

INVESTIGATION REPORT

(s 19.3 Ombudsman Act 2013)

POWER STRUGGLE AT THE NATIONAL UNIVERSITY OF SAMOA

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1. INTRODUCTION and BACKGROUND

The most eagerly awaited, if not the most important function a University gets to perform each year is the conferring of degrees and other awards to students who merit such degrees and awards and thereby deserve to graduate under the statutes and rules of the University.

The National University of Samoa (NUS or University) scrambled to get itself into a state of readiness to perform this function with aplomb and dignity for its students and public at the end of the 2018 academic year. Much was done hurriedly at the last minute to finalize the lists of successful students for some of the University's programmes of study. The scale of the changes made in some cases at the eleventh hour could not be described as necessary fine-tuning adjustments.

In the days prior to the 12 December 2018 graduation ceremony (graduation day), parents were known to consult lawyers and others around town for advice on how to head off outcomes they feared could befall unfairly upon their student children on that special day.

As it turned out, matters were sorted out under the direction and guidance of the Vice Chancellor (VC). Graduation day came and went, but many faculty members were unhappy about what the University went through to wind up the 2018 academic year.

In finalizing the 2018 graduation lists to his satisfaction, the VC had implemented an activity he described as a "research". Continuing discussion of that activity among staff sparked off something that became an issue in itself in the year that followed.

That "something" very quickly blossomed into a struggle which threatened to tie up the NUS from inside itself, into a knot. The issue in that struggle was whether or not the Deputy Vice Chancellor-Academic and Research (DVC-AR) should continue in the employ of the University.

Eventually, the NUS Council moved in early April 2019 to suspend the VC and to put the University's two Deputy Vice Chancellors on special leave to make way for an independent investigation and review.

On 2 May 2019 the Prime Minister, under s19.3 of the Ombudsman Act 2013, referred the NUS situation to the Ombudsman for investigation and report, as a matter of urgency.

In the normal course the Ombudsman investigates, makes determinations and recommends remedies. In an s19.3 referral the compelling requirement is for the Ombudsman to investigate and to report what he finds.

This is the Ombudsman's s19.3 Report on matters of significant interest in the NUS situation alluded to above in response to the Prime Minister's referral of 2 May 2019.

2. The VICE CHANCELLOR'S 'Research' into NUS STUDENT DATABASE SYSTEMS

On 30 August 2018 O Le Palemia (OLP) posted on Facebook serious allegations, implicating the VC for signing 'fake certificates'. There was also speculation that NUS staff were tampering with student results and allowing students who are not eligible to graduate. This stirred public interest and quickly pushed the VC to act. In November 2018, the VC contracted a private consultant (the consultant) to review and confirm whether these allegations could be true with regard to the 2018 final semester examination results and graduation list. The VC, Deputy Vice Chancellor- Corporate Services (DVC-CS) and the consultant (the consultancy team) covertly carried out this exercise to review and to identify weaknesses in the existing processes and overall system without disrupting the normal workings of the University.

2.1 The List of Results

Subject examinations are marked by the course lecturers who then come together in meetings first as individual Departments, and then as individual Faculties to ensure that all exams are properly marked and marks accurately recorded. Once student results are finalized within the Faculties, they are uploaded onto an NUS Excel Sheet template and endorsed by the Deans (alongside the signatures of respective Heads of Departments and course lecturers).

The Excel Sheets are hand delivered by the Deans to the Student Administration Department (Student Admin) on hard and e-copies. Only 1 staff member of Student Admin (a Senior Admin/Database Officer) is authorized to handle and to load this information onto an Access Database called the 'Student Results Database'. The same staff member of Student Admin prints copies for the Senate (chaired by the VC) to approve.

The 2018 second semester results were processed in the usual way and were uploaded onto the Student Results Database in early November 2018. The consultancy team swung into action to conduct its independent check. It requested from the Deans, copies of their results and cross-checked them with the overall List of Results already compiled by Student Admin.

The List of Results was supposed to be ready for the approval of Senate on Thursday 29 November 2018 but on that day the VC suspended the approval process to allow the consultancy team to complete its work.

2.2 The Scholarship List

As soon as the NUS results are finalized each year, Student Admin ranks all first time Foundation students according to English (HEN0004) and the best 7 courses of their programmes. They forward this 'Ranking List' to the Ministry of Foreign Affairs and Trade (MFAT) for the annual awarding of scholarships.

By 2 December 2018, MFAT were still waiting and anxiously following up NUS for the Ranking List as deadlines for scholarship recipient applications to the different Universities were quickly approaching. Things were being held up by the consultancy team which was still working on its checks of the NUS List of Results. It was also carrying out a check of the Ranking List (Original Ranking List) that had already been done by Student Admin in accordance with the established routine. MFAT wrote to the Prime Minister who impressed upon the VC in a letter dated 3 December 2018, that the delays were costing the Government money and straining working relations between MFAT and its bilateral aid partners.

The consultancy team amended the original Ranking List and forwarded it to MFAT on 11 December 2018. MFAT conducted their own check as is their normal practice and **discovered 6 students whose averages were miscalculated by the consultancy team**. One more student was added onto this list by MFAT following a direct complaint from his parents and after confirming with the consultancy team that they had accidentally removed his name from the original Ranking List. **These corrections resulted in a reshuffling of the 'Scholarship List' and MFAT had to console and explain to two (2) students that they were no longer eligible for scholarships.**

2.3 The Graduation List

The established process requires that once the Senate endorses the List of Results from Student Admin, updated transcripts are prepared, printed and passed back to the Faculties to identify students who are eligible to graduate. This 'Graduation List' is then passed back, first to the Senate and then the Executive of Council to approve.

At the Senate meeting called on 6 December to approve 2018 graduating students , **514 students** were on the 'Graduation List' for the 12 December graduation day. A departure from the norm was made at this point.

On 10 December 2018, a Special Senate was called and an amended graduation list was submitted by the consultancy team which effectively **removed 100 students** from the graduation list approved by Senate on 6 December. The Chairman (VC) advised the Senate that "some students had been removed because there was no record of them in Semester 2 and some others had not completed the requisite courses for their programmes". As a result of this consultancy intervention, an amended list of **414 students** was presented to the Executive Council on 10 December and was approved for graduation.

This decision caused an uproar among staff, the affected 100 students and their parents. On the eve of graduation day, 11 December 2018, the consultancy team reversed itself and cleared all 100 students to be put back on the Graduation List.

The VC, through email, quickly sought and obtained from the Executive Council its endorsement of the resurrected 100 students plus **eight (8)** late applicants for graduation to make a total of **522 students** to graduate. Somehow, **three (3)** additional students apparently endorsed by the consultancy team turned up expecting to graduate. Student Admin and Deans had to apologize to the families of these students on graduation day and removed them from the procession.

2.4 Was the VC's research fair and reasonable?

Much criticism and negative public speculation have been levelled at the processes of NUS in the past. It is understandable for the VC to be concerned about this and to want to review the system in place for the collation of student results including the operation of the information database. The manner he went about doing this is however very questionable.

The objective of the consultancy created by the VC under the guise of "research" was to discover any improper handling or processing of student results and to identify those responsible for it. Only members of the consultancy team were privy to the aims of the exercise. Its covert nature created an atmosphere of suspicion and mistrust, confusion and anger among NUS staff members and students alike.

There was IT and database expertise in the NUS Information and Communication Technology Unit that could have carried out the technical side of the review for free. Moreover, much of the delay

and the mistakes made by the consultancy team could easily have been avoided had staff members been asked to explain apparent discrepancies noted, instead of removing students from the finalized list for further review and then putting them all back once full information became known. It was not reasonable or fair to the NUS Senate and Executive of Council to be denied proper opportunity to fully assess the List of Results and proposed Graduation List as per normal process. The interruption of normal process flow prevented the orderly discovery of matters usually detected at Senate meetings.

2.5 Is there a problem with NUS Student database systems?

Examination results at NUS are put through a very rigorous confirmation and re-confirmation process before they reach Student Admin, the Senate and the Executive of Council. There have been odd cases of serious error before 2018 but there were reasonable explanations for them and mistakes corrected before lists were presented to the Senate and Executive of Council for approval. There is always risk from human shortcomings in the entering of data. The University has put in place multiple checks in the system to discover and rectify errors. An additional safeguard mechanism is a post-graduation review to be set up.

If anything, the 2018 kerfuffle proved that NUS systems are secure and checks thorough. **The Investigation was unable to find any evidence to substantiate claims that there is fraudulent tampering by NUS staff of Student Results, Graduation Lists or Rankings for Scholarships.**

As pointed out in the consultant's report, there are software issues that need to be addressed and there is capacity in the University itself to deal with them.

3. CONFRONTATION 1: VC vs DVC-AR (Attempted dismissal of the DVC-AR)

While graduation day 2018 came and went NUS staff members were left upset and confused by their unusual experience of it.

On 20 December 2018, the VC called a management meeting and for the first time revealed that his consultancy team was carrying out a research into the Student Database system. Without divulging anything further, the VC excused himself and the DVC-AR was left to handle the disappointment expressed and the many questions the VC's presentation had generated.

After the meeting, the DVC-AR sent the following e-mail message to the VC:

"Lau Afioga,
FYI
Please don't shoot the messenger. The Deans are angry with your explanation today.
They said it is the "lamest excuse for the most unethical piece of research that has ever been conducted in NUS"
Just wanted to convey that I lau afioga so that you know the feeling on the ground."

The VC expressed appreciation for the message in his response of same date ending with the following:

"I would appreciate very much understanding better from their point of view why my 'research' was 'lame' and the most 'unethical research' ever conducted at NUS (lol). I am also happy that my message came across clear that I was referring to myself as a 'researcher' not as the employer (Vice Chancellor) of the University.

I would also appreciate very much your own take of my conversation this morning.

Faafetai tele i galuega o lenei tausaga.”

From this exchange of messages, it would seem that for the two most senior executives of the University, the year ended on a note of some suspense as the University closed for the Christmas holidays.

On the DVC-AR's first day back at work for the New Year, Monday 14 January 2019, the VC asked for his resignation. The VC told him that he no longer trusted him and could no longer work with him. He wanted his immediate resignation. The VC has not ever set out in writing the particulars of his request for the resignation of the DVC-AR. He has however advanced in subsequent writings, allegations of unsatisfactory work performance on the part of the DVC-AR which in his view justified dispensing with his services.

The DVC-AR fired off a couple of emails to the VC on the resignation issue. The first on the same day he was asked to resign, 14 January expressed in the main, puzzlement and mental groping on his part to understand the justification for the VC's attitude. The second on 16 January told the VC that while he (VC) had been well prepared for the Monday meeting when he claimed loss of confidence, he (DVC-AR) had been ambushed and caught by surprise. He indicated that he had only agreed in their conversation to resign because the incident provoked loss of confidence on his part in the VC's leadership. He asserted that in fairness the time frame and terms of his resignation should be negotiated and not dictated by the VC.

Receiving no reply to his e-mails the DVC-AR dispatched a letter on 24 January 2019 in Samoan asking *“e toe sasa’a le fafao ma alo i luma”* - to reconsider and move forward. This letter was copied to the Prime Minister, the Minister of Education and the Chairman of the University Council (Chairman).

This letter was received in the VC's office on 25 January. The VC did not ever reply to the letter but he characterized it in a later communication to NUS Council as admission of wrongdoing.

On 25 January the VC sent off 2 letters to the DVC-AR.

The first letter was in reply to the DVC-AR's e-mail request of 16 January for negotiated terms of resignation. In it the VC told the DVC-AR that he could stop his salary immediately because the DVC-AR had no legal contract of employment.

He explained, based on a legal opinion he had requested and freshly received from a private law firm, that the notation the DVC-AR had made on the Letter of Intent sent to him on 1 October 2018 had legally derailed the offer of appointment made to him by the University. In that the University had not accepted and incorporated his requested Job Description (JD) amendment into a contract, there was in fact no contract from which to resign. The VC advised that nevertheless, he would honour the terms of departure he had indicated on 14 January for the DVC-AR.

The second letter of the same date was brief and to the point to record matters the VC had verbally conveyed to the DVC-AR earlier in the day:

Talofa Peseta,

I will do the following for you:

1. Give you special leave until the effective date of your departure
2. I will approve your departure date of 28 February
3. You will get your full salary up to 28 February

4. You will vacate the office you are occupying in the weekend and hand in the keys first thing next Monday, 28 January 2019.

You will do the following:

1. Write to me today to **withdraw your intention to take up the DVC-AR job**
2. Complete your Clearance form and submit to me first thing next Tuesday, 29 January 2018 in order for you to get any entitlements you might have.

On 31 January 2019 the DVC-AR wrote to the VC saying that he could not just withdraw his acceptance of the LETTER OF INTENT as requested because it did not accord with any meaningful process. He again proposed to the VC to set aside their different professional and personal views on the issues and to move forward with integrity in the best interests of the University. He apologized unreservedly for any errors or anything on his part that might have been untoward or caused annoyance.

The VC's response was this scribbled notation on DVC-AR's letter.

"Regrettably I have made my decision. You have no contract with NUS. Manuia fuafuaga uma mo le lumana'i 1-02-2019

The DVC-AR vacated his office and surrendered the keys on Friday 1 February 2019. His position in the University was advertised in the *Sunday Samoan* newspaper on 3 February 2019.

On 6 February 2019, DVC-AR wrote to the NUS Council claiming unfair treatment and unlawful dismissal. He requested NUS Council intervention to establish the cause of it all and to arrive at fair treatment of him in the circumstances.

A special Committee of Council engaged the VC and the DVC-AR in a mediation dialogue which secured agreement of the two executives to move forward and for the DVC-AR to return to work on 3 March 2019.

On 4 March the VC e-mailed all NUS staff that "the DVC-AR returns to work this morning from his special leave".

On 22 March 2019 the VC wrote to the DVC-AR saying:

"Following the review of the matter at hand, I sought a second legal opinion which I have received and it reconfirms the opinion provided in the first legal opinion dated 23 January 2019. The opinion provided in the first legal opinion states you do not have a valid employment contract with NUS.

The special committee that was set up to deliberate on your alleged grievances has no legal capacity. That is, it was not necessary to establish that special committee because you did not have an employment contract in the first place among other reasons.

The same special committee had also made decisions on matters that were outside the authority of the council as provided for in the NUS Act 2006.

In view of your long service to NUS since 2004 when you first joined, you will continue to receive your current salary until 7 April 2019.

I would greatly appreciate you hand back the office keys first thing on Monday, 25 March 2019."

On 26 March 2019, the VC locked the DVC-AR out of his office and said to him:

‘Na ua uma ona ou tusi atu, ua e uma’ - I have already written to you, you are finished.’

3.1 What were the reasons behind the attempted dismissal of the DVC-AR?

a) Loss of Trust by VC in DVC-AR

Evidence point to the 20 December 2018 meeting between the DVC-AR and some of the Deans as the **trigger** for the attempt to dismiss the DVC-AR. It was the **last straw**, according to the VC. He could no longer trust or work with the DVC-AR. The VC was convinced that the DVC-AR was rallying staff opposition against him, and was attributing to the Deans his own opinion that the VC's research was *‘unethical’* and *‘lame’*. Evidence given to the Investigation point to the contrary. The majority of the Deans present at the meeting were of the view that the research was *unethical* and *lame* as it did not follow proper University Research and Ethic Committee protocols.

The VC did not dwell on his loss of confidence claim. He abandoned it in a matter of days once he was convinced that the DVC-AR was not contracted to the University. He chose thereafter, to simply dismiss him on terms he saw fit. Intervention by NUS Council however frustrated his intentions in that regard.

b) Under-performance

The VC pointed to underperformance issues in the DVC-AR's work at NUS. The Investigation however found no warnings, notations or disciplinary record of any kind in the DVC-AR's personnel file. Nor were there any negative elements in the DVC-AR's appraisal forms; on the contrary the VC's latest assessment of the DVC-AR is very positive. When asked to explain the lack of negative commentary in the record, the VC said that he did not want to leave a mark on the DVC-AR or any of his employees' records. This is neither a good answer nor is it an answer that does anything for his loss of confidence claim.

c) Misconduct

Two instances of misconduct were cited by the VC against the DVC-AR. It was claimed that the DVC-AR had approved the enrollment of a student in the Foundation Program in 2018 when she had exceeded the period of two (2) years allowed by policy to lapse between active studies in a Foundation Certificate programme. There is no record of this approval by the DVC-AR. The only approving signature for this case is that of the Dean involved who claims to have been given verbal clearance by the DVC-AR.

It was alleged also that the DVC-AR signed a cheque for ST\$1,000 from the VC's purchase order book for a charity event without his approval. It turns out however, that the DVC-AR was acting Vice Chancellor at the time and was acting in the stead of the VC.

4. CONFRONTATION 2: The VC vs NUS Council (Who has power to do what?)

The Chairman wrote to the VC on 28 January 2019 expressing concern about his working relationship and correspondence with the DVC-AR; and even greater concern about issues relating to the 'research', an exercise which had unsettled the majority of the Deans. The VC apparently had promised explanatory commentary on this matter to the Executive of Council but had not delivered on the promise.

The Chairman advised the VC that he had forwarded these concerns to the local members of NUS Council who had agreed to meet with all the senior members of staff concerned, so that all could be heard and to thrash out issues. In this letter the Chairman requested the VC to “desist from any actions or request regarding DVC-AR and this issue until Council has met”.

The meeting proposed by the Chairman never took place because the VC had other ideas on how to move forward and his own timetable for doing so. Foremost in his thinking were steps consistent with his view that the issue of the DVC-AR’s employment was properly a matter under his jurisdiction. Secondly, he could not agree to a process that would bring the NUS Council, VC and lower staff together to discuss the issues. He thought this would neither be proper nor would work. He preferred any discussions to take place at two levels. He and the NUS Council could discuss and then separately he would discuss matters with his staff.

The VC objected to further involvement of the Chairman in matters because of the latter’s very close friendship with the DVC-AR. He felt the situation justified bringing the overseas members to Apia to form the full NUS Council.

On 1 February 2019 the Chairman reported by email to all members of NUS Council the result of a meeting he and another local Council member had had the day before with the VC.

The following items were raised:

1. The VC has sought legal advice on the contractual issue with the DVC-AR. The issue of conflict of interest is still very high in his mind, hence he refused to make any further comments regarding the matter in my presence. I clarified to him as stated in my letter that this issue has many implications for NUS hence in my role as Chair it is only right that I notify EC and intervene. However out [of] respect for due process as mentioned I willingly step aside and let other members of Council step in to meet with you.
2. He has agreed to meet with our local members of Council without the Chair present to discuss how he came about to his decision regarding Peseta. He is adamant that this was a managerial decision of which he as VC has full authority.
3. As a matter is a managerial decision that he has made, he will NOT change his mind.
4. We all agreed that the issue on governance and management will need to be reviewed as many have already spoken on. This issue will need to be discussed at the Council level as there are differences of opinion as shared in the emails received.

It was very clear to both [XXX] and I that the VC has already set his mind and due to #1 above he was not going to speak any further.

On 6 February 2019, DVC-AR wrote to the NUS Council claiming unfair treatment and unlawful dismissal. He requested NUS Council intervention to establish the cause of it all and to arrive at fair treatment of him in the circumstances.

The NUS Council formed a Special Committee of five local council members chaired by the Chairman to “mediate and handle the strain in the working relationship between the VC and the DVC-AR”. The Special Committee felt that the best course was through traditional Samoan dialogue. It asked the VC to reconsider his decision concerning the DVC-AR and to move forward for the sake of NUS. After several sessions agreement was reached. The Special Committee reported on 28 February recommending among other things for the DVC-AR to return to work on Monday 4 March 2019.

The VC had second thoughts on the next day and asked if DVC-AR’s return to work could be postponed until the decision was handed down by NUS Council but the Chairman prevailed on him to stick to what was agreed in the Committee dialogue.

Overseas NUS Council members endorsed the Special Committee's recommendations but one member wondered whether the VC's position had been undermined by the process and outcome. The key question he pointed out was whether the VC had in fact followed the University policy guidelines in his handling of the DVC-AR. The NUS Council member was not convinced from the Report that this had been fully addressed. In response to his query, the Special Committee issued a supplementary fuller Report dated 5 March 2019 for members of NUS Council.

As it turned out, the VC took exception to the original report, claiming that the VC was portrayed in it as being wrong and "at fault in the issue of the non-re-employment of the DVC-AR". He advised Council that he would prepare a response to the Special Committee's Report for Council's consideration.

The VC indicated also that as far as he was concerned things were back to square one. He proceeded through email staff instructions to strip the DVC-AR of many of the normal duties of his position. On 13 March he sent via email to the DVC-AR a special JD reflecting this stripping "whilst awaiting consideration by the Council on the issue of your employment contract."

The VC's response dated 20 March 2019 to the Special Committee of Council's Report was eventually submitted. It was a long point by point rebuttal of the Special Committee's Report, ending with a recommendation

1. That **"the Special Committee of Council prepare a formal apology without conditions** to the Office of the Vice Chancellor taking account of the following reasons:
 - a. The Report implies that the Vice Chancellor had acted illegally in the 'termination' of the DVC-AR
 - b. The Report portrays the Vice Chancellor in a very negative light which could potentially lead to a negative perception of the staff against their employer, the Vice Chancellor
 - c. For convening a Special Committee supposedly to investigate the allegations against the Vice Chancellor that had instead resulted in bringing back the DVC-AR thereby potentially creating a perception among the staff that the Vice Chancellor had acted illegally and unprofessionally in the manner in which he had handled the case of the DVC-AR
 - d. Putting the Office of the Vice Chancellor under unnecessary stress since the start of this case on 28 January 2019, when the Pro Chancellor first alerted the Vice Chancellor and the Council about allegations against Vice Chancellor by the DVC-AR
 - e. For illegally intervening with the work of the Vice Chancellor as provided in the NUS Act 2006, thereby interrupting the flow of work in the Office of the Vice Chancellor early in the start of the new academic year with enrolments and preparations for the April graduation and the council meeting at about the same time
 - f. For usurping the authority of the Vice Chancellor as provided in the NUS Act 2006
2. That the letter of apology would be made available to the NUS staff, hopefully, to help reverse the heavy negative perception that is already out there against the Vice Chancellor.

5. WHAT IS THE VC ASSERTING IN THESE CONFRONTATIONS?

In essence the VC is asserting three things:

1. He is asserting that DVC-AR has no contract of employment with NUS.
2. He is asserting that the VC has the delegated power under s10 (4) of the *National University of Samoa Act 2006* to employ, dismiss and discipline all staff including DVC-AR.
3. He is asserting that given the above two supposedly factual situations, his decisions and actions to disengage DVC-AR from NUS employment were sound; and that NUS Council was interfering in the proper exercise of his powers as the VC and President of the University.

5.1 Process employed in the Re-appointment of the DVC-AR

The DVC-AR was appointed Deputy Vice Chancellor-Academic & Research in 2016. His first contract term was to expire in September 2018. He applied for reappointment and was interviewed on 28 September 2018.

The Interview Committee of NUS Council comprising of the Deputy Chairman of NUS Council, the VC, three other members of NUS Council and the Secretary to NUS Council acting as Secretary to the panel, unanimously re-appointed the DVC-AR effective from the expiration of his then current contract. One member of the Committee was not able to attend and his apologies were noted.

The DVC-AR asked for **duties he had been performing during his expiring contract term to be reflected in his new JD- that is, teaching, learning and research. The VC himself commented in the DVC-AR's most recent appraisal record that he needed to focus on these particular elements.** The appointing committee having discussed the matter with the DVC-AR during the interview recorded a directive to NUS Human Resource Department *"to review current DVC-AR Post Description in consultation with VC and incumbent before contract is signed."*

The Committee clearly intended the incumbent DVC-AR to continue in post and to simply sign a revised contract to reflect the JD amendment discussed at the job interview. HR was empowered without further ado to revise the DVC-AR's JD in consultation with the VC and incumbent and **to have a new contract signed to flow on from the old contract of the DVC-AR on 1 October 2018.**

Management did not get around to revising the JD as requested by the Committee. It issued instead on 1 October 2018 a LETTER OF INTENT in a standard template form used by the NUS in the recruitment of all of its contract employees appointed by the VC. It did not mention in that letter the intention to revise the JD as stipulated by the appointing Committee in response to suggestions from the incumbent.

The letter asked for one of two boxes indicating acceptance or otherwise to be ticked and returned. The acceptance box was ticked with the following words added alongside *"provided my JD is amended to reflect teaching, learning and research"*. The letter was returned to the University on 3 October and DVC-AR continued to function in the role of Deputy Vice Chancellor- Academic and Research as he had done for three years.

On 3 October 2018, the VC informed the Chairman of Council in session that DVC-AR had been re-appointed Deputy Vice Chancellor-Academic & Research. The Chairman thereupon formally announced the reappointment to the NUS Council and congratulated DVC-AR on the spot on behalf of the NUS Council.

Subsequently, the reappointment of DVC-AR **effective 01 October 2018** was reported in the NUS QUARTERLY REPORT JULY – SEPTEMBER FY 2018/19. The quarterly report is posted on the University's website.

5.2 Is the DVC-AR a bona fide contract officer of NUS?

In looking at this question the thing that is startling is the inability of NUS management to carry out a simple Special Committee of Council directive in a reasonable, fair and timely manner.

As explained just above, the Special Committee of Council that interviewed candidates for the position of DVC-AR, **clearly determined to continue the incumbent on a new contract effective**

from the expiration of his then current term of office. The Special Committee of Council asked for the current DVC-AR JD to be reviewed in consultation with the VC and the **incumbent** before his new contract is signed. These things are plain from the document recording the work of the Committee of Council.

Management did not attend straight away to the matters of the JD modification and the signing of a contract. On 1 October 2018 it sent the University's standard Letter of Intent to the incumbent who was already functioning in the job and had applied to continue in it.

The NUS Council or a Committee of Council appoints people to only the three top positions of the University. This happens very infrequently. It is not too much to expect management to handle these important appointments, not robotically in the manner of the many appointments it handles routinely with its template letters, but in accordance with the particular circumstances of the appointment being made.

Whatever management meant to offer by way of its template Letter of Intent sent to DVC-AR, **it was not what the appointing Committee of Council wanted done** following its discussions with the incumbent in the interview.

The appointing Committee wanted the incumbent to continue in the job for a second term under a modified job description. Management needed only to convey this clearly to the man and to get on with what needed to be done to the job description instead of fluffing around with a template letter that obviously did not serve any useful purpose for anyone; that is, until the VC found it sitting in the files almost 4 months later and put it to his own use.

From the position of DVC-AR, he had indicated to his employer during the interview that he wanted to continue in the job but under a modified JD. His request was well received by the Committee of Council which included the VC in person.

In the days that followed, the VC informed the Chairman of Council during a Council meeting which the DVC-AR was also attending, that he had been re-appointed as Deputy Vice Chancellor – Academic & Research. The Chairman formally announced this to the Council and congratulated him on behalf of the Council. The University Quarterly Report July – September 2018 announced his reappointment to the world.

From the time of the interview for the rest of the year 2018 and into the New Year 2019, the University and all in it including the VC acted towards him, and treated him in every way, as it's legally re-appointed DVC-AR. Why would the DVC-AR believe otherwise in an honorable national institution of higher learning? Why would anyone dealing with the University believe or see him otherwise than as the legitimate Deputy Vice Chancellor – Academic & Research of NUS?

This is the reality of the situation. The **principle of estoppel in law would seem to well apply** here. The VC on the other hand, in his oral evidence insisted emphatically that the fact of crucial importance upon which the Investigation's attention ought to focus, is the matter of the DVC-AR's reply to the Letter of Intent. A policy advisor in turn, was similarly pointed in his oral evidence.

The VC stated to the Investigation that he was of the view DVC-AR had a contract when he was appointed. It was only when he was given legal advice that he became aware that DVC-AR had no contract.

It appears on the face of it that once the legal technicality was pointed out to the VC, he pounced on it as convenient means to get rid of the DVC-AR. An interesting question is how or why, given as he

admits, that he had all along assumed DVC-AR to be contracted, did the particular issue even arise and given over to a lawyer along with the 'Letter of Intent' document for an opinion? Further, why wasn't the issue, a very elementary matter in Contract Law, not simply referred to the University's Legal Officer for a view?

Mr. [AAA] was apparently designated to convey this material to the outside lawyer and to be the correspondent and source of information for the lawyer in this matter?

The VC is making everything of the fact that instead of just ticking the box in the Letter of Intent sent to him, the DVC-AR added the words "*provided my JD is amended to reflect teaching, learning and research*" thereby technically proposing a counter offer.

In the circumstances, the DVC-AR would seem entitled in good faith to assume that the University had agreed to such an old proposal from a great deal that happened since its making, including ongoing discussions of the particular matter with the VC. For the VC to hold otherwise is, with respect, disingenuous.

In the totality of things, DVC-AR would not have responded as he did to the Letter of Intent, if the VC's own management had been more competent in conveying in that document, the substance of the arrangement the appointing Committee of Council wanted made with the DVC-AR.

Things moved slowly on the matter of the JD modification. The VC sent the Policy Advisor, to talk to the DVC-AR about it in November, so he too was aware of ongoing discussions. DVC-AR tried to follow up the VC but he was too busy. The DVC-AR travelled to China soon after and other duties apparently prevented management from concluding a matter entrusted to it by the Committee of Council. The failure of the VC and the management of NUS to attend to this matter in a reasonable and timely manner is the reason DVC-AR has functioned so long in his post without a signed contract.

5.3 Does the VC have full and sole authority to dismiss the DVC-AR?

The *National University of Samoa Act 2006* (NUS Act) has in it, the following provisions:

S.1 Short title and commencement: "officers" means the officers of the University, being the Chancellor, Pro-Chancellor, Deputy Chairperson, Vice Chancellor and Deputy Vice-Chancellors, as described in Part 3;

*s10(4) The Council delegates to the Vice Chancellor the power to employ, dismiss and discipline **all staff** of the University, subject to any conditions Council imposes on the delegation.*

*s11 (3) The Deputy Vice Chancellors are appointed for a term of up to 3 years **by a committee determined by the Council** on such terms and conditions the Vice Chancellor determines and may be re-appointed.*

*s11 (6) **The Council may**, upon the recommendation of the Vice-Chancellor, **remove a Deputy Vice Chancellor** from office for:*

- a) breach of any of the Deputy Vice Chancellor's conditions of employment;*
- b) the Deputy Vice Chancellor's failure or inability to adequately perform the Deputy Vice Chancellor's duties; misconduct; or*
- c) any other just cause.*

s18 (1) Subject to this Act, the Council has all the powers reasonably necessary to enable it to perform its functions effectively.

s18 (2) unless they are exercised by delegation under this Act, the following powers are to be exercised only by the Council:

a) to consider any appeals in relation to the termination of the appointment or discipline of academic and other staff by the Vice Chancellor.

The NUS Act provides under s10 (4) for the VC to have delegated power from Council to “employ, dismiss and discipline **all staff** of the University subject to any conditions Council imposes on the delegation”. The Act does not define **staff** but it does define **officers** which means **the officers of the University**, being the **Chancellor, Pro-Chancellor, Deputy Chairperson, Vice Chancellor AND Deputy Vice-Chancellors**.

Essentially, in this contextual reading, a Deputy Vice Chancellor is an **officer** of the University rather than **staff**.

When reading Part 3 of the Act in its entirety, it clearly outlines in separate sections (s7-s12) the process of appointing and dismissing **officers of the University**. The remaining personnel of the University i.e. **staff** is provided for in this regard by delegated authority to the VC under s10 (4) of Part 3. Under Part 3 therefore, whereas the appointment and dismissal of **Officers** are provided for specifically, the appointment and dismissal of **staff** is provided for in blanket fashion under the jurisdiction of the VC. The VC’s claim **that the DVC-AR comes under his blanket power to ‘hire and fire’ runs counter to what Part 3 of the Act in its totality is saying to this Investigation.**

The Act stipulates under s11 (3) that “the **Deputy Vice Chancellors are appointed** for a term of up to 3 years **by a committee determined by the Council** on such terms and conditions the Vice Chancellor determines and may be reappointed.” The Act further provides under s 11 (6) that upon the **recommendation of the Vice Chancellor the Council may remove Deputy Vice Chancellors** from office, for the same reasons that a Vice Chancellor may be removed:

- a. breach of any of the Deputy Vice Chancellor’s conditions of employment;*
- b. the Deputy Vice Chancellor’s failure or inability to adequately perform the Deputy Vice Chancellor’s duties;*
- c. misconduct; or*
- d. any other just cause.*

The Act clearly intends that in the appointment and dismissal of Deputy Vice Chancellors **in particular** both the NUS Council and VC must be properly involved. This means, in good practice, that there must be process to engage both parties when any such event arises.

The VC has every right to ask for the resignation of a DVC and if that officer of the University agrees on whatever terms the parties find acceptable, the matter ends. **This did not happen in this case for reasons or circumstances revealed in this report.**

In the absence of a freely submitted resignation, the VC would then have needed to resort to making a recommendation to the NUS Council (s11 (6) of the Act) for the dismissal for ‘just cause’ of the DVC-AR he no longer wanted to have around.

The VC did not do this. A legal “technicality” had been pointed out to him by a private law firm which he believed justified his dealing with the dismissal **on his own and in the manner he chose to employ.**

Even if the “technicality” is of any moment, which this Investigation does not accept, the actions and conduct of the VC in this matter were **unreasonable and oppressive.**

6. LOW STAFF MORALE

It was brought to the attention of the Investigation that significant “toxicity” (for lack of a better term) permeates relations and interaction within the University. This state of affairs was not clearly explained but seeming symbiosis in the power and influence three individuals are able to exert in the workplace is considered to be its essential feature. The three individuals are the VC, the DVC-CS and a Policy Advisor. Seeming confluence in the activities of these individuals is said to contribute greatly to confusion and low morale at NUS.

The Deputy Vice Chancellor - Corporate Services (DVC-CS) was hired in September 2018. She produced soon after her appointment a Problem Analysis Report with implications for her role that were rapidly implemented. These measures were superimposed upon or duplicated numerous administrative processes, including the additional reviews of applications for academic vacancies (this is the role of the DVC-AR), reviews of student complaints (this is the role of the University counsellor), reviews of policies (this is the role of the Department of Governance, Policies and Planning (GPP)), and the approval of staff overtime (this is the role of immediate staff supervisors), to name a few.

The new processes, well intended as they may have been, unfortunately resulted in hostile confrontations over emails and jeopardized professional partnerships in and outside of the University. There was occasion in 2018 when special efforts had to be made by the Director of GPP to mend relations with exasperated external partners of the University. In other respects, the measures implemented under the new policy mentioned above and actions flowing from them soured relationships in general between staff and Officers of the University.

A number of NUS staff felt victimized by the DVC-CS. For example, during the 2018 rush to finalize student results and graduation lists, staff members worked overtime to complete last minute tasks. They were all denied overtime by the DVC-CS. Course lecturers were also made subject to random spot checks by the DVC-CS, and they had to sign in for work every morning irrespective of the times they are rostered for lectures. Many staff members testified that a new ‘culture of fear’ was brought about by the incoming DVC-CS. Some staff members felt imprisoned and could not move outside the confines of their own offices (during and outside working hours) as the DVC-CS was policing their work area and emailing their immediate supervisors to discipline them for alleged loitering.

It was found in April 2019 after the DVC-CS was suspended that 25 contracts were lying on her desk, unsigned and unactioned, some since October 2018, including the wife of the DVC-AR’s contract of employment.

The VC is viewed to be heavily biased and more often than not, takes sides with the DVC-CS against other staff. The Investigation was told that on occasions in disputes between the DVC-CS and staff (including the DVC-AR), the VC has interjected with threats to dispose of the particular staff member for insubordination.

The VC’s support for the DVC-CS seems to be almost instinctive. When the DVC-CS was put on special leave by Council in April, the VC did not hide his disappointment with the decision and was conveniently nowhere to be found when his signature was sought for cheques to pay the University’s 400 staff on pay week. This smacks of mischief-making. Emails in the possession of the investigation concerning this situation are sadly most disturbing. Worried NUS Council members had to act quickly to ensure staff were paid on time and to avoid attracting further public attention to the woes of NUS.

The Policy Advisor although stationed under the umbrella of the Department of GPP, bypasses the Director of GPP when he proposes amendments and new policies to the VC. His role in NUS, seems to be rather buoyant, floating in all areas of NUS including Human Resource recruitment responsibilities, legal advice in the stead of the NUS legal officer and the delivery of correspondence to private law firms on behalf of the VC. His unscripted involvement in everything in NUS is said to blur lines of authority, jurisdiction and the smooth flow of work at the University.

The Investigation senses that some staff members are ready to vote with their feet if change does not come soon in situations they consider no longer tolerable. NUS staff were frank and blunt in making this point with reference to the two most senior members of the triumvirate alluded to above.

7. OTHER ISSUES

1) *Conflict of Interest*

The VC raised continuously in his arguments the 'friendly' relationship between the DVC-AR and the Chairman of Council. He maintains that this conflict of interest impacted the fairness of NUS Council processes in this matter.

The Chairman of Council declared the relationship raised by the VC to NUS Council members in an email and was willing to step aside but his continued involvement was requested by colleagues. The Chairman of Council therefore, remained involved to the end.

As the Investigation sees it, the Chairman has never made a secret of his personal friendship with the DVC-AR. He has declared this as reason for not participating in the decision making on appointments whenever his friend was a competing candidate. This was proper and is to be expected where personal judgment of the attributes and merit of other individuals is the crucial factor. There is no reason however, ordinarily for the Chairman to recuse himself from performing any other function he is obliged to perform as Pro Chancellor just because a personal friend happens to be involved in a particular matter. This matter is no exception.

Personal relationships with others had no bearing on the problem that arose between the VC and the DVC-AR. The issues stand discernible, on their own, to any onlooker with a duty to deal appropriately with them. When such person does not so act, his errors would be discernible to someone else. The investigation found no sign of impropriety in the conduct of matters by the Chairman of Council in this case.

2) *Letters of Intent*

As illustrated in this case, the letter of intent is an intermediary step that is routinely taken by NUS in their recruiting process. It served no purpose in this case, and therefore superfluous, as the form was simply ignored and filed away. Four months after it was a 'dead document' for all intents and purposes, it resurfaced with a vengeance so to speak to be used, in the view of this Investigation, in a less than honourable way.

Letters of Intent can be more troublesome than they are worth if they are inadequately worded. Letters of Appointment is the new trend in HR recruitment processes.

3) Use of Private Lawyers

The Investigation noted the extensive use made of private legal services by the VC in pursuit of his aims in these matters. While it's not right to say that he should not ever do this, it is appropriate to sound a note of caution about office holders of the rank and power of the VC, resorting to outside legal services at public expense.

It is easy for motivations behind official actions to be coloured by personal needs, or to progress imperceptibly to such colouring, rather than the true needs of the office, whatever one may say. It is easy in fact to go completely off the rails.

The Investigation does not applaud the Vice Chancellor of the University's recourse to private legal services at University expense to refrain the Chairman of Council from involving himself in the affairs of the University.

The VC was asked why he did not avail himself of legal capacity within NUS itself or the Office of the Attorney General. Apparently, he believed the Office of the Attorney General to be too busy to help him quickly.

4) Special Leave - DVC-CS

Objection was raised by a private lawyer on behalf of the DVC-CS that she was being unfairly treated by the NUS Council in putting her on special leave and in the stipulations made by the NUS Council for that leave.

Contradiction is pointed out in that while NUS Council seems to have directed that the DVC-CS '*must comply with the terms and conditions of her employment*' the rest of the stipulations prevent her from doing so.

Resort to special leave of the kind given to the DVC-AR is usually for the purpose of absenting the subject person from the workplace to better facilitate an investigation. This ought always to be made clear.

5) Assessment of Nursing students

The Investigation noted that while the Foundation Program's results and the processing of its Results Lists were put under the microscope there has not been parallel examination of the Faculty of Nursing and its results.

The ideal always, in collaboration is a consensus to which all participating parties subscribe. That was not the situation with regard the 2018 graduation list for the Bachelor of Nursing degree. There was high disagreement between Faculty and the VC about the eligibility of some students to graduate.

It was rumored that the VC without justification had overruled the Faculty and allowed about 10 undeserving students to graduate with Bachelor of Nursing degrees. The truth of the matter is that in the reckoning of the teaching staff, certain students had not completed some of the compulsory practical requirements. The VC's assessment of the situation on the other hand, was that the staff had not been sufficiently diligent or meticulous in recording the activities that comprise the compulsory practical requirements.

The Investigation was not able from interviews held under oath to determine for sure who was right. The truth probably does not lie totally with one side or the other. In the end the VC judged it fair to give the benefit of the doubt to the students. It was his call to make and he made it. His decision should be respected.

What is concerning to the Investigation is the fact that defectiveness in this area within the Faculty of Nursing is not a new discovery. The question is: what is the Faculty of Nursing doing to address this apparent weakness in the assessment of their students?

8. SOME CONCLUSIONS AND OBSERVATIONS

As indicated at the outset, the primary requirement in an s19.3 referral is for the Ombudsman to investigate and to report what he finds. The investigation undertaken and this report flowing from it endeavor to meet that requirement. To conclude I give below some conclusions and observations that come readily to mind from the discoveries made.

- Many members of NUS academic staff view the “Research” instituted by the VC into the processing of 2018 2nd semester student results as the ***“lamest excuse for the most unethical piece of research that has ever been conducted in NUS.”*** This was conveyed to the VC by the DVC-AR on 20 December 2018.
- Mulling things over during the Christmas holidays, the VC must have concluded that the DVC-AR had more to do with the perception conveyed to him than he was making out. As a consequence the VC decided that the DVC-AR had to go because he could no longer work in full trust with him. He asked for the man’s resignation on his first day back at work after the Christmas holidays.
- A few days later, the VC became convinced on legal advice that the DVC-AR was not in fact contracted to the University; he believed consequently that he did not need the man’s resignation. He proceeded then simply to sack him on terms he considered appropriate to give.
- The VC refused to be open to pleas from the DVC-AR to set aside professional and personal differences between them. He was similarly oblivious to the concerns of the Chairman of Council about his course of action. The VC believed the Chairman to have a conflict of interest in the matter because of his close friendship with the DVC-AR. In time, he would instruct Legal Counsel to request the Chairman not to interfere in the carrying out of the VC’s managerial responsibilities.
- The VC was so confident of his legal position vis-a-vis the DVC-AR that he was prepared to defy Committees of Council and to have issues of difference determined in Court if necessary. He eventually called for a formal apology without conditions to the Office of the Vice Chancellor from a Special Committee of Council for the contents of a report the Special Committee had issued and for involving itself with the matter at all. This Committee was appointed to deal with the problem of fractured relationships in higher management impacting negatively on the University and its functioning.
- When NUS Council chose in early April 2019 to meet without the VC to consider the situation NUS was in, with regard to its Chief Executive, the VC sent instructed Counsel to attend on his behalf in accordance with the VC’s right ordinarily, to be a member of NUS Council or any Committee of Council.
- In my respectful view the VC is misguided in his conviction that he is absolutely right in all the important issues of this matter.

- The VC is wrong in thinking that a DVC is *staff* and that the hiring and firing of a DVC is essentially the VC's prerogative.
- The DVC-AR, in my view is a bona fide contracted officer of the National University of Samoa. He is without a signed contract at this point, seven months after his re-appointment from 1 October 2018, because of the failure of NUS management to deal with the administrative aspects of his re-appointment in a reasonably competent and timely manner.
- The academic staff and student administration units of NUS did not tamper with, or inappropriately process the 2018 second semester student results. The requirements and actions of the "research" consultancy team imposed upon the regular system by the VC however, wreaked havoc and caused errors of embarrassing consequence unbecoming of the University.
- The NUS processing of results systems is basically sound. The University is on top of further improvements that can be made to the database.
- A serious situation exists with regard to morale at NUS which needs to be resolved. If it is not addressed quickly the University is likely to have significant loss of staff.

Maiava Iulai Toma

OMBUDSMAN

APIA. 24 May 2019