

## **A Comparison and Contrast of the Role of the Ombudsman in Vanuatu and Samoa:**

### **Who, what & how can they investigate?**

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#### **ABSTRACT**

The increasing abuse of public office throughout countries of the South Pacific has caused great concern. To help deter and stamp out maladministration and corruption practices, one of the safeguards adopted to achieve this purpose, is the Ombudsman. It is the operation of this institution in two South Pacific jurisdictions, Vanuatu and Western Samoa, which forms the focus of this paper.

This paper will discuss the issues of who, what and how can the Ombudsman deter maladministration and corruption practices, in a contrast and comparison approach.

#### **Introduction**

##### *Aim*

The aim of this research paper is to identify whether the Ombudsman's office functions effectively within the legal structures that govern it and if not, to identify ways in which effectiveness might be improved.

##### *Parameters*

This paper compares and contrasts the roles of the Ombudsmen in Vanuatu and Western Samoa. The discussion is limited to the examination of jurisdiction, powers of investigation and enforcement and the functions as provided for by constitutional and statutory provisions. The impediments to the work of the Ombudsmen are also explored.

##### *Origin of the term and the Institution*

The term 'Ombudsman' is of Scandinavian origin and was originally used in Sweden in the early 19th Century to refer to officials appointed by the King to inspect and report on complaints about civil service, armed services, the operation of the courts and judicial services. When Sweden became a constitutional monarch the ombudsman reported to the legislature. This system of investigation and reporting was adopted in Denmark and Norweigh and also by the English speaking world, initially through New Zealand. The term literally means agent or representative.

The institution of the Ombudsman developed from concerns in "situations where decisions by departments

directly affecting individuals were taken without any statutory requirement of a hearing by a tribunal or at an inquiry." In 1970, Fiji took the initiative to set up the first Ombudsman in the USP countries, and was followed by Papua New Guinea in 1975 and the Solomon Islands in 1978. These countries have adopted the idea of the Ombudsman in their Constitutions. Countries that later established Ombudsman has done so by statute. For example, the Cook Islands in 1985 and Western Samoa in 1988 enacted Ombudsman Acts to set up their Ombudsman's Offices. Vanuatu has the most recently established Ombudsman's office in the region. Although the idea of an Ombudsman's Commission was entrenched in its 1980 Constitution, the office did not commence operation until after the enactment of the Ombudsman Act 1995.

The Ombudsman's Commissions throughout the USP region deal with complaints of maladministration and in some countries they are also required to administer leadership codes. This makes the Ombudsman one of the most "important, institutions found in modern democracies for controlling abuses of power."

## 1.0 Governing Laws

This chapter examines the legal framework that establishes the Ombudsman's Office in Samoa and Vanuatu.

The Constitution of the Republic of Vanuatu 1980, chapter 9, articles 61-65 expressly states that there shall be an Ombudsman's Commission and outlines its roles and jurisdiction. The Constitution of Western Samoa 1962, however, does not provide for the establishment of the Ombudsman Office.

Both countries have an Ombudsman Act which defines the jurisdiction, functions and powers of the Ombudsman and, in Western Samoa's case, its establishment. This difference in the source of law providing its establishment may be indicative of the level of importance accorded to it in these two countries.

The Western Samoa Komesina o Sulufaiga (Ombudsman) Act 1988 No.40 establishes the office of the Ombudsman and provides for the appointment of a Komesina o Sulufaiga (Ombudsman), by the Head of State on the recommendation of the Legislative Assembly for a three year period. It also defines his/her functions and jurisdiction. The Vanuatu Ombudsman Act 1995 No.14 establishes the office of the Ombudsman in accordance with the Constitution 1980. The Act provides "for the powers and procedures and immunities of the Ombudsman in addition to those provided for in the Constitution and for other matters relating to the Ombudsman and his delegates, and for the purposes of giving effect to the principles of Chapter 10 (Leadership Code) of the Constitution" as well as extensive functions and powers of investigation and enforcement.

In Vanuatu the Ombudsman has both constitutional and statutory rights and powers. By contrast, the Komesina o Sulufaiga's source of power and function is derived from statute alone. This means that the existence of the Vanuatu Ombudsman is protected by the Constitution 1980, making it difficult to eliminate, as constitutional amendments require the support of three-quarters of parliament. Repealing the Ombudsman Act 1988, which only requires a simple majority in the legislative assembly, can easily erase the Office of the Komesina o Sulufaiga.

## 2.0 Roles and Functions of the Ombudsman

This chapter compares the jurisdiction of the ombudsmen which gives rise to their roles and functions. The aim is to examine whether the current legal framework provides for the effective functioning of the ombudsman.

In Vanuatu, constitutional and statutory provisions provide three main functions for the Ombudsman.

Investigations are undertaken upon a complaint from any member of the public, a request of a Minister, a Member of Parliament, of the National Council of Chiefs or of a Local Government Council; or upon his/her own initiative. The Ombudsman of Vanuatu's 2nd Annual General Report (1996) shows the number of complaints to 208 in total, with 40 from Government employees and 84 from private persons.

Firstly, the Ombudsman is empowered to investigate any practices of maladministration within government. According to article 62 of the Constitution 1980, the Ombudsman can "enquire into the conduct of any person or body" stipulated in the article. These persons or bodies are all public servants, public authorities and ministerial departments. However, the Ombudsman can not investigate the "the President, the Judicial Services Commission, the Supreme Court and other judicial bodies" under this provision. Thus there is some limitation on who the Ombudsman can investigate.

Secondly, the role of the ombudsman is to safeguard and ensure the observance of multilingualism in accordance with articles 3(2) and 64 of the Constitution 1980. That is, to ensure the observance of the three official languages of Vanuatu, and respect for language equity. This is to guarantee that a Vanuatu citizen obtains any service in the official language that s/he uses. For instance, services of the police, town hall, health, postal, educational, legal, financial, electoral and "any other from the "government or fully or partly government-funded organisations."

The Ombudsman submits an annual report to Parliament to outline the state of observance of multilingualism by the administration and detail measures implemented or recommended to ensuring that a high level of observance is continued. The second report states that Bislama is becoming the mother tongue for the new generation particularly in the urban areas of Port Vila and Luganville. It is also mostly used in the islands for public notices, political and religious communications. The report identified and expressed the need for Bislama to be available in written form so as to shape the language's vocabulary and grammar for the future and ensure an equal status with English and French. The concern for the English language is that it requires quality control in its spoken and written forms. Bislama, which is similar to Pidgin English, has contributed to a sub-standard English spoken and written in Vanuatu, so it has been highlighted that there is a need for "professional editors who are able to maintain the standard of written English at an international level." The report also states that the French language has been on "the defensive in Vanuatu since the Santo rebellion in 1980." It is suggested that there is a need to safeguard French for the sake of the French speaking ni-Vanuatu, the business community and schools of the country.

Questioned on whether there is a need to safeguard each of the islands' indigenous languages, the Ombudsman of Vanuatu, Mrs. Marie Noel Ferrieux Patterson replied that it was impossible to do so because of the number of them. She stated in her report on the *Observance of Multilingualism 1996* that the "indigenous languages are fairly well protected by their territories' remoteness, although some may disappear as the population joins the urban drift." The difficulty in preserving the different indigenous languages of Vanuatu results because they are unwritten, only spoken in the islands and most people communicate in Bislama. So Bislama would be the language to preserve and develop as it is used as the communicative language amongst ni-Vanuatu.

The third role of the ombudsman is to administer the Leadership Code set out in the Constitution 1980. This function is expressly stated in section 14(1)(d) Ombudsman Act 1995, but not in the Constitution 1980 which merely provides for a Leadership Code. A Bill was drafted and went before the Council of Ministers on 30 September 1996. However, Parliament has yet to vote on the Bill. This means that there is no Leadership Code.

This raises the crucial question of whether the Ombudsman can conduct investigations under the Leadership Code when there is no Act to implement the principles set out in the Constitution 1980.

Logically, if there is no Leadership Code outlining the instances of breaches by the Government and politicians in general, then that function of the Ombudsman can not be conducted. Yet the Ombudsman, in 1996, has already conducted investigations on her own initiative into breaches of the Leadership Code. Her reports have stated that the persons investigated have breached the Leadership Code even though there is no Code in existence.

The Ombudsman bases her investigations on the strength of the express terms of chapter 10 Leadership Code in the Constitution 1980, arguing that article 66 outlines the breaches by which she can investigate leaders. The Ombudsman argued that the Supreme Court in *Barak Tame Sope v The Ombudsman*, held that "she acted inter vires, that is within her own power under the Ombudsman Act." This decision however was based upon the grounds put forward by the plaintiff, that the ombudsman's reports were "vexatious, frivolous and drafted in bad faith" and not on grounds of jurisdiction.

This role of the ombudsman is questionable, because according to article 68 Constitution 1980, "Parliament shall by law give effect to the principles of this Chapter." That is, the breaches outlined in article 66 require an Act to bring them into being as legal principles. As the Ombudsman herself stated the "way to understand the relationship between the Leadership Code in the Constitution and the Leadership Code Bill is that the first is the bones or skeleton and the second is the flesh." If interpreted, without the flesh (Leadership Code Bill and Act), the skeleton (Leadership Code in the Constitution) is but a lifeless creature. It is like saying that the leader found in breach of the Leadership Code has committed a crime when in fact there is no such offence under the laws of Vanuatu. If this interpretation is taken, then the Ombudsman can not conduct any investigations under the Leadership Code despite her express function under section 14(d) Ombudsman Act 1995, to administer the Leadership Code. It can be argued that until the Leadership Code is enacted by Parliament, the Ombudsman can not find a leader in breach of a conduct, which is yet to be held illegal by any Act of Parliament.

By comparison to the three-roles of the Ombudsman in Vanuatu, the Western Samoa Komesina o Sulufaiga plays one role. That is the traditional role of the ombudsman, to investigate complaints of administrative decisions and practices of corruption in Government Departments and certain other organisations. Its jurisdiction, functions and powers of investigation are provided by the Ombudsman Act 1988. Section 11(1) expressly states that the Ombudsman has an investigative role only. In the Ombudsman of *Western Samoa's Report to the Legislative Assembly 1994-1995*, he stated clearly that his;

*main function is to investigate complaints received from individual members of the community about actions and decisions of government agencies to which the Ombudsman Act applies.*

Not only does it have a limited investigative role, the Komesina o Sulufaiga is only permitted to investigate the Government departments and organisations specified. This clearly shows that the office of the ombudsman is an instrument used to ensure public accountability of public officials and not private persons and organisations.

There was a recommendation for the enactment of a Code of Conduct, by the Commission of Inquiry, after deliberating on the Auditor General's Report, to be administered by a three-man Leadership Committee. However there has been no indication of whether it will eventuate and it also it appears that there is no intention to add to the investigative role of the Ombudsman.

Thus the role and functions of the Ombudsman of Vanuatu are wider and more extensive than those of Komesina o Sulufaiga in Western Samoa.

### 3.0 Scope of Powers and Immunities

This chapter examines the scope of the powers and immunities of the ombudsman, and how it affects who and what can be investigated.

In Samoa the powers of Komesina o Sulufaiga are limited to investigating maladministration and in Government ministries, departments and specified organisations making subsequent recommendations in response to his findings. Under section 11(2) Ombudsman Act 1988, he "may make any such investigation either on a complaint made to him by any person or of his own notion." Section 11(3) provides that investigations can also be referred to the Komesina o Sulufaiga from the Committee of the Legislative Assembly or from the Prime Minister in pursuant of section 11(5). The Komesina o Sulufaiga, Afioga Iulai Toma indicated that so "far all of the office's work has been in response to [public] complaints [and] it has been asked once by the Government to look at a matter." The Ombudsman's office has decided that where "there are glaring examples of wanton unconcern and inexcusably poor service affecting members of the public" then investigations will commence on its own notion. This has been done in the case of the Health Department and the overcharging of patients and medical services at the Motootua National Hospital. However, such concern for the public, "cannot be said to be a notable feature of public administration in Western Samoa." Thus there is lack of actions initiated by the Komesina o Sulufaiga in fulfilling an effective role as an investigator of maladministration.

To carry out this function, the Komesina o Sulufaiga is granted the following powers under the Ombudsman Act 1988. He has discretion under section 14 to refuse to investigate a complaint. If a complainant waits for a period of more than 12 months before making a complaint the Komesina o Sulufaiga can refuse to investigate the matter on the basis that the complainant sat on his/her action for too long. Also during the investigations if the Komesina o Sulufaiga considers the complaint to be frivolous or vexatious or not made in good faith, then it can be dismissed and if "there is an adequate remedy or right of appeal" then investigation may be refused or curtailed. In making any of these decisions the Komesina o Sulufaiga has the right to withhold his reasoning.

The Ombudsman Report 1994 -1995 reveal that of the 200 or so complaints made, "many were dealt with or redirected without formal enquiry proceedings" and "twenty-eight complaints were not followed up by complainants."

If the Ombudsman decides to investigate a complaint, then under section 15 Ombudsman Act 1988, he must inform the Permanent Head of the Department or organisation concerned of his intention to proceed with investigations of the matter complained of. This is to facilitate the acquisition of all relevant information for the investigations. To that end, section 23 Ombudsman Act 1988, permits entry on premises to obtain information for the purposes of investigations, and to request any person, who in his opinion is able to give any information relating to any matter that is being investigated, to give that information. To conduct a fair investigation, there is a requirement under section 15(3), to give any Department, organisation or person affected the opportunity to be heard. The matter is then referred to the appropriate authority, that is, the Minister or Head of Department from which the complaint arose. So the power of the Komesina o Sulufaiga is to investigate, report and recommend.

Under Section 22 the Ombudsman is immune from criminal and civil proceedings brought by the complainant, defendant or any persons affected by his investigations. However, if it can be shown that the Ombudsman acted in bad faith against any persons affected by his investigations then any court proceedings may be brought against him.

Similarly, the Vanuatu Ombudsman has powers under the Ombudsman Act 1995 to conduct proper and effective investigations. She has the power to investigate matters brought to her by the public, directed to her by the Prime Minister or initiated on her own initiative, as specified under section 14. In an interview, Mrs. Marie Patterson believed that she initiated the majority of the work undertaken since the office was

established, although statistics were not readily available for verification.

Under section 16 the Ombudsman can refuse to conduct investigations if the complaint is beyond the ombudsman's jurisdiction, it is frivolous, vexatious or manifestly without foundation, or that it "has been too long delayed to justify present examination of its merit." This discretion may also be exercised if another remedy is available to the complainant, if there are insufficient resources for adequate enquiry, if the complainant's interests in the matter are insufficient or there are complaints with higher priority to be dealt with. So no person can compel the Ombudsman to conduct investigations into any complaint as the Ombudsman still has to determine whether the matter is worth investigating or not. As was seen, the Komesina o Sulufaiga in Western Samoa possesses a similar discretion based on similar grounds.

Under section 21 the Vanuatu Ombudsman has the power to enter any premises under investigation to conduct her investigation. Further, under section 17, she may request any information or summon any person to furnish any information relating to the matter under investigation. These powers ensure that effective and quick investigations can be conducted.

During the course of the investigation and before the final report is published, the Ombudsman is required to uphold the constitutional right, of the suspected person, to reply to any of her findings. That is, the person adversely affected must be given a reasonable time to reply and explain his/her story as to the allegations, so that the Ombudsman is able to give a fair report on the matter.

In addition to powers to conduct investigations the Ombudsman can also participate in other inquiries.. The power operates where she believes that by doing so will assist in her investigations and in understanding the functioning of the bodies or persons subject to her jurisdiction.

As is the position in Samoa, the Vanuatu Ombudsman is also provided immunities, against criminal or civil proceedings in relation to investigations, except where the Ombudsman has acted in bad faith in the course of the investigation and in writing the findings in the report.

The powers to carry out investigations are similar for the Ombudsmen in Vanuatu and Samoa, for example, entry onto premises under investigation, the acquisition of information from source or by summoning a person to give evidence or information. These powers are provided to ensure effective and fair investigation and cooperation from persons or bodies involved.

#### **4.0 Impediments to the Ombudsman's Investigations**

Every person or body has a limit to what s/he or it can do. Such limitations or impediments may be political, legal or economic.

A "guarantee of independence for the Ombudsman's office as an institution is of little use if its individual members are open to political interference or manipulation" and bribery.

In Samoa, it would be naïve to think that there are no political influences. It is always possible that the Ombudsman's work and matters that it is guided and directed to investigate are either directly or indirectly influenced by politics. For instance, in the case of the Chief Auditor of Samoa, the Ombudsman was not directed to investigate the matter. However, the Ombudsman was appointed to sit as a member of the Commission of Inquiry which reported on the 'Controller and Chief Auditor's Report to the Legislative Assembly'. This implies that the Government can direct what the Ombudsman can or can not investigate.

In Vanuatu, political pressure and threats are inevitable with the increase in investigations conducted under the Leadership Code. Such influences exist despite the provision in article 65 Constitution 1980 that the

Ombudsman "shall not be subject to the direction or control of any other person or body in the exercise of his functions." In addition to that, section 44 Ombudsman Act 1995, makes it an offence for a person to attempt to influence the Ombudsman. Obviously, under these provisions the Ombudsman enjoys a wide scope to maneuver in conducting investigations.

Legal impediments constitute prohibitions or limitations in provisions of the Ombudsman Acts or any other enactment relating to the investigations of the Ombudsman. Section 16 of the Ombudsman Act 1988 Western Samoa, provides for secrecy, whereby the work of the Ombudsman and any information uncovered in the course of his investigations is to be used only for the investigations and reporting. Disclosure is prohibited where it would be contrary to the Public Service Act 1977 provisions to maintain secrecy in relation to officers' work and details of employment records. Section 17 also states certain circumstances where disclosure is prohibited, such as where information is prejudiced to security, defence or international relations, deliberations of Cabinet, and the proceedings of Cabinet. These secrecy and non-disclosure provisions can be seen as legal impediments to the work of the Ombudsman especially if the complaint is directed toward any of the above listed areas.

In Vanuatu, privacy provisions in various Acts may also be seen as a legal impediment to the investigative work of the Ombudsman. Under sections 18 and 19 of the Ombudsman Act 1995, the work of the Ombudsman and his/her staff are subject to the Official Secrets Act cap 111, which provides for the preservation of the secrets of the government.

There is also the possibility that persons affected or implicated in the Ombudsman's reports will take court actions in the nature of a declaratory action, to challenge the jurisdiction of the Ombudsman. For instance, the recent Supreme Court case between *Barak Sope v The Ombudsman of Vanuatu*, whereby the plaintiff sought to obtain a preventive injunction to prevent the publication of the Ombudsman's report of 10 December 1996, which implicated him as being in breach of the Leadership Code. The court held that the Ombudsman "acted inter vires, that is within her own power under the Ombudsman Act." In effect, the Ombudsman had jurisdiction to investigate and publish the report of findings that implicated the plaintiff. This case has shown that a declaratory action to challenge the jurisdiction of the Ombudsman can be sought, irrespective of the fact that the Ombudsman in both countries is immune from criminal and/or civil proceedings. It is also seen as a legal impediment as the jurisdiction of the Ombudsman can be challenged.

Economic constraints such as financial support through budgetary measures, technical and manpower assistance affect the functionality of the Ombudsman's office and so the "Government's power to allocate resources is a potential means of thwarting the effectiveness of Independent Constitutional Office-holders such as the Ombudsman." That is, the economic circumstances of the time often imposed budgetary constraints on public sector activities such as the Ombudsman. In the Ombudsman of Western Samoa Report 1994-1995, it was stated that the office was "operating at minimal basic capacity" with manpower reduced to "three regular members, and two casual employees" and budgetary provisions drastically reduced.

Similarly the Ombudsman in Vanuatu has experienced economic constraints. When elected in 1995 to take office, the Ombudsman did not have a permanent office, furniture or staff. Over the last two years staff numbers have increased to 17 made up of local investigators, legal counsel and a Director of Multilingualism. And it was not until recently that the Ombudsman's office moved into a permanent set up.

Economic constraints have delayed investigations, in particular into national and provincial level maladministration. Overall, despite of the wide powers to conduct investigations, if the political, legal and economic impediments exist the performance of the Ombudsman's functions will not be as effective as

had been hoped.

## 5.0 Powers of Enforcement

This chapter compares the powers of enforcement of recommendations, held by the Ombudsman in both Samoa and Vanuatu. Such powers exist to ensure that what has been investigated and recommended is effected, otherwise the process is a waste of time, money and energy if no action can be taken.

The Vanuatu Ombudsman enjoys wide enforcement powers under the Constitution and section 30 Ombudsman Act 1995. There are powers to publish reports and a discretionary power not to publish the reports or parts of it on the grounds of public security and public interest, although a full report must be forwarded to the complainant. Being subject to secrecy provisions in relation to government information, public reports are edited to keep privileged information out of public knowledge. In this way, if the investigations show the need for prosecution, public disclosure of the findings will not affect the proceedings and the defendant's right to a fair trial. Furthermore, the publication of ombudsman's reports may be the "only available weapon in the fight against corruption. This is particularly so for example, where the legal technicalities or inadequacies and gaps in the relevant legislation, which means that a corrupt leader can escape penalty and liability for his/her actions", after all, the public is entitled to know about the findings into any investigations of maladministration, breach of the Leadership Code and non-observance of multilingualism.

The Vanuatu Ombudsman can refer a matter to the public prosecutor, Police or the Attorney General for further investigation or prosecution. In the course of investigations, if it becomes apparent that criminal charges or civil actions may arise then that matter can be referred to the police or the Attorney General. In contrast, in Samoa the Komesina o Sulufaiga's investigation into complaints is suspended if the police or the Attorney General is looking into the matter. There is no power to refer a matter for prosecution, and the complainant will have to initiate criminal proceedings or lay civil claim on his/her own.

Under section 30(2) Ombudsman Act 1995, the Vanuatu Ombudsman can apply directly to the Supreme Court for an order to give effect to her recommendations. This power can only be exercised on the grounds that the responsible person had taken no actions given reasonable opportunity to do so, or the response failed to resolve the problems identified or that person has responded but failed to carry out the recommendations or if the report itself revealed breaches of fundamental rights or breaches of the Leadership Code. The effect of the court order is to direct the responsible person to carry out the Ombudsman's recommendations. The Supreme Court under section 30(4) then gives the person responsible the opportunity to be heard and conducts the proceedings which is contrary to the principle that the court does not run the prosecution's case. Section 30(5) empowers the court to enforce its own order by "any method of enforcement available in civil proceedings, including committal for contempt and the payment of compensation." These provisions show that the Ombudsman's recommendations have the power of the court to be enforced where no action or inappropriate action is taken.

By contrast, there are no powers of enforcement prescribed by the Ombudsman Act 1988 available to the Komesina o Sulufaiga in Samoa. Under section 19(3)-(6) Ombudsman Act 1988, the Komesina o Sulufaiga's findings and recommendations, are referred to the appropriate authority which is either the Head of the Department or organisation from which the complaint derived. It is then up to that authority to implement the ombudsman's recommendations. If within a reasonable time, no action is taken the Komesina o Sulufaiga has the discretion to send a report to the Prime Minister and may also report to Parliament. It is questionable whether this is an effective manner to implement the recommendations of the Komesina o Sulufaiga and to rectify the problems identified in any report. There is no power of enforcement provided by these provisions and the Samoa ombudsman, Mr. Iulai Toma who said, supports this interpretation; "No powers of enforcement are given to the Ombudsman of Western Samoa under any



legislation."

Would it be possible to adopt the enforcement regime as applied in Vanuatu? According to Mr Iulai Toma, "there is no need for such powers unless the Ombudsman institution in Western Samoa is changed or transformed into something like the PNG or Vanuatu Ombudsman Commission." He justified his answer by stating that the Samoa Ombudsman is a conventional one and as such "is not supposed to have any enforcement powers." The fact that the Ombudsman in Western Samoa has no prescribed enforcement powers does not mean that its work is not effective as its tasks are merely to investigate complaints and make recommendations accordingly. The "power or weight behind his recommendations is the moral authority of reasonableness and fairness in the name of the citizenry."

The investigative role of the Ombudsman in Samoa does not require enforcement powers whereas the extended anti-corruption enforcement role of the Vanuatu Ombudsman is such that it needs to have enforcement powers to be effective. The enforcement powers of the ombudsman therefore depend on the different roles that the law prescribes to each of the ombudsmen. The effectiveness of the operation of the Vanuatu Ombudsman is not determined by the extent of the powers that it enjoys so too in Samoa, having less powers does not mean that the work of the Komesina o Sulufaiga is less effective.

## Conclusion

The roles, functions and powers of enforcement of both the Samoa and Vanuatu Ombudsmen can be compared and contrasted. The constitution and statutory provisions for the Ombudsman in Vanuatu have prescribed what and who it can investigate and by what means. Similarly, the Ombudsman Act 1988 Samoa prescribes the role, functions and powers of the Komesina o Sulufaiga. Both Ombudsmen play an investigator role but the Vanuatu Ombudsman has two additional roles; to administer the Leadership Code and to maintain the observance of multilingualism. However it can not be concluded that the role of one is more effective than the other as either play a different roles.

The fact that the Vanuatu Ombudsman has many functions and wider powers of enforcement does not mean that it is the more active and effective than the Komesina o Sulufaiga of Samoa. Since the Komesina o Sulufaiga only investigates maladministration and is required to make recommendations, it does not need to have such wider enforcement powers as that of the Vanuatu Ombudsman. The wider enforcement powers for the Vanuatu Ombudsman is to ensure that leaders and Government officials in breach of the Leadership Code, are vigorously pursued and dealt with under the law. The Vanuatu Ombudsman thus has a stronger role in ensuring that public accountability is adhered to.

This discussion has shown that the Ombudsmen of Vanuatu and Samoa function in accordance with their prescribed roles and jurisdiction provided by their laws. Thus their effectiveness depends on what role, who they can investigate and how they are able to carry the investigation out is provided by the relevant legislation.

There are some areas for improvement to enhance effectiveness of the Ombudsmen's existing roles. In Samoa, it is suggested that Komesina o Sulufaiga must be able to publish its reports, as this is an effective weapon against maladministration and corruption practices within the Government Departments and other specified organisations. Perhaps the office of the Komesina o Sulufaiga should consider raising public awareness as to what the precise role of the Komesina o Sulufaiga is; and how it may assist people as mediator between themselves and Government. It can do this by publishing its annual reports, weekly radio programs and by conducting seminars at educational institutions.

As for the Vanuatu Ombudsman, there is a need to vigorously seek support for the enactment of the Leadership Code so that its powers to administer this Code can be fully exercised. There is still

speculation and challenges directed towards the jurisdiction of the Ombudsman, as the Constitution under chapter 10 'Leadership Code' does not expressly specify who should administer the Code. It is only the Ombudsman Act 1995, which clearly states that it is the role of the Ombudsman to do so. This issue must then be addressed to quickly. It is also important to consider "whether the onerous responsibility of ensuring the integrity of political and other leaders is a task that the Ombudsman Commission can carry out realistically."

Whatever their prescribed roles, the Ombudsmen in Samoa and Vanuatu play the role of the 'watchdogs' for the people and ensure public accountability by public officials.

### Appendices

1. Questionnaire of personal interview with the Ombudsman of Vanuatu, Mrs. Marie-Noel Ferrieux Patterson, at the Office of the Ombudsman, on 25<sup>th</sup> April 1997 at 3:30 p.m.
2. Questionnaire faxed on 11<sup>th</sup> April 1997, to the Komesina o Sulufaiga (Ombudsman) of Western Samoa, Afioga Iulai Toma.
3. *Ombudsman of Western Samoa Report to the Legislative Assembly 1994-1995*, Komesina o Sulufaiga, Apia
4. *2nd Annual General Report to Parliament 1996*, Ombudsman of Vanuatu, Port Vila
5. *Barak Sope v The Ombudsman*, Civil Case No. 150, 1996

### BIBLIOGRAPHY

#### Resource Materials

#### Primary Materials

#### *Legislation:*

#### Vanuatu

1. The Constitution of the Republic of Vanuatu 1980 cap 1, chapter 9, Part II, The Ombudsman, articles 61-65 and chapter 10 Leadership Code articles 66-68, in *The Laws of the Republic of Vanuatu*, (Revised Edition 1988) Vol. 1
2. Republic of Vanuatu Ombudsman Act Vanuatu 1995 No. 14
3. Official Secrets Act 1980 cap 111

#### Western Samoa

1. Western Samoa Komesina o Sulufaiga (Ombudsman) Act 1988 No. 40
2. The Commissions of Inquiry Act 1964, Western Samoa
3. Public Service Act 1977, No. 21

#### *Case-law:*

*Barak Tame Sope v The Ombudsman*, Civil Case No. 150 of 1996, Supreme Court of Vanuatu

In the matter of the Audit Act No. 1 of 1989 and in the matter of the report of the Auditor-General on the Investigation into the Allegations of Maladministration and Improperities Committed by Commissioners,

Management Staff of the National Capital District Commission and in the matter of an application by the Honourable David Unagi for leave to apply for Judicial Review of the said report, PNG, in the National Court of Justice, OS 270 of 31st July 1996.

**Interviews:** (see Appendice 1 & 2)

1. Personal interview with the Ombudswoman of Vanuatu, Mrs. Marie-Noelle Ferrieux-Patterson, at the Office of the Ombudsman on 25th April 1997, 3:30pm
2. Interview through a questionnaire form faxed to the Komesina o Sulufaiga of Western Samoa, on 11<sup>th</sup> April 1997

### **Secondary Materials**

#### **Reports of the Ombudsman of the Republic of Vanuatu:**

1. 2nd Annual General Report to Parliament 1996, 25 November 1996
2. \$100 million US scandal - in which the Prime Minister Maxime Carlot Korman, the Minister of Finance Barak Sope, the Reserve Bank Governor Samson Ngwele and the First Secretary of Finance George Borugu, were involved by signing the Guarantees
3. Alleged misappropriation of Funds by the President of Sheba Province and Maladministration of Sheba Provincial Council - 23rd July 1996
4. Appointment of Maurice Michel to the Public Service and to the position of Auditor General - 6th March 1997
5. Complaint against the Immigration Department concerning a woman whom the Immigration Department attempted to prevent leaving the country - 10<sup>th</sup> October 1996
6. Further Public Report on the US\$ 100 million Bank Guarantees - 22<sup>nd</sup> October 1996
7. Misappropriation of Funds of the Efate provincial council - by its president Charlie Kalmet who borrowed 824,000 vatu (\$US 7,400.) of the province's funds that he never repaid
8. Multiple breaches of the Leadership Code and other Unlawful Conduct by Hon. Barak T. Sope - 10th December 1996
9. Nambawan Bottle Shop - on issue of liquor licences to a bottle shop in Port Vila of which Willie Jimmy (opposition leader) was a major shareholder - 20<sup>th</sup> August 1996
10. Observance of Multilingualism 1996 - 25<sup>th</sup> November 1996
11. On the conduct of Hon. B.T. Sope and the VNPF Board in a Proposed Investment in the Internet Bank CBANK Venture - 16<sup>th</sup> October 1996
12. The Provision of Bank Guarantees given in the sum of US\$100 million, in breach of the Leadership Code, section 14 of the Ombudsman Act and related matters thereto - 3<sup>rd</sup> July 1996
13. Vanuatu Commodities Marketing Board Utilisation of the VT1.3 billion 1986-7 STABEX FUNDS Subsidiary- 6th August 1996

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## ANSWERS for PERSONAL INTERVIEW with the OMBUDSMAN OF VANUATU

1. According to my 2nd General Report to Parliament 1996, the complaints statistics for 1996 show a total of 208 complaints. That is, 40 Government complaints, 84 private persons, private business 12, 1 from a Minister, 71 on her own initiative. So this year there are more cases coming in from the public as public awareness of the role of the Ombudsman has increased. In 1995, most cases were investigated on my own initiative as the Ombudsman has just then been established.
2. No, the provision in the Ombudsman Act 1995 is not inconsistent with the articles of the Constitution 1980, relating to the Leadership Code. It is the Act, which prescribes my role and enacts those principles of the Leadership Code. I have the power to administer the Leadership Code principles provided in the Constitution even though there is no Leadership Code yet, but it is in draft form now.
3. My office has experienced such a challenge once in the *Barak Sope v The Ombudsman* (1996) case. But the Supreme Court held that I had jurisdiction to investigate Mr. Barak Sope's conduct. I did so and published the findings to the effect that he was in breach of the Leadership Code. It is that report which he was trying to seek an injunction to prevent it from being published. The court held I had acted "inter vires" meaning I had jurisdiction to investigate Mr. Sope's conducts. My office has and never will publish a report in bad faith as we are required by law to complete all investigations and provide opportunities for persons affected to reply within a reasonable time. So there is ample time given to the person affected to respond to clear his/her name and reputation.
4. The Constitution clearly states that Vanuatu is a country based on Christian principles so I do not see why I can not quote biblical verses to show the position of the investigation. No, I am not passing moral judgments I'm merely showing the position of the matter.
5. These secrecy provisions do not mean my office is unable to gain access to the information we need. It means that we can have access but we can not disclose it to the public in our public reports.

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