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## Office of the Leader of the Opposition

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### **NRI Seminar on Amendments to Ombudsman Commission Legislation**

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There is an increasing chorus of opposition to the proposed amendments regarding the Ombudsman Commission and the Leadership Code. One common element in the discussions to date, both inside and outside of Parliament, is lack of proper and understandable information, rendering much of the debate superficial.

Some critics imply that the Constitution is God-given and must never be changed. I do not agree with that standpoint. Laws are not set in stone. Laws should at times be reviewed and changed, as long as those changes protect and promote the public good.

Public discussion of important policy issues such as the proposed amendments must be encouraged. But the lesson we learn from the current near-miss is the need for accurate public information and clear explanation from the authorities. I am afraid in this case the Attorney General, the Constitutional Development Committee, the Maladina Committee and the Ombudsman Commission have left us all stranded. Hopefully now with the public outcry, seminars like this and the Chief Ombudsman engaging with the public, it is not too late.

The Opposition voted to support the amendments in the last sitting because of lack of information and lack of knowledge. The Government provided no detailed explanation and true to its form, ambushed Members with the vote. This Government treats Parliament as a rubber stamp, without providing proper briefing to Members or allowing proper debate.

Having now studied the amendments I have different views. On the whole I do not support the amendments but I do see the need to fine-tune some operational aspects of the Ombudsman Commission and the Leadership Code.

Before discussing the specific proposals, I want to make some general statements as background to my comments.

The first is that the law must not treat leaders differently from other people, either more favourably or more harshly. The application of the law should be equal for everyone.

That said; leaders, especially elected leaders, are there by choice, not by conscription. We choose to seek public office and, as a consequence, subject ourselves to the Leadership Code. The Code was adopted as part of the Constitution as the moral and ethical compass to guide leaders.

In commenting on the amendments a legal colleague defined leadership succinctly: “A leader is a public person holding a public office in trust for and on behalf of the people.”

As such, leaders must accept some degree of interference in their privacy and freedoms, provided the reward is enhancement and protection of the common good.

If leaders do not want to pay the price of scrutiny; if leaders do not want to subject themselves to the Leadership Code; then they should get out.

I would like us to keep these two principles firmly in mind.

The views I will express on the amendments are my own. The Opposition Caucus has sought a meeting with the Ombudsman Commission to help develop a position before the next sitting of Parliament.

I will now outline my views on the amendments, under thematic headings:

### **1. Responsibilities of Departmental Heads - Proposed Amendments to Section 27 of the Constitution and Section 16 of the Organic Law on Leadership**

These amendments are not necessary. Departmental heads are already subject to the Leadership Code, as they should be. Failure by departmental heads to implement government policies can be dealt with by other legal and administrative processes, including termination of their contracts or prosecution, if the failure constitutes for example misappropriation or breach of the Public Finances Management Act.

While I sympathise with the probable intention of this proposal, to make public servants more accountable for their actions, I do not believe it will achieve the desired effect. In fact as the amendments stand, they would seem to transfer the weight of accountability away from politicians to public servants, which is unacceptable.

### **2. Power of the Ombudsman Commission to Issue Directions**

In my view this power should remain, although thought needs to be given as to whether the circumstances in which it can be invoked could be more strictly defined. There is a view that the power as it stands is too general, too discretionary and open to abuse.

For example, there was evidence during the lead up to the election that some sitting members were using their electoral funds for personal political use. The Commission used this Directive power to stop all MPs from using electoral funds for a period, whether the due processes and procedures were being followed or not.

Was this fair? Members are Members until they cease being so; they have the duties and privileges of being Members until being defeated or retire. They should be able to use electoral funds, if they exist, up to the time of election as long as the money is spent according to the set guidelines and processes.

One worrying aspect of the proposed amendments to Section 27 of the Constitution is the attempt to remove Ombudsman scrutiny over actions which *[quote]* “implement government policy and the national budget”. One can imagine instances where misappropriation might take place under the guise of “implementing government policy and the national budget” – misuse of trust funds for example. The proposed amendment as it stands would seem to prevent the Ombudsman Commission from intervening in such cases. This is plainly wrong.

The Ombudsman Commission must retain the power to intervene if public money is not being spent lawfully or, in the case of electoral funds, according to the guidelines set by ORD. However, as a general rule directives should be specific, and not invoked across-the-board.

### **3. Permanent Parliamentary Committee on the Ombudsman Commission**

In principle I do not oppose the establishment of such a Parliamentary Committee, provided its role and functions are clearly defined, and defined in ways that do not undermine the integrity or operational independence of the Ombudsman Commission. The Committee should have no power to direct the Commission in any way, on policy or operational matters.

I therefore do not support the proposal that the Committee might “consider and report on any administrative complaint” about the Ombudsman Commission. That is not the job of Members of Parliament.

However, there is an argument that the Ombudsman Commission needs Friends in Parliament to understand better the workings of the Commission, and deal with reports to Parliament by the Ombudsman.

The existence of such a Committee might help to break down some of the unfounded fear and bias against the Ombudsman. There is a view that the Commission is like “God in 3 persons” and not apparently accountable or answerable to anyone. The Parliamentary Committee working more closely with the Ombudsman Commission might help to allay those fears.

### **4. Double Jeopardy**

In considering this issue I remind the audience about the two background principles I set out, of everyone being equal before the law, but for the need for leaders to accept some additional checks and balances over their conduct of public affairs.

The fact is the Leadership Code is NOT a criminal code, so the issue of double jeopardy does not exist or apply.

The Maladina Committee misunderstood this and Members of Parliament, including the Opposition, misunderstood this when the proposals were presented. Members were led to believe that they could be prosecuted twice on the same charge, which is not the case.

As leaders the price we pay is being subject to the moral and ethical code of the Leadership Code. Like everyone, citizen or non-citizen, leaders are subject to the Criminal Code.

The misunderstanding that has arisen on this issue again points to a clear need for explanation in simple English, not legalese.

I do not support the proposed amendment to Section 28 of the Constitution and the corresponding amendment to Section 30 of the Organic Law on Leadership which would prevent criminal prosecution where a Leadership Tribunal had dealt with a matter, or vice versa.

## 5. Evidence of Misconduct

The proposal as put forward is based on a misunderstanding of the role of the Ombudsman Commission. The Ombudsman is an investigative body, not a prosecuting body.

If the Ombudsman finds there is a **prima facie case** against a leader, it refers the matter to the Public Prosecutor who independently assesses the case and decides whether a Tribunal should be constituted or not. To require the Ombudsman Commission to present a case **beyond reasonable doubt** would turn it from being an investigative body into doing the job of the Public Prosecutor and the courts.

Many people misunderstand this important differentiation. The Ombudsman Commission is not a prosecutor and it is not a court. The proposed amendment would turn it into prosecutor, judge and jury all in one. No democracy in the world has such a body.

## 6. Time Limit on Investigation

My personal view is that there should be a reasonable timeframe for the Ombudsman Commission to undertake investigation and to act on any findings. To me, this is only fair to leaders and to the public. It would force the Ombudsman Commission to do its work on a timely basis and prevent it from being a warehouse of unfinished business.

I do not agree with the proposal that a leader should be told within 14 days that he or she is being investigated, but I do agree with a time limit being imposed from formal notification to a leader that enquiry is being conducted over any matter to the time of action, whether referral to the Public Prosecutor or closure of the case by the Ombudsman.

If such a provision were approved, it should not be retrospective; it should only apply to new investigations. Hence current proceedings against the Prime Minister and a number of senior ministers should not be waved away with a magic wand as a result of future time limits on investigations being set.

The public is frustrated with the inordinate length of time it takes the Ombudsman Commission to act. Some examples:

- Why was the Prime Minister allowed to get away with not submitting leadership returns for decades before he was referred to the Public Prosecutor?
- Why has the Ombudsman not taken action against the Prime Minister, Speaker and Leader of Government Business over the constitutional breach regarding sitting days during the last and the current parliamentary year?

- Why did it take 3 years for the report on Motigate to be presented to Parliament, when all the issues regarding laws that were broken and by whom were set out so clearly in the Salika Report?
- Why did it take so long for the report on NMSA to be written? Relatively simple issues were at stake and a mountain of evidence available. The report, comprehensive though it might be, is rendered redundant because the term of the Chairman expired before the report came out.
- What further misery have commercial sex workers suffered at the hands of the Police, when it took 6 years for the investigation into one brutal incident in NCD to be finalised?

I am aware of all the arguments regarding resources and capacity constraints, but I am sure there is scope for the Ombudsman Commission to focus its activity and prioritise its work on the big issues, and on the “big leaders”. Failure to do so could undermine public support for the Commission.

I am also aware that in setting a time limit an agreed administrative process would need to be set which would define the point at which an investigation starts.

But the general principle of a time limit is I think worthy of consideration, subject to the detail being clarified and ensuring it is not in conflict with other legal provisions.

## **7. Shares**

The requirement for prior approval to buy shares has disadvantaged leaders, because the Commission does not respond in a timely manner. In my view leaders, like anyone should be allowed to buy shares as long as there is no conflict of interest with their duties, and provided the Ombudsman Commission is informed and has the power to require the leader to dispose of the shares if in its view there is a conflict of interest.

For example, I do not think the Minister responsible for IPBC should be allowed to buy shares in Oil Search or Bank South Pacific; the Minister for Treasury should not buy shares in a financial institution, nor should the Works Minister in a construction company.

My suggestion is that leaders be required to inform the OC within 30 days of any share purchase, as well as disclosing such acquisition in Leadership Returns. If the Commission directs the leader to dispose of the shares, he/she would be obliged to do so.

## **8. Divulging Information to the Media**

I do not support this proposal. The public has the right to know that a leader, a holder of a public office, has been referred to the Public Prosecutor and the grounds for such referral.

Such announcement by the Ombudsman Commission does not impute guilt or otherwise. If a leader felt defamed by any such announcement, he/she has the opportunity to seek legal redress.

The existing provisions are appropriate; there is no need for change.

## **9. Other Minor Amendments**

The proposals contain a number of other minor amendments, such as changing the provisions to appoint and the composition of a Leadership Tribunal, and tidying up repetition such as the definition of “conduct” of leaders in the Constitution.

These proposals seem to be in order and I understand the Ombudsman Commission does not oppose them.

### **Conclusion**

On the whole, having been made aware of the wider legal, political and ethical issues surrounding the proposed amendments, I do not support them as they stand.

That is not to say that I do not think some of the proposals have merit, or that there is no need to fine-tune either the legislation or the workings of the Ombudsman Commission.

That task remains.

### **Where to from here?**

Given the strong stand taken by some members of the public, and the difficulty in dissecting the proposed amendments to argue to support some but not all of them, the Prime Minister should withdraw the bill on the first day of the next sitting.

The Prime Minister should immediately set up an Advisory Group to assess the views being expressed by interest groups and the general public. It must be a wider group than the Maladina Committee. Leaving it entirely to that Committee to review the amendments is like asking the inmates of Bomana to review the rules under which they serve their sentences.

The Group should consist of:

- Hon Moses Maladina, as Chairman of the Committee that formulated the amendments;
- The Chief Ombudsman;
- Reputable constitutional lawyers;
- A representative of the PNG Council of Churches;
- A representative of the Community Coalition Against Corruption.

Secretariat services to the Committee should be provided by the Constitutional Development Committee. The Group’s terms of reference should be confined to the amendments and it should report to the Prime Minister in three months.

Members of Parliament cannot ignore the opposition that is being mounted by our constituents to the bill. We have to recognise these views, and deal with them.