



NATIONAL INTEGRITY SYSTEM STUDY

OFFICE OF THE OMBUDSMAN

DISCUSSION PAPER 2
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About the Transparency Vanuatu National Integrity System Study Discussion Papers Series

The National Integrity System (NIS) study follows a methodology developed by the Transparency International Secretariat in Berlin. This methodology provides the structure of the report and identifies the questions to be addressed. The Vanuatu NIS study examines 13 key institutions, or “pillars”: legislature, executive, judiciary, ombudsman, auditor general, public service, law enforcement, media, private business, customary authorities, electoral commission, political parties and civil society. The research aims to develop consensus of the key recommendations for change. Each pillar discussion paper is based upon review of laws, documents and interviews. Discussion papers are released to the advisory group, external reviewer and the public. The discussion paper is a work-in-progress. All comments, corrections or additions are welcome. Comments are requested by the end of February 2014. Comments can be returned to Transparency Vanuatu in writing or in person (contact details above). If you would like to be added to the email list to be notified when further discussion papers are released or when public meetings on the report are held please contact Transparency Vanuatu.

SUMMARY

The Office of the Ombudsman was established in 1994. The first Ombudsman Act was passed in 1995, but was repealed in 1998. A new Ombudsman Act, with more restrictive powers, came into force in 1999. The most significant restriction was that the power of the Ombudsman to apply to the Supreme Court for an order that recommendations be implemented in the event that the Prime Minister failed to act on recommendations within a set time frame was removed. Since that time there have been a number of reviews and calls to revise and expand the power of the Office of the Ombudsman. The main reason for calls for review is the lack of consistent action in response to Ombudsman’s reports. No changes have been made to the Ombudsman Act or the Leadership Code Act in response to reviews.

It is not just the issue of legal power that restricts the operation of the Office of the Ombudsman. Staffing levels have been declining and there are limited resources to carry out public awareness functions. The number of public complaints received and the number of reports issued have also been declining.

The fourth Ombudsman passed away in 2012, whilst in Office and this has been somewhat disruptive. In March 2013 Kalkot Mataskelekele was appointed as the fifth Ombudsman.

RECOMMENDATIONS

- 1) There are significant issues with lack of action in response to Ombudsman’s reports and recommendations. One reason for these issues is that gaps in the law allow recommendations to be ignored. The Law Reform Commission (LRC) should follow up on existing proposals and

recommendations to strengthen the law so as to ensure that concrete action on recommendations arises. Issues that the LRC should specifically consider include:

- a) Whether power should be given to the Ombudsman to refer matters to court if recommendations are not responded to
 - b) Whether establishing a new body – a Leadership Code Tribunal - is appropriate
 - c) Whether expanding the powers of the Office of the Ombudsman so that it becomes a Commission with police and prosecutorial powers is appropriate
 - d) Whether the law should allow statements given during the course of Ombudsman enquiries to be used as evidence in court
 - e) Whether the law should be amended to ensure that full copies of all annual returns provided by leaders under the Leadership Code Act be provided to the Office of the Ombudsman and/or scrutinised by a joint body including the Ombudsman, the Auditor General and the Clerk of Parliament.
- 2) Another reason for lack of action on recommendations is that there are weak links between the Ombudsman and other agencies.
- a) In order to facilitate successful criminal prosecutions coordination between the Office of the Ombudsman, the Police and the Public Prosecutor should be improved.
 - b) In order to facilitate successful disciplinary actions against public servants coordination between the Office of the Ombudsman and the Public Service Commission should be improved.
- 3) The number of complaints received by the Office of the Ombudsman is declining, and one of the causes of this is lack of education. The Office also has no formal education or public awareness programme. In order to strengthen the education role of the Office of the Ombudsman:
- a) The LRC should consider amending the Ombudsman Act to specifically list education as one of the roles of the Office;
 - b) Resources should be specifically allocated in a separate budget line for conducting education activities by the Ministerial Budget Committee;
 - c) In order to ensure that resources are well utilised and agencies (including NGOs) are not duplicating education activities coordination and cooperation between agencies who carry out an public education activities in the broad field of integrity/anti corruption/legal literacy/civic education should be strengthened;
 - d) Cooperation between the PSC and the Office of the Ombudsman to strengthen awareness of integrity amongst public servants should be developed.
- 4) Reporting of activities by the Office of the Ombudsman should be strengthened:
- a) Resources and technical support to update the file management/case tracking database should be provided, either by the government, aid donors or other partners, as this will make it easier to collect data.
 - b) Resources and technical support for the Office of the Ombudsman to develop and maintain a website should be provided, either by the government, aid donors or other partners.
 - c) The LRC should consider revising the law to specify further the required contents of annual reports. This will help to ensure that desired information is consistently provided. Content of

the annual report should include clear data on: the number of complaints received in that year, the number of received complaints not investigated, and the reasons for not investigating. Annual reports should also provide clear data on the number of current complaint files being processed in the Office, the number of complaint files closed and the reasons for closure, the number of complaint files resolved and the method of resolution. Brief summaries of disputes resolved by mediation should also be provided, if there are no issues of confidentiality.

- d) The Pacific Legal Information Institute (PacLII) website currently publishes public reports, which makes them easily and freely available to the public. The Office of the Ombudsman should also supply annual reports to PacLII for publication.
5. A cross cutting issue affecting both the OAG and the Office of the Ombudsman is the potential for interference or delays in staffing matters by the PSC. This issue has also been faced by other constitutional offices, and the solution has been to give other constitutional offices the direct power to recruit. The State Law Office Act [Cap 242] provides an example of legislation that allows this. The law should be revised (possibly using the State Law Office Act [Cap 242] or the Ombudsman Act 2995 as a model) to give the Office of the Ombudsman the power to directly recruit staff.
 6. There is a plan to move the Post Vila Office to government buildings by 31 December 2013 in order to address longstanding concerns about high rental costs. The implementation of this plan should be monitored by the National Integrity System (NIS) research team, so that the final NIS report contains current, specific recommendations in respect of the location and resourcing of offices.

STRUCTURE AND ORGANISATION

The Constitution provides for a single Ombudsman who has the power to enquire into the conduct of all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies.¹ The Constitution also requires the Ombudsman to take complaints related to citizens not being able to obtain government services in their choice of official language and to make reports in respect of multilingualism.²

More detail as to the functioning of the Office of the Ombudsman and the Ombudsman's powers are defined by the Ombudsman Act [Cap 252] and the Leadership Code Act [Cap 240].³

The Office of the Ombudsman is the secretariat is in charge of supporting the activities of the Ombudsman. Offices are maintained in Port Vila and Luganville. The Office is divided into two divisions – the leadership code division and the maladministration division. Complaints in respect of multilingualism fall under the leadership code division.⁴

¹ Chapter 9 Part II Constitution.

² Article 64(2).

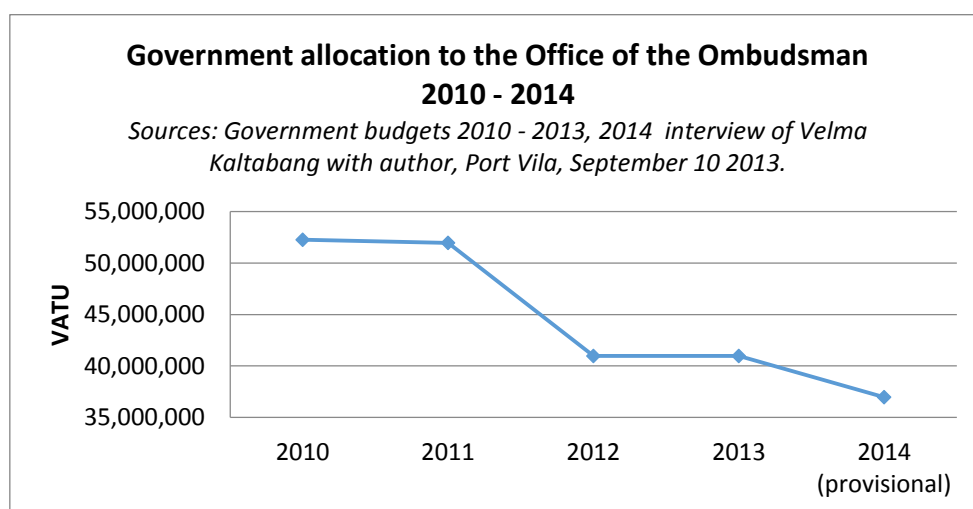
³ A useful descriptive overview of the legal framework governing the Ombudsman can be found in Michael Frahm, (2013) 'Vanuatu Ombudsman', in International Ombudsman Institute (ed) *Australasia and Pacific Ombudsman Institutions* (Springer) pp 283-293.

⁴ Interview of Alain Molgos with author, Port Vila, September 10 2103.

RESOURCES

To what extent does an Ombudsman or its equivalent have adequate resources to achieve its goals?

As the chart below indicates, in the past 5 years government funding of the Office has decreased significantly, and is continuing to decline. The decrease of approximately 12 million vatu between 2011 and 2012 occurred because allocated money had not been used to fill vacant staff positions. Money was therefore reallocated. The Office of the Ombudsman is anticipating a further 4 million vatu cut in 2014 as they have been told that their budget is capped at 36,972,000 vatu in the 2014 budgeting process.⁵ The reason for this cut is that it is planned that the Port Vila Office will move from private premises to government offices by 31 December 2013, which will result in a significant rental savings.⁶



A number of Ombudsman's Annual Reports have recommended moving the Port Vila Office from private to government premises in order to reduce operational expenses.⁷ However, implicit in this recommendation has been the idea that the operations/administration budget should remain at the same level, but that a saving in rental will allow the operations/administration budget to be more effectively utilised for other activities. The 2010 Annual Report commented that of the 2010 allocation of 52,260,931 vatu, 37,677,922 vatu was allocated for staffing and 14,582,939 vatu for administration and operations. Of the operations/administration budget 5,304,000 vatu was spent on rent for offices, leaving just over 9 million vatu for all other expenses and activities.⁸ The most significant area affected by the limited operations/administration budget is education. There is no budget allocated specifically for education or public awareness activities.⁹

⁵ Interview of Velma Kaltabang with author, Port Vila, September 10 2013.

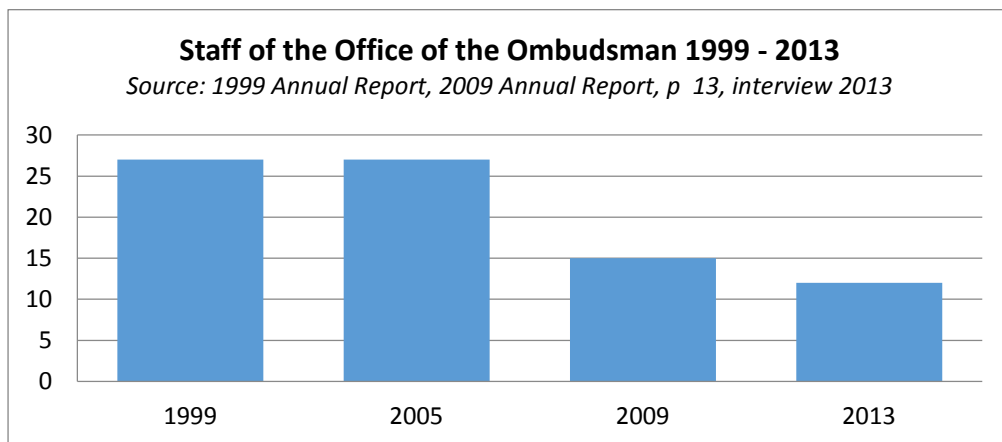
⁶ Ibid.

⁷ See for example, Office of the Ombudsman, *Annual Report January – December 2010*, p 18; Office of the Ombudsman, *Annual Report January – December 2011*, pp 10 – 11.

⁸ Office of the Ombudsman, *Annual Report January – December 2010*, pp 17 – 18.

⁹ Interview of Alain Molgos with author, Port Vila, September 10 2013; interview of Kalkot Mataskelekele with author, Port Vila, 20 August 2013.

Staffing of the Office of the Ombudsman has steadily declined over the past 15 years. Currently there are 12 staff.¹⁰ Whilst some previous Ombudsmen have failed to initiate recruitment procedures to utilise their staffing budgets,¹¹ budgetary issues have recently hindered recruiting. Between December 2011 and June 2012 the Office had 3 staff resign. One further staff member (the then Ombudsman) passed away. These staff were entitled to large severance allowances and/or other benefits. There is no provision for planned saving for the payment of allowances on termination within the government budget system.¹² As a result much of the budget for staff in 2012 was spent on termination allowances, rather than recruitment.¹³



There is some external perception that lack of resources is being used, to a degree, as an excuse for lack of activity.¹⁴ Declining numbers of complaints (discussed further below), which in turn leads to fewer investigation files, means that the ratio of staff to files has increased since 1999 from 16 lawyers/investigators to 1092 investigations, or 1: 68 in 1999 to 6 lawyers/investigators to 217 files, or 1:36 in 2011.¹⁵ These figures exclude the Ombudsman. The first Ombudsman reported that in the late 1990s she had a budget about VT30,000,000 and still managed to receive the highest level of complaints recorded and to produce high levels of public reports.¹⁶ In 1999 the average time to make an initial response to complaints was 1 month, and 86% of cases were closed within 18 months.¹⁷ The 2011 Annual Report lists the disputes resolved that year by mediation. The average length of time taken was about 4 years and 3 months.¹⁸ This is despite the fact that it was expected that giving the Ombudsman power to mediate would result in quicker resolution of disputes.¹⁹

INDEPENDENCE (LAW)

To what extent is the Ombudsman independent by law?

¹⁰ Interview of Alain Molgos with author, Port Vila, September 10 2013.

¹¹ Interview of Alain Molgos with author, Port Vila, September 10 2013.

¹² Mark Bebe, National Integrity System Advisory Group Meeting, Port Vila, September 19 2013.

¹³ Interview of Alain Molgos with author, Port Vila, September 10 2013.

¹⁴ National Integrity System Advisory Group Meeting, Port Vila, September 19 2013.

¹⁵ Office of the Ombudsman, *Annual Report September 1998 – August 1999*, 10.

¹⁶ Email from Marie-Noelle Paterson to author, September 25 2013.

¹⁷ Office of the Ombudsman, *Annual Report September 1998 – August 1999*, 12.

¹⁸ Information is contained in Office of the Ombudsman, *Annual Report January – December 2011*, pp 16 – 23.

The average time has been calculated by the author.

¹⁹ Office of the Ombudsman, *Annual Report September 1998 – August 1999*, 12.

Article 65 of the Constitution guarantees the Ombudsman's independence. It provides that 'The Ombudsman shall not be subject to the direction or control of any other person or body in the exercise of his functions.'

The Ombudsman is appointed by the President in consultation with the Prime Minister, the Speaker of Parliament leaders of other political parties represented in Parliament, and the chairmen of the National Council of Chiefs, the Local Government Councils, the Public Service Commission and Judicial Services Commission for a period of 5 years.²⁰ The requirement for the President to widely consult is intended to ensure that no individual political party can unduly influence the appointment of the Ombudsman, although there has been one recommendation, in 2001, for the Ombudsman to be appointed by a Committee, rather than an individual.²¹ The Ombudsman Act provides further grounds for appointment, relating to knowledge of ni Vanuatu culture, integrity, academic qualifications, political independence and high standing in the community.²² There is no limit on reappointment of Ombudsmen.

Under the Constitution the Ombudsman can only be removed if he or she becomes disqualified to hold the position.²³ Grounds for disqualification in the Constitution are if he or she 'is a member of Parliament, the National Council of Chiefs or a Local Government Council, if he holds any other public office, or if he exercises a position of responsibility within a political party'.²⁴ These grounds aim to ensure the Ombudsman's independence. Further grounds for termination are included in the Ombudsman Act. These include bankruptcy, incapacity, conviction of a criminal charge other than a traffic offence, a finding of gross misconduct or a conviction under the Leadership Code Act.²⁵ Incapacity must be supported by two medical certificates, one from a doctor of the President's nomination and one from a doctor of the Ombudsman's nomination.²⁶ Findings of gross misconduct must be made by at least three members of a tribunal made up of a representative from the Supreme Court, the Attorney General, and two legal representatives, with one nominated by the Prime Minister and one by the Leader of the Opposition. The Ombudsman must be heard and is entitled to representation in front of such a tribunal.²⁷ The President holds the power to dismiss, but can only exercise it after consultation with the same position holders consulted during appointments.²⁸ These safeguards on terminate on help to guarantee that the Ombudsman can carry out his or her duties without fear of losing his or her job.²⁹

His or her salary is determined by the President, in consultation with the PSC, but is statutorily guaranteed to be no less than that of a Supreme Court judge.³⁰

Other aspects of independence that are legally protected are that the Ombudsman is entitled to decide how to conduct proceedings³¹ and that the Ombudsman and his or her staff are protected from legal liability in respect of any actions carried out in good faith whilst undertaking their jobs.³²

²⁰ Article 61(1) Constitution & section 3(2) Ombudsman Act [Cap 252].

²¹ Edward R Hill, 'A Structural Analysis of the Ombudsman of Vanuatu' (LLM thesis, University of the South Pacific, 2004) pp 24 – 25.

²² Ombudsman Act [Cap 252] section 3(3).

²³ Constitution, Article 61(3).

²⁴ Constitution, Article 61(2).

²⁵ Section 8(1) Ombudsman Act [Cap 252].

²⁶ Section 8(3) Ombudsman Act [Cap 252].

²⁷ Sections 8(4)&(5) Ombudsman Act [Cap 252].

²⁸ Section 8(1) Ombudsman Act [Cap 252].

²⁹ Edward R Hill, 'A Structural Analysis of the Ombudsman of Vanuatu' (LLM thesis, University of the South Pacific, 2004, p 25.

³⁰ Section 4(2) Ombudsman Act [Cap 252].

Even though the legal framework provides for a number of mechanisms aimed to ensure the Ombudsman's independence, there are some shortcomings that might threaten independence and impartiality.

There are legal limits on how an Ombudsman can write his or her reports. In particular he or she must not 'c) produce reports containing inflammatory language not in keeping with the professionalism expected of the office'.³³ This limit was introduced by the 1998 Act.

There are also limits on what the Ombudsman can investigate. The law prohibits the Ombudsman from enquiring into: 'a matter that has previously been the subject of an enquiry by the Ombudsman; the reasons a recommendation of the Ombudsman has not been followed; and the action taken by a leader or person in charge of a government agency to give effect to a recommendation of the Ombudsman.'³⁴ These limits are considerably more restrictive than what was provided in the original Ombudsman Act 1995. Under that Act in response to a report the Prime Minister was required to provide information about the steps that were proposed in relation to the Ombudsman's recommendations. If there was no response the Ombudsman was empowered to apply the Supreme Court for an order that the recommendations be implemented.³⁵

Staff of the Office of the Ombudsman are appointed by the PSC in consultation with the Ombudsman, but hold office under terms and conditions decided solely by the PSC.³⁶ Prior to 1998 the Ombudsman had the direct power to recruit,

INDEPENDENCE (PRACTICE)

To what extent is the Ombudsman independent in practice?

The changes introduced by the 1998 Act have the potential to limit the independence of the Ombudsman. Indeed the perceived intention of the 1998 Act was to fetter the Ombudsman. In brief these circumstances leading to the 1998 Act were that political leaders found the first Ombudsman too confrontational and threatening.³⁷ The requirement that reports not include inflammatory language can be perceived as an attempt to limit confrontational reports.³⁸ Removal of the power of the Ombudsman to directly recruit 'creates the potential for employees of the Ombudsman to be intimidated where their work is critical of or threatens someone who has control over the employment of public servants. It was strongly recommended by the advisor from Ombudsman Commission of Papua New Guinea that the hiring of Ombudsman's employees be separate from the Public Service in order to avoid this very possibility.'³⁹ Removal of the power to enforce

³¹ Section 20 Ombudsman Act [Cap 252].

³² Section 41 Ombudsman Act [Cap 252].

³³ Section 6(1)(c) Ombudsman Act [Cap 252].

³⁴ Section 19 Ombudsman Act [Cap 252].

³⁵ Section 30 Ombudsman Act 1995.

³⁶ Section 44 Ombudsman Act [Cap 252].

³⁷ For a discussion of the first Ombudsman and political reaction to her see Edward R Hill, 'The Vanuatu Ombudsman' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law Society and Governance in the Pacific* (Pandanus Press: Canberra) 2003, pp 71 – 91.

³⁸ *Ibid*, pp 78 – 79.

³⁹ *Ibid*, p 78 and note 41.

recommendations via court action means that there is no mechanism to ensure recommendations are acted upon.⁴⁰

Subsequent to the changes in the law in 1998 there have been no examples of overt political interference. The Office of the Ombudsman is currently not subject to direct threats from politicians.⁴¹ The law restricting inflammatory language in reports has not created problems as reports are based on facts supported by evidence and law.⁴²

Lack of action on recommendations contained in Ombudsman's reports is something of a problem. The Ombudsman has received complaints about lack of response to reports.⁴³ As such the law restricting the Ombudsman from enquiring as to why recommendations have not been followed or what actions have been taken in response to recommendations does create a practical restriction on the investigation of such complaints.

Recruitment via the Public Service Commission (PSC) can be a long, slow process.⁴⁴ Delays in recruitment have affected the functioning of the Office of the Ombudsman. As an example of delays experienced, 6 positions (including legal officers, corporate service officers a cleaner and a secretary) were advertised in August 2012. So far four of these positions have been filled, in December 2012, March 2013 and August 2013 (2 positions). Two positions were offered to candidates but they had found positions elsewhere and declined the offers. One of the positions was filled internally, so out of the August 2012 recruitment round for 6 staff the Office ended up having 3 unfilled positions.⁴⁵ Whilst there is no suggestion that delays have been a deliberate attempt to interfere with the Office, delays in recruitment have had a significant impact on the Office. Not recruiting staff in a timely manner also weakens corporate memory. New staff often come into positions that have been left unfilled for quite some time and suffer from lack of handover.⁴⁶ Under the first Ombudsman Act the Ombudsman did have the power to recruit and previous Ombudsmen have recommended that this power be restored.⁴⁷ Previous reviews have also recommended that the Ombudsman's power to directly recruit staff be restored due to the potential for interference with the independent functioning of the Ombudsman.⁴⁸ There is also support for this proposal within the PSC.⁴⁹

TRANSPARENCY (LAW)

To what extent are there the provisions in the place to ensure that the public can obtain relevant information on the activities and decision- making processes of the Ombudsman?

⁴⁰ Ibid, p 79.

⁴¹ Interview of Alain Molgos with author, Port Vila, September 10 2013.

⁴² Interview of Alain Molgos with author, Port Vila, September 10 2013.

⁴³ Transparency Vanuatu's Advocacy and Legal Advice Centre has received several complaints from clients about lack of action on Ombudsman's reports and has forwarded these complaints to the Office of the Ombudsman, although no action has been able to eventuate.

⁴⁴ Office of the Ombudsman, *Annual Report January – December 2009*, p 13.

⁴⁵ Interview of Alain Molgos with author, Port Vila, September 10 2013.

⁴⁶ Interview of Alain Molgos with author, Port Vila, September 10 2013.

⁴⁷ See, for example, Office of the Ombudsman, *Annual Report January – December 2009*, p 13.

⁴⁸ The McDowell Committee, in 2002 and the Review Committee, in 2004, both strongly recommended that the Ombudsman should have direct power to recruit (Draft Development Committee of Officials Ombudsman Legislative Proposal Policy Paper 2011, Attachment 2: Changes to the Ombudsman Act, p 5).

⁴⁹ Interview of Laurent Rep with author, Port Vila, August 30 2013.

The Constitution requires that enquiries be carried out in private.⁵⁰ The only documents on the Ombudsman's activities that are required to be made publicly available are reports on enquiries, although all or part of these too can remain confidential on the grounds of national security or public interest.⁵¹ The grounds for keeping information confidential are further defined in s 26(2) of the Ombudsman Act [Cap 252].

The Ombudsman has the power to attempt to resolve disputes by mediation.⁵² The law is not clear on whether issues resolved by mediation have to be reported on.

Annual reports and other special reports are given to the Prime Minister, for presentation in Parliament,⁵³ but there is no explicit requirement that these be made publically available. The Act does not provide a specific deadline by which annual reports must be presented.

The Ombudsman can establish his or her own proceedings in respect of: the methods by which complaints are acted upon; the scope and manner of enquiries to be made; and the form, frequency and distribution of his or her conclusions and recommendations.⁵⁴ There is no requirement that the Ombudsman publish general information on standard procedures developed by the Ombudsman in respect of any of these things. Nor does the law establish a public council or regulate requirements for public consultation.

TRANSPARENCY (PRACTICE)

To what extent is there transparency in the activities and decision-making processes of the Ombudsman in practice?

The Office of the Ombudsman currently has no website, although this is in the business plan for 2014.⁵⁵ Public information is available on request from the Office. Public reports and annual reports can be obtained, for a nominal fee (100 vatu) to help cover the costs of printing. Public reports are also available for download from PaCLII, a freely accessible legal information site. However, this site is primarily intended for use by legal professionals, so may be difficult for the general public to access.

No annual reports were issued between September 2001 and August 2004 (9th annual report, p 3). Since then annual reports have been issued, sometimes with a small delay. For instance the annual report for the period Jan – Dec 2011 was issued in June 2012.⁵⁶ The annual report Jan – Dec 2012 has not been issued, as of September 2013. Annual reports are currently released only in Bislama.

Annual reports provide information on the number of complaints received and the types of complaints received. They also contain data on the number of complaints closed, resolved and kept open. Some reports contain information on some of the complaints that were resolved, but there is no information on the grounds for closing complaints. Data is not always consistently presented making it difficult to identify how many active cases the Office of the Ombudsman has.

⁵⁰ Constitution, Article 62(5).

⁵¹ Constitution, Article 63(3).

⁵² Section 13, Ombudsman Act [Cap 252].

⁵³ Sections 35 & 36 Ombudsman Act [Cap 252].

⁵⁴ Section 20 Ombudsman Act [Cap 252].

⁵⁵ Interview of Velma Kaltabang with author, Port Vila, September 10 2013.

⁵⁶ Office of the Ombudsman, *Annual Report January – December 2011*, p 24.

One issue that the Office of the Ombudsman faces in respect of consistent data collection and presentation is that it has an old case tracking or file management system. It has discussed the need to upgrade its file management system with the Pacific Ombudsman Alliance (POA) and hopes to be able to implement changes in this area in 2014.⁵⁷

In recent years few public reports on specific investigations have been issued. Public reports on matters that are closed without being resolved or resolved via mediation are not made, although a brief summary of the nature of resolved issues may be available in the annual report.

General information on processes for making complaints and what happens after complaints are made is not readily available. The University of the South Pacific Community Legal Centre produced a brochure on how to make a complaint to the Ombudsman several years ago, but this has not been reprinted recently and is not widely distributed.

The Constitutional requirement that enquiries be conducted in private has been interpreted by the Office of the Ombudsman as meaning that third parties (such as lawyers or NGOs) are not permitted to assist individuals to make complaints.⁵⁸ This also means that third parties are unable to assist individuals to follow up with the Office of the Ombudsman to find out about progress of their complaints.

ACCOUNTABILITY (LAW)

To what extent are there provisions in place to ensure that the Ombudsman has to report and be answerable for its actions?

The Ombudsman is accountable to the Prime Minister via annual reports and special reports. The Prime Minister in turn is required to present these reports to Parliament.⁵⁹ There are no specific requirements as to the content of these reports. It is left to the Parliament's discretion to decide on whether to hold debates on the reports presented by the Ombudsman or not.

If the Ombudsman is of the opinion that administrative injustice has occurred due to the content of national legislation he or she must present a report to Parliament and the Attorney General.⁶⁰ If apparent injustice has occurred due to the content of local level legislation the report is presented to the Head of the local authority and the Attorney General.⁶¹ There is no requirement that any action result from such reports.

The Ombudsman is also required to account to the Office of the Auditor General in respect of expenditure.⁶²

ACCOUNTABILITY (PRACTICE)

⁵⁷ Interview of Velma Kaltabang with author, Port Vila, September 10 2013.

⁵⁸ Correspondence between Office of the Ombudsman and Transparency Vanuatu Advocacy and Legal Advice Centre August 2009.

⁵⁹ Section 35(1) Ombudsman Act [Cap 252].

⁶⁰ Section 35(2) Ombudsman Act [Cap 252].

⁶¹ Ibid.

⁶² See the section on the Office of the Auditor General for its powers in respect of expenditure of public money.

To what extent does the Ombudsman have to report and be answerable for its actions in practice?

Whilst reports are table in Parliament they are not actively debated so the Parliamentary accountability mechanism is ineffective. Parliamentary minutes from the past 5 years do not contain records of any debates on Ombudsman's annual reports.

The Office of the Ombudsman is accountable to the Office of the Auditor General for expenditure. A compliance audit completed in 2006 found that the Office of the Ombudsman had overpaid allowance, overspent its budget and had not maintained a fixed asset register. The Auditor General's Annual Report observed that actions had been taken to recover overpaid allowances and establish a fixed assets register.⁶³ The review of the Auditor General's report by the Public Accounts Committee in 2011 confirmed that an assets register had been established and that overpaid allowances had been recovered.⁶⁴ A further compliance audit of the years 2006 and 2007 was completed in 2010. This audit found significant under spending of the budget.⁶⁵ As discussed above in the section on resources, under spending has resulted in the staffing budget for the Office being reduced. The audit report also found that one staff member had been overpaid salary, although there is no comment on whether action had been taken to recover this overpayment.⁶⁶

INTEGRITY (LAW)

To what extent are there provisions in place to ensure the integrity of the Ombudsman?

The Ombudsman Act lists requirements for appointment. These include political independence and integrity.⁶⁷ The Ombudsman Act also provides special conditions for employment which include a prohibition on receiving any interest in any state property, or soliciting, accepting or receiving any other benefit in addition to his or her terms and conditions of employment.⁶⁸ In addition to specific provisions in the Ombudsman Act the Ombudsman is defined as a leader under the provisions of the Leadership Code Act.⁶⁹ As discussed in the section of the legislature, this Act regulates a wide range of behaviours, including conflicts of interest, receiving gifts and misuse of office. Leaders are also required to provide annual returns of assets and liabilities to the clerk of Parliament. Breaches of this Act are criminal offences.

Whilst the Ombudsman usually investigates breaches of the Leadership Code Act, in the event that there is an allegation of a breach by the Ombudsman the Attorney General is empowered to investigate the breach.⁷⁰

Employees within the Office of the Ombudsman are public servants, and are therefore subject to the public service code of conduct under the Public Service Act. As discussed further in the section on the public service this code contains broad rules relating to honesty and integrity. Breaches of the code are grounds for termination of employment.

⁶³ *Auditor General's Report to Parliament* (October 2007), p 46.

⁶⁴ *Report of the Public Accounts Committee Report of the Auditor General Financial Years 2002 – 2007* (December 2011), pp 16 – 17.

⁶⁵ *Auditor General's Annual Report to Parliament 2005 - 2009* (April 2012), p 34.

⁶⁶ *Ibid.*

⁶⁷ Section 3(3) Ombudsman Act [Cap 252].

⁶⁸ Section 6 Ombudsman Act [Cap 252].

⁶⁹ Section 5(o) Leadership Code Act [Cap 240].

⁷⁰ Section 34(6) Leadership Code Act [Cap 240].

INTEGRITY (PRACTICE)

To what extent is the integrity of the Ombudsman ensured in practice?

The position of Ombudsman has never been subject to investigations for breaches of the Leadership Code by the Attorney General. There is no requirement that asset declarations under the Leadership Code Act be published and in practice the Ombudsman has not voluntarily published asset declarations. As discussed further below, asset declarations are only verified if there is reasonable grounds to believe that there has been a breach of the Leadership Code Act. As such there has been no routine verification of the Ombudsman's asset declarations. There have been no recent instances of staff of the Office of the Ombudsman being subject to disciplinary action by the PSC.⁷¹

The Office of the Ombudsman has internal manuals for both investigators and administrative staff.⁷² These are based on good practice principles and are intended to help to ensure day to day integrity.

INVESTIGATION (LAW AND PRACTICE)

To what extent is the Ombudsman effective in dealing with complaints from the public?

Long delays in completing investigations combined with failures on behalf of other state institutions to act on the recommendations of the Ombudsman undermine the effectiveness of the Office in dealing with complaints. Further, the Ombudsman's lack of legal powers in respect of inspection of asset declarations made under the Leadership Code Act undermine the effectiveness of the Leadership Code Act as an integrity mechanism. There has also been a significant decrease in public complaints being made to the Office of the Ombudsman.

Complaints from the public can be made by telephone, writing a letter or visiting the office. Complaints also sometimes arise after the Office makes public awareness visits to communities.⁷³ In 2010 and 2011 the most common method of making a complaint was by visiting the office, followed by writing a letter.⁷⁴ As the Ombudsman only has offices in the two urban centres and does not regularly make visits outside of these centres it is possible that complaints from other areas are not being heard. Certainly the data in 2010 and 2011 indicate that the vast majority of complaints arise from Shefa and Sanma provinces, where the two urban centres are located.⁷⁵ However, as the majority of government services are centred in the two urban areas it is also possible that there is simply less perceived corruption in rural areas, due in part to fewer government officials and services being located there.

As discussed above in the section on transparency, current practice prevents NGOs or other actors from assisting complainants to make complaints in respect of maladministration. However, as the Ombudsman must investigate all complaints in respect of breaches of the Leadership Code Act⁷⁶ NGOs can assist in making complaints in this area.

⁷¹ Interview of Laurent Rep with author, Port Vila, August 30 2013.

⁷² Interview of Velma Kaltabang with author, Port Vila, September 10 2013.

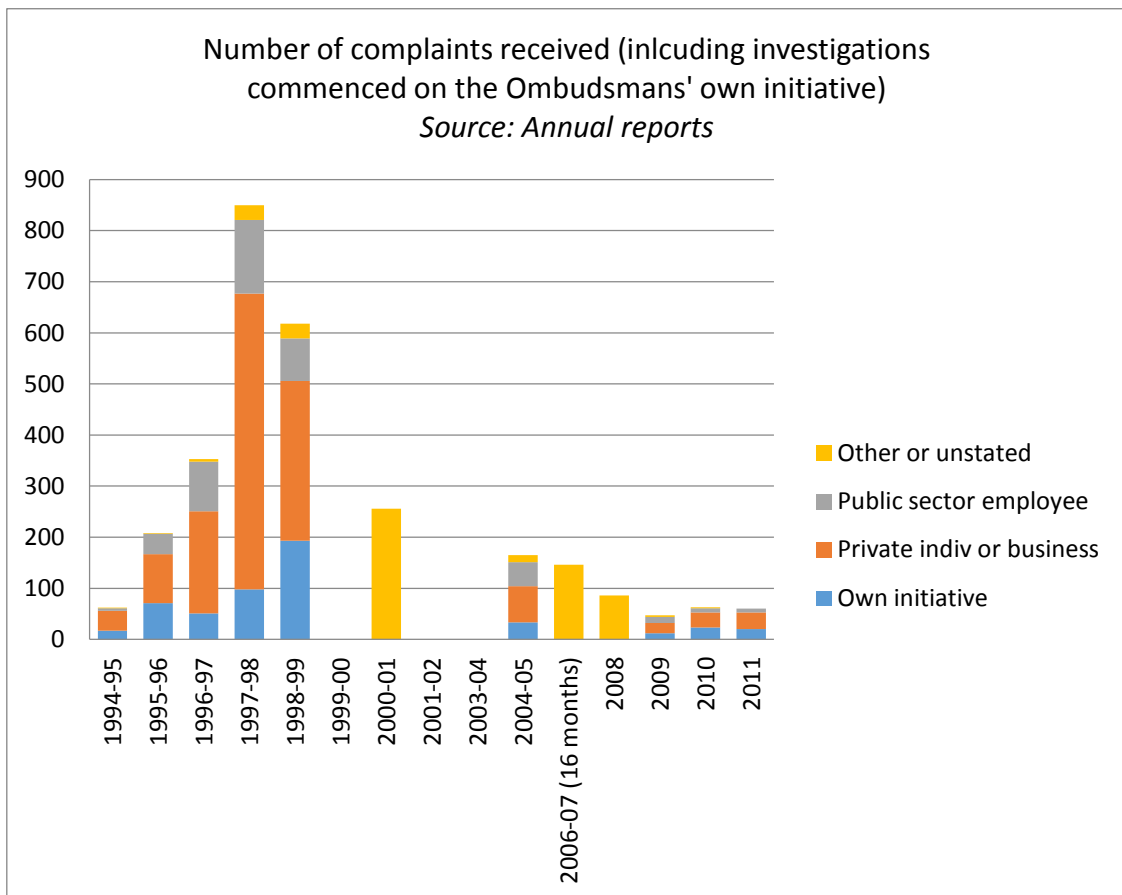
⁷³ Office of the Ombudsman, *Annual Report January – December 2011*, p 4.

⁷⁴ Ibid.

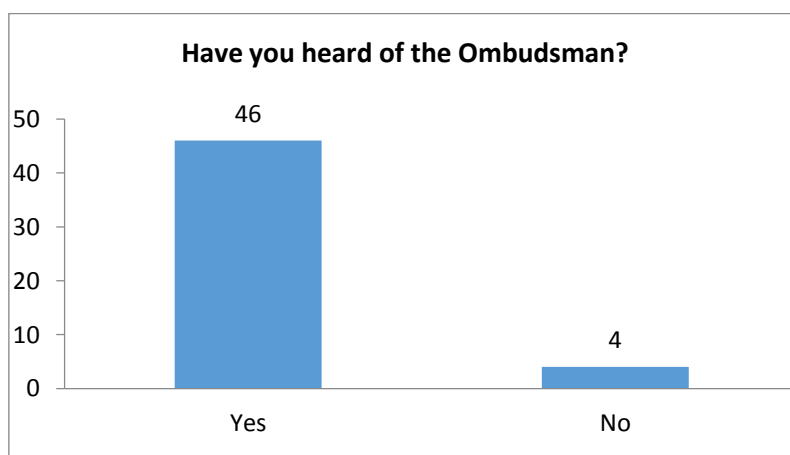
⁷⁵ Ibid, p 15; Office of the Ombudsman, *Annual Report January – December 2010*, p 17.

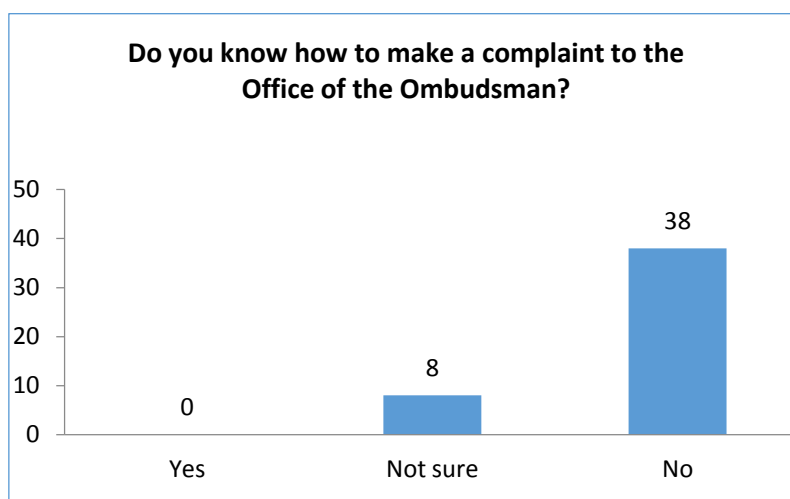
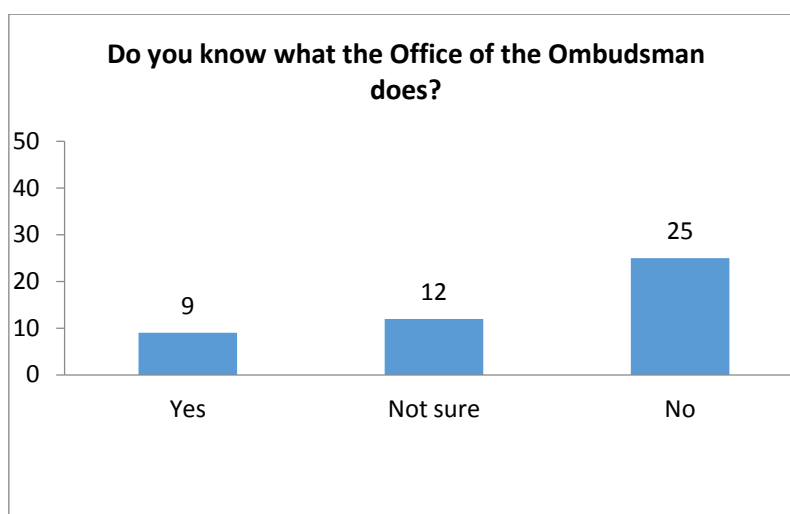
⁷⁶ Section 34(1)(a) Leadership Code Act [Cap 240].

As the table below indicates the number of complaints received by the Office of the Ombudsman has dropped significantly since the first Ombudsman's term expired in 1999.



Part of the reason for this may be lack of public awareness on how to make a complaint. Whilst the procedure is not complicated, a small street survey conducted by the National Integrity System research team in Port Vila in August 2013 with 50 citizens (31 men and 19 women) indicated low levels of public awareness about the work of the Ombudsman and how to make a complaint. Whilst this data is based on a small sample and should be treated with the appropriate caution, it indicates that there is a significant gap in public awareness of this basic information.





Low levels of complaints may also, in part, stem from a perception that there is no point in laying a complaint because the Ombudsman cannot do anything.⁷⁷ Because of the way that the data is presented in annual reports it is not possible to clearly identify how many complaints received in a year have been investigated. In 2011 of the 40 complaints received from external sources 3 complaints were not investigated,⁷⁸ although it is not clear from the annual report whether they were not investigated as being outside of the Ombudsman’s jurisdiction, or for other reasons. Annual reports from the first 5 years of the operation of the office, which did record reasons for not investigating cases, indicated that lack of jurisdiction and the availability of other remedies were the main reasons for declining to investigate.⁷⁹

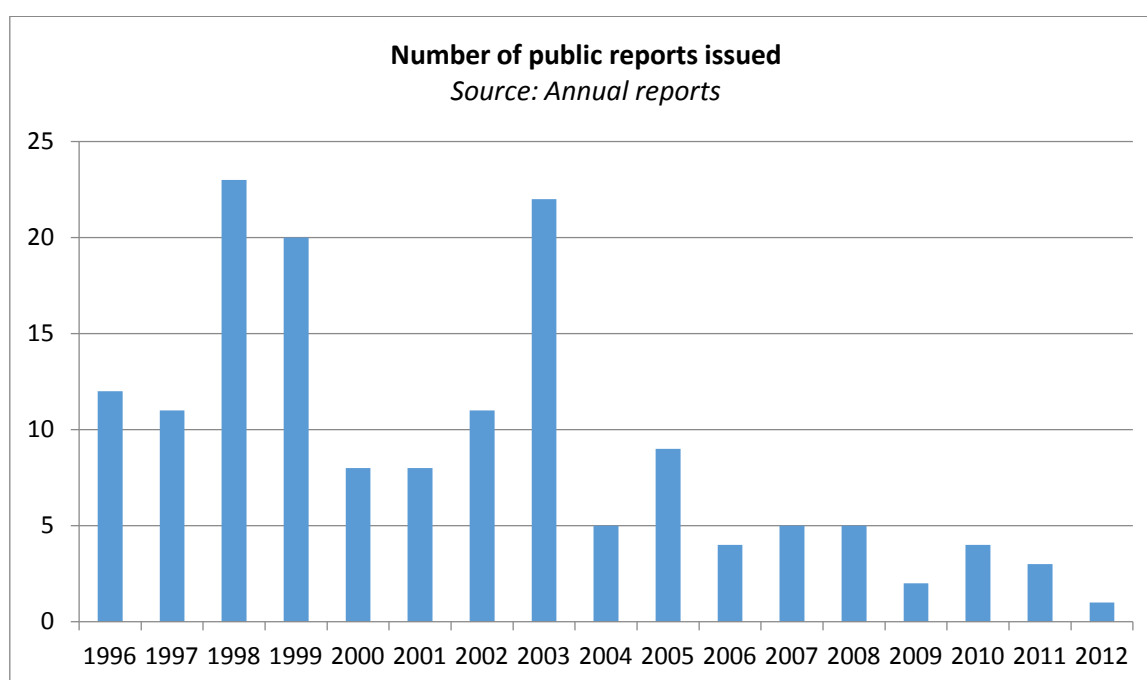
⁷⁷ See, for example, Letter to the editor, ‘Closem down office blong Ombudsman mo Auditor General!’ (Vanuatu Daily Post Online, January 23 2011).

⁷⁸ Office of the Ombudsman, *Annual Report January – December 2011*, p 14.

⁷⁹ Office of the Ombudsman, *Annual Report September 1998 – August 1999*, p 22.

In 2011 the number of active investigation files was 217.⁸⁰ This includes complaints received in years prior to 2011. In 2011 69 complaints were closed. Of these 3 were the subject of public reports and 18 complaints were resolved.⁸¹ The annual report contains a table briefly detailing 14 complaints that were resolved.⁸² It can be assumed that the other 4 were legitimately kept confidential. The average length of time taken to resolve these complaints was about 4 years and 3 months.⁸³ There is no further breakdown of reasons for why the other 48 complaints were closed.

In the early years of operation of the Office of the Ombudsman a high public profile was maintained through controversy generated by the issuing of many Ombudsman’s reports.⁸⁴ As the table below indicates, the number of public reports issued has declined. This has had some impact on the public profile of the Office.



It should be remembered that the lack of reports does not mean that the Office of the Ombudsman is not doing its job.⁸⁵ Part of its job is to resolve complaints, and matters resolved through mediation do not result in public reports being issued. Indeed, given that a significant problem is the lack of follow up on public reports by government agencies, it could be considered strategic to put limited resources into complaints that can be resolved via mediation.

The Ombudsman is required to present public reports to the Prime Minister, the Head of the agency concerned and the complainant.⁸⁶ The Prime Minister or the Head of the agency concerned must, within a reasonable time, notify the Ombudsman in writing of any actions to be taken in respect of

⁸⁰ Office of the Ombudsman, *Annual Report January – December 2011*, p 6.

⁸¹ Office of the Ombudsman, *Annual Report January – December 2011*, p 14.

⁸² Office of the Ombudsman, *Annual Report January – December 2011*, p 16 - 23.

⁸³ Based on the author’s own calculations.

⁸⁴ See Edward R Hill, ‘The Vanuatu Ombudsman’ in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law Society and Governance in the Pacific* (Pandanus Press: Canberra) 2003, pp 71 – 91.

⁸⁵ Interview of Velma Kaltabang with author, Port Vila, September 10 2013.

⁸⁶ Section 29(2) Ombudsman Act [Cap 252].

recommendations. The Prime Minister and/or the Head of the agency concerned can also issue a written notice that no action is to be taken. No reasons for deciding not to act must be given.⁸⁷

Where allegations of criminal wrongdoing are made the report is also presented to the Commissioner of Police and the Public Prosecutor.⁸⁸ If the report identifies that there has been a breach of the Leadership Code the Public Prosecutor must decide, within 3 months, whether there is sufficient evidence to prosecute.⁸⁹ If the Public Prosecutor decides not to prosecute he or she must publish a notice in the Gazette stating the reasons for not prosecuting.⁹⁰ The only reasons for not prosecuting are lack of evidence or that a prosecution would be frivolous or vexatious.⁹¹ Where breaches of the Public Service Act have been identified the report is also presented to the Public Service Commissioner.⁹²

In 2011 the annual report observed that it was the first time that a recommendation to prosecute leaders for breaches of the Leadership Code Act has been acted on by the Public Prosecutor.⁹³ No case eventuated as there was some concern that the person had already been prosecuted for the same action under the Penal Code, so bringing a subsequent action under the Leadership Code Act may be perceived by the court to be an abuse of process.⁹⁴ There have still never been prosecutions under the Leadership Code Act. Nor have there been notices published in the Gazette explaining reasons for not prosecuting.

An interview with the Public Prosecutor indicated that part of the reason that criminal prosecutions, either under the Penal Code or the Leadership Code Act do not eventuate is that there needs to be sufficient evidence to prove matters beyond reasonable doubt.⁹⁵ The Ombudsman Act provides that no statements given during the course of an Ombudsman's investigation can be used in a court of law.⁹⁶ Whilst informants may be willing to talk to the Ombudsman under conditions of confidentiality, when files have been referred by the Public Prosecutor to the Police for further investigation, police have at times experienced difficulties in being able to gather evidence.⁹⁷

The issue of lack of action on Ombudsman's reports is not new, and was addressed in three external review reports issued between 2001 and 2004. Since 2009 four ombudsman's forums have been held to identify strategies to respond to the issue. These strategies included improving coordination between the Vanuatu Police Force, the Office of the Public Prosecutor and the Office of the Ombudsman and amending the Leadership Code Act to clarify offences and processes. A proposal to introduce a new body – a Leadership Code Tribunal – to deal with less serious breaches and with the power to award disciplinary penalties has also been raised. This proposal has received support within ombudsman's forums.⁹⁸ One advantage it has over the current criminal prosecution approach is that the standard of proof could be lower.⁹⁹ However it is not the only option. The alternative of

⁸⁷ Section 32 Ombudsman Act [Cap 252].

⁸⁸ Section 31(1)(b) Ombudsman Act [Cap 252].

⁸⁹ Section 37(1) Leadership Code Act [Cap 240].

⁹⁰ Section 37(3)(b) Leadership Code Act [Cap 240].

⁹¹ Section 37(2) Leadership Code Act [Cap 240].

⁹² Section 31(1)(a) Ombudsman Act [Cap 252].

⁹³ Office of the Ombudsman, *Annual Report January – December 2011*, p 7.

⁹⁴ Interview of Kayleen Tavoia with author, Port Vila, August 29 2013.

⁹⁵ Ibid.

⁹⁶ Section 22(7) Ombudsman Act [Cap 252].

⁹⁷ Interview of Kayleen Tavoia with author, Port Vila, August 29 2013.

⁹⁸ Draft Development Committee of Officials Ombudsman Legislative Proposal Policy Paper 2011, Attachment 1, pp 5 - 12).

⁹⁹ Ibid.

expanding the power of the Ombudsman in a similar manner to that found in Papua New Guinea under the Organic Law on the Ombudsman Commission 1998 was advocated by one interviewee as being a better approach. Other interviewees also commented on the need to further explore options.

In 2011 the Annual Report of the Office of the Ombudsman noted that no action had occurred on one of the public reports issued that year.¹⁰⁰ However, the PSC had in fact taken action in respect of report detailing improper suspension of the Director of the Lands Department,¹⁰¹ so sometimes lack of communication about responses to reports rather than lack of response may be an issue. The other 2011 report, recommending that the Labour (Work Permits) act be revised, has not resulted in any law change however.

In addition to investigation complaints from the public the Ombudsman investigates breaches of the Leadership Code Act and can commence investigations if he or she has formed a view on reasonable grounds that a leader may have breached the Code.¹⁰² One of the key forms of accountability under the Leadership Code Act is that leaders must file annual returns.¹⁰³ However, annual returns are filed with the Clerk of Parliament. The Clerk is under a legal obligation to keep returns confidential unless an investigation has been launched.¹⁰⁴ This means that the Office of the Ombudsman is unable to examine annual returns to identify whether there are reasonable grounds for launching an investigation for a suspected breach of the Leadership Code Act. The Clerk of Parliament is required to publish lists in the Gazette of leaders who have given or failed to give returns so the Ombudsman would be able to launch investigation of leaders who did not file returns.¹⁰⁵ This list is not always published.

PROMOTING GOOD PRACTICE (LAW AND PRACTICE)

To what extent is the Ombudsman active and effective in raising awareness within government and the public about standards of ethical behaviour?

Whilst annual reports recognise that promoting public awareness is part of the role of the Ombudsman it is not specifically listed as a function of the Office in legislation. Nor is the Office provided with a specific budget to conduct education activities.¹⁰⁶ In recent years the Office has not been very active in raising public awareness.

The 2011 annual report indicated that the Luganville Office made presentations about the work of the Office and the Leadership Code Act at 5 different secondary schools. The Office in Port Vila took part in awareness activities on anti-corruption day. Meetings were also held with the Port Vila and Luganville Municipal Councils to raise awareness of the good conduct.¹⁰⁷

No public awareness activities were detailed in the 2010 annual report. In 2009 the only public awareness activities listed was a radio show in July¹⁰⁸ and participation in Law Week, which is a

¹⁰⁰ Office of the Ombudsman, *Annual Report January – December 2011*, p 7 .

¹⁰¹ Interview of Laurent Rep with author, Port Vila, 30 August 2013.

¹⁰² Section 34(1)(b) Leadership Code Act [Cap 242].

¹⁰³ Part 4 Leadership Code Act [Cap 242].

¹⁰⁴ Section 32(2) Leadership Code Act [Cap 242].

¹⁰⁵ Section 32(3) Leadership Code Act [Cap 242].

¹⁰⁶ Interview of Kalkot Mataskelekele with author, Port Vila, 20 August 2013.

¹⁰⁷ Office of the Ombudsman, *Annual Report January – December 2011*, pp 7 – 9.

¹⁰⁸ Office of the Ombudsman, *Annual Report January – December 2009*, p 16.

regular event organised in part by the Vanuatu Law Society and involving many legal actors. Law Week activities took place in Vila and Tanna.¹⁰⁹

There are also no systematic awareness activities aimed at promoting standards of ethical behaviour within government.¹¹⁰ Whilst public reports may raise some awareness of specific issues, and mediation of complaints may help agencies to identify correct behaviour in specific circumstances there is no promotion of, for instance, the duties and obligations of leaders or ethical conduct of public servants. The Office of the Ombudsman and the PSC do not regularly liaise or work together to promote ethics within the public service.¹¹¹ The Office of the Ombudsman has, however, been involved in the recent (2012) induction programme for new members of parliament, by contributing a session on the leadership code.¹¹²

¹⁰⁹ Office of the Ombudsman, *Annual Report January – December 2009*, pp 7 - 9.

¹¹⁰ Interview of Alain Molgos with author, Port Vila, September 10 2013.

¹¹¹ Interview of Laurent Rep with author, Port Vila, August 30 2013.

¹¹² Interview of Alain Molgos with author, Port Vila, September 10 2013.