

Safeguarding the Critical Powers of the Ombudsman Commission

It has been announced that Parliament will reconvene later this month. A proposed alteration to the Constitution relating to the Ombudsman Commission and its powers, and to the Duties and Responsibilities of Leaders may be tabled by the Member for Esa'ala Open, (ref. National Gazette No. G192 of 2008). This proposed Constitutional amendment follows the hearings of the Parliamentary Committee on the Ombudsman, headed by Hon Moses Maladina, MP.

The Committee's recommendations were presented inferring an intention to strengthen the Ombudsman Commission's powers. A few sections of the proposed Amendment provide for some reinforcement of powers and discretion, but the overall thrust would undermine the Commission's powers and make its task harder, notably in providing evidence satisfactory to conclude a successful referral under the Leadership Code. It would hence diminish accountability by leaders and seriously weaken the Commission's capacity to protect public office from abuse.

Now is certainly not the time to be weakening already inadequate controls over the behaviour of leaders. There is much talk within Civil Society and amongst some public bodies, even some Ministers, for the establishment of an independent anti-corruption commission (ICAC), with strong investigative and potentially independent prosecuting powers. This has considerable merit in theory, but in practice would only be effective if resourced adequately, holding adequate powers, independence and professional skills, whilst also being subject to appropriate safeguards. ICAC's value would be doubtful, if not provided such powers and resources, whilst merely splitting the existing inadequate cake for law and justice institutions.

In the meantime, whilst the prospects and design of ICAC (or related institution) are determined, there certainly should be no diminution of the anti-corruption functions of the Ombudsman Commission. The Ombudsman Commission, despite recognised weaknesses, remains one of PNG's highly respected independent Constitutional Offices.

The Ombudsman Commission is a hybrid organisation, merging the prevalent function of Ombudsman Offices worldwide, namely addressing public complaints over administrative abuses, together with oversight of PNG's Leadership Code. The Code provides a set of standards in public office for those defined as "leaders". Many leaders argue that abuses are committed widely by non-leaders, with large sums misappropriated by teeming ranks of malingering junior staff. It is true that public sector corruption, hitherto perhaps largely restricted to few miscreants, notably in higher offices, has spread more widely through the public sector, requiring more rigorous oversight and penalties at all levels. Nevertheless, the extent of insidious and largely petty corruption can be exaggerated, with most public servants remaining basically honest, although performance is certainly generally poor.

Leadership, however, should be provided by example. Leaders' behaviour makes the strongest positive or negative impression. Much of the widespread corruption prevalent has been driven by people with power and authority and they are the most culpable for triggering breakdown of formerly functioning systems. The problem must be tackled at all levels, but starting at the top, necessitating both commitment by

leaders on the one hand (under pressure from a public deprived of effective infrastructure and services), combined with effective exposure of abuses and demonstrative penalties.

As all are aware, there have been virtually no penalties imposed for years upon leaders (or other high profile persons) under the Criminal Code, as demonstrated by the absence of convictions following Commissions of Inquiry (such as the NPF Inquiry) or Audit and PAC Reports, despite findings showing extensive serious abuses, notably theft of public or contributors' funds, massive out of court settlements, multi-million kina contracts awarded to associated companies outside due process, etc. New funding mechanisms are periodically established, with apparent good intent, such as the NADP or DSIP, but readily open to abuse (particularly at demanding times, like Elections) by persons so inclined, or granted undue discretionary powers. Inquiries are constantly thwarted by delaying tactics to avoid difficult questions.

The Ombudsman Commission's role is not to apply the Criminal Code, which is the police responsibility, although for various reasons cases prepared with dedication by the small team in the Fraud Squad too regularly seem set aside further up the hierarchy. The Ombudsman's role is substantially to protect public offices from abuse, using the less demanding evidential rules under the Leadership Code. Penalties under the Leadership Code are not severe (except in terms of diminished capacity to wrought the system from loss of office!); Using the less demanding Leadership Code rules of Evidence enables the Ombudsman Commission to be swifter footed, and intervene more rapidly to remove a perpetrator from office before he causes further damage, whilst the real punishment for individuals committing serious crimes, such as theft of public money, emanates from subsequent successful prosecution under the Criminal Code, although in practice an extremely rare occurrence. In the past mere referrals to a Leadership Tribunal were adequate for the Executive to suspend that office holder aside ending the Tribunal's findings, although in recent years there has been a disappointing reluctance by the Executive to take such firm action.

The Ombudsman Commission also has powers of intervention to halt actions by office holders deemed illegal or against public interest. Again this is a valuable safeguard to prevent potentially damaging decisions or actions from occurring, such as payouts or land grabs, and providing the Executive an opportunity to reconsider or take remedial steps.

The proposed Amendments would undermine the capacity of the Ombudsman Commission to act promptly and readily restrain abuse. Many already complain that the Commission moves too slowly anyway, partly owing to internal processes, but imposing extra procedural requirements and restraining capacity to intervene or publicly expose, sends the wrong signals. Arguing that the modest penalty under the Leadership Code cannot be followed by criminal investigation and prosecution is letting leaders off too lightly, and exempting them from the criminal prosecution which the rest of society would face.

The rules should in fact be tightened and public exposures, for example of abuses and details of assets and interests, be required. People entering public office as Leaders, by the own volition, must accept that they become to some extent public assets,

answerable to the public and ready to face public scrutiny of their assets and behaviour at all times. The register of leaders' assets, or annual returns, should not be confidential to the OC, but should be public documents, able to be viewed on the web or, at least, in person in a public registry.

Setting time limits on the OC is probably justified, as cases often hang over leaders for too long, but this does require the Commission having greater resources to enable faster case work. There is some advantage in providing the Commission limited discretion to differentiate between minor abuses, worthy of prompt administrative penalties, and those of greater severity requiring greater investigative resources and sharper and more demonstrative consequences. Discretionary power should be limited, however, being subject to potential abuse in itself, and maintaining automatic obligation of referral to the Public Prosecutor, for prospective referral to a Tribunal, whilst retaining some valuable powers to refer directly if needs be. The Tribunal should be the party holding the discretion power over suitable penalties, notably through transparent process.

Now is the time to reinforce mechanisms to safeguard against corruption, including providing a deterrent through effective mechanisms and adequate penalties, as well as reducing blatant opportunities which encourage corruption, like discretionary powers (of Ministers or Officials) over public funds, resources or contracts (e.g. sidestepping proper tendering processes, e.g. for schools or roads in ENBP, where some purportedly completed facilities are said to be non-existent). This requires greater public awareness and transparency over processes, with details required to be publicly accessible over funds allocated and for what purposes, at National and District levels. Community members should be empowered to hold leaders to task and report abuse to independent official watchdogs, and other authorities. At a recent workshop held at Divine Word University there was a strong consensus that dismissal from public office should be permanent, at least for more serious abuses; not for a mere 5 year term. This is certainly not the time to undermine the current powers of the Ombudsman Commission, whose role is critical and would remain critical even if/once an ICAC is established.

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