



# NATIONAL INTEGRITY SYSTEM STUDY

## JUDICIARY

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### **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 February 2014. Comments can be returned to Transparency Vanuatu in writing or in person (contact details above). 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**

Vanuatu’s judicial system is generally respected as being impartial, independent and fair, even though there are few legal mechanisms to ensure the integrity of judges. The judicial system is active in overseeing the actions of the executive. It is less active in addressing corruption cases, although this is due, in large part, to cases not coming before the court.

There is considerable concern about delays within the court system. These delays do not only affect corruption cases and can result in parties in a wide range of cases being unable to gain justice via court orders when their rights have been violated. Whilst a range of actors contribute to delays, lack of resources and lack of accountability are specific factors affecting judicial and court staff. Lack of transparency can also affect monitoring of the progress of cases.

### **RECOMMENDATIONS**

1. The issue of delays, and associated issues of lack of resources, lack of accountability and lack of transparency has been addressed in Transparency Vanuatu, ‘Vanuatu Judicial Monitoring System Project: Backlog of Cases Report’ August 2013. This report made a number of recommendations to strengthen the integrity of the courts. The extent to which these recommendations are implemented should be monitored. Some recommendations in this report were directed to lawyers, prosecutors and other court users. In summary, key recommendations relating to the judiciary include:

- a. In order to deal with issues of delays development and implementation of stronger systems of active case management (ACM) is the most pressing priority. Progress on the development and implementation of ACM systems must remain transparent and must provide opportunities for the participation of all stakeholders in the development and implementation of ACM systems.
- b. In order to increase accountability of the judiciary further consultation should be undertaken on whether it is desirable to have the judiciary fall within the scope of the Office of the Ombudsman, or whether an alternate complaints mechanism should be developed and implemented. Further, courts should consider instituting a “customer service” feedback mechanism.
- c. In order to increase transparency of corruption cases it is recommended that consideration be given to issuing and publishing written judgments in all cases where a leader, as defined by the Leadership Code Act, is prosecuted. even if cases are dismissed. This will ensure that there is a publically accessible document showing actions that were taken.
- d. In order to increase transparency of the work of the courts more generally, annual reports containing a range of statistics should be made publically available in a timely manner. Further, all judgments, including Magistrates Court judgments should be published on PaCLII and judgments should include information on the date(s) of hearing, the date of providing an oral decision, and the date of issuing the written judgment.

2. In order to strengthen integrity mechanisms:

- a. A Code of Conduct, based on the Bangalore Principles of Judicial Conduct, should be introduced.
- b. A similar Code of Conduct for court staff should also be considered.
- c. Registers for gifts and hospitality should be introduced.
- d. Judicial and court officers should be required to provide annual returns in accordance with the Leadership Code Act.

## **STRUCTURE AND ORGANISATION**

Vanuatu maintains a common law judicial system. The court of first instance, with unlimited jurisdiction is the Supreme Court. There are two levels of subordinate courts – the Magistrates Court and the Island Courts. The highest court is the Court of Appeal. The main court registry is located in Port Vila. Additional registries are located in Luganville on Espiritu Santo, Lakatoro on Malekula, Isangel on Tanna, Ambore on Ambae, Loltong on Pentecost, and Sola on Vanua Lava in the Banks Group of Islands. There are currently 6 Supreme Court judges, with one based in Luganville and the rest based in Vila. In 2011 there were 9 Magistrates. One Magistrate is located in each of Luganville, Lakatoro and Isangel, with the others located in Port Vila. Other locations, as well as housing island courts, are served by judges and magistrates going on circuit. The Court of Appeal is comprised of a panel of judges. Justices of the Supreme Court sit on the Court of Appeal. In addition judges from overseas, usually New Zealand or Australia, are appointed to the Court of Appeal.

The Chief Justice has overall responsibility for the administration of the Supreme Court. Similarly the Chief Magistrate has specific responsibilities in respect of administration of the Magistrates Courts. They are assisted in these functions by the Chief Registrar. The Judicial Services and Courts Act [Cap

270] (JSC Act) also requires the appointment of a Master.<sup>1</sup> Whilst the position of Master is that of a court officer, rather than a judicial officer, the Master can perform various administration related judicial functions, such as applications for direction on procedure and determination of taxation of costs.

Island Courts have very limited jurisdiction and are presided over by lay justices who are knowledgeable in custom. As they do not have any jurisdiction over corruption related offences they are not considered in detail in this section, but are discussed further in the section on customary authorities.

## **RESOURCES (LAW)**

*To what extent are there laws seeking to ensure appropriate salaries and working conditions of the judiciary?*

*Whilst there are some laws requiring that the government allocate sufficient resources to the courts, there is no requirement that salaries must be adjusted to allow for inflation.*

The JSC Act contains schedules stating the salaries, allowances and benefits for judicial and court staff. These are set by the Judicial Services Commission. The JSC Act provides that the Government Remuneration Tribunal may review salaries, allowance and benefits every 2 years and make recommendations to the Judicial Services Commission. The Judicial Services Commission can then alter the schedules, although it is not permitted to alter them to the detriment any judicial officer.<sup>2</sup> It is not, however, mandatory that reviews occur. Nor is it mandatory for the Judicial Services Commission to adjust salaries to allow for inflation.

There is no requirement that the judiciary be provided a minimum percentage of the general budget. Instead the JSC Act provides that 'The Government must ensure that there is a sufficient budget allocated for the operations of the Judicial Service and the Vanuatu Courts to enable the Judicial Service to perform its functions and each of the Courts to exercise its jurisdiction and powers as provided for under the Constitution, this Act and any other law'.<sup>3</sup> The budget procedure is provided by the Public Finance and Economic Management Act [Cap 244].<sup>4</sup> As part of this procedure budget submissions are prepared and advanced to the Ministers' Budget Committee. 'The Chief Justice has direct responsibility of the financial management of the Courts. His Honour is assisted by the Chief Registrar and the Accountant.'<sup>5</sup> There are no specified statutory limits on how the budget is to be apportioned.

## **RESOURCES (PRACTICE)**

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<sup>1</sup> Section 42 JSC Act.

<sup>2</sup> Section 67 JSC Act.

<sup>3</sup> Section 49(1) JSC Act.

<sup>4</sup> Section 49(3) JSC Act.

<sup>5</sup> Judiciary of the Republic of Vanuatu, 'Annual Report 2009'.

*To what extent does the judiciary have adequate levels of financial resources, staffing, and infrastructure to operate effectively in practice?*

*There are significant resource gaps in respect of the number of judicial officers, the number of support staff and the adequacy of court infrastructure, including buildings and IT systems.*

The court system in Vanuatu faces significant resource challenges. A 2012 report prepared by the Pacific Judicial Development Programme (PJDP) notes that 'Every court visited suffered in some significant way from a lack of funding, problems with accommodation, and lack of tools and equipment.'<sup>6</sup> Most critical, maybe, is the fact that in 2007 the Supreme Court building in Port Vila burned down. The Supreme Court and Court of Appeal are still housed in temporary premises. This creates challenges in operations and efficiency. For instance, judges' chambers are too small to comfortably hold records of files assigned to that judge.<sup>7</sup> The court rooms and chambers are in separate locations, so moving from chambers to court takes time.<sup>8</sup> In 2011 the court building in Luganville was burned down and was also relocated to temporary accommodation.<sup>9</sup>

Whilst work is currently underway to computerise the Court registry the Registry is currently maintained via uncoordinated and unstandardised individual systems, rather than by a centralised computerised system.<sup>10</sup> The operation and reform of the registry is also hindered by the fact that 'the portfolio of the Chief Registrar is simply too large, making it difficult to cope with every day operations and to co-ordinate reform in a methodical way.'<sup>11</sup> There is a need for more staff in both the Supreme and Magistrates Court Registries.<sup>12</sup>

Once cases are assigned to an individual judge he or she assumes administrative responsibility for files. This, however, can create an onerous administrative burden on judges, which in turn reduces the time that judges have to spend on hearing cases and issuing decisions.<sup>13</sup>

The position of Master exists, but the Chief Justice has faced difficulties in finding a person to fill this position.<sup>14</sup> No one has occupied this position since 2010.<sup>15</sup>

The Court has also faced difficulties in recruiting Supreme Court judges. In his 2013 Opening Speech of the Supreme Court that Chief Justice observed that 'Judgeship positions have been advertised in the not-too-distant past, but no interest of note was expressed from the members of the local Bar. It

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<sup>6</sup> Jennifer Ehmann, 'PJDP Phase 2: JUDICIAL ADMINISTRATION DIAGNOSTIC PROJECT Regional Registry Systems and Processes Report' (February 2012) p 3.

<sup>7</sup> Comments of the Chief Justice at the Workshop for Judges and Lawyers under the Vanuatu Judicial Assistance Programme 28 November 2013.

<sup>8</sup> Ibid.

<sup>9</sup> Judiciary of the Republic of Vanuatu, 'Annual Report 2011'.

<sup>10</sup> Jennifer Ehmann, 'PJDP Phase 2: JUDICIAL ADMINISTRATION DIAGNOSTIC PROJECT Regional Registry Systems and Processes Report' (February 2012) p 3.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid, also comments of Mr Justice Speer, Madam Justice Sey, Mr Justice Fatiaki at the Workshop for Judges and Lawyers under the Vanuatu Judicial Assistance Programme 28 November 2013.

<sup>14</sup> Comments of Chief Justice at the Workshop for Judges and Lawyers under the Vanuatu Judicial Assistance Programme 28 November 2013.

<sup>15</sup> Ibid and of the Republic of Vanuatu, 'Annual Report 2010'.

has become clear that the position is not attractive. The need of the Judiciary is for the Government of Vanuatu to review the terms and conditions of the office of a Judge to make it attractive.<sup>16</sup> Judicial salaries and conditions have not been reviewed since the JCS Act was passed in 2000.<sup>17</sup>

Currently the development of the courts is being supported by the PJDP. This programme is particularly focussing on improving case management. In addition to strengthening case management infrastructure by helping to develop a centralised computer system, training for judges and court staff is occurring. In November 2013 a series of workshops, for judges, lawyers and then judges and lawyer together was held to discuss court management issues.

## **INDEPENDENCE (LAW)**

*To what extent is the judiciary independent by law?*

*There are comprehensive laws seeking to ensure the independence of the judiciary.*

The judicial system is provided for in Chapter 8 of the Constitution. As well as establishing the superior court structure, including the Supreme Court<sup>18</sup> and Court of Appeal<sup>19</sup> the Constitution provides that village or island courts with jurisdiction over customary matters must be established.<sup>20</sup> Magistrates Courts are not provided for in the Constitution but are established under the JSC Act.<sup>21</sup>

The Chief Justice is appointed by the President after consultation with the Prime Minister and Leader of the Opposition.<sup>22</sup> Appointment of other judges and magistrates is done by the President acting on the advice of the Judicial Services Commission.<sup>23</sup> The Judicial Service Commission is a constitutionally established body. Its membership consists of the Minister responsible for Justice as Chairman, the Chief Justice, the Chairman of the Public Service Commission, and a representative of the National Council of Chiefs appointed by the Council.<sup>24</sup> There is no scope for public involvement or the involvement of the legal profession in the process of appointing judges. However, the judiciary does have involvement through the Chief Justice's membership of the JSC. Requirements for appointment as a judge in the Supreme Court, including the need for judges to hold appropriate academic qualifications, sufficient experience and be of good character or standing are provided in the JSC Act.<sup>25</sup> Magistrates must also be appointed on merit but the requirements for appointment only include holding a law degree or having suitable legal training or experience.<sup>26</sup>

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<sup>16</sup> Chief Justice's Speech at the Opening of the Supreme Court 2013.

<sup>17</sup> Salaries and conditions are found in the schedule to the JSC Act. No amendments to this schedule are listed in Vanuatu's legislation and subsidiary legislation indexes.

<sup>18</sup> Article 49 Constitution of the Republic of Vanuatu.

<sup>19</sup> Article 50 Constitution of the Republic of Vanuatu.

<sup>20</sup> Article 52 Constitution of the Republic of Vanuatu.

<sup>21</sup> Part 3, JSC Act.

<sup>22</sup> Article 49(3) Constitution of the Republic of Vanuatu.

<sup>23</sup> Article 47(2) Constitution of the Republic of Vanuatu.

<sup>24</sup> Article 48(1) Constitution of the Republic of Vanuatu.

<sup>25</sup> Section 33 JSC Act.

<sup>26</sup> Section 18 JSC Act.

Judges and magistrates are appointed until they reach the age of retirement, although acting appointments can also be made for a fixed time.<sup>27</sup> Judges can only be removed if they are convicted and sentenced for a criminal offence, if they have been found by the JSC to have committed an act or acts of, gross misconduct, or on the grounds of incapacity or professional incompetence.<sup>28</sup> The Constitution also prohibits the transfer of judges unless done by the President acting on the advice of the JSC.<sup>29</sup>

Judges and magistrates cannot be sued for any action done in good faith in exercise of their judicial duties.<sup>30</sup> Further, any attempt to unduly influence a judicial officer is a criminal offence that carries a maximum sentence of a fine of 500,000 vatu and/or imprisonment for 1 year.<sup>31</sup>

## INDEPENDENCE (PRACTICE)

*To what extent does the judiciary operate without interference from the government or other actors?*

*The general consensus is that the judiciary is independent although there has been one recent example of a judge being threatened and there is some concern that conflicts of interest may allow external actors to influence decisions.*

According to a recent review by the PJDP in Vanuatu ‘the judiciary and institution [of the courts] is regarded highly as fair, independent and of integrity.’<sup>32</sup> Appointed judges are appropriately qualified. There are no recent examples of judges being removed from their positions, transferred or demoted. Nor have there been any changes to the foundations or legal jurisdiction of the Supreme Court.

Although there is no official interference in the operation of the judiciary attempts at unofficial interference can occur. In April 2010 Justice Nevin Dawson, a New Zealand judge who was, at the time, serving a 2 year appointment on the Vanuatu bench received death threats after releasing a coroner’s report that was critical of Police and Vanuatu Military Force Officers.<sup>33</sup> Security measures were increased and he completed his term in Vanuatu.

There have been no prosecutions for attempts to unduly influence judges. Whether this means that undue influence does not occur, or that it does not get reported is unclear. A recent Transparency Vanuatu report on the operation of the judiciary observes that whilst ‘there were no reports of judges, court staff or prosecutors accepting bribes in order to delay cases [...], there were, however, some instances where *conflicts of interest* appeared to affect actions of police, prosecutors and judges.’<sup>34</sup> This matter is further discussed in the section below on integrity mechanisms.

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<sup>27</sup> Magistrates: section 23 JSC Act; Judges section 36 JSC Act.

<sup>28</sup> Article 47(3) Constitution of the Republic of Vanuatu.

<sup>29</sup> Article 47(4) Constitution of the Republic of Vanuatu.

<sup>30</sup> Section 55 JSC Act.

<sup>31</sup> Section 56 JSC Act.

<sup>32</sup> Jennifer Ehmann, ‘PJDP Phase 2: JUDICIAL ADMINISTRATION DIAGNOSTIC PROJECT Regional Registry Systems and Processes Report’ (February 2012) p 3.

<sup>33</sup> Eileen Gould, ‘New Zealand Judge, Family Receive Death Threats in Vanuatu’ (6 April 2010) <http://impunitywatch.com/new-zealand-judge-family-receive-death-threats-in-vanuatu/>.

<sup>34</sup> Transparency Vanuatu, ‘Vanuatu Judicial Monitoring System Project: Backlog of Cases Report’ August 2013, p 7.

## TRANSPARENCY (LAW)

*To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the judiciary?*

*Whilst court hearings are usually open and the law requires annual reports to be made publically available there is little public transparency in respect of appointment and removal processes of judicial officers.*

General civil hearings occur in open court, unless the court orders otherwise.<sup>35</sup> Election petitions must be heard in open court.<sup>36</sup> Constitutional applications are to be held in open court, although the public may be 'excluded from a specific part of the hearing in exceptional circumstances if it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.'<sup>37</sup> Criminal cases are to be held in open court<sup>38</sup> although a 'judicial officer may for reasons of decency, security of the State or where otherwise authorised by law'<sup>39</sup> restrict access to the court room. Judgments must be given to the parties and made available to the public.<sup>40</sup> They are also to be written down as soon as possible.<sup>41</sup>

The judiciary is required to provide the Minister responsible for Justice with an annual report within three months of the end of each financial year that contains information on staffing, court statistics, and active committees.<sup>42</sup> Whilst this report is required to provide 'details of all the positions in the Judicial Service, indicating which were filled and for which parts of the year',<sup>43</sup> there is no express requirement that reasons for moving or removing judges be provided. There is also no requirement that this report be released to the public. The Judicial Services Commission is also required to prepare an annual report, which addresses, more broadly, issues related to 'independence and efficiency of the administration of justice... any action needed to be taken to strengthen the operation of law... and reforms that may be needed to any laws.'<sup>44</sup> This report must be produced within three months of the end of the year, and must be tabled by the Minister of Justice in Parliament.<sup>45</sup> Again there is no requirement that these reports be made available to the public. As discussed in the section on integrity mechanisms below, judges are not required to make asset declarations to the Judicial Services Commission either during the appointment process or at any other time. Nor are judges required to make public asset declarations.

## TRANSPARENCY (PRACTICE)

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<sup>35</sup> Civil Procedure Rules 2002, 12.2.

<sup>36</sup> Election Petition Rules 2003 2.11(1), 3.9(1); National Council of Chiefs Election Petitions Rules 2003 2.11(1), 3.9(1).

<sup>37</sup> Constitutional Applications Rules 2003 2.10(1) & (2); 3.8(1)&(2).

<sup>38</sup> Section 26(1) Criminal Procedure Code [Cap 136].

<sup>39</sup> Section 26(2) Criminal Procedure Code [Cap 136].

<sup>40</sup> Civil Procedure Rules 2002, 13.1(4)

<sup>41</sup> Rule 13.2(2) Civil Procedure Rules 2002; Section 95(1) Criminal Procedure Code [Cap 136].

<sup>42</sup> Section 51 JSC Act.

<sup>43</sup> Section 51(2)(a) JSC Act.

<sup>44</sup> Section 4(1) JSC Act.

<sup>45</sup> Section 4(2) JSC Act.

*To what extent does the public have access to judicial information and activities in practice?*

*Whilst there is unofficial reporting of superior court judgments there is little reporting of subordinate court judgments. Annual reports of the judicial services and courts have recently been made available online but reports of the Judicial Services Commission are not available.*

Court proceedings are generally open to the public. Whilst official law reports are not regularly published, judgements are published on the Pacific Islands Legal Information Institute's (PacLII) website. PacLII publishes laws, cases and legal material from around the region and is maintained by the University of the South Pacific. This is a somewhat ad hoc system which relies on the courts forwarding judgements to be published. Whilst Supreme Court and Court of Appeal judgements are usually published, very few Magistrates Court decisions are available. The Vanuatu judiciary does not maintain its own website.

Until November 2013 the only annual report readily available to the public was the 2009 report. The Transparency Vanuatu Backlog of Cases Report recommended that all annual reports be published on PacLII.<sup>46</sup> By early December 2013 annual reports for 2010 and 2011 had been published on PacLII.<sup>47</sup> Reports from the Judicial Services Commission cannot be found in the Parliament library. Nor are they recorded in parliamentary minutes as having been tabled in parliament.

Whilst the annual reports do contain court statistics, a difficulty in producing accurate statistics has been the lack of a centralised database. The PJDP has been assisting the courts in this area. More detailed statistics are being developed but as of November 2013 have not yet been published as work is ongoing to ensure their accuracy.<sup>48</sup>

## **ACCOUNTABILITY (LAW)**

*To what extent are there provisions in place to ensure that the judiciary has to report and be answerable for its actions?*

*Judges need to account for their decisions in individual cases. Whilst the Judicial Services Commission has the power to recommend the removal of judges it does not receive complaints from the public and there is no other independent body to receive public complaints about the judiciary.*

Judges are required to give reasons for their decisions. In respect of criminal cases, the Criminal Procedure Code provides that judgments 'shall contain the point or points for determination, the decision thereon and the reasons for the decision'.<sup>49</sup> The Civil Procedure Code similarly requires judgments to summarise findings of facts, law and give reasons for their decision.<sup>50</sup> There are no specific consequences for judges if judgments fail to give reasons for decisions. However, the appeal process is robust and parties to cases would be able to appeal cases to higher courts if reasons were not given. Whilst there is no appeal from the Court of Appeal, the fact that appeals are heard by three judges provides an internal check on the issuing of decisions without reason.

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<sup>46</sup> Transparency Vanuatu, 'Vanuatu Judicial Monitoring System Project: Backlog of Cases Report' August 2013, p 47.

<sup>47</sup> PACLII, 'Vanuatu Judicial Services & Courts Annual Reports' <http://www.paclii.org/vu/court-annual-reports/main.htm>.

<sup>48</sup> Conversation of the author with Jennifer Ehmann, 28 November 2013.

<sup>49</sup> Section 95(1) Criminal Procedure Code [Cap 136].

<sup>50</sup> Rule 13.1(1) Civil Procedure Rules 2002.



There is no procedure to allow the public to make complaints about the judiciary. The Ombudsman does not have the jurisdiction to enquire into the actions of judges. Whilst the JSC Act establishes a Court Personnel Disciplinary Board<sup>51</sup> this Board only has jurisdiction over Registry and other support staff within the court.<sup>52</sup> Although there is no public avenue for laying complaints the Judicial Service Commission can recommend that the President suspends or removes Magistrates for serious misconduct.<sup>53</sup> Suspension is of limited consequence as a Magistrate must receive full pay whilst on suspension.<sup>54</sup> Judges of the Supreme Court can be removed by the President, on the advice of the Judicial Services Commission on the grounds of gross misconduct, incapacity or professional incompetence.<sup>55</sup> There is no provision allowing for suspension of Supreme Court judges.

## **ACCOUNTABILITY (PRACTICE)**

*To what extent do members of the judiciary have to report and be answerable for their actions in practice?*

*Whilst Superior Court judges, when they issue written decisions, do provide reasons, the Judicial Service Commission is not seen to hold members of the judiciary to account for failures to issue decisions.*

A recent Transparency Vanuatu report which was developed in response to concerns regarding delays within the judicial system noted a number of deficiencies in the operation of judicial services. Whilst a number of parties can cause delays during the court process one particular issue identified was delays by judges in issuing judgments after trial has completed.<sup>56</sup> This is not a new problem and has been openly discussed within the Ministry of Justice since 2011.<sup>57</sup> Judges are not, however, being held to account by the Judicial Services Commission for such delays. This report also observed that the lack of a public complaints mechanism in respect of the judiciary is a significant problem and recommended that 'further consultation is undertaken on whether it is desirable to have the judiciary fall within the scope of the Office of the Ombudsman, or whether an alternate complaints mechanism should be developed and implemented.'<sup>58</sup>

No particular problems were identified in respect of reasons being given for decisions and Supreme Court and Court of Appeal level. However, as Magistrates Court judgements are not readily available<sup>59</sup> it is not possible to assess whether Magistrates are providing reasons for their decisions.

## **INTEGRITY MECHANISMS (LAW)**

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<sup>51</sup>Section 5 9 JSC Act.

<sup>52</sup> Section 1 defines court personnel JSC Act.

<sup>53</sup> Section 23(3) & 23(4)(a) JSC Act.

<sup>54</sup> Section 23(5) JSC Act.

<sup>55</sup> Article 47 Constitution of the Republic of Vanuatu.

<sup>56</sup> Transparency Vanuatu, 'Vanuatu Judicial Monitoring System Project: Backlog of Cases Report' August 2013, p 12.

<sup>57</sup> Ibid, p 9.

<sup>58</sup> Ibid, p 46.

<sup>59</sup> Ibid, p 47.

*To what extent are there mechanisms in place to ensure the integrity of members of the judiciary?*

*There are no legal provisions in place to ensure the integrity of members of the judiciary.*

Judges are not leaders for the purposes of the Leadership Code Act [Cap 240]. As such they are not required to make asset disclosures or annual returns under this Act. Nor are they required to make asset disclosures to the Judicial Service Commission. There are no regulations preventing judges from receiving reimbursements, compensation or honoraria in respect of privately sponsored trips, or regulations governing the hospitality and gifts.

There is currently no Code of Conduct for judges, although the JSC Act requires any judge who has a personal interest in proceedings or an actual or perceived bias to disqualify him or herself from proceedings.<sup>60</sup> Parties to proceedings can also apply to judges to disqualify themselves, and if the judge fails to disqualify him or herself can appeal that decision.<sup>61</sup>

Judges are prohibited from engaging in any paid work outside of the duties of their judicial offices without the consent of the Judicial Services Commission.<sup>62</sup> There are, however, no post-employment restrictions of judges.

#### **INTEGRITY MECHANISMS (PRACTICE)**

*To what extent is the integrity of members of the judiciary ensured in practice?*

*Despite the absence of laws there are some instances of members of the judiciary self regulating to ensure integrity.*

The only law regarding integrity is disqualification of judges in the event of personal interest or actual or perceived interest. The Vanuatu Judicial Monitoring Survey Report did refer to one case study in which judges had removed themselves due to conflicts of interest.<sup>63</sup> Parties do also appeal decisions due to perceived bias where judges have not disqualified themselves.<sup>64</sup>

Despite the absence of laws regulating integrity, Vanuatu's judiciary appears to be very conscious of the need to be seen to maintain professional distance, and self-regulates to maintain integrity. A recent example occurred in 2013, when former Minister of Health Don Ken invited court personnel to kava<sup>65</sup> prior to a decision involving the prosecution of some of Ken's supporters being given. This kava evening would have given Ken the opportunity to talk with the Chief Justice. The Chief Justice required Ken to apologise in open court and also made it clear that any future attempt to influence

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<sup>60</sup> Section 38(1) JSC Act.

<sup>61</sup> Section 38(2) & (3) JSC Act.

<sup>62</sup> Section 39(2) JSC Act.

<sup>63</sup> Transparency Vanuatu, 'Vanuatu Judicial Monitoring System Project: Backlog of Cases Report' August 2013, p 22.

<sup>64</sup> See, e.g. *Matavare v. Talivo* [2010] VUCA referred to in para 40 of *Taftumol v Lin* [2011] VUCA 30; *Jessop v Public Prosecutor* [2010] VUSC 134.

<sup>65</sup> Kava is a traditional drink made from the roots of a variety of pepper. Drinking kava together is used in both formal and informal settings to strengthen relationships and share stories.

the court would result in imprisonment.<sup>66</sup> Whilst self-regulation is to be lauded, the lack of a legal framework to ensure integrity means that in practice judicial measures to ensure integrity are weak and/or untransparent as judges do not declare assets and there is no other transparent mechanism to ensure that judges are not receiving gifts and hospitality.

## EXECUTIVE OVERSIGHT

*To what extent does the judiciary provide effective oversight of the executive?*

*The judiciary is largely effective in providing oversight of the executive.*

The Supreme Court has jurisdiction over the executive.<sup>67</sup> Applications for judicial review of decisions of the executive are fairly common. For instance, between 2012 and 2013 the Supreme Court published decisions relating to judicial reviews of decisions pertaining to the termination of an appointment to be a roving ambassador,<sup>68</sup> the transfer of a Director General,<sup>69</sup> the signing of a concession agreement to build an airport,<sup>70</sup> a refusal to register an applicant as a charitable body<sup>71</sup> and the suspension of local government councils.<sup>72</sup> The Court also reviews other decision makers such as the President<sup>73</sup> and the Electoral Commission.<sup>74</sup>

Vanuatu's court is also particularly active in oversight of the proceedings of Parliament, particularly in relation to motions of no confidence in the Prime Minister. As this affects the composition of the executive the court's involvement in this area is an important aspect of executive oversight. A quite extraordinary series of cases occurred in 2011. As these cases both illustrate issues that can occur within parliament and the role of the court in controlling these issues a brief timeline of events is provided.

- December 2010: Edward Natapei is replaced by Sato Kilman as Prime Minister following a vote of no confidence.
- 24 April 2011: The Supreme Court hears an application filed by Kilman relating to the legality of the Speaker's decision to call an extraordinary session of Parliament to debate a motion of no confidence in the Prime Minister and rules the Speaker's decision is legal.<sup>75</sup>
- 24 April 2011: The extraordinary session of Parliament session takes place. The motion of no confidence is passed and Serge Vohor is elected to replace Kilman as Prime Minister.

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<sup>66</sup> Vanuatu Daily New Digest 24 June 2013 <http://vanuatudaily.wordpress.com/.../vanuatu-daily-news-digest-24-june-2013>.

<sup>67</sup> Government Proceedings Act 2007, renamed State Proceedings Act pursuant to Government Proceedings (Amendment) Act 2010.

<sup>68</sup> *Goiset v Republic of Vanuatu* [2013] VUSC 84.

<sup>69</sup> *Bebe v Republic of Vanuatu* [2013] VUSC 190.

<sup>70</sup> *Vanuaroroa v Republic of Vanuatu* [2013] VUSC 182.

<sup>71</sup> *Union of Moderate Partis (Inc) v Minister of Finance* [2012] VUSC 164.

<sup>72</sup> *SANMA Local Government Council v Wells* [2012] VUSC 27.

<sup>73</sup> See, for example, *Steven v Chairman of Electoral Commission* [2013] VUSC 111, relating to a refusal to accept a potential candidate's application to run for election.

<sup>74</sup> See, for example, *Bong v President of the Republic of Vanuatu* [2012] VUSC 157, relating to suspension of the Police Commissioner.

<sup>75</sup> *Kilman v Republic of Vanuatu* [2011] VUSC 39.

- 30 April 2011: The Supreme Court rules that the Speaker's decision that the vote of no confidence was carried was correct.<sup>76</sup>
- 13 May 2011: The Court of Appeal rules that the vote of no confidence was not carried and Kilman was restored as Prime Minister.<sup>77</sup>
- 16 June 2011: The Supreme Court rules that the vote of no confidence in Edward Natapei that occurred in December 2010 was illegal, with the result being that Kilman's election is held invalid and Natapei appointed interim Prime Minister until a new vote for Prime Minister can take place.<sup>78</sup>
- 17 June 2011: The Supreme Court rules that Kilman's application to have parliament convened immediately is without legal basis.<sup>79</sup>
- 21 June 2011: Ministers appointed by Kilman on 2 December 2010 apply to the Supreme Court for an order that they were legitimate State Ministers, despite being appointed by a Prime Minister who was subsequently held to be invalid.
- 22 June 2011: The Supreme Court rules that Minister appointed by Kilman did not legitimately hold their positions.<sup>80</sup>
- 26 June 2011: Parliament convenes and Kilman is elected Prime Minister.<sup>81</sup>
- 22 July 2011: The Court of Appeal rules that, in the extraordinary circumstances of this situation, the Supreme Court's order to declare Kilman's election on 2 December invalid and to reinstate Natapei as Prime Minister is set aside.<sup>82</sup>

Since events relating to the position of Prime Minister in 2011 the court has continued to consider actions relating to parliamentary procedure and motions of no confidence. For example, in August 2013 Prime Minister Kilman again returned to court to challenge a decision by the Speaker to close a session of Parliament in order to avoid filing and debate on a motion to remove him.<sup>83</sup> In December 2012 the court again reviewed the decision of the Speaker to refuse to summon an extraordinary Parliament to debate a motion of no confidence.<sup>84</sup> In March 2013 an application was held relating to the Speaker's decision to close a session of Parliament so that debate on a motion of no confidence could not take place.<sup>85</sup>

Whilst decisions can be appealed, once matters have been finally determined in court orders are acted upon. However, as indicated by the discussion of political events in 2011 taking matters to court can be used as a delaying tactic to enable the executive to gather sufficient political support for the matter that was first being challenged. This means that once court orders are acted upon, changes in political support mean that the matter is no longer at issue. Further, as discussed below, delays can affect a wide range of cases, including cases involving the review of executive decisions.

## **CORRUPTION PROSECUTION**

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<sup>76</sup> Kilman v Speaker of Parliament of the Republic of Vanuatu [2011] VUSC 35.

<sup>77</sup> Kilman v Speaker of Parliament of the Republic of Vanuatu [2011] VUCA 15.

<sup>78</sup> Natapei v Korman [2011] VUSC 72.

<sup>79</sup> Natapei v Korman [2011] VUSC 91.

<sup>80</sup> Vanuaroroa v Natapei [2011] VUSC 92.

<sup>81</sup> Radio New Zealand International, 'Kilman elected Vanuatu PM – 10 days after ouster by court' (27 June 2011) <http://www.rnzi.com/pages/news.php?op=read&id=61422>.

<sup>82</sup> Kilman v Natapei [2011] VUCA 24.

<sup>83</sup> Kilman v Korman [2011] VUSC 227; Kilman v Korman [2011] VUSC 228.

<sup>84</sup> Natapei v Wells [2012] VUSC 260.

<sup>85</sup> Natapei v Wells [2013] VUSC 43.

*To what extent is the judiciary committed to fighting corruption through prosecution and other activities?*

*The judiciary is largely reactive in its contribution to the fight against corruption as it is dependent upon cases being brought before it. It does not often use the “language of corruption” in discussing criminal cases which involve misuse of position for private gain.*

Statistics in annual reports do not provide separate information on corruption prosecutions. The judiciary is not actively involved in making recommendations relating to anti-corruption measures and reforms.

The court is reliant on other bodies bringing corruption matters to court. As the public prosecutor is not very active in pursuing corruption cases, particularly against political leaders, the court is unable to be active in showing lack of tolerance for corruption via heavy sentencing. The main area that the court is active in hearing cases relating to corruption is in the area of election petitions, usually raised by unsuccessful candidates challenging the election of others. Although no petitions were successful following the 2012 national election two petitions were successful following the 2008 national election.<sup>86</sup> Whilst successful petitions lead to by-elections, as discussed in the section on the electoral management body, corresponding prosecutions for electoral offences are not presented to the court.

In the past five years only three reported criminal cases have mentioned corruption. In 2013 a businessman was given a 16 months sentence, suspended for 2 years, for attempting to bribe a VAT officer.<sup>87</sup> That same year 13 supporters of MP Don Ken were convicted of criminal offences under the penal code relating to attempts to destroy alleged evidence of corrupt practices during the national election. Offences included unlawful assembly, extortion, assault, threats to kill, false imprisonment and kidnapping. They were sentenced to imprisonment for 2 to 3.5 years depending on offences committed, although one has his sentence suspended due to specific family responsibilities.<sup>88</sup> In 2013 the CEO of Air Vanuatu was convicted of 9 counts of obtaining money by deception. He was sentenced to 12 months imprisonment, as well as ordered to pay compensation.<sup>89</sup> In 2011, following a private prosecution, a lands department officer pleaded guilty to some improper dealings.<sup>90</sup> No sentence has been published.

Cases relating to misappropriation and fraud arise in the courts regularly, but usually occur in the context of private sector employees acting improperly, and are not discussed by the courts as corruption.

There is considerable concern about delays within the judicial system.<sup>91</sup> These delays have a number of causes, but the ultimate result is that, often, justice is denied. These issues are systemic, and do not only affect corruption related cases. That said, cases that disappear into the system may involve corrupt actions but, as they “get lost” no remedy is ever available, and no consequences for bad behaviour result. One particular corruption related case that has been caught up in delays is the

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<sup>86</sup> Sope v Principal Election Officer [2009] VUSC 62; Lop v Isaac [2009] VUSC 23.

<sup>87</sup> Public Prosecutor v Chen Jian Lin [2013] VUSC 189.

<sup>88</sup> Public Prosecutor v Urinmal [2013] VUSC 95.

<sup>89</sup> Public Prosecutor v Joewangeh [2013] VUSC 55.

<sup>90</sup> Jessop v Natnaur [2011] VUSC 320.

<sup>91</sup> Transparency Vanuatu, ‘Vanuatu Judicial Monitoring System Project: Backlog of Cases Report’ August 2013.

attempt by the Ombudsman, in 1997, to initiate proceedings against various leaders pursuant to the Ombudsman Act 1995 when others did not act upon her reports. Following various interlocutory matters being heard in 2001,<sup>92</sup> the case proceeded to trial in 2004. No decision has ever been issued, however.<sup>93</sup>

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<sup>92</sup> Ombudsman v Jimmy [2001] VUSC 139; Korman v Ombudsman of the Republic of Vanuatu [2001] VUCA 24; Korman v Ombudsman of the Republic of Vanuatu [2001] VUCA 13.

<sup>93</sup> Notes of Vanuatu Judicial Monitoring System Project researcher, made available to the author in July 2013.