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Regulating Responsively for Oversight Agencies in the Pacific

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State, Society and Governance in Melanesia Project –
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State, Society and Governance in Melanesia Project –
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Executive Summary

Since independence in the Pacific, the performance of oversight agencies has been mixed. This paper examines the performance of these oversight agencies, focusing on their strengths and impediments. It examines possible ways that oversight can be strengthened in the Pacific.

One major finding of this research is that oversight agencies can not be examined in isolation. They must be conceptualised relationally within the law and justice sector as a total package of regulatory institutions. Oversight agencies, with the possible exemption of parliamentary committees (which have a political autonomy), share important linkages with each other and the judiciary, Attorneys General offices, departments of public prosecution, the police and affiliated statutory bodies such as leadership, electoral and human rights commissions.

While this paper is concerned with the oversight capacities of the entire law and justice sector it will focus on:

- Ombudsmen.
- Auditors General.
- The Parliamentary committee system.
- Financial Intelligence Units (FIUs). These relatively new institutions oversee a different but complementary suite of risks, namely money laundering and terrorist financing. They oversee private as well as public sector activities. In providing tools to monitor flows of funds, FIUs can assist oversight agencies in their supervision of public expenditure and the control of corruption.

This paper is concerned with all member states of the Pacific Islands Forum, except Australia and New Zealand. There is a distinction between countries that have constitutional provisions for extensive oversight functions – namely Papua New Guinea, Solomon Islands, Vanuatu and Fiji – and other member states where specific oversight agencies either do not exist or have developed as part of the regulatory machinery of administrative practice (this is most applicable to Ombudsmen offices).

In summary this research has found that:

- 1) Oversight performance is undermined by political interference.
- 2) The linkages within and between oversight institutions and other agencies within the law and justice sector and the rest of the administration is weak.
- 3) There is debate about the reasons for the weak links between oversight and enforcement branches within the law and justice sector.
- 4) Political will is crucial for the effective performance of oversight agencies.
- 5) Oversight agencies do not exercise their powers and capacities to their full potential.
- 6) Oversight institutions require budgetary independence to perform effectively.

- 7) The designated responsibilities, roles and functions of oversight institutions are often unclear, ill-defined or broad.
- 8) The capacities of oversight agencies are impeded by antiquated legislation.
- 9) Leadership codes or codes of conduct for leaders have been developed as a way of addressing shortfalls in legislation.
- 10) Regional support bodies are being encouraged to enhance and institutionally strengthen the capacities of national oversight agencies.
- 11) Leadership and the presence of champions for good governance within oversight agencies is crucial to their performance.
- 12) Education and outreach is an important part of performance for oversight institutions.
- 13) Oversight institutions perform most effectively when there is public demand for good governance and state accountability.

This paper argues that oversight institutions could be institutionally strengthened by developing and applying models of responsive regulation and reinforcing these models with concrete policy innovations.

Introduction

Oversight agencies are meta regulatory authorities.¹ They monitor and regulate the behaviour of wider regulatory bodies comprising the machinery of government and administration. The legitimacy and capacity of governments, parliaments, executives and public services is dependent on their ability to discharge their duties in a responsible and accountable fashion that assumes a fair degree of self-regulation. Oversight institutions such as Ombudsman, Auditors General, and Parliamentary committees have been established over time to monitor and evaluate the self-regulation exercised by governments and public bodies.

Oversight agencies are particularly concerned with accountable, equitable and transparent public financing and expenditure. The scope oversight institutions exercise also includes scrutiny of conflicts of interest among leaders and public officials, electoral supervision, state sector performance, the delivery of public goods and services (such as health, education and infrastructure) and human rights. Oversight institutions are vital in maintaining accountability, responsibility, probity, transparency and equitability in government and administration. This assumes that oversight agencies are themselves accountable, responsible, transparent and equitable in discharging their meta-regulatory duties. It also assumes that they function efficiently and effectively, are well resourced, are free from political interference and have budgetary autonomy. If oversight agencies themselves are unable to perform effectively, due to internal or external factors (or a mixture of both) then their capacity to regulate the wider functions of government and administration can be severely curtailed.

This paper examines the regulatory performance and capacities of Ombudsmen, Auditors General, Parliamentary committee systems and FIUs in member states of the Pacific Islands Forum. With independence, countries in the Pacific inherited or established oversight systems of governance. These are primarily designed to oversee public sector expenditure and the use of public resources. Their roles have been progressively widened over the past 20 years to include oversight of ethical behaviour of public officials, the conduct of leaders, electoral administration, public sector service delivery and human rights. This paper is primarily concerned with oversight of public financing and expenditure and considers other regulatory areas where they affect the management of state funds (for example corruption and conflicts of interest involving leaders and officials).

The success that these agencies have had in overseeing the responsibilities and duties discharged by national governments and administrations has varied. In some cases the oversight agency performs well internally, but because of financial, political or administrative arrangements is unable to effectively make or enforce findings and recommendations. In other cases, the oversight agency itself faces internal administrative and organisational problems that limit its capacity to effectively oversee broader government activities, even where there is support and cooperation from the institutions it

¹ Meta regulation refers to the “risk management of risk management” (Braithwaite, 2003: 1). It involves establishing regulatory networks whereby oversight agencies can monitor and enforce self-regulation by the institutions that they oversee.

is mandated with regulating. Both internal and external factors frame oversight performance. These include linkages and relationships within the law and justice sector (and across the machinery of government and administration), resources, management, leadership, skills and experience, funding and finance, statutory autonomy, political interference, interference from the private sector and antiquated legislation.

Consequently oversight agencies in the Pacific are reported not to operate to their fullest potential. They do not exercise the full range of powers available to their office holders. This may not necessary be a problem per se. Responsive regulation (which can be defined here as a mixture of command and control and self regulation/cooperative regulation, combining ‘hard law’ and ‘soft law’) suggests that regulators should focus their efforts on education, persuasion and cooperation with the institutions that they oversee. What is important is that they do have the full range of capacities to escalate sanctions and enforcement in cases of non-compliance. This paper will examine the enabling and constraining factors to responsive regulation as exercised by oversight institutions in the Pacific. It suggests that more active strategies of responsive regulation combining structural and behavioural factors with specific organisational and administrative changes, championing leadership, specific legal reforms and regionalisation could institutionally strengthen Ombudsmen, Auditors General, Parliamentary committees and FIUs in the Pacific.

Oversight institutions in the Pacific: a review

Oversight institutions are a vital component to ‘national integrity systems’ providing important checks and balances over the powers of governments, administrations and executives (Larmour & Barcham, 2004: 5).² While their oversight contributes to maintaining the integrity of the organisations they regulate, they also need to ensure their own integrity. In the Pacific, efficacy in overseeing external government and administrative bodies as well as maintaining their own internal accountability varies throughout the region. All Pacific Island States have Auditors General. Of the 16 members of the Pacific Islands Forum, 10 have ombudsmen (Larmour & Barcham, 2004: 24). There is even more variation in Parliamentary committees throughout the region. The PNG parliament for example has 38 committees that scrutinise legislation, Fiji has a total of 12 committees and Vanuatu has three standing committees (Morgan, 2005: 18). Public accounts committees charged with oversight of expenditure are an important part of the Parliamentary committee system. Yet they are not always parliamentary committees. In Samoa for example, this is a public service, not a Parliamentary, committee.

There are variations in the constitutional and administrative arrangements for oversight institutions that influence their capacities. For example, in Papua New Guinea, Vanuatu and the Solomon Islands the Ombudsman’s office is incorporated into the constitution

² National Integrity systems is a term devised by Transparency International to refer to “the sum total of the laws, institutions and practices within a given country that address maintaining honesty and integrity of government and private sector institutions” (<http://apseg.anu.edu.au/nispac/default.php>). It consists of 11 inter-dependent pillars (the legislative, executive, judiciary, auditor-general, ombudsman, watchdog agencies, public service, media, civil society, private sector and international actors) (for further details see Pope, 2000: 35).

and is mandated with regulating leadership code legislation. In countries where ombudsmen have been established by legislation rather than provided for by the constitution and there is no designated leadership oversight (over and above the Ombudsman's function of receiving and reporting on complaints about government conduct) their roles are considered relatively ineffectual. In the Cook Islands for example, the Ombudsman is appointed by the Queens Representative on recommendation of the Prime Minister under the terms of the Ombudsman Act of 1984. Appointments to the Ombudsman's office do not need to be made on merit, there is no anonymity for complaints and it is not perceived to be an impartial body. A public opinion survey of people's views of the Ombudsman in the Cook Islands released in 1998 found that 92 per cent were dissatisfied with the office (Ingram & Uhrle, 2004: 20).

Not all oversight institutions are required to make their reports public. In Samoa and the Cook Islands there is no requirement to make reports public. In Tonga annual reports are submitted to parliament and made public by this route. In the Solomon Islands, reports are made available only to the parties concerned and while an annual report is tabled in parliament it receives little consideration. In Papua New Guinea and Vanuatu ombudsman reports are published and made publicly available. Both ombudsman offices have considered this an important part of their educative responsibilities to the community, though the number of reports released in Vanuatu has declined significantly in the past five years.

Auditors General are crucial in providing management and information on the way public funds are uplifted, expended and acquitted. In the Pacific, Auditors General are appointed by or report to the executive, the legislative or both (Larmour & Barcham, 2004). Only Niue does not have an Auditor General, with the Audit Office of New Zealand providing auditing services to the government (Talagi, 2004: 13). In some countries, while there is a statutory office of Auditor General there has been a trend to sub-contract auditing services to the private sector. In the Marshall Islands, state owned enterprises have had their accounts audited by the US firm Deloitte and Touche (Pollock, 2004: 49).

While Auditors General have a crucial role in monitoring and supervising government accounts, funds are susceptible to mismanagement where they are not readily recorded in financial management systems. Financial Intelligence Units (FIUs) can assist in supervising financial transactions through monitoring, assessing and analysing suspicious flows of funds. This is done at both a national and international level. Most Pacific countries have introduced or are in the process of introducing Financial Transaction Reporting (FTR) legislation which is enforced through the establishment of FIUs. These require the private sector to report suspicious cash transactions based on proscribed thresholds of funds or in any event where suspicion is aroused. They also allow transnational financial movements to be effectively monitored. This is particularly relevant in countries that maintain active offshore finance centres, such as Vanuatu, Samoa and the Cook Islands.

In 1998 the OECD calculated that the amount of money flowing from G7 countries into Caribbean and Pacific Island states increased five fold between 1985 and 1995 to more than US\$200 billion per annum, far exceeding total outward bound Foreign Direct

Investment (FDI) in these two regions (OECD, 1998: 17). The OECD contended that these funds are not used for conventional investment purposes, but rather being diverted to Caribbean and Pacific Offshore Finance Centres. The recent move to establish FIUs in the Pacific allows such financial movements to be more effectively scrutinised. They could conceivably provide an important new source of information on the disbursement of funds by governments and administrations, particularly in cases of misuse, fraud and corruption. They thus provide an important domestic, as well as international, oversight tool.

Understanding the similarities and variations in the way oversight institutions operate in the Pacific provides important insights into their capacities and efficacy. For example, if an Auditor General is appointed by the Prime Minister and is not required to report to parliament then accountability in both offices is comprised. However, if an Auditor General is mandated in the constitution and is appointed by an independent and transparent committee, has budgetary independence that is not beholden to any one political faction and is required to report to the legislature who makes the office's findings public, then the accountability of all agencies involved in the auditing process is enhanced. A similar case could be made for Ombudsman offices and arrangements for appointing Parliamentary committees. Appointment processes, budgetary independence, reporting requirements and constitutional and legal mandates vary tremendously in the Pacific. Variations in oversight institutions affect inter-agency cooperation, resourcing, enforcement, political interference, leadership, management and performance, exposing their differences even further. However, they also suggest practical ways that oversight agencies could be institutionally strengthened.

Internal and external levers of oversight accountability

Internal (the oversight agency) and external (institutions that are overseen) levers of oversight accountability are both structural and behavioural. The right structural and behavioural mix is required in and between both regulating and regulated institutions in order to achieve optimal performance. In the Pacific this structural and behavioural balance is unevenly distributed. In some cases oversight agencies perform well with limited resources, but their performance is undermined by external pressures and constraints. It is external individuals and agencies who work against the oversight institutions. Alternatively, the oversight institutions themselves may be ineffectual due to resourcing deficiencies, lack of effective leadership, management constraints, unclear roles and responsibilities and low staff morale. External and internal pressures can operate in tandem so that even if an oversight institution started out performing well, it ends up as an internally moribund organisation.

After 15 years of independence the Vanuatu government gave effect to articles 61-65 of the constitution and passed the *Ombudsman Act of 1995* (Hill, 2001). Marie-Noelle Ferrieux Patterson was appointed first Ombudsman. The Ombudsman commenced work immediately and between 1996 and 2000 published almost 80 reports (Hill, 2001: 13). These were controversial reports, implicating Vanuatu politicians, officials and alleged foreign 'investors' in the misuse of power, corruption, fraud, nepotism and repeated violations of the leadership code (Crossland, 2000). In one case involving the "cyclone Betsy relief fund", the Ombudsman's Office demonstrated that the then Prime Minister

Maxime Carlot Korman had transferred US\$1.1 million set aside for cyclone relief into his own personal bank accounts, including those held offshore in Singapore and Malaysia (Republic of Vanuatu Ombudsman's Office, 1996). The Ombudsman made a number of recommendations, including that the case should be referred to the police and or the public prosecutor and funds be forfeited to the state. None of these recommendations were followed through.

The Vanuatu Ombudsman's office faced sustained external pressure from parties named in complaints to frustrate investigations. For example parties under investigation made attempts in the Supreme Court to block publication of reports (Crossland, 2000: 9-10). These were unsuccessful but did delay release, in one case by six months, by which time public controversy had subsided. There were threats and intimidations against the office, but with independent funding from the Commonwealth Secretariat, the Vanuatu government (whose members and the affiliated administrative machinery of state were the main subjects of investigations, reports and recommendations) was limited in the amount of financial pressure it could exert on the office. However, in 1998 the Vanuatu state exercised the ultimate form of pressure against the Ombudsman. It repealed the *Ombudsman's Act (1995)*.

Ombudsman Patterson however, continued to operate on the grounds that the Constitution provided for that capacity. This was short-lived. In 1998 the Vanuatu government passed a new act. This introduced a number of changes to the 1995 act. Staff employment was regulated by the Public Service, eliminating their independence that the 1995 legislation had enshrined (Hill, 2001: 7). Allegations of criminal misconduct could not be made without asserting the offence and providing supporting evidence. The new act removed the minimal enforcement powers the Ombudsman originally had. A new Ombudsman was appointed in 1999. Since 2000 the number of reports has declined substantially. The Ombudsman's reports must also be given to the public prosecutor and when uncovering allegations of criminal misconduct, must also be lodged with the Commissioner of Police (Newton Cain & Jowitt, 2004: 23). To date there have been no prosecutions as a result of this new act.

In the case of the Vanuatu Ombudsman, the office started out with an active program of hearing complaints, investigating them and releasing reports and recommendations. Political leaders and public officials were routinely exposed for malpractice. Consequently these same political leaders quickly began to exert pressure on the Ombudsman's office, beginning with threats and intimidation and moving to court action challenging the ability of the office to release findings. Then the Ombudsman's act itself was repealed. When the Ombudsman refused to vacate the post, a new law was passed finally removing the office holder who had so publicly rebuked and exposed the malpractices of the leadership. The law itself was altered in an exercise of external pressure on the Ombudsman's independence.

A similar chain of events was evident in the removal of the Controller and Chief Auditor (Auditor General) of Samoa, Su'a Rimoni Ah Chong in 1995. In 1994 the Chief Auditor issued a report to parliament exposing financial irregularities and short comings involving government departments and statutory bodies (So'o, Sinclair, Va'a and Lāmeta, 2004). A report commissioned by Transparency International stated that:

Su'a cited numerous examples of corruption within government departments and among public servants and politicians. Abuses cited include fraud, collusion, conflicts of interest and use of government land, equipment and staff for private enterprise. At least seven cabinet ministers, or half of the total cabinet, were involved in corrupt practices according to the CCA (So'o, Sinclair, Va'a and Lāmeta, 2004: 18).

The Chief Auditor's report was subsequently dismissed by those implicated and Su'a was sacked. There was no follow-up of criminal misconduct by either the Public Prosecutor or the Police. Instead the government amended the constitution in 1997 stripping the office of Controller and Chief Auditor of its independence.

The cases of the Controller and Chief Auditor in Samoa and the Ombudsman in Vanuatu are emblematic of many of the problems of political interference that confront oversight institutions in the Pacific. There is a clear progression: an agency works effectively through efficiently managing its human and physical resources, it investigates, uncovers and releases evidence of malpractice by leaders and officials. These leaders and officials respond by exerting political pressure on and interfering with the oversight agency, this pressure is escalated, and budgetary support is tampered with. Ultimately the heads of oversight agencies are themselves dismissed and laws and constitutions are changed to justify the actions of those undermining the agency. The oversight agency rapidly declines as a source of accountability, loses its independence and is rendered largely ineffective. Thus the following trends in oversight performance emerge:

1) Oversight performance is undermined by political interference

This is primarily exerted by members of the executive and legislative branches of government and partisan appointees in senior levels of the public service. Pressure is also exerted, either directly or indirectly, from private sector interests who are implicated in public wrong doing.³ This political interference can take the form of threats, intimidation and dismissals. Funding can be reduced or even terminated. Legislative changes can be enacted that strip oversight agencies of many of their powers, functions and capacities. The Ombudsman in Vanuatu and the Controller and Chief Auditor in Samoa, for example, faced all these forms of political interference, cumulating in legislative changes reducing the powers of both offices.

2) The linkages within and between oversight institutions and other agencies within the law and justice sector and the rest of the administration are weak.

³ There is a relationship between public corruption and the behavior of the private sector. Both operate in tandem. It was reported in discussions with interlocutors for this research that "government officials become corrupt *because they have access to the private sector*" (interlocutor communication with author). Analyses of corruption, wrong doing and misuse in the Pacific have focused on public sector corruption. However, practices (such as offering or granting bribes, kickbacks and facilitating conflicts of interest) of the private sector in what is in effect a symbiotic relationship also need further investigation, research and oversight scrutiny.

Where oversight agencies undertake investigations, release their findings (either publicly or through official channels) and make recommendations, the latter are not followed through by governments and/or administrations. In cases of alleged criminal misconduct by political leaders and public officials uncovered by offices of Auditors General, Ombudsmen and Parliamentary committees this is not always taken any further by the enforcement branches of the law and justice sector, namely police and Departments of Public Prosecution (DPP). This is seen in the cases of the Vanuatu Ombudsman and the Chief Auditor in Samoa. In Vanuatu, Ombudsman's reports were sent to the police and the DDP but there was no further follow-up action. For example in the Cyclone Betsy account case the Ombudsman's first recommendation was that

[T]he public prosecutor and or the police should investigate the payments made by Mr Korman presented to the bank in the period around the November 1995 elections with the view to charging him with bribery and possibly other offences under the penal code [cap 135] (Republic of Vanuatu, Ombudsman's Office, 1996).

This was never done. In another report entitled *Delays in Police Investigations*, the Vanuatu Ombudsman found that there was widespread police inaction in cases involving misappropriation of funds and government resources (Republic of Vanuatu, Ombudsman's Office, 1998). While evidence was presented to police, the latter took no further action, or delayed taking action by up to three years.

Similar reports suggesting a weak link in the chain of command and action between oversight and enforcement are widespread throughout the Pacific. For example in the Solomon Islands, the Auditor General's office has found evidence of "massive corruption". The police must now investigate, but they "are yet to follow" (interlocutor communication with author). Whereas the Auditor General believes that there is sufficient evidence with which to launch a prosecution, the police feel that it is inadequate. Consequently, the public are seeing that the people involved in the corruption are not being investigated. "Reports come out and nothing is done" (interlocutor communication with author).

There are a number of structural and behavioural reasons cited for these sub-optimal links between oversight and enforcement branches within the law and justice sector. These intersect and expand on the two trends discussed above. They include:

3) There is debate about the reasons for the weak links between the oversight and enforcement branches within the law and justice sector

A first view suggests that agencies lack sufficient resources, skills and expertise to follow through on recommendations made by oversight agencies. In cases of alleged criminal misconduct, the police may lack adequate human resources (skills, training and capacity) to prosecute financial crime (for example, investigators with financial or accountancy skills). One of the reasons cited for the lack of enforcement follow up of oversight recommendations was the lack of investigative skills, capacity and experience in financial and fraud areas. Many police forces lack basic equipment such as computers,

toner for photocopiers, files and stationary. It is not always the case that resources are not available, but rather that they are not suitable for the environments that they are used in. For example, photocopiers periodically break down given the humid vagaries of Pacific climates and there is no support to fix malfunctioning equipment. It is difficult to pursue a case when basic equipment necessary for further investigation is unavailable. In Kiribati for example, there are no commercial photographic processing labs, so police photographs have to be sent to Fiji for processing causing delays in case management. This view emphasises that oversight agencies lack sufficient levels of resources to perform their tasks effectively. Oversight performance could be improved through increased levels of funding and resources.

A second position suggests that oversight agencies have had more than adequate resources made available to them by both national governments and foreign donors. In fact foreign resources have poured aid into oversight agencies in the last thirty years. It is not so much the level of resources, but better management of existing resources that would improve performance. It is accurate for example to observe that Parliamentary Public Accounts Committees in the region tend to be understaffed and underfunded. However, a lot of MPs do not use the resources they have available to them. It was reported that only one MP in Vanuatu actually used the Parliamentary library on a regular basis, “used the internet” for research and carefully studied legislation before it was passed. Most MPs do not concern themselves with the legislative details, even where the infrastructure is available. Many committees are formed but do not actually operate, while their members continue to draw sitting allowances (Morgan, 2005).

The mismanagement of resources is often due to the way managerial operating systems are configured. The loss, damage or disappearance of equipment can sometimes be due to a combination of external climatic factors, lack of awareness or negligence. It is not always a case of criminal intent. Resources need to be sustainable and feasible. It is important to get the right mix of environment, technology, training and resources.

4) *Political will is crucial for the effective performance of oversight agencies*

With some exceptions then, the poor linkages between the oversight and enforcement branches of the law and justice sector are explained by *either* inadequate resourcing (funding, equipment, skills, training and experience) *or* the resources available to them are inefficiently managed *or both*. There is another position which minimises both the resource allocation and management question. It emphasises *political will* as crucial for the effective performance of oversight agencies, regardless of the level of resourcing or how those resources are managed. This returns to the theme of the involvement of external parties in oversight agencies (for example, the effects of political pressure). If there is external political support for their work then this can facilitate performance even if resources are modest or minimal.

For example, FIUs have recently been established in the Cook Islands and Fiji. Both are modestly resourced with two to three full time staff each. The Cook Islands had been blacklisted as a Non Cooperative Country and Territory (NCCT) by the Paris based Financial Action Task Force (FATF) in 2000. The political leadership in the Cook Islands was determined to be removed from this list by establishing an effective financial

transaction oversight institution. The government established an FIU and implemented sound Anti Money Laundering (AML) and Control of Terrorist Financing (CTF) measures. In February 2005 the Cook Islands was removed from the FATF's list of NCCTs. In Fiji, key officials in the Department of Public Prosecutions (DPP) and the police started to meet to discuss money laundering risks and the need for a financial intelligence unit in 1997. They became champions of this anti-money laundering drive within government, recruiting other key actors within the public sector. These informal contacts lead to the passage of an FTR Act and the establishment of an FIU in 2003. Despite minimal resources and the lack of a separate budget line⁴, Fiji does have a fully functioning FIU that reports suspicious transactions and collects and disseminates financial intelligence to other government agencies and neighbouring countries.

These cases in the Cook Islands and Fiji illustrate that a lot can be done even with minimal resources if the political will is there. The Vanuatu Ombudsman also operated with relatively few resources during the height of its investigations in the mid 1990s, but political will and support was absent (and in fact there was active political opposition to the Ombudsman) and the office in that format was eventually legislated out of existence. The Vanuatu Ombudsman's performance in the mid to late 1990s is possibly an example of performance being "too good". The office functioned to the fullest extent of its powers, only to find that was more extensive than advisable, bringing about their curtailment. This leads to oversight agencies engaging in forms of "self-censorship". In the absence of political will and support they do not exercise powers to their full potential in order to maintain their viability.

5) Oversight agencies do not exercise powers to their full potential

Some oversight institutions theoretically have extensive powers in the Pacific. For example, the PNG Ombudsman Commission supervises the leadership code. If there is evidence of breaches of the leadership code, then the Ombudsman's Commission passes this on to the Public Prosecutor. The Public Prosecutor then requests that the Chief Justice appoints a Leadership Tribunal composed of senior judges and magistrates to hear allegations of misconduct. The tribunal can impose sanctions such as dismissal from parliament and levy fines. The key link in this chain of command is the Public Prosecutor's office. If the Prosecutor does not act on a report from the Ombudsman's office however, *then the Ombudsman can prosecute leaders directly* (Mellam and Aloï, 2003: 32). Yet such powers, where oversight agencies do exercise them in the Pacific, are only exerted infrequently. PNG is probably the most successful example of an Ombudsman's office in the Pacific, but even here it was reported that the Commission does not operate to the full extent of its capacity. There is the possibility that if oversight institutions are "too successful" as in Vanuatu and Samoa in the early to mid 1990s then they would be vulnerable to even more political pressure, placing their long-term survival as effective upholders of accountability in doubt. This is not necessarily as damaging as it may appear. In fact the careful exercise of the powers that oversight agencies do have available to them has important implications for models of responsive regulation which will be discussed in the concluding parts of this paper.

⁴ The FIU is funded as part of the Reserve Bank of Fiji.

6) *Oversight institutions require budgetary independence to perform effectively*

The provision of designated budget lines allocated by independent authorities assists oversight institutions in performing effectively. When the Vanuatu Ombudsman was actively initiating investigations in the mid 1990s the office had budgetary independence and was funded directly by external donors (as was often pointed out by the office's critics). The absence of budgetary independence makes oversight institutions susceptible to external financial pressure. If they are making findings that are critical of leadership, government and public administration, then their opponents in those areas can disable them by reducing budgetary support. For many years this occurred in the Solomon Islands. In a 2004 study of national integrity systems in the Solomon Islands Transparency International reported that:

Although the Auditor General's office is protected constitutionally and positioned so as to provide valuable checks and reporting to the public finance process, the office has been effectively prevented from fulfilling those functions. Under-resourcing has been systematic and taken the form of denial of necessary trained personnel for the effective execution of the office's role, and of necessary equipment and facilities. The Auditor General at the time of the study had telephone access only through a public pay-phone, and a professional staff of one. This is in contrast to a professional staff in 1979, of 23 auditors and accountants. The extent of under-resourcing is such that annual reporting and the financial audits cannot achieve meaningful coverage in either breadth or depth (Roughan, 2004: 19).

This situation has only been reversed with the increased support provided as part of the Regional Assistance Mission to the Solomon Islands (RAMSI). The situation in the Solomon Islands up until the arrival of RAMSI illustrates the importance of budgetary independence (and the enforcement of that independence where it is specified either in law or in the constitution).

This raises important questions of how oversight heads are appointed and who appoints them. Different degrees of independence are conferred on oversight agencies if their heads are appointed by the executive, the legislative or autonomous committees mandated constitutionally. The independence of appointment complements an agency's fiscal independence. In PNG the Ombudsman is selected by an Ombudsman Appointment Committee comprising the Prime Minister as Chair, the leader of the Opposition, the Chief Justice, the Chairman of the Public Service Committee and the Chairman of the relevant permanent parliamentary committee (Mellam & Aloï, 2003: 30-31). Although funding is allocated from the national budget, and resourcing has reported to have been inadequate, there is a general sense of financial autonomy for the office. What is important here is the number of people involved in appointing the Ombudsman. The more people there are involved in making appointments and allocating budgets the greater the accountability. Accountability is enhanced through widening the number and backgrounds of people and parties involved in supervising the mechanisms of accountability. Accountability is reduced if only one or two people in government or the public service are responsible for making appointments and allocating budgets.

7) The designated responsibilities, roles and functions of oversight institutions are often unclear, ill-defined or broad

Oversight capacity can be limited where responsibilities, roles and functions are broad and unclear. This applies particularly to Ombudsmen. Alternatively, they can be so specific that they exclude entire categories of behaviour and misconduct. This is the case with FIUs, which are mandated with the surveillance of specified categories of financial transactions. Ombudsmen on the other hand have a much broader mandate in inviting complaints from members of the public about the operation of state agencies and statutory bodies. This can result in complaints about *any* aspect of the conduct of a state agency (unless it is explicitly excluded), including industrial disputes in the public sector. Consequently oversight agencies are inundated with complaints that they do not have the capacity to respond to even if complainants are *technically* within their rights to bring forward a case. For example, the Solomon Islands Ombudsman has been inundated with large numbers of complaints related to individual public sector employment matters, leading to a backlog of cases. While complainants are within their rights to lodge complaints with the Ombudsman, if they are largely public service matters they would more appropriately be processed within the public service. Despite this, with recent institutional strengthening in the Solomon Islands Ombudsman's office there have been "massive amounts of complaints that have been dealt with" (interlocutor communication with author).

8) The capacities of oversight agencies are impeded by antiquated legislation

Countries inherited legislation from colonial powers that did not adequately address conflict of interests, corruption, misappropriation and misuse of public funds. All have laws that address certain categories of corruption, for example bribery (Larmour and Barcham, 2004: 18). However, these have not always been updated or amended to reflect changing national and international standards of best practice of government and administration. For example, in the Solomon Islands many of the definitions of corrupt behaviour date back to British colonial rule and have not changed since 1978 and even before then. These dated definitions of corruption have been cited as a reason for the lack of follow-up by the police and Public Prosecutor. Because of these dated categories of law, they are inadequate to launch prosecutions based on the findings of Auditors General and Ombudsmen. Fiji does not have a contemporary theft act. In Fiji, "embezzlement of office", is part of the same suite of legislation dealing with "larceny of fish", "larceny of fruit" and "larceny by stealing a fence". Contemporaneously, rules and regulations covering the conduct of MPs, particularly conflicts of interest, can be vague. For example, there are no laws regulating an MP practicing law in a private capacity at the same time as sitting in Parliament. Similarly it was reported by interlocutors that regulations governing public procurement do not adequately address nepotism or favouritism. There are some controls, but they tend to reflect past practices rather than best international standards of present practice. The presence of antiquated legislation can limit the scope of oversight capacity and contribute to poor interagency linkages within the law and justice sector.

9) *Leadership codes or codes of conduct for leaders have been developed as a way of addressing shortfalls in legislation*

In four states – PNG, Solomon Islands, Vanuatu and Fiji – leadership code provisions are incorporated into national constitutions. PNG, Solomon Islands and Vanuatu have enacted legislation giving effect to these constitutional provisions. This is useful because it provides for a complementary suite of legislation specifically designed to deal with the conduct of leaders and public officials. The time consuming and resource intensive task of systematically reviewing, amending, repealing and/or replacing dated legislation is not necessarily required if this can be covered by a comprehensive leadership code. The role of the Ombudsman in leadership codes varies. For example in PNG, Solomon Islands and Vanuatu the Ombudsman oversees leadership codes. In Fiji, where there has been no enabling legislation passed to give effect to the constitutional provision for a code of conduct for leaders, there is no such role for the Ombudsman who is prohibited from investigating the conduct of specified categories of leaders (namely ministers). Other countries in the Pacific are currently considering introducing leadership codes that are likely to be overseen by Ombudsman offices.

10) *Regional support bodies are being encouraged to enhance and institutionally strengthen the capacities of national oversight agencies*

In April 2004 the leaders of the member states of the Pacific Islands Forum issued a declaration at their annual meeting in Auckland to improve the “quality of governance” by exploring the potential of regionalism (Pacific Islands Forum Secretariat, 2005: 3). Regional support bodies could enhance and institutionally strengthen the capacities of national oversight agencies. There are currently moves, as part of the Pacific Plan developed by the Pacific Islands Forum Secretariat, to investigate the regionalisation of a number of oversight agencies such as Ombudsmen and Auditors General and encouraging harmonising FTR/FIU procedures and practices.

This would not replace national oversight agencies but would rather offer regional ombudsmen, auditing and financial intelligence services that would enhance and complement national institutions. Individual countries would retain ownership over these institutions but could draw on regional support if and when required. This would be of particular value to smaller member states where economies of scale limit the capacities of their own oversight institutions. Kiribati and Tuvalu for example, do not have an Ombudsman. The availability of a regional body offering ombudsmen services would assist such countries in managing national oversight. The establishment of regional oversight organisations/services does not imply any limitation on national sovereignty (Pacific Islands Forum Secretariat, 2005: 3).

Countries could also explore regionalising services using bilateral instruments. They could share institutions that would oversee their respective machineries of government. For example, Nauru and Kiribati have recently agreed to share the office of Chief Justice. While the Chief Justice exercises separate jurisdiction in both countries, the office is held by one person. Larger countries, which have the resources to effectively fund their own national oversight institutions, would be free to explore other strategies. For example,

while maintaining their own Auditors General and Ombudsmen they could draw on a regional pool of talent and expertise in these areas in specific cases.

11) Leadership and the presence of champions for good governance within oversight agencies is crucial to their performance

Champions in leadership positions have influence, legitimacy and skills in advocating on behalf of clients, colleagues and institutions. They can mediate the functions of their offices on the one hand with the constraints and opportunities they find in the organisations they regulate on the other. (Rosenfeld & Servo, 1990: 54, cited by Hobson, 2001: 1). The ability of leaders within organisations to exercise effective management skills and act as champions for transparency is one of the key behavioural factors affecting oversight performance. Their presence is crucial in achieving an optimal structural and behavioural balance. Without champions of transparency and accountability, external assistance to oversight institutions will not make much difference at all. This relates back to the earlier discussion about the importance of political will. A lot can be achieved if there is political will inside and outside of an organisation, even if human and physical resources are minimal. If those resources are managed by an effective leader then an oversight institution's capacities are greatly enhanced.

12) Education and outreach is an important part of performance for oversight institutions

Auditors General, Ombudsmen, Parliamentary committees and FIUs make important contributions in educating peoples, private corporations and public bodies about their rights and responsibilities, raising awareness in government and administration and in hearing public submissions. Even if there are impediments to other areas of an oversight institution's work, the educative role is fundamental. In the Pacific the capacity of oversight institutions to engage in public education varies. Interlocutors have reported that there is a general lack of awareness of oversight work outside of the main urban areas and even within Pacific towns and cities. Ombudsmen were reported to have particularly low profiles in rural areas and people were unaware of their rights to levy complaints with Ombudsmen. One interlocutor reported that "I'm not really sure whether most people in Fiji actually know of the Ombudsman's existence or not" (interlocutor communication with author). This resonates with published reports. In Tonga for example, the Ombudsman is referred to as the "Commissioner for Public Relations". Transparency International's review of National Integrity Systems in Tonga found that:

Few people use the office. There were only 16 cases in the year 2001-02. Not enough people know about the office or have sufficient trust in going forward with complaints to use it (James & Tufui, 2004: 43).

This contrasts with countries where ombudsmen are involved in active public education initiatives. The success of the Vanuatu Ombudsman in the mid 1990s was largely due to the widespread publicity that the office's reports raised in the country. Even if they were not acted upon, it had the effect of increasing public knowledge about accountability,

transparency and appropriate leadership conduct. Even though the new Ombudsman's act in Vanuatu has reduced its powers, the office continues to maintain an active public education and awareness raising program. In the Solomon Islands the Ombudsman has recently conducted a number of workshops in rural areas that have raised its profile. FIUs in the region have been working with the private sector (most notably banks) to increase awareness among businesses, cash dealers and members of the public of the importance of monitoring and reporting suspicious financial transactions. Even where oversight agencies may "lack teeth" to have their recommendations followed through, or if their work is constrained by an unfavourable political climate, they can make efforts at informing the public of their role, responsibilities and capacities.

13) Oversight institutions perform most effectively when there is public demand for good governance and state accountability

All interlocutors for this study reported that oversight institutions can only perform effectively when there is public demand for good governance. Without a culture that demands good governance and accountability from leaders, officials, governments and administrations, the performance of oversight agencies is limited. The building of demand for good governance requires "testing" and "calibrating" the levers that society has available to it. It is a long-term goal, requiring generational shifts in attitudes, values and norms that are complementary with customary society, not adversarial to it. The exact ways of achieving these goals are complex. It involves strengthening the media and the machinery of civil society. Civil society, the media and play an important part in building demand for good governance and maintaining expectations of accountability. Most Pacific states are active and vibrant democracies (and where there are constraints to full democracy, there are active and flourishing democratic movements within civil society). This provides an important environment in which demand for good governance and accountability can be fostered. This in turn would strengthen the institutional capacities of oversight institutions from the ground upwards, rather than depending on solutions devised from above.

Building responsive regulation in the Pacific

The findings from this research suggest specific ways that oversight agencies in the Pacific could be institutionally strengthened to enhance capacity building. This needs to begin by building demand for good governance in the Pacific. One way that demand for good governance could be encouraged could be through adopting principles of responsive regulation. Responsive regulation emphasises voluntary compliance through persuasion, education and cooperation, rather than sanctions and enforcement (Ayres & Braithwaite 1992:4-5). It takes into account the motivations, problems and conditions of the regulated. Assistance and capacity building are promoted. Threats are de-emphasised. However, sanctions are available and imposable, escalating in ever increasing intensity with recalcitrant non-compliance (Job & Honaker 1992:113). Responsive regulation is flexible, dynamic and culturally accountable. The behaviour of institutions (such as government and administration) can be regulated through oversight agencies having a cooperative, persuasive and educative role that invokes best practice international and national standards, norms and values. Regulatory functions are delegated to different

actors within the model of a ‘regulatory pyramid’ (Ayres and Braithwaite, 1992) (see Fig. 1 and Fig. 2).

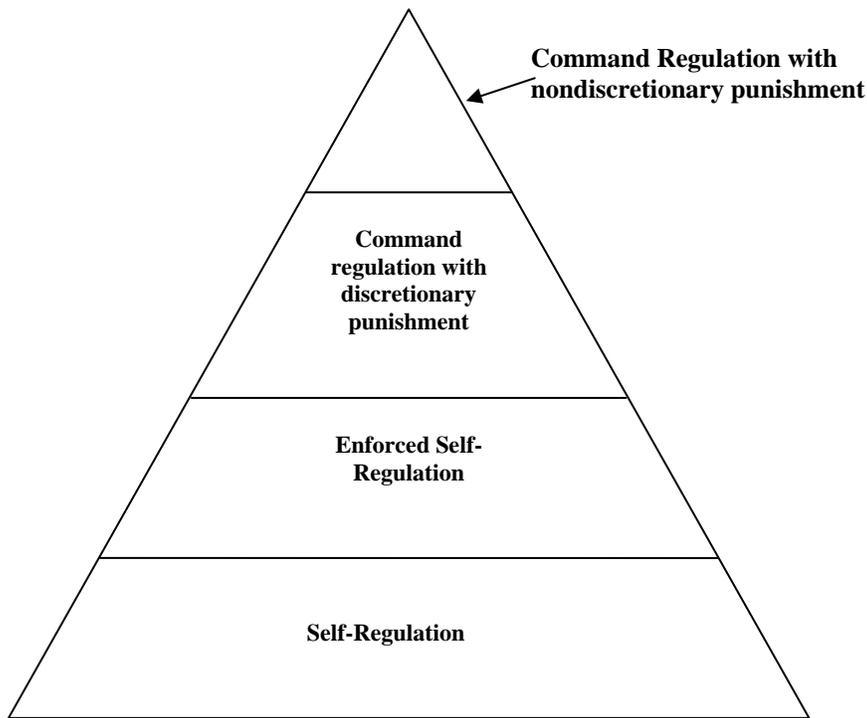


Fig. 1. Example of a pyramid of enforcement strategies (source: Ayres & Braithwaite, 1992: 39).

Regulation should be focused at the broadest base of the regulatory pyramid invoking self-regulation, moral suasion and education. However, regulators should have enforcement capacities available that allow them to escalate sanctions up the regulatory pyramid to its apex where their recommendations can be upheld and enforced.

In the Pacific there are already oversight institutions in which principles of responsive regulation are evident. The practices of the PNG Ombudsman’s Commission invoke widespread appeals to moral persuasion and cooperation with the agencies and individuals that it regulates, especially under the leadership code. Rather than not operating to the full extent of its capacities and powers, the Commission could instead be viewed as functioning at the broadest based of the regulatory pyramid. The Ombudsman’s Commission does have powers to escalate sanctions up the enforcement pyramid in cases of wilful non-compliance and clear breaches of the leadership code. It even has prosecutorial powers (to dismiss MPs for example) in the last instance, that is if the Public Prosecutor fails to act on its recommendations. It escalates its enforcement functions through the Leadership Tribunal and tends to work closely with the Public Prosecutor. Transparency International’s review of National Integrity Systems in PNG reported that:

Between 1975 and 1997, there were thirty-five politicians and public officials that were hauled before the leadership tribunals. Twenty-one of these leaders were found guilty. Out of this twenty-one, thirteen were dismissed from their office while eight were fined...*The effectiveness of the code is to a large extent determined by the capacity of the enforcing organization (the PNGOC), the vigilance of the public and the ability for compliance on the part of the leaders themselves* (Mellam & Aloï, 2003: 32, emphasis added).

The success of the PNG's Ombudsman's Commission resonates with principles of responsive regulation. The use of the enforcement apex peak of the regulatory pyramid is relatively rare, averaging less than one guilty finding per annum between 1975 and 1997. Most of the Commission's work would be concentrating on managing self-regulation. However, the Commission does have the capacity to enforce self-regulation and punish non-compliant breaches of the leadership code. It only needs to use these powers occasionally to reinforce the point that it can effectively oversee misconduct and enforce its oversight. In the Pacific oversight agencies could be institutionally strengthened over time by exploring the applicability of the following model, Fig. 2 (next page):

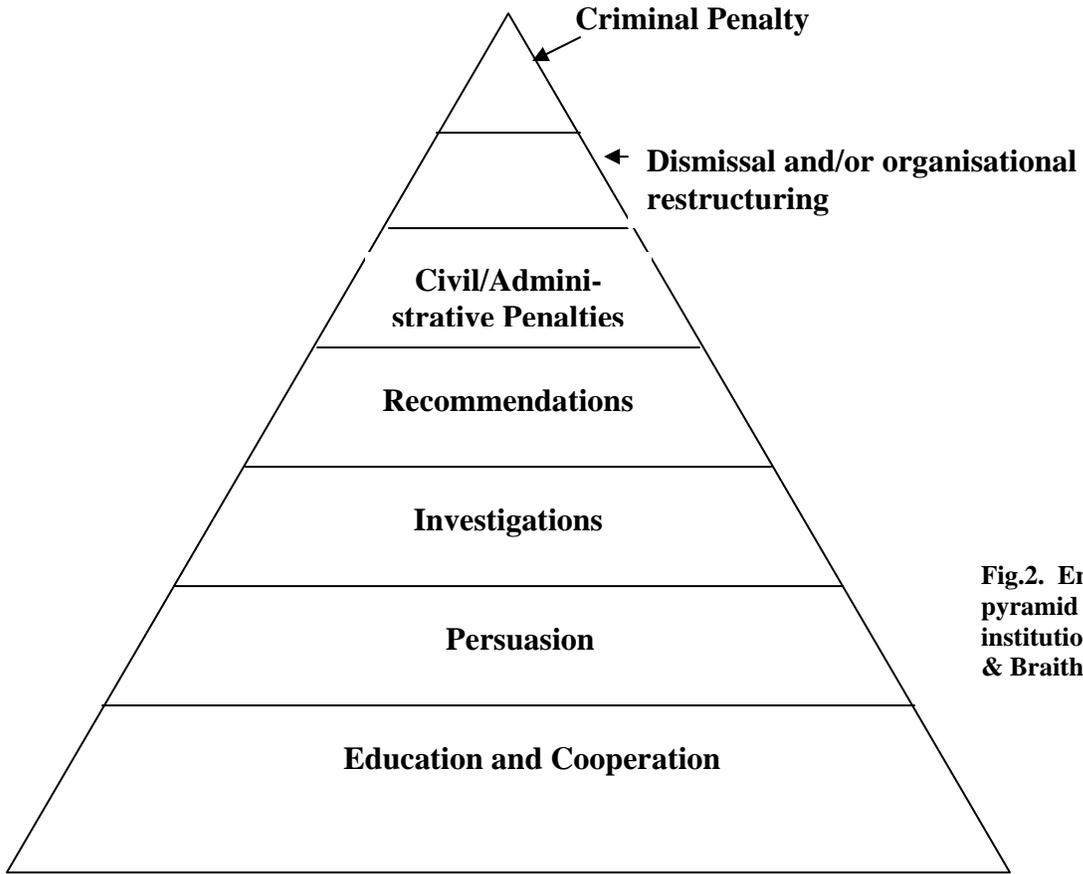


Fig.2. Enforcement pyramid for oversight institutions (Based on Ayres & Braithwaite, 1992: 35).

Conclusion and recommendations

Oversight institutions – Auditors General, Ombudsmen, Parliamentary committees and FIUs – have a vital role in ensuring accountability, transparency and probity in the overall machinery of government and administration. In the Pacific the performance of oversight institutions is characterised by variation at the administrative, constitutional, political and legal levels. This in turn explains common trends and themes that distinguish oversight agencies on the basis of their relative performance. Where oversight institutions have support and political will, are free from external interference, have independent controls over their own budgets, are adequately resourced and have effective relationships with enforcement branches within the law and justice sector, they perform well. In the Pacific some oversight institutions have these high levels of performance, while others find it wanting, both within and between countries.

Oversight agencies lend themselves well to institutional strengthening and capacity building. Adopting principle-based measures that invoke responsive regulation offer one of the most compelling ways of institutionally strengthening oversight agencies. This approach favours the application of broad principles rather than hard and fast rules and regulations. This model of flexibility, cooperation and education may offer the best opportunities for improving both the capacity and quality of oversight institutions and building the demand for good governance and accountability that is so vital for their long term success.

The development of a *model of responsible regulation as indicated in Fig.2* could provide general guidelines on how national governments and donors can allocate resources, focus priorities and calibrate enforcement capacities over time. The emphasis on education and cooperation suggests that oversight agencies should concentrate their energies at the broadest base of the regulatory pyramid as a means of helping build demand for good governance at a community level. The overall effectiveness of responsive regulatory principles could be enhanced by donors, national governments and regional organisations considering the following policy steps:

- Oversight institutions require financial independence to limit the extent of external interference. Efforts should be made to establish independent budget lines. Budgets could be set by independent bipartisan parliamentary committees.
- The placement of expatriate in-line staff at senior levels within oversight institutions should only be done cautiously. Where in-line advisers are placed within oversight institutions their tasks should include mentoring, training and education as well as discharging designated duties.
- High calibre leadership within oversight institutions is crucial. Champions of good governance should be fostered and promoted within oversight institutions. Good leadership contributes to high levels of staff morale, efficaciousness, efficiency, productivity and performance.
- The roles and duties of oversight institutions need to be clarified. This may require administrative reorganisation. In some countries such as PNG and Vanuatu, the

ombudsman oversees leadership codes giving the office a clear and well defined focus. This needs to be encouraged.

- The relationship between oversight and enforcement could be strengthened by increased strategic funding and resourcing. For example, financial investigative powers of police could be enhanced by recruiting additional police officers with audit and accounting experience and skills. Some countries may wish to establish specialised serious fraud squads with prosecutorial powers. Countries are already able to call upon expertise from Australian and New Zealand law enforcement agencies in specific cases where there is a skills/resources shortage. This should be encouraged.
- Common law systems and administrative practices tend to make clear demarcations between investigative functions of oversight agencies and the prosecutorial powers of the enforcement branches within the law and justice sector. This distinction is not a universal practice however. In some countries, particularly civil law jurisdictions, oversight institutions such as ombudsmen and even FIUs have prosecutorial powers. This could be an option to consider for Pacific Island States where the relationship between oversight and enforcement is weak.
- Through regulating official behaviour, oversight agencies can perform a vital role in preventing and reducing corruption within governments and administrations. There are international standards of best practice that provide important benchmarks for countries to work towards. This includes the United Nations Convention Against Corruption (UNODC). Of the 16 Pacific Island Forum member states, Australia, New Zealand and Papua New Guinea have signed this convention. The position of oversight agencies maybe strengthened if other member states sign this convention.
- Regionalisation of oversight services offers economies of scale in delivery. This can be achieved without comprising national sovereignty. Countries could supplement their own oversight agencies by referring to a regional authority when it is required. Alternatively they could delegate oversight capacities directly to regional bodies. This would be particularly useful for small micro states which do not necessarily have the resources available to maintain offices of Ombudsmen and Auditors General. Regionalisation, as formulated in the Pacific plan, should be encouraged.
- Building demand for good governance with the public is a long term goal. National governments and donors can foster this by supporting, encouraging and facilitating dialogue with representatives of civil society, the media and NGOs. A free and open media and an active NGO sector is crucial for building demand for good governance at a local level and these efforts should be encouraged both nationally and internationally.
- Financial management is important for effective oversight agency performance and needs to be strengthened. Assistance is currently provided through regional organisations such as the Pacific Financial Technical Assistance Centre (PFTAC). These support mechanisms and institutions should continue to receive priority.

Annex One: List of Interlocutors

| Date | Person/Position | Organisation |
|-----------------|--|---|
| 13 January 2006 | Michael Morgan, CDI Acting Director | Centre for Democratic Institutions, The ANU, Canberra |
| 17 January 2006 | Tony Liston, PNG Branch | AusAID, Canberra |
| | Marianne Jago, PNG Branch | AusAID, Canberra |
| 18 January 2006 | Amanda Roberts, First Secretary Designate, Apia | AusAID, Canberra |
| | Anthony Gill, First Secretary, Apia | AusAID, Apia, teleconference Canberra |
| | Andrew Pope, Director, Pacific Regional Governance Section | AusAID, Canberra |
| 19 January 2006 | Blair Excell, Director, Solomon Islands Section | AusAID, Canberra |
| | Jill Bell, Solomon Islands Section | AusAID, Canberra |
| | Jeff Prime, Country Program Manager, Fiji, Vanuatu and Nauru Section | AusAID, Canberra |
| 3 February 2006 | Sue Ingram, Program Director, Machinery of Government Program, RAMSI, Solomon Islands | AusAID, Canberra |
| 6 February 2006 | Iosefa Maiava, Deputy Secretary General | Pacific Islands Forum Secretariat, Suva |
| | Shennia Spillane, Legal Adviser | Pacific Islands Forum Secretariat, Suva |
| | Shaun Evans, Law Enforcement Officer | Pacific Islands Forum Secretariat, Suva |
| | Laura Chappell, ODI Economics | Pacific Islands Forum Secretariat, Suva |
| | Samantha Hung, Gender Issues Adviser | Pacific Islands Forum Secretariat, Suva |
| | Andie Fong Toy, Manager, Political and Security Programme | Pacific Islands Forum Secretariat, Suva |
| | Lawrie Cremin, Political Issues Adviser | Pacific Islands Forum Secretariat, Suva |

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|-----------------|--|---|
| 7 February 2006 | Gary Wiseman, Coordinator | UNDP, Pacific Sub Regional Centre, Suva |
| | Henrik Lindroth | UNDP, Pacific Sub Regional Centre, Suva |
| 8 February 2006 | Graham Hassall, Professor of Governance | USP, Suva |
| | David J.E. Smith, Regional Advisor on Development Policy | UNESCAP Pacific Operations Centre, Suva |
| | Apenisa Naigulevu, Executive Officer | Transparency International, Fiji Chapter, Suva |
| | Shaun Evans, Law Enforcement Officer | Pacific Islands Forum Secretariat, Suva |
| 10 February | Josaia Naigulevu, Director of Public Prosecutions (DPP) | Office of the Director of Public Prosecutions, Suva |
| | Raymond L Gibson, Assistant DDP | Office of the Director of Public Prosecutions, Suva |
| | Imrana Jalal, Human Rights Adviser | UNDP, Regional Rights Resource Team, Suva |
| | Angie Heffernan, Director | Pacific Centre for Public Integrity (PCPI), Suva |
| 15 February | Peter Ritchie Adviser | Anti-Money Laundering Assistance Team International Crime Branch Attorney-General's Department, Canberra |
| | Andreana Manifold | Anti-Money Laundering Assistance Team International Crime Branch Attorney-General's Department, Canberra |

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