



Tonga

OMBUDSMAN (AMENDMENT) BILL 2018



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A BILL FOR AN ACT TO AMEND THE OMBUDSMAN ACT 2001

BE IT ENACTED by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

1 Short Title

- (1) This Act may be cited as the Ombudsman (Amendment) Act 2018.
- (2) In this Act, the Ombudsman Act, 2001, as amended, shall be referred to as the Principal Act.

2 Section 3 amended

Section 3 of the Principal Act is amended –

- (a) by repealing subsection (1) and replacing it with the following –
 - “(1) The Ombudsman shall be appointed by the Speaker, with the consent of the Legislative Assembly, after due process of recruitment.”.
- (b) in subsection (2) by deleting the words “with the consent of the Legislative Assembly,”.

3 Section 5 amended

Section 5(1) of the Principal Act is amended by the inserting the words “which may be renewed by the Speaker” after the word “years”.

4 Section 18 amended

Section 18 of the Principal Act is amended by repealing subsection (4) and replacing it with the following –

- “(4) Where recommendations are made through a report to a Department or Organisation and after a reasonable time no action is taken, the Ombudsman in his discretion after considering the comments (if any) made by the Department or Organisation affected may –
- (a) send a copy of the report to the Speaker who shall table the matter in the Legislative Assembly; or
 - (b) cause proceedings to be brought in a Court of competent authority for a suitable remedy to secure the termination of the offending action or conduct or the abandonment or alteration of maladministration procedures.”.

5 Section 21 repealed and replaced

The Principal Act is amended by repealing section 21 and replacing it with the following-

“21 Proceedings privileged

- (1) No proceedings, civil and criminal, shall lie against the Ombudsman, or against any person holding any office or appointment under the Ombudsman, for anything he may do or report or say in the course of the exercise or intended exercise of his functions under this Act unless it is shown that he acted in bad faith.
- (2) No Ombudsman, and no such person as aforesaid, shall be compelled to give evidence in any Court, or in any proceedings of a judicial nature, in respect of anything coming to his knowledge in the exercise of his functions under this Act.
- (3) Anything said or any information supplied or any document, paper, or thing produced by any person in the course of any inquiry by or proceedings before the Ombudsman under this Act shall be privileged in the same manner as if the inquiry or proceedings were proceedings in a Court.
- (4) For the purposes of proceedings under this Act an apology made by a person in connection with a complaint shall not –
 - (a) constitute an express or implied admission of the person’s fault or liability in connection with the complaint; and

- (b) be taken into account in determining fault, liability or any other issue in connection with the complaint to the prejudice of the person.”.

Passed by the Legislative Assembly this day of 2018.

EXPLANATORY NOTES

(These notes do not form part of the Bill and is intended only to explain its purpose and effect)

This Bill proposes to amend the Ombudsman's Act 2001 to introduce an apology provision, empower the Ombudsman's Office to take complainant's rights to Court and amend the Ombudsman appointment process.

(1) **Apology Provision**

In the process of dealing with complaints that have been lodged in the Office of the Ombudsman, one of the most effective means of settling the matter is an apology extended by the Ministry or Public Enterprise complained about to the complainant. Apologies may in some circumstances unblock disputes and lead to settlement without recourse to formal legal action.

This amendment includes an apology provision be included in the *Ombudsman Act* only for the purposes of the Ombudsman investigation proceeding. This apology will be inadmissible in evidence against the apology maker in any other proceedings. The intention behind this is to encourage full and burden-free apologies to prompt amicable settlement. Having such a provision will give the Ministry or Public Enterprise at fault confidence in the Ombudsman process in that there will be no legal downsides in admitting fault.

Tonga follows the footsteps of over 50 common law jurisdiction, including the United Kingdom, United States of America, Canada and Australia in enacting apology legislation.

(2) **Taking Complainant's rights to Court**

One of the challenges that Offices of the Ombudsman face is the lack of authority to have their decisions or recommendations enforced. It is clear that that the office of Ombudsman is an important legal mechanism to protect society against maladministration and abuse of powers. This however cannot be done effectively if the decisions and recommendations of these independent institution have no legal force. In states with a weaker public administration, more direct enforcement of the decision of the Ombudsman is necessary.

In the international Ombudsman context, different countries have different approaches. In Sweden and Finland the Office of the Ombudsman have the power to prosecute public officials. This prosecution powers have been given to hybrid

Ombudsman Offices in countries such as Spain, Bosnia, Hergzgovina, Uganda and Philippines. A growing number of Ombudsman offices have been given the power to apply constitutional and human rights issues. Countries who have that power are pronounced as friend of the Court (*amicus curiae*) in Portugal, Spain, Austria, Lithuania, Poland, Slovenia, Hungary, Albania and Samoa. In Russia, Ukraine, Guatemala, Nicaragua, Panama, Jamaica a specific fund is provided to carry out litigation on behalf of the complainant., In Thailand, East Timor, Namibia, Seychelles, Ghana, Tanzania (these countries whose Ombudsman has multiple mandates are empowered to go to Court to enforce their own recommendation). In Papua New Guinea matters are referred for prosecution for leadership and tribunal actions. This clearly shows a vast of approaches made by countries in their attempt to enforce recommendations made from their Offices.

To ensure that Office of the Ombudsman recommendations are more effective it is submitted that the Act is amended to give the Ombudsman the power to go to Court to enforce its recommendation relating to administrative decisions. However it must be noted that this power will only be used as a last resort when the Ministry complained about refuses or unreasonably delays to implement or recognize the recommendation made. Further there will be no costs for the complainant to bear. This power will not extend to criminal matters because complaints relating to criminal matters must be referred to the Police or to the Attorney General.

(3) Ombudsman appointment process

Currently sections 3(1) and (2) of the *Ombudsman Act* provides that the Speaker of the Legislative Assembly shall appoint the Ombudsman or any person acting in his capacity with the consent of the Legislative Assembly. It is proposed that the process of having the Legislative Assembly involved in the appointment process is cumbersome on the members. This amendment proposes that the Speaker carries out the recruitment process that is required and after due process an appointment is made. Further for the Speaker to make the decision without the Legislative Assembly's consent on who is to be the acting Ombudsman when the Office is vacant.

**Hon. Sione Vuna Fa'otusia
Minister of Justice and Prisons**