

**"FREEDOM OF INFORMATION IN THE ASIA PACIFIC REGION  
(RIGHTS TO HAVE ACCESS TO INFORMATION AND  
WHAT MECHANISMS IN PLACE TO ALLOW PUBLIC  
TO HAVE ACCESS TO SUCH INFORMATION)**

PAPUA NEW GUINEA CONTEXT  
AND  
HOW THE OMBUDSMAN COMMISSION  
MIGHT FIT INTO THE PICTURE"

**POSITION PAPER FOR THE 5<sup>TH</sup> INTERNATIONAL  
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In Papua New Guinea there is an increasing call within the community for a greater 'transparency' as the populace and media say, and it seems clear that there has been a failure by the State officials and the Parliament to fully appreciate the responsibility placed on them in Section 51 of the *Constitution*.

In the interests of freedom of information and open government it is incumbent on the Parliament to enact laws on freedom of information. In accordance with the principles stated in the Constitution Section 51

The Constitution of the Independent State of Papua New Guinea has been in existence since September 1975 and the Parliament has a duty under Section 51<sup>i</sup> of the *Constitution* to enact laws to enable ready access to official information.

Although every citizen has the right to reasonable access to official documents, this right may be regulated by an Act of Parliament and Section 38 (1) of the *Constitution* sets out the purposes for which a law may be made when regulating or restricting a right. A law may be made restricting a right for anyone of three different purposes namely:-

- (1) To give effect to public interest in defence, public safety, public order, etc. Section 38 (1) (a) (i).
- (2) To protect the exercise of the rights and freedoms of others. Section 38(1)(a)(ii).
- (3) To make reasonable provisions for cases where the exercise of one such right may conflict with the exercise of another. Section 38 (1) (b).

We say the Parliament has a duty to enact laws to enable ready access to official information, however, when the time comes for that duty to be discharged, one of the most important issues to address is: what external review procedures should be in place?

When a person makes a "*freedom of information*" request and is denied a document, who do they turn to?

Aggrieved parties can seek orders from the National Court within the right given in the *Constitution* Section 51 - Right to freedom of information.

- **The National Court?**

But that would be cumbersome and unworkable. Time is of the essence in dealing with *freedom of information* requests. The Court would be unable to deliver on that score.

In fact, the Court already has the power under Section 57<sup>ii</sup> of the *Constitution* to enforce the right to freedom of information in proceedings commenced by "any person who has an interest in its protection and enforcement". The power has very rarely if ever been used.

- **Perhaps create a special body such as an information commissioner?**

An information commission - although sounding good, this idea suffers from being an extra bureaucracy, with at least in the early years, an unpredictable workload. The human rights commission - a nice idea that has withered on the vine. No-one should hold their breath waiting for the revival.

- **The Ombudsman Commission?**

The Ombudsman Commission of Papua New Guinea presents itself as the natural choice for an external review body. In fact, it already has that function. It is already established and entrenched as a constitutional institution. It is the most powerful oversight agency in the country. It deals with governmental bodies all the time.

However, the Commission has been shrouded in too much secrecy since its establishment and can afford to have some of its information assets made accessible. But documents obtained for the purposes of investigations need to be put into a special category.

What about all the information that the Ombudsman Commission has in its possession? Can that be made the target of a *freedom of information* request or should it enjoy a special immunity?

Good ombudsmanship entails bringing together a number of critical ingredients<sup>iii</sup> that go to favour the Ombudsman Commission.

- **The Commission is independent and its *Independence*** is given by the *Constitution*. But it still has to be protected at all costs.

- **The Commission is impartial and its *Impartiality*** in large part depends on an ombudsman's reputation. It has to be earned rather than received. The institution must be able to enter a dispute or conflict-driven environment and be regarded automatically as impartial.

This is sometimes a difficult balancing act to perform for the Ombudsman Commission as it invariably works in a politically charged environment by virtue of its Leadership Code jurisdiction.

- **The Commission has integrity and its *Integrity*** depends largely on the individual qualities of the ombudsmen.
- **The Commission creates initiative, has imagination and is intelligent and its *initiative, imagination* and *intelligence*** are qualities that run together. A good ombudsman must be able to come up with creative solutions to disputes; to seize the initiative at the right moment; and to marshal intelligent arguments that will carry the day and move disputing parties to acceptable and realistic outcomes.
- ***Idealism*** - there must be some ideals driving an ombudsman - values worth striving for. In PNG these are provided by the *Constitution*, especially the National Goals and Directive Principles.
- ***Influence*** - once the above factors are working together, the populace will have confidence in the ombudsman. The ombudsman will command respect. And with that comes influence. The ombudsman can be a steady, sage force in the community.

### **IS THE OMBUDSMAN COMMISSION EFFICIENT ENOUGH?**

The Ombudsman Commission is often times, far too slow. But isn't everybody? There are ways around this, such as imposing statutory time limits throughout the decision-making process. (Perhaps this needs to be considered for other parts of the Ombudsman Commission's jurisdiction, e.g. time limits imposed on the resolution of complaints; time limits on leadership investigations. Maybe the Courts need time limits imposed for the handing down of judgments - both oral and written.)

## DOES IT HAVE TOO MUCH TO DO ALREADY?

Consider its already heavy workload.

PRIMARY FUNCTIONS OF THE OMBUDSMAN COMMISSION	
FUNCTION	SOURCE OF POWER
1. Investigation of alleged wrong conduct and defective administration by governmental bodies.	<i>Constitution</i> , Sections 219(1) (a) & (b); <i>Organic Law on the Ombudsman Commission</i> .
2. Investigation of alleged discriminatory practices, by any person or body.	<i>Constitution</i> , Section 219(1)(c); <i>Organic Law on the Ombudsman Commission</i> .
3. Investigation of alleged misconduct in office under the Leadership Code.	<i>Constitution</i> , Section 219(1)(d); <i>Organic Law on the Duties and Responsibilities of Leadership</i> .

In addition to its primary functions, the Commission has a number of subsidiary functions.

COMPLEMENTARY FUNCTIONS OF THE OMBUDSMAN COMMISSION	
FUNCTION	SOURCE OF POWER
1 Power to make special references to the Supreme Court on questions of constitutional interpretation.	<i>Constitution</i> , Section 19.
2 (Implied) power to enforce the Basic Rights.	<i>Constitution</i> , Section 57.
3. Power to advise (jointly with the NEC) the Queen and Head of State, to consent to the Governor-General holding another office or position or engaging in another calling.	<i>Constitution</i> , Sections 87(3) & (4).
4. Power to partly supervise enforcement of the Organic Law regulating particular parties, political donations and the protection of elections from outside or hidden influences, i.e. the "Integrity Law".	<i>Constitution</i> , Sections 129 & 130.
5 Power given to Chief Ombudsman to participate in judicial appointments etc, by virtue of his membership of the Judicial and Legal Services Commission.	<i>Constitution</i> , Section 183; <i>Organic Law on the Judicial and Legal Services Commission</i> .
6 Advisory function – give advice to leaders and other persons on the proper discharge of their functions.	Informal.
7. Education and public awareness – through the external relations program.	Informal.
8. Chief Ombudsman's power to bring constitutional questions to the Supreme Court.	<i>Constitution</i> , Section 18.

The enormous range of responsibilities and breadth of jurisdiction that is conferred on the Ombudsman Commission by the *Constitution* means that it is called upon, under the one roof, to perform functions which in other countries are usually dealt

with by a multitude of different authorities. The Ombudsman Commission of PNG is not just an ombudsman institution. It is also:

- a de facto human rights commission;
- an anti-discrimination commission;
- a de facto anti-corruption commission;
- a conflicts of interests commission;
- a de facto law reform commission; and
- a watchdog of the *Constitution*.

**Will a "determinative" role as an external review body be inconsistent with the traditional Ombudsman function of investigating, forming opinions and making recommendations?**

Not really. The Commission already has some determinative functions under its Leadership Code jurisdiction. And even under its traditional complaint resolution jurisdiction, it does not make "mere" recommendations. There are duties imposed on the recipients of its recommendations.

**What does the overseas experience tell us?** Both New Zealand and Queensland have the external review function successfully carried out by their ombudsmen. The Ombudsman Commission of Papua New Guinea has a very good working relationship with both of those institutions and is well placed to tap into the store of existing expertise.

**Can it do the job with its existing resources?** Clearly, no.

**Is special funding required?** Yes.

And that is the bottom line. The Ombudsman Commission is ideally placed to do the job. But a proper appropriation from the Parliament is essential.

**Information held by the Ombudsman Commission: should it be accessible under a freedom of information law?**

Yes and no, depending on the type of information that is sought. The documents that the Commission has in its possession can be put into (at least) four categories:

- **Administrative information and in particular "financial documents".**

This category of information relates to documents such as the appropriation and expenditure of the Ombudsman Commission; salaries and allowances of members of the Commission and staff; numbers of complaints received and resolved; various policies and determinations of the Commission for officers in the Service of the Commission; etc. This information should be easily accessible.

- **The “annual statement” declarations of leaders.**

Presently, details disclosed in the annual statements lodged with the Ombudsman Commission by leaders are confidential. To facilitate transparency and accountability among our leaders, this information should be accessible. PNG in some ways led the way in the mid-seventies with compulsory disclosure of leaders' financial affairs. But it has now lagged behind. In many countries, members of parliament are required to make declarations of their assets and liabilities in a public register.

The Final Report of the CPC remarked that unless leaders declare their assets, liabilities and business activities, the Ombudsman Commission will not know whether they are living up to what is expected of them. The same sentiment applies with the general public.

<sup>i</sup> 51. **Right to freedom of information.**

1. Every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society in respect of –
  - (a) Matters relating to national security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organization); or
  - (b) records of meetings and decisions of the National Executive Council and of such executive bodies and elected governmental authorities as are prescribed by Organic Law or Act of the Parliament; or
  - (c) trade secrets, and privileged or confidential commercial or financial information obtained from a person or body; or
  - (d) parliamentary papers the subject of parliamentary privilege; or

- (e) reports, official registers and memoranda prepared by governmental authorities or authorities established by government, prior to completion; or
  - (f) papers relating to lawful official activities for investigation and prosecution of crime; or
  - (g) the prevention, investigation and prosecution of crime; or
  - (h) the maintenance of personal privacy and security of the person; or
  - (i) matters contained in or related to reports prepared by, on behalf of or for the use of a governmental authority responsible for the regulation or supervision of financial institutions; or
  - (j) geological or geophysical information and data concerning wells and ore bodies.
- (2) A law that complies with Section 38 (general *qualificafons* on qualified rights) may regulate or restrict the right guaranteed by this section.
- (3) Provision shall be made by law to establish procedures by which citizens may obtain ready access to official information.
- (4) This section does not authorize
- (a) withholding information or limiting the availability of records to the public except in accordance with its provisions; or
  - (b) withholding information from the Parliament.

<sup>ii</sup> 57. **Enforcement of guaranteed rights and freedoms.**

- (1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.
- (2) For the purposes of this section-
- (a) the Law Officers of Papua New Guinea; and

- (b) any other persons prescribed for the purpose by an Act of the Parliament;  
and
  - (c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question,  
have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.
- (3) A court that has jurisdiction under Subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force).
- (4) Any court, tribunal or authority may, on its own initiative or at the request of a person referred to in Subsection (1), adjourn, or otherwise delay a decision in, any proceedings before it in order to allow a question concerning the effect or application of this Division to be determined in accordance with Subsection (1).
- (5) Relief under this section is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.
- (6) The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution.

<sup>iii</sup> [Freedom of Information In Papua New Guinea - How the Ombudsman Commission Might Fit Into The Picture, David Cannings, Counsel To The Ombudsman Commission - Workshop on Freedom Of Information: Defending the Public's Right To Know, Port Moresby November 2000]

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**5<sup>th</sup> INTERNATIONAL CONFERENCE  
OF INFORMATION COMMISSIONERS  
26 - 29 NOVEMBER 2007  
WELLINGTON NEW ZEALAND**

**ICIC Day**

ILA GENO  
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NOVEMBER 2007

**A INTRODUCTION**

**The Two Organic Laws**

Besides its multiplicity of functions the feature of the Ombudsman Commission that sets it apart from equivalent institutions in other countries is that the institution itself and the laws it administers are established directly under the *Constitution*.

One of the hallmarks of an effective ombudsman institution is its independence, and in PNG this has been conscientiously guaranteed by the *Constitution*, through an array of legislative techniques.

The basic principle: freedom from direction and control as prescribed under Section 217(5) of the *Constitution* states:

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

This does not, of course, mean that the Commission is free to apply the Constitutional Laws as it sees fit. Schedule 1.19 of the *Constitution* ensures that the Commission's independence does not affect its control or direction by a court or regulation of its powers by or under statute. Nor does it affect the jurisdiction of the Auditor-General or the Public Accounts Committee.

Section 217(6) of the *Constitution* states:

**The proceedings of the Commission are not subject to review in any way, except by the Supreme Court or the National Court on the ground that it has exceeded its jurisdiction.**

The investigative powers of the Ombudsman Commission are exercised, not only under the *Constitution*, but also under two Organic Laws:

- *The Organic Law on the Ombudsman Commission*; and
- *The Organic Law on the Duties and Responsibilities of Leadership*.

### **Status of Organic Laws**

In its hierarchy of written laws the Organic Laws are special statutes, which have been enacted to elaborate on the key principles of law laid down in the *Constitution*. Section 10 of the *Constitution* states that the *Constitution* and the Organic Laws are "the Supreme Laws of Papua New Guinea".

### **Significance of investigations being conducted under Organic Laws**

The fact that the two Organic Laws have been specifically enacted to provide for Commission investigations reflects the very high status of such investigations.

It also has significant practical consequences. If compliance with a direction issued by the Commission under one of its Organic Laws would involve the breach of an Act of Parliament, the Commission's direction will prevail.

The effect of having two different Organic Laws is to lay down two different procedural codes, depending on what particular aspect of its jurisdiction the Commission is exercising. An investigation of alleged wrong conduct by a governmental body is conducted under the *Organic Law on the Ombudsman Commission* (OLOC)<sup>i</sup> which law is also used for a discriminatory practices investigation. An investigation of alleged or suspected misconduct in office by a leader is conducted under the *Organic Law on the Duties and Responsibilities of Leadership* (OLDRL)<sup>2</sup>.

For example, if the Commission uses its power to issue a summons for the production of documents to the Internal Revenue Commission, the secrecy provisions of the *Income Tax Act* and the *Customs Act* have to "give way" to the summons.

The Organic Laws put the Commission in quite a strong position if it is faced with any resistance during the course of an investigation.

### **Independence of the Commission.**

One of the most important court cases concerning the powers of the Commission has been the 1992 decision of the Supreme Court in *Ombudsman Commission V Ellis*.

This case arose after the Chief Ombudsman refused to comply with a summons issued under the Commission of Inquiry Act by Commissioner Graham Ellis. The summons required the production of documents relevant to the Commission of Inquiry into the Poreporena Freeway project.

In concluding that the Chief Ombudsman acted lawfully by refusing to comply with the summons, the Court emphasised the constitutional independence of the Commission under Section 217(5) of the *Constitution*.

Section 217(5) states:

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

**ILA GENO OBE, QPM**  
**CHIEF OMBUDSMAN**

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<sup>1</sup> Appendix 1 – OLOC

<sup>2</sup> Appendix 2 - OLDRLObtaining relevant information

## **APPENDIX 1: OLOC**

### **Obtaining relevant information**

The powers vested in the Commission are for the purpose of enabling the Commission to conduct its investigations thoroughly and without any obstruction or hindrance from any person or organisation so that it may obtain all the information that it needs from all sources in order to arrive at the facts before forming its opinion and making its recommendations.

The general purpose of an investigation under the OLOC is to determine whether any of the conduct under investigation was wrong, or whether any laws or administrative practices were defective. Under Section 22(1) of the OLOC, the Commission is expressly authorised to form an opinion on the merits of the complaint.

### **Privacy and secrecy during the conduct of an investigation**

Unlike a court or a commission of inquiry, when it performs its fact-finding role, the Ombudsman Commission, and the persons with whom it comes in contact, are subject to a number of constraints which are intended to maintain the privacy and secrecy of the proceedings.

### **Investigations to be conducted in private.**

Section 17(2) of the OLOC states that every investigation conducted under the OLOC must be conducted "in private". Public hearings are not permissible.

Section 20(2) states that all Investigators are subject to a duty of secrecy, imposed by their oath or affirmation of secrecy. However, Investigators should note that the duty to maintain secrecy is qualified by Section 20(3) in that the Commission may disclose matters, which would otherwise be subject to the secrecy provisions, if this were necessary in order to properly investigate the matter before it. This provision recognises that, in order to obtain information from a source, it may be necessary to disclose some otherwise "privileged" information.

### **Power to acquire information**

The Commission's authority to obtain information is derived from the following provisions of the OLOC:

**Sec 17(3)** - The Commission may hear or obtain information from any person it considers can assist and make whatever inquiries it thinks fit.

**Sec 18(1)** - The Commission may serve a summons on any person, who in its opinion is able to give any information relating to a matter being investigated, to furnish information and/or produce any documents, papers or things that may be in the possession or control of that person.

**Sec 18(3)** - The Commission may summon any person to attend the Commission for examination on oath or affirmation.

**Sec 36(1)** - A member of the Commission, may, at any time, enter the premises of a State Service, provincial government body, local government body or statutory body and inspect the premises and carry out an investigation within the premises. (Refer 12.8)

#### **Service of a summons under Section 18(1) of the OLOC**

The OLOC does not prescribe any particular method of serving summonses under Section 18. However, if a person has failed to comply with a summons and is to be successfully prosecuted, it will need to be established that the summons has been personally served. This means:

- An attempt must be made to hand the summons to the person named on the summons.
- If the person refuses to accept the summons, simply place the summons in front of him and say: "this is a summons from the Ombudsman Commission requiring you to attend the Commission and produce documents", or words to that effect; i.e. put the document down in the presence of the person and convey to him the nature of the document.
- The summons cannot simply be left with the person's spouse or a close friend or relative or the person's executive secretary. This is so, even if an undertaking has been given that the summons will be handed on to the person.
- It is not necessary for the person to sign a copy of the summons as evidence of its receipt. This is a preferable procedure, but it is not essential.

- If a person consistently refuses to accept service or successfully evades service, the Legal Services Unit should be consulted for advice on alternative methods of service.
- Of course, if the person to whom a summons is being issued is likely to be cooperative, it will not be necessary to insist on personal service. In this situation, alternative methods of service e.g. leaving the summons with another person can be used.

### **Failure to comply with a summons**

Part VII of the OLOC deals with offences, which can be committed by persons who fail properly to comply with directions, and summonses under Sections 18(1) and 18(3).

Section 30 makes it an offence for a person to fail, without reasonable excuse, to attend the Commission or to produce documents, books or writings in his custody or control that he has been required by summons to produce. Special care needs to be exercised when drafting summonses under Section 18(1).

If it is considered that the person may be unco-operative, the person should be summoned to attend under Section 18(3), in addition to being required to furnish information etc. under Section 18(1).

### **Other offences**

Other offences provided for in the OLOC include -

- Sec 31** Refusing to be sworn or refusing to make an affirmation.
- Sec 31** Refusing to answer questions put by a member of the Commission or a delegated officer of the Commission, relevant to an inquiry.
- Sec 31** Leaving the Commission, after having attended, without the permission of a member of the Commission.
- Sec 32** Wilfully insulting a member of the Commission.
- Sec 32** Wilfully interrupting the proceedings of the Commission.
- Sec 32** Being in wilful contempt of the Commission.
- Sec 33** Wilfully giving false evidence, i.e. perjury.

### **Ombudsman Commission's power to enter premises**

Section 36 of the OLOC confers the power of entry of premises. However, before this power is exercised it is essential that the Office of Counsel is given an opportunity to consider the facts of the matter and if necessary, provide advice to the Investigator, Director and/or member of the Commission, responsible for the conduct of the investigation.

### **Powers of search and seizure**

The Commission has no independent power to conduct searches of buildings or places or to compulsorily seize documents or things. However, as the 1993 case of *Jimmy Tjeong v The Ombudsman Commission* confirmed, the Commission does have the power to apply for search warrants under the *Search Act*. To obtain a warrant, there must be reasonable grounds for suspecting that there is a certain thing in a particular place and that thing, if found, is likely to afford evidence of the commission of an offence.

The *Jimmy Tjeong* case followed a Complaints Division raid on the premises of JJ Wholesale Enterprises at Badili. Tjeong's application for judicial review of the decision of Boroko District Court Magistrate, Mr Vagi, to issue a search warrant to the Commission was successful. However, the result of the case did not disturb the principle that search warrants can be issued to the officers of the Commission.

### **Prosecution for offences**

Any proceedings for an offence under OLOC is brought in the National Court by the Public Prosecutor and with the consent in writing of the Ombudsman Commission. (S.36)

### **Protection and Privilege available to the Commission and Investigators.**

The principle that a member of the Commission or an officer or employee of the Commission has a right of privilege in relation to giving evidence or producing documents in any court proceedings, so far as such evidence may relate to matters arising out of the exercise of his functions, is provided by Sections 35(1) and 35(2) of the OLOC.

When carrying out investigations, Investigators have the protection of Section 13 of the *Organic Law on the Guarantee of the Rights and Independence of Constitutional Office-holders*.

Section 13 states:

**"An officer whilst acting on the instructions and on behalf of a constitutional office-holder in the performance of that office-holder's constitutional functions is not subject to direction or control in the exercise of those functions by any person other than that constitutional office-holder".**

Further protection is given to investigators by Section 35(1) of the OLOC, which provides that all members, officers and employees of the Commission are not liable for any act or omission done or made *bona fide* and without negligence under or for the purposes of the OLOC. Furthermore, it is an offence for a person to obstruct or resist an officer of the Commission who is lawfully carrying out an investigation or performing other functions pursuant to his/her duties as an officer of the Commission.

In particular, Section 201 of the *Criminal Code* states:

**A person who obstructs or resists -**

- a) Any public officer who is engaged in the discharge or attempted discharge of the duties of his office under any law; or**
- b) Any person who is engaged in the discharge or attempted discharge of any duty imposed on him by any law.**

**is guilty of an offence.**

**Penalty: Imprisonment for a term not exceeding two years.**

## **APPENDIX 2: OLDRL**

### **Obtaining relevant information for investigations under the *Organic Law on the Duties and Responsibilities of Leadership* (OLDRL)**

Under its Leadership Code jurisdiction, the Commission performs the role of conflicts-of-interests commissions in other countries and in the absence of an independent, adequately resourced anti-corruption body, it has also become a de facto anti-corruption agency. It has been able to combine its extensive powers under the Leadership Code, together with the exercise of powers as a traditional ombudsman institution, in the overall fight against corruption in PNG.

### **Privacy and secrecy during the conduct of an investigation**

Unlike a court or a commission of inquiry, when it performs its fact-finding role, the Ombudsman Commission, and the persons with whom it comes in contact, are subject to a number of constraints which are intended to maintain the privacy and secrecy of the proceedings.

Under the OLDRL Section 20 provides that every investigation shall be conducted in private however, if after the investigations the Commission is of the opinion that there is evidence of misconduct in office, it shall refer the matter to the Public Prosecutor for prosecution before the appropriate tribunal. Before the referral is made, the Commission is obliged to inform the person whose conduct is being investigated, of the Commission's intention to refer the matter to the Public Prosecutor.

### **Section 21- production of documents**

Section 21 OLDRL deals with the Commission's powers to summon persons who in its opinion is able to give any information and produce any documents required by the Commission in the course of its investigations. Under OLDRL, in general summonses issued by the Commission under the OLDRL are similar to summonses issued by a court of law.

Whether or not the person is an officer, employee or member of any state service, provincial service, local government body or statutory body, including the spouse and the children of the person whose conduct is being examined or investigated.

Witnesses who either disregard summons to appear before the Commission or refuse to cooperate with the Commission can be charged before the National Court. Witnesses before the Commission may be examined under oath or affirmation. They are entitled to the same privileges and subject to the same penalties, as those appearing before a court of law.

The offence referred to above is created by Section 31 OLDRL which provides that a person who having been summoned to attend the Ombudsman Commission, other authority or tribunal fails without reasonable excuse the burden of proof which lies on him to attend the commission, other authority or tribunal or to produce any documents, books or writings in his custody or control that he is required by the summons to produce is guilty of an offence which penalty is a fine of K500.00 or imprisonment for 3 months.

However, Section 22 of OLDRL provides qualification for which the Commission shall not require a witness to answer questions or produce documents only in cases where the Prime Minister, after consultation with the Chief Ombudsman, certifies that the giving of such information or the answering of such questions or the production of such documents or things are likely to:

- a) Prejudice the security or international relations of Papua New Guinea (including relations of PNG with the government of any other country or with any international organisation) or the investigation or detection of offences; or
- b) Involve the disclosure of proceedings, deliberations or decisions of the NEC or of any committee of that council which the Prime Minister certifies relate to matters of a secret or confidential nature, disclosure of which would be injurious to the public interest.

Section 23 OLDR provides that a leader must cooperate to the best of his ability with the Ombudsman Commission at all times. This duty of cooperation applies whether the Commission is investigating his own conduct or the conduct of another leader.

## OFFENCES

### **Failure to attend or produce documents.**

Section 31 of the OLDRL provides that a person who, having been summoned to attend the Commission, fails without reasonable excuse, the burden of proof of which lies on him, to attend the Commission or to produce any documents, books or writings in his custody or control that he is required by the summons to produce, is guilty of an offence which penalty is a fine of K500,00 or imprisonment for three months. (S.31)

In the case of *The State v Gabriel Ramoi (No 2) [1990] PNGLR 136 (N848)*, a trial of a Member for Aitape Lumi Electorate in the National Parliament of Papua New Guinea, the Court found Mr Ramoi guilty for failure to answer a summons to furnish information and produce documents to the Ombudsman Commission contrary to s 31 of the Organic Law and fined him K200

The Court held that

### **For the purposes of s 31 of the Organic Law:**

- (1) absence from the country does not constitute reasonable excuse for failure to attend before the Ombudsman Commission particularly where adequate time existed between the date of the service of the summons and the date fixed for attendance for another date to be fixed;**
- (2) absence of prior consent by a prospective witness to a suitable hearing date cannot constitute reasonable excuse for failure to attend;**
- (3) reliance by the prospective witness on mere knowledge in the Ombudsman Commission of his likely absence from the jurisdiction on the date fixed for attendance does not constitute reasonable excuse for failure to attend.**

### *Refusing to be sworn or give evidence.*

A person appearing as a witness before the Commission who refuses to be sworn or to make an affirmation or to answer any questions relevant to the inquiry put to him by a member of the Commission, or having attended leaves the Commission without the permission of a member of the Commission, is guilty of an offence which penalty is a fine of K500.00 or imprisonment for three months. (S.32)

*Contempt of the Commission.*

A person who willfully insults a member of the Commission, or willfully interrupts the proceedings of the Commission, or is in any manner guilty of willful contempt of the Commission, is guilty of an offence which penalty is a fine of K500.00 or imprisonment for three months. (S.33)

*Giving false evidence.*

A person appearing as a witness before the Commission, who willfully gives false evidence, is guilty of perjury and is liable to prosecution and punishment accordingly. (S.34)

Any person previously covered under the Leadership Code who within three (3) years of ceasing to be that person must first seek approval from the Ombudsman Commission before accepting or holding directorship or any prescribed position with a foreign enterprise is guilty of an offence which penalty is a fine of K1,000 or imprisonment for 12 months. (S.35)

**Prosecution for offences**

Any proceedings for an offence under OLDRL is brought in the National Court and with the consent in writing of the Ombudsman Commission. (S.36)

The Commission gives consent to the Public Prosecutor who prosecutes the

*Protection of witnesses, etc.*

Witnesses and persons appearing before the Commission have the same privileges and immunities as witnesses appearing before the National Court. (S.38)

**Section 27(4) Constitution Power to issue Directions**

The Ombudsman Commission is empowered under Section 27(4) of the *Constitution* to give directions either generally or in a particular case, to ensure the attainment of the objects of the Leadership Code and that is the fulcrum on where the Commission's supervision and enforcement of the Leadership Code depends.

All these powers vested in the Commission are for the purpose of enabling the Commission to conduct its investigations thoroughly and without any obstruction or hindrance from any person or organisation so that, subject to certain constraints

prescribed in OLOC, it may obtain all the information that it needs from most sources in order to arrive at the facts before forming its opinion and making its recommendations.

Failure to comply with a direction issued under section 27(4) of the *constitution* may attract the following consequences:

- In respect of a leader, misconduct in office under section 27(5)(b) of the *constitution* and liability to prosecution before an appropriate tribunal and subject to penalties under section 28(1)(g)(ii) of the *constitution*, section 27(5) of the *organic law on the duties and responsibilities of leadership* and section 2 of the *leadership code (alternative penalties) act*, including dismissal from office.
- In respect of any other person, enforcement proceedings in the national court under section 23 of the *constitution*.

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