



THE AUSTRALIAN NATIONAL UNIVERSITY

Research School of Pacific and Asian Studies

State **Society** and **Governance** *in* **Melanesia**

DISCUSSION PAPER

THE OMBUDSMAN ROLE: VANUATU'S EXPERIMENT

Discussion
Paper 00/5

INTRODUCTION

This paper is an edited version of a paper presented by Kalev Crossland at a conference – “Accountability and Corruption in the Pacific: Evaluating the Roles of Ombudsmen and Leadership Codes” – held at The Australian National University, 6-10 November 1998. That conference was the first occasion in which Ombudsmen, heads of Leadership Code Commissions and their legal and technical advisers from the Pacific Islands region had met to discuss the broader roles of their institutions – including anti-corruption activities, oversight functions and role in governance more generally – as well as their traditional functions of dealing with mal-administration. The conference also provided the first occasion for Ombudsmen to discuss their roles specifically in relation to the cultural, economic and political systems of the Pacific Islands. A key objective of the conference was to evaluate the effectiveness of these institutions and their role in governance.

A book arising from the conference will be published by the *State, Society and Governance in Melanesia Project* in 2001.

SUMMARY

The author was employed as the first Legal Counsel to the first Ombudsman of Vanuatu, Mrs Marie-Noelle Ferrieux Patterson. The author's salary was met by the Commonwealth Secretariat. The author appeared as counsel in several cases before Vanuatu's Supreme and Appeal Courts that considered the constitutionality and legality of certain executive acts, leadership conduct and the parameters of the Ombudsman's jurisdiction. The Ombudsman completed her term and was succeeded by Mr Hannington Alatoa in 1999.

Principal characteristics of Ombudsmen Patterson's approach emerged during the author's two-year assignment:

- a) The Ombudsman as champion and servant of the people rather than a mediator between state and citizen;
- b) Inclusion of biblical texts in preambles to public reports;
- c) In cases involving misuse of power and/or corruption, an approach that was more generally combative than conciliatory;
- d) The Ombudsman as educator; and
- e) Litigation in the courts.

KJ
CROSSLAND

The contribution of AusAID to this series is acknowledged with appreciation.

In attempting to evaluate the role and effectiveness of the first Vanuatu Ombudsman, this paper examines these themes, drawing on events and reports published during my time with the Office of the Ombudsman.

CHAMPION AND SERVANT OF THE PEOPLE

The mission statement in the Office of the Ombudsman's Corporate Plan (1995-1999) is "[t]o work with the government and the people of Vanuatu in promoting and entrenching good governance and government accountability in Vanuatu."

Ombudsman Patterson and staff found it difficult to secure meaningful co-operation from the leaders of the UMP-led coalition government, in power from July 1994 to March 1998. This made it difficult for the Office of the Ombudsman to pursue its mission to "work with the Government". The impediments ranged from simple and repeated failure to return telephone calls through to the unlawful Council of Minister's decision to ask the President to terminate the appointment of Ombudsman Patterson in June 1997, and the repeal in November 1998 of the *Ombudsman Act No 15 (1995)*.

Why was this? In simple terms, it was because Ombudsman Patterson sought to make several senior political leaders publicly accountable—an anathema to those targeted. Starting with the Ombudsman's report into the US\$100 million bank guarantees in July 1995 increasing criticism was made of the Ombudsman by senior government figures. Several of these were made under parliamentary privilege. Some examples are set out below.

Responding to the Ombudsman's Public Report into the Nambawan Bottle Shop (20 August 1996)¹ Mr Willie Jimmy said:

Ating hem no save i no gat loa i
givim paoa blong hem i kam olsem wan
Policeman, Judge, Jury mo Executioner.

[Translation: I think that she [the
Ombudsman] does not know that the law
does not give her the power to act as a
Policeman, Judge, Jury and Executioner.]

On 5 August 1997, Prime Minister Vohor was interviewed on Television Blong Vanuatu about the Cabinet's decision to repeal the Ombudsman Act. Mr Vohor stated that indigenous people should run their own country and not allow 'former colonialists' to decide

their future. He would not allow people with 'colonial ideas' to dictate to Ni-Vanuatu what is right or wrong. Mr Vohor later apologised for his remarks.

Ombudsman Patterson's gender was also a ground for criticism. In November 1997, during the parliamentary debate on the Repeal of the Ombudsman Act, Mr Sope defended his support of the Bill because Melanesian culture did not allow women to criticise men.²

Despite such hostility from some political leaders, the Office of the Ombudsman did meet with co-operation, or at least a desire to co-operate with investigations, from lower level bureaucrats. However this was often tempered by a fear of losing their job or being over-ridden. An indicative example is the Ombudsman's investigation of late 1997/1998 into allegations of expense irregularities by a senior figure. Employees who initially responded favourably to requests for information stopped after receiving a letter from the leader concerned instructing that further co-operation would result in loss of position. The Ombudsman eventually obtained the information following an application under section 17(7) of the Act.

The VP/NUP Government, which took office on 31 March 1998, saw a change in attitude and approach. There was a willingness to seek out the Ombudsman Patterson for views on certain topics. Witnesses responded to telephone requests to attend without the need for a summons.

The actions that produced such resistance among senior political figures also firmly established the Ombudsman in the national psyche as an institution belonging to the people. The response to the Ombudsman's 1997 reports on two sets of payments made by the UMP-led Council of Ministers in 1993 and 1994 is one illustration of this.

Ex gratia payments of VT1.5 million (US\$14,000 approx.) were made to 23 former and current UMP and MPP MPs and payments of VT5 million (US\$46,000) were paid to Mr Willie Jimmy, Mr Maxime Carlot Korman and Mr Barak Sope.³ The Ombudsman recommended that the payments be returned to the Republic as they had no basis in law. The reports struck a chord with ordinary people and letters of support received by the Ombudsman's Office from Ni-Vanuatu citizens suggest that the Ombudsman was seen by some as the people's champion.⁴

This is to express my personal gratitude and appreciation to you in regards to the comprehensive report on 23 MPs

Ex-gratia payments. I have relatively admired your efforts and courage and noted that you had spent a lot of time to compile such a report. (Dated 24.06.97)

...As a young motivated citizen of this country, I fully support your public reports and 100% support what your office is doing. In my view the reports you made does not [go] against any leaders, however, it helps all citizens to actually know where we are going rather than be a blind person not knowing where we are going. I am really sure that there is a lot of rubbish in the Government and do please clear them and make it public to help the voters for our next general election to make [a] good decision.

...I want to encourage you to continue with your job which really assist a lot of people [being] aware of [these] cruel leaders.

The leaders should no longer be trusted and be voted back for the next election. I will stand and make it clear to all supporters/voters of this parties for the next election. (Dated 11.07.97)

Just a short note to tell you to "keep up the good work" that you and your staff are doing for Vanuatu.

I know that I am not the first to say this and I will not be the last . . . "I believe that God Almighty has raised you up to do what you are doing and I would tell you to fear no man for God is with YouBe encouraged for every second of your life there is someone upholding you before the Throne of God in prayer!!! I am proud to be one of them." (Dated 15.07.97)

Mifala plante we i bin tekem part long 16th May 1988 Riot i wantem talem aot long pablik se "Mifala i sappotem work blong Ombudswoman Mrs Marie Noelle Patterson. From follem professional work blong investigation wetem save mo qualification we emi kat long LAW i come aot klia long Vanuatu tedei se plante lida oli mekem plante samting i rong long kantri especialli long fasen we oli kasem bikfala mane blong compensation. Toktok ia i kamaot long mifala blong Efate.⁵ (Signed press release, 07.08.97)

Similar letters to the editor were regularly published in the *Trading Post*.

INCLUSION OF BIBLICAL TEXTS IN PREAMBLES TO PUBLIC REPORTS

Some expatriates found the biblical quotes and preambles at the start of every public report inappropriate. The Office's response was that "the reports are not written for you, they are written for the Ni-Vanuatu."

In Vanuatu, Christianity is central to everyday life and society. All meetings of public servants and statutory bodies start with prayer. Many politicians are former preachers, as is Justice Saksak. Justice Saksak sometimes starts the Supreme Court's business for the day by asking a member in the public gallery (often a pastor) to say a prayer. The correspondence quoted earlier reflects this merger of secular duties and religious life.

Before some Court cases, church leaders came to the Office to pray with the Ombudsman and staff. Before the legal challenge to the Council of Minister's request to the President to terminate Ombudsman Patterson's appointment, a caller told the Office that he and his village were fasting and praying for the Ombudsman's success in the Court.⁶

This gives some indication of the context within which the Office of the Ombudsman operates. I would argue that it is appropriate for an Ombudsman to adapt the role to reflect local conditions and culture. The preamble to the Constitution itself also provides a justification for the Office of the Ombudsman's use of a Christian framework for its reports. The preamble states:

WE the people of Vanuatu, PROUD of our struggle for freedom, DETERMINED to safeguard the achievements of this struggle, CHERISHING our ethnic, linguistic and cultural diversity, MINDFUL at the same time of our common destiny, HEREBY proclaim the establishment of the united and free Republic of Vanuatu *founded on traditional Melanesian values, faith in God, and Christian principles*, AND for this purpose give ourselves this Constitution.

Similarly, those calling for higher standards of public behaviour and accountability from leaders frequently invoke the motto of the country, 'Long God yumi stanap' or '[b]efore God we stand'.

Examining the preambles from three public reports is instructive. The *Public Report on delayed action by Police to curb unrest at Paunangisu village* (12 August 1997) followed

internecine quarrelling about which of two claimants would be the new chief of a village in north Efaté. Three months of lawlessness finally erupted into fighting, property damage, looting and general mayhem. The Ombudsman criticised the police as incompetent and doing too little too late.⁷ In the report's preamble the Ombudsman chose a passage from the Book of Job to underline the consequences of loss of discipline:

“He openeth also their ear to discipline, and commandeth that they return from iniquity. If they obey and serve him, they shall spend their days in prosperity, and their years in pleasure; but if they obey not, they shall perish by the sword and they shall die without knowledge” Job 36 v 10 -12

This report concerning the behaviour of Police appears at a time of some moral and ethical crisis in the affairs of Vanuatu. It reveals persistent slackness, indiscipline, arrogance and ignoring of legitimate duty by members of all ranks of the Police.

It will come as little surprise to the people of Vanuatu... Complaints go unchecked while apparent indifference and protection of relatives is commonplace. There are numerous complaints about Police “taking sides” because of supposed loyalty or preference to people from the same island, or people related to them, or people seen as “big men”.

... Mutiny cannot be tolerated in any form since it poses such a grave threat to the peace of the country and the rule of Law. It is shameful treatment of these men that the incidents four years ago in this report, showing that Police and military refused to obey legitimate orders because they believed they were owed funds of one kind or another should have gone unpunished at that time instead they still apparently form the basis of the festering discontent and insubordination of both forces at the present time.

Adding fuel to this sense of grievance has been the realisation that extravagant allowances and salaries often illegal in nature, have been paid out to political leaders and favourites who are determined to obtain financial gain, so that moral in both forces has been brought to a disillusioned low.

It is obvious that a different kind of discipline and sense of duty is overdue – and we hope we can take encouragement from all the recent talking that has been taking place about “Reform” of all departments of public life...

The *Public Report on the appointment of Maurice Michel to the Public Service and to the position of Auditor General* (6 March 1997) was concerned with nepotism in appointments to posts that should be based on merit. Michel had served a custodial sentence for a serious criminal conviction. After his release from jail he used political connections to the UMP⁸ to secure a senior post in the Public Service Department. Shortly after he was promoted to Auditor General with the approval of then Prime Minister, Mr Maxime Carlot Korman. This occurred despite the fact that Michel had not applied formally to the Public Service Commission. Moreover, Public Service regulations prohibited appointment of persons with criminal convictions four years prior to application.⁹

The report's preamble draws an analogy with the prophet Ezekiel's prediction of the fall of Israel.

“Mischief shall come upon mischief and rumour shall be upon rumour; then shall they seek a vision to the prophet; but the law shall perish from the priest; and counsel from ancients” (Ezekiel 7 v 26)

The quotation, which begins this report, summed up the reaction of the prophet EZEKIEL as he contemplated the moral decline and fall of the nation as a result of the failure of the leaders of the people to set a high example and to teach what was right.

Each successive investigation by the Ombudsman's Office is revealing a network of dishonesty and corruption among those who aspire to leadership. The public's money is misappropriated, power is misused, assets are ruined, and the country brought to poverty and confusion.

Favouritism to friends and relatives is rife, and promotion is given as a reward to those with no apparent ability or experience either in business or responsibility! The public look to the leaders of Church or State to put an end to the decline before it is too late.

Complaints pour into this Office about guilty men going unprosecuted, no sign of repentance or shame and a consequent increase in lawlessness.

There is little point in the public paying for the work of an Ombudsman if all that happens is a piling up of paper reports and no effective action to recover money swindled, or assets acquired dishonestly.

It is the right and the duty of the public to put pressure on their representatives to safeguard their rights, and to remedy the wrongs that are taking place before it is too late.

The final example is from the *Public Report on the Misconduct of Minister Demis Lango* (3 February 1998). This report detailed adultery and alleged rape by Minister Lango on Government premises after late night partying. The preamble places the Minister's conduct in the context of God's warning of the consequence of the Jews breaking the covenant He had made with their ancestors when He led them from Egypt:

"... they obeyeth not, nor inclined their ear but walked everyone in the imagination of their evil heart; behold I will bring evil upon them, which they shall not be able to escape ..."
(Jeremiah 11 v 8 - 11).

This report deals with a matter which may appear small when set against the reports of theft and disappearance of public assets on a large scale but it is important as another illustration of a different kind of disregard for the duties and morals of our elected leaders.

Aside from the personal question of adultery and of forcing intercourse without consent, there is the national question of what kind of behaviour is to be expected from not only officials but Ministers.

When Police are forced to investigate noise and disorderly behaviour inside government office buildings in the middle of the night, the matter has gone beyond a matter of simple personal liberty and becomes one of civic morality.

When the offender concerned is one who travel overseas representing Vanuatu and encounters there all the temptations and opportunities such occasions provide, the public are entitled to expect a very

different standard of representation and behaviour than the one demonstrated in this shameful episode. Perhaps a needed lesson will be learned by our leaders that they cannot be permitted to exploit their positions for inappropriate sexual conquest, any more than for financial gain.

An article published in *The Wall Street Journal* drew parallels between the work of Ombudsman Patterson and US Independent Counsel Kenneth Starr's investigations into the conduct of US President, Mr Bill Clinton.¹⁰

While drawing a direct correlation between biblical events and prophesies and contemporary public life may sit oddly with Western audiences, it is very much *de rigueur* in Vanuatu. With the recent translation of the Bible into Bislama it may be more appropriate to switch from the King James version to its vernacular equivalent.

COMBATIVE RATHER THAN CONCILIATORY APPROACH IN POWER MISUSE AND CORRUPTION CASES

The nature of corruption is that part of the crime is to hide it. Early experience and common sense led the Office of the Ombudsman to conclude that a conciliatory approach would not work with enquiries into misuse of power and corruption.

Section 16(3) and section 19(5) (b) of the now repealed Act recognised this reality. Section 16(3) allowed the Ombudsman to defer notifying the subject of the enquiry where "notification will interfere with his preliminary inquiry". Section 19(5) (b) allowed the Ombudsman to obtain personal information without consent where "the information of a personal nature is or may reveal (either alone or taken with other information) a breach of the Leadership Code, corruption or misappropriation".

The Leymang enquiry

The Leymang enquiry is a case in point. Father Leymang, a Catholic priest, had been a UMP MP and a Chief Minister in the pre-independence National Assembly. The Office of the Ombudsman received a complaint from an expatriate businessperson who had been a significant employer for many years. The complainant claimed Father Leymang, then first political secretary in the Prime Minister's Office with no responsibility for immigration matters,

had directed the Immigration Department not to renew the complainant's residency permit.

During his interview with the Ombudsman's Office, Father Leymang stated that he had acted after receiving complaints but refused to say who had made them. He also refused to disclose their identities when forced to appear before the Supreme Court¹¹ and filed his own petition alleging constitutional breaches by the Ombudsman.

Father Leymang's petition was dismissed and the Ombudsman's application allowed. He refused to answer questions at two further sittings of the Court and was sentenced to six months' imprisonment for contempt. Father Leymang's appeal was rejected by the Court of Appeal. The President of the Court, Justice Robertson gave Father Leymang a final opportunity to purge the contempt by answering the Ombudsman's questions.¹² Father Leymang complied. His submission that activity in the Prime Minister's Office was inviolable sheds some light on why he mounted such resistance.

Following the case, a letter from Father Leymang was published in a Tahitian newsmagazine¹³ and subsequently appeared on the front page of the *Trading Post* on 18 February 1998.¹⁴ The letter called for confiscation of Ombudsman Patterson's passport and her deportation as a *persona non-grata*.¹⁵ Father Leymang claimed he had been vindicated by the Appeal Court:¹⁶

Mrs Marie Noelle Ferrieux Patterson stands there like a European-Style teacher, stern and harsh, wielding a big stick fashioned by foreign powers to punish the young Melanesians (the politicians) . . .

The Ombudsman's Office is heavily subsidised by Australia (30 million vatu) and the EEC (24 million vatu) in addition to the funding by the Vanuatu Government (70 million vatu). It is a mini-foreign State in the Republic of Vanuatu.

To spend such large sums of money to turn Vanuatu into a "Godly State" is a Western Utopia, that is to say, saving the "nice savages" from corruption or from "the deadly civilisation" that is produced by its own industrial societies.

Father Leymang's figures were wildly incorrect. The government budget for the Office of the Ombudsman was Vt 28 million, or 0.1% of Vanuatu's total annual budget. The assistance received from Australia involved

paying for a photocopier and translation of the Ombudsman's reports into Bislama. In an undisciplined reply to Father Leymang's letter, Ombudsman Patterson publicly stated:¹⁷

Lie after lie is trotted out as if he was recounting Gospel. His anti-colonial hatred is raging, as is his dismissal of Anglo-Saxon influence. He is completely ignorant about the origins of the development of the role of the Ombudsman which goes back many centuries and I understand, exists in some forms in Melanesian society and villages.¹⁸

The Leymang enquiry suggests that it would have been pointless to attempt mediation or conciliation at the start of the enquiry. It is regrettable that the example set by the Ombudsman's patient use of the judicial process was later undermined by intemperate, if understandable, public comment.

The "Cyclone Betsy case"

Another situation where it would have been inappropriate to warn the subject was the "Cyclone Betsy case". In January 1992, Cyclone Betsy did considerable damage to Vanuatu. Many countries provided assistance including money. Then Prime Minister Mr Maxime Carlot Korman opened a bank account, "Carlot Maxime (Comité Secours [Relief Committee] Cyclone Betsy)". In late 1997, the Office of the Ombudsman investigated the operation of the account.¹⁹

The Office found that funds from France tagged for cyclone relief had been transferred to another account held by Mr Carlot Korman for his own use. Statements for the two accounts also showed non-attributable deposits totalling Vt126 million (US\$1.1 million), or 45 times Mr Carlot Korman's annual salary. Some of the funds were traced back to Singaporean and Malaysian bank accounts apparently controlled by Mr Carlot Korman.

A fax anonymously provided to the Ombudsman in 1996 took on a new meaning in the context of the bank statements. Set out below is the full text of a hand-written fax dated August 1995 addressed to Mr Lien Than (aka Paul Than) then "Honorary Consul for Asia"²⁰ and signed by Mr Carlot Korman.²¹

For my election, I make this request to be put to our Asian Trade Commissioners, I ask them to transfer their contribution as requested to my ASIACITI TRUST Company in Hong Kong and Shanghai Banking Corporation 10 Collyer Quay...

Paul, the Singapore Honorary Consul has already put 10,000 dollars US in my account. Mr Masumoto promises me to meet me in Tokyo and give me 5,000 dollars on 24 August.

Please Paul ask the others to do their part immediately. If I receive negative answers from the others I will personally as PM and Minister of Foreign Affairs cancel their nomination as Vanuatu Government Rep [sic] in overseas. Paul please give me your fax reply on # 24 August in the morning. Regards to you and Bon Courage et à bientôt Port Vila.
(signature)

Mr Carlot Korman's bank accounts showed that he had issued 147 cash cheques for amounts between Vt5,000-80,000 (\$US45-750 approx.) two days before the December 1995 elections. Mr Carlot Korman did not refute the Ombudsman's allegation that he had engaged in electoral fraud.

It is difficult to explain why so much incriminating evidence was left. One might speculate that Mr Carlot Korman considered himself untouchable and did not believe the Ombudsman would use her powers to summon his bank accounts without his knowledge. The circumstances suggest that the enquiry would have been more difficult if the Ombudsman had advised Mr Carlot Korman of its nature. In my view, legal impediments would have been used to frustrate and probably foil investigations. Mediation would have been impractical and unrealistic. In such cases, the nature of the Ombudsman's function is more akin to an anti-corruption commission than the orthodox model of an Ombudsman.

THE OMBUDSMAN AS EDUCATOR

The period under discussion here was one of extreme stress. For the first time in Vanuatu's history, its leaders were under sustained and trenchant criticism, and publicly so. Men who had held the reins of power for up to 20 years were castigated. They were not only found to have repeatedly breached the leadership code, but were in some cases accused of prima facie criminal activity.

This created considerable interest within Vanuatu and elsewhere in the region. People began to learn more about the way power was exercised in Vanuatu. In the Pacific region, from the time of the \$US100 bank guarantee

fraud in July 1996, virtually every issue of the region's monthly magazines carried news of Ombudsman Patterson's activities.²²

The Pacific Islands News Association ("PINA") awarded Ombudsman Patterson its Freedom of Information Award in July 1997, acknowledging her role in raising public awareness about the conduct of some of Vanuatu's ruling elite:

The winner of this year's award is someone who has been described as the best investigative reporter in the Pacific Islands today.

– she combines her knowledge of the law and accounting to bring to the public domain all sorts of questionable practices by people in public office. And in the true spirit of freedom of information she ensures that her findings are passed on to the public.

– although she is not strictly a journalist her professional qualities and the way she operates make her an excellent role model for investigative reporters.

In spite of attempts to put her out of her job by government ministers who have been subjects of her investigations she continues to operate without fear of reprisal.²³

The public reports are the principal tool used to support public education about the Constitution, expected standards of public behaviour by leaders and human rights. By January 1998, the Office of the Ombudsman had established a very wide network of supporters throughout the archipelago including chiefs, church leaders, teachers, health workers, police officers and other community leaders. The geography of Vanuatu, the relative expense of air travel and the vagaries of the sea made this no mean feat.

Another factor complicating the communication work of the Ombudsman is language. While all three official languages are used in the Office, the working language for reports is primarily English. Bislama is rarely used although AusAID is now funding translation of all reports.²⁴ Many of those at the grassroots who are literate can only read Bislama. Bislama is a second language for indigenous Ni-Vanuatu and English or French, the third.²⁵ The public response to distribution of the reports was enthusiastic, as the letter below shows. The correspondent raised funds

to pay for copying of the reports and public meetings.

RE: OMBUDSMAN REPORTS AND RECOMMENDATIONS

...Just to let you know that I had tried all my efforts to make fund raisings to publish the main [much] interested and needed information or had some photo copies done and distributed to all church leader, Chiefs, Community leaders, members of Provincial [Council] and Youth leaders in Malekula like South East, South West, North West, North East [who] had also contacted [conducted] a work shop on your reports, an awareness program on your report and leaders coming all around Malekula.

They paid their own transport to the workshops also I requested some funding from MPs and they agreed. I must say thanks to 3 MPs who then responded to the needs of these community leaders to come to the workshop.

...After the successful meetings the community leaders, church leaders, chiefs, youth leaders welcome the reports, and they even write their own support of the reports or a good work done by your office to let all "grass roots" know the real situation concerning their voted member of Parliament or some leaders of the country.

... "The Bible says what you did in the darkness will come to light."

I must confirm to your office that the whole [of] Malekula is aware of the good work your office did and fully supports the leadership code, which will be tabled in Parliament very soon.

God Bless.

[Name supplied, with list of 36 grassroots leaders attached in support and 11 additional letters of support from Malekula, 28.08.97]

Reaching the people

Literacy levels in Vanuatu, estimated at around 50 to 60%, demand educational strategies other than printed reports. The Office of the Ombudsman has used radio and to a lesser extent public speaking.

Entertainment options in villages are limited. Outside of working in the gardens or fishing and the responsibilities of child rearing,

the two favourite pastimes are *storian* (for men in the nakamal, accompanied by kava) and listening to the radio.²⁶ My observations suggest radio is one of the constants in the life of an average Ni-Vanuatu.²⁷

Since late 1996, the release of every new public report has been followed by a press release and an interview on Radio Vanuatu. The pre-recorded radio interviews, conducted in Bislama, run for between 20 minutes and three-quarters of an hour and are often aired after the midday news. Where the report has implicated a leader, an interview with the leader follows that of the investigator. Members of the public have responded positively and the process has increased the confidence of investigators.

In the last quarter of 1997 and the first of 1998, the Office of the Ombudsman ran two separate radio campaigns. Both were in Bislama and played every day for around two months. The first focussed on the problem of wife beating, advising the public that it was a crime for which a person could be jailed. It encouraged women to report incidents to the Police and if they failed to respond, to report the inaction to the Ombudsman's Office.

Anecdotal evidence suggests that highlighting this problem led to a reduction in wife beating. One observer noted a significant reduction in the number of women receiving treatment for battery. A Swedish lawyer and academic reported speaking with some villagers about the Office of the Ombudsman when he had anchored his boat at a small island. They told him that a man could not now beat his wife because the Ombudsman's Office had said on the radio that it was "tabu", in the same way that it was tabu under *kastom* to take turtles at certain times of the year.

The second radio campaign, which ran three times a day in the lead up to the March 1998 General Election, outlined Vanuatu's main electoral offences.²⁸ It advised the public to report any instances of "*sweetenem man*" (vote buying or treating) by current leaders seeking re-election.²⁹ The campaign proved controversial, with a number of senior politicians claiming that it was misleading and that the Office of the Ombudsman should have no involvement in electoral matters. Leader of the MPP,³⁰ Mr Barak Sope, ran a number of messages on Radio Vanuatu telling the public to ignore the radio campaign.

The campaign prompted several complaints of electoral fraud, one of which led to an investigation into allegations that Mr Sope and others connected with the MPP had sent a consignment of rice to Aniwa. The rice was

to be handed over in exchange for an assurance to vote for the local MPP candidate.³¹ A number of unsuccessful candidates also sought advice from the Office of the Ombudsman and subsequently filed electoral petitions in the Supreme Court.³²

Another strategy used by the Office of the Ombudsman is public speaking. Principally, this has involved Ombudsman Patterson but more recently senior investigators have also been involved. Logistics and budgets mean that most of these public speaking engagements have been on Éfaté.

Topics covered include the role of the Ombudsman, the Constitution, how to make a complaint and the principles of the Leadership Code and human rights. Audiences have included chiefs, women's groups, school children and villagers. Often a number of investigators will attend and field questions. Particularly on visits to the outer islands, these occasions produce new complaints. Their main value, however, appears to be the sense of empowerment through knowledge.

LITIGATION IN THE COURTS

Mrs Patterson's uncompromising approach to the role of Ombudsman in revealing systemic corruption and misuse of power in the ruling elite caused vigorous reactions. A number of attempts were made in the Supreme Court to silence the Ombudsman or at least limit the flow of reports.

Mr Willie Jimmy, long time Finance Minister and later deputy Prime Minister, mounted the first legal challenge in July 1995. This preceded the enactment of the Ombudsman Act and appointment of in-house counsel for the Ombudsman. Mr Jimmy sought an injunction to prevent Ombudsman Patterson from releasing her report into the Nambawan Bottle Store.³³ He was partially successful. In his judgment, D'Imecourt CJ ordered that the Ombudsman allow Mr Jimmy to have a further 14 days to exercise his constitutional right of reply under article 62(5). This has become the standard time for a right of reply for preliminary reports. All subsequent requests for extensions of time have been granted.

The second case brought against the Ombudsman was by Mr Barak Sope in October 1996. Again, it was an application for an interim injunction to stop the *Public Report into Multiple Breaches of the Leadership Code and other unlawful conduct by Hon Barak T Sope*. It was an omnibus report examining twelve matters. These were set

out in detail in the report's summary and ranged from improper granting of duty exemptions to unlawful appointment of an Italian firm to an exclusive right to development projects.³⁴ The summary characterised Mr Sope as

'...not fit to hold any Ministerial post or any position of public responsibility ever again'. In broad terms, justification for this was given via allegations that he:

- (a) breaks the laws of Vanuatu regularly;
- (b) abuses his high post to get other people and bodies to break the law;
- (c) does not consult the Council of Ministers on important matters affecting the country;
- (d) is unlawfully granting favours to his friends and political supporters; and
- (e) shows a gross disrespect for Christian and moral values.

Mr Sope's interlocutory application for an injunction was refused as his lawyer was unable to satisfy the Court that Ombudsman Patterson had acted beyond jurisdiction.³⁵

In March 1997, a third proceeding was issued naming the Ombudsman as defendant and seeking an interim injunction. In the *Virelala* case the Board members of Air Vanuatu (appointed by the Council of Ministers) argued that the Ombudsman's Act was not constitutionally enacted and therefore the enquiry in question was ultra vires.

The essential allegation being investigated was that the then Prime Minister, Mr Serge Vohor, and the appointed Board members had intentionally ignored a detailed feasibility report. The report stated that if Air Vanuatu purchased an ATR 42 aeroplane then the airline would become insolvent and the economy of Vanuatu gravely affected. Although the Office of the Ombudsman did not have proof, its supposition was that the absence of commercial logic may have stemmed from Mr Vohor's desire to garnish favour with France.

Ombudsman Patterson was successful again. However, the six months it took for the Supreme Court to refuse the interim injunction meant that the applicants obtained de facto injunctive relief, the enquiry lost momentum and the objective of issuing a report on the Air Vanuatu matter had largely passed.³⁶

By the end of July 1997, members of the Council of Ministers were facing the prospect of further legal action. The Ombudsman filed legal actions against them under section 30 of the Ombudsman Act. According to my research,

the only other country where Ombudsman legislation contains a similar provision is Pakistan.

Section 30(1) states that the powers of enforcement are limited to report making, publicity and the making of recommendations. However, section 30(2) gave the Ombudsman standing to apply to the Court for an order “giving effect to a recommendation” in certain circumstances.³⁷ In short what is required is:

an unfollowed recommendation by “the responsible person” involving a leadership or fundamental rights breach filing of the application within 24 months of the recommendation.

Ombudsman Patterson filed two applications under section 30(2) of the Act. The first sought an order giving effect to an unfollowed recommendation that the 23 MPs return *ex gratia* payments of VT1.5 million made to them in 1993. The second case sought an identical order in relation to “compensation” payments of VT 5 million made to Messrs Carlot Korman, Jimmy and Sope in 1994. The two matters were argued in the context of a pre-trial application before Lunabek ACJ in July 1998.³⁸

The cases point to some practical difficulties with the wording of Section 30. How can the Prime Minister or President “decide” (under section 25(1)³⁹ and article 63(4)⁴⁰) that the payments made to these individuals are to be returned? They had no power of compulsion over the recipients of this money. Indeed, the situation is exacerbated in the first case because one of the recipients of the *ex gratia* payments was Mr Serge Vohor, Prime Minister at the time the Ombudsman’s recommendation was made. In the second case, Mr Maxime Carlot Korman was the recipient of the “compensation” payment at the time it was paid.

It is hardly realistic to expect a political party that has acted deliberately and politically through its Ministers and the Prime Minister to make the payments, to then unmake them. It will be interesting to see how the court deals with what it is a thorny political and legal problem.

CONCLUSION

It is premature to make any real assessment about whether the activities of the Office of the Ombudsman will result in long-term, significant political and social change that produces real improvement in the lot of the

average Ni-Vanuatu. What can be said at this stage is that the scales have been lifted from the eyes of the electorate. The cathartic episode of the January 1998 riot that followed the release of the report into gross political misuse of Vanuatu’s superannuation fund gives ample evidence of that.⁴¹ Yet, paradoxically, one of the chief architects of that debilitating and damaging series of incidents, was returned to Parliament. This and many other puzzling political and legal outcomes may give cause to consider the utility of the democratic constitutional models and conventions in Vanuatu (and Melanesia).

But that is a story for another day.

AUTHOR NOTE

KJ Crossland

BA, LLB Cant., LLM (1st Hons) Auckland, Barrister and Solicitor of the High Court of New Zealand; Legal Counsel to the first Ombudsman of Vanuatu, August 1996-August 1998, now in private practice in New Zealand.

NOTES

- 1 The Nambawan Bottle Shop is a commercial establishment created by 3 partners, then Finance Minister Willie Jimmy, Mr Charlie Pakoa, Office Supervisor at the Ministry of Finance and their Manager, Mr Philippe Luankon.
- 2 This comment was reported widely and picked up in the Regional media, including Pacific Islands Monthly, January 1998, "Anti-corruption Ombudsman under attack from Parliament", p14-15.
- 3 See, for example, Republic of Vanuatu, Office of the Ombudsman: "Public Report (Pursuant 15 Art 63(3) of the Constitution) on the payment of compensation ... in breach of the Leadership Code and Compensation Act 1994"
- 4 Letters, internal Ombudsman file, letters of support from grassroots.
- 5 Translation: "Myself and lots of others who took part in the riot of 16 May 1988 want to publicly state that 'I support the work of the Ombudsman, Mrs Marie-Noelle Ferrieux Patterson. As a result of her competently executed investigations along with her qualifications and her knowledge of the law it is now clear that in Vanuatu today that there are plenty of leaders who have been ruining the country especially with the way they took these big compensation payments. This is my opinion as a [ordinary] person from Efata'."
- 6 Ombudsman internal file note, circa late July 1997.
- 7 Before the mayhem the police public relations officer made a statement on the radio to the effect that the police could not get involved in a custom matter. This served to heighten tensions. When action was taken on the date of the breakout of widespread mayhem 26 police/military personnel arrived at night to apprehend offenders. They were ill equipped with only had 3 flashlights between them to search for the culprits in the dark of night..
- 8 Union of Moderate Parties.
- 9 Public Service Regulations, reg. 2.3.
- 10 February 9, 1998, "Ken, Meet Marie-Noëlle".
- 11 Section 17(7) of the Ombudsman Act states that "If any person fails or refuses to appear or fails or refuses to provide any information after having been served with a summons, the Ombudsman may apply to the Court for the person to be summoned to appear before the Court and furnish the information or other thing requested in the summons."
- 12 Also a Judge of the High Court of New Zealand (Auckland Registry).
- 13 *Tahiti-Pacifique*, January 1998.
- 14 Issue No: 321. "Father Leymang wants Ombudsman deported".
- 15 He also called for the deportation of Australian and EU diplomats.
- 16 Trading Post, Issue No 321, 18 February 1998.
- 17 *Ibid*.
- 18 Chief Willie Pakoa explained to the author that on Tongoa (an island in the Shepherds group) an identifiable person in the village had the role to act as a mediator between villagers and a chief in the event of dissatisfaction. The Chief drew parallels of this aspect of his *kastom* with an Ombudsman.
- 19 The investigation relied on article 62(3) and the exception in section 19(5)(b): "When the Ombudsman is dealing with an enquiry that involves disclosure of any information which is prohibited or restricted by any law of Vanuatu (excluding the Official Secrets Act) or any recognised duty of professional confidentiality or privilege, the following provisions shall apply:-
(a) . . .
(b) the person holding the information shall obtain any consents required by the law or duty before disclosing any information of a personal nature except where the information of a personal nature is or may reveal (either alone or taken with other information) a breach of the Leadership Code, corruption or misappropriation; . . .", [Emphasis added] Ombudsman Act, s. 19(5)(b).
- 20 Appointed by Mr Carlot Korman.
- 21 This facsimile is also quoted in full at chapt. 1.4(e).
- 22 Mr Barak Sope the then Finance Minister had effectively pledged the country's foreign reserves apparently on the assurances of certain Australian "businessmen" that the country stood to collect vast amounts of interest when the "bank guarantees" were traded on a bogus international market. Following a report by the Ombudsman into the scam, one of the promoters, Peter Swanson, was later caught and ultimately tried, convicted and imprisoned on several fraud related counts. The Ombudsman's recommendation that the Attorney-General bring charges against Mr Sope was not taken up.
- 23 The quote is from the award presenter, Mr Len Garae.
- 24 The Australian Aid program of the Australian Government.

- 25 For many women, because of exogamy English or French may be their fourth language. In some isolated or inland villages, Bislama may only be spoken by a few of the more “worldly” members of the village.
- 26 Bislama: To discuss, chat, conversation (literally, to tell stories).
- 27 For example, both in Port Vila and in the bush one will regularly see Ni-Vanuatu walking with a small transistor clasped to one ear. In villages on Efate, Santo, Malekula and Wala the author observed large groups of people sitting together listening to the 12 noon news broadcast which takes about 20 minutes in Bislama, and about 5 for each English and French.
- 28 Representation of the People’s Act No 13 of 1982.
- 29 Vote buying and the gathering of electoral registration cards by chiefs was a practice that had occurred in previous elections. The author was informed of a well remembered incident on one candidate in the 1995 election had driven through villages in north Éfaté handing out Vt1,000 notes from the back of a truck to encourage those gathered to vote for him.
- 30 Melanesian Progressive Pati.
- 31 Public Report On The Alleged Bribery Of Voters And Alleged Breach Of Leadership Code By Mr Barak Tame Sope (17 July 1998).
- 32 The petition of Mr Nikenike Vurobaravao (VP) on Santo/Malo over the election result returning Mr Josias Moli succeeded. The Supreme Court ordered a by-election to be held. At the time of writing of this thesis, other petitions were still before the Supreme Court awaiting a hearing or pending a decision.
- 33 *Report on the Nambawan Bottle Shop Case (20 August 1996)*, p 3.
- 34 1.1 In this report the Office of the Ombudsman reports on breaches of the Leadership Code by the Hon Barak Sope and otherwise unlawful conduct. The matters examined are:
- (a) The granting of duty exemptions in respect of:
 - (i) a car for Hon William Edgell (VT 313,333);
 - (ii) a container of alcohol imported by the Nambawan Bottle Shop (VT 4,033,348);
 - (iii) a second-hand outboard motor for the Hon M Carlot Korman;
 - (vi) cigarettes for Laho Ltd (VT 15,543,717);
 - (v) a 4WD vehicle for West Malo but refusal for people from Santo, Tanna and Tafea Province.
 - (b) An attempt to purchase a Boeing 737 jet aircraft.
 - (c) An attempt to start a cruise line company.
 - (d) Unlawful appointment of an Italian firm to an exclusive right to development projects. Unlawful offer to provide a Guarantee from the Reserve Bank of Vanuatu on 30/07/96 in breach of s3 Public Finances Act and s3 of the Government Borrowing and Guarantee Act to an Italian company.
 - (e) Unlawful appointment of Italians to act as an “Investment Consultant” and “Investment representative”
 - (f) Political interference with the National Bank of Vanuatu
 - (g) Unauthorised borrowing from the National Bank of Vanuatu for Mr Peter Swanson (VT 8,177,530).
 - (h) A “dealing” on the US\$100,000,000 Bank Guarantees.
 - (i) The Cybank matter and its apparent connection with the circulation of sexually explicit material that has now come to light since my public report (16 October 1996).
 - (k) Dishonoured (unpaid) cheques for suppliers to the Talimoru Motel.
 - (l) Unlawful interference with the Vanuatu Commodities Marketing Board.
 - (m) Not paying a debt to a “grass root” Ni-Vanuatu for supply of potatoes.
- 35 Lunabek ACJ also dismissed Mr Sope’s substantive proceeding on the Ombudsman’s application to strike out because it failed to disclose a reasonable cause of action. This decision was oral and to this day, a written decision has not been issued.
- 36 Mr Virelala and Air Vanuatu’s management maintained their position and opted to lease another model.
- 37 Section 30(2) provides that if
- (a) (i) the responsible person has failed to respond to the Ombudsman’s report after being given a reasonable opportunity to do so; or
 - (ii) the responsible person has responded to the Ombudsman’s report in a manner which fails to resolve the problems identified by the Ombudsman’s report; or
 - (iii) the responsible person has responded to the Ombudsman’s report but has thereafter failed or refused to carry out the decision communicated in his response after being given a reasonable opportunity to do so; and
- (b) (i) the report reveals (whether this is stated or not) a breach of any of the fundamental rights contained in Article 5 (1) of the Constitution; or
 - (ii) a breach of the Leadership Code; and
 - (c) (i) the application is made within 24 months of the date of the Ombudsman’s recommendation; or
 - (ii) The Court has within that period of 24 months granted to the Ombudsman an extension of time for the lodging of an application based on subparagraph (b) (1) (3) of this section on the grounds that the responsible person requires a further period of time in order to carry out the required actions.
- 38 Despite the Judge’s assurance that a decision would be released within two to three weeks a decision has not been delivered.
- 39 “If the Ombudsman after due enquiry, is of the opinion that the commencement of criminal

proceedings or disciplinary action is justified against any person involved in the subject matter of his enquiry, including any enquiry into the conduct of a leader under Chapter 10 (Leadership Code) of the Constitution, he should refer the matter to the Appropriate Authority including all relevant supporting documents.”

40 “The Prime Minister or the person in charge of the relevant public service shall decide upon the findings of the Ombudsman within a reasonable time and the decision, with reasons, shall be given to the complainant forthwith. Any period limiting the time in which legal proceedings may be commenced shall not begin to run until the complainant has received the decision.”

41 *Public Report into the Vanuatu National Provident Fund* (17 December 1997).



THE AUSTRALIAN NATIONAL UNIVERSITY

Research School of Pacific and Asian Studies

State, Society and Governance in Melanesia

The State, Society and Governance in Melanesia (SSGM) Project was launched in 1996 in the Research School of Pacific and Asian Studies, Australian National University. Funded by the ANU with financial assistance from the Australian Government through AusAID, it comprises three Fellows (Dr Bronwen Douglas, Mr Anthony Regan and Dr Sinclair Dinnen), a Convenor (Mr David Hegarty, on secondment from the Department of Foreign Affairs and Trade) and an Administrator (Ms Monica Wehner).

SSGM Discussion Paper Series

- 96/1: Peter Larmour, *Research on Governance in Weak States in Melanesia*
96/2: Peter Larmour, *Models of Governance and Development Administration*
96/3: David Ambrose, *A Coup that Failed? Recent Political Events in Vanuatu*
97/1: Sinclair Dinnen, *Law, Order and State in Papua New Guinea*
97/2: Tomasi Vakatora, *Traditional Culture and Modern Politics*
97/3: 'I Futa Helu, *Tradition and Good Governance*
97/4: Stephanie Lawson, *Cultural Traditions and Identity Politics: Some Implications for Democratic Governance in Asia and the Pacific*
97/5: Peter Larmour, *Corruption and Governance in the South Pacific*
97/6: Satish Chand, *Ethnic Conflict, Income Inequity and Growth in Independent Fiji*
97/7: Sam Alasia, *Party Politics and Government in Solomon Islands*
97/8: Penelope Schoeffel, *Myths of Community Management: Sustainability, the State and Rural Development in Papua New Guinea, Solomon Islands and Vanuatu*
97/9: Philip Tepahae, *Chiefly Power in Southern Vanuatu*
98/1: John Haglegam, *Traditional Leaders and Governance in Melanesia*
98/2: Binayak Ray, *Good Governance, Administrative Reform and Socioeconomic Realities: A South Pacific Perspective*
98/3: Eric Wittersheim, *Melanesia Élites and Modern Politics in New Caledonia and Vanuatu*
98/4: Bronwen Douglas, Sinclair Dinnen and Anthony J. Regan, *State, Society and Governance in Melanesia Project: Review 1995-98*
98/5: Peter Larmour, *Making Sense of Good Governance*
98/6: Bronwen Douglas, *Traditional Individuals? Gendered Negotiations of Identity, Christianity and Citizenship in Vanuatu*
98/7: Raymond Apthorpe, *Bougainville Reconstruction Aid: What are the Issues?*
99/1: John Rivers, *Formulating Policy for Community Relations Programs*
99/2: Lissant Bolton, *Chief Willie Bongmatur Maldo and the Incorporation of Chiefs in the Vanuatu State*
99/3: Eugene Ogan, *The Bougainville Conflict: Perspectives from Nasioi*
99/4: Grace Molisa and Elise Huffer, *Governance in Vanuatu: In Search of the Nakamal Way*
00/1: Peter Larmour, *Issues and Mechanisms of Accountability: Examples from Solomon Islands*
00/2: Bronwen Douglas (ed), *Women and Governance from the Grassroots in Melanesia*
00/3: Bronwen Douglas, *Weak States and Other Nationalisms: Emerging Melanesian Paradigms?*
00/4: Philip Hughes, *Issues of Governance in Papua New Guinea: Building Roads and Bridges*
00/5: KJ Crossland, *The Ombudsman Role: Vanuatu's Experiment*
00/6: Tarcisius Tara Kabutaulaka, *Beyond Ethnicity: The Political Economy of the Guadalcanal Crisis in Solomon Islands*

State, Society and Governance in Melanesia Project
Research School of Pacific and Asian Studies
Australian National University
Canberra ACT 0200
AUSTRALIA

Convenor: David Hegarty

Telephone: +61 2 6249 4145

Fax: +61 2 6249 5525

Email: dhegarty@coombs.anu.edu.au

Administrator: Monica Wehner

Telephone: +61 2 6279 8394

Fax: +61 2 6249 5525

Email: ssgm@coombs.anu.edu.au

<http://rspas.anu.edu.au/melanesia>