



**OMBUDSMAN COMMISSION  
OF  
PAPUA NEW GUINEA**

**OMBUDSMAN COMMISSION'S  
SUBMISSION  
ON THE  
PROPOSED AMENDMENTS  
TO THE LEADERSHIP CODE**

**8 MAY 2009**

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## **INTRODUCTION**

In light of the proposed amendments to provisions of the Leadership Code advertised in the National Gazette No G192 dated 22 October 2008, the Ombudsman Commission (OC) has considered it necessary for the purpose of making known its position and also for the purpose of raising awareness on apparent misunderstanding of the role and functions of the Ombudsman Commission to prepare this submission to assist you as a legislator.

## **COMMON THEMES UNDERLYING THE PROPOSED AMENDMENTS**

To assist you understand the Commission's view, the following have been identified as the major themes in the proposed amendments upon which the Commission takes issue:

- There was no consultation prior to the proposal being Gazetted and voted on;
- The proposed law would raise concerns about the independence of the Commission;
- The proposed laws lacks clarity;
- The proposed laws confuses the purposes of the Commission, especially with that of the criminal justice system;
- The proposal waters down the powers of the Commission; and
- Provides different and lesser standards of conduct for leaders than for other people.

## **LACK OF CONSULTATION**

The Ombudsman Commission is a very significant creature of the *Constitution*. The Constitutional Planning Committee (CPC) actually devoted two full chapters of its Final Report (Chapters 3 and 11) to express in detail their intentions on the roles and functions and purposes they envisioned for this institution. The content of these two chapters also were arrived at after much involved and widespread consultations with the people of Papua New Guinea.

Consultation is defined under Section 255 of the *Constitution* as;

**In principle, where a law provides for consultation between persons or bodies, or persons and bodies, the consultation must be meaningful and allow for a genuine interchange and consideration of views.**

It is the view of the Commission that what became law after popular consultation should only be undone by the same process. Has there been widespread consultation on the provisions of the Leadership Code that are now being amended? If there has been consultation, the evidence of the consultation must be tabled to show the views of those consulted. This has not been done by the Special Parliamentary Committee on the Ombudsman Commission (SPCOC).

As the elected representative of your people, you have a duty to consult them and to represent their best interests which includes making decisions that is also in their best interests. It is the

democratic right of your constituents also to be informed of how you are exercising their power vested in you.

### **THE COMMISSION'S SUBMISSION TO THE PARLIAMENTARY SELECT COMMITTEE ON THE OMBUDSMAN COMMISSION**

The Ombudsman Commission's Submission to the SPCOC in June 2006 (copy attached) was on pertinent matters to strengthen the work of the Ombudsman Commission in line with the terms of reference of the SPCOC but these were not considered and included in the current amendments.

- Permit Tribunals to Order Restitution and if necessary, bankruptcy proceedings to be pursued;
- Specifically include corrupt conduct as an example of wrong conduct;
- Setting Up a specific Division of the Commission focused on undertaking the Integrity of Government Departments;
- Agrees to the setting up of a Permanent Parliamentary Committee, who should be empowered to undertake reviews of the Commission every three (3) years. Those reviews should also be Public Parliamentary Reviews;
- Establishment of a Permanent Leadership Tribunal. Membership of that Tribunal can include people subject to the fit and proper person test: retired and former judges and magistrates, lawyers, accountants and successful businessmen;
- To receive funding annually in advance and report to Treasury monthly on the financial state of affairs;
- Fines should be increased and expressed as "Fine not to exceed K100,000";
- Set a time period for the Public Prosecutor to refer a matter to the Chief Justice. This can be 30 days. Likewise for the Chief Justice to appoint a Tribunal within 30 days;
- Venue of Tribunals should not be in Courts; and
- Police force and Ombudsman Commission to share information.

We note that the SPCOC has been disbanded by Parliament and it no longer exists. But it is important to note what our position on proposed changes to improve the work of the Commission should be as indicated in the Submission and in particular that a large chunk of that has not been considered in the current proposed amendment. It is suggested that the Commissions submission be read to appreciate in full the recommendations set out above.

### **THE PURPOSE OF THE OMBUDSMAN COMMISSION**

It was the wishes of the People through the CPC that the Ombudsman Commission be established to act as a mediator to go between the aggrieved citizen and the government department in the case of maladministration. With regards to the Leadership Code, it was the intention of the people that the Ombudsman Commission be responsible for the enforcement of

the Leadership Code. This office was particularly chosen because of its constitutional "independence" and the comparative advantage it had in the exercise of its traditional investigative functions.

In relation to the Leadership Code, the Ombudsman Commission investigates and where it makes a prima facie finding of misconduct in office, the matter is referred to the Public Prosecutor who independently assess the case before requesting for a tribunal to be set up to inquire further into the matter.

The Ombudsman Commission was not intended to be a substitute for the Courts. It does not decide on penalties for misconduct under the *Leadership Code (Alternative Penalties) Act*. That mandate is vested in the Leadership Tribunal after an impartial hearing which provides the leader with the opportunity to defend himself or herself.

That is an entirely separate process altogether from the process of investigation.

#### **THE PURPOSE OF THE LEADERSHIP CODE**

The Leadership Code is an ethical and moral code of conduct for leaders. It is concerned primarily with the personal and official integrity of leaders as well as the integrity of Government in Papua New Guinea. Any act that implicates negatively on the moral integrity of a leader can amount to misconduct in office and it is the constitutional duty of the Ombudsman Commission to investigate that.

The Leadership Code was intended to be more than aspirational, it was intended to be morally and legally binding on leaders and firmly enforced. The focus of this Code is not to have the Ombudsman Commission investigate the criminal acts of leaders and misconduct need not be criminal in nature.

It was also not intended to absolve leaders from criminal responsibility. If leaders were guilty of committing criminal offences, they should be criminally liable for their conduct under the Criminal Code. The Leadership Code was not intended to make a leader immune from criminal prosecution or the application of other laws they may have breached by their misconduct.

The CPC stated in particular that:

**We do not intend that the provisions of the Code should limit the effect of any provisions of the Criminal Code or any other law concerning offences similar to the breaches of the Leadership Code. It is additional to existing legislation. (CPC Chap 3 Para 86).**

#### **CONSTITUTIONAL PROVISIONS AND STANDING ORDERS (SO) OF PARLIAMENT ON CONSTITUTIONAL AMENDMENTS**

A Permanent Parliamentary Committee on Constitutional Laws and Acts (PPCCLA) is established at the start of each Parliament (SO 24C(1)). Its main function is to consider proposed laws to the Constitution and the Organic Law and report back to Parliament (SO 24C(2) and (3)).

The following procedures are submitted to be the steps to be followed prior to the passing of a Constitutional amendment. This paper does not comment on whether the process has been complied with as additional facts would have to be established before taking a view.

- Proposed law must be published by the Speaker in full in the National Gazette, and circulated in accordance with the SO of Parliament to all members of Parliament not less than one month before it is formally introduced into Parliament (s 14(2), *Constitution*);
- Mover in charge of a proposed law present a signed copy of it to the Clerk (SO 222A(1));
- The Clerk shall read the proposed law a first time (SO 222A(2));
- Proposed Law then shall stand referred to the PPCCLA for its report (SO 222A(3));
- Any report from the PPCCLA is tabled before Parliament (SO 222B(1));
- The mover of the proposed law may make his second reading speech and open the debate to be referred to as the first opportunity for debate as required by the *Constitution* (SO 222B(2));
- At the conclusion of the first opportunity for debate, if any amendments have been circulated in accordance with SO 222B, Parliament shall resolve itself into a Committee of the Whole for consideration of amendments to the proposed law (SO 222C(1));
- On the Report of the Chairman of Committees the members of Parliament will vote on the proposed law. This is the first vote and will be recorded. It must be in accordance with the prescribed majority (SO 222D);
- Because there are differing prescribed majorities under s 17 of the *Constitution*, for each of the provisions of the proposed law, the majority would be the "...greatest of those majorities" (see s 17(6), *Constitution*);
- The greatest of the majority is three-quarters absolute majority. Section 217 is proposed to be amended, which requires three-quarters absolute majority (s 17(3), *Constitution*). This would be 82 members (rounded of to the nearest whole number);
- If the proposed law is supported by the required majority in the First Vote, the Speaker shall order the third reading be adjourned without question for at least two months as required by the *Constitution* (SO 222E(1));
- After the passage of the required period, any report from the PPCCLA is tabled and members are given the opportunity for debate (SO 222F(b));
- At the conclusion of the debate, the members take the second vote which must be supported by the prescribed majority (SO 222G(3));
- If the proposed law is supported by the required majority, it shall be read a third time, and shall become law on certification by the Speaker.

## THE PROPOSED AMENDMENTS TO THE LEADERSHIP CODE AND THE COMMISSION'S POSITION

As stated by the MP for Esa'ala Open Hon Moses Maladina during the second reading of the Bill with the following amendments in Parliament as recorded in the Hansard of Wednesday 11 March 2009

**"the whole purpose of the amendment to the Leadership of these two to make the Ombudsman more effective to protect the integrity of leaders and to ensure that the system of government is effectively to the people of this nation"**

It is in light of this intention that the Commission presents its views on the following amendments.

### A RESPONSIBILITY OF DEPARTMENTAL HEADS

#### Amendments to *Constitution* Section 27, Responsibilities of office

*Subsection 27(3)* of the *Constitution* to be amended to include a new paragraph (c) which refers particularly to the responsibility of Department Head's for control of public funds.

This proposal is tied up with the proposed amendment to Section 16 of the *Organic Law on the Duties and Responsibilities of Leadership* (OLDRL).

#### Amendments to OLDRL Section 16, Agents

*Section 16A* of the OLDRL would make specific provision for heads of departments to be held responsible for the actions of their staff in relation to finances.

#### OC Response

The Commission acknowledges that this amendment is trying to get around the problem of delays or failure in the implementation of government policy by Departmental Heads. It also seeks to have the Departmental Head held responsible for the actions of their staff in relation to finances. The Committee suggested that this could involve the misuse of funds by Departmental staff.

The Commission is of the view that this proposal is not clear in terms of the mischief it seeks to address and also the role of the Ombudsman Commission and should not be passed because it will serve no useful purpose.

We say this because Departmental Heads are already subjected to the Leadership Code as leaders under Section 26 of the *Constitution*. In addition, there are existing legal and administrative mechanisms available to address the problem of implementation of government policy e.g. provisions of the *Public Finances Management Act* (PFMA), criminal law to address fraud and criminal misuse by staff, *Employment Contracts* which spell out duties and responsibilities of Departmental Heads and Ministerial oversight which is vested in responsible Ministers to oversee the work of their Departmental Heads.

There are also other important reasons why the Commission ought not to be specifically required to enforce the implementation of government policy. These include; resource constraints, demarcation issues with other agencies, especially the Auditor-General and more importantly the Commission may be interfering into the political arena and may compromise its impartiality.

The above proposal also appears to be contrary to the intent of the proposed amendment to Subsection 27(5) of the *Constitution* which is addressed below.

## **B THE COMMISSION'S POWER TO ISSUE DIRECTIONS UNDER S27 (4) OF THE CONSTITUTION**

*Subsection 27(5) of the Constitution would prohibit the Commission from issuing a Constitution Section 27(4) Directive if it would prevent the implementation of Government policy.*

### **OC Response**

Whilst the proposed amendment to Section 27(3) of the Constitution and Section 16 of the OLDRL (discussed above) seeks to engage the Ombudsman Commission in policing the implementation of government policy and directives, it appears that this proposal to restrict the powers of the Commission to issue a Direction under section 27(4) of the Constitution does not allow the Commission to prevent the misuse of public funds and protect the integrity of leaders involved where budgetary allocations are being misused. The result is that the Commission's integrity can be questioned.

Out of Section 27(4) Directions the Commission has issued so far, majority of them have been to used to prevent the misuse of public funds which were in most cases deposited into private accounts and withdrawn at will without compliance with the requirements of the PFMA or the relevant guidelines for use and disbursements of these funds. In addition, the Commission has also used this power to issue Directions to stop hefty payouts to certain individuals that are not justified or sanctioned by law. Millions of kina in public funds have been saved by the use of these Directions.

Section 27(4) Direction is an exceptional power that has been used to maintain the integrity of leaders and the integrity of Government in PNG. It has been used sparingly and with due consideration for the need to prevent the potential misuse of public funds and at the same time not to compromise implementation of government policy. The Commission acknowledges the need for speedy investigations and can have this concern addressed administratively.

The Commission does not support this proposed amendment.

## **C SETTING UP OF A PERMANENT OMBUDSMAN COMMISSION COMMITTEE**

**Amendment to Section 219 of the Constitution - Functions of the Commission**

*Section 219A would create a permanent parliamentary committee called the Ombudsman Commission Committee (OCC).*



This amendment is tied in with the proposed amendment to Section 16 (b) of the OLDRL which will be discussed together here.

*Section 16B* provides for powers and functions of the OCC.

#### OC Response

Hansard records Hon Maladina stating that the responsibilities of the Committee are two-fold. Firstly, it is to enhance the work of the Ombudsman Commission by dealing with reports of the Commission under the *Organic Law on the Ombudsman Commission* in Parliament. That aspect is welcome by the Commission because of lack of political attention to that aspect of its work over the years.

The second role of the Committee was for it to deal with administrative issues in the manner the Public Accounts Committee (PAC) deals with financial matters. This aspect of the work of the OCC needs to be clarified, because it appears to duplicate the work of the Commission and may compromise the independence of the Ombudsman Commission and its investigations.

The Commission supports the establishment of the OCC to complement the work of the Commission under OLOC Administrative Report but any attempt to interfere into the investigative role of the Commission should be considered carefully.

More importantly, this new provision is misconceived it is addressing, corresponding amendments made to OLOC.

#### **D BAR ON PROCEEDINGS - DOUBLE JEOPARDY ARGUMENT**

##### **Amendment to Section 28 of the Constitution – Effect of proceeding**

The proposed amendment is tied in with the Amendment to Section 30 of the OLDRL – (Effect of Proceedings), and will be discussed together here.

*Subsection 28(5)* of the Constitution places a bar on proceedings being commenced under more than one law for the same alleged offence.

Amendments to Section 30 of the OLDRL introduce a bar on proceeding against a leader in more than one Court or Tribunal for the same conduct alleged.

*Subsections 30 (6) and (7)* of the OLDRL direct that the Commission not commence proceedings when other proceedings have already taken place.

#### OC Response

The double jeopardy argument used to justify this amendment reflects a lack of understanding of the intention and purpose of the Leadership Code as a moral and ethical code of conduct for leaders.

The Leadership Code is a moral and ethical code of conduct for leaders. It is concerned primarily with the personal and official integrity of leaders as well as the integrity of

Government in Papua New Guinea and was never intended to give leaders preferential treatment of any kind. It was intended to remind leaders of their responsibilities to be examples to others and to be blameless in their conduct.

In its final report, the Constitutional Planning Committee stated as follows:

We do not intend that the provisions of the Code should limit the effect of any provisions of the Criminal Code or any other law concerning offences similar to the breaches of the Leadership Code. It is additional to existing legislation. (CPC Chap 3 Para 86).

An investigation by the Ombudsman Commission is administrative in nature and does not affect the application of any other Law including the Criminal Code if the conduct is criminal.

This proposal is opposed by the Ombudsman Commission because it would create two sets of laws and procedures, one for leaders and the other for the public. This would be directly contrary to the intention of the CPC and would defeat the purpose of the Leadership Code.

## E TRIBUNAL MATTERS

### Amendments to Section 29 Constitution - Prosecution of Misconduct in Office

*Constitution Subsection 29(1)* amendments would change the test that the OC needs to meet before deciding to refer a leader to the Tribunal from *prima facie* to *evidence of misconduct*, and provides the OC with discretion on whether to refer by replacing *shall* with *may*.

#### OC Response

The Ombudsman Commission is an investigative body. Assessment of evidence and penalties for misconduct in office is decided by the Tribunal hence this proposal may compromise the work of the Commission. There needs to be further clarification from the Committee about the meaning of "evidence of misconduct" in light of possible inconsistency with Section 27(1) of the OLDRL.

## F OMBUDSMAN COMMISSION'S POWER TO ISSUE DIRECTIVES

The following three amendments are proposed to give the Commission the power to issue directives to leaders in certain circumstances instead of referring the matter to the Public Prosecutor for prosecution.

*Subsection 29(3) Constitution* provides the OC with the power to make a directive to a leader to correct an action where the OC considers there is no serious culpability or the misconduct is minor.

*Subsection 27 (1A) OLDRL* would provide the OC with the power to issue directives where it is of the opinion that there is no serious culpability or the misconduct is minor.

*Subsection 20 (11) (b) OLDRL* provides that the OC can issue directives to correct conduct where there is no serious culpability or the misconduct is minor.

**OC Response**

The Ombudsman Commission is concerned that these proposals are confusing the role of the Commission as an investigative body to that of the tribunal. It is not the work of the Commission to decide issues of culpability except to show by its investigation findings evidence that misconduct has taken place.

The Commission may be accused of being investigator, judge and jury and the integrity of its investigations may be questioned. In light of the existing power of the Commission to issue Directions under Section 27(4) of the *Constitution*, this proposal may be unnecessary.

**G INTERFERENCE IN THE WORK OF THE COMMISSION****Amendment to Section 18 OLDRL - Complaints**

The amendment to *Section 18* would place a time limit of 4 years on all leadership investigations.

**OC Response**

The Ombudsman Commission is concerned that legislative timeframes may be counter productive to the enforcement of Leadership Code, especially if the OC has insufficient resources to meet the timeframes. The idea that by this amendment, all investigations will be completed by the end of a parliamentary term is absurd because allegations arise and investigations are commenced at any time.

If allowed this may become a loophole in light of the high frequency of leaders resigning to avoid prosecution and dismissal which would allow them to be reappointed as soon as the 4 year period has expired and avoid altogether their responsibility under the Leadership Code. It may be seen to be interference in the work of the Commission.

There is existing discretion under Section 18(3) of the OLDRL for the Commission not to investigate a matter that has been too long delayed which the Commission can exercise administratively as and when required.

Another proposed amendment that seem to interfere with the work of the Commission by placing a timeframe is the amendment to Subsection 20 (6) and (7) OLDRL.

*Subsections 20(6) and (7)* OLDRL both require that if the OC is satisfied that there is evidence of misconduct they must notify the alleged offender within 14 days of the receipt of the complaint.

**OC Response**

Apart from imposing a timeframe on how soon the Commission is required to act on a complaint, it is unclear how the 'right to be heard' provisions' fit in with the new notification provisions in (6) and (7) above.

In addition, it appears that the Commission is expected by this amendment to be the "conscience" of the leader by reminding leaders of mistakes and asking them to stop. Leaders should not be excused from criminal or moral responsibility for their actions. This

would seem to be case if the Ombudsman Commission fails to remind them of their wrong doing.

All leaders are expected to know their responsibilities and duties under the Leadership Code and all other relevant laws applicable to them first as a citizen and then as a leader. This provision appears to interfere with the investigative scheme provided for under the OLDRL. Pending further clarification on the issues now raised, this proposal is not supported.

#### **Amendments to Section 20 OLDRL - Proceedings of the Commission**

*Subsection 20(8)* OLDRL allows the Commission to consult with the alleged offender in relation to matters investigated under (6) and (7).

##### **OC Response**

This proposal lacks clarity. Given the existing process of the right to be heard, this proposal appears to be duplication and therefore is unnecessary. It compromises the Commission in justifying the conduct of Leaders.

#### **H INCREASE IN THE BURDEN OF PROOF TO THE CRIMINAL STANDARD**

##### **Amendments to Subsection 27 (4A) OLDRL – Burden of Proof**

*Subsection (4A)* would increase the standard of proof to beyond reasonable doubt and place the burden on the prosecution.

##### **OC Response**

The Commission notes that the standard of proof has been raised by the Courts in recent times. The Ombudsman Commission is concerned that to raise the standard of proof to the criminal standard by law imposes upon the Commission greater responsibility to prove its case based on moral and ethical conduct. However, if the criminal standard and burden of proof is to be imposed, it would be appropriate for the tribunal to be able to impose criminal penalties, at least for criminal conduct such as misappropriation.

Generally, the criminal standard of proof confuse the intent of the Leadership Code and the Tribunal as a moral code of conduct rather than a criminal code.

There were irregularities with gazettal of Subsection 27(4A) of the OLDRL.

#### **I APPROVAL FOR SHAREHOLDING**

##### **Amendments to Section 8 OLDRL - Shareholdings**

The new *section 8* would be similar to the requirements around shareholding by leaders and their families; in particular it would remove the requirement to obtain prior approval from the OC before purchasing shares.

##### **OC Response**

The Ombudsman Commission does not see a need to change this provision at this stage. Concerns about delay can be dealt with by improving internal processes, and by improving education/communication with leaders about the process.

## **J AMENDMENTS THAT LACK CLARITY**

### **Amendments to Section 20 OLDRL - Proceedings of the Commission**

New *Subsection 20(2)* OLDRL requires that the Commission not divulge any information to the media that may prejudice a tribunal hearing or impute guilt to the accused. New *subsection 20(3)* would allow a person to seek relief in the National Court if this occurs.

#### **OC Response**

The investigations of the Commission would be invalidated by any information to the media under this proposed amendment. The question of whether the release of information has breached natural justice is a matter of fact, which should properly be left to the Courts.

The Ombudsman Commission has a duty also to keep the public informed of what it is doing at the appropriate time such as when a leader has been referred to the Public Prosecutor for misconduct in office. Such a release to the media is no different from the reporting of criminal charges against any person.

The proposal appears to seek preferential treatment for leaders over members of the public who are subjected to Court proceedings for their actions. There is no justification for this proposal and it is not supported.

## **K AMENDMENTS THAT ARE ACCEPTED WITHOUT OBJECTIONS**

### **Amendments to Section 217 Constitution - The Ombudsman Commission**

This amendment would remove Section 217(8), which defines conduct. This provision is repeated in Section 219(8).

#### **OC Response**

As the definition is captured in Section 219(8) this amendment is accepted.

### **Amendments to Section 27 (5) Constitution - Further provisions**

*Subsection 27 (5)* of the *Constitution* would give the Tribunal the discretion to issue a directive as a punishment.

#### **OC Response**

No objections to this amendment.

### **Amendments to Section 28 Constitution - Further provisions**