

# GOVERNANCE AND CULTURE: SHOULD NIUE DEVELOP LAW AND POLICY FOR AN OMBUDSMAN SERVICE?

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*This paper considers the possibility of establishing the office of Ombudsman in Niue. This is an edited version of a paper presented at the 11<sup>th</sup> Pacific Science Inter Congress held in Tahiti in March 2009.*

*Cet article envisage les conditions de la mise en place d'un Ombudsman à Niue. Les développements qui suivent, représentent la version complétée d'une présentation faite lors du 11<sup>e</sup> Inter-congrès des Sciences du Pacifique qui s'est tenu à Tahiti en mars 2009.*

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Thirty-five years into self-government, Niue has been invited to follow its Forum<sup>1</sup> peers and establish an Ombudsman service. Under

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1 Pacific Islands Forum members are; Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

the Forum's Pacific Plan, good governance is featured as one of the key pillars for achieving the Pacific Leaders vision:<sup>2</sup>

Leaders believe the Pacific region can, should and will be a region of peace, harmony, security and economic prosperity, so that all its people can lead free and worthwhile lives. We treasure the diversity of the Pacific *and seek a future in which its cultures, traditions and religious beliefs are valued, honoured and developed. We seek a Pacific region that is respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values, and for its defence and promotion of human rights. We seek partnerships with our neighbours and beyond to develop our knowledge, to improve our communications and to ensure a sustainable economic existence for all.*

Papua New Guinea, Samoa, Solomon Islands, Vanuatu, Australia, New Zealand and the Cook Islands are members of the Forum with Ombudsman services. The others like Niue are encouraged to set up Ombudsman or Ombudsman-like services. The Ombudsman is an office established by law and led by an independent high level official responsible to the Legislature who receives complaints or acts on its own motion to investigate government sector decisions and makes recommendations for corrective action.<sup>3</sup>

In October 2008, representatives from Ombudsman Offices and Governments across the region established the Pacific Ombudsman Alliance<sup>4</sup> (the Alliance). The Alliance will provide support and other services to allied institutions in the region. A key area is to promote the establishment and maintenance of strong Ombudsmen and

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2 Pacific Islands Forum (2004) "Auckland Declaration" Auckland.

3 Ombudsman Committee of the International Bar Association in Satyanand "Growth of the Ombudsman Concept" 1 JSPL at 3.

4 Pacific Ombudsman Alliance Charter 2008.

accountability institutions among the members that have neither.<sup>5</sup> One of the principal objectives is to develop culturally appropriate resources and training support to address common issues faced by the Ombudsman community.<sup>6</sup> Niue has since 2006 had a draft Ombudsman Bill for consideration.

This paper explores in its first part the possibilities of Niue establishing such a service with a focus on the legal, administrative and traditional cultural challenges it will need to consider. The existing framework of the Niue Public Service will be explored to show the environment in which an Ombudsman may operate in the future. The second part argues in favour of such an establishment and the last part is a comment on the Bill and some suggestions for improvement.

## ***PART 1***

### ***A A Self-governing State***

The Niue Constitution Act 1974 an Act of the New Zealand Parliament, provides for Niue to be a self-governing State in free association with New Zealand.<sup>7</sup> The State comprises a Legislative Assembly of twenty elected members, an executive, a judiciary and a public service. The executive consists of the Premier and three Ministers who together comprise Cabinet. A Niue Public Service (the Service) assists the executive with the day to day operations of

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5 Article 1, *ibid.*

6 Article 4, n 4.

7 Preliminary, Niue Constitution Act 1974 [1974/ 42 (NZ)] "An Act to make provision for self-government by the people of Niue, and to provide a constitution for Niue".

government. The Secretary to Government (SOG) is the head of the Service and represents the Service in meetings of Cabinet.<sup>8</sup>

Recruitment and employment to the Service is the responsibility of the Niue Public Service Commission (the Commission). The Commission manages all employment matters including disciplinary proceedings within the service. With a very low population the Niue Public Service is the key employer. The Service consists of 14 departments; there are also 7 state corporations.<sup>9</sup> The total number of employees is 462.

Niue's constitutional status as a self-governing State in free association with New Zealand leaves New Zealand Government with the responsibility of providing direct administrative and economic assistance to Niue.<sup>10</sup> Niue is financially dependent on New Zealand for direct budget support. These factors must be considered in tandem with the characteristics of the Niue Government in assessing whether or not an Ombudsman service could be supported in Niue.

### ***B Legal Culture and Structure of Government Service***

The legal framework that establishes the administration and management of the Niue Public Service will now be explored. The characteristics and background of the legal framework will determine the possibilities of how an Ombudsman service could fit in the existing setting.

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8 Article 12 (4) Constitution of Niue.

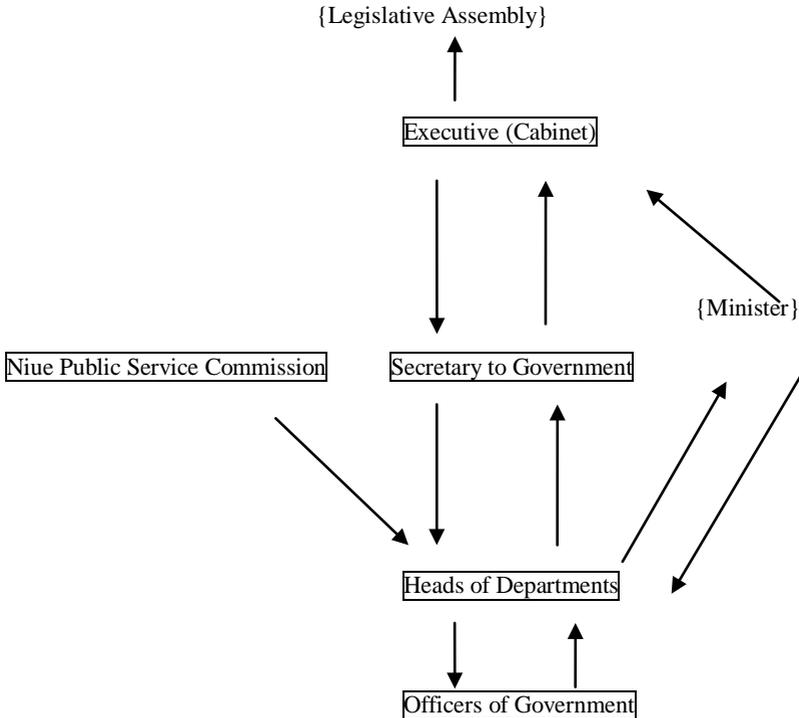
9 Treasury Department *Estimates of Expenditure and Revenue for year 2006/2007* (Government of Niue, Alofi, 2007) 19. In law the corporations are; Broadcasting Corporation (Broadcasting Corporation Act 1989), Tourism (Tourism Authority Act 1995), Niue Development Bank (Niue Development Bank Act 1993), Niue Bank (Niue Bank Act 1994), and the Niue Philatelic Numismatic Bureau (Niue Philatelic Numismatic Bureau Act 1996). The Broadcasting Corporation, Tourism and the Niue Development Bank are the only corporations functioning.

10 Section 7, above n 7.

*1 The Constitution*

Article 61 (3) confers on Cabinet the responsibility of the establishment and maintenance of institutions and services necessary to provide a reasonable standard of living for the people of Niue and to secure their economic, social and cultural welfare. Accordingly, all basic services are provided for by government and include electricity, communications, health, education and others.

Management and operations of these sectors share a common structure:



The above diagram shows the core administrative structure of government is with the Executive, Secretary to Government, Heads of Departments and Offices within each department. The Legislative Assembly although not directly involved in day-to-day management and administration of department affairs, is responsible for passing law that directs and sanctions department functions and powers. It has the power to make laws for the peace and order of the Government of Niue.<sup>11</sup> Bills that have the potential to affect the Niue Public Service cannot be proceeded upon without requiring from the Commission a report on the legal, constitutional and policy issues raised by that Bill.<sup>12</sup>

Cabinet is responsible for the general direction and control of the executive government and has other powers and functions conferred by law.<sup>13</sup> Cabinet is collectively responsible to the Legislative Assembly.<sup>14</sup> The Secretary to Government is the permanent head and chief administrative officer of government.<sup>15</sup> He is responsible to Cabinet for the general direction of the work of all departments and offices of the executive government. Heads of departments accounts for the work of their departments and offices to the Secretary to Government and the Minister responsible for that department.<sup>16</sup> The Secretary to Government and each Minister reports to and receives direction from Cabinet. The Commission is the employing authority and has the general oversight and control of its organisation and management. Article 69 on appointments to the Service provides:

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11 Article 28.

12 Article 3.

13 Article 2(2).

14 Article 3.

15 Article 63(1).

16 Article 63(2).

- (1) All employees of the Niue Public Service shall be appointed by the Niue Public Service Commission and, subject to this Constitution and to any enactment, shall hold office on such terms and conditions as may from time to time be prescribed or determined by the Commission.
- (2) In all matters relating to decisions about individual employees (whether they relate to the appointment, promotion, demotion, transfer, disciplining, or cessation of employment of any employee or any other matter) the Commission shall not receive any direction from the Cabinet, but shall act independently.
- (3) In establishing and revising the terms and conditions of employment in the Niue Public Service, the factors to be taken into account shall include-
  - (a) The need for the Niue Public Service to recruit and retain efficient staff, and, in particular, to provide varied careers and adequate advancement for Niueans with special skills;
  - (b) The need to afford reasonable opportunities of employment in Niue for the people of Niue, and in so doing to have regard to the employment opportunities and levels or remuneration available in New Zealand;
  - (c) The need to act consistently with Government economic and social policy, bearing in mind that the terms and conditions of employment in the Niue Public Service are a major element in the general wellbeing of Niue.

The Commission is responsible for reviewing the efficiency and economy of all departments and offices of the executive government.<sup>17</sup> It possesses a limited degree of inquiry and investigative powers as are conferred on a Commission of Inquiry by law. Article 68 (3) provides "[i]n the performance or exercise of its functions, powers, and duties in relation to the Niue Public Service, the Commission may conduct such inquiries and investigations as it considers necessary..." There is no distinction between whether the system receives internal or external complaints or both. In accordance with the legal framework, it appears the arrangement for the Commission's oversight role is internal in nature.

The constitutional and legal framework of the Niue Public Service does not expressly provide for a complaints handling procedure. Nor does it require the Commission to undertake a complaints handling role. This overlooks the inevitability of problems. The Australian Commonwealth Ombudsman in his opening address at a seminar for ombudsmen stated, "every program or system, no matter how well designed is bound to have problems".<sup>18</sup> A complaint handling procedure permits the citizen to seek redress for grievance suffered as a result of a mistake of the public service. Without such processes, the citizen's opportunity to complain or seek redress for grievance suffered is reduced. Additionally, the absence of a complaints authority removes a critical means whereby the service is able to monitor its efficiency and effectiveness. A prerequisite for good governance is perhaps the

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17 Article 68(1).

18 McMillan (2007) "Thirty years of Complaint handling – what have we learnt?" Presentation opening the 30<sup>th</sup> anniversary seminar of the Commonwealth Ombudsman, Canberra.

rules and institutional capacity of the State to guarantee protection of public interest:<sup>19</sup>

Among the most important factors behind governance failure are the absence of openness, lack of checks and balance with regard to exercise of power and discretion, and lack of institutional opportunities for raising the citizen's voice against abuse of power, maladministration, violation of rights, negligence, nepotism and corruption that take place at the interface between citizens and the administration.

Regardless of the absence of a complaints handling institution, Article 61 (3) authorises Cabinet to set up institutions necessary for the social and economic opportunities of the people. This may include an Ombudsman service. The alternative is to confer on the Commission an ombudsman-like role.

## *2 Niue Public Service Regulations*

The Niue Public Service Regulations 2004<sup>20</sup> (Regulations) provide rules and guidelines for the management and operation of the service. The Regulations are administered by the Commission and are applicable to all government employees. The purpose is:

- (a) to provide standards of service for all departments and offices of the executive government;

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19 Iftekharuzzaman (2007) "Ombudsman for Good Governance in Bangladesh, why now?, and how?" Seminar for Manusho Jonno Foundation and Transparency International, Dhaka.

20 A Public Service Manual of Instructions 1984 gives details on operational and management matters. Because of recent changes in government systems it would be appropriate to update the manual.

- (b) to promote the efficiency, effectiveness and economy and harmonious functioning of all departments and offices of the executive government by:
  - (i) procuring the application of quality technical and professional knowledge, methods, system and practice;
  - (ii) avoiding extravagance and waste;
  - (iii) aiming at high quality work and output;
  - (iv) controlling the volume of the work performed;
  - (v) training, upskilling and re-skilling of employees;
  - (vi) maintaining a proper standard of conduct and ethics by employees;
  - (vii) encouraging employees through incentives to submit suggestions for increasing the efficiency, effectiveness or economy of the Service, and decreasing the cost and volume of work of the State.
- (c) promote mutual trust and confidence in all aspects of the employment relationship which must be built on good faith and behaviour.

Again, the function and role of an Ombudsman service through accepting, investigating and managing complaints can "promote the efficiency, effectiveness ... and harmonious functioning of all departments and offices of the executive government". The absence of such an institution leads to non-compliance with rules and a lack of opportunity for the citizen to seek redress.

### ***C Administrative Culture***

In addition to law, rules and policies with regard to management of the Service and individual departments are found in the Public

Service Code of Conduct, National Strategic Plan and department corporate plans.

### *1 Code of Conduct*

The Code of Conduct extends from the Regulations and builds on the following three principles of conduct:<sup>21</sup>

- (a) In assisting the Cabinet in exercising the executive authority of Niue, under article 62 of the Constitution, employees must act with professionalism and political neutrality;
- (b) Employees must perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and those of their existing colleagues;
- (c) Employees must not bring the Service into disrepute through their private activities.

Under the second principle and with regard to information disclosure, employees have a general duty to keep official information confidential. Employees may not disclose information unless authorized to do so. Communications to the media is limited to information approved by the Commission and responsible Minister.<sup>22</sup> It is also a criminal offence to use or communicate official information without proper and lawful authority.<sup>23</sup> This culture of secrecy and non-disclosure within the public service illustrates a limited avenue for citizens to access official information vital to the complaint.

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21 Rule 6, Niue Public Service Regulations 2004.

22 Rule 53, Niue Public Service Regulations 2004.

23 Section 228A, Niue Act 1966.

## 2 *National Integrated Strategic Plan 2009-2013 (NISP)*

The draft NISP recognizes good governance and aims to "ensure that good governance reflects principles of transparency and accountability is practised at all levels".<sup>24</sup> Strategic areas for implementing includes submission of annual reports to the Legislative Assembly and the establishment of an Ombudsman service by 2013 or access to similar regional facilities.<sup>25</sup> The practice of accountability and transparency inevitably require access to public information. However, to some extent, the law lags behind the goals of NISP. The sharp contrast between laws and regulations of non-disclosure limits the intention of NISP. In this respect, existing rules and laws with regard to official information do not support the ideals of NISP.

## 3 *Niue Public Service Corporate Plan*

The Commission Corporate Plan 2006-2007 aims to "provide governance that is stable, transparent and accountable and to strengthen human resources management for effective and efficient delivery of service in the public service". It acknowledges as a guiding principle that the "terms and conditions of employment in the Niue Public Service are a major element in the general well-being for all Niueans". The goal is to "recruit, develop, maintain and retain human resources and quality service".<sup>26</sup> However, there are no indicators or strategy to review and implement terms and conditions of employment that ensure retention of public servants. The objective on human resource management acknowledges the need for policies to be consistent with Government directions and departmental needs and for departments to understand and effectively implement human

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24 Draft National Integrated Strategic Plan 2009-2013, 8.

25 Page 15, *ibid.*

26 Niue Public Service Commission *Corporate Plan 2006-2007*(Alofi, 2006).

rights management policies. While there is mention of policies, there is no evidence illustrating what those policies are. Without stating what the policies are, it is difficult to know or assess what policies has worked or has not worked in the past. This example illustrates a disconnect between the rules and the means to implement such rules. Such disconnect provides opportunity for inconsistent and inappropriate decisions.

### ***D Status of Government Service Delivery***

A measure for assessing the efficiency and effectiveness of Niue government administration are annual reports. The Constitution requires Heads of Departments to account for the work of their departments and offices to the Secretary to Government and Minister. The Commission is required to report annually on the efficiency and economy of the Niue Public Service and on the work of the Commission to Cabinet. That report is to be laid before the Legislative Assembly.<sup>27</sup>

In addition to the Constitution, several statutory provisions require annual reporting. These are:

- (i) Broadcasting Act 1989: section 34 requires the Corporation to prepare and furnish a report to the Minister within 3 months after the end of the Corporation's financial year...;
- (ii) Niue Development Bank Act 1993: section 27 (1) (a) requires the Board to provide a quarterly report to the Minister; section 27 (1) (b) requires the Board to submit a report to Cabinet no later than 3 months after the end of the financial year; section 27 (3) requires such reports to be laid

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27 Article 68(5).

before the Assembly in the next Assembly session after the report is received...;

- (iii) Tourist Authority Act 1995; section 22 requires the Authority as soon after 30 June each year to furnish a report to the Minister of its activities and financial expenditures...;
- (iv) Environment Act 2003: section 8 (1) requires the Director of Environment to report to the Minister a report each financial year regarding operations of the Department and the discharge of its functions...;
- (v) Niue Trust Fund Act 2004: section 7 requires annual reports of the Board, annual accounts of the Fund, report of the Fund on its annual accounts and the annual report of the Advisory Committee to be laid before the Assembly at its next session after receipt of the reports; and
- (vi) Financial Transactions Reporting Act 2006: section 21(g) requires the Financial Intelligence Unit to prepare and present an annual report to the Niue Assembly; section 21 (3) requires the Head of the Unit to report every quarter to the Minister of Finance.

In 1991 the Clerk of the Assembly issued a letter reminding Heads of Departments to submit annual reports to their respective Ministers who will in turn report to the Legislative Assembly.<sup>28</sup> However, between 2002-2007, only one annual report was laid before the Assembly.<sup>29</sup> The last annual report of the Niue Public Service Commission was submitted in 2002. This indicates low adherence to reporting obligations. Without the annual reports it is

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28 15 March 1991, Signed B Talagi, Clerk of the Assembly, Uplifted 04 September 2008.

29 Clerk of the Assembly, Register of Annual Reports, Uplifted 04 September 2008.

difficult to assess the efficiency of government service delivery or forecast future needs and strategies. This could also mean that current means of estimating future needs may be guesswork rather than existing data or trends. Non-compliance for submitting annual reports could be attributed to many reasons. To name a few, these could be lack of awareness of rules and obligations, absence of internal monitoring and assessment measures, complacency or neglect of inspection obligations by the authorities, poor record-keeping and no enforcement practices for reporting. The oversight function of the Ombudsman may improve this particular situation.

Proactive publication through annual reports is useful to show whether resources have been utilised, what resources are lacking and whether powers and functions are exercised properly. For the Ombudsman service, access to reports is one way to determine a department's commitment to transparency and accountability. These reports could assist with the speed and efficiency of the Ombudsman service. Information provided in annual reports also mitigate against the non-disclosure rules. The lack of reports currently shows a lack of commitment to transparency and accountability. Suggestion is made for strategic plans and corporate plans to be supported by practice.

### *E Culture and Customs of the Niuean Society*

Culture and customs of the Niuean society is limited in the formal setting. Whether by accident or design, the Constitution is an import to the Niuean way of life. With the exception of land,<sup>30</sup> the Constitution does not expressly recognise or protect the customs and traditions of its people. Hence, written laws and rules in relation to

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30 Article 33(5): "Niuean land means land in Niue vested in the Crown but held by Niueans according to the customs and usages of Niue..."

the administration, management and operation of the public service are wholly dependent on imported principles. It fails to recognise or provide measures for the operation of cultural values, customs and norms in management and regulation of decisions and actions.

There is the Taoga Niue Bill 2008 which amongst other things aims to develop policies relating to taoga<sup>31</sup> and advise government on all matters in relation to taoga. The Bill provides opportunity for the development and recognition of things customary and cultural to Niue. It confers on the Taoga Niue Department functions relating to the protection and public awareness of taoga and promotion of work associated with taoga. However, it is limited in the sense that it operates from a sole department rather than the ideal of having values for all departments to undertake simultaneously. It is hoped that in future, the assistance of the Taoga Niue Department will enable all departments to consider customary and cultural approaches where necessary.

## ***PART 2 – PROSPECTS OF AN OMBUDSMAN SERVICE***

The aforementioned constitutional and legal culture of the Niue Public service provides limited opportunity for the service to implement rules on good governance and accountability. The absence of a complaints mechanism and monitoring measures conveys a need for an Ombudsman service. A service that is dedicated specifically to managing complaints and implementing transparent and accountable practices can assist to improve the Niue public service.

The legal culture of the Niue Public Service predominantly maintains a culture of secrecy. This nature of the Public Service may

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31 Section 2, Taoga Niue Bill 2008 – "taoga means culture heritage and treasures of Niue, as represented in its diverse sectors by Vagahau Niue, Arts and Crafts, History, Environment, Customs and Traditions, Heritage Assets..."

be a challenge to the functions of an Ombudsman service. Training and awareness raising is necessary to facilitate management of complaints and access to official information.

The political culture of the Niue Public Service and the close relationship with New Zealand Government are other influences that may affect the establishment of an Ombudsman service. Financial and resource constraints inherent in a small public service could mean reduced flexibility in whether government is willing to resource an Ombudsman service. However emphasis "regarding the essential nature of what an Ombudsman office may accomplish ... failure of legal processes ... suggests that consideration of such an office deserves its place in any contemporary discussion of institutions of governance".<sup>32</sup> Caution is made against the assumption that small administrations are too small to have any complaints. The existence of a society, an administration, the exercise of discretionary power and a responsibility to the public inevitably requires the presence of oversight institutions.

Keith<sup>33</sup> writes that an ombudsman office must be made to measure. He looks into the role of the Ombudsman and compares and contrasts its functions to that of the courts. He illustrates the advantage of flexibility and the direct access of the Ombudsman to official files and records as an advantage over the courts. Flexibility allows the office the opportunity to conduct an investigation at any stage and could suggest resolution within good time than by comparison to the delays of court proceedings. He further advises

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32 Satyanand "Growth of the Ombudsman Concept" (1999) 1 JSPL at 3.

33 K J Keith "Development of the role of the Ombudsman with reference to the Pacific" (2005) 22<sup>nd</sup> Australasian and Pacific Ombudsman Regional (APOR) Conference, Wellington, New Zealand.

that the success of an ombudsman service also depends on the skill and personality of those in office. The appointment process will be crucial to ensuring how a small population may appoint a person who is suitably qualified, highly respected and independent in office.

If a stand-alone Ombudsman Office may not be viable in the meantime, Niue may start off part time from an existing government office on a trial basis for an initial period before developing into some form of permanency.

### ***PART 3 – OMBUDSMAN BILL 2006***

The Ombudsman Bill 2006 was drafted as a starting-point for Niue Government's consideration. The Niue Government has since approved a Working Committee to explore possibilities for the establishment of an Ombudsman service. The Bill is drafted in line with that of New Zealand's Ombudsman legislation.

#### ***A Function***

Clause 11 (1) describes the key function of the Ombudsman is to "investigate any decision or recommendation made, or any act done or omitted relating to a matter of administration in or by any Department and affecting any person or body of persons in that person's personal capacity".

#### ***B Appointment***

Clause 3 provides for an Ombudsman to be appointed after consultation with the Premier. The independence of the Office of the Ombudsman is necessary to ensure it is not influenced or subject to directions of any public office. This in turn allows the Ombudsman to perform the duties independently.

#### ***C Jurisdiction***

Clauses 11, 13 and 14 describe the jurisdiction of the Ombudsman. Clause 11 (5) (a) provides that the Ombudsman is a last resort avenue for complaint handling. The Ombudsman may

investigate a complaint made by any person, on his own motion and in clause 11(3), a matter referred by the Premier. Matters subject to functions of the Ombudsman are decisions, acts, omissions or any matter of administration by any Department. The Ombudsman may not investigate a matter where the law provides a right of appeal for a subject-matter and where such avenues have not been used.

### ***D Process***

In clause 15, the Ombudsman may hear or obtain information from any person, and make such inquiries as he or she thinks fit. Persons bound by secrecy or non-disclosure obligations are deemed not to have breached that obligation because of compliance with requirements of the Ombudsman. S/he may consult the head of department who requests or to whom a recommendation is made after the Ombudsman has made an investigation and before the final decision is reached. If the Ombudsman is of the opinion that there has been a breach of duty or misconduct on the part of any officer or employee of any Department, s/he may refer the matter to the appropriate authority

### ***E Staff***

Clause 10 requires the Commission to appoint staff to assist the Ombudsman.

### ***F Term of Office***

Clause 5 provides for the Ombudsman to hold office for a term of five years, provided the Ombudsman does not exceed the age of 72 years.

## ***G General***

*Clause 2*<sup>34</sup> – A full list of all government departments and corporations should be listed in the Schedule. A full or a near complete list can avoid confusion as to which departments are within the jurisdiction of the Ombudsman Office if it does not appear on the list;

An insertion is suggested for a clause to "establish an Ombudsman office" before clause 3.

*Clause 3*<sup>35</sup> – The appointment process for the Ombudsman is crucial for ensuring "independence". The draft Bill's appointment process for the Ombudsman is "after consultation with the Premier". Suggestion is made for the Ombudsman to be appointed by election or resolution of the Legislative Assembly. In doing so, consultation with the Premier is simultaneously achieved. Appointment by the Legislative Assembly ensures the Ombudsman is independent from the executive and is not subject to the directions of the executive. The Ombudsman is instead an officer of the Legislative Assembly and accounts directly to the Assembly. As an officer of the Legislative Assembly, the Ombudsman can provide "independent assistance to the Assembly ... with regard to its oversight function to make government, public institutions and officials accountable to the people".<sup>36</sup>

A clause should be inserted before clause 4 on the qualifications of an Ombudsman. The educational, administrative experience and

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34 Schedule 2: The following organisations are listed as Departments for the purposes of the Ombudsman Act: Broadcasting Corporation of Niue; Niue Cultural Council; Niue Certification Authority; Niue Development Board; Niue Philatelic and Numismatic Company; Niue Tourist Authority.

35 There shall be an Ombudsman who shall be appointed after consultation with the Premier.

36 Above n 19.

credibility of a prospective Ombudsman should be outlined to ensure the quality of applicants received. Residency and familiarity with Niuean customs should be outlined to ensure local applicants are given priority consideration. Provision should be made for a temporary or acting Ombudsman in the event the Ombudsman is absent. The appointment process and qualifications of an Ombudsman should ensure a meritorious appointment. Keith uses Sir Guy Powles words on New Zealand's early Ombudsman that:<sup>37</sup>

any Ombudsman who appears to the public to be a remote and godlike figure is not a good Ombudsman ... It is a highly personalised office. I think the special characteristic of it is that the ordinary citizen can feel there is some individual in whom he can approach ... who is willing to take an interest in things that might seem unimportant to the system, but very important to the person who has a complaint.

*Clause 7<sup>38</sup>* – The suggestion in clause 3 for the appointment of the Ombudsman to be by resolution of the Assembly should now require the dismissal and suspension to be by the same authority. The Bill gives no reasons or grounds for removal and dismissal. This should be provided to ensure transparency is maintained in cases where removal or dismissal appears unclear.

*Clause 8<sup>39</sup>* – The budget allocation of the Ombudsman service is prescribed by the Civil List Act. The Legislature should outline how

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37 Sir Guy Powles "The New Zealand Ombudsman – The early days" (1982) 12 VUWLR at 207.

38 An Ombudsman shall not be dismissed or suspended except after consultation with the Premier.

39 (1) The salary and allowances of the Ombudsman shall be prescribed by the Civil List Act.

the Ombudsman may exercise direct access and independent of the executive or the Finance department. A separate Government Account for the Ombudsman office should be created to avoid influence of Cabinet or Treasury Department. Expenditures in the separate Government Account could be accounted for during the Office's annual report.

*Clause 11(1)*<sup>40</sup> on the duties of the Ombudsman could be expressed as "subject to this Act..." The jurisdiction of the Ombudsman is currently limited to the administration of Departments. However, in light of the substantive powers of the Secretary to Government, individual Ministers and Cabinet, such powers should be subject to scrutiny of the Ombudsman.

*Clause 11(3)*<sup>41</sup> – Matters referred to the Ombudsman by the Premier should be removed as there is a possibility that this direct referral could diminish the independence of the Ombudsman and to be seen as acting in the interests of the government of the day.

*Clause 18*<sup>42</sup> – should extend to issues where the Ombudsman may resolve a matter without having to make a formal report. Resolution

(2) The salary of an Ombudsman shall not be diminished during the Ombudsman's term in office.

40 "The Ombudsman shall investigate any decision or recommendation made, or any act done or omitted relating to a matter of administration in or by any Department and affecting any person or body of persons in that person's personal capacity."

41 "The Premier may refer to the Ombudsman for investigation and report any matter, other than a matter concerning a judicial proceeding, which Cabinet considers should be investigated by the Ombudsman."

42 "Procedure after investigation

(1) This section applies in every case where, after making any investigation under this Act, the Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject-matter of the investigation:

(a) Appears to have been contrary to law; or

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- (b) Was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
  - (c) Was based wholly or partly on a mistake of law or fact; or
  - (d) Was wrong.
- (2) This section also applies where the Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of discretion, reasons should have been given for the decision.
- (3) If in any case to which this section applies the Ombudsman is of opinion—
- (a) That the matter should be referred to the appropriate authority for further consideration; or
  - (b) That the omission should be rectified; or
  - (c) That the decision should be cancelled or varied; or
  - (d) That any practice on which the decision, recommendation, act, or omission was based should be altered; or
  - (e) That any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
  - (f) That reasons should have been given for the decision; or
  - (g) That any other steps should be taken -  
the Ombudsman shall report that opinion, and the reasons, to the appropriate Department, and may make the recommendations as he or she thinks fit.
- (4) In any such case the Ombudsman may request the Department to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations.
- (5) The Ombudsman shall also, in the case of an investigation relating to a Department, send a copy of his report or recommendations to the Minister concerned.
- (6) If within a reasonable time after the report is made no action is taken which seems to the Ombudsman to be adequate and appropriate, the Ombudsman, after considering the comments (if any) made by or on behalf of any Department affected, may send a copy of the report and recommendations to the Premier, and may thereafter report to Cabinet on the matter.
- (7) The Ombudsman shall attach to every report sent or made under subsection (3) a copy of any comments made by or on behalf of the Department affected.

of minor issues by verbal agreement, email or otherwise should be recognized. This could be particularly important for a small public service where people respond better to face to face meetings and conversation than long and complex reports.

*Clause 25*<sup>43</sup> – In addition to the obligation to report to Cabinet annually, that report should be laid before the next Assembly meeting. Additionally, the Ombudsman office should have another role as the advocate for public awareness in its functions and role. The Office should disseminate information necessary for raising awareness and educating the Niue Public Service and the public generally of its functions and purposes. The materials should be culturally appropriate and relevant to the local context.<sup>44</sup> This raises the public profile of the Office, raises matters of public interest, encourages self-regulation and promotes its relevance in the contemporary society.

In addition to the functions of the Ombudsman, the support of the Pacific Ombudsman Alliance is necessary. The Alliance will assist with quality assurance, training and mentoring of personnel.

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(8) Notwithstanding anything in this section, the Ombudsman shall not, in any report made under this Act, make any comment that is adverse to any person unless the person has been given an opportunity to be heard."

43 Without limiting the right of the Ombudsman to report at any other time, but subject to section 18(8) and any regulations made under this Act, the Ombudsman shall each year make a report to Cabinet on the exercise of functions under this Act.

44 Section 4, n 4.