucial duty for him not to place himself in such a way, both in his public and private life, in a position in which he has or could have a conflict of interest or which the fair exercise of his public or official duties might be compromised.²³⁴

If in any situation, a leader has a conflict of interest in the matter, he is prohibited from assigning the matter to another person in such a way that the leader or a member of his family will benefit from the action.²⁰⁷ Moreover, the leader is to disclose his interest in the matter by way of writing to other members of the council or body before the matter is dealt with by that body or council.²⁰⁸ One is liable to punishment under the Act if he fails to disclose his interest in the matter.²⁰⁹

Although there is no recent activity which raises any issue with the meaning of this term or how it is enforced, a brief comparison with neighboring jurisdictions finds other approaches which

²⁰⁵ Ibid

²⁰⁶ Ibid ²³⁴

Article 66(1)(a), Constitution of the Republic of Vanuatu 1980, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 12/07/16)

²⁰⁷ Section 24, *Leadership Code* [cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

²⁰⁸ Section 16, Above n238

²⁰⁹ Subsection 40(1), Above n238

might better fit Vanuatu compared to the existing one in place. (This is further elaborated below under conflict of interest below).

Comparable Jurisdictions

Leader

In Papua New Guinea, the country first gained its independence in 1975 and through the establishment of its Constitution through Division III 2, section 26-31 provides for its Leadership Code which is managed and enforced by the Papua New Guinea Ombudsman Commission. The Code establishes specific rules and regulations for leaders to avoid matters that may arise to a conflict of interest between leaders in public office from private enterprise.²¹⁰

The Constitution in PNG also provides for the definition of leaders²¹¹as:

- All Members of Parliament (including PM, Opposition Leader & Ministers).
- All members of Provincial Assemblies
- All Constitutional Office Holders (s221).
- All heads (Secretaries) of Departments of the National Public Service.
- All heads of Statutory Authorities and other government bodies and agencies. □
Provincial Administrators □ Commissioner of Police.
- Commander of PNG Defence Force.
- CIS Commissioner
- All of PNG's Ambassadors and High Commissioners
- Public Curator
- Ministerial staff and staff of the Leader and Deputy Leader of the Opposition.
- Governor General's staff
- Executives of registered Political Parties
- members of House of Representatives

The Ombudsman can provide an issuance of directives to stop a leader from breaching any provision of the Leadership Code, and most importantly to protect the honesty and integrity of

²¹⁰ Gregory Rawlings, 2006, Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machinery-leadership-codes-pacific%20.pdf> (Accessed: 12/07/16)

²¹¹ Wood, J.T.D (no date) *Leadership Codes and Corruption Prevention*. Available at: <https://dfat.gov.au/aboutus/corporate/freedom-of-information/Documents/leadership-codes-corruption-prevention.pdf> (Accessed: 22/08/16)

leaders. If a leader fails to comply with those directions, the failure itself is considered to be a breach of the Leadership Code. These are some examples of directions that were issued to leaders over the past several years on things not to do;

- Involving themselves in dealings with special purposes funds;
- Authorising or facilitating a settlement of a claim against the state;
- Taking official overseas travel that was completely unrelated to their official duties.²¹²

Undue Influence and Corruption

Section 11 of the *Organic Law on the Duties and Responsibilities of Leadership* provides for a similar provision like that of Vanuatu, stating that a person who corruptly asks for, receives or obtains, or agrees or attempts to receive or obtain, any property, benefit or favour of any kind for himself or any other person in consideration of his actions as a public official. Being influenced in any manner, or on account of his having acted as a public official in any manner (whether generally or in a particular case) is guilty of misconduct in office. The term “corruptly” is also not defined by legislation.

Conflict of Interest

In Papua New Guinea, a leader must disclose his interest to the Ombudsman’s Commission instead of the Body or council who is dealing with the matter.²¹³

In 1978 Solomon Islands gained its independence and the Constitution chapter VIII section 9395 provided for the implementation of a Leadership Code.²¹⁴ The Constitution provides for who is a leader under section 93;

- Governor General,
- Prime Minister and other
- Ministers,
- leader of opposition and leader of independent,
- all MP’s, the
- Speaker,
- members of any commission established by the constitution,
- public officers,
- officers of government of Honiara city,

²¹² Australasia and Pacific Ombudsman Region Information Manual” 2009, 13 July 2016

²¹³ Section 6, *Organic Law on the Duties and Responsibilities of Leadership* 1998 (Papua New Guinea) http://www.paclii.org/pg/legis/consol_act/olotdarol528/ (Accessed: 11/05/16)

²¹⁴ Wood, J.T.D (no date) *Leadership Codes and Corruption Prevention*. Available at: <https://dfat.gov.au/aboutus/corporate/freedom-of-information/Documents/leadership-codes-corruption-prevention.pdf> (Accessed: 22/05/16)

- provincial government officers,
- members of the Honiara city council and provincial assemblies,
- Officers of statutory corporations and government agencies and other officers as Parliament may prescribe.

This category prescribed by the Solomon Islands Constitution would bring the number to at least 10,000 people that could fall under the mentioned categories.²¹⁵ The definition of a leader is broad and includes all public employees who have very limited leadership roles and whose salary is paid by the national budget.²¹⁶ In the case for Solomon Islands, the Ombudsman and the Leadership Code Commission are two separate institutions.²¹⁷ There have been suggestions for the Solomon Islands to amalgamate the Leadership Code Commission and the Ombudsman into one office due to the success of the PNG Ombudsman in charging the leaders under the Leadership Code in 2006.²¹⁸²¹⁹ However, currently PNG still lacks a chief Ombudsman which needs to be appointed to replace the acting Chief Ombudsman.²⁴⁷

Conflict of Interests

A different approach is seen in the Solomon Islands. A leader must not place him in a position where he could be faced with a conflict of interest or might be compromised when discharging his public or official duty. He will be guilty of misconduct if he places himself in this situation and thus must divest himself of any interest he is associated with.²²⁰

The Act further provides that where a leader must choose between his interest and his obligations as a leader, the Commission will look at:

- (a) the amount of influence the Leader may have on the decision-making process of the Ministry, department, Government agency or authority in which he works or for which he is responsible;

²¹⁵ Gregory Rawlings, 2006, Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machinery-leadership-codes-pacific%20.pdf>

(Accessed: 12/07/16)

²¹⁶

Ibid

²¹⁷ Ibid

²¹⁸

Ibid

²⁴⁷

²¹⁹ August 2016, Concern over “acting” nature of PNG ombudsman appointment, <http://www.radionz.co.nz/international/pacific-news/310235/concern-over-acting-nature-of-png-ombudsmanappointment> (Accessed: 25/05/16)

²²⁰ Section 12, *Leadership Code (Further Provisions) Act 1999*, Solomon islands, http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-libraryfiles/Solomon%20Islands_Leadership%20Code_1999_EN.pdf (Accessed: 25/07/16)

- (b) the esteem in which the public hold the office to which the Leader has been appointed and the need to ensure that the good reputation of that office is upheld;
- (c) the possible financial gain or other benefit to the Leader; and
- (d) the value to the development of Solomon Islands as a whole of the investment the Leader has made or may make, or the position the Leader is holding or may hold or the services he has given or may give to the company, corporation or unincorporated association concerned: Provided that in any case where there is doubt as to whether a conflict of interest has arisen, additional weight shall be given to those matters specified in paragraph (d).²²¹

There is also an obligation on leaders to disclose direct or indirect interest in the matter to the body or committee before he speaks or vote. A leader who fails to make a disclosure in this respect is guilty of misconduct in office.²²²

Consultations

Over 90% of those consulted were of the view that the terms should be defined so as to provide leaders and the public clear definitions as to what conducts falls within the realms of the duties provided. A 7% provided answers that the terms must remain with the courts to determine. 3 % of the populace provided no answer.

Also 94% of those consulted also agreed that Leaders should be well educated and at a tertiary level while a 6 % provided that a well-educated person will make good leaders as good leaders will be good leaders from birth even if there is no education qualification.

During consultations, the idea of disclosing interest was first explained before the populace provided their opinions to which 100% of the populace agreed with the model applied in PNG and that it must be adopted in Vanuatu.

Commission's Views

With the independency of the Ombudsman's office, it is deemed that the model applied in PNG is a positive sign of anti-corruption and good administration compared to that applied in Vanuatu where the Leader is obliged to simply disclose his interest in the matter to the same council or body dealing with the matter. Thus it should also be adopted by Vanuatu.

²²¹ Section 16, Above n248

²²² Section 21, Above n248

With the discussions provided from research with respect to the terms “leader”, “undue influence”, “Education level” and “corruption” and the consultations results, it is the view of the VLC that the terms must remain as they are and should not be further defined.

The Commission also agrees that the terms or definitions provided for in the *Leadership Code Act* should remain as they are for the courts to determine.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: The terms that are provided for in the current *Leadership Code Act* does not require any reform. These terms require interpretation from the court according to the rules of interpretation and according to its circumstances. These are:

- Leader;
- Undue influence;
- Education level required of a leader; and
- corruption

Recommendations: The idea which is applied in PNG of conflict of interest which requires the leader to disclose his interest in the matter to the office of the Ombudsman as well as to the Council or body dealing with the matter must also be applied in Vanuatu.

Recommendations: The scope of the *Leadership Code* must remain as it is as there is no requirement for a substantial amendment with regards to its scope.

CHAPTER EIGHT: DUTIES AND BREACHES OF THE LEADERSHIP CODE

Introduction

This chapter examines the provisions relating to breaches of the *Leadership Code*, with greater focus on the issue of breaches. The main issues are whether or not the different breaches should be categorized into serious and less serious breaches and whether or not tribunals should be established to deal with these different categories of breaches. The duties of leaders are of minor concern and will not be the focus of this chapter.

Categorization of Breaches

Background

Leadership Codes were adopted into the Pacific as a mechanism to establish the accountability of public officials.²²³

The *Leadership Code* of Vanuatu has outlined specific breaches which leaders could be held accountable for, specifically from 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 in the Act are not categorized according to the severity of each breach.

The *Leadership Code Act*, provides that a person who does not comply with Part 2 (duties of leaders)²²⁴, 3 (breaches of *Leadership Code*)²²⁵ or 4 (annual returns)²⁵⁴ is guilty of a breach and is liable to punishment in accordance with Part 6.²²⁶

A report compiled in 2004 by a Review Committee shared a similar view with that of MacDowell's and the Independent report of 2002 in terms of categorising the offences or breaches under the *Leadership Code*. It advocates for the need for a separation between 'less serious' offence and 'serious' offences and the need for creating tribunals to deal with the different breaches. The Committee felt that a proposed system must be in place to clarify and distinguish between

²²³ 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).

²²⁴ *Leadership Code Act* 1998 (Vanuatu) <http://www.paclii.org/vu/legis/consolact/lca131/> (Accessed: 10/05/16)

²²⁵ Ibid ²⁵⁴

s31-33, Above n252

²²⁶ s19, Above n252

offences which are punishable and those that are not punishable but required disciplinary actions only.²²⁷

In terms of less serious breaches, the Committee was of the view that Part 2 and 4 of the *Leadership Code* could be dealt with appropriately by a tribunal rather than a criminal Court. The *Leadership Code* presently provides for a maximum fine of 5,000,000 vatu or imprisonment of 10 years for any breach of the Code. This is excessive for the seriousness of the breaches which are included in part 2 and 4 of the Code. The Committee considered offences under Part 3 (s20-s30) of the Code to be of serious nature in that they ought to be dealt with by a criminal Court with maximum penalty as provided for under Part 6 of the Act.²²⁸

The Independent review of 2002 shared the same view advocating that instead of the Ombudsman recommending whether prosecution is necessary to occur, he or she should clearly document the breaches of the Code which had occurred.²²⁹

Submissions

The Ombudsman's submissions, based on the mentioned three reports²³⁰ to the Vanuatu Law Commission (VLC), proposed that the current *Leadership Code* does not categorise the breaches but rather makes any breach of an offence under Part 2, 3 or 4 of the code a punishable offence.²³¹ Also, it does not give any flexibility or discretionary powers for the Court to decide otherwise. The submission basically outlined the need for categorizing the breaches as it was believed some breaches warranted a less extensive punishment than others.

Comparable Jurisdictions

The breaches outlined in the *Leadership Code* of the three individual Melanesian countries namely Papua New Guinea, Solomon Islands and Vanuatu showed an extensive similarity across the board between the three respective legislations.²⁶¹ However, none of this legislation has separated these offences into serious and less serious offences.

In Samoa 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

²²⁷ Republic of Vanuatu, '*Report of the Ombudsman Act and Leadership Code Review Committee*', (August 2004), P.10.

²²⁸ Ibid

²²⁹ K.W. Wiltshire, '*Independent Review of the Office of the Ombudsman*', (2002)

²³⁰ The MacDowell report, Independent Review of the Office of the Ombudsman report and the Review Committee report 2004.

²³¹ *Leadership Code Act* 1998 (Vanuatu) http://www.pacii.org/vu/legis/consol_act/lca131/ (Accessed: 10/05/16)

²⁶¹ Above n251

Act specifically provides for the values, principles and code of conduct for those in the public service serving under the government of Samoa²³². Samoa does not have a separate *Leadership Code*.

Consultations

The Commission in seeking the views of stakeholders on the idea of categorizing breaches, asked several questions relating to:

- Should the breaches be categorized according to serious and less serious breaches?
- What kinds of alleged breaches of the Leadership Code should be considered less serious?
- What kinds of alleged breaches of the Leadership Code should be considered serious?

The general consensus reflected in the consultation was that the breaches under the *Leadership Code* should be categorized according to the veracity of each breach. The law should consider the different breaches under 'less serious' breaches and 'serious' breaches. The 'less serious' breaches are to be dealt with differently from the 'serious' breaches. There was not much shared when it came to questioning what breaches should be considered less serious and which to be more serious.

However, some stakeholders consulted were of the view that given the nature of the offence committed, it would sometimes be difficult to differentiate between whether the offence would be considered serious or less serious.

Commission's views

The Commission is of the view that the *Leadership Code* in Vanuatu is the most comprehensive code in the region therefore the current provisions of the Code are not in need of reform and should be maintained. However, the Commission sees a need for a bit of rearrangement and a better enforcement of the code.

In terms of rearranging the breaches under the Code, after careful consideration, the Commission is of the view that it would be good to have the breaches categorized according to the nature of the offences or breaches. The Commission viewed that the provisions of the breaches under Part 2, 3 and 4 of the *Leadership Code* should be categorized into less serious and more serious breaches. In doing so, when dealing with cases, it will be easier to distinguish which cases are in need to go before the Courts compared to those who do not need to go before the Courts. This will help with the prioritization of the work of the Ombudsman as well as releasing the burden of having every case (serious or less serious) ending up at the Court.

²³² *Public Service Act* 2004 (Samoa) http://www.paclii.org/ws/legis/consol_act/psa2004152/ (Accessed: 10/05/16)

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the breaches of the Code currently outlined under Part 2, 3 and 4 of the *Leadership Code* should be categorized into two different categories, namely "Less-serious" offences (offences that could be dealt with by a Tribunal) and "Serious" offences and should be placed under one Part titled "Breaches of Leadership Code" of the *Leadership Code*.

Recommendations: That Part 2 and 4 of the present Act to be considered as "Less-serious" breaches while Part 3 of the Act to be considered "Serious" breaches under the Act. However, depending on the seriousness of the breach that is brought before the Ombudsman, he or she shall have the power under the amended Leadership Code Act to determine whether the breach is to be referred to as "Less serious" or that of more "Serious" nature.

Tribunals

Background

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.²³³

In Vanuatu, tribunals are not widely used. The only tribunal that currently exists is the Public Service Disciplinary Board. This body is created under the Public Service Commission to look after or look in into the conduct of its workers.

The Review Committee Report of 2004 advocates for the need of creating two main tribunals. One solely to deal with alleged breaches done by public servants and another to deal with those who do not fall under the scope of public servants such as Ministers and statutory body heads. The current Public Service Commission Disciplinary Board of the public service could act as a tribunal to look into less serious breaches of the Code by public servants. In cases where a leader who is not a public servant is alleged by the Ombudsman in a public report to have committed a less serious breach of the Leadership Code Act, that case can be dealt with by a separate disciplinary tribunal – a Leadership Disciplinary Tribunal.²⁶⁴

The Committee shared the similar opinion to that of MacDowell and the Independent report of 2002 that a tribunal should be given the power to make a binding order and not merely the power

²³³ Professor Kim Lovegrove FAIB, *Tribunals explained along with their strengths and weaknesses*, <http://www.lsclawyers.com.au/elibrary/tribunal-book> (Accessed 14/06/2016) ²⁶⁴
Above n259

to make a recommendation. It also agreed that the present criminal model for prosecutions should be maintained for prosecuting 'serious breaches' (Review committee 2004). Under the current legislation, once the Ombudsman has completed its investigations under the *Leadership Code*, a report recommending prosecution is then submitted to the Public Prosecutor who will then exercise its authority under section 34 to prosecute. This will depend very much on the evidence provided to prove the case beyond reasonable doubt failing which, no convictions will be entered.

The MacDowell's report share the similar view but also stressed that the establishment of the tribunals should be free from political or any form of interference. The tribunal should be treated like any other tribunals. The report stresses that the importance of having a specialised *Leadership Code* tribunal will provide a simple, speedy and accessible implementation of the provisions of the *Leadership Code*. The composition of the tribunal should be balanced and should consist of a Supreme Court judge, the Speaker of Parliament and a member of the academic community, such as the USP law school.²³⁴

Submission

In their submissions to the VLC office, the Ombudsman office proposed that if the law is to be changed to cater for the idea of categorizing breaches according to the nature of the breaches, then the law should also consider the idea of establishing tribunals as suggested by the MacDowell's, the Independent Review and the Review Committee report of 2004.

Comparable Jurisdictions

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 offices are being dealt with accordingly with the relevant tribunal provided under the Constitution.²³⁵ 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.²³⁶

²³⁴ The MacDowell Report, p.35

²³⁵ Section 27 of the *Organic Law on the Duties and Responsibilities of Leadership* (Papua New Guinea) http://www.paclii.org/pg/legis/consol_act/olotdarol528/ (Accessed: 10/05/16)

²³⁶ The Ombudsman Office (Vanuatu), Ombudsman Legislative Proposal Policy Paper Attachment 4: Changes to the *Leadership Code Act* (The Code), 2014

Furthermore, the legislation in Papua New Guinea, further provides for the establishments of tribunals and how to deal with different offences or breaches under the Code. For instances, where a leader has been found in breach of the *Leadership Code*, the tribunal may recommend that he or she:

- a) Be dismissed from office,
- b) Be given a fine an amount not exceeding K1,000 (approximately 45,000 vatu)
- c) Be suspended without pay for a period not exceeding three months
- d) Be ordered by the appropriate authority to enter into a recognisance for a period of up to 12 months
- e) Be reprimanded.²³⁷

In addition, if a leader is a public servant, the tribunal may recommend: a)

A reduction in salary

b) A demotion.²³⁸

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 focuses and deals mainly with the executive actions of the government whereas the civil tribunals focus mainly on resolving issues relating to private disputes.²³⁹

Consultations

In seeking the views of its stakeholders on the idea of having tribunals, those consulted were asked several questions relating to:

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

²³⁷ *Leadership Code (Alternative Penalties) Act 1976* (Papua New Guinea) http://www.paclii.org/pg/legis/consol_act/lcpa1976339/ (Accessed: 10/05/16)

²³⁸ Ibid

²³⁹ 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 12/06/2016)

In terms of introducing tribunals, the majority of the people consulted agreed with the idea of having tribunals established to look into the breaches under the *Leadership Code*. Similar concerns were raised in relation to the idea of having two tribunals, one to deal with public servant issues while the other to look into the issues concerning Ministers, other political posts and statutory bodies.

A number of the people consulted were of the view that less serious offences shall be dealt with by an intended independent tribunal whereas the more serious breaches should be dealt with by the formal justice system which is the courts. Some suggested for the composition of the tribunal to have at least a Magistrate or a Judge, representative of lawyers, representative from the police. The composition of the tribunals should vary amongst the two tribunals.

However, some stakeholders consulted shared the view that categorizing the offences under the *Leadership Code* would be an expensive exercise especially when it comes to implementing the idea and therefore would be a bad practice.

Commission's Views

The Commission's view under this paragraph will look at the option of whether or not Vanuatu should have a system which would allow for the establishment of tribunals to deal with breaches of the Code within the country.

The Commission agreed with the discussions made under the MacDowell report, the Independent report of 2002 and the Review Committee report of 2004 and is of the view that less serious breaches could be dealt with by a tribunal rather than by way of a criminal trial. The Commission considered offences of serious nature are ought to be dealt with by a criminal Court with the requisite safeguards and formalities and with the maximum punishment that is presently provided under the Act.

The Commission agrees with the three (3) previous reports that the less serious offences can be referred to under Part 2 and 4²⁴⁰ of the *Leadership Code* and serious breaches can be referred to under Part 3 of the Act. These are section 20 (misuse of public money), section 21 (accepting loans for personal gain) section 22 (exerting undue influence) section 23 (bribery) section 24 (benefiting from a conflict of interest) and section 26 (having a beneficial interest in a government contract).²⁴¹

²⁴⁰ s13-18 and s31-33 *Leadership Code* Act 1998 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/
(Accessed: 6/05/16)

²⁴¹ s19-30, Above n260

The present punishment as reflected under Part 6 of the Code refers to every breach of the code under Part 2, 3 and 4.²⁴² Where the provisions are to be rearranged or categorized according to these breaches, then the provisions with regard to punishment under Part 6 of the Act should also be re considered to suit the different categories of the breaches. The Commission considered the penalty provisions of the *Leadership Code (Alternative Penalties) Act 1976* of Papua New Guinea and suggested that a leadership tribunal in Vanuatu should have similar penalty provisions.

In considering the issue of whether there should be a tribunal set up to deal with issues of breaches of the *Leadership Code*, the Commission felt that Vanuatu has yet a lot to do in considering the idea of establishing the tribunal. Firstly, Vanuatu needs to have the required physical and financial resources to establish such a tribunal. The composition of the tribunal as suggested by MacDowell are people of high value and to sit in a tribunal of such kind, would need money to cater for their commitment and expertise in doing the job.

Another issue is the demand of having available people of such value to sit in the tribunals. Currently, Vanuatu has very few Magistrates and Judges who sit in more than enough cases that go before the courts. The real question to ask is whether these kinds of people can find or make time for additional responsibilities.

The Papua New Guinea's case is a bit different in that they have a very well established system. They have the capacity both physically and financially to establish their tribunals compared to Vanuatu. However, given the work that a tribunal would do, the Commission sees a need of setting up the tribunals for future considerations. The categorizing of breaches would help in creating a much clearer way with the prosecution of leaders.

The Commission agrees with the MacDowell report and the Review Committee report of 2004 to have a Leadership Disciplinary Tribunal established to oversee the 'less serious' breaches of leaders who are not public servants. Less serious breaches that are committed by public servants can be dealt with under the Public Service Commission (PSC) disciplinary board rules. The Public Service Disciplinary board rules must be revisited to capture this additional function. In terms of 'serious' breaches, it is up to the Courts to determine the outcomes.

Provided these views, generally there is a need to categorize the breaches under the *Leadership Code* and their punishments for future purposes and considerations. Practically speaking, there is a need to categorise the different breaches and introduce tribunals to deal with the different breaches or offences.

²⁴² Above n260

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That for more “Serious” breaches referred to under Part 3 of the present Act (misuse of public moneys, acceptance of loans, exercising of undue influence, bribery, ect) to continue to be prosecuted in the criminal courts while the “Less-serious” breaches to be referred to a disciplinary tribunal to determine what action be taken.

Recommendations: That the existing PSC Disciplinary Board could act as the tribunal for “Lessserious” breaches involving public servants while all other Leaders involving Members of Parliament, political positions, and Heads of statutory bodies would appear before a Leadership Disciplinary Tribunal specially convened for that purpose. That the Leadership Disciplinary Tribunals shall have its own powers including that to directly impose sanctions (eg. removing the Leader from public office and disqualifying the Leader from holding future office and so forth, similar to that of Papua New Guinea spelled out under the *Leadership Code (Alternative Penalties) Act 1976*).

Recommendations: That section 19 of Part 6 of the current Act should also be amended to suit the categories of the breaches outlined under Recommendation One. The Commission accepts the recommendation made by MacDowell supported by the Review committee in 2004 that section 19 is out of place and should be re-instated at the end of Part 6 under “Punishment of Leaders”. This does not result in any substantive changes to the legislation but does set it out in a more logical fashion.

CHAPTER NINE: ANNUAL RETURNS

Background

An annual return is a yearly statement that details both physical and financial status of a Member of Parliament or anyone who is known to be a leader under the law. Returns usually contain the name and title of a leader and office he or she works under, names and addresses of their spouse and children.²⁴³

The return discloses the assets such as real and personal property, land, houses, vehicles, boats or other vessels, money in bank, income during previous year, gifts received during the previous year, number of shares and any other assets.²⁴⁴ The return should also provide any liabilities on the part of the leader such as mortgage and other money owing as well as provide transactions of assets acquired or disposed of during the year and liabilities acquired or discharged.²⁴⁵

The term annual return varies among countries. In some, it can sometimes be known as a statement of assets while in others, the law can refer to it as statement of return or annual return. The legislation in each country will provide specific details on who to submit to and the procedures of submitting and dealing with annual returns.

The purpose of having leaders filing returns is to encourage transparency on the part of the leaders. Leaders must feel responsible to their country.²⁴⁶

A past return can explain or provide evidence of an unexplained accumulation of wealth on the part of a leader. It can be used as a defence especially in circumstances where a leader is allegedly accused of illegal wealth. If the return appears to not fully reflect the amount of wealth and where a natural presumption of improper conduct could be drawn then it is up to the leader in question to provide an explanation to clarify the uncertainty.

In Vanuatu, the 1998 Parliamentary debate removed the responsibility for the collection and the publication of names of leaders from the Ombudsman and placed it with the Clerk of Parliament.

²⁴³ *Leadership Code Act* 1998 (Vanuatu) http://www.pacii.org/vu/legis/consol_act/lca131/ (Accessed: 6/05/16)

²⁴⁴ Ibid

²⁴⁵ Ibid

²⁴⁶ Republic of Vanuatu, *Report of the Ombudsman Act and Leadership Code Review Committee*, (August 2004)

Since then, the office of the Clerk of Parliament has been responsible to follow up and collect the annual returns of leaders. Once the returns are collected, the office of the Clerk prepares a list of names to go before the State Law office for official gazette. The office of the Clerk of Parliament will then forward to the Ombudsman the list of names of leaders who failed to provide their annual returns for investigation.²⁴⁷

Submissions

Unlike other countries in the region, annual returns in Vanuatu are not treated seriously. Reports²⁴⁸ showed that a lot of leaders failed to submit their returns. Others ignored the responsibility of filing their returns while some (new leaders) were ignorant in terms of their responsibility of filing annual returns. The secretary of the Clerk of Parliament who is in charge of collecting annual returns needs to make regular follow ups with the leaders in order for them to provide their returns.²⁸⁰ In their submission to the office of the Vanuatu Law Commission, the office of the Ombudsman proposed that the responsibility of collecting annual returns and publishing the names of leaders through official gazette should be given back to the office of the Ombudsman for proper administration.

The graph below shows the total number of leaders in 2003, 2005 and in 2009. It also shows the total number of leaders who have submitted their returns against those who did not submit their annual returns in those following years.

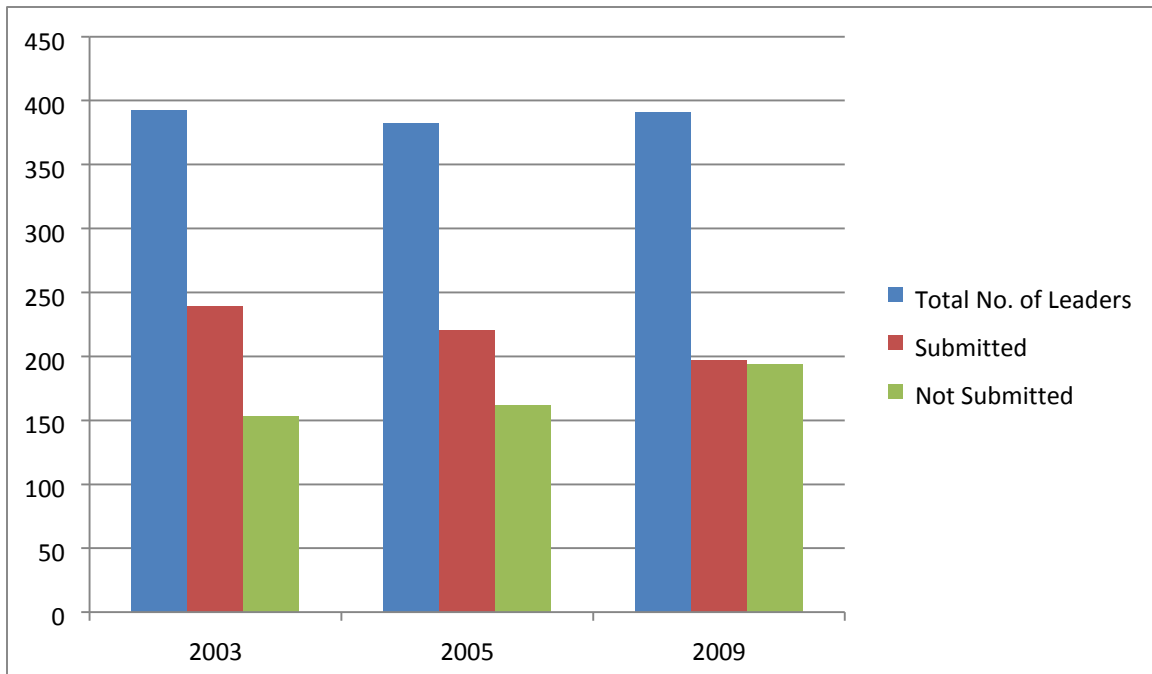
Figure 4: Total number of Leaders against the number of those who submitted and those that do not submit their Annual Returns in 2003, 2005 and in 2009.

Source: Office of the officer in charge of Annual Return, office of the Clerk of Parliament, May 2016

²⁴⁷ Interview with the officer in charge of annual return, office of the clerk of Parliament, May 2016

²⁴⁸ Ombudsman reports referred to in the next paragraph below

²⁸⁰ Ibid



According to the graph shown above, the numbers of leaders who submitted their returns seemed to drop at a very fast rate every year while the number of those who did not submit their returns seemed to climb at a faster rate year after year. The office of the Clerk of Parliament confirmed that the 2011, 2012, 2013, 2014 and 2015 annual returns are yet to be collected due to the clerk’s position being vacant from the period in between 2011 to 2015 as well as for some other reasons.²⁴⁹

Ombudsman’s Reports

A number of Ombudsman’s reports have also confirmed the problem with the collection of annual returns. In June 2002, the Ombudsman in Vanuatu, Hannington Alatoa, issued a report criticising the government administration and the Clerk of Parliament for failing to comply with the *Leadership Code*. Mr Alatoa said the Clerk did not gazette and publish the names of leaders who had submitted annual returns and those who had not, by the due date in 2001. He found that the delay was due to a shortage of staff within the office of the Clerk of Parliamentary and that there was no budget for administering annual returns.²⁵⁰

In 2004, it was purported that there were several problems with the particular section dealing with annual returns. Again it was highlighted that some returns were filed late while some were

²⁴⁹ Ibid

²⁵⁰ Ombudsman Report (2002), Republic of Vanuatu

not filed at all. The report reflected on the failure by the Clerk of Parliament to publish lists of returns in the Gazette as required (Ombudsman report 2004).²⁵¹

The Ombudsman's office in the later years published reports based on the same problems of late filing of annual returns by leaders, no filing of returns, failure of the Clerk of Parliament to publish lists of returns in the Gazette as required as well as the failure to investigate leaders who failed to file returns.

The 2009 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 (Ombudsman report 2009).²⁵²

Comparable Jurisdictions

The current Law

The *Leadership Code Act* of Vanuatu clearly stipulates that leaders are obliged to file annual returns of their assets and liabilities. Part 4 of the Act requires all leaders to lodge an annual return with the Clerk of Parliament detailing assets (both inside and outside Vanuatu), liabilities, other sources of income and beneficial interest in companies and other entities (including trusts) within two months of assuming office. The return must be lodged annually, by 1 March of each year.²⁵³

A leader who does not file or files a return knowing that it is false in a material particular, is guilty of a breach of this Code.²⁵⁴ Leaders, who fail to lodge their annual returns, must be warned by the clerk of Parliament and be given 14 days to file their returns. Failure in doing so will have their details published in the official Gazette.²⁵⁵ If a leader continues to fail to lodge an annual return then he or she is in breach of the *Leadership Code* and is potentially subject to a VT2, 000,000 fine.²⁸⁸

In Solomon Islands, the Act provides the power to the Prime Minister to appoint a special Commission consisting of three persons with a responsibility to deal with statement of assets of leaders in the country.²⁵⁶ The Code purported that statement of assets must be filed within 3

²⁵¹ Ombudsman Report (2004), Republic of Vanuatu

²⁵² Ombudsman Report (2009), Republic of Vanuatu

²⁵³ s31 *Leadership Code Act* 1998 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 6/05/16)

²⁵⁴ s33, Above n285

²⁵⁵ Ibid 288

Leadership Code Act 1998 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 6/05/16)

²⁵⁶ s.4 *Leadership Code (Further Provisions) Act* (Solomon Islands)

http://www.paclii.org/sb/legis/consol_act/lcpa366/ (Accessed: 6/05/16)

months of becoming a leader.²⁵⁷ A statement of asset is to be filed directly to the Commission instead of the Clerk of Parliament. The Commission has absolute control over every procedure with regard to the statement of assets of leaders within the country. Each member of the Commission shall make an oath of secrecy before the Governor General and shall be paid accordingly.²⁵⁸

The advantage of having a system like in the Solomon Islands is that the Commission will be impartial and will carry out its work independently and without fear of real or potential retribution for their actions by another. Also, the burden rests fully only on the Commission and if the Commission fails to carry out its work, then the Commission will be held accountable.

In terms of risk, there is a window of political interference. The Prime Minister could use the opportunity to appoint the Commission members based on his or her own political interest. Subsequently, they may carry out their duties subject to the Prime Minister's interest.

Unlike Vanuatu and Solomon Islands, Tuvalu has a slightly different approach. Its *Leadership Code Act* provides the Ombudsman of Tuvalu the responsibility to oversee the annual statement of interest.²⁵⁹ Every leader must lodge their statement for the preceding year specifying details of their assets and liabilities to the Ombudsman. The leaders of Tuvalu have the right to consult the Ombudsman on the issue of annual return. The Ombudsman also has the power to approach every person who is considered as leaders with a view to provide assistance and advice on how to fill out the annual return.²⁶⁰

The Act provides for a full disclosure of all interests for all leaders.²⁶¹ The Ombudsman must publish the names of leaders in the gazette by 15 June each year.²⁹⁵ Failure in doing so would be considered as a breach of the Code which would constitute an investigation by the

²⁵⁷ *Leadership Code (Further Provisions) Act* (Solomon Islands) http://www.paclii.org/sb/legis/consol_act/lcpa366/ (Accessed: 6/05/16)

²⁵⁸ Ibid

²⁵⁹ s33 *Leadership Code Act 2008* (Tuvalu) http://www.paclii.org/tv/legis/TV-consol_act_2008/lca131/ (Accessed: 6/05/16)

²⁶⁰ s34 *Leadership Code Act 2008* (Tuvalu) http://www.paclii.org/tv/legis/TV-consol_act_2008/lca131/ (Accessed: 6/05/16)

²⁶¹ Ibid ²⁹⁵

s35 *Leadership Code Act 2008* (Tuvalu) http://www.paclii.org/tv/legis/TV-consol_act_2008/lca131/ (Accessed: 6/05/16)

Ombudsman.²⁶² In cases where there is a breach of the Act, the Ombudsman will forward its investigation to the Ombudsman Commission for disciplinary action.²⁶³

The advantage of this law in Tuvalu is that the Ombudsman is not a leader himself²⁶⁴ under the law, therefore is deemed fit to act impartially and independently while carrying out his duty. However, the disadvantage is that there is a greater risk of having files missing in the course of on-forwarding files from one person or office to the other.²⁹⁹

Consultations

In seeking the views of the public on this issue, the Commission asked questions relating to:

- The responsibility for collecting annual returns, publishing the names of those who has/has not filed returns, and the investigation of leaders who do not file returns.
- 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)?
- 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?
- 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?
- Should leaders who breach s.33 (fail to file an annual return) be subject to a criminal trial? Or should disciplinary proceedings apply?

More than 90% of the people consulted agreed that the Ombudsman as an independent body should be given the power to collect annual returns, publish names of leaders who file and those that do not as well as investigate and penalise leaders who have failed to file their annual returns. Also, the Ombudsman office has the capacity to effectively carry out the responsibility. The office of the Clerk of Parliament on the other hand does not have the capacity in terms of human resources in order to effectively implement the provision relating to annual return. Currently only one person (the secretary of the Clerk of Parliament) is responsible for the collection of annual

²⁶² s36 Leadership Code Act 2008 (Tuvalu) http://www.paclii.org/tv/legis/TV-consol_act_2008/lca131/ (Accessed: 6/05/16)

²⁶³ Leadership code Act 2008 (Tuvalu) http://www.paclii.org/tv/legis/TV-consol_act_2008/lca131/ (Accessed: 6/05/16)

²⁶⁴ Ibid ²⁹⁹

Above n297

returns and the publication of names. Also, the Clerk himself is considered a leader and thus this does not make his office an independent office to deal with annual returns of leaders.

Around 80-90% of the people consulted agreed to make s33 of the present Act an offence to punish leaders who filed false returns before the responsible authority.

The question of whether the breaches of the sections dealing with annual return be subject to criminal trial or disciplinary measures is dealt with under the section on breaches of the code under this report.

Commissions' Views

After careful consideration, the Commission is of the view that the present system of separating the powers of collecting returns, publishing the names of leaders in the official gazette and the power to investigate leaders for failing to file their returns is seen as ineffective and therefore should be changed.

The establishment of the present system allowed returns to be filed late, some of which are not filed at all and there is a delay in the publication of the names of leaders in the official gazette. Sometimes there is no publication made at all as required by law. There also seems to be no investigations into leaders who failed to file returns due to miscommunications between the respective offices.

The split system in the administration of annual returns made in 1998 involves a lengthy, expensive and difficult process by the Commission both physically and financially. It would be less expensive and less difficult to have only one office to administer the collection, the publication of names and the investigation of those who failed to file in order to avoid waste of resources.

The current system does not place the burden on either of the offices. Files can go missing, be misplaced or even sent to the wrong office. The failure in corresponding between the offices shows a weakness in the system and therefore be seen as a failure.

The number of leaders at the moment is approximately 400.²⁶⁵ Unlike the Ombudsman's office, the Clerk of Parliament does not have the resources or administrative staff to be given the responsibility to oversee the collection of the returns. Currently, the secretary to the Clerk of Parliament is responsible of assisting a total of 400 leaders, collecting and following up on every leader's returns²⁶⁶.

²⁶⁵ Above n295

²⁶⁶ Ibid

Moreover, the Clerk is himself a leader and therefore is in a conflict of interest to be given the responsibility of ensuring the collection of the returns and publishing the returns in the gazette. Also, he or she does not have the staff and appropriate investigative procedures to look into leaders who failed to submit or forged their annual return.

The Commission also agreed with the 2004 Review Committee that the Clerk of Parliament does not have the relationship with those leaders who are not Members of Parliament as while a total of 400 people are considered as leaders, only 52 are Members of Parliament.

The Ombudsman on the other hand, has the resources and appropriate procedures to be given the duty to collect annual returns compared to the office of the Clerk. The Ombudsman is duly independent and impartial in this instance and is the only office mandated to look into corrupt practices of leaders. The system will be administered by only one head which will save resources physically, financially and also time. The process will be less difficult and information will not go missing along the way. The Ombudsman currently has partly the legislative responsibility to investigate those that failed to submit their annual returns to the responsible authority²⁶⁷.

Given the above views, the Commission is of the view that the complete administration of annual returns should be administered by one system under only one responsible authority. The authority or institution in this instance must be independent from political or any other interference so as to provide an impartial service. It is the view of the Commission that the Ombudsman's office is the best office to be awarded the complete administration over annual returns.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the current section 31(2) of the present *Leadership Code* be amended to provide the Ombudsman instead of the Clerk of Parliament the responsibility to collect annual returns from everyone who are classified as leaders.

Recommendations: That responsibility and the duty of the Clerk under the current section 32(1) of the current Act to collect and file annual returns, be amended to provide this responsibility to the Ombudsman.

Recommendations: That the responsibility under the current section 32(2) be placed with the Ombudsman. If according to section 32(2)(a)(b), the Ombudsman is determined that an

²⁶⁷ Ibid

investigation or prosecution in this instances is needed, then he has the power to proceed accordingly.

Recommendations: That the responsibility of publishing the names of leaders in the official gazette under the current section 32(3) and the responsibility under section 32(4) be placed with the Ombudsman.

Recommendations: That any appointing authority appointing a leader as defined by the Article 67 of the Constitution and section 5 of the *Leadership Code* or as prescribed by other law must inform the Ombudsman immediately of any new appointments, terminations, suspensions, retirements and movement of persons occupying leadership posts.

Recommendations: That the current section 32(3) be amended to allow the Ombudsman to publish in the Gazette a list of the leaders who have given or failed to give the Ombudsman an annual return on or before 1st of April each year instead of on or before 14 March in each year.

Recommendations: That responsibility and duties under the current section 33(a) and (b) be given to the Ombudsman.

Recommendations: That the current section 33(a) be amended to allow a period of 30 days instead of 14 days for a leader to file his or her return after being warned by the Ombudsman in writing of his or her failure to do so.

Recommendations: That a new sub-section (c) be inserted under the current section 33 to punish leaders who files a return knowing that it is incomplete. A leader who files a return knowing that it is incomplete is guilty of a breach of the Code.

Recommendations: That the annual return form should be reviewed to show more details and to be signed as a statutory declaration before a Commissioner of Oath.

CHAPTER TEN: INVESTIGATION AND PROSECUTION OF LEADERS

Introduction

This chapter examines the role and the process in which the Ombudsman plays in carrying out investigations into allegations of breaches of the *Leadership Code*. It discusses the current working procedures that are followed by the Ombudsman's office along with the challenges it faces, with particular reference to the case concerning 16 MP's who were prosecuted for

corruption.²⁶⁸ It will also touch on the different approaches that the Ombudsman uses with regards to evidence collected for investigations relating to leaders as opposed to any other complaints that is lodged with the Ombudsman's office that does not involve leaders.

Background

The current process that is followed by the Ombudsman begins once a complaint has been lodged with the Ombudsman against a leader. The Ombudsman then begins his or her investigations. After the Ombudsman completes his investigations, he or she 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.²⁶⁹ The Ombudsman must also provide a copy of the report to the Prime Minister.²⁷⁰ Once the Ombudsman has forwarded his report to the Public Prosecutor, he or she then 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.²⁷¹ 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. The Public Prosecutor can only act if there is enough evidence to prosecute the breach as a criminal offence in court and this requires proof beyond a reasonable doubt which is a very high standard. 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 which is then published in the official gazette.³⁰⁷

When the Ombudsman reports are sent to the Public Prosecutor, the Public Prosecutor has three months to consider whether there are sufficient grounds to prosecute the matter.²⁷² If the Public Prosecutor decides that there are sufficient grounds to support a prosecution, he or she must begin proceedings within one month of deciding to prosecute a leader. If he or she is unable to commence proceedings within the three months, 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. Despite the Public Prosecutor being given a further three month extension this does not guarantee the Public Prosecutor will

²⁶⁸ *PP v Kalosil* – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/07/16)

²⁶⁹ *Leadership Code* [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131 (Accessed 4/06/2016)

²⁷⁰ Part II, Article 63(2), Constitution of the Republic of Vanuatu http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 22/06/16)

²⁷¹

Ibid

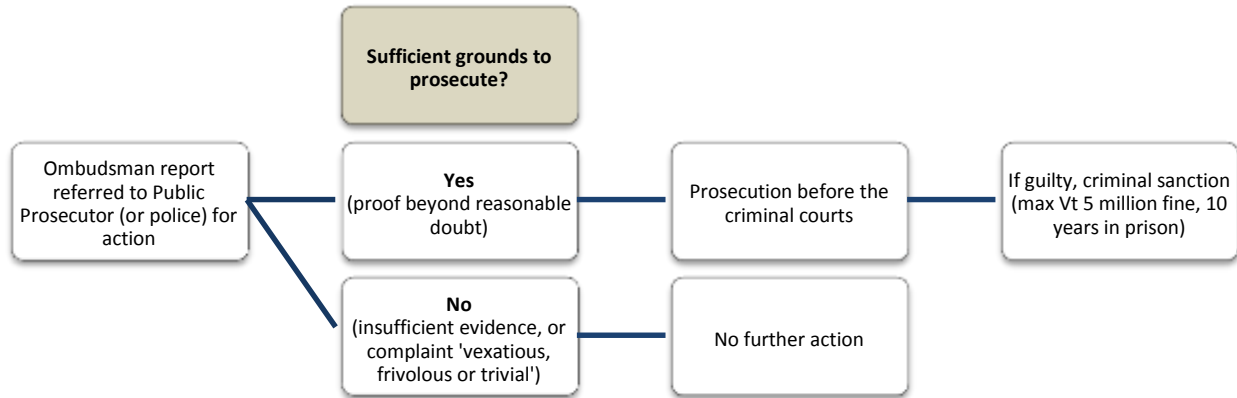
³⁰⁷

Above n304

²⁷² Above n304

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.²⁷³

Figure 5: Current system- criminal prosecutions



Procedural Tangles²⁷⁴

On the issue of the criminal prosecutions of leaders and the relevant processes, it would be beneficial to discuss the recent cases relating to the prosecution of the 16 political leaders, some of whom were Ministers at the time that the allegations of corrupt practices were made against them.²⁷⁵

In his article, Professor Donald Patterson recorded the events surrounding the events November 2015 with respect to the convicted MP’s and pointed out the Procedural Tangles²⁷⁶ which is relevant to this section of “Investigation and Prosecution of Leaders”. It points out the challenges faced when prosecuting leaders under the *Leadership Code*.

²⁷³ Above n304

²⁷⁴ Donald Paterson, ‘Chronicle of the Months of Political and Constitutional Crisis in Vanuatu, 2014, 2015’ <https://www.usp.ac.fj/index.php?id=19562> (Accessed: 12/07/16)

²⁷⁵ *PP v Kalosil* – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/07/16)

²⁷⁶ Ibid

The Speaker of Parliament who was acting President at that time pardoned himself and the other convicted Members of Parliament. The President then dissolved Parliament following a Council of Ministers decision made weeks earlier deciding for a snap election.²⁷⁷²⁷⁸

The Public Prosecutor first filed charges for a breach of section 73 of the Penal Code, including charges for breaches of sections 21 and 23 of the Leadership Code which prohibit a leader from accepting a loan from a non-recognised financial institution and offering or accepting a bribe. The case appeared before the Magistrate Court to which the Senior Magistrate held that there was sufficient evidence to support the charges against the defendants for breaches of the Penal Code and committed all the accused to the Supreme Court for trial on the charges. However the Senior Magistrate did not accept the charges under the *Leadership Code* as he believed that the Public Prosecutor must first ensure that the requirements and the processes outlined in section 34 to 38 if the *Leadership Code* Act were followed.²⁷⁹ These particular sections authorise the Ombudsman to investigate the conduct of a leader (other than the President) and send a report on that conduct to the Public Prosecutor and also to the Commissioner of Police if he considers that the complaint involves criminal misconduct.³¹⁵

In August 2015, the Public Prosecutor filed charges at the Supreme Court for breaches of the *Leadership Code* against Moana Carcasses and the same 15 MP's along with Thomas Bayer. This was challenged on the grounds that the Public Prosecutor had no power to charge the Defendants in the Supreme Court when they had been committed to the Supreme Court by the Magistrates Court after a preliminary enquiry. The Supreme Court held that the Public Prosecutor had power under section 9 of the *Public Prosecutors Act* to commence criminal proceedings in the Supreme Court for breaches of section 21 and 23 of the *Leadership Code* even when the Magistrates Court had not committed the defendants for trial in the Supreme Court.²⁸⁰

On the first day of September 2015, the defendants filed an appeal against the decision of Sey J. in *Public Prosecutor v Kalosil* [2015] VUSC 111. On the 2nd of September 2015, they applied to Sey J. for a deferral or postponement of the date for the trial, pending the hearing of the appeal which was dismissed on the same day by Sey J. on the ground that leave should have been obtained before the application for appeal was made. However it had not been obtained, and

²⁷⁷ Miranda Forsyth and James Batley, What the Political Corruption Scandal of 2015 Reveals about Checks and Balances in Vanuatu Governance, <http://www.tandfonline.com/doi/full/10.1080/00223344.2016.1214247?scroll=top&needAccess=true> (Accessed: ²⁷⁸ /07/16)

²⁷⁹ Donald Paterson, 'Chronicle of the Months of Political and Constitutional Crisis in Vanuatu, 2014, 2015' <https://www.usp.ac.fj/index.php?id=19562> (Accessed: 12/07/16) ³¹⁵ Ibid

²⁸⁰ *Public Prosecutor v Kalosil* [2015] VUSC 111; Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/111.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil%20AND%20111> (Accessed 9/10/2016)

that the proper practice is that any dissatisfactions against an interlocutory ruling, such as the dismissal of the application for leave, should be saved until after the trial, and be included in the grounds of appeal against the decision of the court at the end of the trial.²⁸¹

On the 9th of September 2015, some of the defendants filed a Constitutional application claiming that their Constitutional rights had been interfered with because section 21 of the *Leadership Code Act* was contrary to their rights under article 5 of the Constitution and because the Supreme Court had relied upon a special report which had been prepared by the Ombudsman under section 34 of the *Leadership Code Act*, which was critical of the conduct of the defendants. It was claimed the Ombudsman failed to provide the defendants with an opportunity to refute or explain the criticisms as required by section 21 of the *Ombudsman Act*. This was dealt with by Fatiaki J.

On 8th October 2015, the day before Sey J. was scheduled to pronounce the verdict upon the trial of the defendants for breaches of the *Penal Code Act* and for breaches of the *Leadership Code*, Fatiaki J. ruled that the special report of the Ombudsman which had been used by the Public Prosecutor as the basis for his charges under the *Leadership Code Act* was null and void for non-compliance with the procedures required by the Act, which stipulated that the Ombudsman must not make a report that is adverse to a leader without giving the leader an opportunity to comment on the subject of the enquiry.²⁸²

The Supreme Court pronounced the guilt of Carcasses and other defendants on the 9th of October 2015. Sey J. stated that although the judgement of Fatiaki J. was not binding on her as Fatiaki J. was a judge of the same court as Sey J., nevertheless, to be on the safe side, the charges for the breaches of the *Leadership Code Act* would be disregarded.²⁸³

The danger of adjourning the charges under the *Leadership Code Act* to be determined at another trial was that subsequent proceedings could be argued to be in breach of the rule of double jeopardy which is protected by article 5(2)(h) of the Constitution.

On the 22nd of October 2015 when the Court of Appeal heard appeals against convictions and sentences for breaches of the *Penal Code Act*, it stated that the judgement delivered of Fatiaki J. on the 8th of October 2015 was incorrect in as much as it had held that a report from an

²⁸¹ *Public Prosecutor v Kalosil* [2015] VUSC 121; Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/121.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil%20AND%20121> (Accessed 9/10/16)

²⁸² *Nari v Republic of Vanuatu* [2015] VUSC 132; Constitutional Application 05 of 2015

²⁸³ *PP v Kalosil* – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/07/16)

Ombudsman was necessary before the Public Prosecutor could lay charges in relations to the *Leadership Code Act*. The Court stated:

“In our respectful view Fatiaki J should not have made a substantive determination of breach in the case management hearing that was before him. Further, it is our preliminary view that he was in error in treating the Ombudsman's enquiry as a prerequisite to the laying of a charge under *the Leadership Code* . The Prosecutor may initiate a prosecution for a breach of the Code under s 19 even if there has not been such an enquiry or if there has been an enquiry and it is defective. The Ombudsman section of the Act does not inhibit the powers of a Prosecutor to prosecute, although in the event of a report it places obligations on the prosecution.”²⁸⁴

The court then, at the request of the Public Prosecutor, dismissed the charges in respect of the *Leadership Code*.²⁸⁵

These contradicting decisions made by the Courts only points to the need of a well-established process outlining the proper steps for the Public Prosecutor, the Police and the Ombudsman to follow when deciding to prosecute a leader under the *Leadership Code*.

Submissions

The Ombudsman's office proposed for a proper and well established process to prosecute criminal cases which are also considered as serious breaches of the *Leadership Code*. It was also in their submission for the VLC to explore the idea of establishing a disciplinary tribunal to deal with less serious breaches of the *Leadership Code*. (This is discussed in the Chapter relating to “Duties and Breaches of the *Leadership Code*”).

Comparable Jurisdictions

In Solomon Islands, a Leadership Commission has been established to deal with complaints about leaders. Any person can make a complaint and the Commission has the power to decide not to continue with an investigation if the complaint is trivial, frivolous and vexatious, too long and delayed or if it does not fall under the provisions of the *Leadership Code* and *Constitution*.²⁸⁶

²⁸⁴ *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015), <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/2015/43.html?stem=&synonyms=&query=kalosil%20AND%20public%20prosecutor%20AND%2043> (Accessed: 9/10/16)

²⁸⁵ Donald Paterson, ‘Chronicle of the Months of Political and Constitutional Crisis in Vanuatu, 2014, 2015’ <https://www.usp.ac.fj/index.php?id=19562> (Accessed: 12/07/16)

²⁸⁶ *Solomon Islands Leadership Code (Further Provisions)* [Cap 26] https://www.paclii.org/sb/legis/consol_act/lcpa366/ (Accessed: 4/07/16)

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 and it 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 to witnesses for being in contempt of court. 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. If a witness appears before a Commission and gives false evidence, he or she can be held liable and prosecuted for perjury under their *Penal Code*.²⁸⁷

PNG also has an Ombudsman Commission which follows a similar process to that of the Solomon Islands in receiving complaints and dealing with them.³²⁴ One difference though is that PNG's Ombudsman Commission can refer a complaint to the Public Prosecutor, where there is evidence of misconduct in office of the person in question. PNG's Act also provides that the Commission has the power to not proceed with an investigation after the Commission has decided that the complaint is frivolous, vexatious and trivial. Furthermore, PNG's Ombudsman's Commission has the power to discontinue an investigation if the Ombudsman Commission does not have sufficient resources to be able to carry out the investigation.²⁸⁸

Consultations

The consultation phase of this review coincided with the biggest ongoing court case that the country had ever experienced relating to corrupt practices discussed above under "Procedural Tangles."²⁸⁹ This created a lot of interest with the public and generated a lot of views when the team consulted with them. One thing that all those consulted with were adamant about was that leaders should be punished for whatever illegal actions they may have carried out.

Over 70 of the 96 participants in the consultations agreed with the idea of the establishment of a tribunal to look at the different categories of breaches. They stated that it could also help in fast tracking the Ombudsman's cases and cut down on the lengthy process as the minor cases would be separated from the major cases. However the remaining participants were hesitant about the idea of tribunals as they felt that this would mean more expenses for the Ombudsman's office, whose budget is already stretched. The composition of the tribunals would also be another

²⁸⁷ Ibid ³²⁴

Organic Law on the Duties and Responsibilities of Leadership (Papua New Guinea) http://www.paclii.org/pg/legis/consol_act/olotdarol528/ (Accessed 4/12/2014)

²⁸⁸ Ibid

²⁸⁹ *PP v Kalosil* – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/07/16)

issue as in order for the tribunals to have their decisions binding, the members would have to include Judges which would mean the Courts have to agree. That would be another task for the Ombudsman to achieve and there is no guarantee of this happening as the Judges are already busy with their own work. Furthermore, it was also raised that a lot of tribunals and commissions have been set up to deal with other matters before and most of these bodies have not been successful and are no longer functioning even though the relevant law has provided for their establishment.

Commission's Views

The VLC agrees to the idea of establishing a Leadership Commission but believes that this must be done with some caution and needs to be done slowly over time. This is mainly because with the current cuts in its budget, the Ombudsman's office might not have the financial resources to establish such tribunals.

The VLC would recommend that since the Public Prosecutor has shown his willingness to form an agreement to allow the Ombudsman's office to be able to prosecute his own cases, the Ombudsman office should start off with this step first (Refer to MOU discussed in the Chapter relating to "Complaints and Proceedings). Once this has been done and if it works out well for the Ombudsman's office, then the Ombudsman's office can take the next step in deciding whether it still wants to establish a tribunal. This would also provide time to the Ombudsman's office to obtain funds for the establishment of the tribunals if it does reach that stage.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: The Ombudsman is to focus on establishing an understanding with the three relevant departments to speed up its lengthy process in investigating complaints and also in getting the Ombudsman the right to take its own cases to Courts.

Recommendations: The Ombudsman should consider the idea of establishing a tribunal for future after careful thought and consideration is given to it.

CHAPTER ELEVEN: THE SEVERITY OF THE PUNISHMENT OF LEADERS

Background

Laws relating to punishment of leaders are not contained in one set of laws. The scope of punishment varies from one country to another. In most countries, the provisions relating to the punishment of leaders are found within a *Leadership Code*. Where there is no Leadership Code, the laws relating to such is provided for in other legal instruments such as the *Penal Code*.²⁹⁰ In some places, both Acts provide for the punishment of leaders. The punishment of leaders is also a crucial part of a *Leadership Code* and is the main point of discussion in this chapter. The law stipulates punishment as a means to serve various purposes. Deterrence, incapacitation, rehabilitation, restitution are some of these purposes.²⁹¹

Leadership Codes however are the main legal instruments which specifically regulates the conducts of leaders. They seek to promote and regulate ethical virtue in corporate and/or public administration. Among its attributes, the Acts establish criteria for defining, promoting and

²⁹⁰ *Penal Code* [Cap 135] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/pc66/ (Accessed: 12/07/16)

²⁹¹ Lisa M storm, http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm_1.0-ch01_s05 (Accessed: 19/05/16)

managing integrity, disclosure, government contracts, conflict of interest, the application of public funds and benefits.²⁹²

PNG, Solomon Islands and Vanuatu are the only countries in the Pacific which implement Leadership Codes and will be the focus of this chapter. Comparison is made between these countries on the main issue of the seriousness of the punishment of leaders.

This chapter explores the chapter of “Punishment” in the *Leadership Code*. Under the same Chapter are other minor sections such as certain terms and phrases which are not clearly defined. Questions arose with reference to these terms and phrases as to what definitions are to be given to these terms. Also under the chapter relating to punishment, the Minister is given the discretion to make regulations. The issue related to this is whether or not the discretion should be removed and be replaced with a mandatory obligation to make regulations. The punishment of leaders is the core issue under this chapter. Whether the standards of punishment imposed in Vanuatu are too harsh and whether or not it requires amendments is the main issue. Another equally important issue that is also considered is the granting of the Presidential Pardon and its enforcement in Vanuatu. The process in which it is enforced is discussed and whether amendments are required to improve the processes in which it is being applied.

These issues were identified, researched and consulted upon at the request of the office of the Ombudsman for the VLC office to carry out a complete review and reform of the *Ombudsman’s Act* and the *Leadership Code* and was made at a time when the core issues were the main headlines in Vanuatu with regards to the punishment of leaders and the application of the Presidential pardon to free leaders.

“Hardships” and “Person Other Than the Leader”²⁹³

The term “*Hardships*” and “*persons other than a leader*” is found in section 49 of the *Leadership Code* under the part of punishment. It is stated that the Court, before making an order to rec over proceeds and or restraining order, may take into account any hardship that would be caused to a person other than a leader.²⁹⁴ Nothing further is provided to supplement this provision as to what would define the term of “*hardship*” and “*person other than the leader*”.

²⁹² Gregory Rawlings, 2006, Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006, <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machineryleadership-codes-pacific%20.pdf> (Accessed: 12/07/16)

²⁹³ The terms and phrases are discussed prior to the other issues in this chapter for the purpose of clarity as cases that will be discussed later interlinks with the issue of punishment of leaders and presidential pardons

²⁹⁴ Section 49, *Leadership Code* [Cap 240], http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 4/07/16)

Consultations

These terms were consulted on as to what might constitute the meaning of the terms “hardship” and “person other than the leader”. In almost 90% of the places that were covered for consultation, people stated that the term must be defined in the Act as to what the definitions are. However when they are further asked if they could state what these terms are being referred to, the common answer was silence. In the estimated 10% of the populace, it is said that only the Court must define these terms.

Commission’s Views

The VLC agrees with the minority that the definitions must remain as they are. Only the Court will define these terms as the court will determine the terms according to the circumstances of the case. The Court also possesses legal background and knowledge that can be applied when determining terms such as those in this phrase in the Act.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: The term of “Hardship” must only be determined by the Court and hence it must remain as it is.

Recommendations: The phrase “person other than the leader” must only be determined by the Courts and thus, no amendment must be made to this particular provision.

Minister’s Discretion to make Regulations

This section covers regulations whereby the minister may make regulations that is not inconsistent with the Act for all matters required or necessary to give effect to the Act. The term “may” infers the effect of the rule to be discretionary rather than mandatory.²⁹⁵

Comparable Jurisdictions

Still in the Solomon Islands and PNG, a similar provision is provided. The only variance seen in the Solomon Islands and PNG is that the provision for regulation is provided for under a different Part from those relating to punishment of leaders. In both of these countries, the provision to create regulations is provided for under the part entitled ‘Miscellaneous’.

²⁹⁵ Above n345, *Leadership Code* [Cap 240], http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 4/07/16)

Consultations

This provision was explained during consultation and people’s views were gathered. All people that were consulted stated that it must be clearly stated that the Minister must make regulations, not inconsistent with the Act for all matters required of necessary to give effect to this Act. Hence a mandatory effect must be given to this provision and not a discretionary one.

Commissions’ Views

Since a similar provision is provided for in the neighbouring countries, it is the view of the VLC for the provision to remain untouched. Changing the provision to give a discretionary impact leaves the Minister to create a regulation only when the need arises compared to the mandatory impact that orders the Minister to create regulations.

Therefore the Vanuatu Law Commission makes the following recommendation:

Recommendations: That the only change that is to be made to this provision lies in the format of the whole Act rather than the substance of the provision. This particular provision must be removed from under the part of “Punishment” and must be placed under a new Part for this Act termed “Miscellaneous”.

Punishment of Leaders

As discussed under the “Procedural Tangles” in the chapter relating to “Investigation and Prosecution of Leaders” the circumstances called for a chance to punish leaders under the *Leadership Code* and the *Penal Code*.

In these following sections, the issues of the punishment of leaders and the presidential power to grant pardons are discussed. The purpose as to why these issues are put together in the following chapters is for clarity and convenience purposes as the issues and cases discussed are linked.

In Articles 66-68, the Constitution of the Republic of Vanuatu provides for a *Leadership Code* to regulate the conduct of office holders defined as leaders. The provisions relating to the conducts of leaders are rather brief in the Constitution. ²⁹⁶

²⁹⁶ Gregory Rawlings, 2006, *Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006*, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversightmachinery-leadership-codes-pacific%20.pdf> (Accessed: 12/07/16)

The *Leadership Code* was implemented in the year 1998. The Act expands on the provisions of the Constitution and provides procedural rules and regulations to regulate the conducts of a leader.

Part 6 of the Act provides for the punishment that is applied to leaders should they breach the *Leadership Code*. Section 40 begins with fine or imprisonment for a fine of VT 5 Million and an imprisonment period not exceeding 10 years for such conducts as stated in sections 19 or 20, or 21, or 22, or 23, or 24, or 26, or 27. Acting outside of the scope of the duties of leaders as stated in the Act will result in a punishment. (These duties and breaches are stated in Part 2, 3 and 4 of the Act). A different punishment is applicable to those who breach section 33 of part 4 which require a leader to lodge Annual Return. This provision warrants a fine of VT 2 Million and 20,000vt for every day if the leader continuously fails to lodge an annual return. For situations where there is no specific penalty provided for a breach of the Code, a penalty of VT 2 Million is liable.²⁹⁷ In these provisions, there is contradicting punishments imposed. For instance, section 31 which obligate a leader to lodge annual returns warrants a punishment of a fine of up to VT5million or imprisonment of up to 10 years. However sections 19 and 40(2) states that a leader who is convicted and breaches section 33 (which provides that a failure to lodge annual return is in breach of the *Leadership Code*) Is liable to a fine of only VT2million and 20,000vt every day that the leader does no lodge annual return.²⁹⁸

Other consequences of a breach of the *Leadership Code* includes dismissal from office,²⁹⁹ disqualification from future office for up to 10 years³⁰⁰, loss of employment benefits (such as superannuation),³⁰¹ deprivation of proceeds of corruption,³⁰² recovery of proceeds³⁰³ and a restraining order. All these are only issued by the Courts and where there is property and money concerned, the property is vested back and money is payable to the Government of Vanuatu.

²⁹⁷ *Leadership Code* [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

²⁹⁸ E Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004). 7.4.1

²⁹⁹ Section 41, *Leadership Code* [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

³⁰⁰ Section 42, *Leadership Code* [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

³⁰¹ Section 43, *Leadership Code* [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

³⁰² Section 44, *Leadership Code* [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

³⁰³ Section 45, *Leadership Code* [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

Penal Code

The *Penal Code* of Vanuatu also covers similar provisions with regards to a person holding public office. It extends jurisdiction over a broad range of office holders. Section 73 of the *Penal Code* provides that a public officer must serve an imprisonment time of 10 years if he conducts himself in Acts relating to bribery.

In Vanuatu a more trivial situation is applied. The case of a person who is prosecuted under the *Leadership Code* and the *Penal Code* is conducted in criminal proceedings.³⁰⁴ A prosecution under one Act does not affect the prosecution in the other. It is the procedures to having one prosecuted under each Act that differs.

Reports - Ombudsman's Office

Between 1996 and 2000, the office of the Ombudsman issued almost 80 reports. The second Vanuatu Ombudsman produced 84 reports between the year 1998 and 2005 into the administration of government agencies and breaches of the *Leadership Code*.³⁰⁵ From 1998 to 2016 there were a total amount of 19 reports that were compiled after investigations in order for the police to start prosecution. Out of these 19 reports, there was only one that actually reached the Court and was debated as to whether or not it should be used in making a decision.

Court Cases

Despite the existence of the *Leadership Code* in 1998 until 2015, there has been a lack of its use in regards to prosecuting leaders for their wrong doing in Vanuatu.

2015 Cases Concerning the Members of Parliament - Punishment under Penal Code

In this section, the cases discussed above (See Procedural Tangles) are elaborated in terms of punishment of leaders. In the same case the Supreme Court found 14 MP's to be guilty while one pleaded guilty.³⁰⁶ Upon sentencing, the Supreme Court punished the defendants accordingly. 4 years was the longest imprisonment term imposed on the defendant in this particular case. Twenty months (suspended during good behaviour) was the shortest term for imprisonment for the defendant who pleaded guilty.³⁰⁷ Upon appeal, the Court upheld both the convictions and

³⁰⁴ *Penal Code* [Cap 135 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/pc66/ (Accessed: 12/07/16)

³⁰⁵ Gregory Rawlings, 2006, Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machineryleadership-codes-pacific%20.pdf> (Accessed: 12/08/16)

³⁰⁶ *PP v Kalosil* – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/07/16)

³⁰⁷ *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015), <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/2015/43.html?stem=&synonyms=&query=kalosil%20AND%20public%20prosecutor%20AND%2043> (Accessed 9/10/16)

the sentences.³⁰⁸ The conviction and sentence was upheld and emphasis was made on the seriousness of the offence of bribery stating that Carcases may well have deserved a heavier sentence and went on to state that “.....bribery is a serious crime...a practice of bribes weakens the trust of the public in government, and damages the rule of law.”³⁰⁹

Punishment under Leadership Code It must also be noted that when a leader breaches the *Penal Code*, he automatically breaches the *Leadership Code* which makes a leader punishable under both the *Leadership Code* and the *Penal Code*.³⁴⁷ Thus the Public Prosecutor applied to the Supreme Court on the basis of this provision to have the leaders punished under both the *Penal Code* and the *Leadership Code*. The Supreme Court ruled in the Public Prosecutor’s favour in that the leaders also acted in breach of the *Leadership Code Act* and made an order to dismiss all the defendants from office, disqualifying them from standing for election or being appointed as a leader in any capacity for a period of 10 years.³¹⁰

Loss of Benefits

According to Section 43, any entitlements to payments or allowances in connection with leaders are to be ceased on dismissal. If any payments or allowances had been paid to the defendants, they were to be repaid forthwith.³⁴⁹ No order was made on the recovery of the bribe money that was paid by one defendant to the other defendants in order to get their votes.

The *Proceeds of Crime Act 2002*³⁵⁰ however mandates for the Attorney General to apply to the Supreme Court for an order for the recovery of proceeds of crime. No public statement regarding this provision has ever been made.³⁵¹

Another event which occurred and is not separated from the series of events in 2015 with regards to leaders is that the President dissolved parliament after the Court delivered its judgement. There the Finance Department issued a gratuity payment of VT4,452,023 to each member of the Parliament including the 14 members of Parliament who had been convicted.

The Court mentioned that “...the defendants have ceased to be leaders and thus according to s.43 of the Leadership Code, any entitlement to payments or allowances in connection with them being a leader ceased on dismissal.” It appeared from the media that disbursement of the payments had already been made and the Court ordered for the proper bodies to initiate process in recovering back the payments.³⁵²

³⁰⁸ Donald Paterson, ‘Chronicle of the Months of Political And Constitutional Crisis in Vanuatu, 2014, 2015 <https://www.usp.ac.fj/index.php?id=19562> (Accessed: 12/07/16)

³⁰⁹ Ibid ³⁴⁷

Section 27, *Leadership Code* [cap 240] (Vanuatu) http://www.pacii.org/vu/legis/consol_act/lca131/ (Accessed: 12/07/16)

³¹⁰ Ibid

With reference to punishment, concern is showed where the Court of Appeal stated that a heavier punishment was well deserved by the leaders.

Comparable Jurisdictions

In PNG an established Ombudsman Commission in the Constitution ensures that leaders are not in breach of the conflict of interest provisions of the Code.³⁵³ Section 218 of the Constitution provides for the supervising of the enforcement of the Leadership Code. This is given effect through the provisions of the *Organic Law on the Duties and Responsibilities of Leadership* (OLDR) and the Leadership code provisions of the *PNG Constitution*. The Ombudsman Commission is provided with considerable power under the *Organic Law on the Ombudsman Commission* (OLOC) and the OLDRL to ensure that leaders will be investigated in a timely manner.

349

Public Prosecutor v Kalosil [2015] VUSC 173,
<http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/173.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil%20AND%20173> (Accessed 9/10/16)

350

[Cap 284] http://www.paclii.org/vu/legis/consol_act/poca160/ (Accessed: 12/07/16)

351

Donald Paterson, 'Chronicle of the Months of Political And Constitutional Crisis in Vanuatu, 2014, 2015' <https://www.usp.ac.fj/index.php?id=19562> (Accessed: 12/07/16)

352

*Ibid*³⁵³
Section 27, *Constitution of the Independent State of Papua New Guinea*
http://www.paclii.org/pg/legis/consol_act/cotisopng534/ (Accessed: 12/07/16)

Leaders are penalised under OLOC with an offence of K500 or imprisonment for three months if they fail to attend or produce documents or refuse to give evidence as it is insulting or interrupts a proceedings of the Commission³¹¹. The same penalty applies when a leader present false evidence and commits perjury in a Court. Under the OLDRL, the same penalty is applied for non-compliance. An additional offence is created where a former leader accepts or holds certain positions with a foreign enterprise within three years of ceasing to be a leader without the Commission's approval. This offence is punishable by a K1000 fine or 12 months imprisonment.

³¹¹ Section 30 of the *Organic Law on the Ombudsman Commission*
http://www.paclii.org/cgibin/sinodisp/pg/legis/PG-consol_act_1986/cladp3401/index.html?stem=&synonyms=&query=%22organic%20law%20on%20the%20ombudsman%20commission%20%22 (Accessed: 19/07/16)

In PNG, leaders are also subject to the *Criminal Code*³¹² which covers all citizens. Such behaviours from leaders which includes receiving bribes, misappropriating funds, and interfering with elections are also regulated in the *Criminal Code*. Leaders are investigated by the Royal PNG Constabulary and their prosecution is undertaken by the National Courts.

The difference in both Acts highlight is that the Leadership Code and its Tribunal are not to deal with criminal matters but only to impose an additional obligation on leaders above those obligations expected of all citizens. Breaches of the *Leadership Code* are punishable according to the rules of a civil proceeding as opposed to punishing one under the *Criminal Code* for an offence of a criminal nature. There have been concerns that for a leader to be punished under both acts will give rise to double jeopardy.³¹³ It has been clarified though that the punishment imposed by the Leadership Tribunal is fundamentally a disciplinary measure as opposed to the punishment under the *Criminal Code* and both are two set of laws that run parallel to each other. This does not give rise to a situation of double Jeopardy. A leader that is dealt with under the *Criminal Code* can also be dealt with under the *Leadership Code*³¹⁴

Under the Constitution of PNG, where a leader is found guilty of a breach of the *Leadership Code*, he is not eligible to hold any of the following for up to three years:

- Election to public office,
- Appointment as Head of State,
- To become a nominated member of Parliament, or
- Appointment to a Provincial legislature of provincial executive or a local government body.³¹⁵

When a leader is not dismissed after found guilty, he is liable to pay a fine of K1000.00 for each offence.³¹⁶ An amount of K500 is imposed for good behaviour where they agree to comply with

³¹² *Criminal Code* 1986 (PNG) http://www.paclii.org/cgi-bin/sinodisp/pg/legis/PGconsol_act_1986/cca115/index.html?stem=&synonyms=&query=%22criminal%20code%20%22 (Accessed: 30/06/16)

³¹³ Gregory Rawlings, 2006, Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machineryleadership-codes-pacific%20.pdf> (Accessed: 12/07/16)

³¹⁴ *Paul Saboko v Comissioner of Police* (2006) N2975 <http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGNC/2006/40.html?stem=&synonyms=&query=paul%20AND%20sabako%20AND%20com%20missioner%20of%20police> (Accessed: 27/06/16)

³¹⁵ Section 31 *Constitution of the Independent State of Papua New Guinea* 1975 http://www.paclii.org/cgi-bin/sinodisp/pg/legis/consol_act/cotisopng534/cotisopng534.html?stem=&synonyms=&query=%22conflict%20of%20interest%20%22 (Accessed: 20/06/16)

³¹⁶ Section 35 *Organic Law on Duties and Responsibilities of Leaders* http://www.paclii.org/cgi-bin/sinodisp/pg/legis/consol_act/olotdarol528/olotdarol528.html?stem=&synonyms=&query=organic%20law%20AND%20duties%20AND%20responsibilities (Accessed: 31/06/16)

the Code in the future and suspension from office without pay of up to three months or reprimand them.³¹⁷

There have been numerous calls to increase the fines for leaders and that a maximum amount of money must reflect the seriousness of the breach of the *Leadership Code*. Another issue arises where the leader resigns or loses office before any finding of misconduct is made, consequently resulting in them escaping the penalties imposed by the Leadership Tribunal.³¹⁸

Like PNG, the Solomon Islands also has a Leadership Code in its *Constitution* (Chapter VIII, Sections 93-95) and is supported by enabling Legislation. At independence, a *Leadership Code* was established in 1978 and in 1979. The Parliament passed the *Leadership Code (Further Provisions) Act* [Cap 88] but it did not take full effect until 1985. In 1999, this Act was replaced by the *Leadership Code (Further Provisions) Act*.³¹⁹

The Act currently regulates official misconduct, use of office for personal benefit, neglect of official business, the acceptance of loans, the non-reporting of business interests and the ownership of property. In section 25(1) of the Act, any leader convicted of misconduct in the office must pay a fine \$1,000 or imprisonment for one year or both. Subsection 25(2) continues that in addition to this, a leader who breaches section 13 will be imposed a fine In addition to subsection (1) to pay to the Chief Accountant such amount as the Court may determine as being the value of the property, benefit or favour received or obtained by such leader. Section 13 covers the acceptance of bribery whereby any leader who asks for, receives or obtains or agrees or attempts to receive any property, benefit or favour of any kind for himself in any manner, or on account of his having acted as a leader in any manner is guilty of misconduct in office. Punishment of a leader under the *Leadership Code* also includes disqualification from public office for 3 years.³²⁰

Under the Act, offences are prosecuted in civil proceedings in the High Court of Solomon Islands. Since the *Leadership Code (Further Provisions) Act* 1999 came into force, there has not been any case prosecuted under this Act in the High Court. In the repealed Act however, where the cases

³¹⁷ John T D Wood, Leadership Codes and Corruption Prevention, <https://dfat.gov.au/aboutus/corporate/freedom-of-information/Documents/leadership-codes-corruption-prevention.pdf> (Accessed: 12/07/16) P.20

³¹⁸ SCR No 2 of 1982 *Re Kunangel* [1991] LR1

<http://www.paclii.org/cgibin/sinodisp/pg/cases/PGSC/1991/7.html?stem=&synonyms=&query=%20Re%20Kunangel%20AND%201991> (Accessed: 15/07/16)

³¹⁹ Gregory Rawlings, 2006, Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machineryleadership-codes-pacific%20.pdf> (Accessed: 12/07/16)

³²⁰ *Leadership Code (Further Provisions) Act 1999* (Solomon Islands)

http://www.paclii.org/cgibin/sinodisp/sb/legis/sub_leg/lcpa1999lcp20001801999865/index.html?stem=&synonyms=&query=leadership%20code (Accessed: 20/06/16)

prosecuted were of criminal proceedings, there had been a number of successful cases under the previous *Leadership Code*.³²¹

The Leadership Code Commission (LCC) and the Ombudsman's office are not amalgamated into one office as that of PNG. The LCC brings cases before the High Court, and thus constitutes a major impediment to the effectiveness of the LCC in the Solomon Islands.³²² They do not function as a Tribunal as in PNG and do not impose fines and disciplinary measures.

Besides the *Leadership Code*, Part X of the *Penal Code* [Cap 26] of the Solomon Islands covers corruption and abuse of the office. Any person who is employed by the Public Service and commits offences such as official corruption, extortion, receiving property to show favour, making false claims, abusing office, making false certificates and so forth, is guilty of an offence and must serve an imprisonment term, the maximum being seven years. Under the *Penal Code*, one is punished under criminal proceedings.³²³

This leads to the question as to whether or not one can be punished by both Acts. In section 27 of the *Leadership Code (Further Provisions) Act* 1999, it states that only where the contrary intentions appear, no action taken under this Act shall prejudice any other action that may be taken under any other law: provided that no person shall be liable to be punished twice for the same offence.

In the Solomon Islands, the Commission is faced with the issue of inadequate funds to investigate misuse by leaders throughout the country.³²⁴ The Commission has also suffered from a lack of dynamic leadership as well as defective legislations. Political will is also lacking which contributes to the lack of the successful implementation of the Act. Like Vanuatu and PNG, Solomon Islands is also currently working to reform the *Leadership Code (Further Provisions) Act* 1999. It is their aim to adopt a similar approach like that of PNG where there will be an exclusive leadership tribunal that will have the exclusive jurisdiction to hear issues relating to the breaches of the *Leadership Code*.³²⁵

³²¹ Pacific Islands Legal Information Institute, http://www.paclii.org/cgi-bin/sinosrch.cgi?method=boolean&query=leadership+code+AND+regina&meta=%2Fpacli&mask_path=sb%2Fcase_s%2FSBHC (Accessed: 10/06/16)

³²² Gregory Rawlings, 2006, Accountability and Oversight: The Machinery of Leadership Codes in the Pacific 2006, , <https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/accountability-oversight-machineryleadership-codes-pacific%20.pdf> (Accessed: 12/07/16)

³²³ Ombudsman Commission of Papua New Guinea, Discussion Paper - Review of Enabling Legislation November 2014

³²⁴ Same Seke, Solomon Islands Leadership Code Commission lacks adequate funds, 13th April 2015, <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/solomon-islands-leadership-codecommission-lacks-adequate-funds/1435594> (Accessed: 10/07/16)

³²⁵ Email from Solomon Kalu skalu@lcc.gov.sb to Gracelyn Tasso tgracelyn@vanuatu.gov.vu 17th May 2016.

Consultations

During consultations, two views emerged. The first one was that the provision was fine as it was and there were a total of 35% who were of this view. There must be no changes made to the current provision as the penalty was already serious as it was. The second one of which an estimate of 17% shared the same view, it was stated that the punishment must be changed. More years must be added to the imprisonment term and the fines must increase. When the fine was mentioned, concern was shown for the high amount of fine imposed on leaders and these group of people felt that the term leader must be well defined. Following on from this, the punishment imposed is to be done according to the definition of a leader so that a more serious fine is imposed on the Leaders in the Parliament or very high official positions and a less serious one is imposed on those working in the public offices. This was said on the basis that realistically speaking, one working at a public office does not hold the same respect like that of an MP. An MP is made aware of his responsibilities when choosing to become an MP and hence should know whether or not to conduct himself in conducts prohibited by law. Also in terms of salary, it would not be realistic to impose the same punishment across the board where the salaries of different public workers differ largely. And finally a percentage of 48% did not have the opportunity to give their views because of time constraints.

Previous Recommendations

In a proposal that was made by the Ombudsman, suggestions were made with regards to the punishment of leaders. Having a tribunal in place to deal with less serious matters, dismissal from office and disqualification from office for up to three years were some of the suggestions that can be imposed by the proposed tribunal for less serious matters. Good behaviour bonds and suspension without pay are also sought as sanctions for those found guilty of breaches, along with fines. The Ombudsman also asks that a combination of penalties may be applied.

Customary fines might also be appropriate where a breach is presided over by a Chief as a sitting Tribunal member and where other members agree.³²⁶

Commissions' Views

In PNG, the punishment provided is less severe than those Imposed in Vanuatu as well as in the Solomon Islands. However in PNG, although the punishments imposed are less severe, there is more work done in implementing the provisions compared to Vanuatu and the Solomon Islands.

One outstanding point in PNG is the tribunal which is less complicated than the process applied in Vanuatu. A tribunal would be a completely new process and will require definite political will,

³²⁶ Code Review Committee, Report of the Ombudsman Act and Leadership Code Review Committee August 2004

time and resource to establish but as is seen in PNG, it will be an effective and efficient measure in place to deal with offences conducted by leaders.

There is nevertheless a call for an increase in the fines for leaders to reflect the seriousness of the breaches committed in PNG. The same is reflected in the case in Vanuatu concerning Kalosil and the Public Prosecutor³²⁷ hence, the punishment imposed on leaders must be more than 4 years imprisonment.

The cases discussed suggested that the punishment imposed on leaders must be increased. However, in the region, with respect to Leadership Codes, the current standard is already high compared to Vanuatu. The maximum penalty in the *Leadership Code* which must not exceed a period of 10 years has never been imposed which is already the longest imprisonment term in the region.

It is the view of the Commission that to impose a more serious punishment on a leader, who is in breach of the *Leadership Code*, will be at the discretion of the Court which will decide according to the circumstances of the case.

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: A tribunal must be well established to deal with the offences committed by leaders. For instance, less serious offences can be dealt with by way of a tribunal rather than a complicated court case which requires more time and resources. (Covered in another section).

Recommendations: The punishment that is provided for in the *Leadership Code* is to remain as it is. If there is a case that requires a more serious punishment, the Court will decide according to the circumstances of the case.

Presidential Pardons

A pardon means to forgive a person of his offence. It is an act of grace, proceeding from the power entrusted with the execution of the law which exempts the individual on whom it is

³²⁷ *Kalosil v Public Prosecutor* [2015] VUCA 43, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/2015/43.html?stem=&synonyms=&query=kalosil%20AND%20public%20prosecutor%20AND%2043> (Accessed 9/10/16)

bestowed upon from the punishment the law inflicts for a crime he has committed. The punishment and the guilt of the offender are both affected when a pardon is granted.³²⁸

It is a common provision in almost all Constitutions of the world and is termed differently from one place to another.³²⁹ The roots to granting pardon was first found in English history. The idea was that all powers originated from the King and that it was the King's peace and good order of the Kings' realm which was offended when a crime was committed. Hence why, it is only the king who could grant pardon.

The power to pardon was created to calm situations where laws were created to be just in every circumstance and that it would be applied in circumstances where it would not be in the interest of justice to strictly apply the law. The administration of Justice by the Courts is not always wise or understanding in all situations. A check as some may view it is entrusted to the Executive for special cases.

However there is possibility for the power to grant pardon to be misused and there has been growing concern for whether or not the power to grant a pardon by the Executive should be liable to Judicial Review.³³⁰ Judicial review is the process by which a Court can review an administrative action by a public body.³⁷⁴

Differences are seen in various Constitutions as to the terms used for the authority that will be executing this power to grant pardon according to the governing systems applied in each state.

Prerogative of mercy, Power of mercy and Presidential pardon are some of the terms that are used interchangeably.

The scope of discussion in these chapters is with respect to pardon or mercy granted by the executive power to convicts, leaders in particular. The law and unique case authorities relating to this is discussed.

In Vanuatu, Article 38 of the Constitution provides that the President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. It continues to state that the Parliament may provide for a committee to advise the President in the exercise of this function. The Committee to advise the President when executing his power is generally stated,

³²⁸ 'Power to Pardon: an analysis' <http://www.lawteacher.net/free-law-essays/administrative-law/power-topardon-an-analysis-law-essays.php> (Accessed: 30/06/16)

³²⁹ Pranjal Shekhar, 'Power of President to Grant pardon: Indian Scenario', <http://www.lawctopus.com/academike/power-president-grant-pardon-indian-scenario/> (Accessed: 30/06/16)

³³⁰ Ibid ³⁷⁴

Judicial Review, https://www.google.com/?gws_rd=ssl#q=judicial+review+definition (Accessed: 12/07/16)

unlike similar provisions in PNG and Solomon Islands where the Committee's composition and process and powers are expressly provided for in law.

The Constitution also provides for instances where there is a vacancy in the office of the President or the President is overseas or incapacitated. The Speaker of Parliament shall perform the functions of President under this Constitution and any other law. There is no other law that further provide details for this committee to advise the President in the exercise of this function. The provision is also general in that it makes no reference to leaders specifically.

Applying the power of Presidential Pardon – The Case of Public Prosecutor v Barak Tame Sope Mautamate

In 2003, this provision was applied when a Member of the Parliament Barak Tame Sope Mautamate was convicted of two accounts of forgery under the *Penal Code* [CAP 135] by the Supreme Court of Vanuatu and was sentenced to three years imprisonment.³³¹ The convicted MP only served three months of his term after he was pardoned by the President of the Republic according to Article 38 of the Constitution.

Mr. Sope's seat in Parliament then became vacant according to Section 3 of the *Members of Parliament (Vacation of Seats) Act* [CAP 174 which provides that if a member of Parliament is convicted of an offence and is sentenced by a Court to imprisonment for a term of over 2 years, his seat must become vacant at the expiration of 30 days thereafter. The member may request the Speaker or the Deputy Speaker (in the Speakers absence) to extend that period for a further 30 to 150 days to enable the member to pursue any appeal with regards to his Conviction or sentence. However his conviction must be set aside before he can take up his seat again.³⁷⁶ After Mr. Sope's conviction, the Speaker declared his seat vacant after the 30 day period had passed. However after his pardoning, Mr. Sope moved to resume his seat in Parliament claiming that the pardon removed the disqualification imposed by Section 3 of the *Members of Parliament (Vacation of Seats) Act* [CAP 174]. Mr Sope then sought declaration from the Supreme Court to regaining his seat but the Supreme Court refused to grant the declaration.

The same decision taken by the Supreme Court was upheld by the Court of Appeal when Mr. Sope took his matter before them.

The Court of Appeal applied the law stated in Halsbury in that the pardon is to clear the person from all infamy and from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction. The pardon made him, as it were,

³³¹ *Public Prosecutor v Barak Tame Sope Mautamate*, unreported, CR 10/02 (July 2002)

³⁷⁶ Section 3, *Members of Parliament (Vacation of Seats) Act* [CAP 174] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/moposa362/ (Accessed: 12/07/16)

a new man so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence to which he was convicted.

However with respect to section 3, the Court found that the vacation of the seat is a separate event and independent from the disqualification of the Member. Once the seat became vacant then the provision relating to a vacancy become operational and a by-election should occur. There was no reason in logic or in precedent why the pardon could operate retrospectively. Although the pardon makes him a new man, it does not undo the events that have happened or remove rights that had become vested in a third party. Hence why the appellant could not have his seat restored back to him except through a by election.³³²

The *Leadership Code* however if it was applied in the present case, would have allowed less time and expenses over the proceedings and avoided all the uncertainty over the appellants seat. According to section 41 and 42 of the Act, after being convicted of a breach of the *Leadership Code*, the leader is subject to an order dismissing him or her from office and furthermore disqualified from standing for election for a period of 10 years.³³³

2015 Cases Concerning the Members of Parliament

In the recent case concerning the MP's (See above under "Procedural Tangle") the leaders were pardoned by the Speaker of Parliament in his power as Acting President, as the President was overseas for official reasons. After their conviction in the case of *Public Prosecutor v Kalosil-Judgement as to verdict*³⁷⁹ a statement was made by the then Speaker of Parliament to pardon all the convicted MP's. The Speaker of Parliament executed this power in light of Article 37 of the *Constitution* of the Republic of Vanuatu. However the Acting President was one of the MP's that was convicted which meant that he also pardoned himself. Only one MP was not pardoned at that time and this was the MP who pleaded guilty.

The President returned to the Country the following day and made a statement to revoke the pardon that was made by the Acting President with regards to the convicted MP's. The opposition then started proceedings for the pardon made by the Acting President to undergo Judicial Review while the convicted MP's filed proceedings for the revocation made by the President to undergo judicial review. In *Natuman v President of the Republic of Vanuatu* and *Vohor v President of the Republic of Vanuatu* [2015] VUSC 148; Constitutional Case 6&7 of 2015,

³³² Miranda Forsyth, 'The Legal Limits of a Presidential Pardon: case note on Sope v The Speaker of Parliament of Vanuatu' <https://www.usp.ac.fj/index.php?id=13250> (Accessed: 12/07/16)

³³³ Ibid

³⁷⁹

PP v Kalosil – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/07/16)

the Supreme Court held that pardon was unconstitutional and invalid and that the revocation of the pardon was valid.³³⁴

Upon appeal, the Court of Appeal dismissed the Appeal stating that the pardon was made contrary to Article 66 of the Constitution and was also subject to judicial review as it was based upon considerations that should not have been taken into account. It was also patently unreasonable.³³⁵ Article 66 provides that a leader 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 subarticle (1)”³³⁶

Comparable Jurisdictions

In PNG, the Power of Mercy is provided for under Article 151 of the Constitution. The Head of State with the advice of the National Executive Council is given the power to grant a convicted person or persons held in penal detention under a law of PNG. It is rather general as no specific mention is made of a leader or of interchangeable terms.

A pardon, either free or conditional, a remission or commutation of sentence, a respite of the execution of sentence can be made by way of granting pardon.³³⁷ The Constitution continues to provide for the composition of the Committee on the Power of Mercy. It states that an Organic Law shall make provision for its appointment, constitution, powers and procedures. The National

³³⁴ Donald Paterson, ‘Chronicle of the Months of Political and Constitutional Crisis in Vanuatu, 2014, 2015’ <https://www.usp.ac.fj/index.php?id=19562> (Accessed: 12/07/16)

³³⁵ *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015), <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/2015/43.html?stem=&synonyms=&query=kalosil%20AND%20public%20prosecutor%20AND%2043> (Accessed 9/10/16)

³³⁶ Article 66, Article 149, Constitution of the Republic of Vanuatu 1980, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 12/07/16)

³³⁷ Section 151, Constitution of the Independent State of Papua New Guinea 1975, http://www.paclii.org/pg/legis/consol_act/cotisopng534/ (Accessed: 12/07/16)

Executive Council must consider a report from the Advisory Committee in order to advise the Head of State when granting a pardon.³³⁸

An enabling Act which clearly outlines the establishment and processes required for the execution of the power of mercy is provided for in the *Organic Law on the Advisory Committee on the Power of Mercy*.³³⁹ The Advisory Committee is comprised of a lawyer, a medical practitioner with experience in psychiatry, a member of the National Parliament, a minister of religion and a person with experience in community work. One of these members must be a woman³⁴⁰. The appointment of the members of this particular Committee must be done by the Head of State with and in accordance with the advice of the National Executive Council which is comprised of all the Ministers including the Prime Minister.³⁸⁷ The enabling Act further provides for the powers and procedures of this advisory Committee.³⁴¹

In Solomon Islands there is also a similar provision in Article 45 with the heading as Prerogative of Mercy. Under this section, the Governor General (GG), on behalf of the Head of State may grant a pardon, either free or with condition, can substitute a less severe form of punishment, remit the whole or any part of any punishment to any person convicted of any offence under the law of Solomon Islands.

Under the same heading, the Constitution expressly provides for a committee on the Prerogative of Mercy and the composition of the committee. It will be on the advice of the Committee that the GG can grant pardon to any convicted person. The Committee will include a Chairperson and two other person, one of which will be a qualified medical practitioner, another will be a social worker and one who will be appointed by the Honiara city council. Like PNG, the provision does not specifically provide for pardoning of leaders hence this same provision is applied broadly, covering leaders as well.

Case Authorities

Outside the region, the Court expressed its view against allowing a person to be a self-judge. This is against the principles of natural justice that a person should judge himself³⁴² and that no one

³³⁸ *Organic Law on the Advisory Committee on the Power of Mercy* (Papua New Guinea) http://www.paclii.org/cgi-bin/sinodisp/pg/legis/consol_act/olotacotpom556/olotacotpom556.html?stem=&synonym=&query=advisory%20committee%20AND%20power%20of%20mercy (Accessed: 12/07/16)

³³⁹ Ibid

³⁴⁰ Ibid ³⁸⁷

Article 149, Constitution of the Republic of Vanuatu 1980, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed: 12/07/16)

³⁴¹ Above n387

³⁴² *Calder v Bull* 3 U.S. 386 (1798). <http://caselaw.findlaw.com/us-supreme-court/3/386.html> (Accessed: 15/07/16)

is allowed to be a judge in his own cause because his interest would certainly bias his judgement and corrupts his integrity.³⁴³

In the case of *Public Prosecutor v Willie*³⁴⁴ the Court stated that the power must only be exercised in a way which is consistent with the entire Constitutional framework. The power must be used in a principled, transparent and consistent way. In the absence of a Committee established for this sole purpose, there is a danger that this power will become a problem. When applying this power of Presidential pardon, it is imperative that the Parliament provides a Committee to provide its advice to the President. In the absence of this, the President must not be stopped from appointing advisors with regard to this particular Committee which will assist in ensuring a clear and transparent record of the issues which have weighed with the President in any exercise of the power which is undertaken.³⁴⁵

It is also a power that is not beyond the purview of the Court to review and assess its exercise for legality.

Consultations

During consultation, three main views were gathered and are displayed in the chart below.

³⁴³ Pranjal Shekhar, 'Power to Grant Pardon: Indian Scenario'

http://www.lawctopus.com/academike/powerpresident-grant-pardon-indian-scenario/#_edn13 (Accessed: 15/07/16)

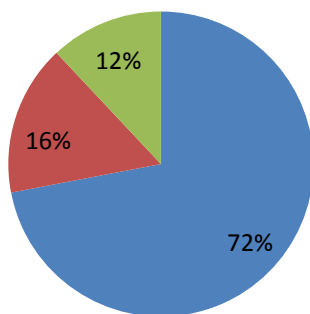
³⁴⁴ *Public Prosecutor v Willie* [2004] VUCA 4,

<http://www.pacii.org/cgi-bin/sinodisp/vu/cases/VUCA/2004/4.html?stem=&synonyms=&query=public%20prosecutor%20AND%20willie> (Accessed 9/10/16)

³⁴⁵ Ibid.

Figure 6. Views of people concerning the presidential power to pardon

- Power to remain but committee to advise must be well established and also to follow advice from parole board
- Revisit Article and consider legal aspects of the provision – more consultation for this issue
- The power must remain because it is constitutional, a change otherwise would be unconstitutional



For the majority who suggested that the power must remain with the President, they also suggested for the President to consider the advice of the parole board in the process of pardoning a convicted person. It would be a waste of resources for other institutions to work hard to punish a person only to be pardoned without actually serving the purpose of being punished. If the power to pardon is used wrongly, it would have an impact on Human Rights where all detainees must be treated fairly. The second largest group stated that this particular provision requires more time and resources to be spent on it for further consultation to be carried out. The legal aspects of this issue must be considered and for related issues such as revoking of the decision to be considered. Finally the smallest portion of the populace stated that a provision to remove the power from the President from pardoning the convicted would be unconstitutional; hence the provision must remain as it is.

Commission's Views

The VLC agrees with the view that one must not be the judge of himself. Attempting to pardon one's self only clouds his judgement and improbably corrupts his integrity.

The Constitution cannot be easily amended although the *Leadership Code* can be amended by way of this reform to supplement the provision for the Constitutional Presidential pardon. It is already proper that this Court case in 2015³⁹³ followed the precedent established in the case of Atis Willie that decisions for Presidential pardon are also subject to judicial review.

Therefore the Vanuatu Law Commission recommends the following:

Recommendations: The power to pardon must remain with the President in the Constitution and must not be removed.

Recommendations: There must be a new Act that will establish the process to further supplement the Constitutional provision to pardon convicted persons. The advantages of the process being established in a new Act is for certainty as there is an established process provided to be followed when the situation calls for it.

Recommendations: The enabling Act must provide for the Composition of the Committee to advise the President when exercising his power to grant pardon.

Recommendations: The Committee must be nominated by Parliament and must be comprised of a lawyer, a medical practitioner, a Member of Parliament, a minister of religion, a person with experience in community work, and a representative of youths.

Recommendations: One of these members must be a woman.

Recommendations: The enabling Act must also state that the Power to grant pardon does not apply to the Acting President.

³⁹³ *Natuman v President of the Republic of Vanuatu and Vohor v President of the Republic of Vanuatu* [2015] VUSC 148; Constitutional Case 6&7 of 2015, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/148.html?stem=&synonyms=&query=natuman%20AND%20vohor%20AND%20148%20AND%20president> (Accessed 9/10/16)

The Act that governs the Ombudsman and its duties is the *Ombudsman Act* and it is the principle 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.³⁴⁶³⁴⁷

Amending the principle Act would mean amending any other correlating relevant acts. A provisional guideline outlined in the New Zealand Law Commission Legislation Manual Structure and Style 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.³⁴⁸

It should be noted that the *Ombudsman Act* is somewhat the parent act which ties in and complements the *Leadership Code*. Both Acts work closely in terms of guiding the conduct of leaders. The Commission in this instance is of the view that if the *Ombudsman Act* is to be amended, it should do so together with the *Leadership Code Act*.

Apart from the afore mentioned Acts one other important Act that also needs to be amended in order to coincide with the recommendations provided in this report would be the *Public Service Act* [CAP 246]. This is to allow the Public Service disciplinary board the power to deal with alleged breaches of the *Leadership Code* by public servants who fall under the scope of leaders and are mandated by the *Public Service Act*. The Public Service Commission disciplinary board will only deal with less serious breaches committed by public servants.

Furthermore, the general consensus drawn from this report is that the complaints and investigative procedures or processes leading up to the prosecution stage does not work well amongst the Ombudsman and other departments such as Police or that of the Public Prosecutor. It is the view of the Commission that considerations should be given to fix internal procedures or processes amongst these departments. Recommendations were made for a MOU to be drawn up between the Ombudsman's office, the Police Department and the Public Prosecutor to address these problems. In doing so, considerations should also be given to the governing legislation consisting of the *Police Act*, the *Public Prosecutors Act*, the *Leadership Code Act* and the *Ombudsman Act*.

The other key legislation which are also needed to be considered are the *Representation of People's Act*, the *Interpretation Act* and the *Constitution* itself.

³⁴⁶ Constitution of the Republic of Vanuatu http://www.palii.org/vu/legis/consol_act/cotrov406/ (Accessed:

³⁴⁷ /06/16)

³⁴⁸ New Zealand Law Commission <http://www.nzlii.org/nz/other/nzlc/report/R35/R35-Appendix-2.html> (Accessed 10/06/16)

Therefore the Vanuatu Law Commission makes the following recommendations:

Recommendations: That the *Ombudsman Act* if amended must do so together with the *Leadership Code Act*.

Recommendations: That as with many of the reforms conducted there is a need for consequential amendments on a range of other legislations including:

- *Public Service Act*;
- *Public Prosecutors Act*;
- *The Representation of Peoples Act*;
- *The Interpretation Act*;
- The Constitution of the Republic of Vanuatu; and
any other Acts necessary to be review in order to work parallel with *Ombudsman Act* and the *Leadership Code*.

LIST OF RECOMMENDATIONS – PART ONE

This chapter summarises the recommendations that has been set out under each issue in each chapter.

For the Ombudsman’s Act, the recommendations are as follows:

Recommendations 1: That the process involved to appoint an Ombudsman must be well established by defining the term consultation and amending the list of authorities that must advise the Head of State on the most qualified person for the Ombudsman.

Firstly, the term consultation must be worded in a way to require the Head of State to act in accordance with the advice of the authorized persons. Secondly, the current list of authorities in section 3(1) who are:

- a) the Prime Minister; and
- b) the speaker of Parliament; and
- c) the leaders of the Political parties represented in Parliament; and
- d) the Chairman of the National Council of Chiefs; and
- e) the Chairman of the local government councils; and
- f) the Chairman of the Public Service Commission and the Judicial Service Commission must be amended.

The following list must be the new list of authorities:

- a) the Prime Minister;
- b) the Chief Justice;
- c) the Leader of Opposition;
- d) the Chairman of the Public Service Commission;
- e) the Chairman of the National Council of Chiefs; and
- f) the Chairman of the Vanuatu Law Commission.

The new list is recommended on the basis that it helps in limiting political influence. There is a representative of the government side which is the Prime Minister, a representative of the Judicial bodies as the Chief Justice, the leader of the Opposition who will always provide scrutinizing views on decisions made by the government side to allow for a decision to be considered from both the government side and the opposition side. The Chairman of the Public Service Commission will represent views with respect to the service provided to the public which

is the Government, the Parliament and the Public in general. The Chairman of the National Council of Chiefs will represent the views of the Chiefs in Vanuatu while the Chairman of the Vanuatu Law Commission will represent the views of any changes happening in the society.

Thirdly, in the schedule of the Act, a grading system must also be provided to guide the Head of State and the authorized persons when appointing the Ombudsman.

And finally, to begin the process of appointment, there must be a call for application of the Ombudsman who will then be scrutinized according to the guidelines provided for in the Schedule and also by the authorized persons in law.

It is also recommended that a Constitutional Review is carried out with reference to Article 61(1) to establish a new Ombudsman Appointment Committee (OAC). The OAC will use the Public Service Commission grading criteria to assess all applicants to arrive at a short list for the position of the Ombudsman. All persons on the short list must be interviewed personally by the OAC. The criteria to be used by the OAC in choosing the final candidate will include the following:

- i) Police Clearance Certificate given by the Commissioner of Police; and ii) Certificate of health and fitness given and signed by the Superintendent of the Vila Central
- iv) Competency in three official languages of Vanuatu; and
- v) Certificate from the Chief Registrar of the Supreme Court that an applicant is not declared bankrupt.
- vi) High skills in Management, Alternate Dispute Resolution and Report Writing.

Recommendations 2: That this provision of subsection 3 (3) (c) is amended to include but not limited to the following academic qualifications:

- Legal qualification; or
- Administrative qualification; or
- Management qualification; or
- Accounting and auditing qualification.

This provision must also state that a level of Bachelor's degree is required but a Master's level and anything beyond this level would be desirable.

Also the suitable candidate must have a minimum of five (5) years in his/her qualified field mentioned above.

Recommendations 3: That the Act remains this way with regards to the age requirement for the position of the Ombudsman. There should not be any age requirement as this will lead to age discrimination.

The Act must also include a provision that a qualified Ombudsman must be of good health; hence a presentation of Doctors certificate is proper.

Recommendations 4: A citizen of Vanuatu, which includes a naturalized and indigenous citizen, must serve a term of 5 years while a non-citizen of Vanuatu must serve only a period of 3 years.

Recommendations 5: That since the process to terminate the Ombudsman is already well established in the Act, no amendments need to be made to the Act. The current process, although is not an exact replica of other Queensland models, nevertheless promotes fairness.

Recommendations 6: To change the powers of the Ombudsman would include an amendment of article 62(2) of Constitution which must be introduced either by the Prime Minister or any other member of Parliament. It must be supported by the votes of no less than two-thirds of all members of Parliament at a special sitting of Parliament at which three-quarters of the members are present.

Although it was agreed by all person that were interviewed that the bodies must be investigated of their administrative actions, the key stakeholders such as the President, the Judicial Service Commission and the Judiciary were not among the group of people that were consulted due to short period available for consultation and the available limited resources.

Hence the VLC recommends for this particular issue of the Ombudsman looking into the administrative functions of these bodies and changing the Constitution in Article 62(2) to be looked into in another future review when the Ombudsman Office decides that it is timely for another review of their Acts.

Recommendations 7: That the Ombudsman Act must remain as it is in that the power of the Ombudsman is not extended to investigate other private bodies that provide public service. Where there are complaints of public services provided that the government owns shares in, independent bodies must be established to look into these matters.

Recommendations 8: Only persons appointed by the law may use the term Ombudsman.

Recommendations

9: There must be a Constitutional amendment to protect the name of the Ombudsman. It must state that only the Ombudsman as provided for by Article 61 is to use the term “Ombudsman.” This must be added in Article 61(4) of the Constitution.

Recommendations 10: Any person, who uses the term “Ombudsman” without being appointed by law, is liable for a fine or imprisonment time.

Recommendations 11: That the Land Ombudsman does not follow Article 61 and must be changed. It is recommended that the term be changed to other synonyms such as the “Land Regulator” or “Land Commissioner”.

Recommendations 12: The Ombudsman’s decision with regards to the use of his or her discretionary power should be made available to the general populace for their better understanding through media outlets such as newspaper only if the matter at hand is of public interest. This does not mean that the general populace should have any influence over the Ombudsman’s decisions making but that they have the right to know the reasons behind the Ombudsman’s decision especially regarding any matter of public interest. If the matter is of private interest, then the Ombudsman’s decision to investigate or not investigate must be communicated to the complainant to maintain confidentiality of the enquiry as required by the Constitution Article 62 (5) and section 28 of the *Ombudsman Act*.

Recommendations 13: Section 19 (a) should be amended to allow the Ombudsman the power to investigate into any matters that he or she had previously investigated especially in circumstances where new evidence has risen up or in circumstances where previous recommendations have not been acted upon or considered by agencies or leaders. However, a limit with regards to the timing of leaving this open should also be provided for.

Recommendations 14: Awareness should be carried out to the general populace about the *Ombudsman Act* so that they are aware and well informed of the different sections within the Act.

Recommendations 15: A Memorandum of Understanding (MOU) to be drawn up between the Ombudsman’s office, the Police Department and the Public Prosecutor with regards to criminal cases that are to be investigated and taken all the way to the Courts.

Recommendations 16: In this MOU, a clear procedure is to be set out as to how these 3 departments are to work together to carry out investigation so that there is no duplication of work when the same complainant reaches another department and work is carried out efficiently and in a timely manner.

Recommendations

17: That Article 62(5) of the Constitution of the Republic of Vanuatu should also be amended to cater for the recommendations provided above. The current Article 62(5) to remain as Article 62(5)(a) and a new sub-article (b) to be inserted to cater only for situations with regards to criminal cases that are to be investigated and taken all the way to the Courts. Sub-article (b) should allow the Ombudsman to have a closer working arrangement or relationship with other agency or institution like the Police Department, Financial Intelligence Unit and the Public Prosecutor's office in terms of processing only criminal cases to the Courts.

Recommendations 18: Considerations should also be given to amend section 28 of the *Ombudsman Act* and sections of the *Leadership Code Act* under its Part 5 to enable the Ombudsman to share information and evidence with other institutions and agencies where appropriate.

Recommendations 19: A manual should be developed for the Ombudsman's investigators so that when collecting evidence, they will have a sound knowledge of the rules of evidence and relevant standards of proof if allegations are to become subject to legal proceedings. Investigators should be trained to take care during the course of investigation to ensure that evidence gathered will not be ruled inadmissible in such proceedings and in accordance with the rules of evidence.

Recommendations 20: The manual should also serve as a statement as to what kind of evidence is admissible or not admissible in Courts so that this can be used by the Ombudsman's office when conducting investigations.

Recommendations 21: Considerations should also be given to amend section 22(7) of the *Ombudsman Act* to enable the Ombudsman to collect formal and admissible evidence during the investigation of cases under the *Ombudsman Act* and the *Leadership Code Act*. This amendment, although small, will help revolutionize the administrative and legal organisation of investigations of the office of the Ombudsman.

Recommendations 22: Section 23(2) is to be removed and section 49 is to be left to provide for penalties with regards to failure to comply with notice.

Recommendations 23: The heading in section 49 should be changed to also reflect this change to 'Failure to comply with Notice'.

24: Along with MOU that has been recommended for the three departments to allow for sharing of evidence along with ensuring that it can be used as admissible evidence in court, this MOU should also cater for circumstances where information can and should be shared and at what stage of the investigation information should be shared.

Recommendations

Recommendations 25: There should also be a confidentiality clause to ensure that the shared information is protected.

Recommendations 26: Since the Public Prosecutor is the only office that has been given the right to prosecute under the Constitution, the MOU is also to cover an arrangement between the Public Prosecutor and the Ombudsman's office for the Public Prosecutor to give the Ombudsman's office power to prosecute under his guidance. The Public Prosecutor is to either provide officers to help prosecute the Ombudsman's cases or some legal officers from the Ombudsman's office can be trained to prosecute, depending on the agreement between the two offices. The confidentiality issue must be taken into consideration as well in this instance.

Recommendations 27: With the right being given by the Public Prosecutor to prosecute, the Ombudsman's office should also make changes on how it collects evidence so it can follow the standard followed by the Courts, which is the common law rule of evidence. This would help in making evidence collected by the Ombudsman's office admissible in court and also cut down on duplication of work by another responsible department. This would also apply to the different sets of rules that the Ombudsman uses to investigate leaders and other complaints brought to his or her attention.

Recommendations 28: That consideration should be given to the issue of whistle blower to be included into the amended *Ombudsman Act*.

Recommendations 29: Proper procedures must be set in place by the responsible authorities in order to allow the law to deal with the protection of whistle blowers. The provisions of the *Public Interest Disclosures Act 2013* of Australia could be referred to as an example in this regard.

Recommendations 30: The Act should protect whistle-blowers in the public sector and provide immunity from civil or administrative liability (including disciplinary action), for making the disclosure, and no contractual or other right or remedy can be exercised or enforced against anyone for having made such a disclosure. Future considerations should also be given to extend this privilege to those that do not fall under public sector as well.

31: Given the above recommendations, the amended *Ombudsman Act* should also have penalty provisions for enforcement purposes. The penalty provisions should look to penalise any form of harassment made towards any whistle blower. Considerations should also be given to penalise a whistle blower for any form of breach on his or her part.

Recommendations

Recommendations 32: That the amended *Ombudsman Act* should cater for the protection of witness with specific reference to witness immunity from prosecution. Any witnesses disclosing information to the Ombudsman should be protected at all times from any civil or criminal proceedings. A similar provision to that of the current section 41(2) of the Act should be inserted but directed only to the witnesses.

Recommendations 33: That having given this form of privilege to the witnesses, there should also be a provision inserted to control such a privilege. A similar provision to that of section 41(3) should be inserted into the amended Act but directed only to the witnesses.

Recommendations 34: That the amended *Ombudsman Act* should cater for the protection of witness outside of Court especially if the witness appear before a Tribunal³⁴⁹ as suggested further down below. A witness appearing before a tribunal should be given the privilege to give information, answer questions, produce documents and papers and the same immunity and things as witness have in Court. Similar provisions can be seen under the New Zealand, Samoa and Papua New Guinea's Ombudsman's Act.

Recommendations 35: That the idea of having a complete witness protection program which includes having the witnesses disclosing information to the Ombudsman to be protected at all times from any form of harm (financial and physical harm) shall be left to the Ombudsman's office to consider in the future. Given its current situation, the Ombudsman's office as well as the country as a whole is not practically ready to adopt such a program to address witness protection.

Recommendations 36: Considerations should also be given to the idea of having a separate *Witness Protection Act* for Vanuatu in the future.

Recommendations 37: That the amended *Ombudsman Act* must allow for the Ombudsman to appoint his or her own staff after having consulted the relevant institutions including the Public Service Commission (PSC) of the Republic of Vanuatu. This can be done by restoring the provisions of the 1995 *Ombudsman Act*.

38: In doing so, the Ombudsman is to be given full power over its administrative, financial and operational activities which include the power to recruit its own staff on terms and conditions determined by him or her. More importantly, the amended Act should state that the Ombudsman shall not be regarded as a servant or agent of the Government. A

³⁴⁹ See Chapter 8 below on duties and breaches of the Leadership Code and the use of tribunals

Recommendations

manual must be put in place to regulate and safeguard the recruitment process in order to avoid misuse of power by the Ombudsman.

Recommendations 39: The Act must clearly provide that the powers of the Ombudsman to appoint staff must be exercised according to strict rules similar to the Public Service rules.

Recommendations 40: The current section 43 should be amended to allow the Ombudsman to consult with the Public Service Commission before making any appointments. However, section 43 and other consequential amendments under the Act should give the Ombudsman full power to administrate the Ombudsman office including the power to appoint all staff independently from the Public Service Commission.

Recommendations 41: The procedure of appointment of staff shall be made independent, outside of political or any other interference so as to uphold the notion of independency.

Recommendations 42: Sections 44, 45, 47, 48 and 54 shall require amendment if section 43 is to be amended.

Recommendations 43: Given its current capacity both physically and financially (in terms money, human resource and the expertise they need), the office of the Ombudsman cannot be given the additional responsibility of overseeing human rights issues. The idea of incorporating the National Human Rights Commission into the office of the Ombudsman pending the establishment of the National Human Rights Commission would also not be a good idea.

Recommendations 44: Vanuatu must have a separate Independent National Human Rights Commission or Institution to deal with the issues and matters of Human Rights in Vanuatu.

Recommendations 45: The government having established an interim committee to report on human rights issues in Vanuatu, should consider the establishment of the National Human Rights Commission as one of its priorities. The Commission will then have the power to oversee the Human Rights functions and the overall administration of the Commission.

LIST OF RECOMMENDATIONS – PART TWO

This chapter summarises the recommendations that has been set out under each issue in each chapter.

For the Leadership Code Act, the recommendations are as follows:

Recommendations 1: The terms that are provided for in the current Leadership Code Act does not require any reform. These terms require interpretation from the court according to the rules of interpretation and according to its circumstances. These are:

- Leader;
- Undue influence;
- Education level required of a leader; and
- corruption

Recommendations 2: The idea which is applied in PNG of conflict of interest which requires the leader to disclose his interest in the matter to the office of the Ombudsman as well as to the Council or body dealing with the matter must also be applied in Vanuatu.

Recommendations 3: The scope of the Leadership Code must remain as it is as there is no requirement for a substantial amendment with regards to its scope.

Recommendations 4: The breaches of the Code currently outlined under Part 2, 3 and 4 of the *Leadership Code* should be categorized into two different categories, namely "Less-serious" offences (offences that could be dealt with by a Tribunal) and "Serious" offences and should be placed under one Part titled "Breaches of Leadership Code" of the *Leadership Code*.

Recommendations 5: Part 2 and 4 of the present Act to be considered as "Less-serious" breaches while Part 3 of the Act to be considered "Serious" breaches under the Act. However, depending on the seriousness of the breach that is brought before the Ombudsman, he or she shall have the power under the amended Leadership Code Act to determine whether the breach is to be referred to as "Less serious" or that of more "Serious" nature.

Recommendations 6: For more "Serious" breaches referred to under Part 3 of the present Act (misuse of public moneys, acceptance of loans, exercising of undue influence, bribery and so forth) to continue to be prosecuted in the criminal courts while the "Less-serious" breaches to be referred to a disciplinary tribunal to determine what action be taken.

Recommendations 7: The existing PSC Disciplinary Board could act as the tribunal for "Lessserious" breaches involving public servants while all other Leaders involving Members of Parliament, political positions, and Heads of statutory bodies would appear before a Leadership

Disciplinary Tribunal specially convened for that purpose. The Leadership Disciplinary Tribunals shall have its own powers including that to directly impose sanctions (eg. removing the Leader from public office and disqualifying the Leader from holding future office and so forth, similar to that of Papua New Guinea spelled out under the *Leadership Code (Alternative Penalties) Act 1976*).

Recommendations 8: Section 19 of Part 6 of the current Act should also be amended to suit the categories of the breaches outlined under Recommendation One. The Commission accepts the recommendation made by MacDowell supported by the Review committee in 2004 that section 19 is out of place and should be re-instated at the end of Part 6 under “Punishment of Leaders”. This does not result in any substantive changes to the legislation but does set it out in a more logical fashion.

Recommendations 9: The current section 31(2) of the present *Leadership Code* be amended to provide the Ombudsman instead of the Clerk of Parliament the responsibility to collect annual returns from everyone who are classified as leaders.

Recommendations 10: The responsibility and the duty of the Clerk under the current section 32(1) of the current Act to collect and file annual returns, be amended to provide this responsibility to the Ombudsman.

Recommendations 11: The responsibility under the current section 32(2) be placed with the Ombudsman. If according to section 32(2)(a)(b), the Ombudsman is determined that an investigation or prosecution in this instances is needed, then he has the power to proceed accordingly.

Recommendations 12: The responsibility of publishing the names of leaders in the official gazette under the current section 32(3) and the responsibility under section 32(4) be placed with the Ombudsman.

Recommendations 13: Any appointing authority appointing a leader as defined by Article 67 of the Constitution and section 5 of the *Leadership Code* or as prescribed by other laws must inform the Ombudsman immediately of any new appointments, terminations, suspensions, retirements and movement of persons occupying leadership posts.

Recommendations 15: The current section 32(3) be amended to allow the Ombudsman to publish in the Gazette a list of the leaders who have given or failed to give the Ombudsman an annual return on or before 1st of April each year instead of on or before 14 March in each year.

Recommendations 16: The responsibility and duties under the current section 33(a) and (b) be given to the Ombudsman.

Recommendations 17: The current section 33(a) be amended to allow a period of 30 days instead of 14 days for a leader to file his or her return after being warned by the Ombudsman in writing of his or her failure to do so.

Recommendations 18: A new sub-section (c) be inserted under the current section 33 to punish leaders who files a return knowing that it is incomplete. A leader who files a return knowing that it is incomplete is guilty of a breach of the Code.

Recommendations 19: That the annual return form should be reviewed to show more details and to be signed as a statutory declaration before a Commissioner of Oath.

Recommendations 20: The Ombudsman is to focus on establishing an understanding with the three relevant departments to speed up its lengthy process in investigating complaints and also in getting the Ombudsman the right to take its own cases to Courts.

Recommendations 21: The Ombudsman should consider the idea of establishing a tribunal for future after careful thought and consideration is given to it.

Recommendations 22: The term of “Hardship” must only be determined by the Court and hence it must remain as it is.

Recommendations 23: The phrase “person other than the leader” must only be determined by the Courts and thus, no amendment must be made to this particular provision.

Recommendations 24: The only change that is to be made to this provision lies in the format of the whole Act rather than the substance of the provision. This particular provision must be removed from under the part of “Punishment” and must be placed under a new Part for this Act termed “Miscellaneous”.

Recommendations 25: A tribunal must be well established to deal with the offences committed by leaders. For instance, less serious offences can be dealt with by way of a tribunal rather than a complicated court case which requires more time and resources. (Covered in another section).

Recommendations 26: The punishment that is provided for in the *Leadership Code* is to remain as it is. If there is a case that requires a more serious punishment, the Court will decide according to the circumstances of the case.

Recommendations 27: The power to pardon must remain with the President in the Constitution and must not be removed.

Recommendations 28: There must be a new Act that will establish the process to further supplement the Constitutional provision to pardon convicted persons. The advantages of the process being established in a new Act is for certainty as there is an established process provided to be followed when the situation calls for it.

Recommendations 29: The enabling Act must provide for the Composition of the Committee to advise the President when exercising his power to grant pardon.

Recommendations 30: The Committee must be nominated by Parliament and must be comprised of a lawyer, a medical practitioner, a Member of Parliament, a minister of religion, a person with experience in community work, and a representative of youths.

Recommendations 31: One of these members must be a woman.

Recommendations 32: The enabling Act must also state that the Power to grant pardon does not apply to the Acting President.

Recommendations 33: The *Ombudsman Act* if amended must do so together with the *Leadership Code Act*.

Recommendations 34: That as with many of the reforms conducted there is a need for consequential amendments on a range of other legislations including:

- *Public Service Act;*
- *Public Prosecutors Act;*
- *The Representation of Peoples Act;*
- *The Interpretation Act;*
- The Constitution of the Republic of Vanuatu; and

any other Acts necessary to be review in order to work parallel with *Ombudsman Act* and the *Leadership Code*.

LIST OF APPENDIX

THE MACDOWELL REPORT



171 | Page 172 | Page 173 | Page 174 | Page 175 |
Page 176 | Page 177 | Page 178 | Page 179 | Page 180 |
Page 181 | Page 182 | Page 183 | Page 184 | Page 185 |
Page 186 | Page 187 | Page 188 | Page 189 | Page 190 |
Page 191 | Page 192 | Page 193 | Page 194 | Page 195 |
Page 196 | Page 197 | Page 198 | Page 199 | Page 200 |
Page 201 | Page

THE INDEPENDENT REVIEW REPORT 2002

**THE REVIEW COMMITTEE REPORT OF THE OMBUDSMAN ACT AND LEADERSHIP CODE ACT
2004**

SIX ESSENTIAL CRITERIA FOR AN INDEPENDENT OMBUDSMAN

1. **“Independence**

- The office of the Ombudsman must be established either by legislation as an incorporated or accredited body—so that it is independent of the organisations being investigated.
- The person appointed as Ombudsman must be appointed for a fixed term—removable only for misconduct or incapacity according to a clearly defined process.
- The Ombudsman must not be subject to direction. The Ombudsman must be able to select his or her own staff.
- The Ombudsman must not be—or be able to be perceived as—an advocate for a special interest group, agency or company. The Ombudsman must have an unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.
- The Ombudsman’s office must operate on a not-for-profit basis.

2. **Jurisdiction**

- The jurisdiction of the Ombudsman should be clearly defined in legislation or in the document establishing the office.
- The jurisdiction should extend generally to the administrative actions or services of organisations falling within the Ombudsman’s jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction—subject only to the contrary ruling of a court.

3. **Powers**

- The Ombudsman must be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.
- In addition to investigating individual complaints, the Ombudsman must have the right to deal with systemic issues or commence an own motion investigation.

- There must be an obligation on organisations within the Ombudsman’s jurisdiction to respond to an Ombudsman question or request.
- The Ombudsman must have power to obtain information or to inspect the records of an organisation relevant to a complaint.
- The Ombudsman must have the discretion to choose the procedure for dealing with a complaint, including use of conciliation and other dispute resolution processes.

4. Accessibility

- A person must be able to approach the Ombudsman’s office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman’s investigation of a complaint.
- Complaints are generally investigated in private, unless there is reasonable justification for details of the investigation to be reported publicly by the Ombudsman—for example, in an annual report or on other public interest grounds.

5. Procedural fairness

The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness:

- The complainant, the organisation complained about and any person directly adversely affected by an Ombudsman’s decision or recommendation—or criticised by the Ombudsman in a report—must be given an opportunity to respond before the investigation is concluded.
- The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudice.
- The Ombudsman must provide reasons for any decision, finding or recommendation to both the complainant and the organisation which is the subject of the complaint.

6. Accountability

- The Ombudsman must be required to publish an annual report on the work of the office.
-

- The Ombudsman must be responsible—if a Parliamentary Ombudsman, to the Parliament; if an Industry-based Ombudsman, to an independent board of industry and consumer representatives.”³⁵⁰

DRAFT NEW LEADERSHIP CODE ACT ANNUAL RETURN FORM

SCHEDULE 1

(LEADERSHIP CODE ACT [CAP.240] SECTION 31 (1)-(6))

FORM OF ANNUAL RETURN

(PRINT ALL INFORMATION IN CAPITAL LETTERS)

1.0 DATE & PERIOD OF ANNUAL RETURN

1.1 DATE OF THIS ANNUAL RETURN BY THE LEADER:

1.2 YEAR COVERED BY THIS ANNUAL RETURN:

2.0 NAME OF LEADER

2.1 FIRST NAME & MIDDLE NAME(S) * :

2.2 SURNAME * :

2.3 LATEST CUSTOMARY NAME OR TITLE:

2.4 PREVIOUS CUSTOMARY NAME OR TITLE:

³⁵⁰ Peak body seeks halt to misuse of the term Ombudsman,
http://www.anzoa.com.au/assets/anzoa_mediarelease_essential-criteria-for-use-of-the-term-ombudsman.pdf
(Accessed: 12/07/16)

2.5 OTHER NAMES YOU ARE KNOWN BY:

*** (PUT NAMES WHICH ARE IN THE CIVIL STATUS REGISTRY RECORD, & ATTACH A COPY OF THE CIVIL STATUS REGISTRY RECORD)**

3.0 ADDRESS OF LEADER

3.1 RESIDENTIAL ADDRESS: **(PUT THE NAME OF YOUR VILLAGE, ISLAND & PROVINCE & YOUR ADDRESS IN PORT VILA OR LUGANVILLE OR OTHER CENTRE)**

<u>VILLAGE</u>	<u>URBAN CENTRES</u>	<u>OFFICE</u>
.....
.....

3.2 POSTAL ADDRESS:
.....

Telephone	(Home):	(Office):
	Mobile:	Email:

4.0 OFFICE OR POSITION HELD BY LEADER

4.1 OFFICE OR POSITION YOU HELD DURING THE YEAR MENTIONED IN PARAGRAPH 1.2.....

4.1.1 THE DATE YOU STARTED HOLDING THIS OFFICE OR POSITION:

4.1.2 THE AGENCY OR INSTITUTION THE OFFICE OR POSITION IS SITUATED IN:

4.1.3 THE DATE YOU STOPPED HOLDING THIS OFFICE OR POSITION:

4.1.4 THE REASON(S) YOU STOPPED HOLDING THIS OFFICE OR POSITION (IF APPLICABLE):
.....

4.2 WHAT OTHER OFFICE OR POSITION DID YOU HOLD DURING THE YEAR MENTIONED IN PARAGRAPH 1.2:

.....

4.2.1 THE DATE YOU STARTED HOLDING THIS OTHER OFFICE OR POSITION:

4.2.2 THE AGENCY OR INSTITUTION THE OTHER OFFICE OR POSITION IS SITUATED IN:

4.2.3 THE DATE YOU STOPPED HOLDING THIS OFFICE OR POSITION:

4.2.4 THE REASON(S) YOU STOPPED HOLDING THIS OFFICE OR POSITION (IF APPLICABLE):
.....

4.3 WHAT OTHER OFFICE OR POSITION DID YOU HOLD DURING THE YEAR MENTIONED IN 1.2):

4.3.1 THE DATE YOU STARTED HOLDING THIS OTHER OFFICE OR POSITION:

4.3.2 THE AGENCY OR INSTITUTION THE OFFICE OR POSITION IS SITUATED IN:

4.3.3 THE DATE YOU STOPPED HOLDING THIS OFFICE OR POSITION:

4.3.4 THE REASON(S) YOU STOPPED HOLDING THIS OFFICE OR POSITION (IF APPLICABLE):
.....

5.0 NAMES & ADDRESSES OF LEADER’S SPOUSE AND CHILDREN (ATTACH APPROPRIATE CERTIFICATES)

5.1 LEGAL SPOUSE & CHILDREN	5.2 DE FACTO SPOUSE & CHILDREN
<p>NAME & SURNAME OF SPOUSE: <i>(ATTACH MARRIAGE CERTIFICATE)</i></p> <p>ADDRESS OF SPOUSE:</p>	<p>NAME & SURNAME OF DE FACTO SPOUSE: <i>(ATTACH PROOF FROM YOUR CHIEF)</i></p> <p>ADDRESS OF DE FACTO SPOUSE:</p>

NAMES & SURNAMES OF CHILDREN <i>(ATTACH BIRTH CERTIFICATES)</i>	ADDRESSES OF CHILDREN	DE FACTO CHILDREN NAMES & SURNAMES	ADDRESSES OF DE FACTO CHILDREN
i.	i. ....	.....
.....	ii. ....	.....
.....	iii. ....	.....
ii.
.....	iv. ....	.....
iii.
.....	v. ....	.....
.....
iv.	vi. ....	.....
.....
.....	vii. ....	.....
v.
.....	viii. ....	.....
vi.
.....	ix. ....	.....
vii.
.....	x. ....	.....
viii.
.....
ix.
.....
x.

6.0 ASSETS OF LEADER DURING PREVIOUS YEAR

6.1 REAL AND PERSONAL PROPERTY OF LEADER

6.1.1 LAND OWNED BY LEADER:

LAND TITLES AND CUSTOMARY LAND YOU OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE PLOT OF LAND LOCATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH PLOT OF LAND IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

6.1.2 HOUSES OWNED BY LEADER (EXCEPT ONE FAMILY HOME IN VANUATU):

HOUSES YOU OWNED IN VANUATU AND IN OTHER COUNTRIES (EXCEPT ONE FAMILY HOME IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE HOUSE LOCATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH HOUSE (EXCEPT ONE FAMILY HOME IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

6.1.3 VEHICLES OWNED BY LEADER (EXCEPT ONE FAMILY VEHICLE IN VANUATU):

VEHICLES YOU OWNED IN VANUATU AND IN OTHER COUNTRIES (EXCEPT ONE FAMILY VEHICLE IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE VEHICLE SITUATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH VEHICLE IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

6.1.4 BOATS AND OTHER VESSELS OWNED BY LEADER:

BOATS AND OTHER VESSELS YOU OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE BOAT OR VESSEL IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH BOAT AND OTHER VESSEL IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

6.1.5 OTHER ASSETS OWNED BY LEADER:

OTHER ASSETS YOU OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE ASSET IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET IN THE YEAR SET OUT IN PARAGRAPH 1.2:

i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

6.1.6 SHARES OWNED BY LEADER:

SHARES YOU HELD IN PUBLIC & PRIVATE COMPANIES IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	NAMES OF COMPANIES WHICH YOU HELD SHARES IN:	CITY AND COUNTRY IN WHICH THE COMPANY'S REGISTERED OFFICE WAS LOCATED:	TYPE OF BUSINESS AND TRADE THE COMPANY CARRIED OUT IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)			
ii)			
iii)			
iv)			
v)			
vi)			
vii)			

6.1.7 INCOME OF LEADER DURING PREVIOUS YEAR

INCOME RECEIVED BY LEADER IN THE YEAR SET OUT IN PARAGRAPH 1.2:	AMOUNT IN VATU (ACTUAL OR ESTIMATED):
i) TOTAL ANNUAL SALARY OF LEADER ACCORDING TO LEADER'S APPOINTED POST:	VT:
ii) TOTAL REVENUE RECEIVED DURINGT THE YEAR AS DIVIDEND FROM SHARES HELD IN VANUATU COMPANIES:	VT:
iii) TOTAL REVENUE RECEIVED DURING THE YEAR AS DIVIDEND FROM SHARES HELD IN COMPANIES REGISTERED IN OTHER COUNTRIES:	VT:
iv) TOTAL REVENUE RECEIVED DURINGT THE YEAR AS INTEREST FROM BONDS OR SECURITIES HELD IN VANUATU COMPANIES:	VT:
v) TOTAL REVENUE RECEIVED DURINGT THE YEAR AS	VT:
INTEREST FROM BONDS OR SECURITIES HELD IN COMPANIES REGISTERED IN OTHER COUNTRIES:	
vi) TOTAL MONEY GIFTS RECEIVED DURING THE YEAR FROM DONORS IN VANUATU:	VT:
vii) TOTAL MONEY GIFTS RECEIVED DURING THE YEAR FROM DONORS IN OTHER COUNTRIES:	VT:
viii) OTHER REVENUE RECEIVED DURING THE YEAR (GIVE DETAILS):	VT:
ix) LEADER'S TOTAL MONEY IN ALL BANKS & CREDIT UNION ETC IN VANUATU & IN OTHER COUNTRIES AT THE END OF THE YEAR SET OUT IN PARAGRAPH 1.2:	VT:

7.0 LIABILITIES OF LEADER DURING PREVIOUS YEAR

LIABILITIES INCURRED BY LEADER IN THE YEAR SET OUT IN PARAGRAPH 1.2:	AMOUNT IN VATU (ACTUAL OR ESTIMATED):
i) TOTAL MORTGAGE(S) IN VANUATU (EXCEPT MORTGAGE ON FAMILY HOME):	VT:
ii) TOTAL MORTGAGE(S) IN OTHER COUNTRY:	VT:
iii) TOTAL OUTSTANDING LOAN IN ALL VANUATU BANKS:	VT:
iv) TOTAL OUTSTANDING LOAN IN ALL BANKS IN OTHR COUNTRIES:	VT:
v) OUTSTANDING DEBT TO VANUATU GOVERNMENT LAND LEASE RENTS AND MUNICIPAL PROPERTY TAXES:	VT:
vi) TOTAL OF OTHER MONEY OWING BY LEADER (GIVE DETAILS):	VT;

8.0 TRANSACTIONS OF LEADER DURING PREVIOUS YEAR

8.1 ASSETS ACQUIRED:

SPECIFY ASSETS ACQUIRED BY LEADER IN THE YEAR SET OUT IN PARAGRAPH 1.2:	SPECIFY COUNTRY & PROVINCE WHERE ASSET IS LOCATED. IF ASSET IS A SHARE OR BOND NAME THE COMPLANY AND ITS PLACE OF INCORPORATION:	SPECIFY DATE THE ASSET WAS ACQUIRED:	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET ACQUIRED IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.
v)			VT.
vi)			VT.
vii)			VT.

8.2 ASSETS DISPOSED OF:

SPECIFY ASSETS DISPOSED OF BY LEADER IN THE YEAR SET OUT IN PARAGRAPH 1.2:	SPECIFY COUNTRY & PROVINCE WHERE THE ASSET WAS LOCATED. IF THE ASSET WAS A SHARE OR BOND SPECIFY THE NAME OF THE COMPLANY AND ITS PLACE OF INCORPORATION:	SPECIFY DATE THE ASSET WAS DISPOSED OF:	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET DISPOSED OF:
i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.
v)			VT.
vi)			VT.
vii)			VT.

8.3 LIABILITIES ACQUIRED:

SPECIFY LIABILITIES ACQUIRED BY LEADER IN THE YEAR SET OUT IN PARAGRAPH 1.2:	EXPLAIN REASONS FOR ACQUIRING THE LIABILITY. IF THE LIABILITY IS A MORTGAGE SPECIFY THE PROPERTY MORTGAGED AND THE COUNTRY AND PROVINCE WHERE THE PROPERTY IS LOCATED:	SPECIFY DATE THE LIABILITY WAS ACQUIRED:	VALUE (ACTUAL OR ESTIMATED) OF THE LIABILITY ACQUIRED:
i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.
v)			VT.
vi)			VT.
vii)			VT.

8.4 LIABILITIES DISCHARGED:

SPECIFY LIABILITIES DISCHARGED BY LEADER IN THE YEAR SET OUT IN PARAGRAPH 1.2:	DID YOU RECEIVE ANY ASSISTANCE FROM ANOTHER PERSON TO DISCHARGE THE LIABILITY. IF SO SPECIFY PERSON OR COMPANY WHO GAVE YOU ASSISTANCE AND SPECIFY CONDITIONS OF THE ASSISTANCE:	SPECIFY DATE THE LIABILITY WAS DISCHARGED:
i)		
ii)		
iii)		
iv)		
v)		
vi)		
vii)		

9.0 DIRECTORSHIPS & OTHER OFFICES HELD BY LEADER DURING PREVIOUS YEAR

SPECIFY IF YOU WERE A DIRECTOR OR OTHER OFFICE HOLDER (EG, A BOARD MEMBER) OF A PUBLIC OR PRIVATE COMPANY OR STATUTORY BODY OR OTHER INSTITUTION IN THE YEAR SET OUT IN PARAGRAPH 1.2:	NAME THE COMPANY, STATUTORY BODY OR INSTITUTION FOR WHICH YOU WERE A DIRECTOR OR OTHER OFFICE HOLDER:	SPECIFY COUNTRY WHERE THE COMPANY OR STATUTORY BODY OR INSTITUTION IN WHICH YOU HELD OFFICE WAS REGISTERED OR LOCATED:	SPECIFY DATE YOU WERE APPOINTED AS DIRECTOR OR OFFICE HOLDER OF THE COMPANY, STATUTORY BODY OR INSTITUTION, AND THE TERM OF THE OFFICE:
i)			
ii)			
iii)			
iv)			
v)			
vi)			
vii)			

10.0 ASSETS OF SPOUSE OF LEADER DURING PREVIOUS YEAR

10.1 REAL AND PERSONAL PROPERTY OF SPOUSE

10.1.1 LAND OWNED BY SPOUSE:

LAND TITLES AND CUSTOMARY LAND SPOUSE OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE PLOT OF LAND LOCATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH PLOT OF LAND IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

10.1.2 HOUSES OWNED BY SPOUSE (EXCEPT ONE FAMILY HOME IN VANUATU):

HOUSES SPOUSE OWNED IN VANUATU AND IN OTHER COUNTRIES (EXCEPT ONE FAMILY HOME IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE HOUSE LOCATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH HOUSE (EXCEPT ONE FAMILY HOME IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

10.1.3 VEHICLES OWNED BY SPOUSE (EXCEPT ONE FAMILY VEHICLE IN VANUATU):

VEHICLES SPOUSE OWNED IN VANUATU AND IN OTHER COUNTRIES (EXCEPT ONE FAMILY VEHICLE IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE VEHICLE SITUATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH VEHICLE IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.

vii)		VT.
------	--	-----

10.1.4 BOATS AND OTHER VESSELS OWNED BY SPOUSE:

BOATS AND OTHER VESSELS SPOUSE OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE BOAT OR VESSEL IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH BOAT AND OTHER VESSEL IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

10.1.5 OTHER ASSETS OWNED BY SPOUSE:

OTHER ASSETS SPOUSE OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE ASSET IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

10.1.6 SHARES OWNED BY SPOUSE:

SHARES SPOUSE HELD IN PUBLIC & PRIVATE COMPANIES IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN	NAMES OF COMPANIES WHICH SPOUSE HELD SHARES IN:	CITY AND COUNTRY IN WHICH THE COMPANY'S REGISTERED OFFICE WAS LOCATED:	TYPE OF BUSINESS AND TRADE THE COMPANY CARRIED OUT IN THE YEAR SET OUT IN PARAGRAPH 1.2:
PARAGRAPH 1.2:			
i)			
ii)			
iii)			
iv)			
v)			
vi)			
vii)			

10.1.7 INCOME OF SPOUSE DURING PREVIOUS YEAR

INCOME RECEIVED BY SPOUSE IN THE YEAR SET OUT IN PARAGRAPH 1.2:	AMOUNT IN VATU (ACTUAL OR ESTIMATED):
i) TOTAL ANNUAL SALARY OF SPOUSE ACCORDING TO JOB OF SPOUSE:	VAT:
ii) TOTAL REVENUE RECEIVED DURINGT THE YEAR AS DIVIDEND FROM SHARES HELD IN VANUATU COMPANIES:	VAT:

iii) TOTAL REVENUE RECEIVED DURING THE YEAR AS DIVIDEND FROM SHARES HELD IN COMPANIES REGISTERED IN OTHER COUNTRIES:	VT:
iv) TOTAL REVENUE RECEIVED DURING THE YEAR AS INTEREST FROM BONDS OR SECURITIES HELD IN VANUATU COMPANIES:	VT:
v) TOTAL REVENUE RECEIVED DURING THE YEAR AS INTEREST FROM BONDS OR SECURITIES HELD IN COMPANIES REGISTERED IN OTHER COUNTRIES:	VT:
vi) TOTAL MONEY GIFTS RECEIVED DURING THE YEAR FROM DONORS IN VANUATU:	VT:
vii) TOTAL MONEY GIFTS RECEIVED DURING THE YEAR FROM DONORS IN OTHER COUNTRIES:	VT:
viii) OTHER REVENUE RECEIVED DURING THE YEAR (GIVE DETAILS):	VT:
ix) SPOUSES TOTAL MONEY IN ALL BANKS & CREDIT UNION ETC IN VANUATU & IN OTHER COUNTRIES AT THE END OF THE YEAR SET OUT IN PARAGRAPH 1.2:	VT:

11.0 LIABILITIES OF SPOUSE OF LEADER DURING PREVIOUS YEAR

LIABILITIES INCURRED BY SPOUSE IN THE YEAR SET OUT IN PARAGRAPH 1.2:	AMOUNT IN VATU (ACTUAL OR ESTIMATED):
i) TOTAL MORTGAGE(S) IN VANUATU (EXCEPT MORTGAGE ON FAMILY HOME):	VT:

ii)	TOTAL MORTGAGE(S) IN OTHER COUNTRY:	VT:
iii)	TOTAL OUTSTANDING LOAN IN ALL VANUATU BANKS:	VT:
iv)	TOTAL OUTSTANDING LOAN IN ALL BANKS IN OTHR COUNTRIES:	VT:
v)	OUTSTANDING DEBT TO VANUATU GOVERNMENT LAND LEASE RENTS AND MUNICIPAL PROPERTY TAXES:	VT:
vi)	TOTAL OF OTHER MONEY OWING BY LEADER (GIVE DETAILS):	VT;

12.0 TRANSACTIONS OF SPOUSE OF LEADER DURING PREVIOUS YEAR

12.1 ASSETS ACQUIRED:

SPECIFY ASSETS ACQUIRED BY SPOUSE IN THE YEAR SET OUT IN PARAGRAPH 1.2:	SPECIFY COUNTRY & PROVINCE WHERE ASSET IS LOCATED. IF ASSET IS A SHARE OR BOND NAME THE COMPLY AND ITS PLACE OF INCORPORATION:	SPECIFY DATE THE ASSET WAS ACQUIRED:	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET ACQUIRED IN THE YEAR SET OUT IN PARAGRAPH 1.2:

i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.
v)			VT.
vi)			VT.
vii)			VT.

12.2 ASSETS DISPOSED OF:

SPECIFY ASSETS DISPOSED OF BY SPOUSE IN THE YEAR SET OUT IN PARAGRAPH 1.2:	SPECIFY COUNTRY & PROVINCE WHERE THE ASSET WAS LOCATED. IF THE ASSET WAS A SHARE OR BOND SPECIFY THE NAME OF THE COMPANY AND ITS PLACE OF INCORPORATION:	SPECIFY DATE THE ASSET WAS DISPOSED OF:	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET DISPOSED OF:
i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.
v)			VT.
vi)			VT.
vii)			VT.

12.3 LIABILITIES ACQUIRED:

SPECIFY LIABILITIES ACQUIRED BY SPOUSE IN THE YEAR SET OUT IN PARAGRAPH 1.2:	EXPLAIN REASONS FOR ACQUIRING THE LIABILITY. IF THE LIABILITY IS A MORTGAGE SPECIFY THE PROPERTY MORTGAGED AND THE COUNTRY AND PROVINCE WHERE THE PROPERTY IS LOCATED:	SPECIFY DATE THE LIABILITY WAS ACQUIRED:	VALUE (ACTUAL OR ESTIMATED) OF THE LIABILITY ACQUIRED:
i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.

v)			VT.
vi)			VT.
vii)			VT.

12.4 LIABILITIES DISCHARGED:

SPECIFY LIABILITIES DISCHARGED BY SPOUSE IN THE YEAR SET OUT IN PARAGRAPH 1.2:	DID SPOUSE RECEIVE ANY ASSISTANCE FROM ANOTHER PERSON TO DISCHARGE THE LIABILITY. IF SO SPECIFY PERSON OR COMPANY WHO GAVE SPOUSE ASSISTANCE AND SPECIFY CONDITIONS OF THE ASSISTANCE:	SPECIFY DATE THE LIABILITY WAS DISCHARGED:
i)		
ii)		
iii)		
iv)		
v)		
vi)		
vii)		

13.0 DIRECTORSHIPS & OTHER OFFICES HELD BY SPOUSE OF LEADER DURING PREVIOUS YEAR

SPECIFY IF SPOUSE WAS A DIRECTOR OR OTHER OFFICE HOLDER (EG, A BOARD MEMBER) OF A PUBLIC OR PRIVATE COMPANY OR STATUTORY BODY OR OTHER INSTITUTION IN THE YEAR SET OUT IN PARAGRAPH 1.2:	NAME THE COMPANY, STATUTORY BODY OR INSTITUTION FOR WHICH SPOUSE WAS A DIRECTOR OR OTHER OFFICE HOLDER:	SPECIFY COUNTRY WHERE THE COMPANY OR STATUTORY BODY OR INSTITUTION IN WHICH SPOUSE HELD OFFICE WAS REGISTERED OR LOCATED:	SPECIFY DATE SPOUSE WAS APPOINTED AS DIRECTOR OR OFFICE HOLDER OF THE COMPANY, STATUTORY BODY OR INSTITUTION, AND THE TERM OF THE OFFICE:
i)			

ii)			
iii)			
iv)			
v)			
vi)			
vii)			

14.0 **ASSETS OF CHILDREN OF LEADER DURING PREVIOUS YEAR**

14.1 **REAL AND PERSONAL PROPERTY OF CHILDREN OF LEADER**

14.1.1 LAND OWNED BY CHILDREN:

LAND TITLES AND CUSTOMARY LAND CHILDREN OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE PLOT OF LAND LOCATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH PLOT OF LAND IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

14.1.2 HOUSES OWNED BY CHILDREN (EXCEPT ONE FAMILY HOME IN VANUATU):

HOUSES CHILDREN OWNED IN VANUATU AND IN OTHER COUNTRIES (EXCEPT ONE FAMILY HOME IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE HOUSE LOCATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH HOUSE (EXCEPT ONE FAMILY HOME IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

14.1.3 VEHICLES OWNED BY CHILDREN (EXCEPT ONE FAMILY VEHICLE IN VANUATU):

VEHICLES CHILDREN OWNED IN VANUATU AND IN OTHER COUNTRIES (EXCEPT ONE FAMILY VEHICLE IN VANUATU) IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE VEHICLE SITUATED IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH VEHICLE IN THE YEAR SET OUT IN PARAGRAPH 1.2:
1.2:		
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.

vii)		VT.
------	--	-----

14.1.4 BOATS AND OTHER VESSELS OWNED BY CHILDREN:

BOATS AND OTHER VESSELS CHILDREN OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE BOAT OR VESSEL IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF EACH BOAT AND OTHER VESSEL IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

14.1.5 OTHER ASSETS OWNED BY CHILDREN:

OTHER ASSETS CHILDREN OWNED IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	WAS THE ASSET IN VANUATU (SPECIFY ISLAND) OR IN ANOTHER COUNTRY (SPECIFY COUNTRY & PROVINCE):	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)		VT.
ii)		VT.
iii)		VT.
iv)		VT.
v)		VT.
vi)		VT.
vii)		VT.

14.1.6 SHARES OWNED BY SPOUSE:

SHARES CHILDREN HELD IN PUBLIC & PRIVATE COMPANIES IN VANUATU AND IN OTHER COUNTRIES IN THE YEAR SET OUT IN PARAGRAPH 1.2:	NAMES OF COMPANIES WHICH CHILDREN HELD SHARES IN:	CITY AND COUNTRY IN WHICH THE COMPANY'S REGISTERED OFFICE WAS LOCATED:	TYPE OF BUSINESS AND TRADE THE COMPANY CARRIED OUT IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)			
ii)			
iii)			
iv)			
v)			
vi)			
vii)			

14.1.7 INCOME OF CHILDREN DURING PREVIOUS YEAR

INCOME RECEIVED BY CHILDREN IN THE YEAR SET OUT IN PARAGRAPH 1.2:	AMOUNT IN VATU (ACTUAL OR ESTIMATED):
x) TOTAL ANNUAL SALARY OF CHILDREN ACCORDING TO CHILDREN'S APPOINTED WORK:	VT:
xi) TOTAL REVENUE RECEIVED DURINGT THE YEAR AS DIVIDEND FROM SHARES HELD IN VANUATU COMPANIES:	VT:

xii) TOTAL REVENUE RECEIVED DURING THE YEAR AS DIVIDEND FROM SHARES HELD IN COMPANIES REGISTERED IN OTHER COUNTRIES:	VT:
xiii) TOTAL REVENUE RECEIVED DURING THE YEAR AS INTEREST FROM BONDS OR SECURITIES HELD IN VANUATU COMPANIES:	VT:
xiv) TOTAL REVENUE RECEIVED DURING THE YEAR AS INTEREST FROM BONDS OR SECURITIES HELD IN COMPANIES REGISTERED IN OTHER COUNTRIES:	VT:
xv) TOTAL MONEY GIFTS RECEIVED DURING THE YEAR FROM DONORS IN VANUATU:	VT:
xvi) TOTAL MONEY GIFTS RECEIVED DURING THE YEAR FROM DONORS IN OTHER COUNTRIES:	VT:
xvii) OTHER REVENUE RECEIVED DURING THE YEAR (GIVE DETAILS):	VT:
xviii) CHILDREN'S TOTAL MONEY IN ALL BANKS & CREDIT UNION ETC IN VANUATU & IN OTHER COUNTRIES AT THE END OF THE YEAR SET OUT IN PARAGRAPH 1.2:	VT:

15.0 LIABILITIES OF LEADER'S CHILDREN DURING PREVIOUS YEAR

LIABILITIES INCURRED BY CHILDREN IN THE YEAR SET OUT IN PARAGRAPH 1.2:	AMOUNT IN VATU (ACTUAL OR ESTIMATED):
vii) TOTAL MORTGAGE(S) IN VANUATU (EXCEPT MORTGAGE ON FAMILY HOME):	VT:

viii)	TOTAL MORTGAGE(S) IN OTHER COUNTRY:	VT:
ix)	TOTAL OUTSTANDING LOAN IN ALL VANUATU BANKS:	VT:
x)	TOTAL OUTSTANDING LOAN IN ALL BANKS IN OTHR COUNTRIES:	VT:
xi)	OUTSTANDING DEBT TO VANUATU GOVERNMENT LAND LEASE RENTS AND MUNICIPAL PROPERTY TAXES:	VT:
xii)	TOTAL OF OTHER MONEY OWING BY CHILDREN (GIVE DETAILS):	VT;

16.0 TRANSACTIONS OF LEADER'S CHILDREN DURING PREVIOUS YEAR

16.1 ASSETS ACQUIRED:

SPECIFY ASSETS ACQUIRED BY CHILDREN IN THE YEAR SET OUT IN PARAGRAPH 1.2:	SPECIFY COUNTRY & PROVINCE WHERE ASSET IS LOCATED. IF ASSET IS A SHARE OR BOND NAME THE COMPANY AND ITS PLACE OF INCORPORATION:	SPECIFY DATE THE ASSET WAS ACQUIRED:	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET ACQUIRED IN THE YEAR SET OUT IN PARAGRAPH 1.2:
i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.
v)			VT.

vi)			VT.
vii)			VT.

16.2 ASSETS DISPOSED OF:

SPECIFY ASSETS DISPOSED OF BY CHILDREN IN THE YEAR SET OUT IN PARAGRAPH 1.2:	SPECIFY COUNTRY & PROVINCE WHERE THE ASSET WAS LOCATED. IF THE ASSET WAS A SHARE OR BOND SPECIFY THE NAME OF THE COMPANY AND ITS PLACE OF INCORPORATION:	SPECIFY DATE THE ASSET WAS DISPOSED OF:	VALUE (ACTUAL OR ESTIMATED) OF THE ASSET DISPOSED OF:
i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.
v)			VT.
vi)			VT.
vii)			VT.

16.3 LIABILITIES ACQUIRED:

SPECIFY LIABILITIES ACQUIRED BY CHILDREN IN THE YEAR SET OUT IN PARAGRAPH 1.2:	EXPLAIN REASONS FOR CHILDREN ACQUIRING THE LIABILITY. IF THE LIABILITY IS A MORTGAGE SPECIFY THE PROPERTY MORTGAGED AND THE COUNTRY AND PROVINCE WHERE THE PROPERTY IS LOCATED:	SPECIFY DATE THE LIABILITY WAS ACQUIRED:	VALUE (ACTUAL OR ESTIMATED) OF THE LIABILITY ACQUIRED:
i)			VT.
ii)			VT.
iii)			VT.
iv)			VT.
v)			VT.
vi)			VT.
vii)			VT.

16.4 LIABILITIES DISCHARGED:

SPECIFY LIABILITIES DISCHARGED BY CHILDREN IN THE YEAR SET OUT IN PARAGRAPH 1.2:	DID CHILDREN RECEIVE ANY ASSISTANCE FROM ANOTHER PERSON TO DISCHARGE THE LIABILITY. IF SO SPECIFY PERSON OR COMPANY WHO GAVE CHILDREN ASSISTANCE AND SPECIFY CONDITIONS OF THE ASSISTANCE:	SPECIFY DATE THE LIABILITY WAS DISCHARGED:
i)		
ii)		
iii)		
iv)		
v)		
vi)		
vii)		

17.0 DIRECTORSHIPS & OTHER OFFICES HELD BY CHILDREN OF LEADER DURING PREVIOUS YEAR

SPECIFY IF CHILDREN WERE A DIRECTOR OR OTHER OFFICE HOLDER (EG, A BOARD MEMBER) OF A PUBLIC OR PRIVATE COMPANY OR STATUTORY BODY OR OTHER INSTITUTION IN THE YEAR SET OUT IN PARAGRAPH 1.2:	NAME THE COMPANY, STATUTORY BODY OR INSTITUTION FOR WHICH CHILDREN WERE A DIRECTOR OR OTHER OFFICE HOLDER:	SPECIFY COUNTRY WHERE THE COMPANY OR STATUTORY BODY OR INSTITUTION IN WHICH CHILDREN HELD OFFICE WAS REGISTERED OR LOCATED:	SPECIFY DATE CHILDREN WERE APPOINTED AS DIRECTOR OR OFFICE HOLDER OF THE COMPANY, STATUTORY BODY OR INSTITUTION, AND THE TERM OF THE OFFICE:
i)			
ii)			
iii)			
iv)			

v)			
vi)			
vii)			

18.0 DECLARATION MADE ON OATH

I (FULL NAME) (POST) IN THE
 REPUBLIC OF VANUATU TAKE OATH AND DECLARE THAT THE INFORMATION GIVEN BY ME IN THIS ANNUAL RETURN FORM AND
 ATTACHMENTS ATTACHED TO THE FORM, TO THE BEST OF MY KNOWLEDGE AND INFORMATION ARE ALL TRUE, AND I AM
 FULLY AWARE THAT MAKING A FALSE OR INCOMPLETE STATEMENT IS A BREACH OF SECTION 33(b) OF THE LEADERSHIP CODE
 ACT [CAP.240] FOR WHICH I CAN BE PROSECUTED.

SWORN BY

AT.....

THIS DAY OF 20.....

SIGNATURE OF LEADER

BEFORE ME:

COMMISSIONER OF OATHS

CONSULTATION LIST

Name/Community		Office Name & Position
1.	Allain Malgos,	Director Leadership Code, Ombudsman's Office, Port Vila
2.	Albert Nalpini	Legal Officer, Officer of the Police Commissioner
3.	Albert Taufa	Senior Legal Officer, Advocacy and Legal Advice Centre
4.	Amos Talu	Save the Children Officer, Penama Province
5.	Bertnard Malwersets	Hospital Manager, Norsup Hospital Malekula
6.	Blandine Tepi	Clerk, Tanna Island Court

7.	David Ali	Area Secretary, North Tanna, Tafea Province
8.	Denley Aru	Red Cross Officer, Penama Province
9.	Dorah Samuel	Principal Investigator, Ombudsman Office, Port Vila
10.	Esther Worek	Secretary, Education Office, Malampa Province
11.	Gray Vuke	Manager, State Prosecution Office, Port Vila
12.	Godfrey Daruhi	Planner, Penama Province
13.	Gideon Rocroc	Chief of East Santo area, Sanma Province
14.	Hensly Roy	Civil Status Officer, Penama Province
15.	Henry Saute	Area Secretary, West Tanna, Tafea Provincial Government

16.	Johnathan Bani	Provincial Rural Water Supply Officer, Penama Province
17.	Jean Juliano	Manager Public Works Department, Tafea Province
18.	Jerry Boe	Principal Legal Officer, Office of the Ombudsman, Port Vila
19.	Jacob Kausiama	Public Solicitor, Public Solicitors Office, Port Vila
20.	Jonathan Tabi	Business man, Lolowai, Penama Province

21.	Josaia Naigulevu	Public Prosecutor, Public Prosecutors Office, Port Vila
22.	James Surai	Secretary (Chief), Malmetenvanu Council of Chiefs, Sanma Province
23.	Juliet Sumbe	Area Council Development Officer, Sanma Provincial Government
24.	Jenny Tevi	Acting Head Treaties and Conventions (Chairperson National Human Rights Committee), MoFA
25.	John Nocklam	Area Secretary, Central Tanna, Tafea Provincial Government
26.	Johnson Wabaiat	Acting Director General, MIPU, Port Vila
27.	Kalkot Mataskelekele	Ombudsman, Office of the Ombudsman, Port Vila
28.	Kevin Enrel	Youth and Sports Officer, Lakatoro Malampa Province
29.	Kenson Tari	Project Officer, World Vision, Penama Province
30.	Ketio Willie	State Prosecutor, Police Tafea Provincial Headquarter
31.	Lui Alick	Area Secretary, South West Tanna, Tafea Provincial Government
32.	Louis Kalnpel	Clerk, Office of the Clerk of Parliament, Port Vila
33.	Lenon Lukan	Area Secretary, Aniwa, Tafea Provincial Government

34.	Leimara Malachi	Deputy Lady Mayer, Port Vila Municipal Council
35.	Linda Vutilolo	Senior Probation Officer, Sanma Correctional Depart
36.	Morrison Boe	Deputy Mayor, Luganville Municipal Council
37.	Michael George	State Prosecution Officer, Police Station, Sanma Province
38.	Murielle Metsan	Manager Compliance, PSC, Port Vila
39.	Mina Popovi	Legal Officer, Advocacy and Legal Advice Centre – Transparency Vanuatu, Port Vila
40.	Mackson Tabi	Health Officer, Lolowai Hospital, Penama Province
41.	Manuel Ure	Acting Secretary General, Penama Province
42.	Mathew Walter	Senior Probation Officer, Sanma Correctional Department
43.	Noel Noar	Area Secretary, South Tanna, Tafea Provincial Gov't
44.	Noel Yalu	Area Secretary, North East Tanna, Tafea Provincial Government
45.	Peter Maki	Constable, Malampa Province Police Headquarters
46.	Paul Mark	Area Secretary, Big bay inland Area Secretary, Sanma
47.	Pelau Michel	ECCE Coordinator, Malampa Province
48.	Precilla Wells	Probation Officer, Sanma Correctional Department

49.	Richard Bani	Manager, Sanma Correctional Centre
50.	Rasai Japhet	Area Secretary, East Tanna, Tafea Provincial Government
51.	Richard Kalses	Compliance Manager, MALFFB, Port Vila

52.	Ruben Neriam	Area Secretary, Aneityum, Tafea Provincial Government
53.	Remi Nampil	Area Secretary, North Erromango, Tafea Province
54.	Reynold Surmat	Secretary General, Tafea Province
55.	Reginald Tariala	Penama Provincial Officer
56.	Rolland Ture	Probation Officer, Sanma Correctional Centre
57.	Simeon	Statistics Officer, Statistics Office, Tafea Province
58.	Stephanie Mahit	Secretary, Office of the Clerk of Parliament, Port Vila
59.	Steph Palo	Technical Advisor, Office of the Public Solicitor, Port Vila
60.	Smith Pakoasongi	Manager, Department of Cooperative, Tafea Province
61.	Selwyn Tabi	Doctor Lolowai Hospital, Penama Province

62.	Selwyn Tangabu	Tourism Officer, Isangel Tanna
63.	Setareki Waoanutoh	Policy Advisor, Ministry of Justice and Community Services
64.	Tabi	Environmental Health Officer, Lolowai Hospital, Penama Province
65.	Toka latipu	Area Secretary, Futuna, Tafea Provincial Government
66.	Tom Nakou	Architech, Education Department, Isangel Tanna
67.	Thomasi Sempet	Area Secretary, South Erromango, Tafea Provincial Government
68.	Velma Karabani	Director General Complaints, Office of the Ombudsman, Port Vila
69.	Veronique L	Assistant Trainer, Education Office, Malampa Province
70.	Viran Triff Molisa	Solicitor General, Office of the Attorney General, Port Vila
71.	Vusi	Driver, Lolowai Hospital, Penama Province
72.	Vuti Muele	Area Secretary, Aore Island, Sanma Province
73.	Vuti Tasaki	Area Secretary, South Santo Area 2, Sanma Province
74.	Wilson Toa	Country Coordinator, Transparency International Vanuatu, Port Vila
75.	Wickliffe Tarilenga	State Prosecutor, State Prosecution Office, Port Vila
76.	Zebedee	Chief, East Santo Area, Sanma Province

COMMUNITIES AND OTHER INDIVIDUALS WHO ARE MISSED OUT ON THIS LIST BUT HAVE BEEN CONSULTED ARE ALSO ACKNOWLEDGED.

BIBLIOGRAPHY

BOOKS

- (ADB/OECD Anti-Corruption Initiative for Asia and the Pacific and Anti-Corruption Commission of Timor-Leste. 2013. Whistle-blower Protection and Strengthening AntiCorruption Agencies Agenda)
- Anita Jowitt, 'USP School of Law Guidebooks Legal Referencing' (2006)
- Anita Jowitt, National Integrity System Study, Office of the Ombudsman Discussion paper 2, September 2013

- Asia Pacific Forum Advancing Human Rights in our Region ‘Republic of Vanuatu scoping mission on a National Human Rights Institution’ 19-23 September 2011
- Ombudsman Commission of Papua New Guinea, Discussion Paper - Review of Enabling Legislation November 2014
- E Edward R. Hill, A structural analysis of the Ombudsman of Vanuatu (LLM thesis, University of the South Pacific, 2004)
- Edward R. Hill, ‘The Vanuatu Ombudsman’, Chapter in Passage of Change, law, Society and Governance in the Pacific, Edited by Anita Jowitt and Tess Cain Newton, Pandanus Book, ANU, 2003
- Micharl Frahm, Ludwig Boltzman , ‘Australasia and Pacific Ombudsman Institutions- Mandates Competences and Good practice’, Institute of Human Rights, Springer, 2013
- Organisation for Economic Co-operation and Development. 2016. Committing to Effective Whistle-blower Protection

CASES

- (Unreported, Constitutional case number 114 of 1997) <http://www.paclii.org/vu/cases/VUSC/1997/41.html> (Accessed: 3/06/16)
- *Calder v Bull* 3 U.S. 386 (1798. <http://caselaw.findlaw.com/us-supreme-court/3/386.html> (Accessed: 15/06/16)
- *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015), <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/2015/43.html?stem=&synonyms=&query=kalosil%20AND%20public%20prosecutor%20AND%2043> (Accessed 9/10/16)
- *Natuman v President of the Republic of Vanuatu and Vohor v President of the Republic of Vanuatu* [2015] VUSC 148; Constitutional Case 6&7 of 2015, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/148.html?stem=&synonyms=&query=natuman%20AND%20vohor%20AND%20148%20AND%20president> (Accessed 9/10/16)
- *Paul Saboko v Commissioner of Police* (2006) N2975 <http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGNC/2006/40.html?stem=&synonyms=&query=paul%20AND%20saboko%20AND%20commissioner%20of%20police> (Accessed on 27th May 2016).
- *PP v Kalosil* – Judgment as to verdict [2015] VUSC 135 Criminal Case 73 of 2015, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil> (Accessed: 21/07/16)
- *Public Prosecutor v Barak Tame Sope Maautamate*, unreported, CR 10/02 (July 2002)

- *Public Prosecutor v Kalosil* [2015] VUSC 111; Criminal Case 73 of 2015 , <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/111.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil%20AND%20111> (Accessed 9/10/2016)
- *Public Prosecutor v Kalosil* [2015] VUSC 121; Criminal Case 73 of 2015, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/121.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil%20AND%20121> (Accessed 9/10/16)
- *Public Prosecutor v Kalosil* [2015] VUSC 173, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/173.html?stem=&synonyms=&query=public%20prosecutor%20AND%20kalosil%20AND%20173> (Accessed 9/10/16)
- *Public Prosecutor v Willie* [2004] VUCA 4, <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUCA/2004/4.html?stem=&synonyms=&query=public%20prosecutor%20AND%20willie> (Accessed 9/10/16)
- SCR No 2 of 1982 *Re Kunangel* [1991] LR1. <http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGSC/1991/7.html?stem=&synonyms=&query=%20Re%20Kunangel%20AND%201991> (Accessed: 15/07/16)
- Unreported, CAC 4/03 (May 2002)

CONVENTIONS

- Convention Against Torture (CAT)
- Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of a Child (CRC)
- Convention on the Rights of Persons with Disabilities (CRPD)
- United Nations Convention against Corruption. 2015. Resource Guide on Good Practices in the Protection of Reporting Persons

EMAILS

- Email from Jerry Boe jboe@vanuatu.gov.vu to Gracelyn Tasso < tgracelyn@vanuatu.gov.vu, 28 June 2016

- Email from Solomon Kalu skalu@lcc.gov.sb to Gracelyn Tasso tgracelyn@vanuatu.gov.vu 17th May 2016

INTERVIEWS

- Interview with Jenny Tevi, Chairperson, National Human Rights committee, 2015
- Interview with Ombudsman, November 2015
- Interview with the officer in charge of annual return, office of the clerk of Parliament, May 2016

ONLINE MATERIALS

- ‘Power to Pardon: an analysis’ <http://www.lawteacher.net/free-law-essays/administrativelaw/power-to-pardon-an-analysis-law-essays.php> (Accessed: 30/06/16)
- 14 May 2012, Vanuatu leader says education the way to achieve sustainable development, <http://www.radionz.co.nz/international/pacific-news/204542/vanuatu-leader-sayseducation-the-way-to-achieve-sustainable-development> (Accessed: 22/06/16)
- 5 August 2016, Concern over “acting” nature of PNG ombudsman appointment, <http://www.radionz.co.nz/international/pacific-news/310235/concern-over-acting-natureof-png-ombudsman-appointment> (Accessed: 25/07/16)
- Actus reus, <https://www.google.com/search?q=actus+rea&oq=actus+rea&aqs=chrome..69i57j0l5.1727j0j9&sourceid=chrome&ie=UTF-8#q=acus+reus> (Accessed: 14/07/16)
- Alatoi Ishmael Kalsakau, ‘The Birth and Rebirth of Law Reform Agencies: The Establishment of Vanuatu’s Law Reform Commission,’ 11 September 2008, [http://www.lawcommission.gov.vu/images/pdf/AG's_speech_addressing_the_need_for_a_VLC\(Kalsakau\).pdf](http://www.lawcommission.gov.vu/images/pdf/AG's_speech_addressing_the_need_for_a_VLC(Kalsakau).pdf) (Accessed: 8/07/16)
- Anita Roberts, Ombudsman suspended, http://dailypost.vu/news/ombudsmansuspended/article_7d4ff788-4790-5938-87cd-d591ca85d580.html (Accessed: 29/07/16)
- Appointment, https://www.google.com/?gws_rd=ssl#q=appointment (Accessed: 15/07/16)
- Australia and New Zealand Ombudsman Association, http://www.anzoa.com.au/assets/anzoa_media-release_essential-criteria-for-use-of-theterm-ombudsman.pdf (Accessed: 12/07/16)
- Australian Human Rights Commission, Know Your Rights: Age Discrimination <http://www.humanrights.gov.au/know-your-rights-age-discrimination> (Accessed: 30/07/16)

- Barry Lenson, 16 November 2012, Should there be a minimum education level for politicians?, <http://www.straighterline.com/blog/should-there-be-a-minimum-educationlevel-for-politicians/> (Accessed: 22/06/16)
- Commonwealth Ombudsman (2009) 'Australasia and Pacific Ombudsman Region Information Manual'

http://www.ombudsman.gov.au/data/assets/pdf_file/0020/26039/apormanual_20091009.pdf (Accessed: 26/04/16)

- Dave Howell, 18th December 2014, The Adoption and Children Act 2002, <http://www.courtroomadvice.co.uk/adoption-children-act-2002-overview.html> (Accessed: 8/07/16)
- Donald Paterson, 'Chronicle of the Months of Political And Constitutional Crisis in Vanuatu, 2014, 2015' <https://www.usp.ac.fj/index.php?id=19562> (Accessed: 12/07/16)
- Gregory Rawlings, Accountability and Oversight: The _ Machinery of Leadership Codes in the Pacific 2006 <https://dfat.gov.au/about-us/corporate/freedom-ofinformation/Documents/accountability-oversight-machinery-leadership-codespacific%20.pdf> (Accessed: 28/06/16)
- International Labour Organisation, <http://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang--en/index.htm> (Accessed: 28/06/16)
- Information Sharing Arrangement, https://www.ombo.nsw.gov.au/data/assets/pdf_file/0019/16561/Information-sharingarrangement-with-Anti-Discrimination-Board,-Legal-Services-Commissioner,-Health-CareComplaints-Commission-and-the-Privacy-Commissioner.pdf (Accessed: 27/05/16)
- JBook June 2016, <http://oca.judiciary.gov.ph/wp-content/uploads/2016/06/JBOOK-JUNE2016.pdf> (Accessed: 8/07/16)
- Jennifer Corrin and Don Paterson (eds), *Introduction to South Pacific Law* (2nd ed, 2007) https://books.google.vu/books?id=BVACHzdm-usC&pg=PA146&lpg=PA146&dq=Introduction+to+South+Pacific+Law,+Ombudsman&source=bl&ots=ScCf5tU-OJ&sig=hp5Ro2PMWLcKRubQKPI12Ud8BZA&hl=en&sa=X&redir_esc=y#v=onepage&q=Introduction%20to%20South%20Pacific%20Law%2C%20Ombudsman&f=falsehttps://books.google.vu/books?id=BVACHzdm-usC&pg=PA146&lpg=PA146&dq=Introduction+to+South+Pacific+Law,+Ombudsman&source=bl&ots=ScCf5tU-OJ&sig=hp5Ro2PMWLcKRubQKPI12Ud8BZA&hl=en&sa=X&redir_esc=y#v=onepage&q=Introduction%20to%20South%20Pacific%20Law%2C%20Ombudsman&f=false (Accessed: 20/04/16)
- Jenny Brice, In the modern work place, Age 50 is considered old, <http://www.theage.com.au/comment/time-to-rectify-costly-age-discrimination-in-theworkforce-20160301-gn73jq.html> (Accessed: 30/06/16)

□

- Judicial Review, https://www.google.com/?gws_rd=ssl#q=judicial+review+definition (Accessed: 12/06/16)
- Judiciary, <http://www.gov.ph/images/uploads/Judiciary-chart-July-021.jpg> (Accessed: 28/06/16)
- Law Reform Commission, <http://www.lawreform.ie/publications/issues-papers.428.html> (Accessed: 14/07/16)
- Lisa M storm, http://catalog.flatworldknowledge.com/bookhub/reader/4373?e=storm_1.0ch01_s05 (Accessed: 19/06/16)
- Mens rea, <https://www.google.com/search?q=actus+rea&oq=actus+rea&aqs=chrome..69i57j0l5.1727j0j9&sourceid=chrome&ie=UTF-8#q=mens+rea> (Accessed: 14/07/16)
- Micheal Ignatieff, *The Attack on Human Rights*, 2001 <http://www.michaelignatieff.ca/assets/pdfs/TheAttack.pdf> (Accessed: 10/06/16) □ Miranda Forsyth, 'The Legal Limits of a Presidential Pardon: case note on *Sope v The Speaker of Parliament of Vanuatu*' <https://www.usp.ac.fj/index.php?id=13250> (Accessed: 12/08/16)
- Miranda Forsyth, *Barak Tame Sope Maautamate v The Speaker of parliament: The Legal Limits of a MOU*, <https://www.google.com/webhp?sourceid=chromeinstant&ion=1&espv=2&ie=UTF-8#q=mou+AND+definition> (Accessed: 14/07/16)
- New Zealand Law Commission, <http://www.nzlii.org/nz/other/nzlc/report/R35/R35Appendix-2.html> (Accessed: 10/06/16)
- P. Imrana Jalal , *Legal Protection against Discrimination in Pacific Island Countries*, <http://www.equalrightstrust.org/ertdocumentbank/Jalal%20article.pdf> (Accessed: 30/06/16)
- Pacific Islands Legal Information Institute, http://www.paclii.org/cgi-bin/sinosrch.cgi?method=boolean&query=leadership+code+AND+regina&meta=%2Fpaclii&mask_path=sb%2Fcases%2FSBHC (Accessed: 10/05/16)
- Pacific Ombudsman Alliance (2013) 'Roles and functions of Ombudsman and current complaint mechanisms in Pacific islands' http://www.pacificombudsman.org/_data/assets/pdf_file/0013/2434/Roles_and_functions_ombudsman.pdf (Accessed: 26/04/16)
- Peak body seeks halt to misuse of the term Ombudsman, http://www.anzoa.com.au/assets/anzoa_media-release_essential-criteria-for-use-of-the-term-ombudsman.pdf (Accessed: 12/07/16)
- Policy, <http://dictionary.reverso.net/english-cobuild/policy%20paper> (Accessed: 14/07/16)

□

- Pranjal Shekhar, 'Power of President to Grant pardon: Indian Scenario', <http://www.lawctopus.com/academike/power-president-grant-pardon-indian-scenario/> (Accessed: 30/06/16)
- Presidential Pardon, <http://www.paclii.org/journals/fJSPL/vol07no1/16.shtml> (Accessed: 12/07/16)
- Professor Kim Lovegrove FAIB, *Tribunals explained along with their strengths and weaknesses*, <http://www.lsclawyers.com.au/elibrary/tribunal-book> (Accessed: 14/06/16)
- Same Seke, Solomon Islands Leadership Code Commission lacks adequate funds, 13th April 2015, <http://www.radioaustralia.net.au/international/radio/program/pacificbeat/solomon-islands-leadership-code-commission-lacks-adequate-funds/1435594> (Accessed: 10/05/16)
- Termination, https://www.google.com/?gws_rd=ssl#safe=active&q=termination (Accessed: 15/06/16)
- 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: 12/06/16)
- Thompson Marango, New Judge Appointed to Supreme Court, Vanuatu Daily Post http://dailypost.vu/news/new-judge-appointed-to-supreme-court/article_2db17510-0323-56a5-8cf7-c0d525b73242.html (Accessed: 28/05/16)
- Thomson Marango, Vanuatu's first Land Ombudsman has been appointed, http://dailypost.vu/news/vanuatu-s-first-land-ombudsman-has-been-appointed/article_cb3ed1da-b7e4-5585-b375-829761b854b1.html (Accessed: 11/07/16)
- Utilities Regulatory Authority, http://www.ura.gov.vu/index.php?option=com_content&view=article&id=14&Itemid=180&lang=en (Accessed: 11/07/16)
- Vanuatu Financial Services Commission, <https://www.vfsc.vu/services/> (Accessed: 11/07/16)
- Vanuatu National Statistics Office '2009 National Population and Housing Census' www.vnso.gov.vu (Accessed: 12/07/16)
- Victorian Ombudsman (2007) 'Good Practice Guide: Victorian Ombudsman's Guide to complaint handling for Victorian Public Sector Agencies' <https://www.ombudsman.vic.gov.au/getattachment/Education/Workshops/Complainthandling/Complaint-handling-good-practice-guide-Dec-2012.pdf.aspx> (Accessed: 12/05/16) □ Wood, J.T.D (no date) *Leadership Codes and Corruption Prevention*. Available at:

□

<https://dfat.gov.au/about-us/corporate/freedom-of-information/Documents/leadershipcodes-corruption-prevention.pdf> (Accessed: 22/06/16)

REPORTS

- Ombudsman and Leadership Code review Committee- Republic of Vanuatu, Report of the Ombudsman Act and the Leadership Code Review Committee – August 2004
- The MacDowell Report
- Public Report on the Vanuatu Fire Service failure to put out the fire on 6 May 1998 at Paris Shopping, Snoopys, Au Peche Mignon and Frank King Tours, May 12 1999
- The Ombudsman Act No 27 of 1998 and Leadership Code Act No. 2 of 1998, Submitted to the Honorable Willie Oli, Minister for the Comprehensive Reform Program, January 24, 2002
- The Ombudsman Office (Vanuatu), Ombudsman Legislative Proposal Policy Paper Attachment 4: Changes to the Leadership Code Act (The Code), 2014
K.W. Wiltshire, 'Independent Review of the Office of the Ombudsman', (2002)

□

STATUTES

- *Adoption Act 1958* (UK) http://www.paclii.org/vu/legis/vu-uk_act/aa1958137/ (Accessed: 8/08/16)
- *Age Discrimination Act 2004* (Australia) <https://www.legislation.gov.au/Details/C2016C00525> (Accessed: 30/06/16)
- *Companies Act* [cap 191] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/ca107/ (Accessed: 11/08/16)
- *Constitution of the Republic of Fiji*, <http://www.paclii.org/fj/Fiji-Constitution-English2013.pdf> (Accessed: 11/08/16)
- *Constitution of Solomon Islands 1978*, http://www.paclii.org/sb/legis/consol_act/c1978167/ (Accessed: 11/08/16)
- *Constitution of the Independent State of Papua New Guinea 1975*. http://www.paclii.org/cgi-bin/sinodisp/pg/legis/consol_act/cotisopng534/cotisopng534.html?stem=&synonyms=&query=%22conflict%20of%20interest%20%22 (Accessed: 20/08/16)
- *Constitution of the Republic of Vanuatu 1980*, http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed on the 14th July 2016).
- *Criminal Code 1986* (PNG) http://www.paclii.org/cgi-bin/sinodisp/pg/legis/PGconsol_act_1986/cca115/index.html?stem=&synonyms=&query=%22criminal%20code%20%22 (Accessed: 30/05/16)
- *Human Rights Decree 2009*(Fiji) http://www.paclii.org/fj/promu/promu_dec/hrcd2009280/ (Accessed 8/06/16)
- *Leadership Code (Alternative Penalties) Act 1976* (Papua New Guinea), http://www.paclii.org/pg/legis/consol_act/lcpa1976339/ (Accessed: 8/08/16)
- *Leadership Code (Further Provisions) Act 1999* (Solomon Islands) http://www.paclii.org/cgi-bin/sinodisp/sb/legis/sub_leg/lcpa1999lcp20001801999865/index.html?stem=&synonyms=&query=leadership%20code (Accessed: 20/05/16)
- *Leadership Code Act* [Cap 240] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/lca131/ (Accessed: 10/05/16)
- *Leadership Code Act 2008* (Tuvalu), http://www.paclii.org/tv/legis/consol_act_2008/lca131/ (Accessed: 10/08/16)
- *Members of Parliament (Vacation of Seats) Act* [CAP 174] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/moposa362/ (Accessed: 12/08/16)
- *Ombudsman (Further Provisions) Act 1996* (Solomon Islands) http://www.paclii.org/sb/legis/consol_act/opa349/ (Accessed: 10/05/16)

- *Ombudsman (Komesina o Sulufaiga) Act 2013* (Samoa), http://www.paclii.org/ws/legis/consol_act/oosa2013295/ (Accessed: 11/08/16)
- *Ombudsman Act 1974* (New South Wales, Australia), <http://www.legislation.nsw.gov.au/#/view/act/1974/68> (Accessed: 11/08/16)
- *Ombudsman Act 1975* (New Zealand) <http://www.legislation.govt.nz/act/public/1975/0009/187.0/DLM430984.html> (Accessed: 11/05/16)
- *Ombudsman Act 1976* (Australia) http://www.austlii.edu.au/au/legis/cth/consol_act/oa1976114/s36.html (Accessed: 16/05/16)
- *Ombudsman Act 1984* (Cook Islands) http://www.paclii.org/ck/legis/num_act/oa1984114 (Accessed: 10/05/16)
- *Ombudsman Act 2001*(Queensland) <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/O/OmbudsA01.pdf> (Accessed: 15/05/16)
- *Ombudsman Decree 1987* (Fiji) http://www.paclii.org/fj/promu/promu_dec/od1987127 (Accessed: 10/05/16)
- *Organic Law on the Advisory Committee on the Power of Mercy* (Papua New Guinea) http://www.paclii.org/cgibin/sinodisp/pg/legis/consol_act/olotacotpom556/olotacotpom556.html?stem=&synonyms=&query=advisory%20committee%20AND%20power%20of%20mercy (Accessed: 12/08/16)
- *Organic Law on the Duties and Responsibilities of Leadership* 1998 (Papua New Guinea) http://www.paclii.org/pg/legis/consol_act/olotdarol528/ (Accessed: 11/05/16)
- *Organic Law on the Ombudsman Commission* No. 913 of 9998, http://www.paclii.org/cgibin/sinodisp/pg/legis/PG-consol_act_1986/cladp3401/index.html?stem=&synonyms=&query=%22organic%20law%20on%20the%20ombudsman%20commission%20%22 (Accessed: 19/08/16)
- *Penal Code* [Cap 135 (Vanuatu) http://www.paclii.org/vu/legis/consol_act/pc66/ (Accessed: 12/08/16)
- *Proceeds of Crime Act* [Cap 284] (Vanuatu) http://www.paclii.org/vu/legis/consol_act/poca160/ (Accessed: 12/08/16)
- *Public Interest Discloser Act* 2013 (Australia) http://www.austlii.edu.au/au/legis/cth/num_act/pida2013295/ (Accessed: 11/05/16)
- *Public Prosecutors Act* [Cap 293] (Vanuatu), http://www.paclii.org/vu/legis/consol_act/ppa218/ (Accessed: 2/07/16)
- *Public Service Act* [Cap 246] (Vanuatu), http://www.paclii.org/vu/legis/consol_act/psa152/ (Accessed: 11/08/16)

- *Public Service Act 2004* (Samoa), http://www.paclii.org/ws/legis/consol_act/psa2004152/ (Accessed: 11/08/16)
- *The Ombudsman Act 1989* (Philippines), http://www.ombudsman.gov.ph/docs/republicacts/Republic_Act_No_6770.pdf, (Accessed: 28/06/16)
- *Witness Protection (Amendment) Act 2010* (Kenya) <http://www.embuni.ac.ke/images/Docs/KenyaWitnessProtectionAmendAct2010.pdf> (Accessed: 11/05/16)
- *Witness Protection Act 1995* (Australia) http://www.austlii.edu.au/au/legis/nsw/consol_act/wpa1995248/ (Accessed: 11/05/16)
- *Witness Protection Act 2006* (Kenya) http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/WitnessProtectionAct_No16of2006.pdf (Accessed: 11/05/16)

OTHER SOURCES

□ Information obtained from the Ombudsman’s Office, 13 May 2016 □
 Letter from Ombudsman Office, 13 May 2016.