



**Ombudsman Commission
of Papua New Guinea**

Discussion Paper

**Review of Enabling
Legislation**

November 2014

Table of Contents

Executive summary.....	5
Chapter 1: INTRODUCTION.....	7
Background.....	7
The scope of the Current Review.....	7
Purpose of the paper.....	8
Invitation.....	8
Chapter 2 – OVERVIEW OF THE OMBUDSMAN COMMISSION.....	9
Introduction.....	9
Establishment of the Commission.....	10
Appointment Committee.....	10
Acting appointments.....	11
Retirement Age.....	11
Qualifications for Commission members.....	12
Referral of Ombudsmen.....	13
Improving internal administration.....	13
Accessibility.....	15
Ombudsman Commission Accountability.....	16
Simplifying the delegations power.....	18
Chapter 3 – ADMINISTRATIVE INVESTIGATIONS FUNCTION.....	19
Introduction.....	19
Preliminary enquiries.....	19
Publication powers.....	20
Enforcing recommendations.....	20
Up-dating of penalties for offence provisions.....	22
Chapter 4 – DISCRIMINATORY PRACTICES FUNCTION.....	23
Introduction.....	23
Discriminatory Practices Legislation.....	23
Proposed Human Rights Commission.....	23
Chapter 5:- LEADERSHIP INVESTIGATIONS FUNCTION.....	25
Introduction.....	25
Role of the Ombudsman in Leadership investigation matters.....	25
Expanding Leadership jurisdiction.....	26
Positions currently covered by leadership code.....	26
Possible new positions.....	27
How best to include new positions?.....	27
Improving cooperation with other integrity organisations.....	28
What are integrity organisations?.....	29
Annual statement declarations.....	30
Compliance and Deterrence.....	31
Compliance with investigation requests.....	31
New powers.....	32
Up-date penalties.....	32
New offences.....	33
Simplification of prosecution.....	34
Chapter 6:- OTHER LEADERSHIP OVERSIGHT FUNCTIONS.....	35
Introduction.....	35
Exemptions to the Leadership Code.....	35
Recent proposals to change prohibitions.....	36
Relaxing restrictions on former leaders.....	38

Chapter 7:- STRENGTHENING THE LEADERSHIP CODE	39
Up-dating penalties for breach of the leadership code.....	39
Criminal convictions	39
Strengthening existing penalties	40
Dismissal from office.....	40
Increasing Alternative Penalties	41
Proceeds of Crime.....	42
Retaining jurisdiction after resignation or dismissal	42
Double jeopardy.....	43
Suspension	46
Standard of Proof	47
Evidentiary Rules.....	48
Chapter 8: THE LEADERSHIP TRIBUNAL	50
Permanent full-time or part-time tribunal	50
Simplify Tribunal composition	51
Use National Courts instead.....	52
Appendix 1.....	54
Appendix 2.....	56

Table of abbreviations

CPC	Constitutional Planning Committee
OAC	Ombudsman Appointments Committee
OC	Ombudsman Commission
OLDRL	Organic Law on the Duties and Responsibilities of Leadership
OLOC	Organic Law on the Ombudsman Commission

EXECUTIVE SUMMARY

The Ombudsman Commission of PNG was established by section 217 of the Constitution in 1975, with responsibility for overseeing public sector administration and enforcing the provisions of the Leadership Code. The two principal organic laws, the *Organic Law of the Ombudsman Commission* and the *Organic Law on the Duties and responsibilities of Leadership* were enacted at the same time. No public review of the roles or responsibilities of the Ombudsman Commission has been completed in the 39 years since independence.

The O'Neill Government has set as one of its key objectives, a review of the Ombudsman Commission's responsibilities with the aim of improving the efficiency and effectiveness of the organisation. This discussion paper is the first step in that review. It sets out a wide range of issues and asks a series of questions about if or how the legislation could be redrafted to assist the Commission to achieve its objectives. The suggestions contained in the paper, do not necessarily represent the views of the Ombudsman Commission itself, or the direction of the policy reform, but are designed to encourage a constructive discussion about the future responsibilities and powers of the Ombudsman Commission.

Responses to the Discussion Paper will assist in the development of a Policy Paper, which aims to strengthen the role of the Ombudsman Commission by ensuring that it has the necessary tools to continue to fulfil its Constitutional mandate into the future.

The issues raised in this paper cover the full range of the Ombudsman Commission's roles and functions and also discusses some broader changes to the Leadership Code processes. In chapter 2, possible changes to the internal administration of the Ombudsman Commission are discussed. Chapters 3 and 4 raise issues related to the Ombudsman Commission's administrative investigations role and its discriminatory practices jurisdiction. Chapters 5 through 7 look at the Ombudsman Commission's leadership code jurisdiction, while chapter 8 raises possible changes to the Leadership Tribunal.

Discussion points on internal processes in chapter 2 include changes to the qualifications and retirement age for Members of the Commission, simplifying the acting appointment process for Ombudsman, clarifying the roles of the three Ombudsman and senior officers, and improving the Commission's accountability mechanisms.

Chapter 3 looks at possible reforms aimed at improving the administrative investigations function, that is, the investigation of the internal practices and procedures of government departments and agencies. These include the addition of a new power to allow the Ombudsman Commission to raise issues with government agencies without first exercising its formal investigations power, and a simplification of the current publications power to allow the Ombudsman Commission greater freedom to publicise the conclusions of its investigations.

In chapter 4, the continuing role of the Ombudsman Commission in the discriminatory practices jurisdiction is discussed. In light of the proposed establishment of a Human Rights Commission, the question of whether the Ombudsman Commission should maintain this jurisdiction is discussed.

Chapters 5 and 6 deal with the Ombudsman Commission's powers and responsibilities under the Leadership Code. Chapter 5 raises a number of issues to do

with the Ombudsman Commission's investigations of breaches of Leadership Code, such as increasing the ability of the Commission to share information about criminal conduct with other law enforcement agencies, providing the Commission with new powers to allow investigations to progress more quickly, and up-dating the penalties that apply for a failure to comply with a summons during an Ombudsman Commission investigation. One significant change that is suggested is the introduction of a new offence for failure to submit annual statements. This would allow the Ombudsman Commission the option of prosecuting leaders who fail to submit their annual statements in the Courts, where a fine or prison sentence could be imposed, rather than using the Leadership Tribunal.

Chapter 6 considers the Ombudsman Commission's role in granting exemptions from the prohibitions on Leaders conduct under the Leadership Code. These restrictions, which are designed to ensure that Leaders are not placed in a position where they may have a conflict of interest between their personal and public responsibilities, have been criticised by some Leaders in recent years. The paper considers whether other models for limiting the possibility of conflicts of interest are better suited to PNG in the twenty first century.

Substantive changes to the Leadership Code are discussed in chapter 7, starting with suggestions for strengthening the current penalties for breaching the Code. These include extending the period of time that a Leader can be excluded from office from the current three year term, expanding the range of positions covered by the exclusion from elected positions to all leadership positions, and increasing the fines from the current level of K1,000.

Other issues discussed in chapter 7 include extending jurisdiction of the Code to cover leaders who resign after a prosecution is commenced so that the Tribunal does not lose its jurisdiction and requiring Leaders to be suspended from office much earlier in the process. There is also a discussion about whether the higher than civil standard of proof and criminal evidentiary standards that are currently applied in Leadership Tribunal matters are appropriate or whether replacing them with the civil standards and procedures which are more consistent with the disciplinary nature of the Code.

Finally, chapter 8 raises a number of issues about the Leadership Tribunal itself. Whether the composition of the tribunal should be simplified and whether the tribunal should be made permanent or abolished altogether in favour of the National Court.

CHAPTER 1: INTRODUCTION

Background

This Discussion Paper has been developed to progress one of the three key strategic priorities for the Ombudsman Commission, a review of its enabling legislation. This priority arises out of the Government's Alotau Accord, which adopted the Commission's recommendation in its Brief to Government for a review of its laws and that the review should focus on changes that would improve the efficiency and effectiveness of the work of the Commission.

In recent years, the work of the Commission has at times been controversial. A series of high profile Leadership cases has raised questions in some quarters not just about the efficiency and effectiveness with which the Commission undertakes its role but more fundamentally about the appropriateness of the role itself.

A special Parliamentary Committee was established in 2005 to look into the work of the Ombudsman Commission. However the Committee was disbanded before it published a report. The results of the Committee's work will never be known.

In 2009, Mr Maladina, then the member for Esa'ala Open Electorate, introduced two bills into the Parliament aimed at amending the leadership jurisdiction of the Ombudsman Commission. Amendments to the Constitution were passed by the Parliament on 9 March 2010, and were certified by the Speaker in May 2012. These amendments were found to be invalid by the Supreme Court, in a decision handed down on 19 December 2013.

The second bill, which proposed amendments to the *Organic Law on the Duties and Responsibilities of Leadership*, was not passed by the Parliament and the Bill lapsed when the Parliament was dissolved before the 2012 elections. Both bills were the subject of extensive public debate, with public protests and demonstrations conducted against the proposed amendments.

Despite this recent debate, no public review of the Commission's role has been completed or published.

The scope of the Current Review

This review will focus on the Constitutional provisions and the two Organic Laws that underpin the primary roles of the Ombudsman Commission. The Constitution establishes the positions of Chief Ombudsman and two Ombudsmen, and sets out their primary roles and responsibilities. The *Organic Law on the Ombudsman Commission* (OLOC) provides for the internal governance of the commission and also its traditional Ombudsman role. The *Organic Law on the Duties and Responsibilities of Leadership* (OLDRL) governs the Commission's role in enforcing the Leadership Code contained in Part III Division 2 of the Constitution.

While there are a number of other subsidiary roles, including important constitutional powers, these functions do not take up the bulk of the Commission's time or resources and have not been the subject of public debate.

This Discussion Paper is primarily focused on ways in which the Commission can better achieve the responsibilities that have been granted to it under the Constitution and the Organic Laws. It will not venture into the broader questions about whether the Commission should continue to be responsible for both Organic Laws nor whether it should be given new responsibilities. These are matters that more properly fall within the responsibility of the government itself.

It is anticipated that Discussion Paper will help to inform further policy development and eventually legislative reform, aimed at improving the ability of the Commission to meet its Constitutional responsibilities.

Purpose of the paper

The purpose of this paper is to promote constructive discussion among interested parties about how the Ombudsman Commission can best meet its Constitutional responsibilities by changes to its jurisdiction and powers. This paper reviews the current responsibilities and powers of the Ombudsman Commission and asks a series of questions about how it could better achieve these responsibilities.

The paper contains a number of different views about the responsibilities of the Commission. None of these views should be taken to be the views of the Ombudsman Commission but rather reflect the range of opinions raised in previous debate. Their inclusion here is to promote discussion, and should not be taken as an indication of any of the final proposals or legislative reforms.

Your responses to the discussion paper will be used to develop a more detailed policy proposal about what changes, if any, are required to the Ombudsman Commission's functions and powers and eventually may result in changes to the Commission's legislation.

Invitation

Interested parties are invited to comment on this paper by writing to:

Office of Counsel
Ombudsman Commission of PNG
PO Box 1831 Port Moresby
NCD 121

Submissions should be forwarded to the Commission by the date set out in the covering letter. Every reasonable effort will be made to consider submissions received after that date however the need to complete the review by the deadline may not allow this to occur.

Information sessions will be run in conjunction with the submission period, and will be publicised at that time.

Inquiries can be directed to:

Ms Tabitha Suwae
Director Legal Services
Ombudsman Commission of PNG

CHAPTER 2 – OVERVIEW OF THE OMBUDSMAN COMMISSION

Introduction

The Ombudsman Commission began operation shortly after independence in 1975, one of the new independent institutions created by the Constitution. It was hoped that the Commission would assist in the development of the Independent State of Papua New Guinea by providing oversight of administrative decision-making in government, ensuring discriminatory practices laws were complied with, and assisting leaders to up-hold the high standards of behaviour expected of them. In relation to government decision-making the Constitutional Planning Committee envisaged it as the institution that would provide a quick flexible means of redress for aggrieved citizens suffering from administrative injustice but as an alternative not a replacement for the courts.

The Commission itself is created by Section 217 of the Constitution, which in Subsection (1) states “[t]here shall be an Ombudsman Commission, consisting of a Chief Ombudsman and two Ombudsmen.” The Constitution goes on in Section 218 to set out the purposes of the Ombudsman Commission as:

- a) to ensure that all governmental bodies are responsive to the needs and aspirations of the People; and
- b) to help in the improvement of the work of governmental bodies and the elimination of unfairness and discrimination by them; and
- c) to help in the elimination of unfair or otherwise defective legislation and practices affecting or administered by governmental bodies; and
- d) to supervise the enforcement of Division III.2 (*leadership code*)

The functions of the Commission, that is, the ways in which the Commission is to achieve the purposes are set out in Section 219 of the Constitution, and in greater detail in the *Organic Law on the Ombudsman Commission* (OLOC) and the *Organic Law on the Duties and Responsibilities of Leadership* (OLDRL).

The main function of the Commission is to investigate. It can investigate a complaint or act on its own initiative in matters of administrative defects, failures to comply with discriminatory practices legislation or breaches of the Leadership Code. As a result the Commission has been given extensive investigative powers, which allow the Commission to compel parties to provide information relevant to the alleged breach. It is also empowered to draw conclusions based on its investigations and take a range of actions based on those conclusions. These actions range from tabling reports of administrative failures in the Parliament through to referring Leaders to the Office of Public Prosecutions for a breach of the Leadership Code.

The Commission also has audit and approval functions in relation to Leaders. It is required to collect and review Leaders annual statements to ensure that Leaders are not in breach of the conflict of interest provisions of the Code. It can also grant exemptions from some aspects of the Code, these exemptions allow Leaders to conduct some activities that would normally constitute a breach of the Code.

Apart from the roles and functions set out in Sections 218 and 219, the Ombudsman shares the special reference power under Section 19 of the Constitution, which allows

questions of interpretation and application of Constitutional Laws to be raised in the Supreme Court.

The roles and functions of the Ombudsman Commission will be discussed in detail in the following chapters. The remainder of this chapter will look at the structure of the Commission itself and the internal administrative powers and procedures.

Establishment of the Commission

Subsection 217(1) of the Constitution establishes the Ombudsman Commission, comprised of three ombudsmen, a Chief Ombudsman and two Ombudsmen.

To be eligible for appointment as the Chief Ombudsman the Appointments Committee must be of the opinion that the person is of integrity, independence of mind, resolution and high standing in the community. One of the Ombudsmen must have appropriate professional accounting qualifications and experience, and the other must have appropriate administrative or legal qualifications.

Elected officials, political party office holders, bankrupts, persons of unsound mind, and those with criminal convictions are all excluded from holding office.

The term of appointment is 6 years for a PNG citizen and 3 years for a non-citizen¹.

Currently the retirement age is 55 years but can be extended to 60 years by the Governor-General on the advice of the Appointments Committee.

Appointment Committee

The Ombudsman Appointment Committee (OAC) is created by Subsection 217(2) of the Constitution. It is responsible for providing advice to the Governor-General on appointments to the Ombudsman Commission.

The Committee consists of

- The Prime Minister, as Chairman
- The Chief Justice
- Leader of the Opposition
- Chairman of the appropriate Permanent Parliamentary Committee, and
- Chairman of the Public Services Commission.

The quorum for the committee is all five members, and the practice of the committee has been to make decisions by consensus.

The Committee is responsible for both permanent and acting appointments to the Ombudsman Commission. It is also responsible for deciding whether to request the Chief Justice to appoint a Constitutional Office-holders Rights Tribunal to investigate the conduct of a member of the Ombudsman Commission.²

¹ OLOC s5

² See OLDRL ss 27(1)(b) & 27(7)(c). also *Organic Law on the Guarantee of the Rights and Independence of Constitutional Office Holders* ss 4 & 5

Acting appointments

Temporary vacancies in the Ombudsman Commission can be filled by acting appointments under Section 11 of the OLOC. A temporary vacancy occurs where a member is absent for more than 14 days or on the retirement or death of a member.

Currently all vacancies, whether temporary or permanent, are filled by the decision of the Ombudsman Appointments Committee. Due to the importance of the persons that make up the committee, significant delays in the appointment of Ombudsman can occur due to the unavailability of the members, which in turn can significantly impact on the work of the Ombudsman Commission.

While it is always appropriate for the OAC to advise on permanent appointments and acting appointments for Chief Ombudsman, it has been suggested that a simpler process be undertaken for acting appointments of Ombudsmen. Possible simplified models include:

1. Allowing the Chief Ombudsman to recommend to the Governor General the person to take on the acting appointment. This power could be limited to allow that only a senior member of the staff of the Commission could be nominated. (for example, the Secretary or one of the Directors)
2. Automatically filling a vacancy by specifying that a particular officer becomes the acting Ombudsman as soon as the position becomes vacant. For instance, the law could be amended to state that when an Ombudsman position becomes vacant the Secretary to the Commission (whether substantive or acting) becomes the acting Ombudsman.

In both these models, the OAC would maintain discretion to make a different acting appointment if it thought it appropriate, but until such time as the OAC made such a decision, the person appointed through the simplified process would be the validly appointed Ombudsman.

Such processes would reduce the frequency with which the OAC has to meet, and also reduce the amount of time in which the Ombudsman Commission has to operate with less than its full complement of Ombudsmen.

Discussion Questions

- 2.1 *What is your opinion on including a simplified appointment process for acting Ombudsman positions?*
- 2.2 *Do you have any suggestions of different possible processes?*

Retirement Age

In recent years there has been a discussion about whether mandatory retirement ages should be abolished or increased, as the early age of retirement has resulted in the departure of valuable senior staff while they still have years of service to the people of PNG. This loss of expertise and experience has not been easy to replace, leaving some organisations struggling to find high calibre senior management.

In 2010 the Section 7(1) of the *Organic Law on the Terms and Conditions of Employment of Judges*³ was amended to increase the retirement age from a maximum of 65 years to 72 years, in recognition that senior judges continue to provide valuable

³ Amended by *The Organic Law on the Terms and Conditions of Employment of Judges (Amendment) Law 2010*

service to the people of PNG. While this year the retirement age for public servants was increased from 60 to 65 years,

In other jurisdictions, age restrictions have been removed from statutes, as such provisions are now seen as discriminating against an individual on the basis of their age.

Discussion Questions

- 2.3 *Do you consider that the mandatory retirement age for Ombudsmen should be retained?*
- 2.4 *If you consider there should be an age limit, what age do you consider appropriate?*

Qualifications for Commission members

There are two issues related to the qualifications of members of the Commission. The first is whether the current requirements are still relevant and necessary, and the second is whether there are other requirements that should be considered.

The qualification requirement is set out in Section 4 of the Organic Law on the Ombudsman Commission, which states:

- (1) A person is not eligible for appointment as the Chief Ombudsman unless he is, in the opinion of the Committee, a person of integrity, independence of mind, resolution and high standing in the community.
- (2) One of the Ombudsmen shall have such professional accountancy qualifications and experience as, in the opinion of the Committee, is appropriate.
- (3) The other Ombudsman shall have such administrative or legal qualifications and experience as, in the opinion of the Committee, is appropriate.

There is a question about whether the qualifications for the ombudsman positions are too prescriptive, tying 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.

The second and related issue is whether there should be any additional requirements placed on the appointment of Members of the Commission. It has been suggested that a requirement that at least one of the Commission Members should be a woman has been raised. Such a requirement would be consistent with both the National Goal of 'equal participation of women citizens in all political, economic, social and religious activities' and the recent move to take proactive steps to promote women's participation. The Ombudsman Commission has had only two women Ombudsmen, Ms Jean Kekedo (1982 to 1986) and Ms Phoebe Sangetari (2007 to present) out of 18 past and present members of the Commission.

Recent legislative proposals have included provisions that promote the inclusion of the women in senior positions. As an example the 2011 Independent Commission Against Corruption Bill would require at least one member of the three member commission to be a female.⁴

⁴ Draft 2011 Proposed Law to Alter the Constitution Section 220A

Discussion Questions

- 2.5 *Do you consider that there is any need to change the qualification requirements for members of the Commission?*
- 2.6 *If so, what changes would you like to see?*
- 2.7 *In particular, would you support the inclusion of a requirement that at least one member was a woman?*

Referral of Ombudsmen

Currently where an Ombudsman is found to have breached the Leadership Code by the Ombudsman Commission, the matter is first referred to the Public Prosecutor and from the Public Prosecutor it is referred to the Ombudsman Appointments Committee (OAC). It is the Committee who decides whether to request the Chief Justice to establish a tribunal to investigate the matter, and also decides on whether the Ombudsman should be suspended from office. With most other leaders, the Public Prosecutor would make the request for a tribunal to be established.

In total, there are three senior politicians, three constitutional office-holders, the Chief Justice and the Public Prosecutor are involved in the process of deciding whether an Ombudsman should be referred to an administrative tribunal for breach of the Leadership Code. A further three judges hear the matter. In contrast, if an Ombudsman were charged with a criminal offence, only the Public Prosecutor would decide whether to proceed with the police charge, and the matter would be heard by a single judge.

The reason for this complex referral system is to ensure that constitutional office holders are not subject to harassment and intimidation through unmeritorious prosecutions. Ensuring that constitutional office holders are protected is entirely appropriate, however, the question has to be asked, whether the process has become too one sided. That is, whether there are so many protections for the individual constitutional officer holders that the interests of the people of Papua New Guinea in having good leadership are being overlooked.

It has been suggested that removal of the OAC from the process would reduce the delay in the decision making process, while still ensuring there was sufficient protection for the Constitution office holder from politically motivated persecution.

Discussion Questions

- 2.8 *Do you consider the current process of referring Ombudsman on leadership matters appropriate?*
- 2.9 *Do you think that applying the same referral process to Ombudsman (and potentially other constitutional office holders) as is applied to other leaders would undermine the independence of the Ombudsman Commission? How would this occur?*

Improving internal administration

The *Organic Law on the Ombudsman Commission* sets out the administrative structures and powers of the Ombudsman Commission. It provides for the procedures of the Commission under Section 14, requires the appointment of a Counsel and a Secretary under Section 25 and places control of Commission staff in the hands of the Commission itself under Section 26. Along with the delegation power in Section 15

these sections combine together to form the basic administrative arrangements for the Commission.

However, these provisions are quite short and provide only minimal guidance on the internal administration of the Commission. For instance, while the role of Secretary is mandated it is not defined. This has resulted in confusion about this role, does it equate to the role of a Departmental Secretary or is it more similar to a secretariat position? Similar questions have been raised about which office holder is responsible for administrative decision-making. Should the power to make administrative decisions rest with a single office holder, for example the Chief Ombudsman or perhaps the Secretary?

The combination of the minimal prescriptive provisions and the delegations power does provide to the Commission the opportunity to create its own internal structures that best meet its operational needs. However, the use of delegations has proven problematic for a number of reasons, and this has resulted in too many administrative matters being dealt with by the Ombudsmen themselves.

It has been suggested that greater definition of the various internal roles within the legislation would provide greater certainty and clarity in decision making, and in turn reduce administrative delay and duplication. Such reforms would be consistent with a move by government to better define the role of various public servants and statutory office holders. For example the role of Departmental Secretaries, is set out in Section 24 of the *Public Services (Management) Act 1995*, and the role of the Secretary to the Public Service Commission is set out in Section 17A of the same Act.

There are two basic administrative models that could be applicable to the Ombudsman Commission. The first model would see the Secretary defined as the Chief Executive Officer for the organisation with responsibility for the agency's administration. Decisions about recruitment, discipline, budgeting etc would all be made by the Secretary within policy guidelines that are established by the Commission itself. This model is similar to the Public Service Commission structure, or the proposed Independent Commission Against Corruption. In these agencies, the statutory office-holders' focus is on the substantive work of the agency, rather than the day-to-day administration.

Alternatively, the Chief Ombudsman could be designated the Chief Executive Officer, taking on the roles of both the Constitutional and Administrative Head of the organisation. The position of Secretary would no longer be required and could be removed from the OLOC. There are a number of benefits to such a model. It allows clear lines of authority and delegation of responsibilities, and will potentially improve the administration of the agency as whole. This is the administrative model that the Commission has used for periods in the past however some people argue that its operation would be improved by its incorporation into the Organic Laws.

In both models, a clear distinction between the Constitutional and Administrative functions would need to be included in order to ensure that the Commission as a whole retained its responsibility for Constitutional matters.

Discussion questions

2.10 *Would you support changes to the OLOC that clarify the roles of the various office holders?*

2.11 *What model do you consider would best meet the needs of the Ombudsman Commission? Or is there another model that you consider appropriate?*

Accessibility

The Ombudsman Commission was envisaged as a quick, informal way in which average Papua New Guineans would be able to access help in dealing with complaints about government administration. The CPC described it this way:-

‘We are concerned to ensure that the Commission should be in close contact with our people in all parts of Papua New Guinea, who it should serve. We propose that through close co-operation between these two institutions the establishment of branch offices of the Public Solicitor and of the Commission in a number of the provinces be co-ordinated.’⁵

The CPC’s vision of co-operation between the two organisation’s has not eventuated, instead the Ombudsman Commission has opened separate offices – a head office in Deloitte Tower in the commercial district of Port Moresby, and three regional offices, in Kokopo, Lae and Mount Hagen. It also conducts a range of outreach activities.

More recently, it has sought to take advantage of the expansion of mobile phone infrastructure in PNG by looking to establish a free call service. This would allow much greater access for remote communities to Ombudsman Commission services. At the time of writing, the free call service is not yet operating.

While it is difficult to mandate accessibility in legislation, it has been suggested that the Ombudsman Commission could be required to publish and maintain a Client Service Charter. Service charters are used to set out the standards of service that a client can reasonably expect from an agency, such as the time a person can expect to wait before receiving a reply to a complaint. It can also be used to set out the frequency with which Commission staff visit each of the provinces. In fact, it could contain a wide range of service measures.

Service charters work best where the agency is required to publish its achievements against the set standards. This could be done annually as part of the Annual Report, or more frequently, through on-line or other reporting mechanisms. Service charters can transform agencies by refocusing their attention on the needs of the clients, making the agencies more responsive and effective. However, charters are only as good as the agency’s commitment to the process, where an agency does not set useful targets, or does not report its outcomes against its objectives, little will be achieved.

Discussion Questions

- 2.12 *Do you consider that you have reasonable access to the Ombudsman Commission to make a complaint? How do think the Commission could improve its accessibility?*
- 2.13 *Do you consider that there should be a legislative provision requiring the Ombudsman Commission to ensure increased accessibility?*
- 2.14 *Do you think that the imposition of a service charter requirement on the Commission would improve the service provided, especially in regional and remote areas?*

⁵ CPC ch 11 para 80

Ombudsman Commission Accountability

The Ombudsman Commission is established as an independent governmental body by Section 217 of the Constitution. Its independence is guaranteed by Subsection 5 which states

In the performance of its functions under Section 219 (*functions of the Commission*) the Commission is not subject to direction or control by any person or authority.

Independence from government is further enhanced by requiring that the Ombudsmen are to be appointed by a specialist Ombudsman Appointments Committee, which is made up of a mix of senior politicians and Constitutional office holders. Ombudsmen are appointed for fixed terms and can only be dismissed from office for proven breach of the Leadership Code; if they are elected to public office, declared bankrupt, or found to be of unsound mind or sentenced to death or imprisonment.

However, independence from government in carrying out its functions does not equate to the Commission being unaccountable for its actions. The Ombudsman Commission, as with all government agencies, is accountable to the people of Papua New Guinea, and this accountability is expressed in a number of ways in its enabling legislation.

- Commission decisions are subject to review in the National or Supreme Court on the ground that it has exceeded its jurisdiction (Constitution s 217(6))
- It is required to publish a report at least annually, on its functions and workings of the Commission. This report is to be presented to the Head of State for presentation to the Parliament. (Constitution s220)
- The Commission is subject to the provisions of the *Public Finances (Management) Act 1995*, though there are a few exceptions. This places on the Ombudsman Commission the same responsibility as any other government agency who receives public funding, to ensure that those funds are spent appropriately.

Discussion Questions

- 2.15 *Do you consider that the Ombudsman Commission is sufficiently accountable to the people of PNG through these mechanisms?*
- 2.16 *Are there any other processes that you consider would assist with transparency and accountability?*

In recent years concerns have been raised about the operation of the Ombudsman Commission, especially in relation to delays in completion of its functions. Leaders have complained about the significant delays in finalising investigations under the Leadership Code and complainants have raised issues about the poor levels of service being provided.

Accountability has been further eroded by the Commission's failure to submit annual reports on time as required by Section 220 of the Constitution. The Commission is not alone among agencies in this failure, almost no government department or agency is up-to-date with its annual reporting requirement and neither the Parliament nor the relevant Ministers have sought to resolve this issue.

Mr Maladina's 2009 Bills to amend the OLDRL contained provisions that sought to address some of these concerns, by placing a time limit on leadership investigations of 4 years and by establishing a permanent Parliamentary Committee on the

Ombudsman Commission which was designed to oversee the work of the Commission and to consider both its annual report and its reports into administrative failures.

Placing a specific time limit on investigations is problematic, as leaders can currently escape prosecution by resigning their leadership position. The Commission keeps investigations active pending the return of the individual to another leadership position and then reactivating the investigation. This is consistent with the Commission's obligation to ensure that the highest standard of leadership. If a time limit was imposed, leaders could simply avoid prosecution by waiting out the time limit and then seeking re-election or reappointment to a leadership position. Changes to the status of leaders who are under investigation, discussed later, or increased prosecution of leaders under the criminal code may alleviate concerns about time limits.

Discussion Questions

- 2.17 *Do you consider that including time limits in the Organic Law will increase the number of investigations completed and prosecutions commenced?*
- 2.18 *Are there other strategies that you consider would be more effective?*

The creation of a Permanent Parliamentary Committee is already possible under the *Permanent Parliamentary Committees Act 1994* and it is unclear why an amendment to the Organic Law would be required. As with other Parliamentary Committees, it is not their creation but their operation that has proven problematic in the past. In the past, many Parliamentary Committees have failed to meet, or function due to a lack of quorum. This failure of Parliamentary Committees to function has significantly reduced transparency in government and often allowed government departments and agencies to operate with impunity.

Another model for oversight of investigatory bodies is the specialist committee, often made up of senior constitutional office holders, representatives of key non-government organisations and respected members of the public. Their role would be to meet regularly in public to consider reports and provide guidance on policy matters. This would provide greater transparency to the work of the Commission and allow members of the public to raise any concerns that they have with working of the Commission.

However, as with the Parliamentary Committee, the success of such an advisory body will depend on it fulfilling its functions. Even where the committee meets, there is still a need to ensure that its recommendations are considered by government and the Parliament. Without political engagement, it is unclear how effective such a committee would be. Furthermore, too much reliance on other Constitutional office holders may place unrealistic demands on these offices. Senior office holders are already expected to fulfil a range of functions in addition to than their primary role.

Discussion Questions

- 2.19 *Do you support the creation of the Permanent Parliamentary Committee on the Ombudsman Commission?*
- 2.20 *Are there other types of oversight that you consider would be more effective?*

Simplifying the delegations power

Section 15 of the OLOC provides for delegation of the Ombudsman Commission's powers in the following terms:

- (1) The Commission may, with the prior approval of the Prime Minister, by instrument in writing under the hand of the Chief Ombudsman, delegate to any member or officer of the Commission all or any of its powers and functions (other than this power or function or any prescribed power or function) so that the delegated powers and functions may be exercised and performed by the delegate in relation to the matters or class of matters specified in the instrument of delegation.
- (2) Every delegation under Subsection (1) is revocable, in writing, at will, and no such delegation affects the exercise of a power or the performance of a function of the Commission.

The ability of Commission to delegate its powers is an important management tool, allowing the Commission to efficiently and effectively manage the large number of matters that are directed to the Commission on a daily basis. Without this power, the Members of the Commission would quickly be overwhelmed by requests for assistance. By delegating some of its powers to its staff, subject to strict oversight, the Commission is able to undertake a wide range of investigations simultaneously.

Unlike most delegation provisions, the Ombudsman Commission's power to delegate is constrained by the need to obtain the Prime Minister's prior approval. This has proven to be a serious stumbling block to the timely amendment of the Commission's discretions, resulting in some delegations becoming obsolete over time.

Simplification of the delegation process to remove the need for prior Prime Ministerial consent would be consistent with most other delegations provisions and assist in the effective management of the work of the Commission.

Discussion Question

2.21 *Would you have any concerns about removing the Prime Minister from the approval process for Ombudsman Commission delegations?*

CHAPTER 3 – ADMINISTRATIVE INVESTIGATIONS FUNCTION

Introduction

On a practical level, the vast majority of complaints received by the Ombudsman Commission are about failings of government departments and agencies. Whether these complaints relate to an agency's failure to respond to a request, poor service delivery, failings in staff and contract management, or any of a wide range of issues, they are all dealt with under the *Organic Law on the Ombudsman Commission* (OLOC). This law sets out the Ombudsman Commission's traditional jurisdiction, which is to assist individuals in their dealing with government bureaucracy, and to work with government agencies to improve the administration of government services.

The OLOC deals with the first three purposes as set out in section 218 of the Constitution, through a complaints handling function that is set out in Part III of the OLOC. This allows the Commission to investigate the conduct of any government department or agency and their employees, either based on a complaint from an individual or on its own initiative. Where the Commission considers it appropriate it may publish a report on the investigation, including any findings and recommendations to improve the work of the agency.

The Commission is not required to investigate every complaint that it receives, it is granted the power to decline to investigate matters where the complaint falls within one of the exceptions listed in Subsection 16(3) of the OLOC. This discretion is a necessity, as the number of complaints received by the Commission far outweighs the commission's resources. As a result the Commission has prioritised for investigation complaints that raise either serious individual breaches or complaints that highlight systemic failures in government administration. Many other cases are dealt with informally, without the use of formal investigative powers.

Acceptance of the Commission's recommendations by an agency is not compulsory. At times, Commission recommendations have not been adopted, and this has led to calls for the Commission's recommendations to have greater weight.

The administrative investigations function has generally worked well over the past 38 years, however a number of issues have arisen over time which suggest that minor changes to the current working arrangements may produce significant improvements in the Ombudsman Commission's outcomes.

Preliminary enquiries

Currently, OLOC only allows the Commission to either decline to investigate or investigate, there are no intermediary steps allowed. Yet there are many complaints that do not warrant formal investigation but would benefit from mediation between the complainant and the agency, it may be that there is a misunderstanding between the two parties. The only way that the Commission can deal with such a situation is to commence a formal investigation, which can cause considerable delays due to the formality involved.

In a number of overseas jurisdictions this issue has been resolved by granting the Ombudsman a preliminary enquiry power. This allows Ombudsman staff to contact authorised officers within other government agencies directly, to try to informally

resolve an issue. This process normally occurs by telephone, allowing quick resolution of minor matters.

A preliminary enquiries power would need to be carefully defined to ensure that it did not replace the formal investigations functions, which contains protections for agencies and staff. For instance, in the Australian Ombudsman's Act, preliminary inquiries are limited to determining whether a matter is within the Ombudsman's jurisdiction, and whether the Ombudsman should exercise its discretion not to investigate. If they decide to investigate they must use their formal powers.

Discussion Question

3.1 What advantages and disadvantages do you see to providing the OC with preliminary inquiry powers?

Publication powers

The Organic Law allows for publication of administrative investigations under Section 23 to a list of senior government officials, and through the Speaker the report can be tabled in the Parliament. Once the report is tabled it is a public document, the Parliament may also decide to debate the report's findings and recommendations. The Commission has no power to publish its reports directly to the public.

When the OLOC was originally written, it was envisaged that the provision of reports to senior public officials and the Parliament would be sufficient to ensure that the Commission's findings were widely discussed and that steps would be taken to improve the quality of government administration.

This has not happened. Reports have often not been tabled in a timely manner, if at all, and the Parliament is not debating the reports. The result is that the persuasive power of the reports is lost, the public is not made aware of the issues and the Commission's ability to influence change in the administration of government agencies is diminished.

It is suggested that the Ombudsman Commission be given a power to make public any report, subject to the need to provide procedural fairness to all parties, without having to wait for the reports to be tabled in the parliament. This would allow for reports to be released in a timely manner, and surrounded by whatever publicity the Commission considered appropriate to ensure that the findings and recommendations received adequate consideration. Discretion to table reports in the Parliament could remain, but it would not be the only, or even the primary way in which Ombudsman Commission reports were released to the public.

Discussion Question

3.2 Do you have any concerns if the Ombudsman Commission could publish its reports without first tabling them in the Parliament?

Enforcing recommendations

Recommendations that are made by the Ombudsman Commission are, by definition, not enforceable. They rely on the strength of the investigation and the logic of its conclusions to persuade leaders, both politicians and public servants, of their merits. The value of making recommendations is that it enables the Ombudsman and the agency to work cooperatively together to improve the government administration,

which is consistent with the constitutional mandate of the Commission to ‘help in the improvement of the work of government bodies’.

However the Ombudsman Commission is not the sole source of information about how to improve service delivery, the Auditor-General, the Public Service Commission and the Department of Personnel Management are among a number of government agencies that provide advice. It is the Government that must decide how to use all the advice it is provided to help it improve service delivery. It is the Government that is accountable to the people of PNG at election time for the quality of the service it provides.

The Ombudsman Commission has the power under Subsection 22(3) of the OLOC to require the relevant minister, or the Permanent head or statutory head to respond to a report’s recommendations, specifying what if any steps they intend to take to implement the recommendations. There is no penalty for failing to respond, and the Ombudsman Commission has had little success in obtaining responses.

As a result, some people have suggested that the Commission should be given the power to enforce its recommendations. This call is strongest where a Commission report has found that some-one has acted unlawfully or unethically and has recommended that the person be dismissed or charged with a criminal offence.

One of the difficulties with requiring an agency to comply with an OC report, is that the OC does not have management responsibility for that organisation, and its recommendations may have unintended consequences. Even in the most straight forward case of requiring that a person be terminated for misconduct, could result in the agency becoming involved in legal action for wrongful dismissal. The OC would not have to deal with this issue, but the agency’s management would be faced with a whole range of new issues that may have been better dealt with another way. It is not hard to imagine how many more unintended consequences could occur if an agency was required to amend its practices and procedures.

While the Ombudsman Commission does have expertise in government administration and change management, organisational improvement cannot be directed from outside, it must be undertaken by the agency itself for it to be effective and sustainable.

Alternative methods for improving compliance may include:-

1. improved publicity around OC findings, resulting in increased community pressure for change
2. increased OC interaction with Ministers and senior public servants to promote improvements. Currently this interaction is limited by the perception that such interaction could compromise the independence of the Commission in relation to Leadership investigations, and from reluctance on the part of Leaders who fear that such interaction is in reality a leadership investigation.
3. a Parliamentary Committee to oversee implementation of Commission recommendations. Parliamentary Committees are used in a number of countries to oversee the work of the Ombudsman, providing a formal public space in which agencies can discuss and explain their responses to an Ombudsman’s finding. A permanent parliamentary committee would have the power under the *Permanent Parliamentary Committees Act 1994* to compel witnesses to respond to report

recommendations but it would not have the power to require the agency to comply.

While a parliamentary committee can be a very effective method for improving both response rates to recommendations, and their implementation, it does require a parliamentary committee to operate effectively.

Discussion Question

3.3 What steps do you think could be taken to improve the implementation rates of Commission reports?

Up-dating of penalties for offence provisions

Part VII of the *Organic Law on the Ombudsman Commission* creates the following offences in relation to administrative investigations:

- failure to attend or produce documents,
- refusing to give sworn evidence,
- contempt of the Commission, and
- giving false evidence.

The maximum penalty of all of these offences, with the exception of contempt, is three months imprisonment or K500.

The penalties were created in 1976 and the fine amount has not been up-dated since that time. There have been on-going calls for the offence penalties to be updated. As similar issues with the penalty provisions under the Leadership Code, this issue is discussed in chapter 6.

CHAPTER 4 – DISCRIMINATORY PRACTICES FUNCTION

Introduction

Section 219(1)(c) of the Constitution provides the Commission with the function to investigate “either on its own initiative or on complaint by a person affected, any case of an alleged or suspected discriminatory practice within the meaning of a law prohibiting such practices”.

The discriminatory practices provision does not provide the Ombudsman Commission with a broad jurisdiction to deal with discriminatory practices. There is no general grant of power to investigate discriminatory practices, and there is no definition to guide the Commission on what constitutes discriminatory practice. Instead, the Commission’s jurisdiction is limited to what is determined to be discriminatory practices by ‘a law prohibiting such practices’.

This is consistent with the CPC’s stated aim of improving the effectiveness of the then Discriminatory Practices Ordinance by providing a watchdog body that could oversee the enforcement of such legislation.

Discriminatory Practices Legislation

The Discriminatory Practices Ordinance became the *Discriminatory Practices Act* (Chapter 269) on independence. It deals with discrimination on the basis of colour, race or ethnic, tribal or national origin, by the proprietor of a licensed premise or vehicle. It further prohibits the incitement of racial hatred in publications or statements made in public places.

The *HIV/Aids Management and Prevention Act 2003* is the only other piece of legislation that prohibits discriminatory practices. It prohibits conduct that is detrimental to a person with or affected by HIV or Aids in a wide range of activities, such as their employment and the provision of services by both public and private providers.

Due to the narrow scope of the jurisdiction provided by the relevant legislation, this jurisdiction has been little used by the Ombudsman Commission, and as a result the Commission has developed only limited expertise in the field.

Proposed Human Rights Commission

In recent years, the PNG government has been pursuing the establishment of a Human Rights Commission, which would have extensive powers to deal with complaints about breaches of human rights by both private and public sector organisations and individuals. It is understood that it would also include the ability to deal with complaints about discrimination by both public and private sector organisations on a broad range of grounds, such as gender, race, ethnicity, marital status, and disability.

The proposed creation of a new government body that would deal exclusively with Human Rights issues is an important development in the protection and promotion of the rights of all Papua New Guineans. However, it also raises the possibility that there would be an overlap between the jurisdiction of the Human Rights Commission and that of the Ombudsman Commission, allowing both organisations to investigate the same complaint.

Overlaps between agency jurisdictions are generally not desirable. They can raise confusion in the mind on the public about who has the power to deal with an issue,

can cause an inefficient use of resources where both agencies investigate the same matter, and potentially raise conflict between the two organisations about which agency should be dealing with a particular matter.

There are two ways in which these issues can be avoided. The first and the most preferred option is to define each agency's jurisdiction in such a way that there is no overlap between the two. For instance, removing discriminatory practices from the Ombudsman Commission and leaving the responsibility solely with the new Human Rights Commission. Alternatively, it is possible to give one agency priority over the other. For example, the Ombudsman Commission could be required to forward all complaints it receives about discriminatory practices to the Human Rights Commission, and only where the Human Rights Commission declines to investigate a matter would the Ombudsman Commission have the power to exercise its jurisdiction.

It should be noted, that even if the specific discriminatory practices jurisdiction was removed from the Ombudsman Commission, it would retain its general jurisdiction over the Human Rights Commission. This would allow the Ombudsman Commission to investigate complaints about the Human Rights Commission's handling of complaints and its administrative processes more generally.

Discussion Questions

- 4.1 Do you think that the Ombudsman commission should maintain a jurisdiction over discriminatory practices?*
- 4.2 If you do, how should the jurisdiction of the two organisations be defined to ensure that discriminatory practices complaints are dealt with effectively?*

CHAPTER 5:- LEADERSHIP INVESTIGATIONS FUNCTION

Introduction

The fourth purpose of the Ombudsman Commission, as set out in Section 218 of the Constitution, is to supervise the enforcement of the leadership code. This is given effect through the provisions of the *Organic Law on the Duties and Responsibilities of Leadership* and the Leadership Code provisions of the *PNG Constitution*. The discussion of the Commission's leadership function covers the next two chapters. This chapter deals with its powers to investigate alleged breaches the Leadership Code. The following chapter covers other issues.

The CPC report places great importance on the role of leaders in ensuring that the then new State of PNG would prosper. "No amount of careful planning in government institutions or scientific disciplines will achieve liberation and fulfilment of the citizens of our country unless the leaders – those who hold official positions of power, authority or influence – have bold vision, work hard and are resolutely dedicated to the service of their people."⁶

This resolute dedication to the service of the people, according to the CPC report, requires leaders to place the interests of the people above their own personal interests. At times requiring leaders to sacrifice personal advantage in favour of the interests of the State or in the words of the CPC report:

In order to ensure that Leaders were not tempted the leadership code was designed 'so that the leaders will not be in a position where their private interests conflict with their public responsibilities'⁷

This emphasis on the importance of good leadership led to the inclusion of the Leadership Code in the Constitution,⁸ which sets out the high standards of the behaviour required of persons who hold important public offices. It also establishes an enforcement mechanism, with the Ombudsman Commission responsible for investigating potential breaches, and an adjudication mechanism in the form of a specialist tribunal.

Role of the Ombudsman in Leadership investigation matters

The Ombudsman Commission is authorised under Subsection 28(1)(f) of the Constitution and Section 17(c) of the OLDRL to conduct investigations, either on its own initiative or on complaint by any person, into any alleged or suspected misconduct in office by a person who is a leader. Leaders are defined by Section 26 of the *Constitution*.

Section 18 of the Organic Law gives the Ombudsman Commission a discretion not to investigate certain complaints, but where it chooses to investigate it must do so in private (Section 20(1)). The Ombudsman Commission has the power to summon witnesses and documents, and witnesses have the same obligations as if they were appearing in the National Court.

There is no obligation on the Ombudsman Commission to inform a person that they are subject to a leadership investigation. However, where the Ombudsman

⁶ CPC Report 1974, ch 3 para 1

⁷ Ibid para 16

⁸ Part III, Division 2

Commission forms the view that there has been a breach, the relevant leader must be provided with an opportunity to respond to the allegations, this is commonly referred to as a ‘right to be heard’ under Subsection 20(3) of the OLDRL.

If, after the leader has been given an opportunity to respond, the Ombudsman Commission is of the opinion that there is evidence of misconduct, the Ombudsman Commission must refer the matter to the Public Prosecutor. The Public Prosecutor then decides whether to prosecute him before the Leadership Tribunal under Subsection 20(4) of the OLDRL. Where the Public Prosecutor fails to refer a matter to the appropriate Tribunal within a reasonable time the Commission may make the referral directly.

The question of what constituted a ‘failure to prosecute’ was discussed in *Re: Public Prosecutor’s power to request the Chief Justice to appoint a Leadership Tribunal* (2008) SC1011. The court found that the request needed to be made within a reasonable time, and defined that as between 1 and 4 months unless there were exceptional circumstances.⁹ A failure to make a decision within this time, does not statute bar the Public Prosecutor from later taking action but rather permits the Ombudsman Commission to exercise its own discretion under Section 27(3) of the OLDRL to refer the matter directly to the appropriate Tribunal.

Expanding Leadership jurisdiction

Positions currently covered by leadership code

The Leadership Code applies to each individual who occupies a position listed in Subsection 26(1) of the Constitution, which states:

- a) the Prime Minister, the Deputy Prime Minister and the other Ministers; and
- b) the Leader and Deputy Leader of the Opposition; and
- c) all other members of the Parliament; and
- d) members of Provincial Assemblies and Local-level Governments; and
- e) all constitutional office-holders within the meaning of Section 221 (*definitions*); and
- f) all heads of Departments of the National Public Service; and
- g) all heads of or members of the boards or other controlling bodies of statutory authorities; and
- h) the Commissioner of Police; and
- i) the Commander of the Defence Force; and
- j) all ambassadors and other senior diplomatic and consular officials prescribed by an Organic Law or an Act of Parliament; and
- k) the public trustee; and
- l) the personal staff of the Governor-General, the Ministers and the Leader and Deputy Leader of the Opposition; and
- m) executive officers of registered parties as defined by Section 128 (“*registered political party*”); and
- n) persons holding such public offices as are declared under Subsection (3) to be offices to and in relation to which this Division applies.

Section 26(3) of the Constitution provides that an office can be categorised as a leadership position through an Organic Law or Act of Parliament. A list of legislation which creates leadership code obligations and the offices covered can be found in Appendix 1.

⁹ Para 116

A number of positions have been deemed to be leadership positions by the Ombudsman Commission itself, exercising its powers under Section 26(4) of the Constitution, which states “In the event of doubt as to whether a person is a person to whom this Division applies, the decision of the Ombudsman Commission is final.” A list of all these positions can be found in Appendix 2.

Where a person ceases to occupy one of these positions they cease to be leaders for the purposes of the Leadership Code or disciplinary proceedings.

Possible new positions

The issue of whether there are other positions that need to be covered by the Leadership Code has been raised. Concerns have been expressed that a number of provincial and district level officials are not covered by the leadership code despite being responsible for spending decisions under the District Service Improvement Program. The extension of the leadership code to district level officials would add new responsibilities to relatively junior government officials but it is argued that these new responsibilities are justified because of the large amounts of money that are now spent by these officials, up to K10 million each year.

Discussion Questions

- 5.1 *Do you think that the scope of the leadership code should be expanded to cover other provincial level officials and some district level officials? If so, which officials should be covered?*
- 5.2 *Do you consider there are any disadvantages to expanding the scope of the leadership code?*

How best to include new positions?

As discussed above, there are several ways in which positions can be included under the leadership code. For instance, they could be listed in the Constitution, under a particular Act or Organic Law, or be declared by the Ombudsman Commission to be covered.

Each of these processes has strengths and weaknesses, legislative provisions allow appropriate parliamentary oversight, and ensure that the decision is publicly available to all. However, it is time and resource intensive, and may not be justified for individual cases. An Ombudsman Commission declaration is a faster and simpler process but does have the disadvantage of not necessarily being widely known and the decision itself may be difficult to access. These disadvantages are of particular concern where the decision covers a number of generic positions, such as Provincial Administrators, rather than a specific position, such as the Commissioner of Taxation. Ombudsman Commission declarations could be improved by the introduction of a publication requirement that allows for greater public awareness.

A third alternative could be to provide the Ombudsman Commission with a regulation making power specifically for expanding the scope of the leadership code. This would allow the Ombudsman Commission to continue to expand the code’s scope where appropriate, while maintaining parliamentary oversight and accessibility to the decision.

Discussion Questions

- 5.3 Do you think that the current ways of expanding the scope of the leadership code are adequate and or appropriate?
- 5.4 What are your views on providing a regulations making power to allow the Ombudsman commission to expand the scope of the leadership code?
- 5.5 What limits should be placed on such a power?

Improving cooperation with other integrity organisations

The *Organic Law on the Ombudsman Commission* provides that both the Members of the Commission and their staff are to maintain secrecy in respect of all matters that come to their knowledge in the exercise of their duties except where the Commission decides to disclose for the purpose of its investigation or in support of the findings or recommendations made in a report.

There is no similar provision in the *Organic Law on the Duties and Responsibilities of Leadership*, instead it provides that the investigations are to be conducted in private and any release of information from a leadership investigation is to the Public Prosecutor in the form of the referral.

The Commission has interpreted these provisions together as preventing it from sharing information with other integrity agencies, even where the information appears to indicate criminal conduct until such time as it either refers the matter to the public prosecutor or publishes an administrative report. The result is that information of criminal conduct is not referred to the police or other relevant agency for months or years after the commission has become aware of it, significantly delaying or compromising any further criminal investigation.

Similarly, many other government agencies have secrecy provisions in their legislation that prevent them from sharing information of breaches of the leadership code, where they discover the breach as part of their own investigations. For example, Section 142 of the *Police Act 1998* makes the following provisions regarding the secrecy of the information collected by Police officers in the course of their duties:-

- (1) Subject to Subsection (2), notwithstanding any other law, the Commissioner shall not make available to any person, not being a member of the Force or of a Police Promotions Selection Board—
- (a) any official record kept by the Force; or
- (b) any information obtained by a member of the force in his official capacity,
- that the Commissioner thinks should be privileged, unless for some special reason the Commissioner thinks it proper to make it available or a court of competent jurisdiction orders that it be made available.

There is clearly an important public policy imperative in ensuring that information that is collected by government agencies is not disclosed inappropriately or otherwise misused. This is especially the case where information is obtained by the use of coercive powers, such as the Ombudsman Commission's power to summons documents and require witnesses to answer questions. Still, this need to protect individuals' privacy must be weighed against the need to ensure that illegal conduct is identified and prosecuted. Failure to act against illegal conduct only allows further corrupt conduct to occur.

Discussion Questions

- 5.6 *Do you consider that it would be appropriate to allow the Ombudsman Commission and other integrity organisations to share information, where the information has been collected in the course of business, if the information raises real concerns that either a criminal act or a breach of the leadership code has occurred?*
- 5.7 *Do you think that agencies should be free to share information of criminal conduct when they become aware of the information rather than have to wait until the end of their own internal processes?*

What are integrity organisations?

It is not proposed that information should be able to be shared without any limitations. An important limitation, discussed above, is that the information must raise the real possibility that criminal conduct or a breach of the leadership code has occurred. The second limitation is that information should only be shared with other integrity organisations. The most obvious agency that the Ombudsman Commission would want to share information with is the Police, as they have the responsibility to investigate criminal conduct by any individual. The Ombudsman Commission, in contrast, has responsibility to investigate breaches of the leadership code, which is a non-criminal jurisdiction limited to the conduct of leaders.

However, Police are only one of a number of existing or proposed organisations that have responsibility for ensuring that the laws are upheld. Agencies that may fall within the definition of an integrity organisation include:

- Royal Papua New Guinea Constabulary
- Ombudsman Commission
- Office of the Public Prosecutor
- Internal Revenue Commission
- Customs Service
- State Solicitor
- Office of the Auditor-General; and
- Solicitor General.

Agencies that are currently being considered by Government include:

- Human Rights Commission, and
- Independent Commission against Corruption.

There have been calls for the inclusion of integrity organisations from foreign countries or international organisations. Sharing of information with such agencies may be useful, for instance, in cases where leaders have acted inappropriately whilst overseas, or misappropriated funds have been transferred to foreign jurisdictions. However, information sharing with such organisations is governed by international treaties, not by either the OLOC or OLDRL and therefore falls outside the scope of this review.

Discussion Questions

- 5.9 *Do you consider that it is appropriate that information about criminal or leadership matters be shared with the agencies listed?*
- 5.10 *Are there any agencies listed that you do not consider appropriate?*

5.11 *Are there other agencies that you would like to see included?*

Annual statement declarations

International experience indicates that a regime of financial declarations can be an effective tool in achieving good governance and reducing the opportunities for corrupt conduct. While disclosure cannot prevent those who are determined to act corruptly, it can be an effective deterrent for most people that are covered where the regime is implemented fairly and consistently and maintains a wide degree of public support. Currently, about three quarters of all countries require some form of disclosure but the nature of the requirement varies significantly across jurisdictions

PNG was an early adopter of this tool, including in the 1975 Constitution a requirement for the disclosure of financial statements by leaders. Leaders are required to provide a statement of their income and assets annually to the Ombudsman Commission under Section 4 of the *Organic Law on the Duties and Responsibilities of Leadership*. A failure to provide a statement, completed to the best of their knowledge, is a breach of the Leadership Code. These statements and the information given to the Ombudsman Commission cannot be revealed by the Ombudsman Commission except in very limited circumstances.

As a result, it is the responsibility of the Ombudsman Commission to assess the information contained in the statements, to determine whether there are any discrepancies in the information provided and identify any potential conflicts of interest.

This model has a number of advantages, it provides for disclosure by leaders which has been proven to be a reasonably effective deterrent to corrupt conduct, while at the same time protecting leaders' privacy by ensuring that the information cannot be released.

There also several disadvantages to the model. The general public has little access to information and must rely on an independent body, the Ombudsman Commission, to collect and assess the information. Depending on the resources and skills available to the Commission this may or may not occur, or may not occur consistently. A failure to manage the process effectively will undermine both its deterrent effect and public confidence in the disclosure regime and the Ombudsman Commission itself.

Secondly, the Commission is largely dependent on the information supplied by the Leader themselves to conduct their assessment. There are few independent sources against which the Commission can compare. If a leader consistently fails to declare assets or liabilities it is unlikely that the Commission would become aware of them.

Other countries have sought to address the need for disclosure differently. Some countries have focused on the risk of conflicts of interest and have therefore required leaders to provide information about the nature of their assets, directorships and business interests but do not require financial statements. Other schemes place a greater focus on anti-corruption issues by collecting financial information as a way of identifying unexplained increases in a leader's wealth. Currently, PNG collects information about both financial assets and positions and is therefore in a position to deal with either conflict of interest or unexplained wealth issues.

Alternative models of financial disclosure have also taken a stronger position on transparency by requiring public disclosure of all or some of a leader's financial declaration. Publication allows others to comment on the leader's statement, to advise

the relevant authority whether the information is accurate or if they believe that items have been excluded. It is also much more intrusive, exposing a leader's private financial lives to potential abuse, and possibly dissuading some wealthier people from seeking public office.

There is no perfect balance between the public interest in knowing what a leader's financial interests are, and a leader's right to privacy. While PNG has taken the position that leader's information should be kept private other countries have taken different positions on the balance between public and private interests. For instance the United States requires full public disclosure of very senior officials but not junior officials while in the UK Parliamentarians are required to file a report of all their interests but not their income and assets.

Alternatively, in some countries leaders are required to make full declarations to the relevant authority which then publishes a summary of each Leader's interest. For instance, Bolivia publishes a summary of a leader's annual statement with totals of assets and debts, while in Canada, the summary lists the assets held but not their values.

Modifying the current annual statement procedure to increase the level of transparency may be one way in which public scrutiny of the leader's interests could improve their accountability to the public but it does contain some risks, both for leaders and the Ombudsman Commission.

Discussion questions

- 5.12 *Do you consider that the current model of disclosure to the Ombudsman Commission is adequate?*
- 5.13 *If you would prefer greater public disclosure, what type of disclosure do you consider to be appropriate?*

Compliance and Deterrence

Compliance with investigation requests

The Ombudsman Commission is provided with considerable power, under both the OLOC and the OLDRL, to ensure that they can investigate a matter comprehensively and in a timely manner. For instance, under OLOC, Section 18 provides the Commission with the power to require the production of documents or persons to answer questions, where they relate to any matter being investigated. Non-compliance with such an order is an offence under Part VII of the OLOC, which states that failure to attend or produce documents, or refusing to give evidence are both offences, as is insulting or interrupting a proceedings of the Commission. Currently, the penalty if found guilty of one of these offences is K500 or imprisonment for three months. It is also an offence to give false evidence, which is equated to committing perjury in a court, with the same penalty provisions.

The OLDRL has the same information collecting powers, and the same offences for non-compliance (see Part VI). It also has an additional offence, 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. They may be guilty of an offence punishable by a K1000 fine or 12 months imprisonment.

There are a number of issues that arise in relation to compliance, firstly, does the Commission have sufficient powers to ensure that they can undertake their investigations efficiently and effectively, secondly, are the current penalties sufficient to ensure compliance, thirdly, are new offences required and finally, can the prosecution process be simplified to allow for more timely judgements.

New powers

In general, the Commission is satisfied with the current powers as they relate to investigations but there is some concern that it does not have sufficient powers to ensure that the information provided by leaders in their annual statements is accurate. All leaders are required to provide to the Commission a financial statement, setting out all their assets and liabilities once a year. These statements are checked by the Commission for possible conflicts of interest, or unexplained increases in wealth.

There may be a temptation by some leaders to undervalue, or mis-describe some of their assets in order to avoid detection. While the Commission can commence an investigation into unexplained changes in a leader's assets, the Commission does not have the power to obtain a valuation, or to gain access for the purpose of inspecting goods or other assets to assess the true value of the goods. For instance, the power could be used to require a leader to give an Ombudsman Commission appointed property valuer access to a property in order to allow the property valuer to properly assess the true value of the asset.

Such a power would be similar to a search power, and would be subject to similar protections to ensure that the privacy of leaders is not unduly interfered with, but it would allow for greater scrutiny of annual statements to occur.

Discussion Questions

- 5.14 *What is your opinion on providing the Ombudsman Commission with an inspections power?*
- 5.15 *Would it improve the Commission's ability to enforce the Leadership Code?*
- 5.16 *What protections should be afforded leaders, if an inspections power was provided?*

Up-date penalties

Penalty provisions have not been up-dated in either the OLOC or OLDRL since they were first passed by the Parliament in 1975. The maximum penalty that can be imposed by the courts for failure to attend or produce documents, refusing to give evidence or contempt of the Commission is K500 or three months imprisonment. Arguably these fines are now ineffective as deterrents, and the Ombudsman Commission has not sought to prosecute any offenders in recent years.

The introduction of higher fines would assist in speeding up Commission investigations, especially by encouraging prompt responses to requests for information, by reinforcing the seriousness with which the Parliament views breaches of these provisions.

However, it can be difficult to determine what the new amount should be. One method is to look at recent legislation to determine how the Parliament related fines to terms of imprisonment. For instance, the *Protection of Transport Infrastructure Act 2010* contained penalties of K100 000 or two years imprisonment and K50 000 or

one year imprisonment. Using these figures as a guide it is possible to calculate what three months imprisonment was equivalent to in 2010, that is, approximately K12 500. (That is, three months is one quarter of a year so the fine for 3 months imprisonment should be one quarter of K50 000). It would therefore be reasonable to set the maximum penalty somewhere between K10 000 and K20 000.

Discussion Questions

- 5.17 *Do you think that the penalties for the offence provisions need to be increased?*
- 5.18 *If so, what type and amount of penalty do you consider would be appropriate?*

New offences

There are currently two types of offence provisions in the OLDRL. The first, and largest group, are offences that are designed to ensure that the Commission can undertake its investigations in an efficient and timely manner, the second group, which contains only one provision, punishes non-compliance with a substantive provision of the OLDRL (s35).

It has been suggested that the inclusion of new offences in both categories would assist the Commission to fulfil its role more effectively. Firstly, in order to improve information collection as part of an investigation, the possibility of new offences aimed at people, other than a leader, who attempt to obstruct the work of the Commission. These offences could include removing, destroying or altering documents and intimidating or otherwise interfering with witnesses. Note that a leader who fails to cooperate or obstructs the Commission would be in breach of Section 23 of the Organic Law, and guilty of misconduct in office.

Discussion Questions

- 5.19 *What is your view on the creation of new offences that would penalise obstruction by persons other than leaders?*
- 5.20 *Do you think that leaders should also be subject to such an offence provision?*

The second group of offences could be expanded to cover a number of compliance issues which currently are treated solely as breaches of the leadership code. For instance, currently a failure to submit an annual statement on time or to provide further information about a leader's annual statement to the Commission when requested is treated as a breach of the leadership code. These breaches are procedural in nature, relatively easily proved on the facts, and arguably not subject to the subtle issues that requires the expertise of a National Court judge and two Magistrates sitting as a Leadership Tribunal. The creation of an offence for failing to comply with a direction by the Ombudsman Commission to provide an annual statement or to provide further information within a particular timeframe would provide a number of benefits.

First, it would ensure that no prosecution could occur until the leader was advised of the need to provide the information.

Secondly, the breach would be clear, that is failure to comply within the specified time period, making it relatively easy to prove and convict.

Thirdly, both the direction power and the offence provision would promote speedier compliance by Leaders with their obligations.

Fourthly, it would avoid the expense and delay involved in the establishment of a Leadership tribunal by using the Courts instead, further assisting with the speedy finalisation of matters.

Fifthly, the inclusion of a limited defence based on the Leader having requested a reasonable extension of time to complete the response would ensure that Leaders were not unfairly disadvantaged when legitimate work commitments prevented completion within the time frame required.

It would be possible to construct such an offence so that the failure to provide the information on time continued to be a breach of the leadership code. This would allow the Ombudsman Commission, in a case where the leader is alleged to be guilty of a range of matters, to include the compliance breach in the matters to be dealt with by a Leadership Tribunal.

The penalty could be set at a level similar to the other offence provisions. As discussed above up-dated penalties could be in the range of K10 000 – K20 000 or three months imprisonment.

Discussion Question

5.21 *Do you think that it is appropriate to create offences for failing to comply with an Ombudsman Commission direction to either lodge an annual statement or provide further information about an annual statement?*

Simplification of prosecution

The offence provisions of both the OLOC and the OLDRL require that offences are to be dealt with in the National Court, which would usually necessitate the involvement of the Office of the Public Prosecutor. By simplifying the prosecution process it would be possible to speed up the prosecution process. This would be consistent with the intention of the provisions to ensure that the commission's information collection is not unnecessarily delayed.

There are several ways in which this could be achieved. The Public Prosecutor could delegate prosecutions under the offence provisions of the Organic Laws to the Ombudsman Commission, as the Commission has its own lawyers. Delegation of this kind already occurs with the Department of Fisheries and the Investment Promotion Authority.

Alternatively, the provisions could be redrafted to allow for the matters to be dealt with in either the National Court or the District Court, depending on the severity of penalty being sought. Where the matter is undertaken in the District Court, lawyers for the Ombudsman Commission could conduct the prosecution in a role similar to that undertaken by Police Prosecutors in the District Court.

Discussion Question

5.22 *Do you see any difficulties in prosecuting offences in the District Court rather than the National Court?*

CHAPTER 6:- OTHER LEADERSHIP OVERSIGHT FUNCTIONS

Introduction

Apart from investigating suspected breaches of the leadership code, the Ombudsman Commission has a responsibility under the leadership code to grant to leaders exemptions from the obligations of the code, where such exemptions are provided for in the code.

Exemptions to the Leadership Code

There are a number of these exemptions contained in the *Organic Law on the Duties and Responsibilities of Leadership*.

Subsection 7(1) prohibits a Minister, their spouse and minor children from becoming a director of a company or a foreign enterprise.

This prohibition is qualified by Subsection 7(3) which provides that a Minister, their spouse and minor children can be a director of specific types of companies, where the Minister has obtained the permission of the Ombudsman Commission. The types of directorship that are acceptable are:

- honorary directorship,
- directorship held as a nominee for Papua New Guinea,
- directorship in a majority owned family business
- directorship in a Business Group incorporated under the *Business Groups Incorporation Act* (chapter 44)
- directorship of an incorporated Land Group recognized under the *Land Groups Act* (chapter 47)

Subsection 8(1) prohibits any leader, their spouse and minor children from holding shares or other investment in a profit making enterprise that could reasonably raise issues of conflict of interest.

Subsection 8(2) prohibits any leader, their spouse and minor children from holding shares in any foreign enterprise.

These prohibitions are qualified by Subsection 8(3), which allow a leader to hold shares in these enterprises if they have received prior permission from the Ombudsman Commission to do so. There is no guidance in the Organic Law on when the Ombudsman Commission should exercise this discretion, but Subsection (5) provides that the Ombudsman Commission may publish guidelines on share ownership.

Subsection 9(1) prohibits a leader from engaging in paid employment other than his official employment without the written approval of the Ombudsman Commission.

The Ombudsman Commission cannot approve secondary employment where it forms the view that a significant conflict of interest could arise between the two roles or the secondary employment has been obtained using their official position.

Subsection 10(1) prohibits a leader, their spouse, their minor children and any company in which they have a controlling interest from seeking, accepting or obtaining any beneficial interest in a contract of Papua New Guinea.

This prohibition does not apply where the Ombudsman Commission has given its prior consent, however the Ombudsman Commission cannot give consent where in their opinion there is potential significant conflict of interest or where the leader has used their position to obtain the interest.

Subsection 12(1) prohibits a leader, their spouse and minor children from accepting a loan, holding a franchise or accepting a gift or other benefit from a person or foreign corporation. This prohibition does not apply to loans from financial institutions granted on commercial terms.

The Ombudsman Commission may exempt any person or class of persons from Subsection 12(1) where it considers it reasonable to do so, and it can publish guidelines setting out the conditions on which it will grant such exemptions.

Finally, under Section 35 a former leader is prohibited for three years from the date on which they cease to be a leader from holding a directorship, consultancy or any other prescribed position with a foreign enterprise, unless they have the approval of the Ombudsman Commission.

These prohibitions were designed ‘so that leaders will not be in a position where their private interests conflict with their public responsibilities.’¹⁰ All of these limitations on leaders were discussed in Chapter 3 of the CPC Report 1974 and they reflect the authors’ concerns about conflict of interest based on their experience with corruption during the transitional government. The authors of CPC report recognised that these prohibitions would impose limitations on leaders’ personal lives but believed that only through the provision of strong rules would good leadership flourish. [T]he public interest must always take priority over the personal interests of the leader even if this results in ‘some personal loss of opportunity or benefit’.¹¹

Despite the need for clear prohibitions, the CPC did recognise that there would need to be some exemptions to these rules, and that the policing of both the rules and the exemptions should be the responsibility of the Ombudsman Commission.

In the 39 years since independence the Leadership Code has proven to be a valuable tool in maintaining quality leadership, and these prohibitions have played an important role in this process by reducing the possibility of conflicts of interest. However, in recent years there have been a number of concerns expressed at how the exemptions are being managed by the Ombudsman Commission, with several leaders and former leaders raising complaints about excessive delays in decision making.

Discussion Questions

- 6.1 *Do you consider that all of these restrictions remain appropriate? Are there any that you would change or delete?*
- 6.2 *Do you think that there are other restrictions that should be imposed on Leaders?*

Recent proposals to change prohibitions

One response to concerns about alleged delays in approval of exemptions is contained in Mr Maladina’s 2009 Bill amending the *Organic Law on the Duties and*

¹⁰ CPC Report 1974 Chapter 3 paragraph 16

¹¹ Ibid paragraph 4

Responsibilities of Leadership. This Bill proposed repealing the existing Section 8 and substituting the following provision.

(1) A person to whom this Law applies:-

(a) who hold shares or any other investment in any company or unincorporated profit-seeking organization; or

(b) whose spouse or any of whose children under voting age hold any such shares or other investment

That could reasonably be expected to place him in a position in which he could have a conflict of interest or might be compromised when discharging his public or official duties, is guilty of misconduct in office.

(2) Subsections (1) does not apply to a person who, prior to obtaining the shares or making the investment referred to in Subsection (1), has obtained the approval of the Ombudsman Commission to do so.

(3) Subsections (1) and (2) do not prevent a person to whom this Law applies, or the spouse or the child of that person, from acquiring, holding and disposing of shares or establishing, maintaining, divesting or disposing of an investment, provided that the Ombudsman Commission is notified in the prescribed manner.

The proposed amendment would have maintained the prohibition on a leader owning shares in a corporation where there is a potential substantial conflict of interest with the leaders' public duties and obligations. However it differs from the original Subsection in two important ways.

First, there is no prohibition on owning shares in a foreign corporation. This is a significant change from the current provision, which was included because of the CPC's concerns about the excessive influence that foreign corporations had had in many developing countries and the risk of foreign control of the country's resources. It may be that these concerns have proven unfounded and the amendment merely reflects current government policy, which has been more accommodating of foreign investment.

Secondly, the proposed amendment does not require the leader to obtain approval from the Ombudsman Commission before they buy or sell shares. Instead, a notification requirement is imposed on the leader; the exact nature of the notification to the Ombudsman Commission is not specified but can be prescribed, presumably by the Ombudsman Commission itself through its regulations power. The amendment does not specify a consequence for not notifying a share transaction, and presumably this would need to be identified as a breach of the leadership code.

This amendment would allow leaders to participate actively in the share market, an activity that is not currently available to leaders because of the need to have approval from the Ombudsman Commission for each transaction. It is argued that the public interest would continue to be protected through the notification requirement, which would allow the Ombudsman Commission to examine each transaction to ensure that there was no conflict of interest.

The success of such a scheme relies on the ability of the regulatory agency to assess the notifications in a timely manner, and where it considers appropriate make orders requiring shares to be sold where a conflict exists. Alternatively, where a profit has been made from an inappropriate trade, the power to require that the profits be paid to the state may be appropriate. However, the frequency with which leaders may

conduct share transactions, risks overwhelming the ability of the regulatory agency to undertake assessments, rendering the envisaged oversight ineffectual.

Discussion Questions

6.3 *Would you support changes to the current approval arrangements?*

6.4 *And if so, what changes would you make?*

Relaxing restrictions on former leaders

Section 35 of the OLDRL prohibits former leaders from working for a foreign enterprise for 3 years unless the Ombudsman Commission approves the engagement. This prohibition was designed to prevent leaders from using their positions to obtain a benefit for themselves after they leave their leadership role and need to find new employment elsewhere.

The limiting of the prohibition only to foreign enterprises appears to reflect the CPC's concerns about foreign control of PNG's resources. Interestingly, the CPC did not appear to be concerned that leaders may grant domestic companies favours in return for future employment or other benefits. It has been suggested that as a result of the change in the government policy on the involvement of foreign enterprises in PNG's resources sector and the growth in large scale domestic enterprises, that this prohibition may need to be both relaxed and broadened.

The provision could be relaxed so that the restriction on leaders is not so onerous. This could be done in a number of ways. For instance, the period of exclusion could be reduced from three to one year. Alternatively, the offence could be narrowed to only cover enterprises that related to the leader's responsibilities, for example, the Secretary of Minerals would not be able to accept a position with a mining company, except with the approval of the Ombudsman Commission.

It has also been suggested that the provision be broadened to also cover domestic enterprises, as a way of ensuring that a leader is not influenced by a promise of a benefit that they will receive once they have left office.

6.5 *Do you consider the restrictions on former leaders contained in Section 35 to be too restrictive?*

6.6 *What do think about expanding the provisions to also cover domestic enterprises?*

CHAPTER 7:- STRENGTHENING THE LEADERSHIP CODE

Up-dating penalties for breach of the leadership code

‘[where] a leader has committed a breach of the Code, we recommend that the leader should automatically be deprived of his office unless the tribunal is satisfied that there are extenuating circumstances which justify the tribunal imposing an alternative penalty’,¹²

During the Commission’s community education programs on the Leadership Code the most commonly raised concern is about the types and severity of the penalties that are given to Leaders found guilty by a Leadership Tribunal. There appears to be a widely held view among the people who attend our programs that the penalties grossly inadequate and do not reflect the importance that the community places on honesty and trustworthiness in public office.

Among the numerous opinions on the topic there are two major themes, one is that existing penalties should be strengthened, and perhaps broadened, while the other view is that a new range of criminal sanctions should be available to the Leadership Tribunal including prison terms for severe breaches of trust.

Calls for prison terms for leaders who have breached the leadership code, may reflect a high level of dissatisfaction that many members of the public feel about the performance of their leaders and the current processes of accountability. It is argued that removal from office and small fines do not appear to fit the level of misconduct that has been demonstrated in a number of cases. While these calls are understandable, they also indicate a fundamental misunderstanding of the role of the Leadership Code, and how it relates to the criminal code.

Criminal convictions

As already discussed, the Leadership Code is not the only piece of legislation that applies to the conduct of leaders. As with all Papua New Guineans, leaders are subject to the Criminal Code, which contains specific offences that are relevant to the behaviour of leaders, such as for receiving bribes, misappropriating funds, and interfering with elections, to mention a few. Investigation of these criminal offences is the responsibility of the Royal Papua New Guinea Constabulary, and their prosecution is undertaken in the National Courts.

The Leadership Code and its Tribunal were not intended to deal with criminal matters. It was designed to impose an additional obligation on Leaders above those obligations expected of all citizens. The Code aims to ensure the integrity of leaders by requiring them to act in a way that would not raise doubts in the minds of voters about their conduct; that voters could be confident that Leaders were acting in the best interests of the nation and not in their own personal interests. Breaches of the Code were designed to be breaches of the civil law, and conduct that breached the criminal law was to be dealt with in the courts. The CPC report states it this way ‘breaches of the Code are disciplinary offences rather than criminal offences (though some breaches would also constitute criminal offences and be dealt with as such).’¹³

¹² CPC Report ch 3 para 96

¹³ CPC Report ch 3 para 93

Despite this intention a number of people have suggested that the Leadership Tribunal be given the power to impose criminal penalties in appropriate circumstances, especially as the Tribunal is bound by rules of evidence and must apply a standard of proof that is higher than the civil standard.

However there is a fundamental difficulty with the idea of granting penal powers to the Leadership Tribunal without further amendment to the Constitution. Section 159 of the Constitution deals with tribunals established outside of the National Judicial System, such as the Leadership Tribunal. It provides that such a tribunal can exercise judicial powers, but prohibits them from imposing ‘a sentence of death or imprisonment, or to impose any penalty as for a criminal offence.’

In order to provide the Leadership Tribunal with the power to impose criminal sanctions it would be necessary to either, reconstitute the Leadership Tribunal as a court within the National Judicial system, or to amend Section 159 of the Constitution to allow some non-judicial bodies, such as the Leadership Tribunal to impose penalties for criminal offence.

This would be a major Constitutional reform, with wide ranging consequences which are outside the scope of this paper. From a practical viewpoint, the imposition of criminal sanctions by the Leadership Tribunal is not a viable possibility. An alternative model that would allow for criminal penalties for breach of the Leadership Code is discussed in chapter 8.

Strengthening existing penalties

Subparagraph 28(1)(g)(ii) of the Constitution provides that where a leader is found to have breached the Leadership Code they are to be dismissed from office, unless the Tribunal finds under Subsection 28(1A) that there was no serious culpability, and no other public policy reason to require dismissal. Where Subsection 28(1A) applies the Tribunal can impose another penalty. These alternative penalties are set out in the *Leadership Code (Alternative Penalties) Act 1976*.

Where a Leader is found guilty of a breach of the leadership code and dismissed from office, under Section 31 of the Constitution they are not eligible to hold any of the following for up to three years:

- for election to public office,
- for appointment as Head of State,
- to become a nominated member of Parliament, or
- appointment to a provincial legislature or provincial executive or a local government body

However, if the Leader is found guilty but not dismissed, the Leadership Tribunal can fine the Leader a maximum of K1000.00 for each offence or impose on the Leader a ‘good behaviour bond’ of K500 where they agree to comply with the Code in future, suspend them from office without pay of up to three months or reprimand them.

Dismissal from office

Three main concerns have been raised about the dismissal provisions:

The first is that the exclusion period of three years is not sufficient. A range of alternative terms have been suggested. The shortest is 5 years, which would ensure

that any dismissed leader was excluded from standing for the next general election, to exclusion for life from public office on the grounds that they have been proven to be ‘not fit’ for public life.

Second, there is the need to expand the range of prohibited positions to all senior public service roles and ministerial advisor posts. Currently, there is nothing in the Constitution or Organic Law that prevents the government from appointing a dismissed leader to such a position, and this has occurred in the past.

Finally, some concern has been expressed that dismissed leaders may be appointed to new positions of trust without the appointing authority being aware that the person is subject to a period of exclusion. It has been suggested that a public register should be kept, perhaps on an Ombudsman Commission website, which records all the leaders who had been excluded from office and the date on which their term of exclusion expires. This would ensure that former leaders serve the terms of exclusion ordered by the courts.

Discussion Questions

- 7.1 *Do you consider that the current penalties for breach of the leadership code are adequate?*
- 7.2 *Do you agree that the length of the term of exclusion needs to be extended? And if so, what term would be appropriate?*
- 7.3 *Do you agree that the range of positions that a dismissed leader is excluded from should be expanded? And if so, how broad, should the exclusion be?*
- 7.4 *Would you support a register of excluded leaders?*

Increasing Alternative Penalties

The fines included in the *Alternative Penalties Act* have not been increased since it was passed in 1976. At that time, the maximum K1000 fines, and K500 bonds, provided real disincentives. Now, however, these penalties have little deterrent value and provide the Leadership Tribunal with no real scope to vary the amount to meet the relative seriousness of particular breaches.

There have been numerous calls for the fines to be increased, most recently by the Public Prosecutor Mr Pondros Kaluwin reported in the Post Courier on 24 April 2013. If the fines were increased in line with the calculations provided for the offence penalty provisions discussed in chapter 5 the maximum fine would be K25 000.¹⁴

However, it may be that a maximum of K25 000 does not reflect the seriousness with which the community views these breaches and want to provide the Leadership Tribunal with a higher range of penalties. K100 000 per breach has been suggested as the maximum possible fine by a number of sources.

Discussion Questions

- 7.5 *Do you consider that the size of the fines should be increased? And if so, what amount do you consider appropriate?*
- 7.6 *While criminal penalties can not be imposed by the Tribunal, are there any other penalties that you consider could be imposed?*

¹⁴ If the current value of the K500 offence penalty (OLOC ss30-32) is now worth K12, 500. Then the original fine of K1,000 can be calculated as twice the offence penalty, or k25,000.

Proceeds of Crime

A number of cases in which Leaders have been found guilty of misconduct relate to misappropriation of funds. While the Tribunal can dismiss the leader it does not have the power to order restitution, that is, it cannot require the leader to repay the funds that they have misappropriated from the government.

This failure to recoup the losses is seen as a significant deficiency in the current system, as it allows leaders who have been found guilty to retain the misappropriated funds. In other jurisdictions the Leadership Codes specifically provide for orders requiring the amount of the financial benefit or an amount equal to the value of material benefit¹⁵ or require the value of the property, benefit or favour received as a bribe¹⁶ to be paid into State revenue. However, in both cases referred to, leadership code breaches are heard by the respective High Court not a Leadership Tribunal.

In PNG, action can be taken by the Public Prosecutor in the National Court under the *Proceeds of Crime Act 2005* to recoup moneys that had been illegally obtained. While relatively few cases have so far been mounted it is anticipated that the State will pursue these matters more vigorously in the future.

There have been suggestions that the Leadership Tribunal should be given the power to order restitution in cases where a leader has been found guilty of misappropriating funds. These suggestions have included either granting the Tribunal a new power under the OLDRL or extending its jurisdiction to cover the Proceeds of Crime Act. Both suggestions would extend to a non-judicial tribunal functions that are normally exercised by judicial bodies.

Discussion Question

7.7 Do you consider the Leadership Tribunal to be the appropriate body to make orders in relation to restitution of funds?

Retaining jurisdiction after resignation or dismissal

The Leadership Code applies only to leaders, a person who ceases to be a leader is no longer subject to the Code or to the jurisdiction of the Leadership Tribunal. A leader who resigns, is dismissed or loses office cannot be prosecuted in the Leadership Tribunal even where they were guilty of misconduct whilst a leader. This was confirmed by the Supreme Court in the case of Mr Kunangel¹⁷, who resigned his seat in Parliament and was found to be no longer subject to the leadership code. The timing of the resignation is important, where a leader has been found guilty of misconduct by a Tribunal before they resign, the resignation will not prevent a penalty being imposed.

A number of leaders have sought to avoid findings of misconduct against them in the Leadership Tribunal by resigning their positions before the Tribunal has made a decision. They have later recontested a leadership position or obtained a government appointment. Despite these attempts to avoid the Leadership Tribunal, the Ombudsman Commission has always retained investigation records and reactivated earlier investigations when a former suspected leader is reappointed. While this process ensures that a leader cannot avoid scrutiny in the Tribunal, it is a cumbersome

¹⁵ *Constitution of the Autonomous Region of Bougainville 2004*, Section 173(1)(f)(iii)

¹⁶ Solomon Islands *Leadership Code (Further Provisions) Act*, Section 25(2)

¹⁷ SCR No 2 of 1982 *Re Kunangel* [1991] PNGLR1

and resource intensive process. The significant delays that can occur between investigation and prosecution can undermine the strength of a prosecution case, or result in further resources being expended to revive the case.

An alternative to having to wait for a former leader to be reappointed to complete a prosecution is to amend the legislation to allow a prosecution to continue even where a leader resigns, is dismissed or loses office. This would allow a case to be completed in a timely manner, to make use of the materials already assembled, save the need for more resources to be used in the future, and most importantly, ensure that high standards of leadership are maintained and enforced.

Expanding the jurisdiction of the Leadership Tribunal to former leaders does raise some issues, especially where the person has retired from public life. As the Leadership Code is intended to promote high quality leadership what policy objective can there be in pursuing individuals who are no longer in a leadership role? Any expansion of the scope would need to be limited to cover Leaders who are deliberately attempting to avoid the Tribunal's jurisdiction by resigning once they become aware of their potential prosecution.

If there were to be a change to cover former leaders the issue becomes at what point is it appropriate to deem that a leader cannot escape the jurisdiction of the Tribunal by resigning. It could be that a person who resigns after being served with a 'Right to be Heard' document by the Ombudsman Commission could be deemed by law to remain a leader for the purposes of any case before the Leadership Tribunal arising from the 'Right to be Heard' even where they resign or otherwise loses office. There are also other points at which the deeming provision could commence, such as when the Ombudsman Commission refers the matter to the Public Prosecutor or when the Public Prosecutor requests the Chief Justice to establish a Tribunal.

The deeming provision would not prevent a leader from resigning or otherwise leaving office, nor would it preserve any entitlements for the leader, its only role would be to preserve the jurisdiction of the Leadership Code for the limited purpose of completing a prosecution that had already commenced. This would allow the prosecution to process to be completed and a determination made about the conduct of the leader in question.

Discussion Questions

- 7.8 *Do you have any concerns about extending the jurisdiction of the Leadership Code to former leaders for the purposes of completing a prosecution?*
- 7.9 *At what point should the deeming provision commence?*
- 7.10 *Do you think that there is another way in which this issue could be dealt with other than using a deeming provision?*

Double jeopardy

In recent years there has been a move to suggest that Leaders should not be subject to both criminal sanctions and Leadership Code sanctions that arise from the same conduct. This argument has been based on the idea that to be exposed to both actions constitutes double jeopardy.

Double jeopardy is an ancient common law principle which prevents a person who has been either convicted or acquitted of a criminal offence from being prosecuted

again for the offence. This principle is incorporated into the PNG Constitution at Subsection 37(8), which states

No person who shows that he has been tried by a competent court for an offence and has been convicted or acquitted shall again be tried for that offence or for any other offence of which he could have been convicted at the trial for that offence, except upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal.

This provision has been the subject of a number of court decisions, most particularly in relation to criminal and non-criminal legal actions. In all cases, the courts have confirmed that the principle of double jeopardy only applies where both of the prosecutions relate to breaches of the criminal law. Where one of the actions is criminal in nature and the other is either a disciplinary action¹⁸, or a customary punishment¹⁹ double jeopardy does not apply. Andrews J in *Sudi Yaku v Commissioner of Police* summaries the relationship between the two in the following way.

In my opinion a criminal conviction does not, in the absence of any statutory provisions, bar subsequent disciplinary action. Any other result would be absurd. How could it be said that a public servant found guilty of stealing monies from the public service could not then be dismissed?

As the issue of double jeopardy only arises when the breaches that are being prosecuted are criminal in nature, it is important to clarify the nature of the Leadership Code. The Leadership Code was designed to be a disciplinary code, much like the disciplinary codes that exist for public servants, police officers and other disciplinary service officers. The CPC considered ‘that breaches of the Code are disciplinary offences rather than criminal offences (though some breaches would also constitute criminal offences and be dealt with as such).’²⁰

The intention of the CPC, is enacted in Subsection 28(5) of the Constitution, by specifically defining Leadership Tribunal matters as non-judicial proceedings. It precludes the Tribunal from dealing with criminal matters. This characteristic is further reinforced by stating that the proceedings in the Leadership Tribunal are not a bar to other proceedings, and other proceedings can not bar Leadership Tribunal matters, that is, the principle of double jeopardy is clearly excluded. The wording of Subsection 28(5) states:

Proceedings under Subsection (1)(g) are not judicial proceedings but are subject to the principles of natural justice, and –

- (a) no such proceedings are a bar to any other proceedings provided for by law; or
- (b) no other proceedings provided for by law are a bar to proceedings under that paragraph.

The relationship of the Leadership Code to the Criminal Code and the nature of the Leadership Code is perhaps best summed up by Cannings J in his judgement in *Paul Saboko v Commissioner of Police* (2006) N2975, where he states in relation to an argument that a criminal acquittal prevented the Commissioner from proceeding with disciplinary charges because of the rule against double jeopardy. The argument

¹⁸ *Sudi Yaku v Commissioner of Police*; Ex parte the Independent State of Papua New Guinea [1980] PNGLR 27

¹⁹ *The State v Ebes Tiun* (2001) N2129

²⁰ CPC report chapter 3 para 93

‘...fails to appreciate that the criminal laws, that apply to all persons in the country, and the disciplinary codes for members of the Police Force, which apply only to members of the Police Force, are independent, parallel sets of laws. Breach of one set of laws may or may not amount to a breach of another set of laws. The same principle applies to the Criminal Code and the Leadership Code. The Criminal Code applies to everyone. The Leadership Code applies only to leaders (as described by s 26 of the Constitution). A leader who is dealt with under the Criminal Code can also be dealt with under the Leadership Code.’

It is clear then that leaders do not suffer double jeopardy, even though they are a subject to both the Criminal Code and the Leadership Code. As with all other Papua New Guineans, they are subject to both the criminal law and the civil law actions arising out of the same set of facts. Employees who are found guilty of stealing are liable to be prosecuted under the Criminal Code and dismissed from their position because of a breach of their employment contract, they may also be subject to civil actions by the employer for the return of the stolen property.

Public servants and disciplinary services officers are subject to both the criminal law and the relevant disciplinary code, which may see them acquitted of a criminal charge but still found guilty of a disciplinary charge and dismissed from office. This outcome is possible because the civil standard of proof applied to disciplinary proceedings is less onerous than the criminal standard.

Despite the fact that under the current laws, leaders are dealt with no differently than any other Papua New Guinean, in 2010 the Parliament passed an amendment which would repeal the existing Subsection 28(5) of the Constitution and replace it with the following:-

Proceedings under Subsection (1)(g) are not judicial proceedings but are subject to the principles of natural justice, and an Organic Law may provide –

(a) for such proceedings for the purposes of this Division to be a bar to a proceeding under another Law; or

(b) for a proceeding under a law to be a bar to a proceeding for the purposes of this Division.

The intention of the amendment is to prevent Leaders from being subject to both the Criminal Code and the Leadership Code, placing Leaders in a fundamentally different position to all other citizens. While this Constitutional amendment was found invalid by the Supreme Court in its 19 December 2012 decision the question of whether leaders should be dealt with differently from other Papua New Guineans remains part of the public debate.

Discussion Questions

7.11 *Do you support a change to the Constitution that would mean that leaders would only be subject to prosecution under either the criminal law or the leadership code but not both?*

7.13 *Do you consider that there is a public policy argument in favour of providing Leaders with this protection?*

Suspension

The Constitution, in Subsection 28(4), provides that an Organic Law can include a Section which would allow a leader to be suspended from office ‘pending the investigation of any case of alleged or suspected misconduct in office by him.’

The use of the word investigation in the Subsection poses some difficulties in interpretation as Section 28 refers to both the Ombudsman Commission and the Leadership Tribunal as conducting investigations. It is therefore unclear which of these two processes Subsection 28(4) may refer to, and unusually the CPC Report provides no guidance on the issue.

In the *Organic Law on the Duties and Responsibilities of Leadership*, suspension occurs where the matter has been referred to a tribunal, that is, after the Ombudsman Commission has completed their investigation. It is however silent on exactly when the suspension commences, and this has been subject of some judicial interpretation.

In 2010 the Supreme Court heard two cases that dealt with suspension. In *Patrick Pruaitch v Chronox Manek* (2010) SC1052 the court concluded that the suspension commenced on the day the Leadership Tribunal was established, in the second case, *Patrick Pruaitch v Chronox Manek* (2011) SC1093 the Court found that suspension occurred on the first day of that the Leadership Tribunal sits. More recently, in the Leadership Tribunal hearing into breaches by Sir Michael Somare²¹ the Tribunal found that it had a discretion on whether or not to suspend the leader, and then decided not to suspend Sir Michael.

The situation is slightly different for Constitutional Office holders. Under Section 9 of the *Organic Law on the Guarantee of Rights and Independence of Constitutional Office-holders*, it is the Appointing Authority that may suspend the office-holder where it has referred a matter to the Tribunal.

There are strong public policy reasons why office-holders are suspended from their positions when there is an allegation of serious misconduct to be resolved. It allows the investigation to be undertaken without the threat of interference, and also prevents the possibility for any further alleged misconduct to occur during the period of the investigation and any determinative process that follows. It also permits the organisation to continue to perform its responsibilities by deputising another person to take on the suspended person’s functions. The detriment suffered by the officer, is usually offset by providing that the suspension is on full pay.

There are similar arguments supporting the suspension of leaders, the continuing presence of a person in a leadership position who has allegations of misconduct to answer, can undermine the integrity of the organisation, sap morale and reduce the organisation’s service delivery or output. For these reasons, in many Commonwealth countries, leaders who are subject to allegations of misconduct stand aside voluntarily until the matter is resolved. This allows for a quick investigation of the allegation and avoids damage to the integrity of the organisation.

On the other side, the removal of key leaders for extended period of time on minor allegations could also have detrimental impacts on the organisation, or the country.

A further argument in favour of an earlier suspension date, is that suspended leaders may have more of an incentive to have the matter dealt with speedily, rather than

²¹ Leadership Tribunal LT1 of 2010

pursue a range of delaying tactics, such as court challenges, that allow them to remain in office for extended periods of time.

Discussion Questions

- 7.14 *What do you think about the current operation of the suspension powers?*
- 7.15 *Do you think that the current interpretation gets the balance between the public interest and the individual interests of the leader right? If not, how would you like to see it changed?*
- 7.16 *Do you agree that the suspension power should be discretionary, or should it be mandatory in leadership cases?*

A number of other starting points have been suggested from which suspension could operate, which would be consistent with the current constitutional provision but which would require changes to the Organic Law.

- The date when the Ombudsman Commission refers the Leader to the Public Prosecutor for prosecution. At this point the Ombudsman Commission has found that there is sufficient evidence of misconduct by the leader to justify pursuing the matter in the Tribunal. The Public Prosecutor retains discretion, and it is possible that a prosecution will not occur.
- The date when the Public Prosecutor asks the Chief Justice to establish a Tribunal. At this point both the Ombudsman Commission and the Public Prosecutor have found that there is sufficient evidence to warrant prosecution. The Chief Justice must appoint a tribunal if requested to do so by the Public Prosecutor, but he can decide the members and the commencement date.

Discussion Question

- 7.17 *Do you consider that either of these points is a more appropriate point at which to commence a suspension?*

Standard of Proof

The standard of proof is the evidentiary test that must be met in order for an accusation to be proven in a court of law. In common law jurisdictions, such as Papua New Guinea, there are two different tests used to make such a determination. The first test is ‘proof beyond reasonable doubt’, which is used in criminal law cases, and the second test is ‘proven on the balance of probabilities’, which is used in all other matters.

These tests are not easily defined, what evidence is sufficient to meet the relevant standard will depend on the facts of each particular case, but they do represent two distinct measures of certainty in the minds of the persons making the assessment. The criminal standard, beyond reasonable doubt, is a much more difficult test to meet than the civil standard.

The reason for the difference between the two standards has nothing to do with nature of the conduct being judged or the status of the person on trial, it has everything to do with the powers that the State possesses and consequences to the individual if they are found to have breached the standard. In criminal law trials, the individual risks being exposed to the coercive power of the State, they can be deprived of their liberty, restricted in their physical movements or activities, and in some jurisdictions, including PNG, lose their lives. It is because of the risk to the fundamental rights of

the accused that the state is required to meet the very high standard of proof of beyond reasonable doubt. The public policy argument is that it is better to have let a guilty man to go free, than to punish an innocent man for a crime that they did not commit.

The public policy imperative for the civil standard of proof is somewhat different, there is no possibility of a person being sent to gaol or executed as a result of being found to have breached the law. As a result both parties are treated more equally, with the accuser only being required to prove their argument on the balance of probabilities, that is, that it is more likely than not that their version of events is the correct version. This makes it much more likely that the accuser will be successful than in a criminal case, but this is considered acceptable because the outcomes are less severe.

The standard used for disciplinary actions in the Public Service, the Police and Defence forces are all the civil standard of proof, even where the person could be dismissed from their position. Employment law matters in the private sector also use the civil standard.

Both the Constitution and the Organic Law are silent on what standard of proof should be used by the Leadership Tribunal, although Section 28(5) of the Constitution defines Leadership hearings as non-judicial proceedings which suggest that a civil law standard of proof would be expected. However, when the Supreme Court was asked to consider the standard to be used in *Re James Eki Mopio [1981]* it created a new standard for Leadership matters, ‘not as high as the criminal proof...but...will require a higher standard of proof than originally applicable to civil cases’.

This standard is unique to the Leadership Code jurisdiction. It makes the Leadership Code different to other disciplinary codes and treats leaders differently to other Papua New Guineans who face similar accusations of misconduct.

In Mr Maladina’s unsuccessful Bill attempting to amend the *Organic Law on the Duties and Responsibilities of Leadership* item 5(c) sought to include a new provision that would have set the standard of proof in tribunal proceedings at the criminal standard, that is, proof beyond reasonable doubt. This would have significantly increased the protections afforded to leaders against prosecution, however, it is unclear what the public interest benefit is to such an amendment.

Discussion Question

7.18 What is the appropriate standard of proof to be applied to Leadership Tribunal matters?

Evidentiary Rules

‘We envisage that they may adopt procedures which are somewhat more informal than those of a court, but that there will be adequate protection of the rights of those charged with a breach of the code.’²²

The CPC in designing the Leadership Tribunal wanted to create an informal process that would allow its members to investigate non-criminal conduct of leaders, which was nevertheless unworthy of them, because they lacked moral integrity or failed to place the public interest above all else in their decision making. In order for the Tribunal to be able to undertake this unique role, the CPC decided that it would be inappropriate for the tribunal to be constrained by the strict rules of evidence, which

²² CPC Report 1974 Chapter 3 paragraph 95

may allow Leaders to escape conviction on mere technicalities; the public interest in ensuring that the highest possible standard of leadership justified some reduction in the evidentiary standards. The CPC's view is reflected in the original wording of Section 27(4) of the Organic Law, which states:

The tribunal shall make due inquiry into the matter referred to it and may inform itself in such manner as it thinks proper, subject to compliance with the principles of natural justice.

This provision allowed for the tribunal to establish its own processes but included the important requirement that the principles of natural justice be adhered to.

Another important protection for leaders is the fact that matters are heard by three judicial officers sitting together to form the tribunal. The CPC considered that it would be too onerous on a single judicial officer to make decisions on essentially moral and ethical conduct and that it would be more appropriate for there to be three. This compares sharply with the criminal jurisdiction, where a leader would be judged by a single judicial officer, but would also benefit from the protections afforded by the rules of evidence.

In 2006 the Parliament amended Section 27(4) in the *Organic Law on the Duties and Responsibilities of Leadership (Amendment No. 2) Law 2006*, adding the words in bold below.

The tribunal shall make due inquiry into the matter referred to it, **with the legal formalities and in strict compliance with the rules of evidence and the provisions of the Evidence Act, (chapter 48)**, and may inform itself in such manner as it thinks proper, subject to compliance with the principles of natural justice.²³

The effect of the amendment was to remove from the tribunal the power to determine its own procedures and to instead impose the rules of evidence. This change has resulted in more protracted investigations and more formal tribunals, which have moved away from the disciplinary model originally envisaged by the CPC. It may also have resulted in prosecutions occurring for more concrete offences, rather than dealing with failure of good leadership, which the Leadership Code was intended to address.

Discussion Questions

- 7.19 Do you consider that the introduction of the Evidence Act provisions is necessary to ensure that leaders are given a fair hearing?
- 7.20 Would the original intention of the Leadership Code be better achieved by using some other evidentiary standard?

²³ The validity of this amendment was challenged in Supreme Court case SC1/2010. Decision pending.

CHAPTER 8: THE LEADERSHIP TRIBUNAL

The establishment of an appropriate tribunal is authorised under Subsection 28(1) of the Constitution, which requires an independent tribunal to be established by an Organic Law to:-

- (i) ...investigate and determine any cases of alleged or suspected misconduct in office referred to them in accordance with the Organic Law; and
- (ii) Are required subject to Subsection (1A), to recommend to the appropriate authority that a person found guilty of misconduct in office be dismissed from office or position:

Tribunals are appointed under section 27 of the Organic Law on the Duties and Responsibilities of Leadership. It provides for different types of tribunals to be established depending on the status of the leader to be investigated. Tribunals established to hear breaches by judges, constitutional office holders and the Prime Minister are made up by three judges, tribunals for all other leaders are comprised of a judge and two magistrates. For example in the Sir Michael Somare's 2010 case, three international judges formed the tribunal, found the matter to be proven and suspended him for 14 days.

Where the Ombudsman Commission considers that a leader has breached a provision of the Leadership Code it refers the matter to the Public Prosecutor. Where the Public Prosecutor considers that a prosecution is warranted he will either request the Chief Justice to appoint a Leadership Tribunal or, in the case of a judge or a constitutional office holder, refer it to the relevant appointing authority. In these cases, it is the relevant appointing authority who will decide whether to refer the leader to the Tribunal. The Chief Justice has no discretion not to establish the tribunal but can decide who to appoint and when it will sit.

A tribunal has to be established separately for each case, the composition of which is dependent on the person being tried and the availability of the required combination of judges and magistrates. This process can add serious delays into the process. It also incurs considerable costs, especially where overseas judges are used.

The complicated nature of Leadership Tribunals, the cost and delays involved in running them, and the perception that they have not proven successful in protecting the integrity of leaders has resulted in a number of suggestions for change.

Permanent full-time or part-time tribunal

The current practice of appointing individual tribunals is seen as time consuming and resource intensive. On each occasion it requires the input of the Chief Justice and the Chief Magistrate to allocate judicial officers, and there are further delays in releasing judicial officers to undertake the leadership tribunal function. Some argue that the effort involved in organising a tribunal is a significant disincentive to prosecuting 'minor matters'.

A permanent tribunal would allow cases to be referred more quickly and easily, encouraging more matters to be referred. It would also allow for greater experience to develop within the judiciary, producing a clear jurisprudence on integrity matters.

There appears to be no legal impediment to the establishment of a single Leadership Tribunal to deal with all matters, with the exception of the specialist tribunals required for the Prime Minister, constitutional office holders and judges. There is no specific

requirement that a separate tribunal be established for each matter but it does appear to have been a long standing practice. The power in paragraph 27(7)(e) would appear to be sufficiently broad to allow the Chief Justice to appoint a permanent Tribunal. This would then allow the Public Prosecutor to refer matters directly to the Tribunal, in a manner consistent with the wording of Subsection 27(2) ‘if the Public Prosecutor considers that the matter should be proceeded with, he shall refer the matter...to the appropriate tribunal.

The establishment of a permanent Tribunal could be on either a part-time or full-time basis, depending on its actual workload. Where the Tribunal is part-time, the members could serve in both the Tribunal and either the National or District Courts, which is the current practice for the new Defence Force Military Court. This would allow for both a permanent tribunal but also address concerns about whether the cost of a full-time tribunal could be justified.

Discussion Question

- 8.1 *Do you consider that a permanent Leadership tribunal can be justified at this time?*
- 8.2 *Would you support a permanent tribunal if it could be established on a part-time basis?*
- 8.3 *Do you see any problems with establishing a permanent tribunal?*

Simplify Tribunal composition

The CPC recommended that any tribunal that dealt with leadership matters should be made up by a number of judicial members as they considered that the alleged breaches would be too onerous a responsibility for a judge or magistrate sitting alone. The CPC does not go on to explain why breaches of the Leadership Code would place greater pressure on a judge or a magistrate than a trial of a serious criminal matter, although the implication appears to be the political nature of the offences.

The CPC recommendation finds its expression in Subsection 27(7) of *the Organic Law on the Duties and Responsibilities of Leadership*. As discussed above it refers misconduct by the Chief Justice, Judges, Law officers and the Chief Magistrate to specialist tribunals established in accordance with Sections 179 and 180 of the Constitution respectively. Other Constitutional Office Holders are referred to a tribunal established under the *Organic Law on the Guarantee of Rights and Independence of Constitutional Office Holders*. The Prime Minister is referred to a Tribunal established by paragraph 27(7)(d) of the OLDRL. All of these tribunals are made up of three National or Supreme Court Judges, former judges or international equivalents.

All other officers are referred to a tribunal established by paragraph 27(7)(e) of the OLDRL, commonly known as the Leadership Tribunal. This tribunal is made up of a Supreme or National Court judge and two magistrates.

These complicated arrangements for complaints against leaders for disciplinary offences can be compared with the situation where a leader is charged with a criminal offence. For example in the case of a leader who is prosecuted for misappropriation of funds would have the matter heard by a single judge or magistrate, depending on the seriousness of the matter, and could be liable for a maximum sentence of 10 years

imprisonment²⁴ If the leader is a parliamentarian, and is found guilty, then he or she is also very likely to be automatically disqualified from office under Section 103 of the Constitution. This can be compared with the use of three judicial officers to deal with a complaint against a leader under the Leadership Code, which has a maximum penalty of K1000, for each offence, or removal from elected office for a maximum period of three years.

It has been suggested that the composition of the tribunals is too complicated for the work that they are required to undertake, and that a simpler composition, or a greater range of candidates to sit on the tribunal would allow for their work to be undertaken more efficiently and at less expense.

Possible changes to the Leadership Tribunal established under paragraph 27(7)(e) have included:

- allowing matters to be heard before a single Judge, or magistrate.
- or possibly allowing a judicial officer to chair a three member panel that includes two non-judicial members. The non-judicial members could be drawn from a pre-approved pool of suitable citizens that could include, for example academics, senior lawyers, accountants and other professionals, senior clergy, or members of community associations. This would also help to ensure that community values were reflected in Tribunal decisions.

Discussion Questions

8.4 Do you consider that it is appropriate to continue to maintain a Leadership tribunal with three judicial members?

8.5 What other tribunal compositions do you consider may be appropriate?

Use National Courts instead

The establishment of the Leadership Tribunal as a non-judicial body to deal solely with breaches of the Leadership Code is unique to PNG. Other jurisdictions that have followed PNG in introducing Leadership Codes have not chosen to replicate this aspect of the PNG model.²⁵

In the Solomon Islands, the *Leadership Code (Further Provisions) Act* requires proceedings for misconduct to commence in the High Court of the Solomon Islands. Closer to home, the *Constitution of the Autonomous Region of Bougainville 2004* requires prosecution before the Bougainville High Court.

The use of the courts to prosecute leadership breaches appear to have a number of benefits. It allows the court to impose criminal penalties, both jurisdictions allow for terms of imprisonment along with fines for breaches. The Bougainville legislation also allows for orders for restitution in cases where there has been some form of unlawful financial gain, while the Solomon Islands allows for the court to order that funds received as bribes be paid over to the Government.

Neither of these powers could be vested with the PNG Leadership Tribunal because of its non-judicial nature. As discussed earlier there are constitutional limitations to

²⁴ *Criminal Code Act 1974*, Section 383A, Misappropriation of Property

²⁵ *Leadership Code Act (Vanuatu) Section 39* – matters dealt in court in the same way as a criminal proceeding

the powers that can be given to tribunals²⁶. Restitution orders could be obtained in the PNG National Court under the Proceeds of Crime Act, and terms of imprisonment are possible under the Criminal Code Act for those offences that have been criminalised. However, in both these cases, action would need to be undertaken by the Public Prosecutor in the court system, separate from the action in the Leadership Tribunal.

Discussion Question

8.6 *Do you consider that a separate Leadership Tribunal should exist to deal with cases against leaders for breach of the Leadership Code?*

²⁶ Section 159 of the PNG Constitution

APPENDIX 1: Organic Laws & Legislation with positions covered by the Leadership Code per Section 26 (3) of the PNG Constitution

No.	Legislation	Section	Position
1	Organic Law on the Integrity of Political Parties & Candidates Commission 2003	4 (3) & 16 (2)	- Members of the Commission - Office of the Registrar of Political Parties
2	Organic Law on the Judicial & Legal Service Commission	3 (1) (d)	- Members of the Commission
3	Organic Law on Provincial Government & Local Level Government	120 (3)	- All members of Provincial Government Assemblies - All members of Local Level Government Assemblies
4	Organic Law on the Sovereignty Wealth Fund 2012	20	- Members of the Sovereign Wealth Fund Board
5	Border Development Authority Act 2008	6	- Office of a member of the Board
6	Central Banking Act 2000	22 (1) (j)	- Office of the Governor - Office of the Deputy Governor
7	Constitutional & Law Reform Commission Act 2004	3 (5), 8 (5), & 17 (4)	- Office of the Commissioners - Office of the Chairman - Office of the Deputy Chairman - Office of the Secretary
8	Correctional Services Act 1995	9	- Commissioner of Correctional Institutes
9	Customs (Amendment) Act 2009	3 (2)	- Commissioner of Customs
10	Gazelle Restoration Authority Act 1995	6	- Office of a member of the Board
11	Income Tax (Budget Provisions 2001) Act 2000	1 & 3	- Commissioner General of Internal Revenue
12	<ul style="list-style-type: none"> ▪ Independent Public Business Corporation of PNG Act 2002 ▪ Independent Public Business Corporation of PNG (Amendment) Act 2012 	1 (3)	- Office of the Managing Director
13	Konedobu Petroleum Park Authority Act 2008	15	- Office of a member of the Board
14	Local Level Government Administration Act 1997	22 (5)	- Members of Local Level Government Assemblies
15	Motu Koita Assembly Act 2007	10 (2)	- Members of the Motu Koita Assembly
16	Manam Resettlement Authority Act 2006	6	- Office of a member of the Authority
17	Magisterial Service (Amendment) Act 2009	1	- Magistrates specified in Section 5 of the Principal Act (<i>Magisterial services Act (Chapter 43)</i>)
18	National Capital District	7	- Office of a member of the

	Commission Act 2001		Commission
19	National Cultural Commission Act 1994	10 (2) (h)	- Office of a member of the Commission
20	National Library & Archives (National Library & Archives Board) Regulation 1998	3 (2) (g)	- Office of a member of the National Library & Archives Board
21	Northern Province Restoration Authority Act 2008	7	- Office of a member of the Authority
22	National Development Bank Act 2007	12 (1) (r)	- Members of the National Development Bank Board
23	▪ National Roads Authority Act 2003	11	- Office of a member of the Board of the Authority
24	Provincial Government Administration Act 1997	11 (5) & 13 (3)	- Members of a Provincial Assembly

**APPENDIX 2 – Positions determined to be covered by the Leadership Code by
Ombudsman Commission under Section 26(4) of the PNG
Constitution since 2001**

No.	OC Decision No.	Date	Decision
1	02-210-02	29.07.2002	Executive Director of Consumer Affairs Council
2	02-210-03	29.07.2002	Managing Director of Mineral Resources Development Company
3	02-210-05	29.07.2002	Commissioner of the National Youth Commission
4	02-210-06	29.07.2002	<ul style="list-style-type: none"> • Chairman of the Cocoa Board • CEO of the Cocoa Board
5	02-298-01	25.10.2002	Solicitor General
6	02-314-04	14.11.2002	Director of National Research Institute
7	03-209-11	28.07.2003	Provincial Administrators
8	05-207-02	26.07.2005	Director General of the National Intelligence Organisation
9	05-222-05	10.08.2005	members of the Teachers Service Commission
10	06-005-11	05.01.2006	<ul style="list-style-type: none"> • all members of the Bougainville Autonomous Government Legislature, • all Bougainville Autonomous Government Constitutional Office Holders, • and all heads of the Bougainville Autonomous Government Services;
11	06-234-04	22.08.2006	members of the Road Safety Council