



NATIONAL INTEGRITY SYSTEM STUDY

PUBLIC SECTOR

DISCUSSION PAPER 10
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Author: Anita Jowitt

Transparency Vanuatu: PO Box 355, Port Vila, Vanuatu. Ph 25715. Fax 25617. Email transparency@vanuatu.com.vu. Website www.transparencyvanuatu.org.

About the Transparency Vanuatu National Integrity System Study Discussion Papers Series

The National Integrity System (NIS) study follows a methodology developed by the Transparency International Secretariat in Berlin. This methodology provides the structure of the report and identifies the questions to be addressed. The Vanuatu NIS study examines 13 key institutions, or “pillars”: legislature, executive, judiciary, ombudsman, auditor general, public service, law enforcement, media, private business, customary authorities, electoral commission, political parties and civil society. The research aims to develop consensus of the key recommendations for change. Each pillar discussion paper is based upon review of laws, documents and interviews. Discussion papers are released to the advisory group, external reviewer and the public. The discussion paper is a work-in-progress. All comments, corrections or additions are welcome. Comments are requested by the end of March 2014. Comments can be returned to Transparency Vanuatu in writing or in person (contact details above). They can also be sent to the lead researcher at anita.jowitt@gmail.com. If you would like to be added to the email list to be notified when further discussion papers are released or when public meetings on the report are held please contact Transparency Vanuatu.

SUMMARY

The public sector is widely perceived as facing issues relating to corruption. There is a reasonable legal framework for accountability and integrity of public servants. However, political interference and lack of implementation of the legal framework mean that in practice there is little accountability. In the absence of financial accountability mechanisms it is difficult to determine to what extent public service agencies are suffering from shortages of resources in undertaking activities, and to what extent mismanagement and corruption plays a role in limiting service delivery. In likelihood both contribute to weak service delivery by the public service. There are plans to strengthen the extent to which the public service educates the public on corruption and cooperates with other agencies in addressing corruption. In past years, and at the moment, however, little is done in these areas. Public procurement is not transparent and there are significant loopholes in the laws in this area. As a result public procurement processes are open to abuse.

RECOMMENDATIONS

- 1) Strengthening accountability involves, in part strengthening the Office of the Auditor General and the Office of the Ombudsman. Recommendations in respect of these pillars are discussed in separate pillar reports. Strengthening accountability via internal public service mechanisms requires both an increase in reporting (which involves building personal integrity) and better enforcement. To achieve these it is recommended that:
 - a) The Public Service Commission (PSC) implements, as part of its orientation and ongoing education and training programmes, more information about the Code of Conduct and

- obligations to report breaches. It should also consider a reward system for those that actively participate in upholding the Code of Conduct.
- b) The PSC be given power to recover misappropriations as part of its disciplinary procedures, with orders of the PSC being enforceable as debts through court.
 - c) The PSC publishes a list of public servants, annually, who have been subject to disciplinary action (including the nature of the misbehaviour and the penalty applied, but possibly withholding names to protect privacy) in order to demonstrate that public servants who get caught for misbehaviour do face consequences.
 - d) The PSC establishes a mechanism for the public to complain directly to the PSC about misbehaviour by public servants.
 - e) The PSC has an appropriately resourced legal section to handle the processing of disciplinary complaints, terminations of employment and public servant grievances.
- 2) Recommendations on cooperation have been reported elsewhere. The public service should be represented on the proposed anti-corruption or national integrity committee made up of both government and non government representatives.
 - 3) Public procurement needs to be addressed. As there are many loopholes in the law a useful starting point would be for the Vanuatu Law Commission to review public procurement laws.
 - 4) The change in the law to allow Director Generals to be appointed by the Prime Minister, rather than the PSC creates an avenue for political interference in the operation of the public service. This law should be repealed, and the power for appointing Director Generals returned to the PSC.

STRUCTURE AND ORGANISATION

The Public Service Commission (PSC) is a constitutional entity established under Chapter 9 of the Constitution. It has responsibility for the hiring and termination of most public servants, although there are other commissions, including the Judicial Services Commission, the Police Services Commission and the Teaching Services Commission which deal with the employment of specific groups of people paid out of public money. The PSC is composed of five members appointed for 3 years by the President of the Republic of Vanuatu after consultation with the Prime Minister.¹ The PSC is supported by a secretary who is appointed by the Commission who role is to provide secretariat and administrative support to the Commission. The secretary is also the administrative head of the Office of the PSC, which includes a number of support staff.

RESOURCES (PRACTICE)

To what extent does the public sector have adequate resources to effectively carry out its duties?

The public service is provided with financial, human and infrastructural resources. Although there are resource gaps, inefficiency in managing resources also leads to ineffectiveness in carrying out public sector duties.

¹ Article 59(1), Constitution of the Republic of Vanuatu.

Resource issues within some public sector agencies appear to hamper their work. For instance, in 2010 the Ministry of Health faced a crisis when limited drugs were available. It was later established that budget issues contributed to this issue.² Limited resources have been used to explain why the Public Works Department is unable to be more active in repairing roads.³ There are also concerns that limited financial resources hinder the PSC from performing its functions.⁴ In 2012 an issue of shortage of funds for teachers' salaries in the Department and the Ministry of Education was raised.⁵ In the absence of detailed audit reports, including performance audits, it is difficult to assess the extent to which limited resources, as opposed to mismanagement of resources, hinders the work of public sector agencies.

Wages in the public sector, particularly for low level employees, are low, and insufficient to maintain a reasonable standard of living. At mid range levels wages can make it difficult to attract the best staff to work within the public service.⁶ However, wage plus benefits packages at higher levels do make public sector packages attractive.⁷ It can also be observed that wages of those employed by the PSC are better than those employed by the Police Services Commission and Teaching Services Commission.⁸ The Government Remuneration Tribunal (GRT) is a legal entity which has the job of determining wages.⁹ One issue with public sector wages is that the GRT has not been very active in recent years. It was revitalised in 2013, so may become more effective.

The sustainability of public sector wages, and public sector activities in general, is questionable. As discussed in the foundations section Vanuatu is reliant on aid. It has a small private sector, which limits private sector derived tax revenue. If aid levels reduce Vanuatu may find it difficult to maintain funding for current levels of public sector staffing. With more effective and efficient management it, may, however, be able to maintain current levels of activities. For instance, whilst few Auditor General's reports have been produced, they consistently reveal misuse of allowances and benefits and overspending in this area, across a number of different agencies.¹⁰ Better management to prevent, auditing to detect, and law enforcement to recover this misspending (and punish wrongdoers) would enhance the efficiency of use of resources.

² Godwin Ligo, 'Report on medical drugs shortage completed' *Vanuatu Daily Post Online* 15 June 2011 <http://www.dailypost.vu/content/report-medical-drugs-shortage-completed> [accessed 4 March 2014].

³ 'PWD uses new approach to tackle road problems' *Vanuatu Daily Post Online* 14 March 2012 <http://www.dailypost.vu/content/pwd-uses-new-approach-tackle-road-problems> [accessed 4 March 2014].

⁴ Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

⁵ Jean - Baptiste Calo, 'Teachers unpaid salaries estimated at hundreds of millions' *Vanuatu News Online* 29 June 2012 [accessed 10 November 2014]; Transparency Vanuatu, 'Accountable Financial Mechanisms can only exist without Political Interference' *Vanuatu Daily Post Online* 23 July 2012 <http://www.dailypost.vu/content/accountable-financial-mechanisms-can-only-exists-without-political-interference> [accessed 13 March 2014].

⁶ Interview of former Director General of Ministry of Justice Mark Bebe with Sam Railau, Port Vila, February 13, 2014.

⁷ Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

⁸ Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

⁹ Government Remuneration Tribunal Act [Cap 240].

¹⁰ Office of the Auditor General, *Auditor General's Annual Report to Parliament 2005 - 2009*, (Port Vila: Office of the Auditor General, 2012).

INDEPENDENCE (LAW)

To what extent is the independence of the public sector safeguarded by law?

While there are provisions some allowing for the independence of the PSC and public sector employees a number of loopholes exist within the legal framework and these can undermine independence.

The legal framework provides a number of provisions relating to independence of the public sector. The Constitution provides that the PSC 'shall not be subject to the direction or control of any other person or body in the exercise of its functions.'¹¹ The Government Act prohibits Ministers from interfering in employment decision of the PSC¹² although, as noted elsewhere, the Constitution gives the Prime Minister the power to transfer senior public servants to equivalent positions.¹³ The guiding principles of the public service and the PSC include Service to be independent and perform their functions in an impartial and professional manner and to make employment decisions based on merit.¹⁴

The PSC is comprised of members (including the Chair) who are appointed by the President on the advice of the Prime Minister for a term of 3 years.¹⁵ There is no requirement that the Leader of the Opposition or any other person be consulted, in order to avoid the risk of "stacking" the PSC with political appointments. There are few limits on who can be appointed. Members of Parliament of Local Government and the National Council of Chiefs are prohibited from holding position on the PSC, as are people holding positions of responsibility within political parties.¹⁶ People must also be of good character and have experience in public sector management in order to be appointed.¹⁷

Only the PSC has the power to terminate or demote public servants, and must follow strict and detailed procedures laid out in the Public Service Act and Public Service Staff Manual. This protects employees most employees against political interference. The procedures, do, however, require the Director-General to endorse decisions of Selection Committees.¹⁸ In 2011 the law changed to give Minister the power to hire and fire Director Generals.¹⁹ This essentially gives a person who is potentially a political appointee power over the appointments process. The Constitution also permits the Prime Minister to transfer senior public servants to equivalent positions.²⁰

Public service employees obligations are stated in the Public Service Act to include following lawful orders, behaving honestly and with integrity, taking reasonable steps to avoid any conflict of interest (real or apparent) in connection with his or her employment not making improper use of

¹¹ Article 60(4), Constitution of the Republic of Vanuatu.

¹² Section 9(4), Government Act [Cap 243].

¹³ Article 58(2), Constitution of the Republic of Vanuatu.

¹⁴ Section 4, Public Service Act [Cap 246].

¹⁵ Article 59(1), Constitution of the Republic of Vanuatu.

¹⁶ Article 59(3), Constitution of the Republic of Vanuatu.

¹⁷ Section 9, Public Service Act [Cap 246].

¹⁸ Public Sector Staff Manual, 3.7; 3.8.

¹⁹ Sections 17A and 17 C, Public Service Act [246] as amended by Public Service (Amendment) Act 2011.

²⁰ Section 58(20), Public Service Act [Cap 246].

information or his or her duty, status, power or authority in order to gain or seek to gain a benefit or advantage for himself or herself or for any other person.²¹

There is no legal regulation of parliamentary lobbying for publicly procured projects in plans, programmes and budgets.

INDEPENDENCE (PRACTICE)

To what extent is the public sector free from external interference in its activities?

It is perceived that there is widespread political interference in the appointment, suspension and termination process of public servants.

There is considerable public concern about political interference in the public service. In a street survey conducted in January 2014 by the national integrity system researchers, 86% thought that there was interference. Comments indicated that interference both in appointments and service delivery were perceived to be occurring. The same survey also indicated that 85% of respondents saw nepotism to be a problem, with a further 10% being unsure if it was a problem. 80% also thought that nepotism was worse as compared to 3 years ago. Employment of siblings and children was seen to be a problem as was the practice of recruiting people from the same people from same village or island to be employed at the same place. There was little confidence that appointments were being done on merit.

Whilst there is no wholesale exchange of public servants following changes in government Ministers control the appointments of Director Generals and Director Generals are able to wield considerable power both in the appointments process, as they must endorse all appointment decisions made by selection committees.²² Director-Generals also have the power to suspend staff pending further enquiries. The Ministry of Health, which has a Director General and 3 Directors, has provided an ongoing example of interference in appointments, particularly through the misuse of the power to suspend staff. In November 2012 it was reported that the outgoing Director General had suspended or terminated the appointments of all Directors, with political interference alleged to be a motivator.²³ In December 2012 a new Director General was appointed, but then quickly replaced by a person who had been terminated from employment within the Ministry of Health for inappropriate behaviour.²⁴ By September 2013, when the Ministry of Health was led by a new Acting Director General, the Director General again suspended all Directors, for apparently spurious reasons. Other staff, including the Acting Manager of Human Resources, were also suspended.²⁵ In

²¹ Section 34(1), Public Service Act [Cap 246].

²² Interview of former Director General of Ministry of Justice Mark Bebe with Sam Railau, Port Vila, February 13, 2014.

²³ <http://vanuatudaily.wordpress.com/2012/11/26/vanuatudaily-news-digest-26-november-2012/> [accessed 4 March 2014].

²⁴ 'Vanuatu controversy over health director appointment' *Radio New Zealand International* 21 December 2012 <http://www.radionz.co.nz/international/pacific-news/209280/vanuatudaily-controversy-over-health-director-appointment> [accessed 4 March 2014]; 'Vanuatu Health Department Calls to reinstate Director General' *Pacific Islands Report* 23 December 2012 <http://pidp.eastwestcenter.org/pireport/2012/December/12-24-09.htm> [accessed 4 March 2014].

²⁵ Len Garae 'Directors Suspended' *Vanuatu Daily Post Online* 4 September 2013 <http://www.dailypost.vu/content/directors-suspended> [accessed 4 March 2014].

December 2013 it was reported that all medical personnel suspended by the Acting Director were reinstated following a petition to the Prime Minister.²⁶

Another example is the suspension in later 2012 and again in early 2013 of the Director of Ports and Harbours, allegedly for refusing to allow the yacht Phoece to leave the country in contravention of an order by the Prime Minister.²⁷ The Phoece had been fraudulently registered and was at the heart of allegations of drug and arms smuggling, which would have given cause to doubt the lawfulness of the Prime Minister's orders, although matters were never fully investigated and the truth of allegations remain unknown.²⁸ The Director of Ports and Harbours was subsequently terminated by the PSC.²⁹ Questions have been raised as to the independence of the PSC due to the appointments process which allows that Prime Minister to decide the members of the Commission.³⁰

Also detailed, in the discussion paper on the Electoral Management Body, is the transfer of the Principal Electoral Officer at a sensitive time during the lead up to the 2012 national election.

TRANSPARENCY (LAW)

To what extent are there provisions in place to ensure transparency in financial, human resource and information management of the public sector?

Job vacancies must be publically advertised, but there are a number of other significant gaps in laws relating to transparency of activities and information management within the public sector.

In terms of overall reporting on activities of the PSC and public sector agencies, the Chairman of the PSC must within 90 days after the end of each financial year furnish a report to the Minister relating to the operations of the Commission for that year. A copy of the report must be laid before the Parliament within a set time.³¹ As proceedings of Parliament are public,³² once reports are table in Parliament they should be accessible to the public. Nothing is specified in law as to the content of this report. As discussed in the section on the executive, Ministers are required to report annually to Parliament on activities under their ministries, and it may be assumed that these reports would contain information on activities by all public sector agencies that fall under their ministerial portfolio. There is, however, no requirement that these documents be tabled in Parliament, or otherwise be made public.³³ Director General's are also required to provide corporate plans to the

²⁶ 'All Vanuatu Health Care Suspension Lifted' *Radio New Zealand International* 13 December 2013 <http://www.radionz.co.nz/international/pacific-news/230819/all-vanuatu-health-care-suspensions-lifted> [accessed 4 March 2014].

²⁷ <http://vanuatudaily.wordpress.com/2013/02/03/vanuatu-daily-news-digest-3-february-2013/> [accessed 10 March 2014].

²⁸ 'The Long, troubled, Glamorous life of Superyacht Phoece' *Pacific Islands Report* 16 November 2012 <http://archives.pireport.org/archive/2012/November/11-19-ft.htm> [accessed 10 March 2014].

²⁹ Godwin Ligo, 'Vanuatu Public Service sacks Bio-security, Port Directors' *Pacific Islands Report* 28 February 2013 <http://pidp.org/archive/2013/February/02-28-11.htm> [accessed 10 March 2014].

³⁰ Comments of Advisory Group, Advisory Group Meeting 6 March 2014.

³¹ Section 10, Public Service Act [Cap 246].

³² Article 24, Constitution of the Republic of Vanuatu.

³³ Section 23, Parliament Administration Act [Cap 306].

PSC³⁴ and to provide annual reports to the PSC.³⁵ Again there is no requirement that these plans and reports be made public.

Whilst a freedom of information law is currently in development there are currently no laws about how records in the public sector are managed and made public. As discussed below, whilst government tenders are usually required to be advertised, there are a number of loopholes which allow this process to be circumvented. There is also no requirement that a publically accessible record of awarded government contracts is made available.

Although there are gaps in transparency at the activity-reporting level and in procurement, processes for appointing staff are somewhat more transparent. The Public Service Staff Manual contains detailed rules for advertising positions and the selection of staff.³⁶ Positions need to be widely advertised, with closing dates usually being 1 month after the advert first runs.³⁷ Director-General positions are only required to be advertised for two weeks, however.³⁸ All unsuccessful applicants must be informed in writing of this outcome,³⁹ although reasons why applicants were not successful do not need to be given. There are strict limits on when staff already engaged within the public service can be promoted to positions or converted from casual to permanent staff without advertisement.⁴⁰

Members of the PSC, directors-general of ministries and directors of departments are leaders under the Leadership Code Act.⁴¹ Whilst the Leadership Code Act [Cap 240] requires leaders to make annual returns to the Clerk of Parliament disclosing their assets, as discussed in the section on the legislature these returns are not required to be made public under the law. Nor is there any legal requirement for them to be routinely scrutinised.

TRANSPARENCY (PRACTICE)

To what extent are the provisions on transparency in financial, human resource and information management in the public sector effectively implemented?

In practice, other than in respect of job advertisements, gaining information on the activities of the public sector is difficult and depends on goodwill relationships and/or what has been released to the media.

There are significant gaps in information about the public sector in practice. As discussed elsewhere in this report the Leadership Code Act does not require public disclosure of annual returns of leaders and this information is not available in practice. The government website does not include any information about current tenders. A brief internet search only found tender information about projects in Vanuatu that were funded by aid donors such as NZAid or AusAID. As discussed in the

³⁴ Section 20(1)(g) Public Service Act [Cap 246].

³⁵ Section 20(1)(h) Public Service Act [Cap 246].

³⁶ Chapter 3, Public Service Staff Manual 2008.

³⁷ Chapter 3.3, Public Service Staff Manual 2008.

³⁸ Section 17B, Public Service Act as amended by Public Service (Amendment) Act 2011.

³⁹ Chapter 3.10(d)(i), Public Service Staff Manual 2008.

⁴⁰ Chapter 3.9, Public Service Staff Manual 2008.

⁴¹ Section 4, Leadership Code Act [240].

section below on public procurement, in the absence of a register of government contracts or other public information it is not possible to assess the degree to which tenders get advertised. In the absence of freedom of information laws the extent to which public sector agencies will disclose information held on citizens depends entirely on good will relationships. Whilst corporate business plans and other reports may be available on request, again this is largely dependent upon goodwill relationships.

There is, however, one transparent area, that of job advertisements for public sector positions. These are advertised in the newspaper and online. As reported in the section on the media both public and private media are also active in reporting on government activities. Whilst this is largely dependent upon the release of information by public sector agencies media does provide some (piecemeal) transparency in respect of government activities. There are also current initiatives to improve provision of information, both in relation to the PSC and in relation to public sector agencies generally, using the internet.⁴²

ACCOUNTABILITY (LAW)

To what extent are there provisions in place to ensure that public sector employees have to report and be answerable for their actions?

There are fairly comprehensive legal measures to ensure that individual public servants are accountable for their actions. There are, however, gaps in relation to laws requiring public sector agencies to be accountable.

The Public Service Act provides a comprehensive list of disciplinary offences.⁴³ Whilst corruption is not specifically listed as a disciplinary offence, behaviour such as extortion, bribery, corruption, and abuse of privileged state information would be considered improper conduct, which is a disciplinary offence. Disciplinary offences are dealt with, in the first instance, at ministerial level.⁴⁴ In the event that the matter cannot be resolved (for instance if it is serious misconduct) then the matter is referred to the PSC, who may choose to dismiss the matter refer it to a disciplinary board. In the event of serious misconduct the PSC also has the power to terminate employment without referring the matter to a disciplinary board,⁴⁵ which then make recommendations to the PSC. The board can make a number of recommendations, including to demote, suspend or terminate employment of a worker.⁴⁶ Although a recent Public Accounts Committee report recommended that the PSC take action to recover misappropriated money⁴⁷ the PSC does not have the power to apply criminal penalties, and cannot require that an offender pay back misappropriated money.⁴⁸ Instead

⁴² Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

⁴³ Section 36(1), Public Service Act [Cap 246].

⁴⁴ Chapter 6.2, Public Service Staff Manual 2008.

⁴⁵ Chapter 6.2.4(a), Public Service Staff Manual 2008.

⁴⁶ Chapter 6.2.5(k), Public Service Staff Manual 2008.

⁴⁷ The Parliament of the Republic of Vanuatu, *Public Accounts Committee Report 2011*, (Port Vila: Parliament of the Republic of Vanuatu, 2011).

⁴⁸ Interview of Secretary of the Public Service Commission Laurent Rep with Anita Jowitt, Port Vila, August 30, 2013.

it can refer matters to the police for investigation and criminal prosecution. The inability to recover money through a disciplinary action is something of a gap in the law.⁴⁹

Staff are, in law, subject to regular performance reviews.⁵⁰ Although these reviews relate to the achievement of work plans more than detection of non compliance with laws, they provide an opportunity for identifying gaps in performance which may signify corrupt behaviour. The requirement for signatures and oversight by the Ministry of Finance before public expenditure is approved⁵¹ provides an avenue by which misappropriations can be detected. Auditor General's reports are also vital legally mandated mechanisms for financial accountability. An additional measure to help with the detection of corruption is that any public servant who sees an apparent breach of any law is under an obligation to report it, either to the PSC or his Director General.⁵² Such whistleblowers are legally protected from any penalty unless it is proved beyond reasonable doubt that the report was made maliciously.⁵³ Public servants who report irregularities in relation to government contracts are also protected from being penalised.⁵⁴

There is no formal mechanism for the PSC to receive complaints from the public. Instead the Ombudsman is mandated to enquire into the conduct of any government agency or public servants,⁵⁵ and this provides a channel for public complaints. Senior public servants are also leaders for the purposes of the Leadership Code Act and can be investigated by the Ombudsman for breaches of the Leadership Code.

Although there are fairly comprehensive provisions for ensuring accountability of individual public servants, as discussed above, there are few requirements for public sector agencies to report directly to parliament. The main device for oversight and reporting is the conduct of financial and performance audits by the Auditor General.⁵⁶

ACCOUNTABILITY (PRACTICE)

To what extent do public sector employees have to report and be answerable for their actions in practice?

Disciplinary procedures for breaches of the employment relationship do occur to some degree, although other accountability mechanisms are not functioning.

Accountability of public servants via disciplinary procedures is occurring to some degree. Whilst complaints are internally generated, in 2013 more than 70 disciplinary cases were received by the PSC.⁵⁷ Only serious cases come to the PSC, with less serious cases being dealt with internally in

⁴⁹ Interview of Secretary of the Public Service Commission Laurent Rep with Anita Jowitt, Port Vila, August 30, 2013.

⁵⁰ Chapter 5.2, Public Service Staff Manual 2008.

⁵¹ Section 39, Public Finance and Economic Management Act [Cap 244].

⁵² Section 47(1), Public Service Act [Cap 246].

⁵³ Section 47(2), Public Service Act [Cap 246].

⁵⁴ Section 13C(2), Government Contracts and Tenders Act [245].

⁵⁵ Article 62, Constitution of the Republic of Vanuatu.

⁵⁶ Section 28, Expenditure Review and Audit Act [Cap 241].

⁵⁷ Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

ministries. There are no records of the number of less serious cases handled. There are no statistics on the types of behaviours resulting in disciplinary complaints. Nor are there public records on the outcomes, although some staff were dismissed.⁵⁸ It is not known how effectively whistleblower protections are operating, although there is a perception that there is a lack of moral responsibility on behalf of public servants (and others) to make reports.⁵⁹ As discussed in the section on procurement at the end of this report, there appears to be little accountability in respect of public procurement.

There have been no prosecutions of public officers for receiving bribes in the past 5 years. Nor have there been any published decisions relating to prosecution of public officers for misappropriation.

Accountability via the Ombudsman's Office is not occurring. Since the beginning of 2010 the Ombudsman's Office has issued 8 reports. None of these dealt with instances of wrongdoing by public servants. One report, in 2011, did address the actions of a Director-General in using suspension as part of disciplinary proceedings against the then Director of Lands.⁶⁰ The Ombudsman's report did not dispute any of the findings of wrongdoing by the then Director of Lands. Instead, it said found that natural justice had been breached by suspending the Director-General prior to a hearing by the PSC or a Disciplinary Board. Whilst the Public Service Staff Manual permits immediate suspension for serious misconduct, pending further processes 'The Ombudsman is of the opinion that this provision contradicts the Constitution as it does not take into account the individual's right to natural justice.'⁶¹ Given that suspension is done prior to a decision making process which usually involves the right to be heard occurring it is not clear what this opinion is based on. This report hinders, rather than helps, the PSC and Director-Generals in the use of disciplinary procedures to hold public servants accountable. There are, however, other cases where the PSC has terminated staff without a hearing, so concerns about natural justice are not entirely unfounded.⁶²

Whilst a number of public servants have been detected of financial wrongdoing (including receiving overpayments and misappropriating funds) and have faced consequences because of this, as the Auditor General is not up-to-date in conducting audits, detection is delayed, which can make recovery or the imposition of penalties difficult.

INTEGRITY MECHANISMS (LAW)

To what extent are there provisions in place to ensure the integrity of public sector employees?

There are a number of laws that set standards of integrity for public servants. These standards are fairly comprehensive.

⁵⁸ Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

⁵⁹ Interview of former Director General of Ministry of Justice Mark Bebe with Sam Railau, Port Vila, February 13, 2014.

⁶⁰ Office of the Ombudsman, *Public Report on the Unfair and Improper Suspension of the Director of the Lands Department 2011*, Port Vila: Office of the Ombudsman, 2011), 3.

⁶¹ *Ibid*, para 7.2.3.

⁶² Godwin Ligo, 'Vanuatu Public Service sacks Bio-security, Port Directors' *Pacific Islands Report* 28 February 2013 <http://pidp.org/archive/2013/February/02-28-11.htm> [accessed 10 March 2014].

Senior public servants who are defined as leaders are required to adhere to the Leadership Code Act. As discussed in the sections on the executive and legislature this contains rules on conflicts of interest.

All public servants are also subject to the provisions of the Public Service Act which provides, in part 5, a code of conduct. This code of conduct prohibits receiving fees or rewards of any kind for performing duties as a public servant.⁶³ It also requires public servants to take steps to avoid real or apparent conflicts of interest⁶⁴ and not to make improper use of information.⁶⁵ Public servants are required to make lawful use only resources and public money.⁶⁶ Misuse of government vehicles is a crime which attracts a spot fine of up to 20,000 vatu (US\$200). It is also a disciplinary offence.⁶⁷

There is nothing specific in the code about the employment of family members, although if a member of the selection panel who makes recommendations to the PSC discovers that he or she has a personal relationship with any applicant then he or she must step down from the panel.⁶⁸ There are no specific limits on being supervised by a family member. Whilst the Act prohibits public servants from engaging in other employment without permission⁶⁹ there are no post-employment restrictions. Nor are there any laws requiring bidding or contracting documents in relation to public procurement to contain any special anti-corruption clauses.

Both giving and receiving bribes to public officers is a criminal offence, which attracts a penalty of up to 10 years.⁷⁰ If a public servant is convicted of any criminal offence the PSC may dismiss him or her, following standard disciplinary procedures.⁷¹

INTEGRITY MECHANISMS (PRACTICE)

To what extent is the integrity of public sector employees ensured in practice?

Despite the presence of integrity mechanisms in law corruption is perceived to be a problem within the public sector in practice. Work is, however, underway to revise the Code of Conduct and the methods by which it is communicated to staff.

There is a public perception that corruption within the public service is a problem. The Global Corruption Barometer study uses a score scale of 1-5, where 1 means not at all corrupt and 5 means extremely corrupt. The results of the Global Corruption Barometer 2013 show that in Vanuatu the perception of corruption in public officials/civil servants was 3.9.⁷²

⁶³ Section 33(1), Public Service Act [Cap 246].

⁶⁴ Section 34(1)(i), Public Service Act [Cap 246].

⁶⁵ Section 34(1)(l), Public Service Act [Cap 246].

⁶⁶ Section 34(1)(j), Public Service Act [Cap 246].

⁶⁷ Section 29B, Public Service Act [Cap 246].

⁶⁸ Chapter 3.4(h), Public Service Staff Manual 2008.

⁶⁹ Section 33, Public Service Act [Cap 246].

⁷⁰ Section 73 Penal Code Act [Cap 135].

⁷¹ Section 29A, Public Service Act [Cap 246].

⁷² Transparency International, *Global Corruption Barometer 2013*, (Berlin, Transparency International, 2013) 38 <http://www.transparency.org/gcb2013> [accessed 10 March 2013].

Agencies under the control of the Ministry of Lands have been particularly scrutinized for corruption recently. Investigations are currently ongoing in relation to allegations that a former Minister of Lands sold state owned land at discount rates to some staff of the Department of Lands and associated friends.⁷³ The Ministry of Health has also been subject to scrutiny by a Commission of Inquiry, following a serious drug shortage in 2010. In addition to budget issues, a number of integrity related issues, including ‘the supplies system of recording[and] distribution... performance management, staff transparency, authoritarian management style, lack of reporting mechanisms, as well as understaffing, workplace attitudes and behavior and language issues’⁷⁴ which contributed to this problem. Over the last year the crisis within health appears to have been deepening, with a number of changes at the level of Director General and Director and the termination of contracts of some medical personnel. These two only serve as examples of perceived corruption within public sector agencies. It is not an overstatement to say that every week there is at least one news story published which alleges corruption or mismanagement within a public entity.

Due to concerns within the PSC as to the effectiveness of the Code of Conduct the PSC is currently working on developing it further.⁷⁵ A former secretary of the PSC commented that ‘the existing code of conduct is not exactly a code of conduct and is not effective. There should be a specific code of conduct for all public sector employees which must be very specific and clearly outlines how the public sector employees should behave and act.’⁷⁶

There are gaps in training on ethical behavior. Whilst the Secretary to the PSC reported various training of staff, none of this was related to the Code of Conduct specifically.⁷⁷ There is a haphazard approach to the communication of public sector core values, with this work being left to ministerial level. However, core values (the code of conduct) are included in appointment letters, and there are plans to include them in orientation packages for news staff. There are also plans to develop a website for the PSC which employees can access and for this website to include a section on core values.⁷⁸

PUBLIC EDUCATION

To what extent does the public sector inform and educate the public on its role in fighting corruption?

Whilst there are piecemeal efforts by some public sector agencies to educate the public about corruption at the moment there are no widespread public sector activities in this area.

⁷³ ‘Vanuatu leaders defying the rules amid ongoing corrupt land deals’ *Radio New Zealand International* 15 September 2012 <http://www.radionz.co.nz/international/pacific-news/207253/vanuatu-leaders-defying-the-rules-amid-ongoing-corrupt-land-deals> [accessed 10 March 2014]. ‘Minister asks staff to surrender leases over state land’ *Vanuatu Daily Post Online* 19 April 2013 <http://www.dailypost.vu/content/minister-asks-staff-surrender-leases-over-state-land> [accessed 10 March 2014].

⁷⁴ <http://www.dailypost.vu/content/report-medical-drugs-shortage-completed> [accessed 13 March 2014].

⁷⁵ Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

⁷⁶ Interview of former Director General of Ministry of Justice Mark Bebe with Sam Railau, Port Vila, February 13, 2014.

⁷⁷ Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

⁷⁸ *Ibid.*

The PSC does not have an education plan to educate the public in order to combat corruption. Nor does it make public information available about how to make complaints about corruption within the public service. As discussed in the section below it does, however, have a plan to increase cooperation with communities. If this plan is implemented it will involve elements of public education.

Some public sector agencies do conduct some public education. The Department of Customs and Inland Revenue runs a regular newspaper column which informs the public of activities and educates the public about laws. Whilst this column does not have a specific anti-corruption focus, it has been used to highlight corruption issues within public revenue gathering, such as the recent prosecution of a person for attempting to bribe a public officer.

The Electoral Office is another public sector agency that has, in the past conducted public education activities in respect of correct behaviour during voting. As discussed in the section on the Electoral Management Body resource issues currently limit the extent to which the Electoral Office fulfils this role, however.

COOPERATE WITH PUBLIC INSTITUTIONS, CSO AND PRIVATE AGENCIES IN PREVENTING/ ADDRESSING CORRUPTION

To what extent does the public sector work with public watchdog agencies, business and civil society on anti-corruption initiatives?

There has been little cooperation of public sector agencies with other agencies on anti-corruption activities although there are current plans to build cooperation in this area.

Whilst co-operation between the PSC and others has not been done recent years it is incorporated in the corporate plan for 2014 – 2016. This plan includes working with communities, the ombudsman and others on anti-corruption initiatives.⁷⁹ Whilst the PSC does follow up on Ombudsman's Reports, there has been little communication about follow up actions taken in the past. For instance, as noted in the section on the Ombudsman in 2011 the Annual Report of the Office of the Ombudsman noted that no action had occurred on one of the public reports issued that year.⁸⁰ However, the PSC had in fact taken action in respect of report detailing improper suspension of the Director of the Lands Department.⁸¹

One public sector agency is notable for taking a more cooperative approach, however. As noted in the section above, the Electoral Office is a public sector agency and has, in the past worked with NGOs on public awareness around corruption. It has also allowed NGOs and external agents to act as election observers, as discussed in the section on the Electoral Management Body.

⁷⁹ Interview of Secretary of the Public Service Commission Laurent Rep with Sam Railau, Port Vila, February 13, 2014.

⁸⁰ Office of the Ombudsman, *Annual Report January – December 2011*, (Port Vila: Office of the Ombudsman, 2011), 7.

⁸¹ Interview of Secretary of the Public Service Commission Laurent Rep with Anita Jowitt, Port Vila, August 30, 2013.

REDUCE CORRUPTION RISKS BY SAFEGUARDING INTEGRITY IN PUBLIC PROCUREMENT

To what extent is there an effective framework in place to safeguard integrity in public procurement procedures, including meaningful sanctions for improper conduct by both suppliers and public officials, and review and complaint mechanisms?

Whilst there are some laws in the area of procurement, these contain significant gaps and weaknesses. Further, in the absence of public registers and statistics it is not possible to assess the extent to which good practice in public procurement is occurring.

The Government Contracts and Tenders Act [Cap 245] (GCTA) governs contracts with a value of over 5,000,000 vatu (US\$50,000). Contracts for less than this amount are governed by the Financial Regulations made pursuant to the Public Finance and Economic Management Act [Cap 244]. The government contracts process under the GCTA is controlled by the Tenders Board, a body made up of a chairperson, the Director-General of the ministry which is procuring the goods or services, or his representative; the Director-General of Finance, or his representative; a representative of the ministry responsible for procuring the goods or service who has detailed knowledge of the requirements of the ministry in relation to the contract to be performed; and, where the Government Contract is of a value of VT 10,000,000 or more, a person with legal qualifications or experience appointed by the Minister after consultation with the Chairperson of the Board.⁸² The Chair is 'appointed by the Prime Minister, after consultation with the leaders of every political party represented in Parliament and a recognized representative of the private business sector'⁸³ Members of the Tenders Board cannot participate in the tendering process for contracts for which they have a conflict of interest,⁸⁴ which helps to protect independence. Although the Tenders Board 'is not to be subject to interference or influence from any person',⁸⁵ as discussed in above, Director-Generals can be subject to external interference by their Ministers, so the composition of Tenders Board means is not entirely independent of potential government interference. Nor is the Tenders Board entirely independent of the particular procuring body for any contract.

The GCTA requires that any minister entering a government contract must 'use a competitive and transparent process when deciding who to award the contract to including where applicable, a tender process as may be prescribed by this or any other Act or regulation.'⁸⁶ Open bidding is usually required under the Tenders Regulations,⁸⁷ with tenders being advertised in the press and on the radio.⁸⁸ International tenders are required if in the opinion of the Tenders Board,⁸⁹ 'when it is unlikely that goods or services being purchased can be supplied at the best price or quality from within Vanuatu'.⁹⁰ Any person inquiring about a tender must be supplied with key information,⁹¹ although there is no requirement that clarifications and amendments during the bidding process to

⁸² Section 10(1). Government Contracts and Tenders Act [245].

⁸³ Section 11(1). Government Contracts and Tenders Act [245].

⁸⁴ Section 10(5). Government Contracts and Tenders Act [245].

⁸⁵ Section 10(8), Government Contracts and Tenders Act [245].

⁸⁶ Section 3(3)(f), Government Contracts and Tenders Act [245].

⁸⁷ Regulation 3(2), Tenders Regulations 1999.

⁸⁸ Regulation 4(1), Tenders Regulations 1999.

⁸⁹ Regulation 3(7), Tenders Regulations 1999.

⁹⁰ Regulation 3(6), Tenders Regulations 1999.

⁹¹ Regulation 4(3), Tenders Regulations 1999.

be shared among all bidders. The law does not provide a standard form for tenders. Nor does it require companies to have any code of conduct or any other anti-corruption policies before it can submit a tender.

The Tenders Regulations 1999, made pursuant to the GCTA, provide exceptions to an open process. First, 'the Tenders Board may approve another tender process for projects where a straight open and competitive tender process may not provide the best result in the opinion of the Tenders Board.'⁹² Whilst the Tenders Regulations provide alternative processes⁹³ it is not mandatory to follow any of the alternative processes. If the Tenders Board has decided that an open process is not appropriate then the only restriction on the process to be used is that it 'must follow any guidelines or instructions issued by the Director General of the Ministry of Finance and Economic Management.'⁹⁴ Second, the Tenders Regulations provide that 'in the case of emergency expenditure, the Tenders Board may choose to recommend a Government Contract to the Council of Ministers without following the procedure set out in regulations 4 to 8. This may only be done when the urgency of the expenditure does not allow sufficient time for the full tender process to be carried out.'⁹⁵ This second exception means that the entire tender process, from advertising to evaluation, can be avoided in emergency situations.

In respect of evaluation the usual process is that before the Tenders Board makes a decision, all correctly submitted tenders are given to 'the appropriate technical officer'⁹⁶ to be evaluated. There are no further laws for determining who the appropriate technical officer is or the qualifications he or she must hold. The Tenders Regulations provide a list of example evaluation criteria,⁹⁷ although it is at the discretion of the technical officer as to what evaluation criteria are actually used.⁹⁸ The technical officer provides a report back to the Board. This report requires, amongst other things, a statement of the criteria used, an evaluation of each tender against the criteria, and a statement of the technical officer's preferred tender, with reasons why this is preferred.⁹⁹ The Tenders Board can then either ask for more information from the technical officer or make a recommendation to the Council of Ministers.¹⁰⁰ If the recommendation is declined then the Council of Ministers must give reasons,¹⁰¹ with the matter then being referred back to the Tenders Board.¹⁰²

Neither the GCTA nor the Tenders Regulations require procurement award decisions to be made public. They also do not require the maintenance of registers and statistics on contracts. There is no procedure for members of the public, or unsuccessful bidders, to request a review of procurement decisions although the Public Accounts Committee does have the records, minutes and decisions of the Tenders Board.¹⁰³ The GCTA also provides some protections for whistleblowers. Suspected breaches of the GCTA are to be reported to senior personnel within the Ministry of Finance, who

⁹² Regulation 3(3), Tenders Regulations 1999.

⁹³ Regulation 3(4), Tenders Regulations 1999.

⁹⁴ Regulation 3(5), Tenders Regulations 1999.

⁹⁵ Regulation 9(1), Tenders Regulations 1999.

⁹⁶ Regulation 7, Tenders Regulations 1999.

⁹⁷ Regulation 7(4), Tenders Regulations 1999.

⁹⁸ Regulation 7(5), Tenders Regulations 1999.

⁹⁹ Regulation 7(6), Tenders Regulations 1999.

¹⁰⁰ Regulation 8, Tenders Regulations 1999.

¹⁰¹ Section 12(4), Government Contracts and Tenders Act [245].

¹⁰² Section 12(1), Government Contracts and Tenders Act [245].

¹⁰³ Section 18, Government Contracts and Tenders Act [245].

must then report the matter to the Director General.¹⁰⁴ The Director General may then report the matter to the Auditor General, the Public Prosecutor or the Commissioner of Police, although he is under no obligation to do so.¹⁰⁵ Any whistleblower who is a public servant must not be victimised or discriminated against.¹⁰⁶ There are no similar protections of whistleblowers who are not public servants, however.

Breaches of the GCTA are criminal offences.¹⁰⁷ The GCTA also makes it clear that any leader who is convicted of an offence under the GCTA who has also breached the Leadership Code Act is also subject to prosecution under that Act.¹⁰⁸ There are no administrative penalties within the GCTA (such as losing one's job or being prohibited from holding certain positions) that attach to successful prosecution under the GCTA.

The GCTA only deals with the procurement process. There is no special process for monitoring government contracts. Instead payments must follow the procedures in the Public Finance and Economic Management Act and the associated Financial Regulations. The main monitoring device is audits by the Auditor General, although in the past breaches of the GCTA has also been the subject of Ombudsman's Reports.

The rules for bidding on contracts with a value of less than 5 million vatu (US\$50,000) are quite lax. 'The Financial Regulations do not currently require an authorised officer to obtain quotations for expenditure under VT 100,000. Furthermore, quotations are only required 'wherever possible' for procurement between VT 100,000 and VT 5 million. Allowing public procurement without ensuring that multiple quotations have been received increase the chance of corrupt activities and inefficient use of public funds.'¹⁰⁹ The GCTA does, however, prohibit contract splitting in order to avoid the tendering process.¹¹⁰

In the absence of publication of a public tenders register it is difficult to assess the degree to which the law (or good practice, in the event that there are gaps in the law) is being followed. The Transparency international Vanuatu Advocacy and Legal Advice Centre 'has received a number of complains concerning contracts entered into by the Vanuatu Government which highlight serious deficiencies in the current public procurement laws.'¹¹¹ In 2006, the European Union conducted a Public Expenditure Financial Assessment and allocated a score of D to procurement controls.¹¹² An assessment of public procurement in 2010 awarded Vanuatu a score of 0 on many indicators. Often the absence of statistics or data often made it impossible to score performance.¹¹³

¹⁰⁴ Section 13C(1) & (3), Government Contracts and Tenders Act [245].

¹⁰⁵ Section 13C(4), Government Contracts and Tenders Act [245].

¹⁰⁶ Section 13C(2), Government Contracts and Tenders Act [245].

¹⁰⁷ Sections 14 and 15, Government Contracts and Tenders Act [245].

¹⁰⁸ Section 16, Government Contracts and Tenders Act [245].

¹⁰⁹ Transparency International Vanuatu Advocacy and Legal Advice Centre, , *Reference to the Vanuatu Law Reform Commission on Public Procurement* (Vanuatu, Transparency International Vanuatu, 2013).

¹¹⁰ Section 13A, Government Contracts and Tenders Act [245].

¹¹¹ Transparency International Vanuatu Advocacy and Legal Advice Centre, 2013.

¹¹² Comments of Francis Bryard on draft Transparency International Vanuatu Advocacy and Legal Advice Centre, *Reference to the Vanuatu Law Reform Commission on Public Procurement*.

¹¹³ Transparency International Vanuatu Advocacy and Legal Advice Centre, 2013.