



**UNODC**

United Nations Office on Drugs and Crime

## **Country Review Report of Vanuatu**

Review by India and Solomon Islands of the implementation by Vanuatu of articles 15 – 42 of Chapter III, “Criminalization and law enforcement”, and articles 44 – 50 of Chapter IV, “International cooperation”, of the United Nations Convention against Corruption for the review cycle 2010 - 2015

## Table of Contents

I.	Introduction .....	3
II.	Process.....	4
III.	Executive Summary .....	4
IV.	Implementation of the Convention.....	15
	A. Ratification of the Convention .....	15
	B. Legal system of Vanuatu .....	15
	C. Implementation of selected articles .....	25
Chapter III: Criminalization and Law Enforcement .....		25
	Article 15 Bribery of national public officials.....	25
	Article 16 Bribery of foreign public officials and officials of public international organizations ..	33
	Article 17 Embezzlement, misappropriation or other diversion of property by a public official ...	34
	Article 18 Trading in influence.....	45
	Article 19 Abuse of Functions .....	46
	Article 20 Illicit Enrichment.....	49
	Article 21 Bribery in the private sector .....	54
	Article 22 Embezzlement of property in the private sector .....	55
	Article 23 Laundering of proceeds of crime .....	56
	Article 24 Concealment .....	66
	Article 25 Obstruction of Justice .....	67
	Article 26 Liability of legal persons .....	70
	Article 27 Participation and attempt.....	73
	Article 29 Statute of limitations.....	76
	Article 30 Prosecution, adjudication and sanctions .....	77
	Article 31 Freezing, seizure and confiscation.....	95
	Article 32 Protection of witnesses, experts and victims .....	108
	Article 33 Protection of reporting persons.....	110
	Article 34 Consequences of acts of corruption .....	112
	Article 35 Compensation for damage .....	113
	Article 36 Specialized authorities .....	114
	Article 37 Cooperation with law enforcement authorities .....	138
	Article 38 Cooperation between national authorities.....	140
	Article 39 Cooperation between national authorities and the private sector.....	141
	Article 40 Bank secrecy.....	144
	Article 41 Criminal record.....	146
	Article 42 Jurisdiction .....	147
Chapter IV: International Cooperation.....		154
	Article 44 Extradition .....	154
	Article 45 Transfer of sentenced persons .....	188
	Article 46 Mutual legal assistance .....	192
	Article 47 Transfer of criminal proceedings .....	232
	Article 48 Law enforcement cooperation .....	233
	Article 49 Joint investigations .....	239
	Article 50 Special investigative techniques .....	240

## I. Introduction

1. The Conference of the States Parties to the United Nations Convention against Corruption (UNCAC) was established pursuant to article 63 of the Convention to, *inter alia*, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention (Review Mechanism). The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an inter-governmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

## II. Process

5. The following review of implementation by Vanuatu of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Vanuatu, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from India, Solomon Islands and Vanuatu, by means of telephone conferences, e-mail exchanges and in-person dialogue. The review process involved the following persons listed below.

### Vanuatu:

- Ms. Jenny Tevi, Senior Desk Officer, Treaties and Conventions Divisions, Ministry of Foreign Affairs

### India

- Mr. Jai P. Prakash, Additional Secretary, Ministry of Personnel & Training
- Mr. Manoj Kumar Dwivedi, Director (Services & International Cooperation), Department of Personnel and Trainings, Ministry of Personnel, Public Grievances and Pensions
- Mr. Ashish Chandra Singh, Senior Legal Adviser

### Solomon Islands

- Joe Poraiwai, Ombudsman
- Nelson Dhita Ofamana, Senior Legal Officer / Crown Prosecutor

6. A country visit, agreed to by Vanuatu, was conducted from 28 to 30 October 2013. The following institutions met included the Prime Ministers' Office, Attorney-General's Office/ State Law, Public Service Commission, Public Prosecutions Office, Reserve Bank, Vanuatu Financial Services Commission, Vanuatu Financial Intelligence Unit, Vanuatu Police Force/Fraud/Criminal Investigations Department, Transnational Crime

Unit, Correctional Services, Ombudsman's Office, Transparency & Social Accountability (a non-governmental organization), Vanuatu Chamber of Commerce and National Council of Women (agenda see annex 1).

### **III. Executive summary**

#### **1. Introduction**

***Overview of the legal and institutional framework of Vanuatu in the context of implementation of the United Nations Convention against Corruption***

*The Convention was acceded to by the Government of the Republic of Vanuatu on 12 July 2011. It entered into force on 11 August 2011, pursuant to the United Nations Convention against Corruption (Ratification) Act of 2010.*

*Vanuatu is a unitary State with a Parliamentary-type of Government based on the Westminster model. Its sources of law vary as a result of joint British-French administration before independence in 1980.*

*Key institutions involved in the criminalization of corruption and law enforcement include: the Vanuatu Police Force (VPF); Office of the Public Prosecutor; Office of the Ombudsman; Vanuatu Financial Intelligence Unit (VFIU); and Public Service Commission (PSC). Key for international cooperation are the Attorney-General's Office/State Law, Transnational Crime Unit (TCU) and VFIU.*

*Criminal matters, including corruption offences, are prosecuted by the Public Prosecutor, pursuant to article 55 of the Constitution of 1983 and the Public Prosecutor Act of 2003. Matters are submitted to the Public Prosecutor by the Ombudsman and Vanuatu Police Force.*

#### **2. Chapter III: Criminalization and Law Enforcement**

##### **2.1. Observations on the implementation of the articles under review**

*Bribery and trading in influence (articles 15, 16, 18, 21)*

*Section 73(1) and (2) of the Penal Code of 1988 (PC) criminalizes active and passive bribery.*

*Section 73(3) of PC defines a bribe and public officer. Bribe means any money, valuable consideration, office or employment, or any benefit, whether direct or indirect. Public officer means any person in the official service of the Republic (whether that service is honorary or not, and whether it is within or outside the Republic), any member or employee of any local authority or public body and includes police and judicial officers. Any member of a public body would be widely interpreted to include Members of Parliament. It was confirmed that judges could also fall under the definition, but no case examples exist.*

*Bribery is further covered in the Leadership Code of 1998 (LC), but no prosecutions have been made under this Code to date. Bribery concerning votes falls under the Representation of the Peoples Act of 1982.*

*Bribery of foreign public officials and officials of public international organizations, and bribery in the private sector are not criminalized.*

*Some aspects of trading in influence are covered (i.e. ss.73 and 130B, PC; ss.22 and 23, LC).*

*Money-laundering, concealment (articles 23, 24)*

*Section 11 of the Proceeds of Crime Act of 2012 (POCA) criminalizes money-laundering, whereby if a person knows or ought reasonably to know that given property is the proceeds of crime: acquires, possesses or uses, or engages, directly or indirectly, in an arrangement that involves such property; or converts or transfers such property; or conceals or disguises the true nature, source location, disposition, movement, ownership of or rights with respect to such property.*

*For participation and attempt, the PC provisions sections 28 to 35 are applicable.*

*A “serious crime” approach is applied to determining predicate offences, namely, offences against Vanuatu law where the minimum threshold is 12 months imprisonment or where, if the offence were committed overseas, it would have reached the 12-month imprisonment threshold or the proceeds of that offence would have amounted to a minimum of VT 10 million, had the offence occurred in Vanuatu.*

*All corruption offences are serious offences according to this definition.*

*A person can be convicted of both money-laundering and the underlying predicate offences, according to section 11(3) and (4) of POCA.*

*No cases of money-laundering have been prosecuted so far.*

*Concealment is covered under section 12 of POCA which criminalizes the receiving, possession, concealment, disposition or bringing into Vanuatu of money or other property that may reasonably be suspected of being proceeds of crime.*

*Embezzlement, abuse of functions and illicit enrichment (articles 17, 19, 20, 22)*

*Section 123 of PC provides that a person commits misappropriation of property if he destroys, wastes, or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption). The causing of loss to another through misappropriation is criminalized (s.125(b), PC). Further provisions that may cover embezzlement, misappropriate or other diversion of property are defined in PC (i.e. ss.126 and 128, PC). However, property is narrowly defined in the Interpretation Act of 1982 and could prevent successful prosecutions.*

*The provisions highlighted above criminalize those acts for “all persons” and, therefore, include embezzlement and misappropriation in the private sector. Case examples were provided for both cases involving public officers and in the private sector.*

*Abuse of functions has been considered by Vanuatu in LC (i.e. ss.22, 23). However, the implementation, in practice, seems challenging; for example, numerous conflict of interest and abuse of power matters were investigated by the Ombudsman’s Office, but no prosecutions have been reported since LC was enacted.*

*Illicit enrichment is not criminalized in Vanuatu. The Republic has a system of asset declarations (annual returns) for leaders, as regulated in Part 4 of LC. A leader who does not file a return or files a return knowing that it is false is guilty of breach. The declarations have not been made public, but the pending Freedom of Information Bill may change this.*

### *Obstruction of justice (article 25)*

*Obstruction of justice is covered in section 79 of PC. The authorities provided that this section would also apply during the investigative stage. Interference “in any way” would include cases of promising, offering or giving of an undue advantage to interfere in the giving of testimony. Additional provisions which could be applicable are sections 81 and 82 of PC in regard to deceiving witnesses and offences relating to judicial proceedings.*

*PC has a specific provision regulating the obstruction of police officers (s.73A) and court officers (s.87). It was not clear if section 87 would also apply to lawyers, prosecutors and judges; nonetheless, section 79(c) of PC is sufficiently broad to encompass all such cases.*

*Due to a lack of case examples, it was not possible to assess the implementation in practice of the provisions on obstruction of justice.*

### *Liability of legal persons (article 26)*

*Criminal liability of legal persons is provided for in section 18 of PC, “provided that the acts and intentions of its principals or responsible servants may be attributed to the corporation”. Moreover, according to the Interpretation Act, a “person” includes any statutory body, company or association or body of persons corporate or unincorporated (Schedule to s.2).*

*The implementation, in practice, of the provisions has not been tested; however, 3 cases were under investigation and it was confirmed that the criminal liability of the natural person would also be possible.*

*In most cases, the law does not regulate separate penalties for natural and legal persons, except for money laundering offences in POCA.*

### *Participation and attempt (article 27)*

*The attempt to commit an offence is criminalized according to sections 3 and 28 of PC, but the “mere preparation of an offence shall not constitute an offence”.*

*Sections 28 to 35 of PC criminalize all forms of participation.*

### *Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (articles 30, 37)*

*The penalties for most corruption offences are terms of imprisonment of up to, for example, 7 years for obstruction of justice, 10 years for bribery or money laundering, and 12 years for misappropriation. According to section 51 of PC, it is possible to convert the sentence into the payment of a fine.*

*Pursuant to article 55 of the Constitution, the Public Prosecutor has the discretion to prosecute, free of direction or control. There have been no prosecutions in relation to money laundering or LC offences.*

*The Public Prosecutor may grant indemnity from prosecution for any offence to a person on account of an undertaking given by that person to give evidence in a specified proceeding or an understanding or expectation that the person will give such evidence (s.9, Public Prosecutors Act). It was explained that immunity from prosecution could be granted, but this has not been tested. A guilty plea and cooperation with the police and prosecutors are factors that could be considered as mitigating factors.*

*Vanuatu does not provide for immunities from criminal prosecution for public officials, except as provided for in articles 27 and 32 of the Constitution. These articles regulate that no Member of Parliament or the National Council of Chiefs is to be arrested or prosecuted during a sitting session of these bodies. However, in exceptional circumstances, exceptions are possible (i.e. where the postponement of arrest or prosecution is not possible).*

*Sections 60 to 70 of the Criminal Procedure Code of 2003 (CPC) regulate bail, providing wide discretionary powers to the court to determine bail conditions.*

*Parole is regulated in sections 50 to 54 of the Correctional Services Act of 2006. According to section 51, every inmate serving a sentence of less than 12 months will be released on parole automatically after half of the term has passed. Others, with the exception of prisoners sentenced to life imprisonment, are eligible to be considered by a community parole board for release on parole upon request and expiry of half the sentence. The granting of parole takes into account numerous factors (i.e. primarily the safety of the community, prospects of successful reintegration, conduct of the prisoner, gravity of the offence).*

*Administrative sanctions, such as dismissal and disqualification are provided for in the Public Service Act (dismissal for a cause: s.29; dismissal for criminal conviction: s. 29A). A person disqualified from holding office as a result of a criminal conviction can only be appointed to the public service at least 4 years after such conviction. PSC is responsible for the decision of cases involving persons working in the public service. This comprises persons employed in the ministries, departments, State-appointed offices, agencies and instruments of the Government of Vanuatu, as designated by the Prime Minister, pursuant to an enactment (s.2, Public Service Act). Political appointees are excluded from the auspices of PSC. For police officers and armed forces, teachers and judicial officers, separate service commissions exist.*

*There are no provisions in the Public Service Act which foresee the suspension of a public servant or similar measures pending trial. However, a parallel process of disciplinary sanctions would be possible if the conduct was brought to the attention of PSC.*

#### *Protection of witnesses and reporting persons (articles 32, 33)*

*Vanuatu does not have specific witness protection measures, except in limited cases for victims of domestic violence. The Police Force reported cases of witness intimidation and that an investigation into obstruction of justice could be opened in such cases; no such matter has been fully investigated.*

*The Governments Contracts and Tenders Act of 2001 provides that a person performing functions in or for any Ministry or Department must not victimise or discriminate against an employee of the Public Service because that employee has reported breaches or alleged breaches of the tender process (s.13C(2)). No similar provisions exist to protect all public officials in regard to reporting any allegations of corruption.*

#### *Freezing, seizing and confiscation; bank secrecy (articles 31, 40)*

*Sections 15 and 20 of POCA regulate forfeiture of tainted property in relation to a serious offence, namely, property intended for use in, or used in or in connection with, the commission of the offence, or proceeds of crime (s.2, POCA).*

*Proceeds of crime is defined as property derived or realized directly or indirectly from a serious offence, and also covers converted or transformed property and income, capital or other economic gains derived or realized from that property (s.5, POCA). If such property is intermingled with other property, the portion of the whole represented by the original proceeds is taken to be the proceeds of crime.*

*Section 53 of PC and section 44 of LC regulate the confiscation of proceeds of crime and property.*

*Sections 37 and 37 of POCA and 56 to 59 of PC enable search and seizure.*

*VFIU can issue directions to financial institutions which include freezing for up to 5 days (details are regulated in ss.13F and 13A(1)(i), Financial Transactions Reporting Act of 2005 (FTRA)). This power has been exercised in several cases. VFIU has further powers under section 13(A)(i) to direct a financial institution to facilitate any investigation.*

*The Vanuatu Police Force is responsible for identification, tracing, freezing or seizure (ss.55-59, CPC, ss.37 and 38, POCA) and can apply for restraining (s.55, CPC) or production orders (s.82A).*

*Sections 48 and 49 of POCA entitle the Attorney General to administer frozen or seized property in accordance with a court order.*

*The provisions apply without prejudice to the rights of bona fide third parties.*

*Bank secrecy laws have been superseded by FTRA. Banks are required to make any records available to VFIU/law enforcement agencies, or as requested by a court order (i.e. ss.13A, 13D, 13E, 13F and 14, FTRA).*

*Statute of limitations; criminal record (articles 29, 41)*

*The statute of limitations is established in section 15 of PC. For offences which are punishable by more than 10 years' imprisonment, the limitations period is 20 years; for more than 3 months but not more than 10 years' imprisonment, the statute of limitations is 5 years. For bribery, money laundering and obstruction of justice, the statute of limitations would therefore be 5 years. Vanuatu authorities acknowledged that the timeframes foreseen were relatively short.*

*Jurisdiction (article 42)*

*Jurisdiction extends to cases in which the offence or an element of the offence was committed in the territory of Vanuatu; this extends to territorial waters and airspace, and all civil vessels and aircrafts registered in the Republic (ss.1 and 2(a), PC).*

*Pursuant to section 2(b) of PC, jurisdiction is established for any offence against Vanuatu's national security or counterfeiting local money.*

*If an offence has been committed by a citizen outside of Vanuatu, s/he may be prosecuted, if the double-criminality requirement is satisfied (s.4, PC).*

*Consequences of acts of corruption; compensation for damage (articles 34, 35)*

*No concrete forms of remedial action were cited. However, in practice, some measures to address acts of corruption exist.*

*The court can make an order for the payment of costs, damages or compensation, or for the restitution of any property, notwithstanding that the offender is not sentenced on conviction (s.42, PC). Section 54 of PC*

*specifies that an order on the restitution of property to the person lawfully entitled to possession thereof can be made by the court upon conviction.*

*Details of the applicability of other statutes or principles which provide for redress under tort or breach of contract remained unclear.*

*Specialized authorities and inter-agency coordination (articles 36, 38, 39)*

*The anti-corruption mandate is spread across several agencies. Within the VPF, the Serious Crime, Fraud, Intelligence and Transnational Crime Units deal with corruption offences.*

*The Ombudsman's Office is responsible for enquiring into any conduct on the part of any Government agency and into any defects in any law or administrative practice. Furthermore, he investigates alleged breaches of LC; 871 investigations have been made.*

*The Office of the Public Prosecutor employs 7 prosecutors. It receives reports from the VPF and must consider reports transferred to it from the Ombudsman.*

*VFIU was established in 2004 pursuant to FTRA. It is situated under the Attorney General's Office, but has no reporting line to the Office. It has 4 staff members who collaborate with other law enforcement agencies.*

## **2.2. Successes and good practices**

*Overall, the following successes and good practices in implementing Chapter III of the Convention are highlighted:*

- Training of the financial service institutions by VFIU and vice versa, taking into account priorities through the awareness raising of sectors at risk of corruption;*
- The establishment and effective functioning of the reintegration programme by Correctional Services;*

## **2.3. Challenges in implementation**

*The following steps could further strengthen existing anti-corruption measures:*

- Ensure that the definition of public officer covers the scope defined in UNCAC article 2(a) and includes a person who performs a public function for a public enterprise;*
- Criminalize active bribery of foreign public officials and officials of public international organizations and consider criminalizing its passive form;*
- Consider, for the purposes of legal certainty, amending the legislation to allow for the criminalization of trading in influence in a more clear and explicit manner;*
- Consider criminalizing bribery in the private sector;*
- Assure that all forms of embezzlement and misappropriation are criminalized and that the definition of property is wide enough;*

- *Consider criminalizing abuse of function for all public officials (not only leaders as provided for under LC);*
- *Consider adopting measures to establish illicit enrichment as a criminal offence;*
- *Prioritize the investigation and prosecution of corruption offences. Monitor and assess the implementation, in practice, of the corruption offences in order to take necessary measures to strengthen their implementation;*
- *Establish more effective, proportionate and dissuasive fines and sanctions, including for legal persons;*
- *Consider widening the scope of PSC to cover all public officials and harmonize the manner in which public officials are dealt with across the existing service commissions in relation to the provisions of the Convention;*
- *Take legislative and other measures, as appropriate, to enable the protection of witnesses and experts from retaliation or intimidation;*
- *Consider introducing further provisions to protect reporting persons who report in good faith and on reasonable grounds acts of corruption;*
- *Specify which measures could apply to address consequences of corruption as provided for in UNCAC article 34 and strengthen their application in practice;*
- *Ensure that sufficient measures exist to provide compensation for damages resulting from acts of corruption, in line with UNCAC article 35;*
- *Ensure that the statute of limitations is long enough for all corruption offences, and further ensure that the legislation provides for the suspension of the statute of limitations in prescribed cases and particularly when the alleged offender has evaded the administration of justice;*
- *Improve efficiency in the fight against corruption by strengthening inter-agency coordination and collaboration. Sufficient resources should be made available for capacity-building and the development of processes to address constraints and backlogs in the investigation, prosecution and adjudication of cases.*

#### **2.4. Technical assistance needs identified to improve implementation of the Convention**

*Vanuatu indicated that it would require a range of technical assistance. On criminalization, such assistance predominantly included summaries of good practices/lessons learned, legal advice, model legislation and legislative drafting. In relation to law enforcement, capacity-building programmes for the establishment of witness and whistleblower protection programmes and corruption-related trainings would be required for the police (i.e. on how to collect evidence), the Ombudsman's Office and prosecutors dealing with corruption offences. There was also a specific request to develop an action*

plan for implementation and to assist PSC in developing a complaints management system.

### **3. Chapter IV: International cooperation**

#### **3.1. Observations on the implementation of the articles under review**

*Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)*

*The procedures regulating extradition to and from Vanuatu are contained in the Extradition Act of 2002 (EA). Conduct-based dual criminality is required with a penalty threshold of imprisonment, or other deprivation of liberty, for a maximum period of not less than 12 months (s.3(1)). An extradition treaty for Vanuatu is broadly interpreted to include Commonwealth countries, South Pacific countries and comity countries, declared to be so by regulation or certified by the Attorney General to an extradition country for the purpose of a particular request (s.2(1)(c)). Vanuatu joined the Commonwealth in 1980 and despite not having used it to date, could rely upon the London Scheme for Extradition within the Commonwealth of 2002 (London Scheme). Vanuatu does not have any additional extradition agreements or arrangements, but could, in principle, use the Convention as a legal basis for extradition in respect of any UNCAC-related offences.*

*The reviewers noted that the dual criminality requirement may be problematic, as some UNCAC-related offences have not been criminalized (e.g. bribery of foreign public officials and bribery in the private sector).*

*Vanuatu does not make extradition conditional on the existence of a treaty with Commonwealth and South Pacific Countries, but does with other States. Section 4 of the Act contains a comprehensive list of grounds for refusing extradition, including the nature of the crimes for which extradition is requested as political offences; the possibility of prosecution or punishment of a person because of race, religion, nationality, political opinions, sex and status; the existence of an extradition offence only under the military but not ordinary criminal law; immunity due to the lapse of time, amnesty or any other reason; and double jeopardy. Vanuatu will also not refuse an extradition request on the sole ground that the offence involves fiscal matters (s.3(4)(a), EA).*

*There are different evidentiary requirements in EA, depending on the country requesting the extradition. These requirements differ if the requesting State is a Commonwealth country (Part 3), South Pacific country (Part 4), treaty country (Part 5) or comity country (Part 6).*

*Division 2, Part 2 of EA deals with arrests in relation to extradition offences. Vanuatu has a mechanism for dealing with urgent requests by issuing a provisional arrest warrant. Such a request can also be received via the International Criminal Police Organization (ICPO)-INTERPOL.*

*Section 60 of EA provides for the refusal of extradition based on nationality, but requires the discretion of the Attorney General (ss.1(b)). If the extradition of such a person is denied, he may be prosecuted and punished. Temporary surrender of Vanuatu nationals for purposes of trial is possible (s.19, EA). Vanuatu may refuse to grant an extradition request for the enforcement of a sentence imposed under the domestic law of the requesting State if the judgment was handed down in abstentia (s.4(h), EA).*

*In Vanuatu, extradition proceedings are conducted in the same manner as criminal proceedings (s.5, EA). The general guarantees of fair treatment*

are contained in the Constitution (art.37), PC (i.e. rights of the accused at trial: s.14) and CPC (presumption of innocence: s.81).

The legislation does not contain provisions requiring consultations to take place with requesting States before refusing extradition; however, in practice, such consultations have been conducted.

Vanuatu does not have substantial experience in dealing with extradition. To date, only 3 extradition requests have been received and in the last 2 years, none have been sent.

The authority responsible for extradition and mutual legal assistance (MLA) in Vanuatu is the Attorney General.

Vanuatu is de facto part of the Scheme for the Transfer of Convicted Offenders within the Commonwealth. However, it has not used this Scheme and has not entered into any agreements or arrangements on the transfer of sentenced persons. Moreover, in relation to UNCAC article 47, the transfer of criminal proceedings has not been implemented.

#### *Mutual legal assistance (art. 46)*

The procedures regulating MLA are regulated in the Mutual Assistance in Criminal Matters Act of 2005 (MACMA) and POCA. In principle, the Scheme relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth also applies, but has not been used in practice. Vanuatu would be willing to provide the widest assistance possible with regard to UNCAC-related offences upon the request of Member States, but such assistance is subject to the approval of the Attorney General (s.5, MACMA). The dual criminality requirement applies to Parts 4 (assistance for search and seizure) and 7 (assistance regarding proceeds of crime) of MACMA, but not to other Parts of the Act. The principle of reciprocity was deemed to be applicable to such Parts. MLA examples in relation to legal persons exist.

Vanuatu can generally afford the types of assistance listed in UNCAC article 46(3) (ss.1, 2, Parts 3, 4 and 7, MACMA; Parts 4 and 5A, POCA). Part 3 of POCA (forfeiture orders, pecuniary penalty orders and related matters) and Division 2, Part 7 (assistance regarding proceeds of crime) of MACMA provide for conviction-based forfeiture. Provisions do not exist on recovery of assets in accordance with UNCAC Chapter V.

Vanuatu requires an MLA request before information can be transmitted. However, where information in an MLA request is to remain confidential, (s.63, MACMA) or to be restricted in its use (s.62, MACMA), this will be respected.

The authorities explained that there are no obstacles to providing legal assistance posed by bank secrecy in relation to money laundering offences (ss.13D and 14, FTRA).

Vanuatu can transfer detained persons for purposes of identification, testimony or other assistance, pursuant to Part 5 of MACMA; immunities are granted only to a person in Vanuatu (s.25)

Section 6 of MACMA sets out how a foreign country is to make an MLA request.

Based on section 55 of MACMA, the examination of a person giving evidence may be conducted through a video link.

*Sections 8, 9 and 10 of MACMA contain mandatory (s.8) and optional (depending on the Attorney General: ss.9 and 10) grounds for refusal of an assistance request.*

*Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)*

*Vanuatu has various means to facilitate law enforcement cooperation, including joint investigations. It has an arrangement with the Australian Federal Police (AFP) on direct cooperation. As part of the Pacific Transnational Crime Network (PTCN), AFP through its Law Enforcement Cooperation Program established TCU under the Vanuatu Police Force.*

*Vanuatu is party to the multilateral agreement that established PTCN in the region, a multilateral arrangement between Pacific Chief of Police, and arrangements established through the Forum Secretariat, Melanesian Spearhead Group, INTERPOL Fiji and INTERPOL New Zealand. The Vanuatu Police Force is also part of the Pacific Transnational Crime Commission.*

*Personnel of AFP have been located within the Vanuatu Police Force (i.e. TCU), as liaison officers. Vanuatu police officers have also been seconded into AFP, and TCU seconded to Fiji and Samoa through PTCN.*

*VFIU has signed 7 memoranda of understanding with foreign FIUs. It is also a member of the Pacific FIU Association, Asia Pacific Group on Money Laundering and Egmont Group of FIUs.*

*Several successful examples of regional cooperation and coordination were cited; notably, with AFP.*

*There is no legislation in place that provides for the use of special investigative techniques.*

### **3.2. Successes and good practices**

*Overall, the following success and good practice in implementing Chapter IV of the Convention is highlighted:*

- Vanuatu's international law enforcement cooperation, as facilitated primarily through TCU.*

### **3.3. Challenges in implementation**

*The following challenges and recommendations were highlighted by the reviewers:*

- Criminalize all UNCAC-related mandatory offences and consider criminalizing the optional UNCAC offences which are currently not established as crimes in the domestic legislation to satisfy the dual criminality requirements of EA, MACMA and POCA and ensure that extradition and MLA requests (to the extent they involve coercive measures) can be granted with regard to corruption-related offences;*
- Consider allowing for an extradition request that includes several separate offences, one of which is extraditable, to be addressed;*
- Ensure that any extradition treaties that Vanuatu may conclude with other Member States contain direct references to UNCAC-related offences as being extraditable;*

- *Consider simplifying and streamlining procedures and evidentiary requirements in order to allow for extradition and MLA requests to be dealt with efficiently and effectively. This may include the adoption of a request management system and internal guidelines;*
- *Notify the Secretary-General of the United Nations of the central authority designated for extradition and MLA, as well as the acceptable language for executing such requests;*
- *“Ethnic origin” be specifically included in the legislation (i.e. s.4, EA), so that this may also be used as a ground for potential discrimination in the requesting State and thus, a reason for refusing extradition;*
- *Consider spontaneously transmitting information to a foreign competent authority, without a prior request, where such information could assist in the investigation and prosecution of UNCAC-related offences;*
- *Introduce legislative provisions that do not allow Vanuatu to decline rendering MLA on the ground of bank secrecy or fiscal matters (noting that this is currently addressed only for money laundering offences);*
- *Consider developing internal procedures to guide the manner in which discretion and “any conditions” (i.e. s.7, MACMA) are to be exercised and applied by the Attorney General;*
- *Reasons should be given to the requesting State for any MLA refusal, and prior to this, consultations taken;*
- *Require that a person (i.e. witness, expert), detained or not, who is transferred overseas, pursuant to an MLA request, not be prosecuted, detained, punished or subjected to any other restrictions of his/her personal liberty;*
- *Take legislative measures or adopt guidelines to ensure a more consistent approach to the determination of the costs associated with executing MLA requests;*
- *Consider the possibility of transferring criminal proceedings where it is in the interests of proper administration of justice. This may require introducing legislative measures;*
- *Consider amending relevant legislation in order to introduce special investigative techniques and providing corresponding training to law enforcement personnel.*

### **3.4. Technical assistance needs identified to improve implementation of the Convention**

*The following technical assistance needs were identified:*

- *Summary of good practices/lessons learned in relation to extradition and special investigative techniques;*

- *Legal advice on how to improve extradition, MLA, the transfer of criminal proceedings and special investigative techniques;*
- *Legislative drafting in relation to the transfer of sentenced persons and criminal proceedings;*
- *Capacity-building programmes for authorities in charge of international cooperation in criminal/investigative matters (in particular, TCU) and for cross-border law enforcement cooperation, as well as for designing and managing the use of special investigative techniques;*
- *Development of an international cooperation record-keeping system, as well as extradition and MLA templates for requesting States and internal guidelines for staff on how to deal with international cooperation requests;*
- *Technological assistance (e.g. set-up and management of databases/information-sharing systems);*
- *Model agreements and arrangements on law enforcement cooperation and joint investigations.*

## **IV. Implementation of the Convention**

### **A. Ratification of the Convention**

7. The Convention was acceded to by the Government of Vanuatu and it entered into force on 11 August 2011. Pursuant to article 26 of the Constitution, the Government presented the Convention for accession to Parliament. The Convention was domesticated in the United Nations Convention against Corruption (Ratification) Act, No. 15 of 2010.
8. Vanuatu deposited its instrument of ratification with the Secretary-General of the United Nations on 12 July 2011 (C.N.461.2011.TREATIES-40 (Depositary Notification)).
9. Vanuatu has no reservations to the Convention.

### **B. Legal system of Vanuatu**

10. Vanuatu indicated that it has a draft revision pending to the Ombudsman Act, No. 27 of 1998, in order to give the Ombudsman more "teeth" to prosecute corruption-related offences.
11. The following information is extracted from M.A. Ntumy's "South Pacific Islands Legal Systems", University of Hawaii, USA, 1994.

### **III. SOURCES OF LAW**

Vanuatu has a variety of sources of law as a result of its joint administration by Britain and France before independence in 1980.

## **A. Constitution**

The Constitution of Vanuatu was brought into force in 1980 by an exchange of notes between Britain and France. Its provisions provide the basic structure of the government of Vanuatu and also the fundamental rights, freedoms, and duties of individuals. Article 2 of the Constitution provides that the Constitution is the supreme law of Vanuatu.

Parliament may amend the Constitution by the vote of not less than two-thirds of all members at a special meeting attended by at least three-quarters of members in the first instance, or two-thirds of the members one week later- provided that any amendment regarding the status of the three official languages, the electoral system, of the parliamentary system shall not come into effect unless supported at a national referendum (Constitution, Chapter 14).

## **B. Statutory Law**

The Constitution provides at Article 16 that Parliament “may make laws for the peace, order and good government of Vanuatu.” Article 16 further stipulates that laws may not be inconsistent with the Constitution.

Acts of Parliament, as well as those pre-independence regulations that are still in force, are compiled in the Laws of Vanuatu, which was published in a revised edition in 1988. In the revised edition, each law is designated by chapter number.

## **C. British and French Laws**

The Constitution provides, at Article 93, that the British and French laws in force or applied in New Hebrides immediately before independence continue to apply to the extent that they are neither expressly revoked by Parliament nor incompatible with the independent status of Vanuatu.

The Anglo-French Protocol of 1914, which came into force in 1922 and regulated the government of the New Hebrides, provided that the laws of Britain and France were to apply to the nationals of each country and also to nationals of other countries who chose, or opted, to be subject to such laws.

This meant that much of French law was applied to French nationals and optants. So far as British nationals and optants were concerned, the Pacific Order-in-Council 1893, which established a High Commissioner’s Court for British dependency in the Pacific, provided that "the substance of the law for the time being in force in and for England" was to be applied. The Western Pacific (Courts) Order 1961, which replaced the High Commissioner’s Court with the High Court of the Western Pacific, provided that the court was to apply “(a) the statutes of general application in force in England on the 1st day of January 1961 and (b) the substance of the English common law and equity... so far only as the circumstances of any particular territory and its inhabitants and the limits of Her Majesty’s jurisdiction permit." After the abolition of the High Court of the Western Pacific by the New Hebrides Order 1975 and its replacement in the New Hebrides by the High Court of the New Hebrides, the High Court of the New Hebrides Regulation 1976 provided that "so far as circumstances admit... the statutes of general application in force in England on the 1st day of January 1976" were to be applied as well as the principles of common law and equity. In addition, the Pacific Order-in-Court 1893 authorized the British High Commissioner of the Western Pacific to make regulations for the peace, order, and good government of those subject to British

jurisdiction. Accordingly, British nationals and optants were, prior to independence, subject to statutes of general application in force in England on January 1, 1976, to the substance of English common law and equity (so far as appropriate to the circumstances of the country), and to the regulations that under the revised edition of the laws of Vanuatu are now designated as acts. These nationals were also subject to any particular British acts of Parliament and subsidiary legislation expressly stated to apply in the New Hebrides.

#### **D. Joint Regulations**

The Anglo-French Protocol of 1914 authorized the Resident Commissioners of Britain and France to act together to make joint regulations that were binding on all inhabitants. A large number of joint regulations were made, some of which authorized the making of rules or orders by public officers and bodies - that is, subsidiary legislation.

The Constitution provides at Article 93 that, until otherwise specified by Parliament, all joint regulations (now called acts) and subsidiary legislation in force immediately before independence will continue in force and will be construed with adaptations necessary to bring them into conformity with the Constitution.

#### **E. Common Law**

The Constitution makes no express provision for the reception of the common law. However, Article 93 of the Constitution provides that British and French law in force immediately before independence continue to apply to the extent that they are neither expressly revoked by Parliament nor incompatible with the independent status of Vanuatu. Prior to independence, French nationals and optants were not subject to the English common law, but, under the High Court of the New Hebrides Regulative 1976, the common law was received for British nationals and optants, so far as it was appropriate to the circumstances of the country (see III, C British and French Laws). It is therefore to be assumed that British nationals and optants are still subject to the English common law.

#### **F. Customary Law**

The Constitution recognizes customary law in a number of ways. It provides at Article 72 that "the rules of custom shall form the basis of ownership and use of land in the Republic." Article 93 of the Constitution provides on general terms that "customary law shall continue to have effect as part of the law of the Republic. Article 45 directs the judiciary "to resolve proceedings according to law," and law, according to Article 93, includes custom. Article 45 continues: "If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom." Article 49 authorizes Parliament to "provide for the manner of the ascertainment of relevant rules of custom," which would assist the courts in applying custom.

### **IV. CONSTITUTIONAL SYSTEM**

#### **A. Territory**

The Anglo-French Protocol of 1914 referred only in general terms to "the group of the New Hebrides, including the Banks and Torres Islands, - and the Constitution refers to "New Hebrides," later amended to "Vanuatu" There is no statutory definition of these terms.

## **B. Nationality and Citizenship**

The Constitution provides in Chapter 3 that on the day of independence, persons with full grandparents indigenous to Vanuatu and persons of a lesser degree of ni-Vanuatu ancestry who did not hold citizenship, nationality, or the status of an optant of a foreign state automatically became citizens. (Ni-Vanuatu is not defined in the Constitution but means indigenous to Vanuatu.)

Persons who at independence were ni-Vanuatu but held citizenship, nationality, or the status of an optant of a foreign state were nonetheless entitled to Vanuatu citizenship if they made application within -three months of independence and renounced their other citizenship or nationality within three months of receiving Vanuatu citizenship.

Persons born after Independence Day, whether in Vanuatu or abroad, are citizens if at least one of her parents is a Vanuatu citizen.

Nationals of foreign states or stateless persons may apply to be naturalized as citizens of Vanuatu if they have lived in Vanuatu continuously for a period of ten years before the date of application.

## **C. National Government**

Vanuatu is a unitary state with a parliamentary type of government based on the Westminster model.

### **HEAD OF STATE**

The Constitution provides at Chapter 6 and Schedule 1 that the Head of State, to be known as the President, must be an indigenous ni-Vanuatu citizen qualified robe elected to Parliament. The President is to be elected in a secret ballot by an electoral college comprising the members of Parliament and chain of local government councils. A two-thirds majority vote is required and the vote may take place only if a quorum of three-fourths is present at the first meeting of the college. If that quorum is not present, the college must meet forty-eight hours later and may then vote if two-thirds of the members are present. The term of office is five years; the President can be removed by a two-thirds majority of the electoral college for gross misconduct or incapacity. There is no express provision for the suspension or resignation of the President, although a President has in fact resigned on one occasion.

The President has a general function to symbolize the unity of the nation, and a number of more specific functions. The President has a duty to assent to all bills passed by the Parliament, unless the President considers a bill unconstitutional, in which case it will be referred to the Supreme Court for its opinion. The President is authorized, on the advice of the council of ministers, to dissolve Parliament but not to summon or adjourn it.

With regard to the executive, the President has the right to be kept fully informed by the Prime Minister of the general conduct of government of the Republic and the power to refer any regulation made by ministers to the Supreme Court if the President considers it unconstitutional. The President has no power to appoint or dismiss ministers, except that if the Prime Minister dies and there is no Deputy Prime Minister, the President may appoint a minister to act as Prime Minister until a new one is elected.

With regard to public administration, the President has power to appoint the five members of the Public Service Commission after consultation with the Prime Minister and to appoint a chair each year from among the members of the commission. The President also has the power to appoint but no express power to suspend or remove the ombudsman, after consultancy with the Prime Minister, leaders of the political parties represented in Parliament, the Speaker of Parliament, the President of the National Council of Chiefs, the chairs of the local government councils, and the chairs of the Public Service Commission and judicial Service Commission.

## **EXECUTIVE**

The executive power of the people of the Republic which Chapter 7 of the Constitution vests in the Prime Minister and the Council of Ministers is to be exercised as provided by the Constitution or a law.

The Prime Minister is elected by an absolute majority of the members of Parliament voting by secret ballot. The Prime Minister may appoint, from members of Parliament, ministers not exceeding a quarter of the number of members of Parliament, and may designate one of them as Deputy Prime Minister. Ministers remain members of Parliament. The Prime Minister assigns responsibilities for conduct of government to ministers and may remove them from office.

The council has no legislative authority, it is empowered only “to discuss all matters relating to custom and tradition and [to] make recommendations for the preservation and promotion of ni-Vanuatu culture and language” (Article 28). Article 28 also provides that the council “mainly be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament.” but the article does not specify who will do the consulting, nor does it require that other branches of government adopt the council’s advice.

## **JUDICIARY**

Chapter 8 of the Constitution establishes a Supreme Court with unlimited jurisdiction in civil and criminal proceedings. The Constitution also gives the Supreme Court jurisdiction over the following matters:

1. claims that the Constitution has been contravened;
2. questions as to whether a person has been validly elected to Parliament, to the National Council of Chiefs, or to a local government council, or has vacated his or her seat in such bodies, or has become disqualified to hold it;
3. the validity of emergency regulations made by the Council of Ministers, and the validity of any bill or regulation referred to the court by The President; and
4. appeals from Island Courts as to the ownership of land.

The Chief Justice is appointed by the President after consultation with the Prime Minister and leader of the opposition, and other judges of the Supreme Court are appointed by the President on the advice of the judicial Service Commission.

The Constitution also provides for a Court of Appeal, to be made up of two or more judges of the Supreme Court sitting to. Decisions of the Court of Appeal are final.

Magistrates’ Courts are not referred to in the Constitution but are established by the Courts Act (Chapter 122) in criminal proceedings, and ordinary Magistrates’ Court has

jurisdiction to try offenses punishable by imprisonment not exceeding two years; however, a Magistrates' Court presided over by a senior magistrate has jurisdiction to try offences punishable by imprisonment not exceeding five years, but with power to impose a sentence of not more than two years' imprisonment, in civil proceedings, all Magistrates' Courts have jurisdiction to try claims, where the amount claimed or the subject matter in dispute does not exceed VT100,000, dispute between landlord and tenant where the amount claimed does not exceed V500,000, claims for maintenance not exceeding VT2,000,000, and uncontested petitions for divorce or nullity of marriage. Magistrates' Courts shy have jurisdiction to hear appeals from decisions of Island Courts, except decisions as to the ownership of land, which must be heard by the Supreme Court. Magistrates are appointed by the President, acting on the advice or the Judicial Service Commission.

The Constitution states at Article 50 that Parliament should provide for the establishment of Village Courts of Island Courts, with jurisdiction over customary and other matters. Article 50 stipulates that chiefs should have a role in these courts. The Island Courts Act (Chapter 167) establishes Island Courts, which have jurisdiction over criminal offenses occurring within their district and specified in their warrants of appointment (usually minor offenses such as assaults, trespass, health offenses and offences under regional bylaws). The Island Courts can impose fines not exceeding VT24,000 or imprisonment not exceeding six months. In civil matters, Island Courts usually authorized by their warrants to determine all claims to ownership of land, claims in contract or tort where the amount claimed or the value of the subject do not exceed VT50,000, claims for compensation under regional bylaws not exceeding VT50,000, and claims for maintenance not limited in amount. The act also provides at Section 10 that Island Courts "shall administer the customary law" of their localities "so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order."

#### **D. Provincial and Local Government**

The Constitution contains a chapter that expressly recognizes the importance of decentralization to the people's full participation in the government of their regions. Chapter 13 provides for Parliament to enact legislation to give effect to that ideal, by enacting legislation dividing the country into regions, each of which may have a local government council. Representatives of customary chiefs are to sit on each council.

The Decentralization Act (Chapter 127) provides for the election, of local government councils every four years. These councils are to have responsibility for the location, construction, and maintenance of schools, clinics, dispensaries, health centers, bridges, roads, (other than those for which the national government has responsibility), water supplies, wharves, markets, libraries, museums, and cultural centers. The act also authorized local government councils to regulate and control markets; to license cinemas, business premises and premises for sale of liquor or for trading; to control dogs, pigs and other livestock; to supervise and control and village councils; to supervise fishing within one nautical mile oldie low water line; and to provide staff for village courts and information services.

Local government councils are authorized by the act to levy and collect various kinds of taxes(head tax, liquor licensing tax, trading tax, dog tax, cinema tax, entertainment tax, gaming and lottery tax); control vehicular traffic, and register births, deaths, and

marriages. A local government council can make regional laws for the good government of the region and welfare of its people, but such regional laws must not conflict with the Constitution of with any Act, joint regulation, or order that expressly or implicitly applies throughout Vanuatu.

## **V. ADMINISTRATIVE ORGANISATION AND LAW**

### **A. Organization**

The administration of Vanuatu is provided for in Chapter 9 of the Constitution, which establishes the public service and the Public Service Commission.

The Public Service Commission consists of five members appointed for three years by the President after consultation with the Prime Minister, and the President may also each year appoint one of the members the chairperson. The commission is responsible for the appointment, promotion, and discipline of public servants and the selection of those to undergo training courses but has no authority over members of the judiciary, the armed forces, or the police and teaching services. In the exercise of its functions, the commission is not subject to direction or control by any other person or body. The teaching service and the police service are established as separate services under the control of their own service commissions under the Teaching Service Act (Chapter 171) and the Police Act (Chapter 105), respectively.

The Reserve Bank of Vanuatu and the Vanuatu Commodities Marketing Board are the major statutory bodies or quasi-governmental organizations in Vanuatu.

### **B. Public Service**

Public servants, who must be citizens, are appointed by the Public Service Commission and may not be removed from their positions, so long as the positions exist, except in accordance with the Constitution. The Constitution provides that public servants will leave the service upon reaching retirement age or upon being dismissed by the Public Service Commission and may not be demoted without consultation with the commission.

The security of tenure provisions do not apply to the personal political advisers of the Prime Minister and ministers. Senior public servants in ministries may be transferred by the Prime Minister to other posts of equivalent rank. Public Servants are subject to such compulsory early retirement as the law may provide.

The Constitution further provides that the Prime Minister or, in urgent cases, the Public Service Commission in place of the Prime Minister, may make provision for the recruitment of staff for a specified period to meet unforeseen needs.

### **C. Public Finance and Audit**

Article 23 of the Constitution requires that every year the government presents a budget bill for Parliament's approval and that no taxation be imposed or altered and no public funds except in accordance with a law passed by Parliament. Article 23 also provides that no motion for levying or increasing taxation or for the expenditure of public funds shall be introduced unless supported by the government.

The office of Auditor General, appointed by the Public Service Commission, is established by Article 23 of the Constitution, with responsibility to audit and report to Parliament and the government on the public accounts of Vanuatu. In the exercise of official functions, the Auditor General is not subject to direction or control by any other person or body.

#### **D. Rule Making**

There are no constitutional requirements on the manner in which rules or subsidiary laws are to be made, but the Interpretation Act (Chapter 132) contains some general provisions on the topic. The common law principle that subsidiary legislation must be made in accordance with the terms of the authorizing statute is applied by the courts.

#### **E. Review of Administrative Actions**

##### **1. JUDICIAL REVIEW**

The Supreme Court of Vanuatu applied the common law principle, of judicial review - that is, decisions of public officials may be reviewed on grounds of lack or excess of jurisdiction, breach of principles of manual justice, error of law, and fraud.

The procedures for applying for judicial review are contained in the Rules of the High Court of the Western Pacific 1964, which are applied by the Supreme Court of Vanuatu. Leave must be first obtained from the Court for the issue of proceedings for judicial review. The rules provide also for the granting of the prerogative remedies of certiorari, prohibition, mandamus, and habeas corpus, as well as the making of a declaration of rights.

##### **2. OMBUDSMAN**

The Constitution provides at Chapter 9 for an ombudsman to be appointed by the President, after consultation with the Prime Minister and leaders of political parties in Parliament, the Speaker, the president of the National Council of Chiefs, chairpersons of the local government councils, and of the Public Service and Judicial Service Commissions.

A person who is a member of Parliament, the National Council of Chiefs, or a local government council, holds any other public office, or exercises a position of responsibility within a political party is disqualified from appointment as ombudsman.

The ombudsman, who serves a five-year term, is not subject to direction or control from any other person or body. The ombudsman may inquire into the conduct of any public servant, public authority and ministerial department except the President, the Judicial Service Commission, the Supreme Court, and other judicial bodies, but the person or body complained of must be given an opportunity to reply to the complaints.

The ombudsman may find that the complaint is unjustified or that the conduct was contrary to law, based on error of law or fact, unjustifiably delayed, unjust, or blatantly unreasonable. The findings of the ombudsman shall be made known to the complainant, the Prime Minister, and the public department or authorities concerned.

Another function of the ombudsman is to investigate a complaint by a citizen that the citizen has been denied the service which he or she may rightfully expect from the

Republic's administration in the official language that he or she uses. The ombudsman is also required each year to make a special report to Parliament about observance of multilingualism and the measures likely to ensure its respect.

### **3. COMMISSION OF REVIEW**

There is no provision in Vanuatu for renewal of administrative action by a standing commission of review. The Commission of Enquiry Act (Chapter 85) does, however, provide for the appointment of a commission of inquiry to enquire into any matter that in the opinion of the minister should be investigated for the public welfare.

### **4. LEADERSHIP CODE**

Chapter 10 of the Constitution requires political Leaders (the President, the Prime Minister, other ministers, members of Parliament, and such other public servants or government officers as the law may prescribe) to conduct themselves. In both their public and private lives, so as not to be in positions where they have or could have a conflict of interest, demean their offices, allow their integrity to be called into question, or endanger or diminish respect for and confidence in the integrity of the government. In particular, Article 44 prohibits leaders from using their office for personal gain and from entering into any transaction or engaging in any enterprise that might be expected to give rise to doubt in the public mind as to whether they are carrying out their offices in the manner required by Chapter 10.

## **VI. INTERNATIONAL OBLIGATIONS**

### **A. Treaty Making**

Article 24 of the Constitution requires treaties negotiated by the government to be presented to Parliament for ratification if they concern international organization, trade, or peace; commit the expenditure of public funds; affect the status of people; require the amendment of the laws of Vanuatu; or provide for the transfer, exchange, or annexing of territory.

The treaties that have been presented for ratification by Parliament since independency involve loans the government has negotiated from overseas agencies' and countries, including loan agreements with the Asian Development Bank, Barclays Bank and Republic of China.

Vanuatu entered into a fishing agreement with the Soviet Union in 1987 for one year but it expired in 1988 without renewal. This treaty was not presented for ratification since it did not commit public funds or in any other respect fall within the categories of treaties for which ratification by Parliament is required.

### **B. Diplomatic Privileges**

The Diplomatic Privileges and Immunities Act (Chapter 143) provides that the articles contained in schedule 1 of the Vienna Convention on Diplomatic Relations 1961 have the force of law in Vanuatu, subject to the power of the ministers to withdraw certain privileges from a state if the minister consider, that the immunities accorded to a mission of Vanuatu by that state are less than those conferred by the act on a mission of that state. The act authorizes the minister to order that any international organization may have such of the privileges and immunities set out in the act as are specified in the order.

### **C. International Organizations**

Vanuatu is a member of the United Nations and hosts the Pacific operations office of the Economic and Social Commission for Asia and the Pacific. Vanuatu is also a member of the Commonwealth, the French cultural association, the Association de Co-operation Culturel et Technique, the South Pacific Forum group, the Spear Head Group of Melanesian countries, and the Non-Aligned Movement.

### **D. Reciprocal Enforcement Judgments**

There is no Vanuatu legislation for the reciprocal enforcement of judgments, and the occasion for such legislation had not arisen. Presumably the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) would be applicable to British citizens and optants under the terms of the New Hebrides Order 1975, as amended by the High Court of the New Hebrides Regulations 1976; and the provisions of the French Code Civil would apply to French citizens and optants.

### **E. Extradition**

The Extradition Act (Chapter 199) applies to those Commonwealth countries designated by the minister and other countries with which Vanuatu has an extradition arrangement (treaty states).

The act provides that a person may be extradited under the act for offenses in a Commonwealth country of the kind described in the schedule to the act if punishable by imprisonment of not less than one year offenses in a treaty state of the kind described in the treaty, an offenses that would be offenses under Vanuatu law if they occurred in Vanuatu. However, under the act a person may not be extradited if the offence is of a political character; if the purpose of the proposed extradition, is to punish the person on account race, religion, nationality, or political opinions; or if the person, if extradited, might be prejudiced at trial or punished, detained, or restricted in personal liberty by reason of race, religion, nationality, or political opinions. The act also provides that a person may not be extradited if the person would be entitled, if charged with the offense in Vanuatu, to be discharged under the rule of law relating to previous acquittal or conviction.

## **C. Implementation of selected articles**

### **Chapter III. Criminalization and law enforcement**

#### **Article 15 Bribery of national public officials**

##### **Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

12. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 73 (2) and (3) and 51 of the Penal Code 1988

Sections 8, 9, 23(c),(d),(e), 27(1), (2) (m) and 40 of the Leadership Code Act, No. 2 of 1998

Section 45 of the Representation of the People Act 1988

##### **PENAL CODE**

##### **73. Corruption and Bribery of Officials**

(2) No person shall corruptly give or offer or agree to give any bribe to any person with intent to influence any public officer in respect of any act or omission by him in his official capacity.

Penalty: Imprisonment for 10 years.

(3) For the purposes of this section, "bribe" means any money, valuable consideration, office or employment, or any benefit, whether direct or indirect, and the expression "public officer" means any person in the official service of the Republic (whether that service is honorary or not and whether it is within or outside the Republic) any member or employee of any local authority or public body and includes every police officer and judicial officer.

##### **51. Fine**

(1) (...)

(2) In addition to the power to sentence any person convicted of a criminal offence to pay a fine prescribed by any provision of criminal law as penalty for such offence, a court may, where the penalty provided is a limited term of imprisonment, in place thereof or as an alternative penalty, fine the offender.

(3) No fine imposed as an alternative penalty by a court other than the Supreme Court shall exceed a sum calculated at the rate of VT 200 for every day of prescribed maximum penalty of imprisonment to which the offender is liable.

## **LEADERSHIP CODE ACT**

### **Section 8. Meaning of "benefit"**

A reference in this Code to a benefit derived by a person includes a reference to:

- (a) a benefit derived indirectly by the person; and
- (b) a benefit derived, directly or indirectly, by another person at the request or direction of the first person.

### **Section 9. Property or benefit outside Vanuatu**

A reference in this Code to property, or to a benefit or advantage, includes a reference to property situated, or a benefit or advantage received outside Vanuatu.

### **Section 23. Bribery**

A leader must not:

...

- (c) corruptly offer;

any money, property, or other benefit or advantage of any kind, for:

- (d) himself or herself; or
- (e) another person or body;

in exchange for his or her acts or omissions as a leader being influenced in any way, either directly or indirectly.

### **Section 27. Other offences punishable under this Act**

(1) A leader who is convicted by a court of an offence under the Penal Code Act [CAP. 175] and as listed in subsection (2) is:

- (a) in breach of this Code; and
- (b) liable to be dealt with in accordance with sections 41 and 42 in addition to any other punishment that may be imposed under any other Act.

(2) The offences are:

...

- (m) corruption and bribery of officials;

### **Section 40. Fine or imprisonment**

(1) A leader who is convicted of a breach of section 19, or 20, or 21, or 22, or 23, or 24 or 26 or 27 is liable to –

- (a) a fine not exceeding VT 5,000,000; or
- (b) imprisonment for a period not exceeding 10 years.

## **REPRESENTATION OF THE PEOPLE ACT**

### **45. Bribery**

(1) A person commits the offence of bribery –

- (a) if he directly or indirectly by himself or by any other person –

- (i) gives any money or procures any office to or for any voter or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting;

- (ii) corruptly does any such act on account of any voter having voted or refrained from voting; or

- (iii) makes any such gift or procurement to or for any person in order to induce that person to procure, or endeavour to procure, the election of any candidate or the vote of any voter;

or if upon or in consequence of any such gift or procurement he procures or engages, promises or endeavours to procure the election of any candidate or the vote of any voter;

(b) if he advances or pays any money or causes any money to be paid to or to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or knowingly pays any money or causes any money to be paid to any person in discharge or repayment of any money wholly or in part expended in bribery at any election;

(c) if before or during an election he directly or indirectly, by himself or by any other person on his behalf, receives, agrees or contracts for any money, gift, loan or valuable consideration or any office, place or employment for himself or for any other person for voting or agreeing to vote or from refraining or agreeing to refrain from voting;

(d) if after an election he directly or indirectly by himself or by any other person on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting.

(2) For the purposes of subsection (1) of this section –

(a) references to giving money include references to giving, lending, agreeing to give or lend, offering, promising and promising to procure or to endeavour to procure any money or valuable consideration; and

(b) references to procuring office include references to giving, procuring, agreeing to give or procure, offering, promising and promising to procure or to endeavour to procure any office, place or employment.

13. Vanuatu provided the following examples of implementation:

Since 2011, the Vanuatu Financial Intelligence Unit (VFIU) has received 4 reports on suspected bribery of national public officials. The reports were developed into financial intelligence reports and disseminated to local law enforcement agencies for further criminal investigation.

The Public Prosecution's Office confirmed that, to date, there have been no criminal prosecutions on active bribery of national public officials. However, the Office noted that, pursuant to section 8(1)(i) of the Public Prosecutor Act 2006, "(1) The functions of the Public Prosecutor are: (i) to prosecute breaches of the Leadership Code [Cap. 240]".

A civil case that raised allegations of bribery include *Solomon v Turquoise Ltd* [2008] VUSC 64 (see: under UNCAC article 26(2)).

**(b) Observations on the implementation of the article**

14. Section 73(2) of the Penal Code (PC) criminalises active bribery. Section 73(2) refers to the acts of giving, offering and agreeing to give a bribe, the latter of which can be understood in the same way as the term “promise” used in the Convention. It is criminalised to give the bribe to “any person”. This person can be a third person, the public officer him/herself or a legal entity. According to the schedule of section 2 of the Interpretation Act, the term “person includes any statutory body, company or association or body of persons corporate or unincorporated”.

15. Section 73(3) of PC defines the term “bribe”. Bribe means any money, valuable consideration, office or employment, or any benefit, whether direct or indirect. The

reviewing experts were of the opinion that this definition was sufficiently wide to cover any advantage as envisioned by the Convention.

16. Section 73(3) of PC also defines the term “public officer”. Public officer, according to this section, means any person in the official service of the Republic (whether that service is honorary or not, and whether it is within or outside the Republic), any member or employee of any local authority or public body, and includes police and judicial officers.
17. The reviewing experts discussed with the authorities if the term, “public officer” would reach the same scope as the term of public official, defined in article 2 (a) of the Convention. It was clarified by Vanuatu that the formulation of “any member or employee of any local authority or public body” could be widely interpreted and was broad enough to include Members of Parliament. However, no case examples exist to verify the operational value of this.
18. Furthermore, the Public Prosecutor explained, during the country visit, that the terms “court officer” or “judicial officer” could also comprise all lawyers, prosecutors and judges. However, also no case examples exist to verify the operational value of this.
19. What remained questionable was if also a person who performs a public function for a public enterprise was covered. In discussions with the Public Service Commission (PSC) (see: article 30, paragraphs 6 and 7) on persons employed in the Public Service, it was confirmed that provisions would also apply to persons employed in companies owned in whole or in part by the State. This might be an indication of extended coverage, but could not be sufficiently determined.
20. Based on the discussions had in relation to the term, “public officer”, the reviewing experts recommended that Vanuatu ensure that the definition of public officer covers the scope defined in UNCAC article 2(a), including a person “who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party”.
21. Bribery is further covered in the Leadership Code 1998 (LC), but no prosecutions have been made under this Code to date. LC criminalises, in section 23, passive bribery but also refers to the “offering” of a bribe by a leader in exchange for his omissions or acts being influenced. As it could not be sufficiently clarified in what circumstances section 23 of LC might be applicable, this section is discussed in more detail under article 15 (b) of the Convention (passive bribery).
22. The specific case of bribery concerning votes is criminalised under the Representation of the Peoples Act 1982. The Act is comparatively older and only foresees a maximum penalty of a fine up to VT 100,000 or a maximum of 5 years imprisonment. Vanuatu may wish to discuss the alignment of the maximum penalties in the Representation of the People Act to the bribery provisions of other Acts.
23. The reviewing experts also noted that Vanuatu currently has a “no gift policy” in place. However, it provides no further guidance to public officials. Guidance for public

officials should be considered so as to raise awareness and so as to create more legal certainty.

24. In summarising the elaborations made above, the reviewing experts were of the opinion that Vanuatu has sufficiently criminalised the active form of bribery of national public officials in section 73(2) of PC, with the exception of the definition of “public officer” in section 73(3). This should be extended to ensure that the definition covers the full scope of article 2(a) of UNCAC, including a person who performs a public function for a public enterprise. This wider definition of a public officer should also be kept in mind when introducing new offences or legislative amendments in relation to the content of the Convention. The reviewers noted that consolidated language and definitions could strengthen legal certainty.

## **Article 15 Bribery of national public officials**

### **Subparagraph (b)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

25. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 73 (1) and (3) (cited above) of the Penal Code  
Sections 33 (1) and (2) of the Public Service Act 2006  
Sections 8 (cited above), 9 (cited above), 23(a),(b),(d) (cited above),(e) (cited above) and 27 (1),(2)(m) (cited above) and 40 (cited above) of the Leadership Code Act  
Section 45 of the Representation of the People Act (cited above)

#### **PENAL CODE**

##### **73. Corruption and bribery of officials**

(1) No public officer shall, whether within the Republic or elsewhere, corruptly accept or obtain or agree or offer to accept or attempt to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.

Penalty: Imprisonment for 10 years.

## **PUBLIC SERVICE ACT**

### **33. Fees for official services**

(1) Unless otherwise provided, in the performance of any service on behalf of the Government no fee, reward, or remuneration of any kind whatsoever, beyond the remuneration and approved allowances, of a person employed in the Public Service may be received by that person or other person for that person's own use or benefit.

(2) Where an employee is required to perform any service for which a charge would lawfully be payable, then that charge must be levied and the amount paid into the Public Fund, or into the account of the ministry concerned.

## **LEADERSHIP CODE ACT**

### **Section 23. Bribery**

A leader must not:

- (a) corruptly ask for or receive; or
- (b) agree to ask for or obtain; or

5. Vanuatu provided the following cases.

Case examples of passive bribery of national public officials –

#### ***Public Prosecutor v Marae (Criminal Case No. 10 of 1989)***

In 1989, Mr. Marae received a 2 year suspended sentence of imprisonment coupled with a fine (of full restitution to the Cultural Centre of VT 1,128,000 outstanding, as set out in the separate order that accompanied this sentence), for receiving what was then described as the largest bribe ever received by a Ni-Vanuatu. That bribe was received by him at a time when he was working as Second Secretary to one of the Ministries and in order for him to use his influence improperly.

#### ***Public Prosecutor v Wai [2001] VUSC80***

The Defendant was a policeman. He was charged and pleaded guilty to 2 charges of corruptly accepting bribes from Yoan J. Hua, contrary to section 73(1) of the Penal Code. The bribes from Yoan J. Hua totaled an amount of VT 20,000 (US\$100 on 6 March and VT 5,000 on 10 May 2001) for the processing of 8 residency permits to some Chinese nationals. Mr. Wai was sentenced to 3 months imprisonment under the Penal Code.

#### ***Public Prosecutor v Zheng Quan Cai [2002] VUSC 81 (Criminal Case No. 22 of 2002)***

In 2002, Zheng Quan Cai was sentenced to 6 months imprisonment which a 2 year suspended sentence along with a fine of VT 1.5 million for bribing a customs officer. The sentence was handed down pursuant to section 59(1) of the Customs Act, No.15 of 1999. Notably, the learned Judge stated that, "Anyone who bribes or attempts to bribe a customs officer or public officer must expect to receive a prison sentence. Bribery and corruption cannot be accepted in any shape or form" - R.J. COVENTRY, Judge.

#### ***Public Prosecutor v Sope (2002)***

In 2002, former Prime Minister, Mr. Bark Sope, was sentenced to 3 years imprisonment for fraud under the Penal Code. Within a few months of his sentencing, however, Mr. Sope was pardoned by the President on the grounds of ill health.

26. The Public Prosecution's Office confirmed that there have been no criminal investigations in the last two years on passive bribery of national public officials. There was one that failed to meet the requirements of a *prima facie* case due to a lack of evidence. To date, there is an ongoing passive bribery case under consideration by the Public Prosecution's Office.

**(b) Observations on the implementation of the article**

27. Passive bribery is criminalised in section 73(1) of PC. The reviewing experts referred to the observations made under article 15 (a) of the Convention, in particular, in relation to the discussion on the definition of a “public officer”.

28. Moreover, the reviewing expert noted the additional provision of the passive form of bribery in section 23 of LC, including the additional sanctions according to section 40 et seq. LC. These will be elaborated upon in more detail below. However, it is important to point out that, to date, no prosecution has been made under any article of LC. As this was brought to the attention of the reviewing experts, the experts recommended that Vanuatu assess any operational challenges of the provisions as a basis for strengthening its application in practice.

29. In theory, two case scenarios were deemed possible. If a leader were prosecuted according to section 73 of PC, then the additional sanctions of dismissal from Office (section 41 of LC) and disqualification from future Office (section 42 of LC) were applicable through section 27. Otherwise, also a direct prosecution under section 40 in conjunction with section 23 of LC could be pursued with a fine not exceeding VT 5,000,000 or 10 years imprisonment, as well as dismissal and disqualification. This possible fine was higher than the fine which could be imposed pursuant to sections 73 and 51 (2) of PC.

30. The definition of a “leader” is included in article 67 of the Constitution of Vanuatu.

**Article 67. Definition of a leader**

For the purposes of this Chapter, a leader means the President of the Republic, the Prime Minister and other Ministers, Members of Parliament, and such public servants, officers of Government agencies and other officers as may be prescribed by law.

31. Moreover, section 5 of LC points out:

**Section 5. Leaders**

In addition to the leaders referred to in Article 67 of the Constitution the following are declared to be leaders:

- (a) members of the National Council of Chiefs;
- (b) elected and nominated members of local government councils;
- (c) elected and nominated members of municipal councils;
- (d) political advisors to a Minister;
- (e) directors-general of ministries and directors of departments;

- (f) members and the chief executive officers (however described) of the boards and statutory authorities;
- (g) chief executive officers or secretaries-general of local government;
- (h) the town clerks (or their equivalent in name) of municipal councils;
- (i) persons who are:
  - (i) directors of companies or other bodies corporate wholly owned by the Government; and
  - (ii) appointed as directors by the Government;
- (j) the Attorney General;
- (k) the Commissioner and Deputy Commissioner of Police;
- (l) the Solicitor General;
- (m) the Public Prosecutor;
- (n) the Public Solicitor;
- (o) the Ombudsman;
- (p) the Clerk of the Parliament;
- (q) the Principal Electoral Officer;
- (r) the Auditor-General;
- (s) the Chairperson of the Public Accounts Committee;
- (t) the Chairperson when acting in that capacity of the Tenders Board;
- (u) members of the Public Service Commission;
- (v) members of the Teaching Service Commission;
- (w) members of the Police Service Commission;
- (x) members of the Electoral Commission;
- (y) the Commander of the Vanuatu Mobile Forces.

**(c) Challenges**

32. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

33. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Legal advice; and
2. Legislative drafting.

34. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.
35. During the country visit, technical assistance needs were discussed in more detail. The Public Prosecutor highlighted the need for capacity-building and training for the prosecutors, as well as for law enforcement authorities in regard to bribery to ensure the collection of sufficient evidence.

## **Article 16 Bribery of foreign public officials and officials of public international organizations**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

*2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

36. Vanuatu indicated that it has not implemented the provision under review.

### **(b) Observations on the implementation of the article**

37. Section 73 of PC only regulates bribery involving public officers of the Republic of Vanuatu. No other provisions exist which regulate the bribery of foreign public officials and officials of public international organizations.
38. The reviewing experts recommended that Vanuatu criminalise the mandatory provision of active bribery of foreign public officials and officials of public international organizations and consider criminalising its passive form.

### **(c) Challenges**

39. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

### **(d) Technical assistance needs**

40. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

41. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 17 Embezzlement, misappropriation or other diversion of property by a public official**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.*

**(a) Summary of information relevant to reviewing the implementation of the article**

42. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 122-130, 130B, 130C, 131, 138-141 (esp. section 123) of the Penal Code  
 Sections 8 (cited above), 9 (cited above), 27(1) (cited above) and (2)(n) of the Leadership Code Act

**PENAL CODE**

**Offences against Property**

**Section 122. Theft defined**

(1) A person commits theft who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof;

(2) A person shall also be guilty of theft of any such thing notwithstanding that he has lawful physical control thereof, if, being a bailee or part owner thereof he fraudulently converts the same to his own use or the use of any person other than the owner.

(3) For the purpose of subsection (1) -

(a) the word "takes" includes obtaining physical control -

(i) by any trick or by intimidation;

(ii) under a mistake on the part of the owner with knowledge on the part of the taker that physical control has been so obtained;

(iii) by finding, whether or not at the time of finding the finder believes that the owner can be discovered by taking reasonable steps;

(b) the words "carried away" include the removal of any thing from the place which it occupies but in the case of a thing attached, only if it has been completely detached;

(c) the word "owner" includes any part-owner or person having physical control of, or a special property or interest in, anything capable of being stolen.

**Section 123. Misappropriation defined**

A person commits misappropriation of property who destroys, wastes, or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption).

**Section 124. Obtaining property by false pretences defined**

Every person obtains property by false pretences who, by a false pretence, that is to say, any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true with intent to defraud, either directly or indirectly, obtains possession of or title to anything capable of being stolen or procures anything capable of being to be delivered to any person other than himself.

**Section 125. Prohibition of theft, misappropriation and false pretences**

No person shall cause loss to another -

- (a) by theft;
- (b) by misappropriation; or
- (c) by false pretences.

Penalty: Imprisonment for 12 years.

**Section 126. Offences resembling theft**

No person shall -

- (a) without lawful authority appropriate any generated energy;
- (b) without lawful authority use any property of another notwithstanding that he does not have the intention permanently to deprive the owner of it;
- (c) take or misappropriate his own property which is charged by any debt due by him.

Penalty: Imprisonment for 8 years.

**Section 127. Obtaining credit fraudulently**

No person shall, in incurring any debt or liability, obtain credit by means of any false pretence or by means of any other fraud.

Penalty: Imprisonment for 1 year.

**Section 128. Fraud by trustee**

No person, being a trustee of any property, shall destroy the property with intent to defraud, or, with intent to defraud, convert the property to any use not authorized by the trust.

Penalty: Imprisonment for 7 years.

**Section 129. False statement by promoter**

No person, being a promoter, director, manager, or officer of any company or body corporate, either existing or intended to be formed, shall make, circulate or publish, or concur in making, circulating or publishing, any prospectus, statement or account which he knows to be false in any material particular -

- (a) with intent to induce persons, ascertained or not, to become shareholders, members or investors;
- (b) with intent to deceive or defraud the members, shareholders, or creditors of the company or body corporate, or any of them, whether ascertained or not; or

(c) with intent to induce any person or persons, whether ascertained or not, to entrust or advance any property to the company or body corporate or to enter into any security for its benefit.

Penalty: Imprisonment for 10 years.

### **Section 130. False accounting**

No person being –

- (a) a public officer with responsibility for public accounts;
- (b) a director or officer or member of any company or body corporate;
- (c) an officer or clerk or servant of any employer whatever, shall, with intent to defraud

-  
(i) destroy, mutilate, alter or falsify, any book, account, valuable security, or document belonging to the company or body corporate, or concur in so doing;

(ii) make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, account, valuable security, or document;

(iii) make any transfer of any interest in any stock, debenture, or debt in the name of any person other than the owner of that interest; or

(iv) in any manner falsify wilfully any such accounts as aforesaid.

Penalty: Imprisonment for 10 years.

### **Section 130B. Obtaining money, etc., by deception**

(1) A person must not by any deception dishonestly obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever.

Penalty: Imprisonment for 12 years.

(2) In subsection (1) -

"deception" means deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including:

(a) a deception as to the present intentions of the person using the deception or of any other person; and

(b) an act or thing done or omitted to be done with the intention of causing -

(i) a computer system; or

(ii) a machine that is designed to operate by means of payment or identification, to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make.

### **Section 130C. Obtaining money, etc., by false or misleading statements**

A person must not, with intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever, make or publish, or concur in making or publishing, any statement (whether or not in writing) -

(a) which he or she knows to be false or misleading in a material particular; or

(b) which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular.

Penalty: Imprisonment for 12 years.

### **Section 131. Receiving property dishonestly obtained**

No person shall receive anything obtained by any offence, or by any act wherever committed which, if committed within the Republic would constitute an offence, knowing that thing to have been dishonestly obtained.

**Section 138. Extortion**

No person shall, with intent to extort or gain anything from any person -

- (a) threaten expressly or impliedly to make about any person, living or dead, any accusation or disclosure of any offence, or moral misconduct, whether the accusation or disclosure is true or not;
- (b) threaten expressly or impliedly that any person shall make any such accusation or disclosure about any person living or dead;
- (c) threaten to publish, or offer to abstain from publishing, any defamatory words within the meaning of section 120;
- (d) send or cause to be sent to any person any document containing any such threat;
- (e) by any such means compel or attempt to compel any person to sign, execute, make, accept, endorse, alter, or destroy the whole or part of any valuable security, or to write, impress, or affix any name or seal upon any document in order that it may afterwards be used as a valuable security;
- (f) by any such means induce or compel or attempt to induce or compel any person to do any act against his will, other than an act which it is his legal duty to do, or not to do any lawful act.

Penalty: Imprisonment for 14 years.

**Section 139. Forgery defined**

- (1) Forgery is making a false document, knowing it to be false, with the intent that it shall in any way be used or acted upon as genuine, whether within the Republic or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within the Republic or not.
- (2) For the purposes of this section, the expression "making a false document" includes making any material alteration in a genuine document, whether by addition, insertion, obliteration, erasure, removal or otherwise.
- (3) For the purposes of this section the expression "false document" means a document-
  - (a) of which the whole or any material part purports to be made by any person who did not make it or authorise its making;
  - (b) of which the whole or any material part purports to be made on behalf of any person who did not authorise its making;
  - (c) in which, though it purports to be made by the person who did in fact make it or authorise its making, or purports to be made on behalf of the person who did in fact authorise its making, the time or place of its making, whether either is material, or any number or distinguishing mark identifying the document, whether either is material, is falsely stated;
  - (d) of which the whole or some material part purports to be made by a fictitious or deceased person, or purports to be made on behalf of any such person; or which is made in the name of an existing person, either by him or by his authority, with the intention that it should pass as being made by some person, real or fictitious, other than the person who makes or authorises it.
- (4) It is immaterial in what language a document is expressed or in what country or place and whether within or beyond the Republic it is expressed to take effect. (5) The crossing of any cheque, banker's draft, post office money order, postal order or other document the crossing of which is authorised or recognized by law, is a material part of such document.

**Section 140. Prohibition of forgery**

No person shall commit forgery.

Penalty: Imprisonment for 10 years.

**Section 141. Uttering forged documents**

No person, knowing a document to be forged, shall -

(a) use, deal with, or act upon it as if it were genuine;

(b) cause any person to use, deal with, act upon it as if it were genuine.

**LEADERSHIP CODE ACT**

**Section 27. Other Offences Punishable Under this Act**

(2) The offences are:

...

(n) theft or misappropriation or false pretences;

43. Vanuatu provided the following cases.

Case examples of implementation –

***Public Prosecutor v Swanson* [1997] VUSC 37; Criminal Case No 007 of 1996 (1 October 1997)**

This is the trial of Peter Harold Swanson on 10 counts in the nature of fraud relating to a scheme carried out in 1996 involving the signing of 10 “guarantees” on behalf of the Reserve Bank of Vanuatu. The guarantees appeared to commit the Reserve Bank of Vanuatu and the Government of the Republic of Vanuatu to pay the sum of US\$10 million within 2 years. The total face liability of these documents was US\$100 million. Each guarantee was signed by Mr Sope, the then Treasurer and Minister of Finance of the Republic of Vanuatu, Mr George Borugu, Mr Sampson Ngwele, Governor General of the Reserve Bank of Vanuatu, and the Honourable Maxime Carlot Korman, the then Prime Minister of the Republic of Vanuatu.

VERDICT (provided by VINCENT LUNABEK J., Acting Chief Justice) -

Guilty of the offence of attempting/ obtaining of property by false pretences, contrary to sections 125(c) and 28 of the Penal Code Act [CAP 135], offence of fraudulently attempting to induce a person to invest money, contrary to section 11 of the Prevention of Fraud (Investments) Act [CAP 70], offence of dealing in securities without a dealers license contrary to section 2 of the Prevention of Fraud (Investment) Act [CAP 70], offence of forgery, contrary to section 140 of the Penal Code Act [CAP 135], offence of altering forged documents, contrary to section 141(a) of the Penal Code Act [CAP 135], offence of false statement by promoter, contrary to section 129 (c) of the Penal Code Act [CAP 135].

***Public Prosecutor v Adams* [2008] VUCA 28**

From 21 May 2007 until 10 July 2007, a criminal enterprise involving forgery of cheques drawn by the Government of Vanuatu, and obtaining money by deception was perpetrated in Port Vila. The forgery involved fraudulent alteration of legitimately drawn cheques by changing the name of the payee and grossly inflating the amounts of the cheques. A total of 7 cheques were forged in this way. Six of the cheques were deposited into accounts and funds were then drawn upon. The presentation of the 7th cheque on 10 July 2007 resulted in the discovery of the criminal enterprise and charges were preferred against 8 alleged participants.

The ringleader and mastermind of the criminal enterprise was one Salendra Sen Sinha, an Indo-Fijian who arrived in Vanuatu in late 2005. When the criminal enterprise was discovered, Salendra fled Vanuatu and returned to Fiji. He was on bail for other unrelated offences. He has not been returned to Vanuatu, despite a request for extradition to face trial on charges arising from their criminal enterprise. However, all the others who were alleged to have been involved with Salendra in the criminal enterprise stood trial in his absence.

Police laid charges in relation to individual cheques. Initially, separate trials were conducted before Tuohy J., but subsequently matters were amalgamated and heard together. Verdicts were delivered on 11 March, 14 March, 15 April and 11 July 2008 respectively. Five persons were found guilty of charges arising out of the criminal enterprise namely: Lopez Adams, James Weties, Malon Hopsmander, Andre Lesines and Sandie Leo.

Of the accused, 1 was a Member of Parliament at the time (Hospmander) and another a political advisor to the Ministry of Foreign Affairs (Lesines).

Hospmander - sentenced to two years imprisonment and compensation order in the amount of VT90,000 on two counts of aiding a forgery.

Lesines - compensation order of VT 250,000 and 250 hours of community work on one count of aiding forgery.

***Public Prosecutor v Sivehi [1999] VUSC 47; CRC 024 1998 (4 May 1999)***

The Accused was former Treasurer of the Farmer Pentecost Local Government Council in 1994. It is charged that sometimes in or about 8 January 1995, he had defrauded the Rassa Development Trust by false accounting and misuse of the sum of VT1,200,000. This money was spent by the accused to build a rent house in Luganville, Santo, to pay his children's school fee and to meet funeral expenses of two relatives.

In 1999, Mr. Sivehi was sentenced for two counts of false accounting contrary to section 130(a)(i) of the Penal Code [Cap 135] and misappropriation contrary to section 125(b) of the Penal Code upon entering a plea of guilty for both counts. In considering the circumstances of the case, the Court imposed a sentence of 3 years imprisonment for each count to run concurrently. However, the learned Judge ordered the 3 years be suspended for a period of 2 years pursuant to the Suspension of Sentences Act [Cap 657] and then further ordered a 3 year suspended sentence. A condition of the sentence was that he would refund the Rassa Development Trust Fund the sum total of 1,200,000 plus interests calculated at a rate of 7 percent per annum commencing in 1995 until the whole amount outstanding is paid up in full. That means that from 1995 to 1999, the interest accumulated at the given rate was VT420,000. The total outstanding was therefore VT1,620,000.

***Public Prosecutor v Mantaktak [1994] VUSC 20 (4 November 1994)***

Gaspard Palaud was the Branch Manager of the Vanuatu Commodities Marketing Board at Luganville at the time of the offence. Francis Mantaktak was the Deputy Branch manager. Mr Mantaktak had the responsibility of managing the cash which came into the office.

The offence took place over a period of time during 1993.

Gaspard Palaud claimed that he needed the money to finance some building operations being carried out by a company in which he had an interest. Mr Palaud claimed that he intended to repay the money taken when the building contracts were completed and payment received. He had not made any repayments.

The VCMB has regulations which provide for the payment of advances of salary. Mr Palaud asked Mr Mantaktak to make cash payments to him, by way of salary advances on a number of occasions.

Pursuant to section 43(1) of the Penal Code Act and based on the facts, Mr Mantaktak was discharged without conviction. Mr Palaud was sentenced to be imprisoned for 1 year and 3 months and to pay the sum of VT 327,000 by way of restitution, to the VCMB. Such a sum was recoverable as a civil debt.

***Public Prosecutor v Salerua [2013] VUSC 74; Criminal Case 45 of 2012 (4 June 2013)***

"During the Presbyterian General Assembly held at Tangoa Island on 10th September 2012, the then Prime Minister Sato Kilman handed over an envelope to Chief Norman Mele Livo. The Prime Minister announced publicly that there was cash in the sum of VT1 Million in the envelope which was given to be used for projects that would benefit the whole Community of Tangoa Island. Chief Norman Mele and other Community Leaders then passed on the envelope to the defendant and specifically instructed him to keep the money safe for the benefit of the Community. The defendant took the money and deposited them into his personal bank account at the BRED Bank. Over a period of time the defendant withdrew moneys until the total amount given was depleted."

Livo Salerua was charged with one count of misappropriation contrary to section 125(b) of the Penal Code Act Cap 135.

From the judgment by Judge OLIVER A. SAKSAK on 4 June 2013:

"I therefore Order that your sentence of 1 year and 10 months imprisonment be suspended for a period of 2 years from the date of this Sentence. You must understand that you must not commit any offences within these 2 years for which you would be charged and convicted. If you do, your sentence will be activated automatically and you will go to prison to serve your 22 months sentence. This suspension is made pursuant to section 57 of the Act.

Finally, it is necessary in the Court's opinion that a restitution order is made against you to repay the full amount of VT1,000,000 which you took and misappropriated. This should restore Community confidence back in yourself and harmony within your Community which appears to be divided over your actions."

***Public Prosecutor v Simon [2012] VUSC 246; Criminal Case 107-12 (18 December 2012)***

Fiona Simon was charged with one count of theft and one count of misappropriation, contrary to sections 125(a) and 125(b) of the Penal Code Act [CAP.135] respectively.

At the time, she was employed as the accountant for Carpenter Motors in Port-Vila. She was found to have stolen of VT1,285,898 and misappropriated VT2,941,667 totalling an amount of VT4,227,565 from her employer.

She was sentenced to 18 months imprisonment on each count concurrently.

***Public Prosecutor v Yanick* [2012] VUSC 252; Criminal Case 47 of 2012 (10 December 2012)**

The Defendant convinced Ray Melterel to go to his village and community on Vao Island and collect money from people who were interested in buying the solar products that he (the Defendant) was promoting. The Defendant told Ray Melterel that once he received the money, he would send the products to Malekula for the respective purchasers. The Defendant gave Ray Melterel a receipt book in which he could record sales and issue receipts. At all material times, the Defendant had no such business and was at all material times intending to defraud people who were conned by him including Ray Melterel. The Defendant was charged with one count of misappropriation, contrary to section 125 (b) of the Penal Code Act [Cap 135].

He was sentenced to imprisonment for a period of 1 year and 8 months (noting that restitution had been suggested by Counsel, but the Defendant did not have the means to meet any restitution order).

***Public Prosecutor v Morris*. [2012] VUSC 180; CR 150 of 2011, 23 of 2012 (15 May 2012)**

Lucy Morris entered guilty pleas to 2 counts of forgery, contrary to section 140 of the Penal Code Act and 2 counts of misappropriation contrary to section 125(b) of the Penal Act [CAP 135].

On the 2 counts of misappropriation, the offence occurred in February 2011, while she was working for the National Bank of Vanuatu (NBV) at Tongoa as a teller. She misappropriated VT26,000 from a customer's Bank account and VT100,000 from another customer's bank account.

She was sentenced to 7 months imprisonment concurrently on each count (10 months imprisonment but 3 months were deducted for mitigating factors).

***Public Prosecutor v Gama* [2005] VUSC 60; Criminal Case No 011 of 2005 (11 April 2005)**

Mr Gama was charged with a total of one hundred and forty eight counts, of which there were seventy four counts of misappropriation. For the period of just over three and a half years from 25 May 2001 to 2 December 2004, he defrauded his employer, the ANZ Bank (Vanuatu) Limited, in a number of sophisticated and systematic ways while he were employed as team leader/supervisor in the treasury department of the bank. While he was in that position of control, the summary said that he systematically manipulated various accounts with the intention of defrauding the bank and succeeded in so doing in the total sum of VT18,660,386.

Items returned or intended for return totalled up to some VT2, 982, 500.

He received the maximum penalty of twelve years imprisonment, but due to his guilty plea (1/3 of the sentence) and his time already served in prison, he was given seven years, eight and a half months imprisonment.

44. Vanuatu provided the following statistics.

Since 2011, VFIU has received 7 reports on suspected embezzlement, misappropriation or diversion of property by a public official. The reports were developed into financial intelligence reports and disseminated to local law enforcement agencies for further criminal investigation.

**(b) Observations on the implementation of the article**

45. Misappropriation is defined in section 123 of PC and criminalised in section 125 (b). Section 123 of PC provides that a person commits misappropriation of property if the person destroys, wastes or converts any property capable of being taken which has been entrusted to the person for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption). The causing of loss to another through misappropriation is criminalised in section 125(b) of PC.
46. The case examples provided, specifically *Public Prosecutor v Sivehi* and *Public Prosecutor v Salerua*, show that 125 (b) of PC can even be construed in a way to cover cases of embezzlement.
47. However, the reviewing experts highlighted that the definition of acts “destroying, wasting or converting” was too limited.
48. Further provisions that may cover embezzlement, misappropriate or other diversion of property are defined in PC (i.e. sections 126 and 128).
49. “Property” according to the Interpretation Act includes (a) money, goods, choses in action and land; and (b) obligations, easements and every description of estate, interest and profit, present or future, arising out of or incident to property as defined in paragraph (a). This definition is more limited than the definition of property in article 2 (d) of the Convention and could prevent successful prosecutions.
50. The reviewing experts were of the opinion that Vanuatu has partially criminalised embezzlement, misappropriation or other diversion of property. They recommended assuring that all forms of embezzlement and misappropriation are criminalised and that the definition of “property” be expanded to comprise the full spectrum of article 2 (d) of the Convention.

**(c) Challenges**

51. Vanuatu identified following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

52. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Model legislation;
2. Legislative drafting.

53. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

## Article 18 Trading in influence

### Subparagraph (a)

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;*

### (a) Summary of information relevant to reviewing the implementation of the article

54. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 13, 22, 23 and 30 of the Leadership Code Act  
Section 48 of the Ombudsman Act 1998

#### **LEADERSHIP CODE ACT**

##### **13. Duties of leaders**

(1) A leader must:

- (a) comply with and observe the law;
- (b) comply with and observe the fundamental principles of leadership contained in Article 66 of the Constitution;
- (c) comply with and observe the duties, obligations and responsibilities established by this Code or any other enactment that affects the leader; and
- (d) not influence or attempt to influence or exert pressure on or threaten or abuse persons carrying out their lawful duty.

##### **22. Undue influence**

(1) A leader must not exercise undue influence over, or in any other way bring pressure to bear on, a person who is:

- (a) another leader; or
  - (b) any other person holding public office;
- so as to influence, or attempt to influence, the person to act in a way that is:
- (c) in breach of this Code; or
  - (d) improper; or
  - (e) illegal; or
  - (f) against the requirements of the Act under which the person was appointed; or
  - (g) contrary in any other way to the requirement of the person's office or position.
- (2) A leader must not influence or attempt to influence or exert pressure or threaten or abuse or interfere with persons carrying out statutory functions.

##### **23. Bribery**

A leader must not:

- (a) corruptly ask for or receive; or
  - (b) agree to ask for or obtain; or
  - (c) corruptly offer,
- any money, property, or other benefit or advantage of any kind, for:
- (d) himself or herself, or

(e) another person or body, in exchange for his or her acts or omissions as a leader being influenced in any way, either directly or indirectly.

### **30. Offences by other persons**

(1) A person other than a leader who:

(a) takes part in conduct that is a breach of this Code; or

(b) obtains a benefit, directly or indirectly, from an act or omission that is a breach of this Code;

is guilty of a breach of this Code.

(2) A person other than a leader must not exercise undue influence over or in any other way bring pressure to bear on a leader, so as to influence, or attempt to influence, the leader to act in a way that is in breach of this Code.

(3) A person who is found guilty of a breach under this section is liable, on conviction, to a penalty of.

(a) a fine not exceeding VT 5,000,000; or

(b) imprisonment for a period not exceeding 10 years;  
or both the fine and imprisonment.

(4) If the person obtains a benefit as a result of acting in breach of this section, the court may make an order that the benefit be recovered in accordance with section 45 or 46.

## **OMBUDSMAN ACT**

### **PART 7 - OFFENCES AND PENALTIES**

#### **Section 48. Improper influence etc.**

A person is guilty of an offence if the person improperly influences, hinders or obstructs the Ombudsman, or an officer acting under a delegation made under section 14, in the exercise of his or her powers or the performance of his or her functions or duties.

Penalty: VT 100,000 or 6 months imprisonment or both.

55. Vanuatu indicated that there have been no cases reported in the last 2 years.

56. Vanuatu provided the following statistics.

Since 2011, VFIU has received 3 reports on suspected trading, undue influence or undue advantage. The reports were developed into financial intelligence reports and disseminated to local law enforcement agencies for further criminal investigation.

#### **(b) Observations on the implementation of the article**

57. The reviewing experts pointed out that some cases of trading in influence could be dealt with under either sections 73 and 130 B of PC or sections 22 and 23 of LC. Against this backdrop, the authorities stated that no prosecutions had been carried out under LC, to date.

58. In order to cover all cases sufficiently (cases of supposed influence), the reviewing experts recommended that Vanuatu consider, for the purposes of legal certainty, amending the legislation to allow for the criminalisation of trading in influence in a more clear and explicit manner. Bearing this in mind, they further recalled the elaborations on the definition of the term “public officer” made under article 15 (a) of the Convention.

## Article 18 Trading in influence

### Subparagraph (b)

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.*

#### (a) Summary of information relevant to reviewing the implementation of the article

59. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 23 and 30 of the Leadership Code Act (cited above)  
On "supposed influence" - sections 130B and 130C of the Penal Code (cited above)

60. Vanuatu provided the following cases.

See relevant examples cited above that link to passive trading in influence of public officials, including -

#### ***Public Prosecutor v Marae (Criminal Case No. 10 of 1989)***

In 1989, Mr. Marae received a 2 year suspended sentence of imprisonment coupled with a fine (of full restitution to the Cultural Centre of the 1,128,000 VT outstanding, as set out in the separate order that accompanied this sentence), for receiving what was then described as the largest bribe ever received by a Ni-Vanuatu. That bribe was received by him at a time when he was working as Second Secretary to one of the Ministries and in order for him to use his influence improperly.

61. Vanuatu provided the following statistics.

Since 2011, VFIU has received 3 reports on suspected trading, undue influence or undue advantage. The reports were developed into financial intelligence reports and disseminated to local law enforcement agencies for further criminal investigation.

#### (b) Observations on the implementation of the article

62. The Public Prosecutor mentioned that the case of *Public Prosecutor v Marae* was based on bribery provisions. No further case examples were provided to assess the operational value in relation to trading in influence.

63. The reviewing experts were of the opinion that trading in influence is only partially covered and noted the recommendations made under article 18 (a) of the Convention.

**(c) Challenges**

64. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

65. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

66. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 19 Abuse of Functions**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.*

**(a) Summary of information relevant to reviewing the implementation of the article**

67. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Section 138 of the Penal Code (cited above)  
Sections 7, 13, 22, 23(cited above), 24 and 30 of the Leadership Code Act  
NB: Influence and abuse are regarded as the same in Vanuatu.

**LEADERSHIP CODE ACT**

**7. Conflict of interest**

- (1) A leader has a conflict of interest in a matter if the matter relates in any way to:
- (a) property the leader directly or indirectly owns or controls; or
  - (b) property owned or controlled, directly or indirectly, by a member of the leader's close family; or
  - (c) property in which the leader has a beneficial interest of any kind, whether through a trust or otherwise.
- (2) A leader has a conflict of interest in a matter if the leader, or a member of the leader's close family, could benefit directly or indirectly from a decision on the matter, except as a member of a community or group.

**13. Duties of leaders**

- (1) A leader must:

- (a) comply with and observe the law;
- (a) comply with and observe the law;
- (b) comply with and observe the fundamental principles of leadership contained in Article 66 of the Constitution;
- (c) comply with and observe the duties, obligations and responsibilities established by this Code or any other enactment that affects the leader; and
- (d) not influence or attempt to influence or exert pressure on or threaten or abuse persons carrying out their lawful duty.

## **22. Undue influence**

- (1) A leader must not exercise undue influence over, or in any other way bring pressure to bear on, a person who is:
  - (a) another leader; or
  - (b) any other person holding public office;
 so as to influence, or attempt to influence, the person to act in a way that is:
  - (c) in breach of this Code; or
  - (d) improper; or
  - (e) illegal; or
  - (f) against the requirements of the Act under which the person was appointed; or
  - (g) contrary in any other way to the requirement of the person's office or position.
- (2) A leader must not influence or attempt to influence or exert pressure or threaten or abuse or interfere with persons carrying out statutory functions.

## **24. Conflict of interest**

A leader who has a conflict of interest in relation to a matter must not act in relation to the matter, or arrange for someone else to act in relation to the matter, in such a way that the leader or a member of his or her close family benefits from the action.

## **30. Offences by other persons**

- (1) A person other than a leader who:
  - (a) takes part in conduct that is a breach of this Code; or
  - (b) obtains a benefit, directly or indirectly, from an act or omission that is a breach of this Code;
 is guilty of a breach of this Code.
- (2) A person other than a leader must not exercise undue influence over or in any other way bring pressure to bear on a leader, so as to influence, or attempt to influence, the leader to act in a way that is in breach of this Code.
- (3) A person who is found guilty of a breach under this section is liable, on conviction, to a penalty of:
  - (a) a fine not exceeding VT 5,000,000; or
  - (b) imprisonment for a period not exceeding 10 years;
 or both the fine and imprisonment.
- (4) If the person obtains a benefit as a result of acting in breach of this section, the court may make an order that the benefit be recovered in accordance with section 45 or 46.

68. Vanuatu provided the following statistics.

From the Ombudsman's Office -

Since LC was enacted, there have been 871 cases opened and investigated under its provisions. These 871 cases have been further categorized as follows:

- Conflict of interest - 60 cases
- Fair exercise of public or official duties - 106 cases
- Integrity - 26 cases
- Use of office for personal gain - 61 cases
- Non-submission of annual return - 87 cases
- Abuse of power - 188 cases
- Violation of other provisions of the LC - 343 cases

69. These categories relate to the relevant sections of LC and are statistics from the date of commencement of LC which is 7 September 1998. The cases reflect both individual, but also lump sum cases (i.e. so 10 people may fall under 1 case).

70. Arguably, they all relate/link to this UNCAC provision, in particular "use of office for personal gain" and "abuse of power".

71. Since 2011, VFIU has received 14 reports of suspected abuse of functions/position. The reports were disseminated to local law enforcement agencies for further criminal investigations.

**(b) Observations on the implementation of the article**

72. Vanuatu has not criminalised abuse of function in a general PC provision for all public officials, but has some specific provisions. During the country visit, it was highlighted that some relevant provisions are included in the Public Finances Act regarding the tender process.

73. Furthermore, sections 22 et seq. of LC apply. The implementation in practice seems challenging; for example, numerous conflict of interest and abuse of power matters were investigated by the Ombudsman's Office, but to date, not a single prosecution has been reported on LC since it was enacted.

74. The reviewing experts recommended that Vanuatu consider criminalising abuse of function for all public officials (not only leaders as provided for under LC). Against this backdrop, they recalled the elaborations on the definition of "public officer" made under article 15 (a) of the Convention.

75. Moreover, Vanuatu should assess the operational value of the provisions in LC in order to make informed decisions on how to strengthen its implementation.

**(c) Challenges**

76. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

77. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

78. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 20 Illicit Enrichment**

*Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.*

**(a) Summary of information relevant to reviewing the implementation of the article**

79. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Section 5(2) of the Constitution: presumption of innocence  
Section 8 of the Penal Code: general rule as to burden of proof  
Part 4 and section 33 of the Leadership Code Act: annual returns

**CONSTITUTION OF THE REPUBLIC OF VANUATU  
CHAPTER 2 - FUNDAMENTAL RIGHTS AND DUTIES  
PART I - Fundamental Rights**

**Section 5. Fundamental rights and freedoms of the individual**

(2) Protection of the law shall include the following -

- (a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;
- (b) everyone is presumed innocent until a court establishes his guilt according to law;
- (c) everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged;
- (d) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;
- (e) a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence;
- (f) no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed;
- (g) no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence;

(h) no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial

## **PENAL CODE**

### **Section 8. General rule as to burden of proof**

(1) No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.

(2) In determining whether a person has committed a criminal offence, the court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the natural or probable consequences of his actions.

(3) If the prosecution has not so proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith.

## **LEADERSHIP CODE ACT**

### **PART 4.**

#### **ANNUAL RETURNS**

(1) Every leader must complete an annual return for the preceding year setting out details of the leader's assets and liabilities in accordance with the form in the Schedule.

(2) The annual return must be given to the clerk of the Parliament:

- (a) within 2 months of becoming a leader; and
- (b) by 1 March in each year.

(2) The annual return must set out details, listed in subsection (4), of the assets and liabilities of:

- (a) the leader; and
- (b) the leader's spouse and children where feasible;
- (c) any trust of which the leader or the leader's spouse or children are a beneficiary where feasible.

(2) The details to be set out in the annual return are:

- (a) all land and other property (except one family home);
- (b) all vehicles (except one family vehicle);
- (c) all shares in public or private companies;
- (d) all income;
- (e) all liabilities;
- (f) directorships in corporations;
- (g) all directorships or other office held in unincorporated bodies;
- (h) any assets acquired or disposed of during the period covered by the return;
- (i) any liabilities acquired or discharged during the period covered by the return.

(2) The details must include assets within and outside Vanuatu .

(3) The leader is not required to include:

- (a) any liabilities in respect of the family home; or
- (b) the personal effects of the leader and his or her spouse and children.

#### **PUBLICATION OF ANNUAL RETURNS**

(1) The Clerk must ensure that:

- (a) annual returns filed by the leaders; and
- (b) a list of leaders who have failed to give the Clerk an annual return, are published in the Gazette, by 14 March in each year.

(2) The list must set out the leader's name, and the position he or she holds.

### **Failure to File Annual Return**

**33.** A leader who:

- (a) does not file an annual return as required by section 31, and after having been warned by the Clerk in writing of his failure to do so, fails to file the return within a further 14 days; or
- (b) files a return knowing that it is false in a material particular;  
is guilty of a breach of this Code.

80. Vanuatu further provided the following information.

Under LC, the Clerk of Parliament receives the annual returns of leaders. State Law receives a list of those who have provided their returns, but not a copy of the returns themselves. State Law then publishes this list. The Ombudsman's Office is issued with a public report.

81. Sample reports produced by the Ombudsman's Office are below -

#### **PUBLIC REPORT ON THE FAILURE OF 53 LEADERS TO FILE ANNUAL RETURNS TO THE CLERK OF PARLIAMENT (20 September 2001) -**

[http://www.paclii.org/cgi-](http://www.paclii.org/cgi-bin/disp.pl/vu/ombudsman/2001/4.html?stem=0&synonyms=0&query=kalvao*%20and%20vanuatu)

[bin/disp.pl/vu/ombudsman/2001/4.html?stem=0&synonyms=0&query=kalvao\\*%20and%20vanuatu](http://www.paclii.org/cgi-bin/disp.pl/vu/ombudsman/2001/4.html?stem=0&synonyms=0&query=kalvao*%20and%20vanuatu)

The Ombudsman is issuing this Public Report to show how 53 leaders failed to observe and follow the law.

Section 31 of the Leadership Code Act states that all leaders must submit their annual returns to the Clerk of Parliament by 1 March each year or within 2 months of becoming a leader by using the Annual Returns Form that is found in the Schedule of the Act.

The Official Gazette of 2000 Annual Returns showed that 61 leaders failed to file their annual returns to the Clerk of Parliament. The names of these leaders can be found in Appendix C. However, after due enquiry by the Ombudsman, it was found that 7 of the leaders listed in the Official Gazette were no longer occupying the leadership positions specified on the list.

The Ombudsman commenced an enquiry into these 53 leaders who failed to file their annual returns under section 34 (1) of the Leadership Code Act. Section 34 (1) of the Act states that the Ombudsman must investigate and report on the conduct of a leader that may have breached the Leadership Code.

The Ombudsman found that some leaders are not aware of their duty to file Annual Returns to the Clerk of Parliament each year before 1 March. This is in spite of the fact that the Leadership Code was enacted in 1998.

The Ombudsman also found that some leaders are not aware that the Clerk of Parliament has no legal obligation to send them the forms. It is the duty of the leaders to get the forms and submit their annual returns to Parliament. The Clerk has a obligation under the

law to ensure that the leader's returns are published in the Official Gazette together with a list of the leaders who failed to file returns.

The Ombudsman also found that the Clerk of Parliament is not kept informed by the administration of the public offices concerned when new appointments were being made pursuant to section 5 of the Leadership Code Act, and/or when the leaders cease to hold such positions.

The Ombudsman recommends that persons who are appointed to hold positions of leadership pursuant to section 5 of the Leadership Code Act must be informed of their legal obligations under the Act and any other laws affecting their duties and responsibilities by the administrations responsible for the positions that they occupy.

The Ombudsman recommends that the Police Commissioner consider this report and open an enquiry for further investigation, pursuant to the provisions of the Leadership Code Act.

Accordingly the Ombudsman further recommends that the Public Prosecutor decide within 3 months of receiving the report whether there are sufficient grounds to support prosecution under the Leadership Code.

With the review of the Leadership Code Act due by end of 2001, the Ombudsman envisages amendments to s34 to enhance procedural proficiency, as well as provisions that will permit verification of annual returns.

**PUBLIC REPORT ON THE FAILURE OF 150 LEADERS TO DECLARE THEIR 2004 ANNUAL RETURNS TO THE CLERK OF PARLIAMENT (15 December 2006) -**

<http://www.paclii.org/cgi-bin/disp.pl/vu/ombudsman/2006/4.html?stem=0&synonyms=0&query=annual%20and%20returns%20and%20vanuatu>

The Ombudsman is issuing this Public Report as required by section 34 of LC to investigate and report on the conduct of leaders who have breached LC.

Section 31 of LC requires those persons who occupy positions of leadership as identified by Article 67 of the Constitution and section 5 of LC to declare their annual returns for the preceding year to the Clerk of Parliament by 1 March each year.

A leader who fails to declare his or her annual returns even after being reminded by the Clerk of Parliament is guilty of a breach of LC and is liable to be investigated by the Ombudsman. The Clerk of Parliament is responsible, under section 32 of the Leadership Code [Amendment] Act 1999; for submitting a list of leaders who have declared their annual returns and those who have failed to submit their annual returns to the State Law Office to be published in the Official Gazette.

On 11 July 2005, Extraordinary Gazette No. 3 was published in which the names of 166 leaders were listed as those who had failed to declare their 2004 Annual Returns.

**(b) Observations on the implementation of the article**

82. Vanuatu has not criminalised illicit enrichment. The reviewing experts therefore recommended that Vanuatu consider criminalising illicit enrichment.
83. The reviewing experts acknowledged the system on asset declarations (annual returns) for leaders as regulated in Part 4 of LC. A leader who does not file a return or files a return knowing that it is false is guilty of breach. The declarations have not been made public, but the pending Freedom of Information Bill may change this.
84. A leader who does not file a return or files a return knowing that it is false in a material particular is guilty of a breach of the Code, according to section 33 in conjunction with section 40 and can be liable to a fine not exceeding VT 2,000,000. Moreover, if the offence is a continuing one to a fine not exceeding VT 20,000 a day for each day or part day, the leader remains in breach.
85. As pointed out previously in this report, the reviewing experts wished to draw Vanuatu's attention to the lack of prosecutions of offences under LC. This lack hinders the assessment of its operational value and could hinder the enforcement of the annual returns system. During the country visit, it was discussed that the introduction of administrative sanctions might be a useful measure to enable responses which do not require a full criminal proceeding.
86. During the country visit, it was also provided to the reviewing experts that a transparent filing and publication system of the annual returns would be beneficial. The reviewing experts recommended that Vanuatu continue the discussion to find measures to strengthen the system and its operation.

**(c) Challenges**

87. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Specificities in our legal system.

**(d) Technical assistance needs**

88. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned; and
2. Other: Transparent filing and publication system of annual returns.

89. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

## **Article 21 Bribery in the private sector**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:*

*(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;*

*(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

90. Vanuatu indicated that it has not implemented the provision under review.

91. The "Business Principles for Countering Bribery" were noted. This is an initiative of Transparency International and Social Accountability International, developed by a group of private sector interests, NGOs and trade unions as a tool to assist enterprises to develop effective approaches to countering bribery in all of their activities.

### **(b) Observations on the implementation of the article**

92. The reviewing experts recommended that Vanuatu consider criminalising bribery in the private sector.

### **(c) Challenges**

93. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

### **(d) Technical assistance needs**

94. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

95. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

## **Article 22 Embezzlement of property in the private sector**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position*

### **(a) Summary of information relevant to reviewing the implementation of the article**

96. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 123 of PC (cited above) is a general provision that criminalises misappropriation of property.

97. Vanuatu indicated that the Public Prosecutor confirmed that section 123 of PC has also been applied to the private sector.

### **(b) Observations on the implementation of the article**

98. Section 123 of PC provides that a person commits misappropriation of property if s/he destroys, wastes or converts any property capable of being taken which has been entrusted to her/him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption).

99. The causing of loss to another through misappropriation is criminalised in section 125(b) of PC. Further provisions that may cover embezzlement, misappropriate or other diversion of property are defined in PC (i.e. sections 126 and 128).

100. The provisions highlighted above criminalise those acts for “all persons” and therefore, include embezzlement and misappropriation in the private sector. Case examples were provided for both cases involving public officers and in the private sector.

101. The reviewing experts made reference to their observations under article 17 of the Convention, specifically to the narrow definition of “property” which could prevent successful prosecutions.

### **(c) Challenges**

102. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

103. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

104. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 1 (a)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

- (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;*

**(a) Summary of information relevant to reviewing the implementation of the article**

105. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 2(1), 5 and 11 (esp. (3) (b)) of the Proceeds of Crime Act, No. 12 of 2012

**PROCEEDS OF CRIME ACT**

**Section 2 (1)**

“property” means assets of every kind, whether corporeal or incorporeal, moveable or immoveable, tangible or intangible, whether situated inside or outside of Vanuatu, including legal documents or instruments evidencing title to, or interest in such assets.

“serious offence” – see definition below under article 23 (2) (a)

**Section 5. Meaning of proceeds of crime**

(1) In this Act:

"proceeds of crime" means property derived or realised directly or indirectly from a serious offence, including:

- (a) property into which any property derived or realised directly from the offence is later successively converted or transformed; and

(b) income, capital or other economic gains derived or realised from that property since the offence.

(2) If property that is proceeds of crime ("the original proceeds") is intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds is taken to be proceeds of crime.

### **Section 11. Money-laundering**

(1) In this section:

"transaction" includes the receiving or making of a gift.

(2) A person who, after the commencement of this Act, engages in money-laundering is guilty of an offence punishable on conviction by:

(a) if the offender is a natural person - a fine of VT 10 million or imprisonment for 10 years, or both; or

(b) if the offender is a body corporate - a fine of VT 50 million.

(3) A person engages in money-laundering only if the person:

(a) acquires, possesses or uses property or engages directly or indirectly, in an arrangement that involves property that the person knows or ought reasonably to know to be proceeds of crime; or

(b) converts or transfers property that the person knows or ought reasonably to know to be proceeds of crime; or

(c) conceals or disguises the true nature, source location, disposition, movement, ownership of or rights with respect to property that the person knows or ought reasonably to know to be proceeds of crime.

(4) Nothing in this Act prevents a person that has committed an offence that generates proceeds of crime, from being convicted of a money laundering offence in respect of those proceeds of crime under subsection (3).

(5) Nothing in this Act requires a person to be convicted of an offence that generates proceeds of crime before they can be convicted of a money laundering offence in respect of those proceeds of crime under subsection (3).

106. Vanuatu provided the following statistics.

VFIU - Annual Report 2010-2012

## Performance at the Glance: 2010-2012

### Combat Money Laundering, Financing of Terrorism and other Economic offences

#### Collection of Information:

- 132 Suspicious Transaction Report (STR)
- 17,175 Cash Transaction Report (CTR)
- 43,056 International Funds Transfer Report (IFTR)
- 76 Border Currency Report (BCR)
- 23 Cash Courier Report (CCR)

#### Analysis and Dissemination of Information:

- 60,462 Processed
- 33 Disseminated

#### Collaboration with Domestic and International Law Enforcement and Intelligence Agencies:

- 243 Request received by Vanuatu FIU
- 195 Requests sent by Vanuatu FIU

### Deter Money Laundering and Financing of Terrorism

#### Awareness of Financial Institution and Public:

- 3 Training workshops
- 7 Public awareness

#### Improving Compliance with FTR ACT:

- 14 Pocket meeting with financial institutions
- 37 Notification of compliance breach issued
- 6 Comprehensive on-site examinations
- 2 Follow up examination
- 336 Notification of compliance officer and Internal Procedure

#### Strengthening Legislative and Regulatory Framework:

- 3 Legislative amendments passed by parliament and enforced

### 3.1.5 Suspicious Transaction Reports (STR)

Financial institutions are required to submit to the VFIU information relating to:

- Suspicious transaction or attempted transaction if it forms a reasonable suspicion on a transaction or attempted transaction that is or may be relevant to detection, investigation or prosecution of a person for a money laundering offence, a financing of terrorism offence or any other serious offence.
- STR submission must be within two days of forming the suspicion.

Table 4.0 Suspicious Transaction Report

Years	2007	2008	2009	2010	2011	2012
Number of STRs	19	34	34	42	40	50

Source: VFIU

From a 6 year period since 2007, the statistic confirmed an increasing trend of STRs submitted to the VFIU and in particular from a wide spectrum of financial institution sectors.

Table 5.0 Distribution of STRs submitted to VFIU in 2010, 2011 and 2012

Years	Bank Sector	Non-Bank Sector	Others
2010	32	8	2
2011	30	6	4
2012	34	10	6

Source: VFIU

Information submitted to the VFIU was assessed on the level of risk. In addition, STRs submitted to the VFIU were analysed on the basis of ground/reason of suspicion.

Table 6.0 Reasons for suspicion as reported by financial institutions

SUSPICIOUS INDICATORS	2007-8	2009-10	2011-12	TOTAL VOLUME
Avoidance of reporting obligation	1	4	5	10
Unusual customer/account activity	9	4	10	23
Questionable source of fund	11	7	7	25
Suspicious customer behavior	1	2	3	6
Unusual exchange of cash	1	4	8	13
Customer adverse record/implication	9	30	22	61
Non-compliant with FTRA requirement	6	2	4	12
Scam/counterfeit/fraudulent activity	4	11	12	27
Structuring of fund	6	5	6	17
Large cash transaction	3	4	5	12
Other	3	3	8	14

Source: VFIU

107. Of the reports that have been sent by VFIU to other law enforcement authorities, VFIU has followed up on these reports 60% of the time, as there is no requirement to give back feedback. Upon request, it has assisted with further investigations.

108. No AML-related cases have progressed to the Public Prosecutor.

109. Reference was also made to the Asia/Pacific Group on Money Laundering and Offshore Group of Banking Supervisor's 2<sup>nd</sup> Joint Mutual Evaluation Report against 2003 - FATF 40 Recommendations and 9 Special Recommendations of March 2006 (see: UNCAC article 38 for more information).

110. VFIU has, since 2011, received a total of 35 reports on suspected activities involving public officials. These reports were developed into financial intelligence and disseminated to local law enforcement agencies for further criminal investigations.

**(b) Observations on the implementation of the article**

111. The reviewing experts noted that the offences in subparagraphs 1(a)(i) and (ii) are criminalised in sections 11 (3) (b) and (c) of the Proceeds of Crime Act (POCA), respectively.

112. In regard to the definition of “serious offence” in section 5 of POCA, see the observations made under article 23 (2) (a) of the Convention.

113. As no AML-related cases have progressed to the Public Prosecutor, the reviewing experts pointed out that it was not possible to assess the operational value of implementation of the UNCAC provision. They therefore recommended that the investigation and prosecution of money-laundering cases be prioritised.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 1 (b) (i)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) Subject to the basic concepts of its legal system:*

*(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;*

**(a) Summary of information relevant to reviewing the implementation of the article**

114. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 11(3) (a) (cited above) and 12 of the Proceeds of Crime Act

**PROCEEDS OF CRIME ACT**

**Section 12. Possession of property suspected of being proceeds of crime**

(1) A person who, after the commencement of this Act, receives, possesses, conceals, disposes of, or brings into Vanuatu, money or other property that may reasonably be suspected of being proceeds of crime is guilty of an offence punishable on conviction by:

(a) if the offender is a natural person - a fine of VT 10 million or imprisonment for 10 years, or both; or

(b) if the offender is a body corporate - a fine of VT 50 million.

(2) It is a defence to a charge of contravening subsection (1) that the person charged had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

(3) A person is not liable to be convicted of an offence against both section 11 and this section because of one act or omission.

**(b) Observations on the implementation of the article**

115. The reviewing experts noted that the offence was criminalised in section 11 (3) (a) of POCA.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 1 (b) (ii)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) Subject to the basic concepts of its legal system:*

*(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

116. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 28-33 of the Penal Code (section 30 is cited above)

**PENAL CODE**

**28. Attempts**

(1) An attempt to commit a criminal offence is committed if any act is done or omitted with intent to commit that crime and such act or omission is a step towards the commission of that crime which is immediately connected with it, or would have been had the facts been as the offender supposed them to be.

(2) An attempt shall be committed notwithstanding that complete commission of the offence was impossible by reason of a circumstance unknown to the offender.

(3) Acts committed in mere preparation of an offence shall not constitute an offence.

(4) The commission of an attempted offence shall constitute an offence punishable in the same manner as the offence concerned.

(5) The criminal responsibility of a person committing an attempted offence who voluntarily withdraws from the attempt before the offence has been committed shall be diminished.

**29. Conspiracy**

(1) Conspiracy is an agreement, express or implied, between two or more persons to do an act which, if done, even by one person, would constitute a criminal offence.

(2) There can be no conspiracy between husband and wife.

(3) The criminal responsibility of a conspirator who voluntarily withdraws from the conspiracy before the commission of the offence shall be diminished.

(4) A conspiracy to commit a criminal offence shall be punishable only where expressly provided by any provision of law.

(5) No person shall be prosecuted as a conspirator without the consent in writing of the Public Prosecutor.

## **Participation in Criminal Offences**

### **31. Co-offenders**

A co-offender shall mean a person who, in agreement with another, takes part with him in the commission of a criminal offence.

### **32. Punishment of accomplices and co-offenders**

Subject to any express provision of law, an accomplice and a co-offender shall be punishable in like manner as a principal or sole offender.

### **33. Foreseeable consequences**

Any accomplice or co-offender in the commission or attempted commission of an offence shall be equally responsible for any other offence committed or attempted as a foreseeable consequence of the complicity or agreement.

## **(b) Observations on the implementation of the article**

117. It was confirmed, during the country visit, by the Public Prosecution's Office that the general provisions of Part I of PC are applicable as general principles also in relation to all offences regulated in other Acts (such as POCA).

118. Sections 28 to 33 of PC criminalise all forms specified in article 23 (1) (b) (ii) of the Convention. Although PC does not use the term "abetting", it seems that the act can be covered sufficiently under the terms "aids, counsels or procures" as regulated in section 30 on complicity of PC.

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 2 (a)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;*

*(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;*

## **(a) Summary of information relevant to reviewing the implementation of the article**

119. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 5 of the Proceeds of Crime Act (cited above)

120. Furthermore, under the Proceeds of Crime (Amendment) Act, No. 12 of 2012, a “serious offence” means (a) an offence against a law of Vanuatu for which the maximum penalty is imprisonment for 12 months or more; or (b) an offence against the law of another country that, if the relevant act or omission had occurred in Vanuatu, would be an offence against the law of Vanuatu for which the maximum penalty is imprisonment for 12 months or more; or (c) an offence against the law of Vanuatu or of another country that, if the relevant act or omission had occurred in Vanuatu, would be an offence against the law of Vanuatu for which the proceeds of that offence is VT10 million or more or its equivalent in foreign currency.

121. It was confirmed by VFIU that a “serious offence” includes a corruption-related offence.

VFIU Annual Report 2010-2012

#### Predicate Offence

Theft or obtaining money through false pretense, false statement – VFIU noted an increased trend in this offence where offenders pretending as government officials, RSE agents obtain money from the general public. VFIU also noted an increase in institutional theft or internal theft.

Tax Evasion – The VFIU continues to note trend of VAT evasion whereby businesses usually transact funds using employees’ personal accounts to evade VAT obligation.

Corruption – VFIU noted a continuous increased trend on public office corruption or corruptible practices particularly, receiving of funds with no legitimate purpose.

Structuring – VFIU noted continuous attempts of customers wishing to establish business relationships with financial institution but refuses to complete the customer due diligence checks. The relationships were terminated but customers moves to the next financial institution.

122. Self-laundering is also captured under POCA (CAP 284), namely section 11.

#### (b) Observations on the implementation of the article

123. Vanuatu does not follow a list approach, but rather the “serious crime” (i.e. threshold) approach.

124. A “serious crime” is an offence against Vanuatu law where the minimum threshold is 12 months imprisonment or where, if the offence were committed overseas, it would have reached the 12-month imprisonment threshold or the proceeds of that offence

would have amounted to a minimum of VT 10 million, had the offence occurred in Vanuatu. All corruption-related offences are serious offences according to this definition.

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 2 (c)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

125. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 12 (1) of the Proceeds of Crime Act (cited above) - NB: refers to money or other property that is received, possessed, concealed, disposed of or brought into Vanuatu

126. According to POCA, a “serious crime” is an offence against Vanuatu law where the minimum threshold is 12 months imprisonment or where, if the offence were committed overseas, it would have reached the 12 month imprisonment threshold or the proceeds of that offence would have amounted to a minimum of VT 10 million, had the offence occurred in Vanuatu. All corruption offences are serious offences according to this definition.

127. VFIU confirmed that offences committed outside of Vanuatu constitute predicate offences.

#### **(b) Observations on the implementation of the article**

128. It was noted by the reviewing experts that the aspect of predicate offences committed outside of Vanuatu was included in Section 12 of the Proceeds of Crime Act but not in Section 11. During the time-span of the review, it could not be sufficiently clarified if an offences committed outside of Vanuatu could constitute a predicate offence for a money-laundering case based on Section 11 in Vanuatu. The reviewing experts therefore recommended revisiting this fact in order to fully align the law to the Convention.

## **Article 23 Laundering of proceeds of crime**

### **Subparagraph 2 (d)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;*

**(a) Summary of information relevant to reviewing the implementation of the article**

129. Vanuatu indicated that it has not furnished copies of its laws to the Secretary-General of the United Nations as prescribed above.

**(b) Observations on the implementation of the article**

130. The reviewing experts recommended that Vanuatu furnish copies of its law (i.e. POCA) to the Secretary-General of the United Nations.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 2 (e)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

131. Vanuatu indicated that its domestic system did not contain fundamental principles as referred to in the provision above and cited the following measure.

Section 11 of the Proceeds of Crime Act (cited above)

**(b) Observations on the implementation of the article**

132. A person can be convicted of both money-laundering and the underlying predicate offences, according to section 11(3) and (4) of POCA.

**(c) Challenges**

133. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.);
2. Limited capacity (e.g. human/technological/institution/other);
3. Limited resources for implementation (e.g. human/financial/other).

**(d) Technical assistance needs**

134. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Summary of good practices/lessons learned;
2. Legal advice.

135. Vanuatu indicated that the Australian Transaction Reports and Analysis Centre (AUSTRAC) had provided short-term assistance to VFIU. Vanuatu indicated that the extension and/or expansion of such assistance would partially help it adopt the measure(s) described.

## **Article 24 Concealment**

*Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

136. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 79 and 86 of the Penal Code  
Section 12 of Proceeds of Crime Act (cited above)

#### **PENAL CODE**

##### **79. Conspiracy to defeat justice etc.**

No person shall -

- (a) conspire with any other person to accuse any person falsely of any offence or to do anything to obstruct, prevent, pervert, or defeat the course of justice;
- (b) in order to obstruct the due course of justice, dissuade, hinder or prevent any person lawfully bound to appear and give evidence as a witness from so appearing or giving evidence, or endeavour to do so; or
- (c) obstruct or in any way interfere with or knowingly prevent the execution of any legal process civil or criminal.

##### **86. Removal of property under lawful seizure**

No person shall, when any property has been attached or taken under the process or authority of any court, knowingly and with intent to hinder or defeat the attachment or process, receive, remove, retain, conceal or dispose of such property.

137. Vanuatu indicated that there have been no case examples to date.

138. Vanuatu indicated that since 2011, VFIU has received 7 reports on suspected concealment activity by public officials and their associates.

### **(b) Observations on the implementation of the article**

139. Concealment is covered under section 12 of POCA which criminalises the receiving, possession, concealment, disposition or bringing into Vanuatu of money or other property that may reasonably be suspected of being the proceeds of crime.

140. Some cases could also be covered by section 79 (a) of PC, “to do anything to obstruct, prevent, pervert, or defeat the course of justice”.

**(c) Challenges**

141. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

142. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

143. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 25 Obstruction of Justice**

**Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;*

**(a) Summary of information relevant to reviewing the implementation of the article**

144. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 79 (cited above), 81 and 82 (1) (c) of the Penal Code

**PENAL CODE**

**81. Deceiving witnesses**

No person shall practise any fraud or deceit, or knowingly make or exhibit any false statement, representation, token, or writing to any person called or to be called as a witness in any judicial proceeding with intent to affect the testimony of such person as a witness. Penalty: Imprisonment for 7 years.

## **82. Offences relating to judicial proceedings**

(1) No person shall

(...)

(c) cause an obstruction or disturbance in the course of a judicial proceeding;

145. Vanuatu indicated there are no cases pertaining to the provision under review to date.

### **(b) Observations on the implementation of the article**

146. The reviewing experts noted that PC on misleading justice, specifically section 79, criminalises obstruction of justice. It was confirmed, during the country visit, that this section would also apply to any obstruction during the investigative stage.

147. The broad terminology of interference “in any way” of section 79 (c) specifically, can be applied to all cases included in article 25 (a) of the Convention, meaning physical force, threats or intimidation, as well as the promise, offering or giving of an undue advantage.

148. Additional provisions which could be applicable, depending on the specific case, are sections 81 and 82 of PC in relation to deceiving witnesses and offences relating to judicial proceedings.

149. As no case examples were provided, it was not possible to assess the operational value of the provision under review.

## **Article 25 Obstruction of Justice**

### **Subparagraph (b)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

150. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 73A, 79 (cited above) and 87 of the Penal Code

#### **PENAL CODE**

##### **73A. Obstructing police officer**

Any person who obstructs, molests, or assaults any police officer in the performance of his public duties shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding six years or to a fine not exceeding VT 300,000 or to both such fine and imprisonment.

NB: Public Prosecutor provided that section 73A has since been amended to "a term not exceeding seven years".

### **87. Obstructing court officers**

No person shall willfully obstruct or resist any person lawfully charged with the execution of an order or warrant of any court.

Penalty: Imprisonment for 7 years.

151. Vanuatu provided the following cases.

In relation to section 73A of PC, there have been approximately 5 cases in the last 2 years.

An example is: *PP v Kalvao Moli* (not found in PacLii).

### **(b) Observations on the implementation of the article**

152. Vanuatu criminalises the obstruction of police officers in section 73A of PC and the obstruction of court officers in section 87 of PC.

153. The Public Prosecutor explained that also the obstruction of judges, prosecutors or lawyers could, in theory, fall under section 87 of PC as "court officers". This could be widely interpreted to cover all these persons. Due to the absence of case examples, the operational value could not be assessed and more clarity in relation to the terminology could have been useful.

154. However, it was highlighted by the national authorities that in relation to all persons and "any" interference, section 79 (c) of PC would be applicable as a 'catch-all' provision. The reviewing experts were satisfied with this explanation.

### **(c) Challenges**

155. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

### **(d) Technical assistance needs**

156. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

157. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

## Article 26 Liability of legal persons

### Paragraph 1 and 2

*1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.*

*2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.*

#### (a) Summary of information relevant to reviewing the implementation of the article

158. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Section 2 and its Schedule of the Interpretation Act, No. 9 of 1982  
Section 18 of Penal Code - provides for the liability of corporations  
Sections 7, 7A and 17A of the Financial Transactions Reporting Act 2006

#### **INTERPRETATION ACT** **PART 2 - MEANING OF CERTAIN EXPRESSIONS AND REFERENCES**

##### **Section 2. Interpretation of words and expressions**

The words and expressions in the Schedule shall have the meanings given to them.

##### **Schedule to Section 2.**

#### **INTERPRETATION OF WORDS AND EXPRESSIONS**

"person" includes any statutory body, company or association or body of persons corporate or unincorporated;

#### **PENAL CODE**

##### **18. Liability of corporations**

A corporation may be criminally liable to the same extent as a natural person, provided that the acts and intentions of its principals or responsible servants may be attributed to the corporation.

#### **FINANCIAL TRANSACTIONS REPORTING ACT**

##### **Section 7**

(1) No civil or criminal proceedings are to be taken against:

(a) a financial institution; or

(b) an officer, employee or agent of the financial institution acting in the course of that person's employment or agency; in relation to any action by the financial institution or the officer, employee or agent taken under this Part in good faith or in compliance with a direction given by the Unit under section 13A(1)(i) or 13D.

(2) Subsection (1) does not apply in respect of proceedings for an offence against a section in this Part.

##### **Section 7A**

(1) No civil or criminal proceedings are to be taken against:

(a) the auditor or the supervisory body of a financial institution; or

(b) an officer, employee or agent of the auditor or the supervisory body acting in the course of that person's employment or agency; in relation to any action by the auditor or the supervisory body or the officer, employee or agent taken under this Part in good faith or in compliance with a direction given by the Unit under section 13A(1)(i) or 13D.

(2) Subsection (1) does not apply in respect of proceedings for an offence against a section in this Part.

### **Section 17A**

If a body corporate is convicted of an offence under this Act, any director or officer concerned in the management of the body corporate is guilty of the offence if it is proved that the act or omission that constituted the offence took place with his or her knowledge, authority, permission, or consent.

159. Vanuatu provided the following information.

Civil case -

***Solomon v Turquoise Ltd* [2008] VUSC 64; Civil Case 163 of 2006 & 29 of 2007 (8 August 2008)**

The Minister granted the lease in exchange for a bribe of VT 3 m in cash given to him by Gilbert Trinh, the principal of Turquoise, on the day he signed the lease.

An order was made under section 100(1) of the Land Leases Act rectifying the register for leasehold title 12/O512/002 by cancelling the registration of the lease.

### **(b) Observations on the implementation of the article**

160. The criminal liability of legal persons is provided for in section 18 of PC, “provided that the acts and intentions of its principals or responsible servants may be attributed to the corporation”. Moreover, according to the Interpretation Act, a “person” includes any statutory body, company or association or body of persons corporate or unincorporated (Schedule to section 2).

161. During the country visit, Vanuatu highlighted its challenges in attributing liability to corporations and mentioned that the legislation in this regard had not been tested sufficiently. To date, 3 cases involving legal persons were under investigation.

## **Article 26 Liability of legal persons**

### **Paragraph 3**

*3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

162. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 18 of the Penal Code (cited above)

**(b) Observations on the implementation of the article**

163. The Public Prosecutor provided that such liability would be possible without prejudice to the criminal liability of the natural persons who have committed the offences, but no such case has existed to date. The reviewing experts were satisfied with the explanation provided by the national authorities.

**Article 26 Liability of legal persons**

**Paragraph 4**

*4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

164. Vanuatu indicated that it has partially implemented the provision under review and cited the following information.

Vanuatu expressed the view that existing sanctions are not necessarily effective, proportionate and dissuasive. For example, in a 2010 fraud case, while the Vanuatu Police Force (with a seizure warrant) was attempting to seize items, they were obstructed. These items belonged to board members and the CEO of a mixed private/public company who were all causing the obstruction. The sentence handed down to the CEO was a fine of VAT100,000.

**(b) Observations on the implementation of the article**

165. In most cases, the law does not regulate separate penalties for natural and legal persons, except for money-laundering offences under POCA.

166. The conversion of the sanction of imprisonment into a fine is regulated in section 51 (2) of PC.

**PENAL CODE**

**51. Fine**

(1) In sentencing any persons to pay a fine a court may, after enquiry as to his means, direct that the fine be paid within such period as it may specify or that it be paid by instalments.

(2) In addition to the power to sentence any person convicted of a criminal offence to pay a fine prescribed by any provision of criminal law as penalty for such offence, a court may, where the penalty provided is a limited term of imprisonment, in place thereof or as an alternative penalty, fine the offender.

(3) No fine imposed as an alternative penalty by a court other than the Supreme Court shall exceed a sum calculated at the rate of VT 200 for every day of prescribed maximum penalty of imprisonment to which the offender is liable.

167. The reviewing experts took note of the concerns raised by Vanuatu. They recommended that Vanuatu revisit its penalty provisions. It would be necessary to ensure that the available penalties would be sufficiently effective, proportionate and dissuasive for legal persons. Vanuatu might also wish to identify additional civil or administrative penalties, such as revocation of a license, de-registration or similar.

**(c) Challenges**

168. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

169. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice; and
5. Other: Consideration for effective, proportionate and dissuasive sanctions for legal persons

170. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 27 Participation and attempt**

**Paragraph 1**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

171. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 3 (Complicity and attempts), 29 (Conspiracy) (cited above), 30 (Complicity) (cited above), 31 (Co-offenders) (cited above), 32 (cited above), 33 (cited above), 34 (Accessory after the fact), 35 (Inciting and soliciting commission of offence) and 79 (Conspiracy to defeat justice etc) (cited above) of the Penal Code

**PENAL CODE**

**3. Complicity and attempts**

The criminal law of the Republic shall apply -

(a) to any act or omission within the territory of the Republic constituting complicity or attempt in relation to an offence against the criminal law of the Republic beyond such territory which is also an offence punishable by the law of the place in which it is or is intended to be committed;

(b) to any such act or omission beyond its territory in relation to an offence or intended offence within its territory.

#### **34. Accessory after the fact**

(1) An accessory after the fact shall mean a person who, knowing or having reasonable cause to suspect that another person has committed a criminal offence, shelters such person or his accomplice from arrest or investigation, or has possession of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence or used for the purpose of committing the offence.

(2) Subsection (1) shall have no application to any ascendant, descendant, sibling or the spouse of the person sheltered.

(3) An accessory after the fact shall be punished as a principal offender.

#### **35. Inciting and soliciting commission of offence**

It shall be unlawful to incite or solicit another person to commit any offence, whether or not that offence is committed. A person guilty of inciting or soliciting an offence may be charged and convicted as a principal offender.

172. Vanuatu provided the following information.

The cited provisions have never been successful in relation to a corruption-related offence, but there are a number of examples of use.

I.e. section 29 (conspiracy) of PC - see: *Public Prosecutor v Benard* [ 2005 ] VUSC 153; [ 2005 ] 1 LRC 418 (1 May 2005)

Christophe Emelee was charged with forging documents contrary to section 141 of PC on 15 November 2003. He was further charged with conspiracy to defeat justice contrary to section 79 of PC on 3 December 2003. The Defendants, Guy Bernard, John Simbolo, John Less Napuati and Steven Kalsakau, were charged with the offence of conspiracy to defeat justice contrary to section 79 on 5 December 2003.

#### **(b) Observations on the implementation of the article**

173. Sections 28 to 35 of PC criminalise all forms of participation in any capacity. It was explained by Vanuatu, during the country visit, that the general provisions of PC would apply as “lex generalis” to all offences.

### **Article 27 Participation and attempt**

#### **Paragraph 2**

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

**(a) Summary of information relevant to reviewing the implementation of the article**

174. Vanuatu indicated that it has implemented the provision under review and cited the following provisions.

Sections 3 and 28 of the Penal Code (cited above)

175. Vanuatu provided the following case.

Example of where attempt was considered: *Public Prosecutor v Swanson* [1997] VUSC 37; Criminal Case No 007 of 1996 (1 October 1997)

However, the accused was deemed not guilty of attempt (attempting to corrupt an official, contrary to sections 73(2) and 28 of PC).

The offence was particularised as follows:

That sometime between 1 March 1996 and 23 June 1996, Peter Harold Swanson did attempt corruptly to offer to give a bribe to Barak Sope, Minister of Finance, with intent to influence him in his official capacity.

**(b) Observations on the implementation of the article**

176. The attempt to commit an offence is criminalised according to sections 3 and 28 of PC.

**Article 27 Participation and attempt**

**Paragraph 3**

*3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

177. Vanuatu indicated that it has not implemented the provision under review and cited the following information.

Section 28 (3) of the Penal Code (cited above) - "mere preparation of an offence shall not constitute an offence"

**(b) Observations on the implementation of the article**

178. The reviewing experts noted that Vanuatu has not criminalised acts committed in mere preparation of an offence.

**(c) Challenges**

179. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

180. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

181. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

182.

**Article 29 Statute of limitations**

*Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.*

**(a) Summary of information relevant to reviewing the implementation of the article**

183. Vanuatu indicated that it has implemented the provision under review and cited the following measure.

Section 15 of the Penal Code

**PENAL CODE**

**15. Limitation in criminal prosecutions**

No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence -

- (a) in the case of offences punishable by imprisonment for more than 10 years - 20 years;
- (b) in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years - 5 years;
- (c) in the case of offences punishable by imprisonment for 3 months or less or by fine only - 1 year.

184. Vanuatu indicated that, in practice, corruption-related offences fall under section 15(a) of PC according to the Public Prosecutor, providing for a 20 year statute of limitations in criminal prosecutions.

**(b) Observations on the implementation of the article**

185. The reviewing experts pointed out that for some corruption-related offences, mainly the various bribery offences regulated in the laws of Vanuatu, money laundering and obstruction of justice, the maximum sentence was 10 years. According to section 15 of PC, the statute of limitation would therefore be 5 years. This was considered by the experts to be a relatively short time-frame.
186. Upon discussion during the country visit, Vanuatu itself pointed out that an amendment to the law in order to provide for a longer statute of limitation was necessary. As cases might only be reported some time after the commission and as delays in investigation might occur, a period of 5 years was deemed too short.
187. Based on such discussions, the reviewing experts recommended that Vanuatu strengthen its implementation of article 29 of the Convention by ensuring that the statute of limitations is long enough for all corruption-related offences. Moreover, Vanuatu should further ensure that the legislation provides for the suspension of the statute of limitations in prescribed cases and particularly when the alleged offender has evaded the administration of justice.
188. The general principle of the suspension of the statute of limitations in certain cases did not appear foreign to the laws of Vanuatu (i.e. see: article 63 (4) of the Constitution). This principle should be extended, as mentioned above, to strengthen the implementation of article 29 of the Convention.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 1**

*1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

189. Vanuatu indicated that it has partially implemented the provision under review and cited the following information.

The penalties are provided behind each corruption-related provision in the Penal Code.

It was noted that the Law Reform Commission (together with also i.e. the Vanuatu Police Force) are reviewing existing penalty requirements.

**(b) Observations on the implementation of the article**

190. The penalties for most corruption-related offences are terms of imprisonment of up to, for example, 7 years for obstruction of justice, 10 years for bribery or money-laundering, and 12 years for misappropriation. According to section 51 of PC, it is possible to convert the sentence into the payment of a fine.

191. The reviewing experts noted that it might be necessary to establish more effective, proportionate and dissuasive fines and sanctions, including for legal persons as pointed out under article 26, paragraph 4 of the Convention.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 2**

*2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

192. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 27 and 32 of the Constitution

#### **CONSTITUTION OF THE REPUBLIC OF VANUATU**

##### **27. Privileges of members**

(1) No member of Parliament may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him in Parliament in the exercise of his office.

(2) No member may, during a session of Parliament or of one of its committees, be arrested or prosecuted for any offence, except with the authorisation of Parliament in exceptional circumstances.

##### **32. Privileges of members of Council**

(1) No member of the National Council of Chiefs may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him in the Council in the exercise of his office.

(2) No member may, during a session of the Council or of one of its committees, be arrested or prosecuted for any offence, except with the authorisation of the Council in exceptional circumstances.

193. Vanuatu provided the following examples of implementation.

Other than the privileges granted to Members of Parliament and the National Council of Chiefs, there is no immunity for other public officials.

See: *Sokomanu v Public Prosecutor* [1989] VUCA 3; [1980-1994] Van LR 440 (14 April 1989) - Mr. Sokomanu was at the relevant time President of the Republic who was not granted immunity from prosecution.

**(b) Observations on the implementation of the article**

194. Vanuatu does not provide for immunities from criminal prosecution for public officials, except as provided for in articles 27 and 32 of the Constitution. These articles regulate that no Member of Parliament or the National Council of Chiefs is to be arrested or prosecuted during a sitting session of these bodies.

195. However, these immunities can be lifted with the authorisation of the Parliament of the Council in exceptional circumstances. Exceptional circumstances could include the presence of experts or witnesses from abroad or other reasons which do not allow a postponement of the arrest or prosecution until after the session of Parliament.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 3**

*3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

196. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 9 (7) of the Public Prosecutor Act 2003

**PUBLIC PROSECUTOR ACT**

**9. Preliminary enquiries, indemnities and other powers**

(7) The Public Prosecutor may grant indemnity from prosecution for any offence to a person on account of:

- (a) an undertaking given by that person to give evidence in a specified proceeding; or
- (b) an understanding or expectation that that person will give such evidence.

197. Vanuatu provided the following information.

The Public Prosecution's Office stated that section 9(7) has been used after a guilty plea has been entered into, but not for a corruption-related offence.

**(b) Observations on the implementation of the article**

198. The general discretionary power of the prosecution and the use of this power in corruption-related offences was discussed during the country visit, particularly in relation to article 55 of the Constitution.

199. It was highlighted in several meetings that no prosecution had been made under the LC or in regard to money-laundering offences. Furthermore, only a limited number of corruption-related matters had been prosecuted.

200. Against this backdrop, the reviewing experts recommended that Vanuatu ensure that discretionary powers are exercised with a view to maximising the effectiveness of law enforcement in regard to corruption-related offences. They further highlighted the recommendations made under UNCAC articles 36 and 38, which deal with capacity-building, monitoring of implementation in practice and strengthened inter-agency collaboration.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 4**

*4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

201. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Provisions on bail (sections 60-70) of the Criminal Procedure Code 2003  
Section 43 (Power of court to discharge offender without conviction or sentence) of the Penal Code

#### **CRIMINAL PROCEDURE CODE**

##### **Provisions on Bail**

##### **POWER IN CERTAIN CASES TO RELEASE FROM CUSTODY**

60. (1) When any person, other than a person accused of an offence punishable by life imprisonment, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to enter into a bond in writing, with or without conditions, for his subsequent appearance before the court, such person may be temporarily released from custody on bail.

(2) The conditions of such release shall be fixed with due regard to the circumstances and shall not be oppressive or unreasonable.

(3) Notwithstanding anything contained in subsection (1) the Supreme Court may in any case direct that any person be released from custody on bail or that the conditions required by the Magistrates' Court or a police officer be amended so as to be less onerous.

##### **BOND FOR APPEARANCE**

61. Before any person is released temporarily from custody a bond in writing subject to such conditions if any, as the court or police officer, as the case may be, thinks necessary, shall be executed by such person, on condition that such person shall attend at the time and place mentioned in the undertaking and shall continue to attend until otherwise directed by the court or police officer, as the case may be.

### **SPECIAL CONDITIONS OF BAIL**

62. (1) In releasing any person from custody on bail on his own recognizance a court may impose such conditions as it may consider fit.

(2) The conditions on which any person is released from custody on bail may include conditions appearing to the court to be likely to result in his appearance at the time and place required or to be necessary in the interests of justice or for the prevention of crime.

(3) When a court releases, or directs the release of, any person from custody on bail and imposes a condition under subsection (2) it shall not require him to find any surety in respect of that condition.

### **DISCHARGE FROM CUSTODY OF PERSON RELEASED**

63. (1) As soon as a bond has been executed in accordance with section 61 the person concerned shall be released, and when he is in prison the court ordering his release from custody shall issue an order of release to the officer in charge of the prison, and such officer on receipt of the order shall release him.

(2) Nothing in this section or in section 60 shall require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

### **POWER TO ORDER SUFFICIENT CONDITIONS WHEN CONDITIONS FIRST IMPOSED ARE INSUFFICIENT**

64. If, through mistake, fraud or otherwise, insufficient conditions have been imposed, or if they afterwards become insufficient, the court may issue a warrant of arrest directing that a person released from custody on bail be brought before it and may order him to comply with sufficient conditions, and on his failing so to do may commit him to prison.

### **COMMITTAL OF PERSON BOUND BY BAIL BOND**

65. If it appears to any court from information on oath, that any person bound by a bond to appear is about to leave the Republic, the court may cause him to be arrested and may commit him to prison until the trial, unless the court shall see fit to release him from custody on bail upon further conditions.

### **STATEMENT OF RIGHTS TO BE READ ON REFUSAL OF BAIL BY MAGISTRATE**

66. Upon the refusal by the Magistrates' Court of an application for bail, the magistrate shall state the grounds for such refusal and shall read aloud to the applicant in open court the following statement -

"Your application for release from custody on bail having been refused by this Court, you now have the right to make a fresh application for bail to the Supreme Court. If you so desire, the matter will be referred immediately by this Court to the Supreme Court, which will review your application as soon as possible. You will remain in custody in the meantime but will suffer no disadvantage by reason of making a further application to the Supreme Court. Do you wish the Supreme Court to consider your application for release from custody on bail?"

### **PRESIDING MAGISTRATE RESPONSIBLE FOR FORWARDING FILE TO SUPREME COURT**

67. If an applicant for bail informs the presiding magistrate that he wishes his application to be considered by the Supreme Court, that magistrate shall be personally responsible for ensuring that the relevant case file and other documents and material are forwarded without delay to the Registrar of the Supreme Court.

### **REPORT BY PRESIDING MAGISTRATE TO SUPREME COURT**

68. The file forwarded to the Supreme Court pursuant to section 67 shall include a written report by the magistrate addressed to the Supreme Court stating the grounds for refusing bail and setting out in detail the evidence or information upon which his conclusions were based. The report shall be dated and signed by the magistrate.

### **DECISION OF SUPREME COURT ON BAIL**

69. The decision of the Supreme Court on an application referred to it pursuant to sections 67 and 68 shall be delivered in writing and copies thereof shall be issued without delay to the appropriate magistrate and all parties to the proceedings. If the Supreme Court shall order that the applicant be released from custody on bail, the magistrate shall be personally responsible for ensuring that a copy of the decision is served upon the officer in charge of the prison or other place where he is detained and that he is forthwith produced before him in court for release for such period and upon such conditions as the magistrate shall determine.

### **NO APPEAL AGAINST ORDER REFUSING BAIL**

70. There shall be no right of appeal under Part 11 against the order of a judicial officer refusing the grant of bail to any person.

### **PENAL CODE**

#### **43. Power of court to discharge offender without conviction or sentence**

(1) Where any person is accused of any offence, any court, after inquiry into the circumstances of the case, may in its discretion discharge that person without convicting him, unless by any enactment applicable to the offence a minimum penalty is expressly provided for.

(2) A discharge under this section shall be considered to be an acquittal.

(3) The court discharging any person under this section may, if it is satisfied that the charge is proved against him, make any order for the payment of costs, damages, or compensation, or for the restitution of any property, that it could have made under any enactment applicable to the offence with which he is charged if it had convicted and sentenced him, and the provisions of every such enactment shall apply accordingly.

(4) Nothing in this section shall affect the power of any court to convict and discharge any person.

202. Vanuatu provided the following information in terms of the examples of implementation.

The Public Prosecution's Office provided that there are numerous examples; however, they are currently facing the problem of the Bulgarian national who was recently released on bail in relation to a fraud-related offence and he has since fled the country.

**(b) Observations on the implementation of the article**

203. Bail is regulated in sections 60 to 70 of the Criminal Procedure Code (CPC). The granting of bail is at the discretion of the court as it “may” decide to temporarily release the accused from custody on bail.
204. The court has this discretion in all cases except when the alleged offence is criminalised with life-long imprisonment. The refusal of bail can be reviewed by the Supreme Court.
205. Bail can be granted upon entering into a bond, in writing, which may include conditions. Next to standard bail conditions, wide discretionary powers are provided to define appropriate conditions.
206. The reviewing experts were of the view that the provisions regulating bail were appropriate and recommended that Vanuatu make full use of its powers in practice to ensure the efficient administration of the process of bail.
207. In relation to the case of the two Bulgarian individuals, it was explained that the Boarder Control and Immigration were not informed early enough to prevent their escape. Close communication and inter-agency collaboration would need to be improved in order to underpin the effective implementation of article 30, paragraph 4, of the Convention.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 5**

*5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

208. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 44 - 48 and 50 of the Penal Code  
Section 209 of the Criminal Procedure Code  
Sections 50-54 of the Correctional Services Act 2006

**PENAL CODE**

**44. Nature of periodic detention**

(1) In any case in which a person convicted of a criminal offence may be sentenced to imprisonment for a limited term in accordance with any provision of law, the court may in its discretion sentence such person in place thereof to undergo periodic detention for a term of not less than 1 month and not more than 6 months.

(2) Periodic detention shall mean the loss of liberty of the offender for not more than 36 hours between Friday evening and Sunday evening in each consecutive week throughout the term for which such periodic detention has been imposed. During such

sentence the offender shall be obliged to perform community work without remuneration for periods not exceeding 8 hours in each day.

While in detention for such periods, the offender shall be treated as far as local circumstances allow as though he were undergoing a sentence of imprisonment.

(3) In exercising its discretion under subsection (1) the court shall have regard to the nature of the offence, the age and circumstances of the offender including his occupation or employment, family circumstances, the prospects of his reformation and any other circumstances which it may consider relevant.

(4) If an offender sentenced to periodic detention shall fail on any occasion to surrender himself into custody, properly to perform the work he is directed to perform or to comply in any way with the terms of such sentence or the rules governing periodic detention, such sentence shall thereupon lapse and he shall be taken in custody or the rules governing periodic detention, such sentence shall thereupon lapse and he shall be taken in custody before the same court to be sentenced afresh and he shall not thereafter be eligible for periodic detention.

#### **45. Probation**

(1) In any case where a sentence of imprisonment may be imposed, probation may be ordered in addition to or in place of any other sentence.

(2) The period of probation may be imposed for from 1 to 3 years.

#### **46. Nature of probation**

(1) Probation shall be granted upon general and, where appropriate, special conditions.

(2) The compliance of the offender with such conditions shall be supervised by a magistrate nominated in that behalf, with the assistance of honorary probation officers.

(3) The probation officer shall be chosen and may be replaced by the magistrate in charge of the case.

(4) The magistrate in charge of the case at the home district of the offender may at any time for reasons to be recorded in writing suspend all or any of the special conditions or may vary them so as to make them less onerous.

#### **47. General conditions of probation**

An offender on probation shall always be subject to the following general conditions -

(a) to establish his residence in a given place;

(b) to appear when called upon by the probation officer;

(c) to receive visits from the probation officer and furnish all information and documents necessary for verifying his means of support;

(d) to advise the probation officer in advance of any change of employment or residence and the reasons therefore;

(e) to inform the probation officer of any intended absence of over 15 days and of his return;

(f) to obtain the prior permission of the probation officer before any departure abroad.

#### **48. Special conditions of probation**

In addition to such general conditions imposed by section 47, the court may by its judgment subject the offender to any one or more of the following special conditions -

(a) to take up residence in any specified place or places;

(b) not to be present without special permission in any specified place or places;

(c) to remain in employment or follow a course of instruction or vocational training;

- (d) to submit to measures of control or treatment including treatment in hospital, in particular for curing an addiction to alcohol or drugs;
- (e) to contribute to his family expenses or pay regularly any maintenance due by him;
- (f) to compensate any person for damage caused by his offence;
- (g) not to drive any motor vehicle or class of motor vehicle;
- (h) to avoid specified places or premises;
- (i) to abstain from wagering or excessive or any consumption of alcohol;
- (j) to avoid the company of specified offenders, in particular his co-offenders or accessories to the offence;
- (k) not to receive or lodge any specified persons or class of persons at his residence.

Where the offender shall have broken any general or special conditions of probation the court shall order the termination of such probation and shall sentence the offender afresh. He shall not thereafter be eligible for probation.

## **CRIMINAL PROCEDURE CODE**

### **RELEASE FROM CUSTODY OR SUSPENSION OF SENTENCE PENDING APPEAL**

209. (1) After the entering of an appeal by a person entitled to appeal, the trial court which convicted or sentenced such person may order that he be released from custody on bail subject to such conditions as the court may consider fit.

(2) An application for release from custody on bail under this section may be heard in chambers. In the Supreme Court such application shall be by motion served on the Public Prosecutor. In the Magistrates' Court such application may be made without formal process to any magistrate.

(3) If the appeal is ultimately dismissed and the original sentence confirmed or some other sentence of imprisonment substituted therefore, the time during which the appellant has been released from custody on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

## **CORRECTIONAL SERVICES ACT**

### **PART 6 PAROLE AND THE COMMUNITY PAROLE BOARD**

#### **50. Parole**

For the purposes of this Part:

parole is the period of supervision that an offender is subject to, following release from a correctional centre.

[NB: Board means the Community Parole Board.]

#### **51. Eligibility for Parole**

(1) Subject to subsection (2) and subsection (3), a detainee is eligible for consideration by a community parole board for release on parole upon the expiry of a half of his or her sentence.

(2) An offender sentenced to a term of imprisonment of 12 months or less, will be automatically released on parole after serving a half of his or her sentence.

(3) If an offender is sentenced to life imprisonment the offender will be eligible for consideration by a community parole board for release on parole after serving 8 years of his or her sentence.

(4) The period of parole for an offender shall be the longer of a period of 12 months or until the end date of his or her sentence expiry date.

(5) Notwithstanding subsections (1) to (4), the Director may apply to the Board to have an offender's release on parole delayed if the offender has committed, within one month of the offender becoming eligible for parole under this section, a disciplinary offence under section 26.

(6) If the Board grants an application under subsection (5) the Board may delay the release of parole to the offender for such period and on such conditions as it thinks fit but not beyond the offender's sentence expiry date.

## **52. Conditions of Parole**

(1) The following standard conditions will apply to an offender released on parole:

(a) the offender must report in person to a probation officer as soon as practicable and not later than 72 hour after his or her release on parole; and

(b) the offender must report to a probation officer as and when required to do so by a probation officer and must notify the probation officer of his or her residential location; and

(c) the offender must not move to a new residential location without the prior written consent of a probation officer; and

(d) the offender must take part in a rehabilitative and reintegrative needs assessment and/or programme if and when directed to do so by a probation officer.

(2) The conditions imposed in paragraphs (1)(c) and (d) do not apply if, and to the extent that, they are inconsistent with any special conditions imposed by the Board.

## **53. Special conditions of parole**

(1) The Board may impose such special condition or conditions related to the rehabilitation or integration of an offender as the Board thinks necessary.

(2) An offender may not be subject to a special condition that requires the offender to take prescribed medication.

## **54. Offence related to breach of parole**

(1) An offender commits an offence if the offender fails without reasonable excuse to comply with any condition of parole.

(2) An offender who commits an offence against subsection (1) is liable on conviction to a fine not exceeding VT10000 or to imprisonment not exceeding 3 months.

### **(b) Observations on the implementation of the article**

209. Parole is regulated in sections 50 to 54 of the Correctional Services Act. In a case where imprisonment is 12 months or less, the prisoner will automatically be released on parole after half of the term has passed. Others, with the exception of prisoners sentenced to life imprisonment, are eligible to be considered by a community parole board for release on parole upon request and after the expiry of half the sentence.

210. The decision as to whether or not parole is granted will be based on numerous factors; primarily, the safety of the community and the prospects of successful reintegration. Aspects of conduct of the prisoner and gravity of the offence also form part of this decision-making process.

211. Parole is granted under a number of standard conditions, which include a rehabilitation and re-integrative needs assessment and/or programme. Special conditions can be ordered by the parole board. In relation to the reintegration programme, more information is comprised in Vanuatu's answer to the implementation of article 30, paragraph 10, of the Convention.

212. Non-compliance with parole conditions is a criminal offence.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 6**

*6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

213. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 29, 29A, 29B and 35(3) of the Public Service Act  
Section 41 of the Leadership Code Act

#### **PUBLIC SERVICE ACT**

##### **29. Dismissal for cause**

(1) The Commission may dismiss an employee at any time for serious misconduct or inability but subject to its obligations to act as a good employer.

(1A) If the Commission dismisses an employee under subsection (1), the matter is not to be referred to the Board for hearing and determined under section 37.

(2) The Commission may where the past performance of the employee has been exemplary provide to the employee a redundancy payment as if his or her employment had been terminated under the Employment Act.

##### **29A. Dismissal for criminal conviction**

(1) Subject to subsection (2), the Commission may dismiss an employee who is convicted of a criminal offence.

(2) A dismissal is to be made in accordance with the provisions of this Act and the regulations as if the criminal offence were a disciplinary offence.

##### **29B. On-the-spot fines for unauthorized use of motor vehicles**

(1) An employee must not use a vehicle belonging to the Government without appropriate authority.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding VT 20,000.

(3) If the Commission is satisfied that an employee has contravened subsection (1), the Commission may issue the person with a penalty notice.

(4) A penalty notice is a notice to the effect that, if the person does not wish to have the matter determined by a court, he or she must, within 7 days after receiving the notice, pay to the Commission the amount specified in the notice which must not exceed VT 20,000.

(5) The use of a vehicle belonging to the Government without appropriate authority by an employee is taken to be a disciplinary offence for the purposes of this Act and the regulations. Nothing in this section is to be construed so as to prevent disciplinary action being taken against the employee in accordance with Part 6.

### **35. Dispute resolution**

(3) An employee can be suspended only by a director-general or a director in accordance with the provisions of this Act and the regulations.

## **LEADERSHIP CODE ACT**

### **Section 41. Dismissal from Office**

(1) Where a leader is convicted of a breach of this Code the court may, if it regards the breach as serious, make an order dismissing the leader from office.

(2) In determining whether the breach of this code is serious, the court may have regard to:

- (a) in the case of a breach involving a financial matter, the amount involved;
- (b) whether the conduct of the leader was significantly below what would be expected of a leader;
- (c) where it is possible to discern, the motives of the leader;
- (d) the extent to which the breach diminished the respect or public confidence in the leader's position; and
- (e) whether the leader has been previously convicted of a breach of this Code.

### **(b) Observations on the implementation of the article**

214. During the country visit, how the PSC functions was elaborated on in more detail. The PSC is responsible for public servants, but no definition of this term is contained in the Interpretation Act.

215. It was explained that the Public Service Act covers all persons employed in the Public Service on a permanent basis. According to section 2 of the Act, the "Public Service" comprises of those persons employed in the ministries, departments, State appointed offices, agencies and instruments of the Government of Vanuatu, as are designated by the Prime Minister pursuant to an enactment.

216. Political appointees are excluded from being covered by the Public Service Act, as are teachers, judicial officers and police officers. Those are administered by the Teaching Service Commission, Judicial Service Commission and Police Service Commission, the last of which is also dealing with the armed forces.

217. In relation to the general process, a detailed description of this was provided; cases of misconduct by public servants (i.e. those appointed by the PSC) are referred to the PSC by the Head of Departments or Ministries based on the disciplinary offences, as provided for in section 36 (1) of the Public Service Act.

218. Prior to the allegations being referred to the PSC, the defendant within the Department must be given and/or provided with an opportunity to respond to the allegations. Upon reaching the PSC, it will deliberate on the matter by considering the allegations and supporting evidence, as well as responses and any supporting evidence from the defendant. Where the PSC considers that the allegations are true because of overwhelming evidence present by the Department, the PSC may terminate an employee, pursuant to section 29(1) of the Public Service Act or provide other sanctions, as provided for in the Public Service Staff Manual, depending on nature of the case.
219. Where the PSC is of the view that there may be a case but more evidence is required to prove the matter, and parties will need to present their case, the PSC will refer the matter to Public Service Disciplinary Board (PSDB) as per section 37 of the Public Service Act. The PSDB then makes recommendations to the PSC on how to proceed after having heard both parties.
220. The abovementioned process is the disciplinary process in the Vanuatu Public Service, but it must be noted that there is also a separate process for the removal of Director Generals. It used to be the case that the Director Generals were also managed under the same provisions of the Public Service Act, but since the Public Service (Amendment) Act No. 1 of 2011 came into effect, the provisions no longer apply to the Director Generals as the terms of their contracts of employment now apply to them.
221. In relation to the case covered by article 30, paragraph 6 of the Convention, pending a criminal trial, the following was explained. Generally, the PSC would not become active if a case was investigated by the Police and then prosecuted. However, if the same conduct were reported to the PSC, utilising either of the two processes (referred to above), the PSC might consider the same conduct as serious misconduct under section 29(1) of the Public Service Act and dismiss an employee. For Director employees, the PSC must receive a complaint from persons, pursuant to section 19B (1) of the Public Service Act, before it can begin to process the discipline which may involve an investigation, responses from all parties and so forth.
222. Cases involving corruption or misuse of public funds would always be regarded as a serious misconduct which can lead to the dismissal of a public servant, Director or Director General.
223. The reviewing experts were satisfied with the detailed explanations provided. They concluded that no provisions exist in the Public Service Act, which foresee the suspension of a public servant or similar measures pending trial. However, it was noted that a parallel process of disciplinary sanctions would be possible, if the conduct were brought to the attention of the PSC.
224. In order to assure consistency in relation to the application of rules regulating various public officers, the reviewing experts noted that Vanuatu may wish to consider widening the scope of the PSC to cover all public officials and harmonising the manner in which public officials are dealt with across the existing service commissions in relation to the provisions of the Convention.

## **Article 30 Prosecution, adjudication and sanctions**

### **Subparagraph 7 (a)**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*(a) Holding public office; and*

*(b) Holding office in an enterprise owned in whole or in part by the State.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

225. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 42 of the Leadership Code Act

#### **LEADERSHIP CODE ACT**

##### **Section 42. DISQUALIFICATION FROM FUTURE OFFICE**

Where the leader is dismissed from office under section 41 the leader is disqualified from standing for election as, or being appointed as, a leader of any kind for a period of 10 years from the date of the conviction.

226. As already mentioned under article 30, paragraph 6, there are 2 procedures that the PSC follows regarding disciplinary measures. One for the levels of Director and the other for officers below this level. For the first procedure, measures may include removal from Office meaning termination of service. In this instance, the PSC has terminated (from 2007 to today's date) at least 5 employees pursuant to these procedures. But 4 out of 5 of these cases have challenged their terminations in court. At least one case has been determined in favour of the PSC. One of these is about to be reinstated because of a procedural error by the PSC. Two of the cases are still pending before the courts although they are more than 2 to 4 years ago cases.

227. Under the second procedure, measures (sanctions) may include dismissal, demotion, or suspension of the officer for a certain period without pay, warnings or reprimand, or order of compulsory retirement from the Public Service. Under this procedure, a lot of cases in the Public Service are dealt with.

228. It is to be noted that for a "serious" offence, reference is made to the Public Service Staff Manual (PSSM), an internal regulation.

229. After a disciplinary measure has been hand down, the person can re-apply to the Public Service after 2 years. It was confirmed by the national authorities that this also applied to holding Office in an enterprise owned in whole or in part by the State.

230. In this context, the PSC pointed to the PSSM, which further compliments this concept in its recruitment procedures (Chapter 3, section 5).

## **PUBLIC SERVICE STAFF MANUAL**

### **5. General conditions of eligibility for appointment**

(a) No person may be appointed to an office in the Public Service:

- (i) Unless he or she is a citizen of Vanuatu
- (ii) unless he or she fulfils the physical requirements, if any, for the appointment;
- (iii) if he or she is under 18 years of age;
- (iv) if he or she is over 55 years of age, except in respect of an appointment on contract;
- (v) unless he or she has a knowledge of English, French and Bislama;
- (vi) unless he or she is of good character, but a person:

- with a criminal conviction, a person may be considered for appointment if they have not been convicted of an offence for a period of not less than 4 years, and there is no known reason to suppose that they are not a reformed character and fit for appointment to the Public Service, or as the Commission may determine; or
- who was dismissed or retired on a compulsory basis or resigned from the Public Service as the result of a disciplinary matter may be considered for re-appointment if the date of dismissal/retirement or resignation is two years or more from the new date of proposed appointment, or as the Commission may determine.

(b) The Commission may determine any other general conditions of eligibility for appointment, including minimum educational qualifications or their equivalent.

### **(b) Observations on the implementation of the article**

231. The Public Service Act foresees the possibility of dismissal for a criminal conviction according to section 29 A.

232. The reviewing experts were satisfied with the explanations provided. They took note that a person disqualified from holding office as a result of a criminal conviction may only be considered for appointment to the public service at least 4 years after such conviction. They also took note of the explanation that this rule would apply to holding office in an enterprise owned in whole or in part by the State.

233. As mentioned under article 30, paragraph 6, in order to ensure consistency in relation to the application of rules regulating various public officers, the reviewing experts recommended that Vanuatu consider widening the scope of the PSC to cover all public officials and harmonising the manner in which public officials are dealt with across the existing service commissions in relation to the provisions of the Convention.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 8**

*8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.*

**(a) Summary of information relevant to reviewing the implementation of the article**

234. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 36 of the Public Service Act

**PUBLIC SERVICE ACT**

**36. Disciplinary matters**

(1) An employee commits a disciplinary offence who -

(a) by any wilful act or omission fails to comply with the requirements of this Act or of any order hereunder or of any official instrument made under the authority of the Commission or of the director-general of the ministry in which the employee is employed;

(b) in the course of his or her duties disobeys, disregards or makes wilful default in carrying out any lawful order or instruction given by any person having authority to give the order or instruction or by word or conduct displays insubordination;

(c) is negligent, careless, indolent, inefficient, or incompetent in the discharge of his or her duties;

(d) behaves in a manner calculated to cause unreasonable distress to other employees or to affect adversely the performance of their duties;

(e) uses intoxicating liquors or drugs (including for the avoidance of doubt, kava) to excess or in such manner as to affect adversely the performance of his or her duties;

(f) improperly uses or removes property, stores, monies, stamps, securities or negotiable instruments for the time being in his or her official custody or under his or her control, or fails to take reasonable care of any such property, stores, monies, stamps, securities or negotiable instruments;

(g) otherwise than in the proper discharge of his or her duties directly or indirectly discloses or for private purposes uses any information acquired by him or her either in the course of his or her duties or in his capacity as an employee;

(h) absents himself or herself from his or her office or from the official duties during hours of duty without leave or valid excuse, or is habitually irregular in the time of his or her arrival or departure from his or her place of employment;

(i) is guilty of any improper conduct in his or her official capacity, either inside or outside of working hours, or of any other improper conduct which is likely to affect adversely the performance of his or her duties or is likely to bring the Public Service into disrepute;

(j) is guilty of any other offence prescribed from time to time by regulations made under this Act.

**(b) Observations on the implementation of the article**

235. The process of disciplinary matters can be followed in parallel to criminal proceedings. The reviewing experts were satisfied with the explanations provided.

## Article 30 Prosecution, adjudication and sanctions

### Paragraph 10

*10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.*

#### (a) Summary of information relevant to reviewing the implementation of the article

236. Vanuatu indicated that it has implemented the provision under review and cited the following measure.

Section 1(1) of the Correctional Services Act

#### **CORRECTION SERVICES ACT**

##### **1. Purpose and objects of the Act**

(1) The purpose of this Act is to:

- (a) ensure that sentences are administered in a fair and effective manner; and
- (b) ensure that correctional facilities are based on internationally accepted standards for the fair and humane treatment of offenders consistent with the cultural, traditional and religious values of Vanuatu ; and
- (c) aim at reducing re-offending by managing the rehabilitation of offenders and their reintegration into society; and
- (d) providing useful and timely information to Courts and Community Parole Boards to assist them in determining decisions relating to the rehabilitation and reintegration of offenders; and
- (e) provide for the establishment, maintenance and operation of correctional centres; and
- (f) provide for the facilities for the appropriate detention of detainees in accordance with human rights conventions; and
- (g) provide for the maintaining of links between detainees and the community through rehabilitative and reintegrative community programmes.

(2) The principal objects of this Act are:

- (a) the maintenance of public safety; and
- (b) the consideration of victims' interests; and
- (c) to ensure offenders undertaking sentences of supervision or in correctional centres have access to rehabilitative and reintegration programmes; and
- (d) to ensure the fair treatment of offenders undergoing sentences of supervision, community work or detained in correctional centres; and
- (e) for offenders as far as is reasonable and practicable in the circumstances and within the resources available, to be given access to activities that may contribute to their rehabilitation and reintegration into the community.

237. Vanuatu provided the following examples of implementation.

Correctional Services focus on reintegration programmes. These are general programmes and these are not specific for persons convicted of corruption-related offences. One person who recently partook in a programme was convicted of fraud. For corruption-related offences, there have been less than 5 people in the programmes in the last 2 years. The length of the programmes vary depending on the time served/ left to

serve; sometimes, depending on the gravity of the offence, offenders can spend half their time in prison and half their time in one of the reintegration programmes.

Correctional Services has an MOU with Wan Smol Bag (a private organization) since 2013 (yet they have been collaborating since 2007), with the assistance of NZAid, to further develop and strengthen the reintegration programmes - life skills programmes. Correctional Services also works closely with Chiefs in the communities and others i.e. churches. Community Justice Supervisors have also been appointed to assist with the programmes. These people are volunteers, generally from the communities.

The focus of the reintegration programmes vary from woodwork, carpentry, arts (i.e. Art Rehabilitation Programme) and music to farming, cooking/ catering and so forth.

**(b) Observations on the implementation of the article**

238. The reviewing experts deemed Vanuatu to have implemented the provision under review through measures such as the reintegration programme described above.

**(c) Successes and good practices**

239. The reviewing experts acknowledged the work of Correctional Services in relation to the establishment and effective functioning of the reintegration programmes and encouraged Vanuatu to continue its efforts in this regard.

**(d) Challenges**

240. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Limited resources for implementation (e.g. human/financial/other);
2. Inadequacy of existing normative measures (constitution, laws, regulations, etc.);
3. Limited capacity (e.g. human/technological/institution/other).

**(e) Technical assistance needs**

241. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice;
5. Other assistance: A complaints management system for PSC.

242. Vanuatu indicated that the forms of technical assistance previously mentioned had been partially provided. The PSC received assistance in 1998 and occasionally from the Pacific Island Centre for Public Administration (also, see above: assistance received from NZAid on the reintegration programmes).

243. Vanuatu has indicated that the extension and/or expansion of such assistance would help it adopt the measures described.

## **Article 31 Freezing, seizure and confiscation**

### **Subparagraph 1 (a) and (b)**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

*(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*

*(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

244. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 2 (definition of ‘tainted property’), 5 (cited above), 6, 15 and 20 of the Proceeds of Crime Act  
Section 53 of the Penal Code  
Section 44 of the Leadership Code Act

#### **PROCEEDS OF CRIME ACT**

##### **2. Definitions for Act**

“tainted property”, in relation to a serious offence, means:

- (a) property intended for use in, or used in or in connection with, the commission of the offence; or
- (b) proceeds of crime;

##### **6. Meaning of realisable property**

(1) In this Act, "realisable property" means:

- (a) any property held by a person who has been convicted of, or charged with, a serious offence; or
- (b) any property held by a person to whom a person so convicted or charged has directly or indirectly made a gift caught by this Act.

##### **15. Application for forfeiture order or pecuniary penalty order on conviction**

(1) If a person is convicted of a serious offence committed after this Act commences, the Attorney General may apply to the Court for either or both of the following orders:

- (a) a forfeiture order against tainted property in relation to the offence;
- (b) a pecuniary penalty order against the person for benefits derived by the person from the commission of the offence.

(2) However, the Attorney General may not make such an application after the end of the relevant application period for the conviction.

(3) A single application under this section may be made in connection with 2 or more serious offences.

(4) After an application under this section is finally determined, no further application for a forfeiture order or a pecuniary penalty order may be made in relation to the offence for which the person was convicted without leave of the Court.

(5) The Court may give leave for a new application only if:

(a) the property or benefit to which the new application relates was identified after the previous application was determined; or

(b) necessary evidence became available only after the previous application was determined; or

(c) it is in the interests of justice that the new application be made.

## **20. Forfeiture order on conviction**

(1) If:

(a) the Attorney General applies to the Court for a forfeiture order against property in relation to a person's conviction of a serious offence; and

(b) the Court is satisfied that the property is tainted property in relation to the offence; the Court may order that the property, or so much of the property as is specified by the Court in the order, be forfeited to the State.

(2) In deciding whether property is tainted property, the Court may infer:

(a) if the evidence establishes that the property was in the person's possession at the time of, or immediately after, the offence was committed - that the property was used in, or in connection with, committing the offence; and

(b) if the evidence establishes that the property (in particular, money) was found, during investigations before or after the person was arrested for and charged with the offence:

(i) in the person's possession; or

(ii) under the person's control in a building, vehicle, receptacle or place - that the property was derived, obtained or realised as a result of the person's committing the offence; and

(c) if:

(i) the evidence establishes that the value, after the person committed the offence, of all the person's ascertainable property is more than the value of all the person's ascertainable property before the person committed the offence; and

(ii) the Court is satisfied that the person's income from sources unrelated to criminal activity cannot reasonably account for the increase in value- that the value of all or part of the increase represents property that the person derived, obtained or realized directly or indirectly from committing the offence.

(3) If the Court orders that property (other than money) be forfeited to the State, the Court must specify in the order the amount that it considers to be the value of the property when the order is made.

(4) In considering whether to make a forfeiture order against property, the Court may take into account:

(a) any right or interest of a third party in the property; and

(b) the gravity of the offence concerned; and

(c) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and

(d) the use that is ordinarily made of the property, or the use to which the property was intended to be put. (5) If the Court makes a forfeiture order, the Court may give any directions that are necessary or convenient to give effect to the order.

[NB: Production orders are regulated in Part 5A of POCA]

## **PENAL CODE**

### **Section 53. Confiscation of property**

(1) On the conviction of any person for a criminal offence, the court may order the confiscation of any property of the offender seized and which was used as a means of committing the offence or is or represents the proceeds of the offence.

(2) Subsection (1) shall apply to any ship, boat, aircraft or motor-vehicle used by the offender to travel to or away from the place where the offence was committed.

[NB: For search and seizure, see also 56 to 59 of CPC]

## **LEADERSHIP CODE ACT**

### **44. Deprivation of proceeds of corruption**

If:

(a) a leader has been convicted of a breach of this Code (including an offence listed in section 27); and

(b) the leader or another person has obtained a benefit in any way from the conduct that constituted the breach, the leader or the other person is not entitled to retain the benefit.

245. Vanuatu indicated that there have been no cases in the last 2 years. A previous example of implementation referred to by the Public Prosecution's Office was: *Public Prosecutor v Leo* [2008] VUSC 54; Criminal Case 75, 76 & 78 of 2008 (11 July 2008). It was held that cash was confiscated.

#### **(b) Observations on the implementation of the article**

246. The Vanuatu Police Force confirmed that they can confiscate property, pursuant to section 53 of PC.

247. Sections 15 and 20 of POCA regulate forfeiture of tainted property in relation to a serious offence, namely, property intended for use in, or used in or in connection with, the commission of the offence, or proceeds of crime (section 2 of POCA). "Proceeds of crime" is defined as property derived or realized directly or indirectly from a serious offence, and also covers converted or transformed property and income, capital or other economic gains derived or realized from that property (section 5 of POCA).

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 2**

*2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

248. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 2 (definition of 'authorised officer') and 37 - 39 of the Proceeds of Crime Act

## **PROCEEDS OF CRIME ACT**

### **2. Definitions for Act**

“authorised officer” means:

- (a) the Commissioner of Police; or
- (b) a police officer authorised by the Commissioner of Police for a provision of this Act;
- or
- (c) a person authorised by the Minister for a provision of this Act;

### **37. Warrant to search land etc. for tainted property or terrorist property**

(1) An authorised officer may apply to the Court for the issue of a warrant to search land or premises for tainted property or terrorist property.

(2) If an application is made under subsection (1) for a warrant, the Court may issue the warrant authorising the authorised officer, with such assistance, and by such force, as is necessary and reasonable:

- (a) to enter the land or premises; and
- (b) to search the land or premises for the tainted property or terrorist property and to seize it.

(3) The Court may issue the warrant only if it is satisfied that:

- (a) the property authorised to be seized is tainted property; and
- (b) an information has been laid or will be laid within 48 hours for the relevant offence in relation to the tainted property or a forfeiture order under section 19 of the Counter Terrorism and Transnational Organised Crime Act has been or will be made within 14 days against the terrorist property; and
- (c) there are reasonable grounds for issuing the warrant.

(4) A warrant issued under this section must include:

- (a) a statement of the purpose for which the warrant is issued, including a reference to the nature of the relevant offence; and
- (b) a description of the kind of property authorised to be seized; and
- (c) a time at which the warrant ceases to have effect; and
- (d) a statement whether entry is authorised at any time or at specified times.

### **38. Authorised officer may seize tainted property or terrorist property**

(1) If, in the course of a search under a warrant issued under section 37, for a thing of a kind specified in the warrant, an authorised officer finds another thing, the warrant is taken to authorise the officer to seize the other thing if there are reasonable grounds:

- (a) for believing the other thing to be tainted property in relation to a serious offence or to be terrorist property, or to afford evidence about the commission of a criminal offence, or the existence of terrorist property in Vanuatu; or
- (b) for believing that it is necessary to seize the property or thing to prevent it being concealed, lost or destroyed, or used to commit, continue or repeat the offence or another offence.

(2) Any property seized must be given to the Attorney General.

### **39. Return of seized property - general rule**

(1) If property has been seized under section 38(1), a person who claims an interest in the property may apply to the Court for an order that the property be returned to the person.

(2) The Court must order that the property be returned to the person if the Court is satisfied that:

- (a) the person is entitled to possession of the property; and

- (b) the property is not tainted property or terrorist property; and
- (c) in the case of tainted property, the person in relation to whose conviction, charging or proposed charging the property was seized has no interest in the property.

249. Vanuatu provided the following examples of implementation.

VFIU "can issue direction" which includes freezing - there was once in 2012 and 5 instances since 2007; see: sections 13F and 13A(1)(i) of the Financial Transactions Reporting Act (FTRA). The Vanuatu Police Force, including its units such as the Transnational Crime Unit, collaborates with VFIU on relevant cases.

Otherwise, the Vanuatu Police Force would be responsible for identification, tracing, freezing or seizure of any item referred to under paragraph 1. They confirmed that they can freeze or seize an item and then get a Court order e.g. based on sections 55 to 59 of CPC and sections 37 to 38 of POCA.

In 1 case, an account was frozen for 2 weeks.

**(b) Observations on the implementation of the article**

- 250. Sections 37 and 37 of POCA and 56 to 59 of PC enable search and seizure.
- 251. All freezing orders to financial institutions in regard to transactions are carried out by VFIU based on section 13 (F) of FTRA. They are valid for up to 5 days and can be made orally and followed up within 24 hours by a written order. This power has been exercised in several cases.
- 252. VFIU also has powers under section 13(A)(i) of FTRA to direct, in writing, a financial institution to take such steps as the Unit considers appropriate in relation to any information or report received by the Unit, so as to facilitate any investigation that is anticipated or being undertaken by the Unit or an assisting entity.
- 253. The reviewing experts were satisfied with the answers provided by Vanuatu.
- 254. The Vanuatu Police Force is responsible for the identification, tracing, freezing or seizure according to sections 55-59 of CPC, and sections 37 and 38 of POCA and can apply for restraining (section 55 of CPC) or production orders (section 82A of CPC).

**Article 31 Freezing, seizure and confiscation**

**Paragraph 3**

*3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

- 255. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 48 and 49 of the Proceeds of Crime Act

#### **PROCEEDS OF CRIME ACT**

##### **48. Retention of seized property if restraining order made**

(1) Subsections (2), (3) and (4) apply if:

- (a) property has been seized under section 45(2); and
- (b) but for that subsection, the Attorney General would be required to arrange for the property to be returned to a person as soon as practicable after the end of a period; and
- (c) before the end of that period:
  - (i) a foreign restraining order against the property is registered in the Court; or
  - (ii) the Court makes a restraining order against the property; and
- (d) the Attorney General is not the Administrator.

(2) The Attorney General must:

- (a) if the restraining order directs the Administrator to take custody and control of the property - arrange for the property to be given to the Administrator in accordance with the restraining order; or
- (b) if the Court has made an order under subsection (4) about the property - arrange for the property to be kept until it is dealt with in accordance with another provision of this Act.

(3) If the property is in the Attorney General's possession when the restraining order is made or registered, the Attorney General may apply to the Court for an order that the Attorney General retain possession of the property.

(4) The court may, if satisfied that there are reasonable grounds for believing that the property may afford evidence as to the commission of an offence or that the property is terrorist property, order that the Attorney General may retain the property for as long as the property is so required as evidence or is so required.

(5) In proceedings for an order under subsection (4), the Court may order that a witness need not answer a question, or produce a document, if the Court is satisfied that answering the question, or producing the document, may prejudice the investigation of an offence or the prosecution of a person.

##### **49. How Attorney General must deal with property subject to forfeiture order**

(1) Subsection (2) applies if:

- (a) property has been seized under this Division; and
- (b) while the property is in the Attorney General's possession, a foreign forfeiture order against the property is registered in the Court.

(2) The Attorney General must deal with the property as required by the order.

256. The administrator of such property is the "exhibit officer" under the Serious Crime Unit of the Vanuatu Police Force.

#### **(b) Observations on the implementation of the article**

257. Sections 48 and 49 of POCA entitle the Attorney-General to administer frozen or seized property in accordance with a court order.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 4**

*4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

258. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 5 and 6 of Proceeds of Crime Act (cited above)

259. Vanuatu indicated that the Public Prosecutor confirmed that this was possible, in principle.

#### **(b) Observations on the implementation of the article**

260. Property into which any property is derived or realised directly from the offence that is later successively converted or transformed, can also be seized, frozen or confiscated, according to the definition of proceeds of crime in section 5(1)(a) of POCA.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 5**

*5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

261. Vanuatu indicated that it has implemented the provision under review and cited the following measure.

Section 5 (2) of POCA (cited above) establishes that, in the event property that the proceeds of crime ("the original proceeds") are intermingled with other property from which it cannot readily be separated, that proportion of the whole represented by the original proceeds, will be taken to be proceeds of crime.

262. Vanuatu indicated that the Public Prosecutor confirmed that this was possible in theory; however, it had never arisen in practice.

#### **(b) Observations on the implementation of the article**

263. The provision is sufficiently regulated in section 5 (2) of POCA. The reviewing experts noted that there were no case examples of implementation.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 6**

*6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

264. Vanuatu indicated that it has implemented the provision under review and cited the following measure.

Article 5 (1) of the Proceeds of Crime Act (cited above)

265. Vanuatu indicated that the Public Prosecutor confirmed that this was possible in theory; however, it had never arisen in practice.

#### **(b) Observations on the implementation of the article**

266. The reviewing experts deemed the provision under review to have been sufficiently regulated in section 5 (1) (b) of POCA.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 7**

*7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

267. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Section 7 of the Financial Institutions Act 2006  
Sections 9C and 13D of the Financial Transactions Reporting Act  
Section 82A of the Proceeds of Crime Act

### **FINANCIAL INSTITUTIONS ACT**

#### **Section 7**

(1) If the Reserve Bank has reason to believe that a person is contravening section 6(1) or 7(1), the Reserve Bank may cause an examination of the person's books, accounts and records to find out if there is a contravention.

(2) If a person refuses to make available books, accounts or records for examination by the Reserve Bank, the person is guilty of an offence punishable on conviction:

(a) if the person is an individual - by a fine not exceeding VT 500,000 or imprisonment for a term not exceeding 12 months, or both; or

(b) in any other case - by a fine not exceeding VT 2,500,000.

## **FINANCIAL TRANSACTIONS REPORTING ACT**

### **Section 9C**

A financial institution must make available any of its records referred to in section 9 or 9A to the Unit if requested to do so in writing by the Unit.

[Note: Unit meaning Financial Intelligence Unit, as defined in section 1, Interpretation ]

### **Section 13D**

(1) A member of the Unit or any person authorised in writing by the Attorney General may examine the records and inquire into the business and affairs of any financial institution for the purpose of ensuring compliance by the financial institution with Parts 2, 2A and 3.

(2) Without limiting subsection (1), the member or authorised person may do all or any of the following:

(a) at any reasonable time, enter any premises, in which the member or authorised person believes, on reasonable grounds, that there are records relevant to ensuring compliance by a financial institution with Part 2, 2A or 3;

(b) use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system;

(c) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other intelligible output and remove the printout or other output for examination or copying;

(d) use or cause to be used any copying equipment in the premises to make copies of any record.

(3) The owner or occupier of premises referred to in subsection (1) and any person found there:

(a) must give the member or authorised person all reasonable assistance to enable him or her to carry out his or her duties; and

(b) must provide the member or authorised person with any information that he or she may reasonably require for that purpose.

(4) The Unit may transmit any information from, or derived from, such examination to an assisting entity if the Unit has reasonable grounds to suspect that the information is or may be relevant to:

(a) the detection, investigation or prosecution of a person for a money laundering offence, a financing of terrorism offence or any other serious offence; or

(b) the commission of a money laundering offence, a financing of terrorism offence or any other serious offence; or

(c) an act preparatory to a financing of terrorism offence; or

(d) the enforcement of this Act, the Proceeds of Crime Act [Cap. 284] or any other Act prescribed by the regulations.

(5) If a person:

(a) obstructs or hinders or fails to cooperate with the member or any authorised person in the lawful exercise of the powers under subsection (1); or

(b) does not comply with subsection (3); the person is guilty of an offence and is punishable on conviction:

(i) in the case of an individual - by a fine not exceeding VT 2.5 million or imprisonment for a term not exceeding 2 years, or both; or

(ii) in the case of a body corporate - by a fine not exceeding VT 10 million.

## **PROCEEDS OF CRIME ACT**

### **Section 82A**

(1) If an authorised officer has reasonable grounds for believing that a person has been, is or will be involved in the commission of a serious offence, and that a person (other than the first-mentioned person) has possession or control of a document relevant to:

- (a) identifying, locating or quantifying property of the first-mentioned person; or
- (b) identifying or locating any document necessary for the transfer of property of the first-mentioned person; or
- (c) identifying, locating or quantifying tainted property in relation to the offence; or
- (d) identifying or locating any document necessary for the transfer of tainted property in relation to the offence; the officer may apply to the court for a production order against the person having possession or control of the document.

(2) If an authorised officer has reasonable grounds for believing that a person has possession or control of a document relevant to:

- (a) identifying, locating or quantifying terrorist property; or
- (b) identifying or locating any document relevant for the transfer of terrorist property; the officer may apply to the court for a production order against the person having possession or control of the document.

(3) An application under subsection (1) or (2) may be made ex parte and must be in writing and supported by an affidavit.

(4) The court if it is satisfied that there are reasonable grounds to do so may make an order requiring the person to produce to the authorised officer at a specified time and place any documents referred to in subsection (1) or (2).

(5) The authorised officer to whom the documents are produced may:

- (a) inspect the documents; or
- (b) make copies of the documents; or
- (c) retain the documents for as long as is reasonably necessary for the purposes of this Act.

(6) If the authorized officer retains the documents produced to him or her, he or she must make a copy of the documents available to the person who produced them.

(7) A person is not entitled to refuse to produce any document required under a production order on the ground that production of the document:

- (a) may incriminate him or her, or cause him or her to be liable to a penalty; or
- (b) will be in breach of his or her obligation (whether statutory or otherwise) not to disclose the existence and/or the content of the document.

268. Vanuatu provided the following statistics.

VFIU, as a competent authority under FTRA, can order banks and other financial institutions to make available bank/financial/commercial records to VFIU. Since 2011, VFIU has ordered and received over 200 records (banking/financial/commercial) from banks and financial institutions. The records assisted VFIU in its analytical processing of suspected reports and assisted requests for information (approved) from supervisory and law enforcement agencies.

The Public Prosecution's Office can also seek a court order from the Supreme Court.

**(b) Observations on the implementation of the article**

269. The reviewing experts were satisfied with the answers provided. During the country visit, VFIU also pointed to the other provisions of FTRA, e.g. section 13 A, D, E, F and section 14.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 8**

*8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

270. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 29 and 30 of Proceeds of Crime Act

**PROCEEDS OF CRIME ACT**

**29. Rules for determining benefit and assessing value**

- (1) If a person obtains property as the result of, or in connection with committing, a serious offence, the person's benefit is the value of the property so obtained.
- (2) If a person derives an advantage as the result of, or in connection with committing, a serious offence, the person's advantage is taken to be a sum of money equal to the value of the advantage so derived.
- (3) Unless the contrary is proved:
  - (a) property is taken to be tainted property if it is held by a person on the day when the application is made, and at any time:
    - (i) if the offence or earliest offence was committed more than 5 years before the application is made - within 5 years before the application is made; and
    - (ii) in any other case - after the offence, or the earliest offence, was committed and before the application is made; and
  - (b) any expenditure by the person in the time mentioned in paragraph (a)(ii) is taken to be expenditure met out of tainted property; and
  - (c) any property received or taken to have been received by the person at any time as a result of, or in connection with, committing the offence or offences is taken to have been received free of any other interests; and
  - (d) if evidence is given at the hearing of the application that the value of the person's property increased after committing an offence, the increase is taken to be part of the person's benefit from the offence.
- (4) If a pecuniary penalty order has previously been made against a person in relation to an offence, any of the person's benefits that are shown to the Court to have been taken into account in determining the amount to be recovered under the earlier order must be disregarded.

### **30. Statements about benefits from committing serious offences**

(1) If a person has been convicted of a serious offence, the Attorney General may tender to the Court a statement about any matter relevant to:

(a) deciding whether the person has benefited from the offence, or from any other serious offence of which the person is convicted in the same proceedings or that is taken into account in passing sentence on the person; or

(b) assessing the value of the person's benefit from the offence or any other serious offence of which the person is so convicted in the same proceedings or that is so taken into account.

(2) If a statement under subsection (1) has been tendered by the Attorney General and the Court is satisfied that a copy of the statement has been served on the person, the Court may require the person to indicate:

(a) to what extent the person accepts each allegation in the statement; and

(b) for each allegation that the person does not accept wholly or in part - any matters the person proposes to rely on.

(3) If the person accepts to any extent an allegation in the statement, the Court may, in deciding or assessing the matters mentioned in subsection (1), treat the person's acceptance as conclusive of the matters to which it relates.

(4) If a person fails, wholly or in part, to comply with a requirement under subsection (2), the Court may treat the person, for this section, as having accepted every allegation in the statement, other than:

(a) an allegation for which the person has complied with the requirement; or

(b) an allegation that the person has benefited from the offence concerned, or that the person obtained any property or advantage as a result of, or in connection with, committing the offence.

(5) An allegation may be accepted, or matter indicated, for this section either:

(a) orally before the Court; or

(b) in writing.

(6) An acceptance by a person under this section that the person received any benefits from committing a serious offence is admissible in any proceedings against the person for any offence.

### **(b) Observations on the implementation of the article**

271. The reviewing experts noted that section 29(3) of POCA legislatively provides for the provision under review.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 9**

*9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

272. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Third party rights are protected under section 22 of the Proceeds of Crime Act

**PROCEEDS OF CRIME ACT**

**22. Protection of third parties**

- (1) If an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the Court, before the forfeiture order is made, for an order under subsection (2).
- (2) If a person applies to the Court for an order about the person's interest in property, the Court must make an order declaring the nature, extent and value (as at the time the order is made) of the person's interest if the Court is satisfied:
  - (a) that the applicant was not involved in committing an offence in relation to which forfeiture of the property is sought, or a forfeiture order against the property was made; and
  - (b) if the applicant acquired the interest when, or after, the offence was committed - that the applicant acquired the interest:
    - (i) for sufficient consideration; and
    - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property.
- (3) If a forfeiture order has already been made against property, a person who claims an interest in the property may, within 6 months starting on the day when the order is made, apply to the Court for an order under subsection (2).
- (4) A person may not make an application under subsection (3), except with the leave of the Court, if the person:
  - (a) knew about the application for the forfeiture order before the order was made; or
  - (b) appeared at the hearing of that application.
- (5) A person who applies to the Court under subsection (1) or (3) must give 28 days written notice of the application to the Attorney General.
- (6) The Attorney General:
  - (a) is a party to the proceedings in an application under subsection (1) or (3); and
  - (b) may make an application under subsection (1) for a person.
- (7) An appeal lies to the Court of Appeal of Vanuatu from an order under subsection (2).
- (8) Subsection (9) applies if:
  - (a) a person has obtained an order under subsection (2); and
  - (b) the period for appeals has expired and any appeal from that order has been determined or has lapsed; and
  - (c) the Administrator has received the property under a forfeiture order.
- (9) On application by the person, the Administrator must:
  - (a) return the property, or the part of it to which the interest of the person relates, to the person; or
  - (b) pay an amount equal to the value of the interest of the applicant, as declared in the order, to the person.

**CRIMINAL PROCEDURE CODE**

**Section 106**

- (1) Where any property of whatsoever description comes into the possession of the police in the course of their duties it shall be lawful for the Commissioner of Police to direct that it be disposed of by sale or otherwise unless it be claimed by the owner within –
  - (a) 1 day, in the case of perishable goods;

(b) 15 days, in the case of all other goods when the total value of such goods belonging to the same person is less than VT 1,000;

(c) in all other cases 3 months after a notice shall have appeared in the Gazette giving a description of the property and requesting the owner to claim it from the police.

(2) All moneys resulting from the sale or disposal of such property by the police, after deduction of all expenses, shall be paid into the Public Fund and no claim lies against the police by any person in respect of such property.

(3) This section shall not apply to any property forfeited to the State.

**(b) Observations on the implementation of the article**

273. POCA sets out several provisions which recognise the rights of bona fide third parties. Not only section 22, but also sections 21A, 39, 46, 51, 5564, 68, and 73, legislatively provide for the provision under review.

**(c) Challenges**

274. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc.).

**(d) Technical assistance needs**

275. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Legal advice;
3. Model legislation.

276. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 32 Protection of witnesses, experts and victims**

*1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.*

*2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

*(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;*

*(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.*

*3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.*

*4. The provisions of this article shall also apply to victims insofar as they are witnesses.*

*5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

277. Vanuatu indicated that it has not implemented the provision under review and cited the following information.

Sections 81 (cited above) and 82(1)(f) of PC criminalise the act of deceiving or influencing a witness. These provisions tend to protect the witness in order to protect his or her testimony rather than to ensure his or her physical protection.

**PENAL CODE**

**Section 82. Offences relating to judicial proceedings**

(1) No person shall –

(f) attempt wrongfully to interfere or influence a witness in a judicial proceeding, either before or after he has given evidence, in connection with such evidence.

Communications technology (i.e. through video) for testimony does not exist and is currently not possible. However, this is being considered.

Bail conditions provide for a degree of protection.

**(b) Observations on the implementation of the article**

278. Vanuatu does not have specific witness protection measures, except in limited cases for victims of domestic violence.

279. During discussions with the Vanuatu Police Force and other stakeholders in Vanuatu, it was highlighted that cases exist in which witnesses are intimidated or threatened with a similar act. The Police Force would have the possibility of opening a new case against the offender, according to sections 81 and 82 or also 79 of PC (see above), but so far, no such case was fully investigated and sent for prosecution.

280. The reviewing experts recommended that Vanuatu take legislative and other measures, as appropriate, to enable the protection of witnesses and experts from retaliation or intimidation.

**(c) Challenges**

281. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Inadequacy of existing implementing normative measures (laws, regulations, etc.);
2. Limited capacity (e.g. human/technological/institution/other);
3. Limited awareness of state-of-the-art programmes and practices for witness and expert protection;
4. Limited resources for implementation (e.g. human/financial/other).

**(d) Technical assistance needs**

282. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Legal advice;
3. Model legislation;
4. Capacity-building programmes for authorities responsible for establishing and managing witness, expert and victim protection programmes.

283. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 33 Protection of reporting persons**

*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

284. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 13(C) of the Government Contracts and Tender Act

**GOVERNMENT CONTRACTS AND TENDER ACT**

**13C. Protection of whistleblowers**

(1) A person who becomes aware of a breach or an alleged breach of the tender process provided for by this Act or the regulations may report it orally or in writing to:

- (a) the Director of the Department responsible for finance; or
- (b) any other senior official within that Department or the Ministry responsible for finance.

(2) A person performing functions in or for any Ministry or Department must not victimise, or discriminate against, an employee of the Public Service because that employee has reported breaches or alleged breaches of the tender process.

(3) The Director or any senior official who under subsection (1) receives a report of any breach or alleged breach of the tender process must refer the matter to the Director-General or a person authorised by the Director-General.

(4) The Director-General or the person authorised by the Director-General may refer the matter to the Auditor-General, the Commissioner of Police and/or the Public Prosecutor.

285. Vanuatu provided the following examples of implementation.

From 2011 to mid-2013, the Central Tenders Board Office has examined 6 instances of breaches or alleged breaches to the Government Contracts and Tenders Act (CAP 245) and Tenders Regulations. The majority of these instances have been completed and the recommendations were acted upon, while others are still ongoing. Therefore, section 13C on the protection of whistleblowers is implemented with no repercussions, allowing the individual to report a breach or alleged breach.

**(b) Observations on the implementation of the article**

286. Section 13 C (2) of the Governments Contracts and Tenders Act 2001 provides that a person performing functions in or for any Ministry or Department must not victimise or discriminate against an employee of the Public Service because that employee has reported breaches or alleged breaches of the tender process. No similar provisions exist to protect all public officials in regard to reporting any allegations of corruption.

287. The reviewing experts pointed out that the case examples exemplify the implementation of the reporting obligation in section 13 C (1), but that more information was necessary to assess also the operational value of section 13 C (2).

288. The reviewing experts recommended that Vanuatu consider introducing further provisions to protect reporting persons who report in good faith and on reasonable grounds acts of corruption e.g. not only in regard to the tendering process, but throughout the Public Service or even beyond.

**(c) Challenges**

289. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Limited awareness of state-of-the-art systems and programmes to protect reporting persons;
2. Limited capacity (e.g. human/technological/institution/other);
3. Limited resources for implementation (e.g. human/financial/other).

**(d) Technical assistance needs**

290. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Legal advice;
3. Model legislation;
4. Capacity-building programmes for authorities responsible for establishing and managing protection programmes for reporting persons.

291. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

## Article 34 Consequences of acts of corruption

*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.*

### (a) Summary of information relevant to reviewing the implementation of the article

292. Vanuatu indicated that it has not implemented the provision under review.

293. Vanuatu cited a civil case -

***Solomon v Turquoise Ltd [2008] VUSC 64; Civil Case 163 of 2006 & 29 of 2007 (8 August 2008)***

Minister granted the lease in exchange for a bribe of VT 3 m in cash given to him by Gilbert Trinh (“Trinh”), the principal of Turquoise, on the day he signed the lease.

An order was made under s. 100(1) of the Land Leases Act rectifying the register for leasehold title 12/O512/002 by cancelling the registration of the lease.

### (b) Observations on the implementation of the article

294. No concrete forms of remedial action were cited. However, in practice, some measures to address acts of corruption exist as provided for in the case example and confirmed during the country visit.

295. In considering the Constitution of Vanuatu, article 63 (2) on the ‘Findings of the Ombudsman’ report reads as follows:

Wherever, after due enquiry, the Ombudsman concludes that conduct was contrary to the law, based on error of law or of fact, delayed for unjustified reasons, or unjust or blatantly unreasonable and that, consequently, any decision taken should be annulled or changed or that any practice followed should be revised, he shall forward his findings to the Prime Minister and to the head of the public authority or department directly concerned.

296. This passage, as well as for instance section 29(3)(c) of the Ombudsman Act, suggests that there are possibilities to annul or rescind a contract, withdraw a concession or other similar instrument or to take any other remedial action, if the relevant conduct or decision which formed the basis of such contract, concession or instrument was unjust. This seems to include acts of corruption.

297. Thus, the reviewing experts recommended that Vanuatu specify which measures could apply to address the consequences of corruption as provided for in UNCAC article 34, assuring full implementation and strengthening their application in practice.

**(c) Challenges**

298. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Specificities in our legal system.

**(d) Technical assistance needs**

299. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. Legal advice.

300. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 35 Compensation for damage**

*Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.*

**(a) Summary of information relevant to reviewing the implementation of the article**

301. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 42(2) and 54 of the Penal Code

**PENAL CODE**

**Section 42. Power of court to order offender to come up for sentence if called upon**

(1) ...

(2) The making of an order under this section shall not limit or affect the power of the court, under any enactment applicable to the offence, to make any order for the payment of costs, damages, or compensation, or for the restitution of any property, notwithstanding that the offender is not sentenced on conviction, and the provisions of every such enactment shall apply accordingly.

**Section 54**

Upon the conviction of any person for a criminal offence whereby such person has unlawfully obtained possession of any property of another, the court may order him to make restitution of such property to the person lawfully entitled to possession thereof and may direct by its order that in default of making restitution within a period specified in such order, the offender shall suffer imprisonment, which shall not exceed a term calculated at the rate of one week's imprisonment for every VT 1,000 of the value of the

property concerned. The offender shall continue to be liable to make restitution of such property notwithstanding the execution of the sentence of imprisonment.

**(b) Observations on the implementation of the article**

302. According to section 42 of PC, the court can make an order for the payment of costs, damages or compensation, or for the restitution of any property, notwithstanding that the offender is not sentenced on conviction.
303. Section 54 of PC specifies that an order on the restitution of property to the person lawfully entitled to possession thereof can be made by the court upon conviction.
304. Details of the applicability of other statutes or principles which provide for redress under tort or breach of contract remained unclear.
305. The reviewing experts therefore recommended that Vanuatu ensure that sufficient measures exist to provide compensation for damages resulting from acts of corruption, in line with UNCAC article 35.

**(c) Challenges**

306. Vanuatu identified the following challenge and issue in fully implementing the provision under review:
1. Specificities in our legal system.

**(d) Technical assistance needs**

307. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:
1. Summary of good practices/lessons learned;
  2. Legal advice.
308. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 36 Specialized authorities**

*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.*

**(a) Summary of information relevant to reviewing the implementation of the article**

309. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

1) Ombudsman Office

Sections 61-65 of the Constitution

Sections 10 and 11 of the Ombudsman Act, 2006

Part V of the Leadership Code Act

2) Public Prosecution's Office

Section 55 of the Constitution

Sections 7 and 8 of the Public Prosecutor Act, No. 18 of 2003

Sections 35 and 37-39 of the Leadership Code Act

Part 3 relating to all prosecutions (sections 24-27 and 33) of the Criminal Procedure Code

3) VFIU

Sections 12, 13A and 13B, 13D (cited above), 13E and 13F of the Financial Transactions Reporting Act

4) Vanuatu Police Force

Section 36 of the Leadership Code Act

Part 2 (sections 2-4 and 5) of the Police Act 2002

5) Public Service Commission

Section 60 of the Constitution

Sections 7 and 8 of the Public Service Act, 2001

6) State Law (Attorney-General's Office)

Sections 6, 10 and 12 of the State Law Office Act, 2006

7) Other

1) **Ombudsman Office**

**CONSTITUTION OF THE REPUBLIC OF VANUATU**

**Part II - The Ombudsman**

**61. Ombudsman**

(1) The Ombudsman shall be appointed, for 5 years, by the President of the Republic after consultation with the Prime Minister, the Speaker of Parliament, the leaders of the political parties represented in Parliament, the chairman of the National Council of Chiefs, the chairmen of the Local Government Councils, and the chairmen of the Public Service Commission and the Judicial Service Commission.

(2) A person shall be disqualified for appointment as Ombudsman if he is a member of Parliament, the National Council of Chiefs or a Local Government Council, if he holds any other public office, or if he exercises a position of responsibility within a political party.

(3) A person shall cease to be Ombudsman if circumstances arise that, if he were not the Ombudsman, would disqualify him for appointment as such.

**62. Enquiries by Ombudsman**

(1) The Ombudsman may enquire into the conduct of any person or body to which this Article applies -

- (a) upon receiving a complaint from a member of the public (or, if for reasons of incapacity, from his representative or a member of his family) who claims to have been the victim of an injustice as a result of particular conduct;
  - (b) at the request of a Minister, a member of Parliament, of the National Council of Chiefs or of a Local Government Council; or
  - (c) of his own initiative.
- (2) This Article shall apply to all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies.
- (3) The Ombudsman may request any Minister, public servant, administrator, authority concerned or any person likely to assist him, to furnish him with information and documents needed for his enquiry.
- (4) The Ombudsman shall grant the person or body complained of an opportunity to reply to the complaints made against them.
- (5) The enquiries of the Ombudsman shall be conducted in private.

### **63. Findings of the Ombudsman and reports**

- (1) Wherever, after due enquiry, the Ombudsman concludes that a complaint is unjustified, he shall so inform the complainant and the Prime Minister and the head of the public department or authority concerned.
- (2) Wherever, after due enquiry, the Ombudsman concludes that conduct was contrary to the law, based on error of law or of fact, delayed for unjustified reasons, or unjust or blatantly unreasonable and that, consequently, any decision taken should be annulled or changed or that any practice followed should be revised, he shall forward his findings to the Prime Minister and to the head of the public authority or department directly concerned.
- (3) The report of the Ombudsman shall be public unless he decides to keep the report, or parts of it, confidential to the Prime Minister and the person in charge of the relevant public service, on the grounds of public security or public interest. The complainant shall in any case be told of the findings of the Ombudsman.
- (4) The Prime Minister or the person in charge of the relevant public service shall decide upon the findings of the Ombudsman within a reasonable time and the decision, with reasons, shall be given to the complainant forthwith.
- Any period limiting the time in which legal proceedings may be commenced shall not begin to run until the complainant has received the decision.
- (5) The Ombudsman shall present a general report to Parliament each year and may make such additional reports as he considers necessary concerning the discharge of his functions and action taken or his findings. He may draw the attention of Parliament to any defects which appear to him to exist in the administration.

### **64. Right of a citizen to services in own language**

- (1) A citizen of Vanuatu may obtain, in the official language that he uses, the services which he may rightfully expect from the administration of the Republic of Vanuatu.
- (2) Where a citizen considers that there has been a breach of subarticle (1) he may make a complaint to the Ombudsman who shall conduct an enquiry in accordance with Articles 62 and 63.
- (3) The Ombudsman shall, each year, make a special report to Parliament concerning the observance of multilingualism and the measures likely to ensure its respect.

### **65. Ombudsman not subject to direction or control**

The Ombudsman shall not be subject to the direction or control of any other person or body in the exercise of his functions.

## **OMBUDSMAN ACT**

### **PART 3 - FUNCTIONS AND POWERS OF THE OMBUDSMAN**

#### **10. General exercise of functions and powers**

(1) The Ombudsman must perform the functions of his or her office, and exercise the powers relating to the office, as provided for by the Constitution and by this or any other Act.

(2) The Ombudsman has all powers necessary or convenient to perform his or her functions, and to carry out his or her duties, as provided for by the Constitution and by this or any other Act.

#### **11. Functions of the Ombudsman**

(1) The Ombudsman has the following functions:

- a) to enquire into any conduct on the part of any government agency;
- b) to enquire into any defects in any law or administrative practice appearing from any matter being enquired into;
- c) to enquire into any case of an alleged or suspected discriminatory practice by a government agency;
- d) in respect of conduct of a leader occurring on or before the 1st day of July 1998, to enquire into any case of alleged or suspected breach of Chapter 10 (Leadership Code) of the Constitution;
- e) in respect of conduct of a leader occurring after 1st July 1998, to conduct an investigation in accordance with Part 5 of the Leadership Code [Cap. 240];
- f) to undertake mediation in accordance with section 13.

(2) The Ombudsman may exercise his or her functions:

- a) on the complaint of a person or body referred to in Article 62(1)(a) or (b) of the Constitution; or
- b) on his or her own initiative.

(3) The functions of the Ombudsman specified in subsection (1) are in addition to the enquiries that the Ombudsman may conduct under Article 62(1) of the Constitution, and subsection (1) does not in any way limit that Article.

(4) To avoid doubt, conduct on the part of any officer, employee, member or agent of a government agency in his or her capacity as an officer, employee, member or agent of the government agency is taken to be conduct on the part of the government agency.

## **LEADERSHIP CODE ACT**

### **PART 5 - INVESTIGATION AND PROSECUTION OF LEADERS ROLE OF OMBUDSMAN**

(1) The Ombudsman must investigate and report on the conduct of a leader (other than the President):

- (a) if the Ombudsman receives a complaint from a person that a leader has breached this Code; or
- (b) if the Ombudsman has formed the view on reasonable grounds that a leader may have breached this Code.

(2) The Ombudsman must give a copy of the report to the Public Prosecutor and where, in the opinion of the Ombudsman, the complaint involves criminal misconduct, to the Commissioner of Police within 14 days after forwarding his or her findings to the Prime Minister under Article 63(2) of the Constitution.

(3) Where an Act provides for the functions, duties, and powers of the Ombudsman, the provisions of that Act will apply when the Ombudsman is carrying out an investigation under this Act.

(4) Notwithstanding subsection (3), for the purpose of fulfilling any function or duty lawfully conferred or imposed on the Ombudsman under this Act, the Ombudsman :

(a) shall have full access at all convenient times to Government contracts, documents, books, accounts and any other material that relates to and is relevant to the investigation; and

may, by notice in writing signed by the Ombudsman require any person having possession or control of any Government contract, documents, books, accounts or any other material that relates to and is relevant to the investigation to deliver such document or documents to the Ombudsman at such time and place as is specified in the notice; and

(c) may cause extracts to be taken from any Government contract, documents, books, accounts or any other material that relates to and is relevant to the inquiry without paying any fee therefore.

(5) Where a person fails to comply with a notice or any other requirement under subsection (4) the Ombudsman may apply to the Supreme Court for an order requiring that person to do so.

(6) Where the complaint is against the Ombudsman the investigation will be carried out by the Attorney-General (6) Where the complaint is against the Ombudsman the investigation will be carried out by the Attorney-General in accordance with the procedure set out in this part as if the Attorney-General were vested with all the functions, duties discretions and powers of the Ombudsman.

In a brochure produced by the Ombudsman Office, "The Role of Leaders Under the Leadership Code", a leader was held to be: the Prime Minister and Ministers of State; all Members of Parliament; Members of the National Council of Chiefs; elected and nominated members of the Local Government Councils; Director-Generals of the Ministries and Directors of Departments; Chief Executive Officers or Secretary-Generals of the Local Governments; the Town Clerks of the Municipalities; Directors of companies or other bodies corporate wholly owned by the Government; all Members of the Boards of Government Statutory Authorities; all political advisors; Commissioner of Police; Commander of the Vanuatu Mobile Force; the Attorney General; the Solicitor General; the Public Prosecutor; the Public Solicitor; the Ombudsman; the Clerk of Parliament; the Principal Electoral Officer; the Auditor-General; Members of the Public Service Commission; Members of the Teaching Service; Members of the Police Service Commission; and Members of the Electoral Commission.

## **2) Public Prosecution's Office**

### **CONSTITUTION**

#### **55. Public Prosecutor**

The function of prosecution shall vest in the Public Prosecutor, who shall be appointed by the President of the Republic on the advice of the Judicial Service Commission. He shall not be subject to the direction or control of any other person or body in the exercise of his functions.

### **PUBLIC PROSECUTOR ACT**

#### **Division 2 - Functions and Powers**

## **7. Independence of Public Prosecutor**

(1) The Public Prosecutor must perform his or her functions and exercise his or her powers under this Act or any other law independently.

(2) The Public Prosecutor is not subject to the direction or control of any other person or body in the performance of his or her functions or the exercise of his or her powers under this Act or any other law.

## **8. Functions of the Public Prosecutor**

(1) The functions of the Public Prosecutor are:

(a) to institute, prepare and conduct preliminary enquiries; and

(b) to institute, prepare and conduct on behalf of the State, prosecutions for offences in any court; and

(c) to institute, prepare and conduct, on behalf of the State appeals in any court in respect of prosecutions; and

(d) to conduct, on behalf of the State as respondent, any appeal in any court in respect of prosecutions; and

(e) if requested by the Attorney General to do so, to institute, prepare and conduct on behalf of the State, or be a party to, proceedings under legislation dealing with proceeds of crime, mutual assistance or extradition; and

(f) to discontinue prosecutions regardless of who instituted them; and (g) if requested to do so, to give advice to members of the Vanuatu Police Force and any other investigators in relation to investigations, proposed prosecutions or prosecutions; and

(h) to provide assistance in obtaining search warrants; and

(i) to prosecute breaches of the Leadership Code [Cap. 240]; and

(j) such other functions that are conferred on the Public Prosecutor by this Act or any other law.

(2) In the performance of his or her functions, the Public Prosecutor must have regard to:

(a) considerations of justice and fairness; and

(b) the need to conduct prosecutions in an effective, economic and efficient manner; and

(c) the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime.

## **LEADERSHIP CODE ACT**

### **PUBLIC PROSECUTOR TO CONSIDER OMBUDSMAN'S REPORT**

35. (1) The Public Prosecutor must:

(a) consider the report; and

(b) if within 14 days of receiving the report, is of the opinion that further investigation is required, refer the report to the Commissioner of Police for that purpose; and

(c) after receiving the results of the investigation, decide whether there are sufficient grounds to prosecute the leader or any other person.

(2) If, after considering the report under subsection 1(a), or after considering the results of the investigation under subsection 1(c), the Public Prosecutor decides the complaint is vexatious, frivolous or trivial the Public Prosecutor may determine not to prosecute a leader. If the Public Prosecutor does decide not to prosecute on those grounds he or she must follow the procedure set out in section 37(3).

(3) Where the complaint is against the Public Prosecutor the Attorney-General will carry out the duties and obligations of the Public Prosecutor in accordance with the procedure set out in this Part.

### **37. PUBLIC PROSECUTOR TO DECIDE ON PROSECUTION**

(1) The Public Prosecutor must decide, within 3 months of receiving the report, whether there are sufficient grounds or evidence to support a prosecution under this Code or under any other Act.

(2) The Public Prosecutor may decide not to prosecute only on the basis that there is insufficient grounds or evidence to support a prosecution, or that the complaint is vexatious, frivolous or trivial.

(3) If the Public Prosecutor decides not to prosecute a person, he or she must:

(a) notify the Prime Minister of the decision within 7 days of making the decision, giving reasons for the decision; and

(b) publish a notice in the Gazette within 14 days of the decision, stating that he or she has decided not to prosecute, and setting out the reasons for the decision.

### **38. PROCEEDINGS AGAINST LEADER**

(1) If the Public Prosecutor decides that there are sufficient grounds to support a prosecution, he or she must begin proceedings within one month of deciding to prosecute a leader.

(2) If the Public Prosecutor is not able to begin proceedings against the leader, or has not been able to decide whether to prosecute or not, within 3 months because the matter is complex, the Public prosecutor must:

(a) notify the Prime Minister of this, and tell the Prime Minister that he or she needs an extension of another 3 months to complete consideration of the matter; and

(b) publish a notice in the Gazette to this effect.

(2) The Public Prosecutor must decide the matter and either begin the proceedings, or publish the notice, before the end of that second period of 3 months.

### **39. CONDUCT OF PROCEEDINGS**

(1) Proceedings against a leader for a breach of this Code, or against another person under section 30, are to be conducted in the same way as any other criminal proceedings.

(2) Proceedings under sections 45 and 46 are to be conducted in the same way as proceedings for the recovery of a debt or other property.

(3) Proceedings under this Act may in the Court's discretion, be heard by 3 judges sitting together.

## **CRIMINAL PROCEDURE CODE**

### **PART 3 - PROVISIONS RELATING TO ALL PROSECUTIONS**

#### **Place of Trial**

#### **GENERAL AUTHORITY OF COURTS**

24. Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within the Republic, or which according to law may be dealt with as if it had been committed within the Republic and to deal with the accused person according to its jurisdiction.

#### **PLACE AND DATE OF SITTINGS OF THE SUPREME COURT**

25. (1) For the exercise of its criminal jurisdiction the Supreme Court shall hold sittings in each district of the Court at such places and on such dates as the Chief Justice may direct.

(2) The registrar shall ordinarily give notice beforehand of all such sittings.

### **COURT TO BE OPEN**

26. (1) Subject to subsection (2) the place in which a court is held for the purpose of trying an offence shall be open and accessible to the public so far as the same can conveniently contain them.

(2) The judicial officer may for reasons of decency, security of the State or where otherwise authorised by law, order at any stage in the trial of any particular case that the public generally, or any particular person or class of persons, shall not have access to, or be or remain in, the room or building used by the court.

### **POWER OF SUPREME COURT TO TRANSFER PROCEEDINGS**

27. (1) Whenever it appears to the Supreme Court that it is necessary or expedient so to do, it may order that the accused person against whom proceedings have been instituted in the Magistrates' Court be brought for trial to itself or that an accused person against whom proceedings have been instituted in the Supreme Court be sent for trial to the Magistrates' Court if that court has jurisdiction to try the case.

(2) The Supreme Court may act either on the report of the Magistrates' Court or on the application of an interested party or of its own motion.

### **CERTAIN OFFENCES MAY BE PROSECUTED BY PUBLIC OFFICER**

33. In any prosecution for an offence under any law other than the Penal Code, the Public Prosecutor may permit any public officer having legal or administrative responsibility for the enforcement of such law to conduct the prosecution, notwithstanding that he has not been appointed a state prosecutor.

### **3) VFIU**

#### **FINANCIAL TRANSACTIONS REPORTING ACT**

#### **PART 4 - FINANCIAL INTELLIGENCE UNIT**

#### **12. Establishment of Financial Intelligence Unit**

The Financial Intelligence Unit is established within the State Law Office.

#### **13A. Primary functions and powers**

(1) The following functions are the primary functions of the Unit:

- (a) to receive suspicious transaction reports and other reports, and information, in accordance with the provisions of this Act;
- (b) to analyse and assess any report or information mentioned in any paragraph of this subsection, and to make recommendations to relevant persons;
- (c) to receive information, whether or not it has been requested by the Unit from an assisting entity, or a ministry, department or agency of the Government or any person, for the purposes of this Act;
- (d) to disclose information derived from any report provided to the Unit under this Act, or any information provided to the Unit under this Act, to an assisting entity if the Unit has reasonable grounds to suspect that the report or information is relevant to:
  - (i) the detection, investigation or prosecution of a person for a money laundering offence, a financing of terrorism offence or any other serious offence; or
  - (ii) the commission of a money laundering offence, a financing of terrorism offence or any other serious offence; or
  - (iii) an act preparatory to a financing of terrorism offence; or

- (iv) the enforcement of this Act, the Proceeds of Crime Act [Cap. 284] or any other Act prescribed by the regulations;
  - (e) to carry out examinations of financial institutions to ensure their compliance with this Act;
  - (f) to collect information that the Unit considers relevant to a money laundering offence, a financing of terrorism offence or any other serious offence, whether or not the information is publicly available, including information in commercially available databases or databases maintained by the Government;
  - (g) to enter into agreements or arrangements under section 13C, and exchange information in accordance with those agreements or arrangements;
  - (h) to request information from an assisting entity to assist with any analysis or assessment mentioned in paragraph (f);
  - (i) to direct in writing a financial institution to take such steps as the Unit considers appropriate in relation to any information or report received by the Unit so as to facilitate any investigation that is anticipated or being undertaken by the Unit or an assisting entity.
- (2) The Unit has power to do everything necessary or convenient to be done for, or in connection with, the performance of its functions under this section and section 13B.

### **13B. Additional functions**

The Unit has the following additional functions:

- (a) in consultation with the relevant supervisory body (where appropriate), to issue guidelines to financial institutions in relation to customer identification, record keeping, reporting obligations, identification of suspicious transactions and money laundering and financing of terrorism typologies;
- (b) to provide training programs for financial institutions in relation to customer identification, record keeping, reporting obligations and the identification of suspicious transactions;
- (c) to compile statistics and records, and to disseminate information within Vanuatu;
- (d) to undertake inquiries as may be requested in writing by an assisting entity where appropriate;
- (e) to do probity checks when requested to do so by the Vanuatu Investment Promotion Authority or a ministry, department or agency of the Government;
- (f) to provide feedback to financial institutions and other relevant persons regarding outcomes relating to the reports or information given under this Act;
- (g) to conduct research into trends and developments in the area of money laundering and the financing of terrorism and improved ways of detecting, preventing and deterring money laundering and the financing of terrorist activities;
- (h) to educate the public and create awareness on matters relating to money laundering and the financing of terrorism.

### **13D. Power to examine**

(1) A member of the Unit or any person authorised in writing by the Attorney General may examine the records and inquire into the business and affairs of any financial institution for the purpose of ensuring compliance by the financial institution with Parts 2, 2A and 3.

(2) Without limiting subsection (1), the member or authorised person may do all or any of the following:

- (a) at any reasonable time, enter any premises, in which the member or authorised person believes, on reasonable grounds, that there are records relevant to ensuring compliance by a financial institution with Part 2, 2A or 3;
  - (b) use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system;
  - (c) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other intelligible output and remove the printout or other output for examination or copying;
  - (d) use or cause to be used any copying equipment in the premises to make copies of any record.
- (3) The owner or occupier of premises referred to in subsection (1) and any person found there:
- (a) must give the member or authorised person all reasonable assistance to enable him or her to carry out his or her duties; and
  - (b) must provide the member or authorised person with any information that he or she may reasonably require for that purpose.
- (4) The Unit may transmit any information from, or derived from, such examination to an assisting entity if the Unit has reasonable grounds to suspect that the information is or may be relevant to:
- (a) the detection, investigation or prosecution of a person for a money laundering offence, a financing of terrorism offence or any other serious offence; or
  - (b) the commission of a money laundering offence, a financing of terrorism offence or any other serious offence; or
  - (c) an act preparatory to a financing of terrorism offence; or
  - (d) the enforcement of this Act, the Proceeds of Crime Act [Cap. 284] or any other Act prescribed by the regulations.
- (5) If a person:
- (a) obstructs or hinders or fails to cooperate with the member or any authorised person in the lawful exercise of the powers under subsection (1); or
  - (b) does not comply with subsection (3);
- the person is guilty of an offence and is punishable on conviction:
- (i) in the case of an individual - by a fine not exceeding VT 2.5 million or imprisonment for a term not exceeding 2 years, or both; or
  - (ii) in the case of a body corporate - by a fine not exceeding VT 10 million.

### **13E. Powers to enforce compliance**

- (1) A financial institution must take all reasonable steps to ensure that the financial institution complies with its obligations under this Act.
- (2) The Unit may in writing direct a financial institution that has without reasonable excuse failed to comply in whole or in part with any of its obligations under Part 2, 2A or 3 to:
  - (a) implement such obligations within such time as is specified in the direction; and
  - (b) produce a written action plan in relation to the implementation of its obligations.
- (3) The Unit may in writing direct a financial institution to take such steps as the Unit considers appropriate in relation to any information or report received by the Unit to enforce compliance with this Act.
- (4) If a financial institution fails to comply with a direction under subsection (2) or (3) within the time specified in the direction, the Unit may apply to the Supreme Court for an order against the financial institution to enforce compliance with the relevant obligations.

(5) The Court must not make an order unless it is satisfied that the financial institution has failed without reasonable excuse to comply in whole or in part with any of its obligations under Part 2, 2A or 3 and has failed to comply with a direction under subsection (2) or (3).

(6) If a financial institution fails to comply with a direction under section 13A (1) (i), the Unit may apply to the Supreme Court for an order against the financial institution to comply with the direction.

(7) The Court must not make an order unless it is satisfied that the financial institution has failed without reasonable excuse to comply with the direction given under section 13A (1) (i).

### **13F. Power to halt transaction or attempted transaction**

(1) This section applies if the Unit has reasonable grounds to suspect that a transaction or attempted transaction may:

(a) involve the proceeds of a money laundering offence, a financing of terrorism offence or any other serious offence; or

(b) be preparatory to a financing of terrorism offence.

(2) The Unit may in writing direct the financial institution concerned not to proceed with that transaction or attempted transaction for a period to be determined by the Unit in order to allow the Unit:

(a) to make any necessary inquiries concerning the transaction or attempted transaction; and

(b) to consult or advise any relevant assisting entity on its inquiries.

(3) A direction under subsection (2) may be given orally or in writing. However, if it is given orally, it must be followed up in writing within 24 hours after having been given orally.

(4) The period determined by the Unit under subsection (2) must not exceed 5 days.

(5) The Unit may apply to the Supreme Court for an extension of the period determined under subsection (2).

(6) If a financial institution fails to comply with a direction, the financial institution is guilty of an offence and is punishable on conviction:

(a) in the case of an individual - by a fine not exceeding VT 2.5 million or imprisonment for a term not exceeding 2 years, or both; or

(b) in the case of a body corporate - by a fine not exceeding VT 10 million.

## **4) Vanuatu Police Force**

### **LEADERSHIP CODE ACT**

#### **36. INVESTIGATION BY POLICE AFTER A COMPLAINT**

(1) Where the Commissioner of Police receives a report under section 34(2), the Commissioner must:

(a) ensure that the police force investigates the complaint; and

(b) within 60 days of the complaint being made:

(i) forward the results of the investigation to the Public Prosecutor, if the Commissioner is of the view that there is sufficient evidence to support a prosecution; or

(ii) if the Commissioner is not satisfied of this, inform the complainant in writing of this decision and the reasons for that decision and provide a copy to the decision and reasons to the Public Prosecutor.

(2) If the person making the complaint to the Ombudsman requests the Ombudsman in writing not to publish that person's name, the Ombudsman must provide a copy of that

request to the Commissioner who must ensure that the person's name is not disclosed to anyone other than:

- (a) another member of the police force; or
- (b) the Public prosecutor; or
- (c) in accordance with a court order.

## **POLICE ACT**

### **PART 2 - CONSTITUTION, FUNCTIONS, ORGANISATION AND ADMINISTRATION**

#### **2. Establishment of the Vanuatu Police Force**

There is hereby established a police force called the Vanuatu Police Force.

#### **3. Composition of the Force**

The Force shall consist of the Commissioner and such senior and subordinate officers as may from time to time be approved by the Minister.

#### **4. Functions of the Force**

- (1) It shall be an essential duty of the Force to maintain an unceasing vigilance for the prevention and suppression of crime.
- (2) The Force shall be employed throughout Vanuatu and its territorial waters for -
  - (a) the preservation of peace and the maintenance of order;
  - (b) the protection of life and property;
  - (c) the enforcement of laws;
  - (d) the prevention and detection of offences and the production of offenders before the Courts; and
  - (e) such other duties as may be expressly provided for by law.
- (3) Members of the Force shall be entitled for the performance of their duties to carry arms which shall only be used on the instructions of the Commissioner or of a senior officer authorised by him and in accordance with the general directions of the Minister.
- (4) Members of the Force may be engaged outside Vanuatu with the approval of the Council of Ministers on the recommendation of the Prime Minister and the Minister of Foreign Affairs as -
  - (a) a military force in operations involving hostilities or war; or
  - (b) a military, police or internal security force for operations involving peace-making, peace-keeping or truce and cease fire operations.
- (5) The Prime Minister and the Minister of Foreign Affairs must consult with the Commissioner before making a recommendation.

#### **5. Public Service Commission**

## **CONSTITUTION OF THE REPUBLIC OF VANUATU**

### **60. Functions of Public Service Commission**

- (1) The Public Service Commission shall be responsible for the appointment and promotion of public servants, and the selection of those to undergo training courses in Vanuatu or overseas. For such purposes it may organize competitive examinations.
- (2) The Commission shall also be responsible for the discipline of public servants.
- (3) The Commission shall have no authority over the members of the judiciary, the armed forces, the police and the teaching services.
- (4) The Commission shall not be subject to the direction or control of any other person or body in the exercise of its functions.

## **PUBLIC SERVICE ACT**

### **PART 2 - PUBLIC SERVICE COMMISSION**

#### **7. Objectives of Public Service Commission**

The objectives of the Commission are to provide a service to the Government and Vanuatu people of the highest professional standard, and to conform to, comply with, and foster within the Public Service, the guiding principles of the Public Service set out in section 4.

#### **7A. Adequate funding to perform functions**

The Government must ensure that there is a sufficient budget allocated to the Commission to perform its functions efficiently, effectively and properly.

#### **8. Major functions of the Commission**

(1) Subject to Article 60 of the Constitution and to the provisions of this Act, the major functions of the Commission are:

- (a) to provide policy advice to Government on matters relating to the efficiency and effectiveness of the Public Service and in human resource development; and
- (b) the appointment and promotion of employees on merit; and
- (c) the selection or approval of those to undergo training courses overseas and for such purposes may organise competitive examinations; and
- (d) the resolution of employment disputes and discipline of employees in accordance with this Act; and
- (e) promoting the codes of conduct in Part 5; and
- (f) subject to the provisions of any other enactment, to classify and set levels of salary and allowances and other entitlements of employees; and
- (g) to review the efficiency and economy of the Public Service in employment matters; and
- (h) for the purposes of efficient Government in employment matters, to review the establishment and approve the grading of posts; and
- (i) coordinating and providing training programs in Vanuatu for, and assisting with, the training of employees; and
- (j) providing guidelines to directors-general, directors and to the Public Service in managing or developing employees in good employer systems and obligations; and
- (k) ensuring the observance of the rule of law in public affairs;
- (l) to ensure compliance with and be responsible for the administration of this Act;
- (m) to set targets for the delivery of services by the Commission;
- (n) to provide regular reports in writing to the Minister on the performance of the Commission.

(2) In carrying out its functions, the Commission must have regard to the policies of Government as communicated to the Chairman of the Commission from time to time in writing by the Minister.

(2A) The Commission must perform its functions efficiently, effectively and properly.

(3) Notwithstanding subsection (2), in matters affecting employees (whether matters relating to the appointment, remuneration, promotion, demotion, transfer, disciplining or the cessation of any employee or other matters), the Commission shall act independently but have regard to its obligation to act as a good employer.

(4) Notwithstanding subsection (2), the Commission will not be subject to the direction or control of any other person or body in the exercise of its functions.

- (5) The Commission may at any time in respect of matters referred to in this section or on such other matters as the Minister may request:
- (a) carry out such investigations or inspections as the Commission thinks necessary;
  - (b) require and receive such reports as the Commission thinks necessary;
  - (c) provide advice to a director-general;
  - (d) report to the Minister and to the Speaker of Parliament in which event the Speaker shall upon receipt of a report table it in Parliament as soon as practicable.
- 6) State Law (Attorney-General's Office)

## **STATE LAW OFFICE ACT**

### **6. Principal functions of Office**

The principal functions of the Office shall be:

- (a) to provide advice to, and represent the Government on, legal matters that may be referred to it by the President, the Council of Ministers, the Prime Minister, a Minister, a director-general of a ministry, or a director of a department; and
- (b) to provide legislative drafting services to Government.

### **10. Role, functions and powers of Attorney General**

- (1) The Attorney General shall be the principal legal officer of the State and the principal legal adviser to Government.
- (2) The Attorney General shall be vested with all such duties, functions and powers as may be provided for by the Constitution, statute and at common law.
- (3) The Attorney General shall participate in all meetings and deliberations of the Council of Ministers for the purpose of providing independent legal advice but shall have no vote, and shall not be deemed to be a member of the Council.
- (4) The Attorney General shall have a right of audience in, and shall take precedence over, any other person appearing before any court or tribunal.

### **12. Exercise of the Attorney General's functions and powers**

- (1) The Attorney General may exercise his or her functions through the Solicitor General or any other legal officer appointed to the Office.
- (2) Notwithstanding the delegation of functions under subsection (1), the Attorney General must supervise his or her legal officers and remain responsible for their performance of such functions.
- (3) Any function authorised or required by any enactment or at common law to be performed by the Attorney General may be discharged by the Solicitor General if:
  - (a) the office of the Attorney General is vacant; or
  - (b) the Attorney General is unable to act owing to absence or illness; or
  - (c) the Attorney General authorises the Solicitor General to act in any particular case.
- (4) During any period when the office of Attorney General is vacant, any certificate, petition, direction, notice, proceeding or other document, matter or thing whatsoever authorised or required by any enactment to be given, delivered, served, taken or done to, on or against the Attorney General, may be given, delivered served, taken or done to, on or against the Solicitor General.

310. Vanuatu provided the following examples of implementation.

#### **1) Ombudsman Office**

In a brochure produced by the Ombudsman Office, "The Role of Leaders Under the Leadership Code", this Q/A was provided –

What happens after the Ombudsman issues a public report?

The Ombudsman conducts an investigation into all complaints and allegations that are made against a leader. If the Ombudsman has formed the view of reasonable grounds that a leader may have breached the Code, the Ombudsman must give a copy of the report to the Public Prosecutor, and if the complaint involves criminal misconduct, a copy of the report is sent to the police for further investigation.

The Ombudsman Office has 12 employees - 4 are investigators (2 in Port Vila and 2 in Santos). It has financial autonomy from the Government, but also receives funds from the Pacific Ombudsman Alliance. The Office is currently seeking to make amendments to the Leadership Code Act and Ombudsman Act based on 3 past reviews and the opinions of the Ombudsman (one of these amendments includes the establishment of a Leadership Code Tribunal). The paper is firstly to go to the Law Reform Commission (LRC) from the Ombudsman Office, and then LRC will develop an "issues paper" for State Law that will then draft the amendments accordingly.

Since LC was enacted, there have been 871 cases opened and investigated under its provisions. These 871 cases have been further categorized as follows:

- Conflict of interest - 60 cases
- Fair exercise of public or official duties - 106 cases
- Integrity - 26 cases
- Use of office for personal gain - 61 cases
- Non-submission of annual return - 87 cases
- Abuse of power - 188 cases
- Violation of other provisions of LC - 343 cases

These categories relate to the relevant sections of LC and are statistics from the date of commencement of LC which is 7 September 1998. The cases reflect both individual, but also lump sum cases (i.e. so 10 people may fall under 1 case).

## **2) Public Prosecution's Office**

There are 7 prosecutors in the Office.

It was noted that for matters where the penalty might constitute 2 years imprisonment or a fine of VAT 1m (or below), would go to the Magistrate's Court; however, anything above would go to the Supreme Court.

## **3) VFIU**

Established in 2004, it currently has 4 people working in the Unit. It sits under the Attorney-General's Office (otherwise referred to as State Law), but has no reporting line to the Office; however, the legal team in State Law provides VFIU with advice. Currently, an amendment is pending which would improve the governance and operation of VFIU, including the appointment of a Director.

It has its own budget (as the direction of the Ministry of Finance).

VFIU Annual Report 2010-2012 –

## **VANUATU FIU**

### **OUR OBJECTIVE**

To positively contribute to the combating of money laundering, financing of terrorism and other financial/economic crime in Vanuatu as well as in the Pacific and broader region

### **OUR MISSION**

To collect, analyze and disseminate financial information and intelligence to support the detection, investigation and prosecution of money laundering, financing of terrorism and financial/economic crimes.

### **KEY STAKEHOLDERS**

Financial Institutions and their representative associations

National financial regulators – Reserve Bank of Vanuatu and Vanuatu Financial Services Commission

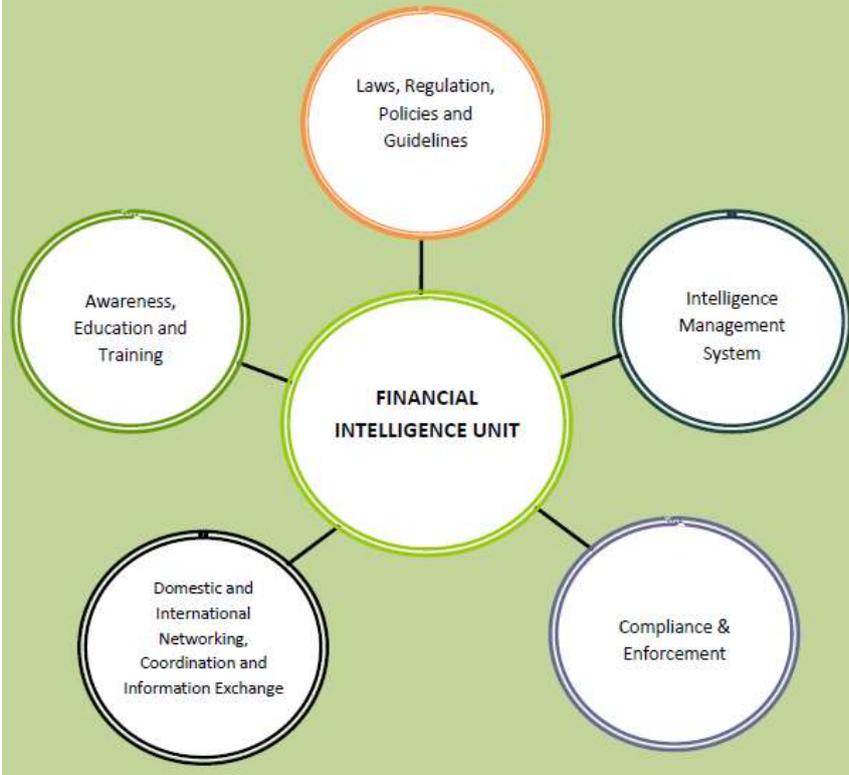
Law Enforcement Agencies – Vanuatu Police Force, Department of Customs and Inland Revenue, Department of Immigration and Citizenship

State Law Office, Office of the Public Prosecutor

Vanuatu Government-Office of the Prime Minister, Ministry of Finance and Economic Management, Ministry of Foreign Affairs, Ministry of Justice and Social Welfare, Vanuatu Investment and Promotion Authority

Vanuatu Financial Sector Assessment Group

### Five Roles of the Financial Intelligence Unit



## Vanuatu AML/CFT Regime

### 1.1 Background

Money laundering is the process by which criminals disguise the illegal origin of their wealth to avoid suspicion of law enforcement authorities and to wipe the trail of incriminating evidence.

Money derived from criminal activities can pose significant risk to the local financial system and can devastate Vanuatu's social, political, cultural and economic structure in all levels. Whilst it is impossible to measure accurately the amount of proceeds generated from illicit activity globally each year, it can be estimated at around USD 3.3 trillion (World Bank) per year.

There is no one method of laundering funds. Methods can range from transferring money overseas into various accounts to purchase and resale of a luxury item, to passing proceeds through legitimate local businesses and companies.

There is, however, an agreed 3 stage of typical money laundering process which is Placement, Layering and Integration. Placement is the first stage where the illegal funds/proceeds are placed in the financial system e.g. making small deposits of cash into a bank account. Layer is the second stage which involves creating layers of transactions to disguise the origin of the funds and to obscure the audit trail e.g. quickly moving funds across different accounts and to overseas accounts. Final stage – Integration involves re-introducing the funds/proceeds into legitimate financial system and projecting them as clean funds to enable their further use e.g. setting up funds companies, purchasing luxury assets.

Financing of Terrorism is the process of collecting and providing funds for terrorists, terrorist organisations and terrorist activities.

### 1.2 Vanuatu AML/CFT Regime

Vanuatu has in place several legislations which form the legal AML/CFT framework, these legislations were recently enacted by the Parliament (most recent 2005). In 2000, the Financial Transaction Reporting Act ("FTR Act") was enacted which established the AML/CFT regulator/supervisor, the Vanuatu Financial Intelligence Unit ("VFIU") and spells out the AML/CFT preventive measures. In 2002, the Proceeds of Crime Act was enacted and defined Money laundering as an offence. The Mutual Assistance in Criminal Matters Act was also enacted in the same year and provided the legal channel of exchanging mutual criminal assistance between Vanuatu and other jurisdictions. And in 2005, the Counter Terrorism & Transnational Organised Crime Act was enacted, which defined terrorist and terrorism financing as offences in Vanuatu.

In addition, Vanuatu enacted several United Nations Conventions – Convention against illicit traffic in narcotic drugs and psychotropic substance, convention for the suppression of the financing of terrorism and convention against transnational organised crime.

Since 2007, VFIU imposed an AML/CFT regulatory/supervisory program, where the AML/CFT preventive measures were strictly regulated and supervised. Awareness amongst the stakeholders were conducted and monitoring and enforcement improved.

In the three years (2010-12), Vanuatu FIU received information relating to financial crimes which were assessed and analysed. This information was disclosed to law enforcement agencies for further criminal investigation and possible prosecution.

Range of offences noted in the period were: theft (fraud), obtaining property through false pretense, obtaining money by false or misleading statement, forgery, tax evasion, corruption, abuse of legal entities and money laundering.

The Unit also received suspicious activities such as: attempts to avoid conducting transactions which would be reportable to the VFIU, unusual account/service/business relation activity, suspicious behavior of customers/potential customers, suspicious source of funds, unusual exchange of currency and adverse recording of customers/potential customers.

Vanuatu experienced an exponential rise in scams in the early period, in response, law enforcement agencies and Vanuatu FIU increased its awareness on this illegal activity and ensured financial institutions apply stringent AML/CFT measure in compliance with the FTR Act.

There were also cases of obtaining funds through false pretense e.g. hoax RSE Agent collecting funds from victims. The VFIU, in addition received cases on forgery and tax evasion (VAT offences).

Notably, Vanuatu also experienced an increasing trend on corruption or corruptible practices in the public institutions.

Offences committed were investigated by Vanuatu Law Enforcement Authorities, some of the cases are pending investigation or prosecution, and some were successfully prosecuted.

There are 21 globally accepted criminal offences related to profit-driven crimes and are: participation in an organised criminal group and racketeering; terrorism including financing of terrorism; human trafficking; sexual exploitation including sexual exploitation of children; illicit trafficking of narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking of stolen goods and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder, kidnapping, robbery or theft; smuggling; tax crimes; extortion; forgery; piracy; and insider trading and market manipulation.

These criminal offences are predicate offences of money laundering.

In the reviewed period, VFIU has not received any report on terrorist financing, however, the VFIU is fully aware of likely abuse of legal persons and arrangements and is aware several project are undertaken to strengthen the legal framework.

### 1.3 Legislative Achievements

In 2012, the Parliament passed the Counter Terrorism & Transnational Organised Crime Amendment Act No. 9 of 2012, the Mutual Assistance in Criminal Matters Amendment Act No. 11 of 2012 and the Proceeds of Crime Amendment Act No. 12 of 2012 and were published in the Official Gazette in mid-2012.

These amendments significantly strengthen Vanuatu's AML/CFT legal framework and in particular, explicitly provide for money laundering as a predicate offence and the prosecution of money laundering offence for proceeds of crime generated by a predicate offence.

A fourth piece of legislative amendment – Financial Transaction Reporting Amendment Bill will be forwarded to the Parliament in 2013 for discussion and approval. If approved, this amendment will enhance VFIU's regulatory responsibilities and foster stringent AML/CFT regimes within each financial institution.



VFIU is mandated by FTRA to receive and analyse reports of suspected financial transactions and activities. And disseminate financial intelligence to law enforcement agencies. It combats corruption by acting as a filtering and value adding institution to information received from the financial sector and disseminate filtered and value added intelligence to law enforcement agencies for criminal investigation and prosecution.

VFIU is financially and structurally autonomous.

The staff of VFIU are selected by an independent selection process and appointed by the Attorney General on the recommendation of the selection panel. The staff received regular training on AML/CFT issues including corruption and proceeds of crime.

#### **4) Vanuatu Police Force**

##### **a) Criminal Investigations Department**

There are 26 employees in the Criminal Investigations Department. There are 6 Units in the Department (now the 7th - Criminal Intelligence - sits under another Department). Only the Serious Crime Unit and Fraud Unit deal with corruption-related offences. The Units receive complaints (i.e. over the telephone, by email or in person), but a formal complaint requires a statement by the person. By institutions and of the Police Force's own accord, matters can also be investigated. 1196 complaints (under serious crime) had been investigated in 2013. About 10% of the investigative briefs sent to the Public Prosecution's Office are prosecuted.

Moreover, it is to be noted that there are challenges associated with covering the six provinces of Vanuatu - Tafea, Shefa, Malampa, Penama, Sanma and Torba. Each province is made up of a number of islands with varying levels of law enforcement personnel primarily based on the main island of each province. The capital of Vanuatu, Port Vila, is located on the island of Efate which forms part of Shefa Province.

##### **b) Transnational Crime Unit (TCU)**

As part of the Pacific Transnational Crime Network (PTCN), AFP through its Law Enforcement Cooperation Program (LECP), the Vanuatu Police Force have established the Transnational Crime Unit (TCU), a team of dedicated law enforcement officers, drawing on resources from the Police, Customs, Immigration and other boarder protection authorities, working proactively to develop law enforcement intelligence and undertake targeted investigations into transnational organized crime threats.

TCU plays a key role in international cooperation under the direction of State Law (designated to be the de facto central authority by the Attorney-General).

##### **5) Public Service Commission (PSC)**

33 people work in the Commission.

PSC made less than 10 referrals to the Police in 2012 and only 1, to date, in 2013.

##### **6) State Law (Attorney-General's Office)**

The State Law Office is headed by the Attorney-General and consists of 18 lawyers (30 employees). State Law has 3 functions (and thus 3 teams):

- a) legal advice;
- b) representative of the Government/ civil litigation matters (the team also focuses on international cooperation requests - incoming/outgoing); and
- c) legislative drafting (Parliamentary Council Team).

##### **7) Other**

The Central Tenders Board (CTB) was mentioned under UNCAC article 33. It was established by the Government Contracts and Tenders Act and it is responsible for the implementation and management of the public procurement and disposal process aimed at ensuring an efficient, fair, accountable competitive procurement process in which the people of Vanuatu will have confidence in. For example, pre-tender briefings are conducted for tenderers to understand what information is required for submission and the scope of work is clearly understood as defined from the documentation. Tenderers are also invited to attend the opening of the tender envelopes and also all unsuccessful

Tenderers will be offered the opportunity to be debriefed. The purpose of the debriefing is to assist tenderers to offer more competitive tenders in the future by identifying ways in which the tenderer's offer could have been improved. The debriefing process will be conducted by a member or members of the Evaluation Committee and may be carried out by telephone, letter or interview.

CTB is a parastatal organization, operating under the Ministry of Finance and Economic Management (MFEM).

The primary mandate of CTB is to adjudicate and award tenders for Central Government and any other institutions specified under the Act for the delivery of works, services and supply-related services. This is coupled with the registration and grading of contractors who so which to do business with the Government. This is carried out to ensure that projects are prudentially managed and value for money is achieved in the procurement and disposal of assets.

The Chairperson heads the Board, assisted by two full-time officers - the Secretary and Assistant to Secretary. The Secretary oversees the operations of the Board as well as the day to day running of the organizational finance and human resource management.

**(b) Observations on the implementation of the article**

311. The anti-corruption mandate is spread across several agencies.
312. Enquiries and investigations in relation to corruption-related offences can be commenced, based on reports or of the own initiative of various institutions, primarily the Vanuatu Police Force, VFIU, Ombudsman or the Public Prosecutor.
313. **The Vanuatu Police Force:** Within the Force, the Serious Crime and Fraud Units deal with corruption-related offences. Furthermore the Intelligence and Transnational Crime Units is noteworthy for support in relevant cases. No disaggregated data was available, but the reviewing experts took note that 1196 complaints (under serious crime) had been investigated in 2013 and that only about 10% of the investigative briefs sent to the Public Prosecution's Office were prosecuted. The reasons for the low prosecution rate should be analysed further to make informed decisions as to how to improve the investigation and prosecution of corruption-related offences.
314. **VFIU:** VFIU was established in 2004, pursuant to FTRA. Administratively, it is situated under the Attorney-General's Office. It has 4 staff members who collaborate with other law enforcement agencies. Its primary functions relate, according to section 13A of FTRA, to the offences of money-laundering, financing of terrorism or any other serious offence.
315. To facilitate the effective exchange of information including information on corruption detection, investigation, prosecution and confiscation, VFIU established an MoU with the Vanuatu Police Force in 2011 (in regard to other MoUs, see information under article 38 of the Convention).

316. Of the reports that have been sent by VFIU to other law enforcement authorities, VFIU has followed up on these reports 60% of the time, as there is no requirement to give back feedback. Upon request, it has assisted with further investigations.
317. VFIU has, since 2011, received a total of 35 reports on suspected activities involving public officials. These reports were developed into financial intelligence and disseminated to local law enforcement agencies for further criminal investigations.
318. However, due to low capacities of law enforcement authorities, namely the Vanuatu Police Force, to carry out investigations of financial crime cases, there are no AML-related cases have progressed to the Public Prosecutors so far. As mentioned above, the reviewing experts recommended that Vanuatu analyse the reasons for this and seek to address the bottlenecks of the system to enable successful investigation and prosecution of cases.
319. **The Ombudsman's Office:** The Ombudsman's Office is responsible for enquiring into any conduct on the part of any Government agency and into any defects in any law or administrative practice, including Penal Code matters. Furthermore, the Ombudsman's Office investigates alleged breaches of LC (see: section 34 of LC). The Ombudsman has the discretion to investigate complaints, but can also investigate on his own initiatives.
320. The Ombudsman is appointed for 5 years according to article 61 of the Constitution and section 3 of the Ombudsman Act. The President may terminate the appointment of the Ombudsman under the limited conditions of section 8 of the Ombudsman Act. Staff members in the Ombudsman's Office are under the control and direction of the Ombudsman, but employed by the PSC after consultation with the Ombudsman. It was noted, during the country visit, that the lack of full authority by the Ombudsman over such human resources could pose a challenge as disciplinary matters, transfers, etc. fall under the PSC.
321. Criminal offence matters are referred by the Ombudsman to the Police and Public Prosecutor, according to section 31(1) of the Ombudsman Act. If the matter concerns a leader, the relevant provisions are sections 35 to 39 of LC.
322. As mentioned earlier in this report, the reviewing experts noted that so far there has not been one single prosecution under LC. Contrasting the 871 investigations that have been made under LC so far by the Office of the Ombudsman, a challenge becomes evident and should be considered by the respective law enforcement agencies.
323. In total, only one case, which was based on a report submitted by the Ombudsman's Office to the Public Prosecutor, seems to have been prosecuted in 2011. It is recommended to assess and address the existing challenges in the laws and procedural rules to enable successful investigation and prosecution.
324. It was also reported by civil society that due to the lack of follow-up and enforcement, a number of reports filed with the Ombudsman have been declined.
325. **The Public Prosecution's Office:** The establishment and functions of the Public Prosecutor are based on article 55 of the Constitution and the Public Prosecutor Act. The

Public Prosecutor receives reports from different institutions, including primarily VPF, and must also consider the reports transferred by the Ombudsman's Office. The Office of the Public Prosecutor employs 7 prosecutors. The prosecutors deal with all cases without specific specialization. There is a backlog of cases, but no statistics were provided to assess the extent of the cases pending.

326. Currently, there are initial discussions ongoing about the establishment of an MOU between the Ombudsman's Office, Public Prosecution's Office and the Vanuatu Police Force. The improvement of the collaboration between these institutions, in practice, seems highly necessary.

327. The reviewing experts recommended that Vanuatu prioritise the investigation and prosecution of corruption-related offences. They further recommended that Vanuatu conduct an in-depth analysis of the existing framework in investigating and prosecution corruption-related offences (e.g. work-flow of cases, mandates and processes). During the country visit, mixed views were presented to the experts and there seemed to be a degree of uncertainty about the process and collaboration which hinders successful prosecution.

328. It is of primary importance to improve efficiency in the fight against corruption by strengthening inter-agency coordination and collaboration. Sufficient resources should be made available for capacity-building and the development of processes to address constraints and backlogs in the investigation, prosecution and adjudication of cases.

**(c) Challenges**

329. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Inter-agency co-ordination;
2. Competing priorities;
3. Limited capacity (e.g. human/technological/institution/other);
4. Limited resources for implementation (e.g. human/financial/other);
5. Other issues: PSC is currently responsible for the recruitment of the entire public service, leading to delays. Previously, this task had been conducted by individual agencies.

**(d) Technical assistance needs**

330. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legal advice;
4. Other assistance: Specific request from the Vanuatu Police Force: Fraud and corruption-related trainings for the Police.

331. Vanuatu indicated that the forms of technical assistance previously mentioned had been partially provided.

332. Vanuatu indicated that Vanuatu Police Force received training on the management of serious crimes. 4 employees of the Public Prosecution's Office have been trained on anti-money-laundering. Moreover, others (i.e. Law Society) have provided in-house training to the prosecutors. Previously, there was an Australian adviser with the Law School of the University of the South Pacific who also provided support to the Office.

333. Vanuatu indicated that the extension and/or expansion of such assistance would partially help it adopt the measure(s) described in the article under review.

### **Article 37 Cooperation with law enforcement authorities**

*1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.*

*2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

*3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

*4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.*

*5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

334. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 9 (7), Public Prosecutor Act

#### **PUBLIC PROSECUTOR ACT**

##### **9. Preliminary enquiries, indemnities and other powers**

(7) The Public Prosecutor may grant indemnity from prosecution for any offence to a person on account of:

- (a) an undertaking given by that person to give evidence in a specified proceeding; or
- (b) an understanding or expectation that that person will give such evidence.

335. Vanuatu provided the following example of implementation.

An example -

***Public Prosecutor v Yanick* [2012 ] VUSC 252; Criminal Case 47 of 2012 (10 December 2012 ) [cf: UNCAC article 17]**

Per Judge OLIVER A. SAKSAK,

"I now consider your mitigating factors. Defense Counsel submitted five factors but I consider that only two are relevant which are -

- (a) Your cooperation with the police; and
- (b) Your early guilty plea.

Accordingly to *Public Prosecutor v Gideon* [2002] VUCA 7 you are entitled to 1/3 reduction for your guilty plea. Coupled with the other factor of cooperation with the police, it is my view you should be entitled to a total of 1 year and 4 months reduction from your total of 3 years imprisonment term. Accordingly, I so order. This means that your remaining imprisonment term is to be 20 months which is 1 year and 8 months."

In principle, agreement or arrangements mention in paragraph 5 of UNCAC article 37 could be provided for under mutual legal assistance (MLA), but has not occurred to date.

336. Vanuatu indicated that there are no specific agreements on this in existence, but through MLA/ MOUs, such cooperation could be possible.

**(b) Observations on the implementation of the article**

337. During the country visit, it was clarified that section 9 (7) of the Public Prosecutor Act would be applicable, in general, to UNCAC article 37. According to this paragraph, the prosecution could, in theory, grant immunity from prosecution, but, to date, has not done so in practice.

338. A guilty plea and cooperation with the police and prosecutors can be considered as mitigating factors.

339. The reviewing experts noted their observations made under UNCAC article 32 in relation to the protection of such persons.

**(c) Challenges**

340. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Specificities in our legal system;
2. Limited capacity (e.g. human/technological/institution/other);
3. Limited resources for implementation (e.g. human/financial/other).

**(d) Technical assistance needs**

341. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;

2. Legislative drafting;
3. Legal advice.

342. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

### **Article 38 Cooperation between national authorities**

*Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:*

*(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or*

*(b) Providing, upon request, to the latter authorities all necessary information.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

343. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 20 of the Public Service Act

#### **PUBLIC SERVICE ACT**

##### **20. Principal responsibilities**

(2A) Directors-general and directors must work cooperatively with other directors-general and directors, political advisors and the heads of other Government agencies.

344. Vanuatu provided the following examples of implementation.

Working Committees exist that share information, also on corruption-related offences.

VFIU has signed 3 MOUs with national authorities (1 supervisory body and 2 local law enforcement agencies - Police and Customs; in the future, hope to also sign an MOU with Immigration). The MOUs focus on sharing of information which included information on corruption detection, investigation, prosecution and confiscation.

The Criminal Investigations Department of the Vanuatu Police Force and TCU cooperate - i.e. 2012 matter concerns a Bulgarian national who had committed fraud in Vanuatu. Agreements also exist between the Criminal Investigations Department and the Public Prosecution's Office - the Police had received training from the Public Prosecution's Office on the quality of the evidence required in order to have a *prima facie* case for prosecution.

Currently, there are initial discussions ongoing on the establishment of an MOU between the Ombudsman's Office, Public Prosecution's Office and Vanuatu Police Force; thus, the Police and Ombudsman's Office could in the future ideally do a joint brief to the Public Prosecution's Office where possible.

Prior to 1998, Police Officers had been seconded to the Ombudsman's Office as investigators.

The Public Prosecution's Office has arrangements in place with the Police and Customs' Department. They cooperate with State Law on a case-by-case basis (especially concerning appeals). There are initial discussions ongoing with respect to establishing an MOU with the Ombudsman's Office.

**(b) Observations on the implementation of the article**

345. The reviewing experts acknowledged the cooperation between national authorities, but recommended improving efficiency in the fight against corruption by strengthening inter-agency coordination and collaboration. They refer to the observations made under article 36 of the Convention.
346. Sufficient resources should be made available for capacity-building and the development of processes to address constraints and backlogs in the investigation, prosecution and adjudication of cases.

**(c) Challenges**

347. Vanuatu identified the following challenges and issues in fully implementing the provision under review:
1. Inter-agency co-ordination;
  2. Competing priorities.

**(d) Technical assistance needs**

348. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:
1. Summary of good practices/lessons learned;
  2. Legal advice.
349. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 39 Cooperation between national authorities and the private sector**

**Paragraph 1**

*1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

350. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Article 5 of the Financial Transactions Reporting Act

**FINANCIAL TRANSACTIONS REPORTING ACT**

**5. Financial institutions to report suspicious transactions**

(1) This section applies if a financial institution suspects that a transaction or attempted transaction is or may be relevant to:

(a) the detection, investigation or prosecution of a person for a money laundering offence, a financing of terrorism offence or any other serious offence; or

(b) the commission of a money laundering offence, a financing of terrorism offence or any other serious offence; or

(c) an act preparatory to a financing of terrorism offence; or

(d) the enforcement of this Act, the Proceeds of Crime Act [Cap. 284] or any other Act prescribed by the regulations.

(2) The financial institution must prepare a report of the transaction or attempted transaction and give the report to the Unit as soon as possible, but no later than 2 working days after forming the suspicion.

(3) If a financial institution fails without reasonable excuse to comply with subsection (1), the financial institution is guilty of an offence punishable on conviction:

(a) in the case of an individual - by a fine not exceeding VT 25 million or imprisonment for a term not exceeding 5 years, or both; or

(b) in the case of a body corporate - by a fine not exceeding VT 100 million.

351. Vanuatu provided the following examples of implementation.

The financial sector are obligated under FTRA to implement certain preventive measures (CDD, record keeping, etc) and to report any suspicious transaction or large cash transaction conducted by their customers.

Since 2011, the financial sector reported 122 suspicious reports and over 120, 000 large cash transactions.

When VFIU was first established, it had 2 people seconded into it from the Reserve Bank.

The Vanuatu Financial Sector Assessment Group was established in 2002/3 - this Group consists of the Attorney-General's Office, Reserve Bank, VFIU, Vanuatu Financial Services Commission, Public Prosecution's Office, Vanuatu Police Force, Ministry of Finance, Prime Minister's Office and Ministry of Foreign Affairs. Their focus is on financial sector integrity/ law reform/ policy, in particular meeting the requirements of FATF. The Group used to meet once a year, but since 2012, it has only had 2 meetings.

Furthermore, there is an MOU between VFIU and the Reserve Bank since 2012 for the sharing of information.

**(b) Observations on the implementation of the article**

352. The reviewing experts acknowledged the efforts of Vanuatu in the area of cooperation with the private sector, in particular with financial institutions. This includes the collaboration between VFIU and the Reserve Bank based on the MOU and through the secondment of officers.

353. During the country visit, it was highlighted that mutual training had taken place between VFIU and the Reserve Bank.

354. It was also explained that the Financial Services Commission was responsible for the corporate registry which contained around 2000 local and 3000 international companies.

355. The reviewing experts recommended that Vanuatu continue to strengthen the collaboration of the national authorities with the private sector.

**(c) Successes and good practices**

356. The experts noted the mutual training of the financial service institutions by VFIU and vice versa as a good practice. As explained by VFIU during the country visit, the training was specifically targeting priority areas – such as awareness-raising about sectors at an increased risk of corruption.

**Article 39 Cooperation between national authorities and the private sector**

**Paragraph 2**

*2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

357. Vanuatu indicated that it has partially implemented the provision under review and cited the following information.

The Vanuatu Police Force advocate such reporting through their outreach programmes - individuals can issue complaints over the telephone, by email or in person, but statements will only be accepted in person. Under the Criminal Investigations Department, the Crime Prevention Unit exists that focuses on this. Campaigns have been run in the newspaper and on TV to fight corruption.

The Advocacy and Legal Advice Centre (ALAC), established by Transparency Vanuatu, provides free legal advice and assistance to victims and witnesses of corruption. It helps citizens and residents, from the unemployed to entrepreneurs, from public servants to business people, to pursue corruption-related complaints, encouraging them to come forward.

ALAC does not investigate complaints, but rather viewed as a step prior to the submission of a complaint to Government authorities as is required under section 18(2) of the Ombudsman Act.

**(b) Observations on the implementation of the article**

358. The reviewing experts were satisfied with the explanations provided.

**(d) Challenges**

359. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Inter-agency co-ordination;
2. Specificities in our legal system;
3. Limited capacity (e.g. human/technological/institution/other);
4. Limited resources for implementation (e.g. human/financial/other).

**(e) Technical assistance needs**

360. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Model legislation;
2. Legislative drafting.

361. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 40 Bank secrecy**

*Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.*

**(a) Summary of information relevant to reviewing the implementation of the article**

362. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 13D-F (cited above) and 14 of the Financial Transactions Reporting Act

**FINANCIAL TRANSACTIONS REPORTING ACT**

**14. Search warrants**

- (1) A member of the Unit may apply to a judge of the Supreme Court for a warrant:
- a) to enter premises belonging to, or in the possession or control of, a financial institution or any officer or employee of the institution; and
  - b) to search the premises and remove any document, material or thing on the premises.

(2) The judge must grant the application if he or she is satisfied that there are reasonable grounds for believing that:

- a) the financial institution has failed to make a report under Part 2 or 2A or keep a record under Part 3; or
- b) an officer or employee of a financial institution is committing, has committed or is about to commit a financing of terrorism or a money laundering offence.

363. Vanuatu provided the following examples of implementation.

The bank secrecy laws have been lifted with the passage of FTRA. Banks are required by the said Act to make records available to VFIU and/or law enforcement agencies or as requested by an order of the courts.

**(b) Observations on the implementation of the article**

364. According to FTRA, financial institutions are required to make any records available to VFIU or as requested by a court order (i.e. sections 13A, 13D, 13E, 13F and 14, FTRA). The power to examine compliance with parts of the Act according to section 13D of FTRA is with VFIU and any person authorized in writing by the Attorney-General.

365. The failure to comply with a direction, according to section 13A is criminalised in sections 13D (5) and 13A (6) of FTRA.

366. The reviewing experts, during the country visit, took note of the explanation provided by VFIU that bank secrecy was not an obstacle to investigations of corruption-related offences.

**(c) Challenges**

367. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inter-agency co-ordination.

**(d) Technical assistance needs**

368. Vanuatu indicated that the following form of technical assistance, if available, would assist it in better implementing the provision under review:

1. Development of an action plan for implementation.

369. Vanuatu indicated that no form of technical assistance mentioned above had already been provided.

## Article 41 Criminal record

*Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.*

### (a) Summary of information relevant to reviewing the implementation of the article

370. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Article 75 of the Criminal Procedure Code

#### **CRIMINAL PROCEDURE CODE**

#### **MANNER OF PROOF OF PREVIOUS CONVICTIONS OR ACQUITTALS**

**75.** (1) In any trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other manner provided by any law for the time being in force -

(a) by an extract certified, under the hand of the officer having the custody of the records of the court in which judgment for such conviction or acquittal was given, to be a copy of the sentence or order; or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered; together with, in each case, evidence as to the identity of the accused person so convicted or acquitted.

(2) A previous conviction in any place outside the Republic may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where judgment for the conviction was given, containing a copy of the sentence or order, and the fingerprints or photographs of the fingerprints of the person so convicted together with evidence that the fingerprints of the person so convicted are those of the accused person. Such a certificate as aforesaid shall be prima facie evidence of all facts stated therein without proof that the officer purporting to sign it did in fact sign it and was empowered to do so.

371. Vanuatu provided the following example of implementation.

In *Public Prosecutor v Foster* [2007] VUMC 1; CRC No 07 of 2007 (2 February 2007), the overseas convictions were not considered (even if they were to exist).

Per Magistrate Stephen D. Felix, "The accused has no previous convictions in Vanuatu. He may have criminal records in other jurisdictions but the defense counsel submitted, and this court also agrees, that this court should disregard such information and considers them as irrelevant in the jurisdiction of this court."

**(b) Observations on the implementation of the article**

372. A previous conviction in any place outside the Republic may be provided, according to section 75 (2) of CPC, and can be used as *prima facie* evidence of all facts stated therein.

373. However, there have been no case examples in which law enforcement authorities or courts have considered convictions from another State in a criminal case. In fact, only the opposite, the authorities highlighted a conviction that was not considered, but without sufficient details to allow for an analysis of potential obstacles.

374. Vanuatu may wish to make use of section 75 (2) of CPC in relevant criminal cases for sentencing or other substantive or procedural issues.

**Article 42 Jurisdiction**

**Subparagraph 1 (a) and (b)**

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

*(a) The offence is committed in the territory of that State Party; or*

*(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.*

**(a) Summary of information relevant to reviewing the implementation of the article**

375. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 1 (1) and (2) and 4 of the Penal Code

**PENAL CODE**

**1. Offences within Republic**

(1) The criminal law of the Republic shall apply to any act done or omitted within its territory.

(2) For the purposes of this Code, the territory of the Republic shall include its territorial waters and the airspace above the territory and waters, and all civil vessels and aircraft registered in the Republic:

Provided that no person aboard a foreign civil vessel or aircraft may be tried for an offence committed on board such vessel or aircraft within the territory of the Republic if the Public Prosecutor is satisfied that the offence may be dealt with fairly and in a manner not contrary to public policy in the Republic under the foreign law or regulations governing such vessel or aircraft.

**4. Offences abroad**

(1) Any citizen may be prosecuted within the Republic for an offence against the criminal law of the Republic in respect of any act or omission committed by him beyond the Republic which had it been committed within the Republic would have

constituted an offence against such law, if such act or omission constituted a corresponding offence under the law of the place where it was committed.

(2) The penalty imposed upon conviction of a person under subsection (1) shall not be more severe than the corresponding penalty prescribed by the law of the place in which the act or omission was committed.

(3) Subsection (1) shall not apply if such person has been prosecuted in respect of such act or omission in the place in which it was committed, whatever the result of such prosecution.

(4) No criminal proceedings shall be brought against any person under the provisions of subsection (1) without the consent in writing of the Public Prosecutor.

376. In terms of the examples of implementation, Vanuatu referred to the cases provided above under other articles of the Convention as examples of 'offences committed in the territory of Vanuatu'.

**(b) Observations on the implementation of the article**

377. Jurisdiction is regulated in PC, Part 1 on general provisions. According to section 1 (1) and (2), the jurisdiction of Vanuatu extends to cases in which the offence or an element of the offence was committed in the territory of Vanuatu; this extends also to territorial waters and airspace, and all civil vessels and aircrafts registered in the Republic.

**Article 42 Jurisdiction**

**Subparagraph 2 (a)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(a) The offence is committed against a national of that State Party; or*

**(a) Summary of information relevant to reviewing the implementation of the article**

378. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 2 and 4 (cited above) of the Penal Code

**PENAL CODE**

**2. Offences partly or wholly abroad**

The criminal law of the Republic shall apply -

(a) to any offence of which an element has taken place within the territory of the Republic;

(b) to any offence against the external security of the Republic or of counterfeiting the current money of the Republic, wherever committed:

Provided that no alien may be tried for an offence against the criminal law of the Republic solely by virtue of this section unless he has been arrested within the territory of the Republic or has been extradited to it.

**(b) Observations on the implementation of the article**

379. PC does not cover the passive personality principle, meaning an offence committed by a citizen of another State outside of the Republic against a national of Vanuatu.

**Article 42 Jurisdiction**

**Subparagraph 2 (b)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or*

**(a) Summary of information relevant to reviewing the implementation of the article**

380. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 2 and 4 (both cited above) of the Penal Code

**(b) Observations on the implementation of the article**

381. If an offence were committed by a citizen outside of Vanuatu, s/he may be prosecuted, if the double-criminality requirement were satisfied, according to section 4 of PC.

**Article 42 Jurisdiction**

**Subparagraph 2 (c)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or*

**(a) Summary of information relevant to reviewing the implementation of the article**

382. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Section 2 of the Penal Code (cited above)

**(b) Observations on the implementation of the article**

383. Jurisdiction as foreseen in the optional provision of article 42, paragraph 2 (c) of the Convention is not clearly regulated in PC. The counterfeiting of local money abroad and

in relation to offences where an element has taken place within the territory of Vanuatu could be covered.

## **Article 42 Jurisdiction**

### **Subparagraph 2 (d)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(d) The offence is committed against the State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

384. Vanuatu indicated that it has implemented the provision under review and cited the following measure.

Section 2 (b) (cited above) of the Penal Code

#### **(b) Observations on the implementation of the article**

385. Pursuant to section 2(b) of PC, jurisdiction is established for any offence against Vanuatu's external security or the counterfeiting of local money.

## **Article 42 Jurisdiction**

### **Paragraph 3 and 4**

*3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.*

*4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

386. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 3, 4 and 60 of the Extradition Act, No. 16 of 2002

### **EXTRADITION ACT**

#### **3. Extradition offence**

(1) An offence is an extradition offence if:

(a) it is an offence against a law of the requesting country for which the maximum penalty is imprisonment, or other deprivation of liberty, for a period of not less than 12 months; and

(b) the conduct that constitutes the offence, if committed in Vanuatu, would constitute an offence in Vanuatu for which the maximum penalty is imprisonment, or other deprivation of liberty, for a period of not less than 12 months.

#### **4. Extradition objection**

An extradition objection may be made in writing by any person to a request for the surrender of a person for an extradition offence if:

- (a) the extradition offence is regarded as a political offence; or
- (b) there are substantial grounds for believing that surrender of the person is sought for the purpose of prosecuting or punishing the person because of his or her race, religion, nationality, political opinions, sex, status, or for a political offence in the requesting country; or
- (c) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, because of his or her race, religion, nationality, political opinions, sex or status; or
- (d) the offence is an offence under the military law, but not also under the ordinary criminal law, of Vanuatu; or
- (e) final judgement has been given against the person in Vanuatu, or in a third country, for the offence; or
- (f) under the law of the requesting country or Vanuatu, the person has become immune from prosecution or punishment because of lapse of time, amnesty or any other reason; or
- (g) the person has already been acquitted or pardoned in the requesting country or Vanuatu, or punished under the law of that country or Vanuatu, for the offence or another offence constituted by the same conduct as the extradition offence; or
- (h) the judgment has been given in the person's absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have.

#### **60. Prosecution, instead of extradition, of Vanuatu citizens**

(1) A person may be prosecuted and punished in Vanuatu for an offence if:

- (a) a country requests the surrender of a person because of conduct the person engaged in outside Vanuatu; and
- (b) the Attorney General refuses to order the surrender of the person because of a circumstance listed in subsection (2); and
- (c) the person would have committed an offence against a law in force in Vanuatu if the person had engaged in the conduct, or equivalent conduct, in Vanuatu at that time.

(2) The following are the circumstances for the purpose of subsection (1) (b):

- (a) the person is a citizen of Vanuatu; or
- (b) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, because of his or her race, religion, nationality, political opinions, sex or status; or
- (c) the person has been subjected in the requesting country to torture or cruel, inhuman or degrading treatment or punishment; or
- (d) the judgment has been given in the person's absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defence the person may have; or
- (e) the offence for which surrender has been ordered is punishable by death in the requesting country but not in Vanuatu and the requesting country has not given a

sufficient undertaking that the penalty either will not be imposed or, if imposed, will not be carried out; or

(f) the person has been sentenced or would be liable to be tried or sentenced in the requesting country by an extraordinary or ad hoc court or tribunal.

(3) For the purpose of the prosecution, the person must be taken to have engaged in the conduct in Vanuatu.

(4) A person must not be prosecuted unless the Public Prosecutor:

(a) considers that there is sufficient evidence in Vanuatu to justify prosecuting the person for the offence; and

(b) consents to the person being prosecuted for the offence.

(5) A person may be prosecuted whether the person engaged in the conduct before or after the commencement of this Act.

(6) A person to whom subsection (1) applies may be:

(a) arrested for an offence mentioned in subsection (1) (c); and

(b) charged with the offence; and

(c) remanded in custody or on bail;

although the Public Prosecutor has not given consent under subsection (4).

(c) Section 5(2) of Penal Code states that aliens would be judged in the Republic for offences committed abroad, if

(i) the offender has been arrested in Vanuatu,

(ii) there has been no extradition order for the offender and

(iii) the Public Prosecutor consents to prosecute the offender.

(d) Vanuatu indicated that there has been no example to date of this.

**(b) Observations on the implementation of the article**

387. Article 60 of Extradition Act allows for the prosecution of its own nationals in the event that the Republic would refuse to entertain an extradition request. Thus, Vanuatu has jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such a person solely on the ground that s/he is a Vanuatu national. The jurisdiction also extends to other grounds of refusal to extradite, as listed in section 60 (2) (b) – (f) of the Extradition Act.

**Article 42 Jurisdiction**

**Paragraph 5 and 6**

*5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.*

*6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.*

**(a) Summary of information relevant to reviewing the implementation of the article**

388. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 59 and 61 (both cited above) of Extradition Act

389. Vanuatu provided the following examples of implementation.

Consultations took place between USA, Australia and Vanuatu in this case - *Public Prosecutor v Bedford - Judgment [2002] VUSC 49; Criminal Case No 002 of 2002 (6 August 2002)*.

**(b) Observations on the implementation of the article**

390. The reviewing experts were satisfied with the laws and examples provided.

**(c) Challenges**

391. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing implementing normative measures (laws, regulations, etc.).

**(d) Technical assistance needs**

392. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Legal advice;
3. Legislative drafting.

393. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

## **Chapter IV. International cooperation**

### **Article 44 Extradition**

#### **Paragraph 1**

*1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

394. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 2 and 3 (cited above) of the Extradition Act provides for the dual criminality requirement.

Vanuatu joined the Commonwealth in 1980 and is bound by the London Scheme for Extradition within the Commonwealth, incorporating amendments agreed to in Kingstown in November 2002 (London Scheme for Extradition within the Commonwealth), but does not use this Scheme.

#### **EXTRADITION ACT**

##### **2. Interpretation**

(1) In this Act, unless the contrary intention appears:

"comity country" means a country other than a Commonwealth country, a South Pacific country or a treaty country;

"Commonwealth country" means a country that is specified in Schedule 1;

"country" includes:

(a) a colony, territory or protectorate of a country; or

(b) a territory for the international relations of which a country is responsible;

or

(c) a ship or aircraft owned by, or registered in, a country;

"extradition country" means:

(a) a Commonwealth country; or

(b) a South Pacific country; or

(c) a treaty country; or

(d) a comity country that is declared by the regulations to be an extradition country; or

(e) a comity country certified by the Attorney General to be an extradition country for the purpose of a particular extradition request;

"extradition offence" has the meaning given by section 3(1);

"extradition treaty", in relation to a country, means a treaty:

(a) to which the country and Vanuatu are parties (whether or not any other country is also a party); and

(b) that relates wholly or partly to the surrender of persons accused or convicted of offences;

"South Pacific country" means a country:

(a) that is a member of the South Pacific Forum; and

(b) that is specified in Schedule 2;

"treaty" includes a convention, protocol, or agreement between 2 or more countries;

"treaty country" means a country:

- (a) with which Vanuatu has an extradition treaty; and
- (b) that is specified in Schedule 3;

## **SCHEDULE 1**

### **COMMONWEALTH COUNTRIES**

#### **(Section 2 & Part 3)**

#### **Part 1-Countries to which prima facie evidence scheme applies**

##### **(Section 23(1))**

#### **Part 2-Countries to which the record of the case scheme applies**

##### **(Section 23(1))**

Anguilla  
Antigua and Barbuda  
Bahamas  
Bangladesh  
Barbados  
Belize  
Bermuda  
Botswana  
British Antarctic Territory  
British Indian Ocean Territory  
British Virgin Islands  
Brunei Darussalam  
Cameroon  
Canada  
Cayman Islands  
Cyprus  
Cyprus (Sovereign Base Areas of Akrotiri and Dhekelia)  
South Africa  
Dominica  
Falkland Islands  
Ghana  
Gibraltar  
Grenada  
Guyana  
India  
Jamaica  
Kenya  
Lesotho  
Malaysia  
Malawi  
Maldives  
Malta  
Mauritius  
Montserrat  
Mozambique  
Namibia  
Nigeria  
Pakistan  
Pitcairn Islands

St. Helena and Dependencies  
St. Kitts and Nevis  
St. Lucia  
St. Vincent and Grenadines  
Seychelles  
Sierra Leone  
Singapore  
South Georgia and South Sandwich Islands  
Sri Lanka  
Swaziland  
Tanzania  
The Gambia  
Trinidad and Tobago  
Turks and Caicos Islands  
Uganda  
United Kingdom of Great Britain and Northern Ireland  
Zambia  
Zimbabwe

**SCHEDULE 2**  
**(Section 2 & Part 4)**  
**SOUTH PACIFIC COUNTRIES**

Australia  
Cook Islands  
Federated States of Micronesia  
Fiji Islands  
Kiribati  
Marshall Islands  
Nauru  
New Zealand  
Niue  
Palau  
Papua New Guinea  
Samoa  
Solomon Islands  
Tonga  
Tuvalu  
Vanuatu

**SCHEDULE 3**  
**(Section 2 & Part 5)**

**THE LONDON SCHEME FOR EXTRADITION WITHIN THE  
COMMONWEALTH**

1. (1) The general provisions set out in this Scheme will govern the extradition of a person from the Commonwealth country, in which the person is found, to another Commonwealth country, in which the person is accused of an offence.
- (2) Extradition will be precluded by law, or be subject to refusal by the competent executive authority, only in the circumstances mentioned in this Scheme.

(3) For the purpose of this Scheme a person liable to extradition as mentioned in paragraph (1) is described as a person sought and each of the following areas is described as a separate country:

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates, and

(b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding subparagraph.

#### **EXTRADITION OFFENCES AND DUAL CRIMINALITY RULE**

2. (1) A person sought will only be extradited for an extradition offence.

(2) For the purpose of this Scheme, an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty.

(3) In determining whether an offence is an offence punishable under the laws of both the requesting and the requested country, it shall not matter whether:

(a) the laws of the requesting and requested countries place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) under the laws of the requesting and requested countries the elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting country constitute an offence under the laws of the requested country.

(4) An offence described in paragraph (2) is an extradition offence notwithstanding that the offence:

(a) is of a purely fiscal character; or

(b) was committed outside the territory of the requesting country where extradition for such offences is permitted under the law of the requested country.

395. Vanuatu provided the following examples of implementation.

The Penal Code specifies that the following as criminal offences bearing a penalty of a term of imprisonment of not less than 12 months: Corruption and bribery of public officials (10 years each); Misappropriation, theft and obtaining property by false pretences (12 years each); Obstructing Police Officer (6 years); Obtaining money by deception or by false statement or misleading statement (12 years each). Thus, these corruption-related offences meet the threshold of section 3 of the Extradition Act. Section 3 provides that the penalty for the offence needs to not be less than 12 months imprisonment/ other deprivation of liberty.

To date, Vanuatu does not have any extradition treaties/ arrangements in place. It has also not used the London Scheme for Extradition within the Commonwealth, but in principle, this could be used as a legal basis for extradition.

State Law provided that, to date, only 3 extradition requests have been received (from Australia) and 1 sent (to Fiji).

Of the 3 received (none were positively responded to) -

i.e. 2 involved extraditions requests from Australia on tax evasion-related offences - however, as the dual criminality requirement was not satisfied, the 2 people sought were not extradited.

Of the 1 sent -

This went to Fiji for the extradition of Mr. Salendra Sen Sinha (see case referred to above: *Public Prosecutor v Adams* [2008] VUCA 28). He was not extradited back to Vanuatu.

No extradition requests have been sent or received in the last 2 years.

**(b) Observations on the implementation of the article**

396. The reviewing experts noted the information provided by Vanuatu, including on the dual criminality requirement. Section 2 of the Extradition Act further provides a broad definition of an “extradition country”, namely “(a) a Commonwealth country; or (b) a South Pacific country; or (c) a treaty country; or (d) a comity country that is declared by the regulations to be an extradition country; or (e) a comity country certified by the Attorney General to be an extradition country for the purpose of a particular extradition request”. In principle, the London Scheme for Extradition within the Commonwealth could provide a further avenue for a Commonwealth country, but as provided by Vanuatu, it has not been used to date as it was deemed that there has not been a need.

**Article 44 Extradition**

**Paragraph 2**

*2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.*

**(a) Summary of information relevant to reviewing the implementation of the article**

397. Vanuatu indicated that it has not implemented the provision under review. State Law confirmed that there is no exception to the dual criminality requirement.

**Article 44 Extradition**

**Paragraph 3**

*3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

398. Vanuatu indicated that it has not implemented the provision under review. State Law confirmed that no such an extradition request had been received including several separate offences (at least one of which was extraditable). As the law is silent on this matter, it was hard to confirm how this UNCAC provision would be applied.

**(b) Observations on the implementation of the article**

399. The reviewing experts recommended that Vanuatu consider allowing for an extradition request that includes several separate offences, one of which is extraditable, to be addressed also in respect of those related offences to the one that is extraditable.

**Article 44 Extradition**

**Paragraph 4**

*4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

400. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 2 and 4 (cited above) of the Extradition Act  
Section 12 (political offence exception), London Scheme

**EXTRADITION ACT**

**2. Interpretation**

(1) In this Act, unless the contrary intention appears:

"political offence", in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

(a) an offence

(i) that is constituted by conduct of a kind referred to in a multilateral treaty to which Vanuatu is a party; and

(ii) for which parties have an obligation to extradite or prosecute; or

(b) the offence of genocide; or

(c) an offence of:

(i) murder, kidnapping or other attack on the person or liberty; or

(ii) threatening or attempting to commit, or participating as an accomplice in, murder, kidnapping or other attack on the person or liberty;

on the head of a State, head of Government or Minister of the Government of the country or a member of his or her immediate family; or

(d) any other offence that Vanuatu and the other country have agreed will not be treated as a political offence for the purposes of extradition;

**THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH**

**POLITICAL OFFENCE EXCEPTION**

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;

(b) Sub paragraph (a) shall not apply to:

- (i) offences established under any multilateral international convention to which the requesting and the requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought;
- (ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law.
- (c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.
- (2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:
  - (i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),
  - (ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,
  - (iii) murder, or any related offence as described above,
  - (iv) any other offence that a country considers appropriate.
- (b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.

13. The extradition of a person sought also will be precluded by law if -

- (a) it appears to the competent authority that:
  - (i) the request for extradition although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or
  - (ii) that the person may be prejudiced at trial or punished, detained or (ii) that the person may be prejudiced at trial or punished, detained or restricted in personal liberty by reason of race, religion, sex, nationality or political opinions.
- (b) the competent authority is satisfied that by reason of
  - (i) the trivial nature of the case, or
  - (ii) the accusation against the person sought not having been made in good faith or in the interests of justice, or
  - (iii) the passage of time since the commission of the offence, or
  - (iv) any other sufficient cause,it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment for the person to be extradited or, as the case may be, extradited before the expiry of a period specified by that authority.
- (c) the competent authority is satisfied that the person sought has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or has been acquitted, whether within or outside the Commonwealth, of the offence for which extradition is sought.

401. State Law confirmed that there have been no examples, to date, where extradition has even been requested involving a political offence.

402. Vanuatu indicated that there are no relevant extradition treaties.

**(b) Observations on the implementation of the article**

403. The reviewing experts noted that, pursuant to section 2(1)(a)(i) of the Extradition Act, that a political offence, “in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include: (a) an offence (i) that is constituted by conduct of a kind referred to in a multilateral treaty to which Vanuatu is a party”. Thus, a political offence in Vanuatu does not include any of the offences established in accordance with this Convention.

**Article 44 Extradition**

**Paragraph 5**

*5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

404. Vanuatu indicated that it did not make extradition conditional on the existence of a treaty and provided the following information.

Pursuant to the Extradition Act (section 5), Vanuatu can entertain an extradition request with:

- (a) a Commonwealth country in accordance with Part 3; and
- (b) a treaty country in accordance with Part 5; and
- (c) a country other than a South Pacific country in accordance with Part 6.

To date, Vanuatu has not used the Convention as a legal basis for extradition, but in principle, could consider doing so in the future. There would be nothing preventing Vanuatu from doing so.

**(b) Observations on the implementation of the article**

405. The reviewing experts recommended that Vanuatu consider *using* the Convention as a legal basis for extradition.

## Article 44 Extradition

### Paragraphs 6 and 7

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

#### (a) Summary of information relevant to reviewing the implementation of the article

406. Vanuatu indicated that it has partially made extradition conditional on the existence of a treaty and provided the following information.

Section 5, Extradition Act - extradition is not conditional on the existence of a treaty with Commonwealth and South Pacific Countries, but is conditional on the existence of a treaty with other States.

#### **EXTRADITION ACT**

##### **5. Purpose of Part 2**

(1) The purpose of this Part is to provide for the extradition from Vanuatu to other countries of persons accused or convicted of extradition offences in other countries.

(2) This Part applies to extradition from Vanuatu to:

(a) a Commonwealth country in accordance with Part 3; and

(b) a treaty country in accordance with Part 5; and

(c) a country other than a South Pacific country in accordance with Part 6.

407. Vanuatu indicated that it has, in part, considered this Convention as the legal basis for extradition in respect to any offence to which this article applies, and mentioned that in principle, UNCAC could be used as a legal basis for extradition, but it has not been used to date.

408. Vanuatu indicated that has not yet informed the Secretary-General of the United Nations as prescribed above.

#### (b) Observations on the implementation of the article

409. If Vanuatu were able to use the Convention as a legal basis and there appears to be nothing preventing it from doing so, the reviewing experts recommended that Vanuatu inform the Secretary-General of the United Nations of this development.

## Article 44 Extradition

### Paragraph 8

*8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.*

#### (a) Summary of information relevant to reviewing the implementation of the article

410. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 3 (cited above), 4 (cited above), 9 and 41 of the Extradition Act

#### **EXTRADITION ACT**

##### **9. Authority to proceed**

(1) If an extradition request is received by Vanuatu, the Attorney General must do the following:

(a) consider the request;

(b) issue an authority to proceed if he or she is satisfied that:

(i) the offence for which extradition is sought is an extradition offence; and

(ii) the requesting country is an extradition country; and

(iii) there is nothing in section 17 or any other law that would preclude surrender of the person; and

(iv) there is no other reason why the authority to proceed should not be issued;

(c) give the authority to proceed to a magistrate;

(d) provide a copy of the authority to proceed and the extradition request to the person concerned.

(2) If the Attorney General does not issue an authority to proceed, he or she must advise a magistrate of this and the magistrate must order:

(a) the person to be released; or

(b) the discharge of the recognisance on which bail was granted.

(3) If an authority to proceed is received by a magistrate in relation to a person who has not been arrested under a provisional arrest warrant, the magistrate must issue a warrant for the arrest of the person.

##### **41. Application of Part 2**

Part 2 applies to the extradition of a person to a treaty country subject to:

(a) any limitations, conditions, exceptions or qualifications that are contained in the extradition treaty between Vanuatu and the treaty country; and

(b) any modifications to this Act made by the regulations.

411. Vanuatu provided the following examples of implementation.

As provided for in law, extradition requests can be refused for a number of reasons. An example of where an extradition request was refused by Vanuatu from Australia was when the dual criminality requirement was not satisfied. This was a 2009 request concerning tax evasion that involved 2 people sought by Australia for extradition.

**(b) Observations on the implementation of the article**

412. The reviewing experts deemed the provision under review to have been implemented.

**Article 44 Extradition**

**Paragraph 9**

*9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

413. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

There are different evidentiary requirements in the Extradition Act, depending on the country requesting the extradition -

In general - Division 3 - Extradition proceedings

Commonwealth Countries - PART 3 - EXTRADITION FROM VANUATU TO COMMONWEALTH COUNTRIES;

South Pacific Countries - PART 4 - EXTRADITION FROM VANUATU TO SOUTH PACIFIC COUNTRIES, Division 2 - Extradition proceedings;

Treaty Countries - PART 5 - EXTRADITION FROM VANUATU TO TREATY COUNTRIES;

Comity Countries - PART 6 - EXTRADITION FROM VANUATU TO COMITY COUNTRIES

Extradition to Vanuatu - PART 8 - EXTRADITION TO VANUATU

**EXTRADITION ACT**

Section 2 (cited above)

**In general - Division 3 - Extradition proceedings**

**11. Consent to surrender**

(1) At any time, a person may tell a magistrate that he or she consents to being surrendered to the requesting country for the extradition offence for which that country seeks his or her surrender.

(2) If

(a) the person tells the magistrate that he or she consents to being surrendered; and

(b) the magistrate is satisfied that the consent was given voluntarily;

(c) the magistrate must tell the person of the effect of consenting.

(3) The effect of consenting is:

(a) the person will be committed to prison without any extradition proceedings to determine whether the person should be surrendered for an extradition offence; and

(b) after the Attorney General issues a surrender warrant, the person will be surrendered to the requesting country.

(4) If, after being told of the effect of consenting, the person again consents to being surrendered, the magistrate must:

- (a) by warrant, order that the person be committed to prison; and
  - (b) inform the Attorney General in writing that the person has been committed to prison and of the offence for which the person has consented to be surrendered.
- (5) The Attorney General may under section 17 issue a surrender warrant for the person after being informed under subsection (4)(b).

If:

- (a) a person consents to being surrendered for the extradition offence; and
- (b) the requesting country has asked that the person also be surrendered for another offence that is not an extradition offence;
- (c) the magistrate must ask the person whether the person also consents to being surrendered for that other offence.

## **12. Extradition proceedings**

If:

- (a) the Attorney General has issued an authority to proceed for an extradition offence in relation to a person; and
  - (b) the person has not under section 11 consented to surrender for the offence; and
  - (c) an application is made to a magistrate by or on behalf of the person or the requesting country for extradition proceedings to be conducted in relation to the person; and
  - (d) the magistrate considers that the person and the requesting country have had reasonable time since the person received a copy of the extradition request in which to prepare for the proceedings;
- the magistrate must conduct extradition proceedings as soon as practicable to determine whether the person should be surrendered for the extradition offence.

## **13. Conduct of extradition proceedings**

- (1) Extradition proceedings must be conducted in the same manner as criminal proceedings. The rules that apply in criminal proceedings to the following matters apply to extradition proceedings:
- (a) summoning witnesses;
  - (b) remanding defendants;
  - (c) ordering the production of documents;
  - (d) administration of oaths and affirmations;
  - (e) payment of witness expenses;
  - (f) contempt of court, privilege and other matters relating to the administration of courts;
  - (g) the imposition and level of fines for offences.
- (2) During the proceedings, a person is not entitled to adduce evidence, and the magistrate is not entitled to receive evidence to contradict an allegation that the person has engaged in conduct that constitutes the offence for which extradition is sought.

## **14. Determination for surrender**

- (1) A magistrate must not determine that a person should be surrendered and order that the person be held in custody until the Attorney General makes a decision under section 17 unless the magistrate is satisfied:
- (a) that the requesting country is an extradition country; and
  - (b) that the offence for which surrender is sought is an extradition offence; and
  - (c) as to the identity of the person; and
  - (d) that the supporting documents have been produced to the magistrate; and
  - (e) that the supporting documents satisfy the requirements of section 15; and

(f) that surrender should not be refused because the person sought has established an extradition objection.

If the magistrate orders that the person be held in custody, the magistrate must:

(a) issue a warrant, ordering that the person be committed to prison to await the Attorney General's decision on surrender under section 17; and

(b) tell the person that he or she may, within 15 days after the day on which the order is made, seek a review of the order under section 16(1); and

(c) record in writing his or her decision and the extradition offence for which the person should be surrendered; and

(d) give a copy of the record to the person and the Attorney General.

(3) If:

(a) the magistrate orders that the person be held in custody; and

(b) the requesting country has asked that the person also be surrendered for another offence that is not an extradition offence;

the magistrate must ask the person whether the person also consents to being surrendered for that other offence.

(4) If the magistrate determines that the person should not be surrendered to the requesting country, the magistrate must:

(a) order that the person be released; and

(b) inform the Attorney General in writing of the order and of the magistrate's reasons for determining that the person should not be surrendered.

## **15. Supporting documents**

(1) In section 14, "supporting documents", in relation to an extradition offence means:

(a) a description of the person sought, together with any other information that may help to establish the identity and nationality of the person; and

(b) the text of the law creating the offence or, if the offence is not created by statute, a statement of the offence; and

(c) the text of the law of the requesting country that prescribes the penalty or, if the penalty is not prescribed by statute, a statement of the penalty that can be imposed; and

(d) a statement of the acts and omissions that constitute the offence, and details of the time and place the offence was committed; and

(e) if the person is accused of the offence - a warrant issued by the requesting country for the arrest of the person for the offence, or an authenticated copy of the warrant; and

(f) if a person has been convicted of the offence, documents, or authenticated copies of documents, that provide evidence of the following:

(i) the conviction;

(ii) the sentence imposed or intended to be imposed;

(iii) whether the sentence imposed has been carried out;

(iv) whether the sentence is immediately enforceable.

(2) If:

(a) a document relevant to the proceedings contains a deficiency; and

(b) the magistrate considers the deficiency to be minor;

the magistrate must adjourn the proceedings for a reasonable period to allow the deficiency to be remedied.

(3) Any document that is duly authenticated is admissible in the proceedings.

(4) A document that is sought by or on behalf of the requesting country to be admitted in the proceedings is authenticated if:

(a) it purports to be signed or certified by a judge, magistrate or other judicial officer in or of the requesting country; and

(b) it purports to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal:

(i) of the requesting country or of a Minister, Department of State or Department or officer of the Government of that country; or

(ii) of the person administering the Government of that country or of any person administering a Department of the Government of that country if the extradition country is a colony, territory or protectorate.

(5) Nothing in this section prevents the proof of any matter or the admission of any document in the proceedings in accordance with any other law of Vanuatu.

#### **16. Review of magistrate's decision**

(1) If a magistrate orders that a person be held in custody until the Attorney General makes a decision under section 17 on surrender, the person may apply to the Supreme Court for a review of the order.

(2) If a magistrate orders that a person be released, or that the person be surrendered for some offences only, the requesting country may apply to the Court for a review of the order.

(3) The application must be made within 15 days after the day on which the magistrate makes the order.

(4) The Court must have regard only to the material that was before the magistrate.

(5) The Court may, by order, confirm, vary or quash the order of the magistrate and order that the person be held for surrender or be released.

(6) If the Court orders that the person be held in custody until the Attorney General has made a decision under section 17 on surrender, the Court must include in its judgment a statement specifying the offence and must:

(a) if the person is not in custody, by warrant, commit the person to prison until the Attorney General has made that decision; or

(b) if the person is in custody, order that, the person remain in custody until the Attorney General has made a decision under section 17.

(7) If the Court orders that the person be released, the person must be released accordingly.

#### **17. Surrender determination by Attorney General**

(1) If:

(a) a magistrate has reported to the Attorney General that a person should be held for surrender; and

(b) the period during which an appeal may be lodged has ended and no appeal was lodged or, on appeal, the Court ordered that the person be held for surrender; the Attorney General must make a final decision whether the person should be surrendered.

(2) The Attorney General may refuse to order that the person be surrendered if:

(a) the requesting country has not given a specialty undertaking; or

(b) the requesting country is not a country with which Vanuatu has a bilateral treaty containing a specialty undertaking; or

(c) the law of the requesting country does not contain a provision prohibiting prosecution for an offence other than the one for which the person is surrendered; or

(d) the person is a citizen of Vanuatu; or

(e) the offence for which surrender has been ordered is punishable by death in the requesting country but not in Vanuatu and the requesting country has not given a

sufficient undertaking that the penalty either will not be imposed or, if imposed, will not be carried out; or

(f) a prosecution for the offence for which surrender has been ordered is pending against the person in Vanuatu; or

(g) the offence for which surrender has been ordered was committed outside the territory of the requesting country and the law of Vanuatu does not provide for jurisdiction over an offence of that kind committed in similar circumstances outside its territory; or

(h) the offence for which surrender has been ordered is regarded by Vanuatu as having been committed wholly or partly within Vanuatu; or

(i) the person has been sentenced or would be liable to be tried or sentenced in the requesting country by an extraordinary or ad hoc court or tribunal; or

(j) the person has been subjected in the requesting country to torture or cruel, inhuman or degrading treatment or punishment; or

(k) having regard to:

(i) the national interest of Vanuatu, including its interests in effective international cooperation to combat crime; and

(ii) the severity of the offence;

the Attorney General is of the view that the person should not be surrendered.

(3) For the purposes of subsection (2)(a), the requesting country is taken to have given a specialty undertaking if it undertakes that the person will not, without having the opportunity of leaving the requesting country:

(a) be detained or tried for an offence committed before surrender, other than:

(i) the offence for which surrender is granted; or

(ii) an offence of which the person could be convicted on proof of the facts constituting the offence for which surrender is sought, for which the penalty is no greater than the penalty for the offence for which surrender is sought; or

(b) be detained in the requesting country for surrender to a third country for an offence committed before surrender to the requesting country;

unless the Attorney General consents to the trial or the surrender to the third country.

(4) The Attorney General must not refuse to surrender a person because the person may be subjected to torture or cruel, inhuman or degrading treatment or punishment under subsection (2) (h) if the requesting country and Vanuatu have ratified:

(a) the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, that was adopted by the General Assembly of the United Nations on 10 December 1984; or

(b) the International Covenant on Civil and Political Rights.

(5) If the Attorney General decides that the person is to be surrendered to the requesting country, the Attorney General must issue a surrender warrant or a temporary surrender warrant for the person.

(6) If the Attorney General decides that the person is not to be surrendered to the requesting country, the Attorney General must in writing order that the person be released.

## **18. Surrender warrant**

(1) The surrender warrant must:

(a) be in writing; and

(b) state the offences for which the person is to be surrendered; and

(c) require any person who has custody of the person to hand the person over to a police officer; and

- (d) authorise a police officer to:
  - (i) transport the person from the place where the police officer takes custody of the person to another place within Vanuatu for the purpose of handing the person over to the custody of a foreign escort officer; and
  - (ii) hold the person in custody for so long as is necessary to enable the person to be handed over to the foreign escort officer; and
- (e) authorise the foreign escort officer to transport the person out of Vanuatu.
- (2) If the person is serving a custodial sentence, or has been admitted to bail, in Vanuatu for an offence committed in Vanuatu, the surrender warrant must not be executed until:
  - (a) the person has been released from custody; or
  - (b) the recognisance has been discharged.

### **19. Temporary surrender warrant**

- (1) The Attorney General may issue a temporary surrender warrant instead of a surrender warrant if:
  - (a) the person is serving a custodial sentence in Vanuatu; and
  - (b) surrender is sought for an offence of which the person is accused but of which the person has not been convicted; and
  - (c) the Attorney General is satisfied that the requesting country has given an adequate undertaking that the person is subject to a trial in the requesting country and the person is returned to Vanuatu; and
  - (d) the Attorney General is satisfied that adequate provision has been made for the travel of the person to the requesting country and for his or her return to Vanuatu.
- (2) The temporary surrender warrant must:
  - (a) be in writing; and
  - (b) state the offences for which the person is to be surrendered; and
  - (c) require any person who has custody of the person to hand the person over to a police officer; and
  - (d) authorise a police officer to:
    - (i) transport the person from the place where the police officer takes custody of the person to another place within Vanuatu for the purpose of handing the person over to the custody of a foreign escort officer; and
    - (ii) hold the person in custody for so long as is necessary to enable the person to be handed over to the foreign escort officer; and
  - (e) authorise the foreign escort officer to transport the person out of Vanuatu.
- (3) If a person who was the subject of a temporary surrender warrant:
  - (a) is in Vanuatu after trial and sentence in the requesting country; and
  - (b) has completed his or her custodial sentence in Vanuatu;the Attorney General may issue a surrender warrant for the surrender of the person to the requesting country, unless the Attorney General is satisfied that it would be unjust or oppressive to surrender the person because of changed circumstances in the requesting country.
- (4) The time that a person spends in custody in the requesting country as a result of the temporary surrender warrant, is taken to be time spent in custody in Vanuatu for the purpose of completing the sentence, for which the person was in custody in Vanuatu.
- (5) If:
  - (a) time spent in custody in the requesting country is taken into account as mentioned in subsection (4); and
  - (b) because of this, the person's sentence in Vanuatu is concluded;

the Attorney General must inform the requesting country that the undertakings provided by that country about the trial and return of the person no longer apply.

## **20. Execution of surrender warrant**

- (1) If a person is not surrendered under a surrender warrant within 2 months after:
  - (a) the date the surrender warrant was issued; or
  - (b) if the person is serving a custodial sentence, or has been admitted to bail, in Vanuatu - the person has been released from custody or the recognisance has been discharged; the person may apply to a magistrate to be released from custody. The person must inform the Attorney General of the application.
- (2) If the magistrate is satisfied that:
  - (a) the Attorney General is informed of the application; and
  - (b) there is no reasonable cause for delay in surrendering the person, the magistrate must order that the person be released from custody.
- (3) Without limiting subsection (2)(b), reasonable cause for delay exists if:
  - (a) it would have been a danger to the person's life, or prejudicial to the person's health, to surrender the person; or
  - (b) there was no suitable means of transporting the person to the requesting country, and all reasonable steps were taken to obtain suitable transport; or
  - (c) there was delay by a country in responding to a request by the requesting country for permission to transport the person, and all reasonable steps were taken to obtain the permission; or
  - (d) because of the remoteness of the requesting country, it would be unreasonable to expect the person to have been surrendered within the period mentioned in subsection (1).

## **Commonwealth Countries - PART 3 - EXTRADITION FROM VANUATU TO COMMONWEALTH COUNTRIES;**

### **21. Purpose of Part 3**

The purpose of this Part is to provide for the extradition from Vanuatu to Commonwealth countries of persons accused or convicted of extradition offences in those countries.

### **22. Application of Part 2**

Part 2 applies to the extradition of a person from Vanuatu to a Commonwealth country.

### **23. Application of different evidentiary requirements**

- (1) The evidentiary requirements set out in section 24 apply to all extradition proceedings conducted at the request of a Commonwealth country listed in Part 1 of Schedule 1.
- (2) The evidentiary requirements set out in section 25 apply to all extradition proceedings conducted at the request of a Commonwealth country listed in Part 2 of Schedule 1.

### **24. The prima facie evidence scheme**

In addition to any evidentiary requirements in Part 3, a magistrate must not determine that a person should be surrendered to a requesting country unless the evidence before the magistrate is such that, if the offence for which surrender is sought was committed in Vanuatu, there would be sufficient evidence to place the person on trial.

## **25. The record of the case scheme**

(1) In this section:

"record of the case", in relation to an offence for which surrender is sought, means:

- (a) a document containing a recital of the evidence acquired to support the request; and
- (b) an authenticated copy, reproduction or photograph of all exhibits and documentary evidence.

In addition to any evidentiary requirements in Part 3, a magistrate must not determine that a person should be surrendered to a requesting country unless a record of the case is produced for the offence for which surrender is sought.

(3) The record of the case must be accompanied by:

(a) an affidavit of an officer of the authority that investigated the matter, stating that:

- (i) the record of the case was prepared by him or her, or under his or her direction; and
- (ii) the evidence in the record of the case has been preserved for use in the person's trial; and

(b) a certificate of the Attorney General of the requesting country stating that, in his or her opinion, the record of the case discloses the existence of evidence that is sufficient under the law of the requesting country to justify a prosecution in the requesting country.

## **South Pacific Countries - PART 4 - EXTRADITION FROM VANUATU TO SOUTH PACIFIC COUNTRIES,**

### **Division 2 - Extradition proceedings;**

#### **32. Extradition proceedings**

A magistrate must conduct extradition proceedings as soon as practicable to determine whether the person should be surrendered to the South Pacific country if:

(a) either:

- (i) the person has been remanded after being arrested under an endorsed warrant; or
- (ii) the person has been remanded after being arrested under a provisional arrest warrant and the original warrant has been endorsed; and

(b) a request is made to the magistrate by or on behalf of the person or the South Pacific country for extradition proceedings to be conducted in relation to the person.

#### **33. Conduct of extradition proceedings**

(1) A magistrate must not conduct extradition proceedings unless he or she is satisfied that both the person sought and the South Pacific country have had reasonable time to prepare for the conduct of the proceedings.

(2) Extradition proceedings must be conducted in the same manner as criminal proceedings. The rules that apply in criminal proceedings in relation to the following matters apply to extradition proceedings:

- (a) summoning witnesses;
- (b) remanding defendants;
- (c) ordering the production of documents;
- (d) administration of oaths and affirmations;
- (e) payment of witness expenses;
- (f) contempt of court, privilege and other matters relating to the administration of courts;
- (g) the imposition and level of fines for offences.

(3) In the proceedings, the person is not entitled to adduce evidence, and the magistrate is not entitled to receive evidence to contradict an allegation that the person has engaged in conduct that constitutes the offence for which extradition is sought.

#### **34. Consent to surrender**

(1) At the proceedings the magistrate must ask the person if he or she consents to being surrendered.

(2) If:

(a) the person tells the magistrate that he or she consents to being surrendered; and

(b) the magistrate is satisfied that the consent was given voluntarily; the magistrate must tell the person of the effect of consenting.

(3) The effect of consenting is that the person will be:

(a) committed to prison without any further proceedings; and

(b) surrendered to the South Pacific country as soon as practicable.

(4) If, after being told of the effect of consenting, the person again consents to being surrendered, the magistrate must:

(a) by a surrender warrant, order that the person be surrendered to the South Pacific country; and

(b) by warrant, order that the person be committed to prison until the person is surrendered to the South Pacific country.

#### **35. Determination for surrender**

(1) At the proceedings, a person may not bring evidence that the person did not commit the offence.

(2) However, the person may bring evidence about matters mentioned in subsection (3).

(3) A magistrate must determine that the person should be surrendered for an offence unless he or she is satisfied that:

(a) the offence is of a trivial nature; or

(b) if the offence is one of which the person is accused but not convicted, the accusation was not made in good faith and in the interests of justice; or

(c) a lengthy period has elapsed since the offence was committed; or

(d) it would be unjust, oppressive or too severe a punishment to surrender the person; or

(e) the prison conditions in the requesting country are not substantially equivalent to the minimum standards for imprisonment in Vanuatu.

(4) If the magistrate determines that the person should be surrendered, the magistrate must:

(a) by a surrender warrant, order that the person be surrendered to the South Pacific country; and

(b) by a warrant, order that the person be committed to prison until the person is surrendered to the South Pacific country; and

(c) inform the person that he or she may, within 15 days of the day on which the order is made, seek a review of the order under section 36; and

(d) record in writing his or her decision and the extradition offence for which the person is to be surrendered; and

(e) give a copy to the person and to the Attorney General.

(5) Despite subsection (4), if:

(a) the person is serving a custodial sentence in Vanuatu; and

(b) surrender is sought for an offence for which the person is accused but not convicted; the magistrate must not issue a surrender warrant for the person but must refer the matter to the Attorney General to be dealt with under section 38.

(6) If the magistrate determines that the person should not be surrendered to the South Pacific country, the magistrate must order that the person be released.

### **36. Review of magistrate's decision**

- (1) If a magistrate makes an order for the surrender of a person, the person may apply to the Supreme Court for a review of the order.
- (2) If a magistrate makes an order for the release of a person, the South Pacific country may apply to the Court for a review of the order.
- (3) The application must be made within 15 days after the day on which the magistrate makes the order.
- (4) The Court must have regard only to the material that was before the magistrate.
- (5) The Court may, by order, confirm or quash the order of the magistrate and order that the person be surrendered or released.
- (6) If the Court orders that the person be surrendered, the Court must include in its judgment a statement specifying the offence and must:
  - (a) if the person is not in custody - by warrant commit the person to prison until the person is surrendered; or
  - (b) if the person is in custody - order that the person remain in custody until the person is surrendered.
- (7) If the Court orders that the person be released, the Court must:
  - (a) if the person is in custody - order that the person be released; or
  - (b) if the person has been remanded on bail - order that the recognisance be discharged.

### **37. Surrender warrant**

- (1) The surrender warrant must:
  - (a) be in writing; and
  - (b) require any person who has custody of the person to hand the person over to a police officer; and
  - (c) authorise a police officer to:
    - (i) transport the person from the place where the police officer takes custody of the person to another place within Vanuatu for the purpose of handing the person over to the custody of a foreign escort officer; and
    - (ii) hold the person in custody for so long as is necessary to enable the person to be handed over to the foreign escort officer; and
  - (d) authorise the foreign escort officer to transport the person out of Vanuatu.
- (2) If the person is serving a custodial sentence, or has been admitted to bail, in Vanuatu for an offence committed in Vanuatu, the surrender warrant must not be executed until:
  - (a) the person has been released from custody; or
  - (b) the recognisance has been discharged.

### **38. Temporary surrender warrant**

- (1) The Attorney General may issue a temporary surrender warrant instead of a surrender warrant if:
  - (a) the person is serving a custodial sentence in Vanuatu; and
  - (b) surrender is sought for an offence of which the person is accused but of which the person has not been convicted; and
  - (c) the Attorney General is satisfied that the South Pacific country has given an adequate undertaking that:
    - (i) the person will be given a speedy trial in the South Pacific country; and
    - (ii) the person will be returned to Vanuatu after the trial; and

(d) the Attorney General is satisfied that adequate provision has been made for the travel of the person to the South Pacific country and for his or her return to Vanuatu.

(2) The temporary surrender warrant must:

(a) be in writing; and:

(b) state the offences for which the person is to be surrendered; and

(c) require any person who has custody of the person to hand the person over to a police officer; and

(d) authorise a police officer to:

(i) transport the person from the place where the police officer takes custody of the person to another place within Vanuatu for the purpose of handing the person over to the custody of a foreign escort officer; and

(ii) hold the person in custody for so long as is necessary to enable the person to be handed over to the foreign escort officer; and

(e) authorise the foreign escort officer to transport the person out of Vanuatu.

(3) If a person who was the subject of a temporary surrender warrant:

(a) has been returned to Vanuatu after trial and sentence in the South Pacific country; and

(b) has completed his or her sentence in Vanuatu;

a magistrate must issue a surrender warrant for the surrender of the person to the South Pacific country.

(4) Any time the person spends in custody in the South Pacific country is taken to be time spent in custody in Vanuatu for the purpose of completing the sentence for which the person was in custody in Vanuatu.

(5) If:

(a) time spent in custody in the South Pacific country is taken into account as mentioned in subsection (4); and

(b) because of this, the person's sentence in Vanuatu is concluded;

the Attorney General must tell the requesting country that the undertakings given by that country about the speedy trial and return of the person no longer apply.

### **39. Execution of surrender warrant**

(1) If a person is not surrendered under a surrender warrant within 2 months after:

(a) the date the surrender warrant was issued; or

(b) if the person is serving a custodial sentence, or has been admitted to bail, in Vanuatu - the person has been released from custody or the recognisance has been discharged; the person may apply to a magistrate to be released from custody. The person must tell the Attorney General of the application.

(2) If the magistrate is satisfied that:

(a) the Attorney General has been told of the application; and

(b) there is no reasonable cause for delay in surrendering the person; the magistrate must order that the person be released from custody.

(3) Without limiting subsection (2) (b), reasonable cause for delay exists if:

(a) it would have been a danger to the person's life, or prejudicial to the person's health, to surrender the person; or

(b) there was no suitable means of transporting the person to the requesting country, and all reasonable steps were taken to obtain suitable transport; or

(c) there was delay by Vanuatu in responding to a request for permission to transport the person, and all reasonable steps were taken to obtain the permission.

## **Treaty Countries - PART 5 - EXTRADITION FROM VANUATU TO TREATY COUNTRIES;**

### **40. Purpose of Part 5**

The purpose of this Part is to provide for the extradition of persons from Vanuatu to countries with which Vanuatu has an extradition treaty.

### **41. Application of Part 2**

Part 2 applies to the extradition of a person to a treaty country subject to:

- (a) any limitations, conditions, exceptions or qualifications that are contained in the extradition treaty between Vanuatu and the treaty country; and
- (b) any modifications to this Act made by the regulations.

## **Comity Countries - PART 6 - EXTRADITION FROM VANUATU TO COMITY COUNTRIES**

### **42. Purpose of Part 6**

The purpose of this Part is to provide for extradition from Vanuatu to countries other than Commonwealth countries, South Pacific countries or treaty countries.

### **43. Application of Part 2**

Subject to this Part, Part 2 applies to the extradition of a person from Vanuatu to a comity country.

### **44. When comity country an extradition country**

(1) The Minister may, after consultation with the Attorney General:

- (a) by regulation, specify a comity country as an extradition country; or
  - (b) if an extradition request is received from a comity country that is not specified in the regulations, certify that the country is an extradition country for the purpose of that extradition request.
- (2) When the Minister certifies that the country is an extradition country, he or she may also specify the provisions of this Act that are to apply to the extradition request.
- (3) In determining whether a comity country is to be an extradition country, the Minister must consider:
- (a) the public interest of Vanuatu; and
  - (b) if the country is to be certified, the seriousness of the offence for which extradition of the person is sought; and
  - (c) the public interest of the requesting country.

### **45. Limitation on extradition proceedings**

Proceedings may not be commenced on a request from a comity country for the surrender of a person unless the country has been specified or certified as an extradition country in accordance with section 44.

### **46. Other modifications of Part 2**

If the Minister specifies a comity country as an extradition country, he or she may by regulation also modify Part 2 in its application to the country under this Part.

## **Extradition to Vanuatu - PART 8 - EXTRADITION TO VANUATU**

### **54. Purpose of Part 8**

The purpose of this Part is to provide for the extradition of persons to Vanuatu.

### **55. Surrendered persons to be brought into Vanuatu**

- (1) A person surrendered to Vanuatu for an offence against a law of Vanuatu of which the person is accused or of which the person has been convicted must be brought into Vanuatu and delivered to the appropriate authorities to be dealt with according to law.
- (2) In particular, the person may be remanded in custody or on bail until the person can be brought to trial.

### **56. Treatment of persons surrendered to Vanuatu**

- (1) A person surrendered to Vanuatu must not be detained or tried in Vanuatu for an offence that is alleged to have been committed, or was committed, before the person was surrendered, other than:
  - (a) an offence for which the person was surrendered; or
  - (b) another offence (for which the penalty is the same or less) of which the person could be convicted on proof of the conduct constituting the extradition offence; or
  - (c) another offence for which the surrendering country consents to the person being detained or tried.
- (2) A person surrendered to Vanuatu must not be detained in Vanuatu for surrender to a third country for trial or punishment for an offence that is alleged to have been committed, or was committed, before the person was surrendered to Vanuatu.
- (3) Subsection (1) and (2) do not apply if:
  - (a) the country that surrendered the person to Vanuatu consents to the person being so detained, and tried or surrendered; or
  - (b) the person has left, or has had the opportunity of leaving, Vanuatu.

### **57. Persons temporarily surrendered to Vanuatu**

- (1) This section applies to a person if surrendered to Vanuatu:
  - (a) has not completed a custodial sentence in the surrendering country immediately before being surrendered; or
  - (b) is a person whom Vanuatu has undertaken to hold in custody and return to the surrendering country.
- (2) The person:
  - (a) must, while travelling to and from, and while in, Vanuatu, be kept in the custody ordered in writing by the Attorney General; and
  - (b) may only be tried for an offence for which the person was surrendered; and
  - (c) after the person has been tried, must be returned to the surrendering country.
- (3) The Attorney General must order that a person be released from custody if:
  - (a) a person is held in custody only because of an order of the Attorney General under subsection (2); and
  - (b) the surrendering country notifies Vanuatu that the surrendering country no longer requires the person to be returned.

### **58. Evidence for purposes of surrender of persons to Vanuatu**

- (1) If the Attorney General intends to seek a person's extradition to Vanuatu, the Attorney General may, by notice in writing, authorise the taking of evidence for use in any proceedings for the extradition of the person to Vanuatu.
- (2) A magistrate may take the evidence of each witness on oath or affirmation and must:
  - (a) cause the evidence to be reduced to writing and certify as to the taking of the evidence; and
  - (b) cause the evidence and the certificate to be sent to the Attorney General.

(3) The person in relation to whom the evidence is being taken is not entitled to be represented while the evidence is being taken.

414. State Law confirmed that other than what is in the law, there are no extradition procedures to expedite requests and to simplify evidentiary requirements.

**(b) Observations on the implementation of the article**

415. The reviewing experts recommended that Vanuatu establish measures to streamline extradition procedures and evidentiary requirements in order to allow it to address an extradition request within a reasonable time. These measures might also be supplemented with a tracking system/ request management system and adopting internal guidelines / manual.

**Article 44 Extradition**

**Paragraph 10**

*10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

416. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

PART 2 - EXTRADITION FROM VANUATU - GENERAL PROVISIONS, Division 2 - Arrest in relation to extradition offences, Extradition Act (NB: Section 9 is cited above)

Sections 3-6, THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH incorporating the amendments agreed at Kingstown in November 2002.

**EXTRADITION ACT**

**PART 2 - EXTRADITION FROM VANUATU - GENERAL PROVISIONS**

**Division 2 - Arrests in relation to extradition offences**

**6. Issue of provisional arrest warrant**

(1) A magistrate must issue a provisional arrest warrant for a person if:

(a) a country, either directly or through ICPO-Interpol, notifies Vanuatu that:

(i) a person whose surrender is desired is, or is believed to be, in or on his or her way to Vanuatu; and

(ii) the requesting country intends to make a formal request to Vanuatu for the extradition of the person; and

(b) an application on behalf of the requesting country is made to a magistrate for a provisional arrest warrant; and

(c) the application is supported by the required documents; and

(d) the magistrate is satisfied that the offence is an extradition offence; and

- (e) the magistrate is satisfied that the request is made by an extradition country.
- (2) The following documents are required for a provisional arrest warrant:
  - (a) a copy of the warrant for the arrest of the person issued in the requesting country;
  - (b) a description of the person sought;
  - (c) a description of the acts and omissions that constitute the offence;
  - (d) the text of the law creating the offence or, if the offence is not created by statute, a statement of the offence;
  - (e) the text of the law of the requesting country that prescribes the penalty or, if the penalty is not prescribed by statute, a statement of the penalty that can be imposed.

### **7. Arrest and remand on provisional arrest warrant**

- (1) A person arrested under a provisional arrest warrant must be brought before a magistrate as soon as practicable.
- (2) Until the Attorney General issues an authority to proceed, the magistrate must:
  - (a) remand the person in custody; or
  - (b) if the magistrate is satisfied that the person is unlikely to abscond, remand the person on bail.
- (3) A magistrate who remands a person on bail:
  - (a) has the same powers in relation to recognisances and reporting conditions as he or she has under the criminal laws of Vanuatu; and
  - (b) may order that the person's passport and other travel documents be surrendered to him or her until the extradition proceedings in relation to the person are concluded.
- (4) Subject to section 8, a person must not be remanded in custody or on bail for a period longer than 42 days.
- (5) After remanding the person, the magistrate must:
  - (a) inform the Attorney General of the following:
    - (i) that he or she has remanded the person;
    - (ii) the name of the requesting country;
    - (iii) the offence for which surrender is being sought; and
  - (b) provide to the Attorney General and the person being remanded a copy of the documents on which the issue of the provisional arrest warrant is based.

### **8. Release from remand**

- (1) If:
  - (a) a person is on remand (in custody or on bail) either:
    - (i) 42 days after the date on which the person was arrested; or
    - (ii) if an extradition treaty between Vanuatu and the requesting country provides for another period - at the end of that period; and
  - (b) the Attorney General has not issued an authority to proceed;the person must be brought before a magistrate.
- (2) The magistrate may remand the person, in custody or on bail, for a further period of not more than 42 days if the magistrate is satisfied that an authority to proceed will be issued within that period.
- (3) If the magistrate is not satisfied that an authority to proceed will be issued within the remand period referred to in subsection (2), the magistrate must order:
  - (a) the release of the person from custody; or
  - (b) the discharge of the recognisances on which bail was granted.

### **10. Arrest and remand on authority to proceed**

- (1) A person who is arrested under a warrant issued under section 9 must be brought before a magistrate as soon as practicable.
- (2) The magistrate must:
  - (a) remand the person in custody; or
  - (b) if the magistrate is satisfied that the person is unlikely to abscond - remand the person on bail;
  - (c) for a period that is necessary for proceedings under this Part to be conducted.
- (3) A magistrate who remands a person on bail:
  - (a) has the same powers in relation to recognisances and reporting conditions as he or she has under the criminal laws of Vanuatu; and
  - (b) may order that the person's passport and other travel documents be surrendered to the magistrate until the extradition proceedings in relation to the person are concluded.
- (4) If a magistrate remands the person in custody after the person has made an application for bail, the person is not entitled to apply to any other magistrate for release on bail during that remand, unless the first magistrate is no longer available.

### **THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH WARRANTS, OTHER THAN PROVISIONAL WARRANTS**

3. (1) A person sought will only be extradited if a warrant for arrest has been issued in the country seeking extradition and either -
  - (a) that warrant is endorsed by a competent judicial authority in the requested country (in which case, the endorsed warrant will be sufficient authority for arrest), or
  - (b) a further warrant for arrest is issued by the competent judicial authority in the requested country, other than a provisional warrant issued in accordance with clause 4.
- (2) The endorsement or issue of a warrant may be made conditional on the competent executive authority having previously issued an order to proceed.

### **PROVISIONAL WARRANTS**

4. (1) Where a person sought is, or is suspected of being, in or on the way to any country but no warrant has been endorsed or issued in accordance with clause 3, the competent judicial authority in the destination country may issue a provisional warrant for arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the extradition offence had been an offence committed within the destination country.
- (2) For the purposes of paragraph 1, information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a person sought may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that person.
- (3) A report of the issue of a provisional warrant, with the information in justification or a certified copy thereof, will be sent to the competent executive authority.
- (4) The competent executive authority who receives the information under (4) The competent executive authority who receives the information under paragraph (3) may decide, on the basis of that information and any other information which may have become available, that the person should be discharged, and so order.

### **COMMITTAL PROCEEDINGS**

5. (1) A person arrested under a warrant endorsed or issued in accordance with clause 3(1), or under a provisional warrant issued in accordance with clause 4, will be brought,

as soon as practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if the person were charged with an offence committed in the requested country.

(2) The competent judicial authority will receive any evidence which may be tendered to show that the extradition of the person sought is precluded by law.

(3) Where a provisional warrant has been issued in accordance with clause 4, but within such reasonable time as the competent judicial authority may fix:

(a) a warrant has not been endorsed or issued in accordance with clause 3(1), or

(b) where such endorsement or issue of a warrant has been made conditional on the issuance of an order to proceed, as mentioned in clause 3(2), no such order has been issued, the competent judicial authority will order the person to be discharged.

(4) Where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if -

(a) such evidence is produced as establishes a prima facie case that the person committed the offence; and

(b) extradition is not precluded by law but, otherwise, will order the person to be discharged.

(5) Where a person sought is committed to prison to await extradition as mentioned in paragraph (4), notice of the fact will be given as soon as possible to the competent executive authority of the country in which committal took place.

#### **OPTIONAL ALTERNATIVE COMMITTAL PROCEEDINGS**

6. (1) Two or more countries may make arrangements under which clause 5(4) will be replaced by paragraphs 2-4 of this clause or by other provisions agreed by the countries involved.

(2) Where a warrant has been endorsed or issued as mentioned in clause 3(1), the competent judicial authority may commit the person sought to prison to await extradition if -

(a) the contents of a record of the case received, whether or not admissible in evidence under the law of the requested country, and any other evidence admissible under the law of the requested country, are sufficient to warrant a trial of the charges for which extradition has been requested; and

(b) extradition is not precluded by law, but otherwise will order that the person be discharged.

(3) The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting country if it is accompanied by -

(a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and

(b) a certificate of the Attorney General of the requesting country that in his or her opinion the record of the case discloses the existence of evidence under the law of the requesting country sufficient to justify a (4) A record of the case will contain -

(a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;

(b) particulars of each offence or conduct in respect of which extradition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting country, including a certified copy of any such definition in the written law of that country;

- (c) the original or a certified copy of any document of process issued in the requesting country against the person sought for extradition ;
- (d) a recital of the evidence acquired to support the request for extradition; and
- (e) a certified copy, reproduction or photograph of exhibits or documentary evidence.

417. Vanuatu indicated that, to date, there are no examples, as no extradition request has been positively responded to.

**(b) Observations on the implementation of the article**

418. The reviewing experts deemed the provision under review to have been legislatively implemented.

**Article 44 Extradition**

**Paragraphs 11 - 13**

*11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.*

*12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.*

*13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.*

**(a) Summary of information relevant to reviewing the implementation of the article**

419. Vanuatu indicated that it has partially implemented paragraph 11 of UNCAC article 44 and provided the following measure.

Section 60 (cited above) of the Extradition Act

420. State Law confirmed that Vanuatu would not necessarily prosecute a person if s/he is not extradited, but this has also never been tested. Such a matter has never arisen in practice.

421. Vanuatu does not extradite its own citizens, pursuant to section 60 (prosecution, instead of extradition, of Vanuatu citizens) of the Extradition Act. Moreover, no such circumstance has arisen, to date.

422. Vanuatu indicated that it has implemented paragraph 12 of UNCAC article 44 and provided the following measure.

Sections 19 (in general) and 38 (specifically to South Pacific Countries) of the Extradition Act (both cited above).

423. Vanuatu indicated that it has not implemented paragraph 13 of UNCAC article 44 and provided the following measure.

Section 4 of the Extradition Act (cited above)

**(b) Observations on the implementation of the article**

424. The reviewing experts noted that “For the purpose of the prosecution, the person must be taken to have engaged in the conduct in Vanuatu” (section 60(3) of the Extradition Act). This and in light of section 4 of the Penal Code (below) was not interpreted to mean that the conduct, act or omission of the alleged crime need have occurred in Vanuatu itself, but rather for prosecutorial purposes, it would be treated as if it had been committed within the Republic.

**4. Offences abroad**

(1) Any citizen may be prosecuted within the Republic for an offence against the criminal law of the Republic in respect of any act or omission committed by him beyond the Republic which had it been committed within the Republic would have constituted an offence against such law, if such act or omission constituted a corresponding offence under the law of the place where it was committed.

(2) The penalty imposed upon conviction of a person under subsection (1) shall not be more severe than the corresponding penalty prescribed by the law of the place in which the act or omission was committed.

(3) Subsection (1) shall not apply if such person has been prosecuted in respect of such act or omission in the place in which it was committed, whatever the result of such prosecution.

(4) No criminal proceedings shall be brought against any person under the provisions of subsection (1) without the consent in writing of the Public Prosecutor.

425. Thus, if Vanuatu were not to extradite a person and the requesting State were to request that the person be prosecuted, Vanuatu may prosecute (*aut dedere aut judicare* principle). However, no such circumstance has arisen in practice. The experts noted that Vanuatu may wish, on a procedural level, to consider requiring the submission of such matters for prosecution.

426. Moreover, the experts noted that a ground for refusing extradition is that a ‘judgment has been given in the person’s absence and there is no provision in the law of the requesting country entitling the person to appear before a court and raise any defense the person may have’ (section 4(h)).

## Article 44 Extradition

### Paragraph 14

*14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.*

#### (a) Summary of information relevant to reviewing the implementation of the article

427. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Section 5 of the Extradition Act provides that "Extradition proceedings must be conducted in the same manner as criminal proceedings. The rules that apply in criminal proceedings to the following matters apply to extradition proceedings..." Section 13 (cited above) was also deemed applicable. Moreover, other measures were found in the Constitution (esp. Chapter 2 - Fundamental Rights and Duties, esp. articles 5(2) and 6), Penal Code (section 14) and CPC (sections 81, 87 and 88).

### **CONSTITUTION OF THE REPUBLIC OF VANUATU CHAPTER 2 - FUNDAMENTAL RIGHTS AND DUTIES**

#### **PART I - Fundamental Rights**

##### **5. Fundamental rights and freedoms of the individual**

(2) Protection of the law shall include the following -

- (a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;
- (b) everyone is presumed innocent until a court establishes his guilt according to law;
- (c) everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged;
- (d) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;
- (e) a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence;
- (f) no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed;
- (g) no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence;
- (h) no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial.

##### **6. Enforcement of fundamental rights**

(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.

(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.

## **Penal Code**

### **Principles of Criminal Proceedings**

#### **14. Rights of accused at trial**

Every accused person may, after the closure of evidence for the prosecution, elect to give evidence on oath on his own behalf or to remain silent. His election to remain silent shall not of itself give rise to an inference of guilt.

## **Criminal Procedure Code**

### **Presumption of Innocence**

#### **STATEMENT OF PRESUMPTION TO BE READ TO ACCUSED**

81. In every criminal trial in which a plea of not guilty has been entered, the judicial officer presiding shall, before the prosecution case is opened, read aloud to the accused the following statement of the presumption of innocence -

"In this trial you will be presumed to be innocent unless and until the prosecution has proved your guilt beyond reasonable doubt. It is not your task to prove your innocence. If at the end of the trial, any reasonable doubt exists as to your guilt, you will be deemed to be innocent of the charge and will be acquitted"  
and shall record such step in the proceedings.

#### **TAKING OF EVIDENCE IN ABSENCE OF THE ACCUSED**

87. If it is proved that an accused person has absconded and that there is no immediate prospect of arresting him, the court competent to try such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such depositions may, on the arrest of such person, be given in evidence against him on the trial for the offence with which he is charged if the deponent is dead or incapable of giving evidence, or beyond the limits of the Republic, or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

### **Evidence for Defence**

#### **STATEMENT OF RIGHTS OF ACCUSED TO BE READ ALOUD**

88. In every trial in which a plea of not guilty has been entered, at the close of the case for the prosecution, and if the court shall decide that there is a prima facie case made out against the accused, the presiding judicial officer shall read aloud to the accused, whether or not he is represented by an advocate, the following statement

-

"In making your defence in this trial, you are entitled, in addition to calling other persons as witnesses, to give evidence yourself on your own behalf, upon oath or affirmation and subject to cross-examination by the prosecution. However you are not obliged to give evidence and may elect instead to remain silent. If you do not choose to give evidence, this will not of itself lead to an inference of guilt against you."  
and shall record this step in the proceedings.

#### **(b) Observations on the implementation of the article**

428. The reviewing experts deemed the provision under review to have been legislatively implemented.

## Article 44 Extradition

### Paragraph 15

*15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.*

#### (a) Summary of information relevant to reviewing the implementation of the article

429. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Section 4 (b) and (c) of Extradition Act (cited above)

#### (b) Observations on the implementation of the article

430. The reviewing experts deemed the provision under review to have been largely implemented legislatively. However, it was recommended that "ethnic origin" be specifically included in the legislation, namely in section 4 of the Extradition Act in order for Vanuatu to fully implement this UNCAC provision.

## Article 44 Extradition

### Paragraph 16

*16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.*

#### (a) Summary of information relevant to reviewing the implementation of the article

431. Vanuatu indicated that it has implemented the provision under review and cited the following measure.

Section 3(4)(a) of the Extradition Act

#### **3. Extradition offence**

...

(4) An offence may be an extradition offence although:

(a) it is an offence against a law of the requesting country relating to taxation, customs duties or other revenue matters or relating to foreign exchange control;

#### (b) Observations on the implementation of the article

432. The reviewing experts deemed the provision under review to have been legislatively implemented.

## Article 44 Extradition

### Paragraph 17

*17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.*

#### (a) Summary of information relevant to reviewing the implementation of the article

433. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Section 15 of the Extradition Act (cited above)

Section 7 of the London Scheme for Extradition within the Commonwealth

#### **THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH SUPPLEMENTARY INFORMATION**

7. (1) If it considers that the material provided in support of a request for extradition is insufficient, the competent authority in the requested country may seek such additional information as it considers necessary from the requesting country, to be provided within such reasonable period of time as it may specify.

(2) Where a request under paragraph (1) is made after committal proceedings have commenced the competent judicial authority in the requested country may grant an adjournment of the proceedings for such period as that authority may consider reasonable for the material to be furnished, which aggregate period should not exceed 60 days.

434. State Law confirmed that it had consulted in the past and there is nothing disbaring it from doing this.

#### (b) Observations on the implementation of the article

435. It was noted that, in practice, Vanuatu appears to consult with requesting States prior to refusing extradition. Based on this, the reviewing experts deemed the provision to have been implemented, noting that the requesting State should also be provided with ample opportunity to present its opinions and relevant information.

## Article 44 Extradition

### Paragraph 18

*18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.*

#### (a) Summary of information relevant to reviewing the implementation of the article

436. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Pursuant to the Extradition Act (section 5), Vanuatu can entertain an extradition request with:

- (a) a Commonwealth country in accordance with Part 3; and
- (b) a treaty country in accordance with Part 5; and
- (c) a country other than a South Pacific country in accordance with Part 6.

437. Vanuatu indicated it is not currently entertaining any additional agreements/arrangements on extradition.

**(b) Challenges**

438. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Inter-agency co-ordination;
2. Inadequacy of existing normative measures (constitution, laws, regulations, etc);
3. Specificities in our legal system;
4. Limited capacity (e.g. human/technological/institution/other);
5. Limited resources for implementation (e.g. human/financial/other).

**(c) Technical assistance needs**

439. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Other assistance - specific requests:
  - 1) International cooperation record-keeping - system of filing incoming/ outgoing requests, legal basis, specific request, who is dealing with it (i.e. Police, FIU), timeline, information provided, reasons for refusing assistance, etc;
  - 2) Development of extradition and mutual legal assistance templates that can be sent to States requesting Vanuatu's assistance, so that requesting States comply with all the necessary requirements of Vanuatu;
  - 3) Easy to follow guidelines on how to deal with international cooperation requests for staff internally in the Government;
2. Summary of good practices/lessons learned;
3. Legal advice;
4. Capacity-building programmes for authorities responsible for international cooperation in criminal matters.

440. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

## Article 45 Transfer of sentenced persons

*States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.*

### (a) Summary of information relevant to reviewing the implementation of the article

441. Vanuatu provided the following measures.

Article 62(2) of the Extradition Act  
SCHEME FOR THE TRANSFER OF CONVICTED OFFENDERS WITHIN  
THE COMMONWEALTH applies to Commonwealth countries

#### **EXTRADITION ACT**

##### **62. Surrender for purposes of trial only**

(2) Vanuatu may surrender the person to the requesting country for the purpose of being tried in the requesting country for the offence for which extradition is sought if:

(a) the law of the requesting country permits the transfer of convicted offenders to Vanuatu; and

(b) Vanuatu is satisfied that if the person is convicted the person will be returned to Vanuatu to serve the sentence imposed; and

(c) Vanuatu is satisfied that there is no likelihood that the person will be subjected to torture or cruel, inhuman or degrading treatment

...

#### **SCHEME FOR THE TRANSFER OF CONVICTED OFFENDERS WITHIN THE COMMONWEALTH GENERAL PRINCIPLES**

1. A person convicted and sentenced to a term of imprisonment in one country ("the sentencing country") for an offence may be transferred, in accordance with the provisions of this scheme, to another country ("the administering country") in order that he may serve the remainder of that sentence in that other country.

#### **DEFINITIONS**

2. For the purposes of this Scheme –

(a) each of the following is a separate country, that is to say -

(i) each sovereign and independent country within the Commonwealth, together with any dependent territories which that country designates, and

(ii) each country within the Commonwealth which, although not sovereign and independent, is not designated for the purposes of the preceding sub-paragraph;

(b) (i) "administering country" means the country to which the convicted offender" may be, or has been, transferred in order to serve his sentence;

(ii) "convicted offender" means a person upon whom a sentence has been imposed.

(iii) "judgement" means a decision or order of a court or tribunal imposing a sentence;

(iv) "sentence" means any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a determinate period of time in the exercise of its criminal jurisdiction;

(v) "sentencing country" means the country in which the sentence was imposed on the convicted offender who may be, or has been, transferred.

### **TRANSFER OF CONVICTED OFFENDER**

3. (1) A convicted offender to whom this Scheme may apply shall be informed by the sentencing country of the substance of the Scheme.

(2) A convicted offender may only be transferred following a request by either the sentencing country or the administering country, but the convicted offender may apply for transfer.

(3) When a convicted offender applies for his transfer, the country which receives that application shall, as soon as practicable, so inform the other country.

### **CONDITIONS FOR TRANSFER**

4. (1) A convicted offender may be transferred under the Scheme only on the following conditions

(a) if that person -

(i) is a national of the administering country, notwithstanding that he may also be a national of any other country, including the sentencing country, or other country, including the sentencing country, or

(ii) has close ties with the administering country of a kind that may be recognised by that country for the purposes of this Scheme; and

(b) if the judgment is final; and

(c) if at the time of receipt of the request for transfer, the convicted offender still has at least six months of the sentence to serve or if the sentence is indeterminate; and

(d) if the transfer is consented to by the convicted offender or, where in view of his age or his physical or mental condition one of the two countries considers it necessary, by a person entitled to act on behalf of the convicted offender; and

(e) if the sentencing and administering countries agree to the transfer.

(2) In exceptional cases it is open to the sentencing and administering countries to agree to a transfer even if the time to be served by the sentenced person is less than that specified in sub-paragraph (1)(c).

(3) A country may, at any time, define as far as it is concerned the term "national" for the purposes of this Scheme.

### **OBLIGATIONS TO FURNISH INFORMATION**

5. (1) For the purposes of enabling a decision to be made on a request or an application under this Scheme, the sentencing country shall send the following information and documents to the administering country, unless either country has already decided that it will not agree to the transfer -

(a) the name, date and place of birth of the convicted offender;

(b) his address, if any, in the administering country;

(c) a certified copy of the judgment and a copy or account of the law on which it is based;

(d) a statement of the facts upon which the conviction and sentence were based;

(e) the nature, duration and date of commencement of the sentence;

(f) whenever appropriate, any medical or social reports on the convicted offender, information about his treatment in the sentencing country and any recommendation for his further treatment in the administering country; and

(g) any other information which the administering country may specify as required in all cases to enable it to consider the possibility of transfer and to enable it to inform the

prisoner and the sentencing country of the full consequences of transfer for the prisoner under its law.

(2) The administering country, if requested by the sentencing country, shall send to it a document or statement indicating whether the convicted offender satisfies the requirements of paragraph 4(1)(a).

#### **REQUESTS AND REPLIES**

6. (1) Requests and applications for transfer and replies shall be made in writing.

(2) Communications between sentencing and administering countries shall be conducted through the channels notified in pursuance of paragraph 19.

#### **SUPPORTING DOCUMENTS**

7. Except as provided in paragraph 5(1)(c), documents sent in accordance with this Scheme need not be certified.

#### **CONSENT AND ITS VERIFICATION**

8. (1) The sentencing country shall ensure that the person required to give consent to the transfer in accordance with paragraph 4(1)(d) does so voluntarily and in writing with full knowledge of the legal consequences thereof. The procedure for such consent shall be governed by the law of the sentencing country.

(2) The sentencing country shall afford an opportunity to the administering country to verify that the consent is given. In accordance with the conditions set out in sub-paragraph (1).

#### **NOTIFICATION OF DECISIONS**

9. A convicted offender shall be informed, in writing, of any action taken by the sentencing country or the administering country, as well as of any decision taken by either country, on a request for his transfer.

#### **EFFECT OF TRANSFER FOR SENTENCING COUNTRY**

10. The enforcement of the sentence by the administering country shall, to the extent that it has been enforced, have the effect of discharging that sentence in the sentencing country.

#### **EFFECT OF TRANSFER FOR ADMINISTERING COUNTRY**

11. (1) The competent authorities of the administering country shall continue the enforcement of the sentence immediately or through a court or administrative order under the conditions set out in paragraph 12.

(2) Subject to the provisions of paragraph 13, the enforcement of the sentence shall be governed by the law of the administering country and that country alone shall be competent to take all appropriate decisions.

(3) Any country which, according to its national law cannot avail itself of the procedure referred to in sub-paragraph (1) to enforce measures imposed in another country on a person who, for reasons of mental condition, has been held not criminally responsible for the commission of an offence, and which is prepared to receive such a person for further treatment, may indicate the procedure it will follow in such a case.

#### **CONTINUED ENFORCEMENT**

12. (1) The administering country shall be bound by the legal nature and duration of the sentence as determined by the sentencing country.

(2) If, however, the sentence is by its nature or duration incompatible with the law of the administering country, or its law so requires, that country may, by court or administrative order, adapt the sanction to a punishment or measure prescribed by its own law. As to its nature the punishment or measure shall, as far as possible, correspond with that imposed by the judgment of the sentencing country. It shall not aggravate, by its nature or duration, the sanctions imposed in the sentencing country.

#### **PARDON, AMNESTY, COMMUTATION, REVIEW**

13. (1) Unless the sentencing and the administering countries otherwise agree the sentencing country alone may grant pardon, amnesty or commutation of the sentence in accordance with its constitution or other laws.

(2) The sentencing country alone may decide on any application for review of the judgment.

#### **TERMINATION OF ENFORCEMENT**

14. The administering country shall terminate enforcement of the sentence as soon as it is informed by the sentencing country of any decision or measure as a result of which the sentence ceases to be enforceable.

#### **INFORMATION ON ENFORCEMENT**

15. (1) The administering country shall notify the sentencing country –

(a) when it considers enforcement of the sentence to have been completed; or

(b) if the convicted offender escapes from custody before enforcement of the sentence has been completed.

(2) The sentencing country may, at any time, request a special report from the administering country concerning the enforcement of the sentence.

#### **TRANSIT**

16. Each country shall afford reasonable co-operation in facilitating the transit through its territory of convicted offenders who are being transferred between other countries pursuant to this Scheme. Advance notice of such transit shall be given by the country intending to make the transfer.

#### **COSTS**

17. The cost of the transfer of a convicted offender shall be defrayed by the sentencing country and the administering country in such proportions as they may agree either generally or in regard to any particular transfer.

#### **TEMPORAL APPLICATION**

18. The Scheme shall be applicable to the enforcement of sentences imposed before as well as after its adoption.

#### **ACCEPTANCE OF SCHEME**

19. Any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.

442. Vanuatu indicated that an example of a transfer of a sentenced person involved a Chinese national in 2011.

**(b) Observations on the implementation of the article**

443. The reviewing experts observed that section 62(2) of the Extradition Act only applies “for the purpose of being tried in the requesting country for the offence for which extradition is sought” and the Scheme for the Transfer of Convicted Offenders within the Commonwealth only applies to Commonwealth countries. In view of these limitations, the reviewers noted that Vanuatu may wish to consider entering into bilateral or additional multilateral agreements or arrangements on the transfer of convicted persons for UNCAC-related offences.

**(c) Challenges**

444. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Specificities in our legal system.

**(e) Technical assistance needs**

445. Vanuatu indicated that the following form of technical assistance, if available, would assist it in better implementing the provision under review:

1. Other assistance: legislative drafting

446. Vanuatu indicated that no form of technical assistance mentioned above has already been provided.

**Article 46 Mutual legal assistance**

**Paragraph 1**

*1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

447. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 5 and 6 Mutual Assistance in Criminal Matters Act, No. 31 of 2005 (MACMA)

Section 1, SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH including amendments made by Law Ministers in April 1990, November 2002 and October 2005 (MLA Scheme within the Commonwealth)

**Mutual Assistance in Criminal Matters Act**  
**PART 2 - REQUESTS FOR ASSISTANCE GENERALLY**  
**5. Requests by Vanuatu for assistance generally**

A request for international assistance in a criminal matter that Vanuatu is authorised to make under this Act may be made only by the Attorney General.

#### **6. Request by foreign countries for assistance generally**

(1) A request by a foreign country for international assistance in a criminal matter must be made to the Attorney General or a person authorised by the Attorney General to receive requests by foreign countries under this Act.

(2) A request must be in writing and must include, or be accompanied by, the following information:

(a) the name of the authority concerned with the criminal matter to which the request relates;

(b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(c) a description of the purpose of the request and of the nature of the assistance being sought;

(d) any information that may assist in giving effect to the request.

(3) Failure to comply with subsection (2) is not a ground for refusing the request, but the Attorney General is not obliged to consider the request until that subsection is complied with.

(4) If a foreign country makes a request to a person authorised under subsection (1), the request is taken, for this Act, to have been made to the Attorney General.

(5) If a foreign country makes a request to the Court for international assistance in a criminal matter:

(a) the Court must refer the request to the Attorney General; and

(b) the request is then taken, for this Act, to have been made to the Attorney General.

#### **7. Assistance may be provided subject to conditions**

Assistance under this Act may be provided to a foreign country subject to any conditions that the Attorney General determines.

### **SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH PURPOSE AND SCOPE**

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.

(2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).

(3) Assistance in criminal matters under this Scheme includes assistance in

a) identifying and locating persons;

b) serving documents;

c) examining witnesses;

d) search and seizure;

e) obtaining evidence;

f) facilitating the personal appearance of witnesses;

g) effecting a temporary transfer of persons in custody to appear as a witness;

h) obtaining production of judicial or official records;

i) tracing, seizing and confiscating the proceeds or instrumentalities of crime; and

j) preserving computer data.

448. Vanuatu provided the following examples of implementation.

State Law (on behalf of the Attorney-General) confirmed that only 4 MLA requests have been sent to Australia (2 were bribery related and 1 for the misuse of public office), to date. Assistance was received for 2 such requests.

State Law has received 35 MLA requests (1 from Fiji, 20 from Australia, 2 from France, 8 from USA, 2 from China and 2 from the UK). Only 6 have been responded to. Reasons were not provided for why Vanuatu had not responded to the others. Most MLA requests received relate to the searching and seizing of evidence.

VFIU confirmed that it had never sent an MLA request, but had received 2 (one in 2009/2010 from Fiji) and another in 2012.

**(b) Observations on the implementation of the article**

449. The reviewing experts noted that 35 MLA requests have been received by Vanuatu, but only 6 had been responded to. The technical assistance needs requested by Vanuatu were highlighted, namely:

Other assistance - specific requests:

- 1) International cooperation record-keeping - system of filing incoming/ outgoing requests, legal basis, specific request, who is dealing with it (i.e. Police, FIU), timeline, information provided, reasons for refusing assistance, etc;
- 2) Development of extradition and mutual legal assistance templates that can be sent to States requesting Vanuatu's assistance, so that requesting States comply with all the necessary requirements of Vanuatu;
- 3) Easy to follow guidelines on how to deal with international cooperation requests for staff internally in the Government.

In light of the above, the experts deemed this to be a priority, as highlighted by Vanuatu itself.

**Article 46 Mutual legal assistance**

**Paragraph 2**

*2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

450. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Schedule of section 2 of the Interpretation Act, No. 9 of 1982

**Interpretation Act**

**PART 2 - MEANING OF CERTAIN EXPRESSIONS AND REFERENCES**

**Section 2. Interpretation of words and expressions**

The words and expressions in the Schedule shall have the meanings given to them.

**Schedule to Section 2.**

**INTERPRETATION OF WORDS AND EXPRESSIONS**

"person" includes any statutory body, company or association or body of persons corporate or unincorporate;

**(b) Observations on the implementation of the article**

451. The reviewing experts deemed the provision under review to have been legislatively implemented.

**Article 46 Mutual legal assistance**

**Paragraph 3**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

- (a) Taking evidence or statements from persons;*
- (b) Effecting service of judicial documents;*
- (c) Executing searches and seizures, and freezing;*
- (d) Examining objects and sites;*
- (e) Providing information, evidentiary items and expert evaluations;*
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;*
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*
- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*
- (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

(a) **Summary of information relevant to reviewing the implementation of the article**

452. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 1-2 and Parts 3, 4 and 7 of the Mutual Assistance in Criminal Matters Act  
Sections 1(3), 3, 17-20 and 22, SCHEME RELATING TO MUTUAL ASSISTANCE  
IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

**Mutual Assistance in Criminal Matters Act**

**1. Definitions**

In this Act, unless the contrary intention appears:

"authorised officer", for a provision of this Act, means a person, or a person in a class of persons, designated in writing by the Attorney General as an authorized officer for the provision;

"Counter Terrorism and Transnational Organised Crime Act" means the Counter Terrorism and Transnational Organised Crime Act [Cap. 313];

"Court" means the Supreme Court of Vanuatu;

"criminal matter" includes a matter (whether arising under Vanuatu law or a law of another country) relating to:

(a) the forfeiture or confiscation of property for an offence; or

(b) the restraining of dealings in property that may be forfeited or confiscated for an offence;

"document" means a record of information in any form, including:

(a) a written or printed thing (including a map, plan, graph or drawing);

(b) a computer file, including a record that is kept in electronic form and can be accessed in Vanuatu;

(c) a photograph;

(d) a disk, tape, film sound track or other thing in which sound or other data is embodied;

(e) a film, negative, tape or other thing in which a visual image is embodied;

"facsimile copy" means a copy obtained or sent by facsimile transmission;

"foreign forfeiture order" means an order, made under the law of a foreign country, for the forfeiture of property because of an offence against the law of that country;

"foreign law immunity certificate" means a certificate or a declaration:

(a) given or made by a foreign country or under a law of a foreign country; and

(b) stating that, under the law of the foreign country, persons generally or a specified person could or could not, either generally or in specified proceedings and either generally or in specified circumstances, be required:

(i) to answer a specified question; or

(ii) to produce a specified document;

"foreign pecuniary penalty order" means an order made under the law of a foreign country for a person to pay to the foreign country an amount representing the value (or part of the value) of what the person gained from an offence against the law of that country;

"foreign prisoner" means a person who is being held in custody pending trial or sentence for, or is under a sentence of imprisonment for, an offence against a law of a foreign country, but does not include a person who is at large after having escaped from lawful custody;

"foreign restraining order" means an order made under the law of a foreign country, about an offence against the law of that country, restraining a particular person, or all persons, from dealing with property;

"Foreign State" means:

(a) any country other than Vanuatu; and

(b) every constituent part of such country, including a territory, dependency or protectorate, which administers its own laws relating to international cooperation.

"forfeiture order" means a forfeiture order within the meaning of the Proceeds of Crime Act;

"pecuniary penalty order" has the same meaning as in the Proceeds of Crime Act;

"political offence" has the same meaning as in the Extradition Act [Cap. 287];

"prisoner" means a person who is being held in custody pending trial or sentence, or is under a sentence of imprisonment, for an offence against a law of Vanuatu, but does not include a person who is at large, having escaped from lawful custody;

"prison" includes a gaol, lock-up or other place of detention;

"proceeds of crime" has the same meaning as in the Proceeds of Crime Act;

"proceeding", for a criminal matter, includes a proceeding before a judicial officer or a jury:

(a) to gather evidence that may lead to a criminal charge being laid; or

(b) to assess evidence in support of a criminal charge;

"Proceeds of Crime Act" means the Proceeds of Crime Act [Cap. 284];

"property" has the same meaning as in the Proceeds of Crime Act;

"property-tracking document", in relation to an offence, means a document relevant to:

(a) identifying, locating or quantifying property of a person who committed the offence; or

(b) identifying or locating any document necessary for the transfer of property of a person who committed the offence; or

(c) identifying, locating or quantifying tainted property in relation to the offence; or

(d) identifying or locating any document necessary for the transfer of tainted property in relation to the offence;

"restraining order" has the same meaning as in the Proceeds of Crime Act;

"serious offence" means an offence:

(a) against a law of Vanuatu for which the maximum penalty is imprisonment for at least 12 months; or

(b) against a law of another country constituted by an act or omission that, had it occurred in Vanuatu, would have constituted an offence for which the maximum penalty is imprisonment for at least 12 months;

"tainted property" has the same meaning as in the Proceeds of Crime Act;

"trial", for an offence in a foreign country, includes a proceeding to determine whether a person should be convicted of the offence;

"video or internet link" means a system, including an internet connection, that lets persons assembled in a place see, hear and talk to persons assembled in another place.

## **Section 2. Objects of Act**

The objects of this Act are:

(a) to regulate the provision by Vanuatu of international assistance in criminal matters when a request is made by a foreign country for any of the following:

(i) the taking of evidence, or the production of a document or other article, for a proceeding in the foreign country;

- (ii) the issue of a search warrant and seizure of any thing relevant to a proceeding or investigation in the foreign country;
  - (iii) the forfeiture or confiscation of property for the commission of a serious offence against the law of the foreign country;
  - (iv) the restraining of dealings in property that may be forfeited or confiscated because of the commission of a serious offence against the law of the foreign country; and
- (b) to facilitate Vanuatu providing international assistance in criminal matters when a request is made by a foreign country to make arrangements for a person who is in Vanuatu to travel to the foreign country:
- (i) to give evidence in a proceeding; or
  - (ii) to give assistance for an investigation; and
  - (c) to facilitate Vanuatu obtaining similar international assistance in criminal matters.

### **PART 3 – ASSISTANCE WITH TAKING EVIDENCE AND PRODUCTION OF DOCUMENTS OR OTHER ARTICLES**

#### **11. Requests by Vanuatu for assistance with evidence**

- (1) The Attorney General may request the appropriate authority of a foreign country to arrange, for a proceeding or investigation in a criminal matter in Vanuatu, for:
- (a) evidence to be taken in the foreign country under the law of that country; or
  - (b) a document or other article in the foreign country to be produced under the law of that country.
- (2) When making a request under subsection (1), the Attorney General may also request that an opportunity be given for the person giving the evidence, or producing the document or other article, to be examined or cross-examined, through a video or internet link, from Vanuatu by:
- (a) a party to the proceeding, or the party's legal representative; or
  - (b) a person being investigated, or the person's legal representative.

#### **12. Requests by foreign countries for assistance with evidence**

- (1) If a foreign country (the "requesting country") asks that evidence be taken in Vanuatu for a proceeding or investigation in a criminal matter in the requesting country or another foreign country, the Attorney General may authorise:
- (a) the taking of the evidence; and
  - (b) the transmission of the evidence to the requesting country.
- (2) If a foreign country (the "requesting country") asks that a document or other article in Vanuatu be produced for a proceeding or investigation in a criminal matter in the requesting country or another foreign country, the Attorney General may authorise:
- (a) the production of the documents or articles; and
  - (b) their transmission to the requesting country.

#### **13. Taking evidence**

- (1) If the Attorney General authorises the taking of evidence under section 12, a Judge may take, on oath, the evidence of each witness in the matter, and the Judge who takes any such evidence must:
- (a) cause the evidence to be put in writing and certify that he or she took the evidence; and
  - (b) send the evidence and certificate to the Attorney General.
- (2) The evidence of such a witness may be taken in the presence or absence of the person to whom the proceeding in the requesting country relates or of his or her legal representative (if any).

(3) A certificate by a Judge under subsection (1)(a) or (2) must state whether, when the evidence was taken or the document produced, any of the following persons were present:

(a) the person to whom the proceeding in the requesting country relates or his or her legal representative (if any);

(b) any other person giving evidence or producing documents or other articles or his or her legal representative (if any).

#### **14. Production**

(1) If the Attorney General authorises the production of a document under section 12, a Judge:

(a) may require the document to be produced to him or her; and

(b) if it is produced, must send it, or a copy of it certified by the Judge to be a true copy, to the Attorney General.

(2) If the Attorney General authorises the production of an article (other than a document) under section 12, a Judge:

(a) may require it to be produced to him or her; and

(b) if the article is produced, must send it to the Attorney General.

#### **15. Conduct of proceedings**

(1) The Judge conducting a proceeding under section 13 or 14 may permit any of the following to have legal representation at the proceeding:

(a) the person to whom the proceeding in the requesting country relates; and

(b) any other person giving evidence or producing a document or other article at the proceeding before the Judge; and

(c) the relevant authority of the requesting country.

(2) If the requesting country has so requested, the Judge may permit examination or cross-examination, through a video or internet link from the requesting country, of any person giving evidence or producing a document or other article at the proceeding by:

(a) any person to whom the proceeding in the requesting country relates, or that person's legal representative; or

(b) the legal representative of the relevant authority of the requesting country.

#### **16. Exceptions to compulsion**

(1) The laws of Vanuatu about:

(a) compelling a person to attend before a Judge; and

(b) giving evidence, answering questions and producing documents or other articles; on the hearing of a charge against a person for an offence against the law of Vanuatu, apply, so far as they are capable of applying, to the compelling of a person under this Part:

(c) to attend before a Judge; and

(d) to give evidence, answer questions and produce documents or other articles.

(2) However, for this section, the person to whom the proceeding in the requesting country relates is competent, but not compellable, to give evidence.

(3) Also, for this section, the person is not compellable to answer a question or to produce a document or article if the person would not be compellable to do so in the requesting country or other foreign country to which the request relates.

#### **17. Foreign law immunity certificates**

A foreign law immunity certificate is admissible in proceedings under this section as evidence of the matters stated in the certificate.

#### **PART 4 – ASSISTANCE FOR SEARCH AND SEIZURE**

##### **18. Requests by Vanuatu for search and seizure**

(1) This section applies to a proceeding or investigation for a criminal matter involving a serious offence against the law of Vanuatu or in relation to terrorist property if the Attorney General believes, on reasonable grounds, that a thing relevant to the proceeding or investigation may be located in a foreign country.

(2) The Attorney General may request the appropriate authority of the foreign country to obtain a warrant or other instrument that, under the law of the foreign country, authorises:

(a) a search for a thing relevant to the proceeding or investigation; and

(b) if such a thing or any other thing that is or may be relevant to the proceeding or investigation is found as a result of the search — the seizure of that thing.

(3) A thing that:

(a) is relevant to the proceeding or investigation; and

(b) has been obtained by the appropriate authority of the foreign country by a process authorised by the law of that country other than the issue (as requested by Vanuatu) of a warrant or other instrument authorising the seizure of the thing; may be admissible in evidence in the proceeding or used in the investigation despite having been obtained otherwise than in accordance with the request.

##### **19. Requests by foreign countries for search and seizure**

(1) The Attorney General may direct an authorised officer to apply to the Court for a search warrant if:

(a) a proceeding or investigation for a criminal matter involving a serious offence has commenced in a foreign country or in relation to terrorist property; and

(b) the Attorney General believes, on reasonable grounds, that a thing relevant to the investigation or proceeding is located in Vanuatu; and

(c) the foreign country requests the Attorney General to arrange for the issue of a search warrant for that thing.

(2) The authorised officer may apply to the Court for the issue of a warrant to search land or premises in Vanuatu for a thing relevant to the proceeding or investigation.

(3) Having regard to the need for prompt action in seizing property that may be at risk of being destroyed or removed, the Court must make itself available to hear an application for a search warrant under this section at short notice.

##### **20. Search warrants**

(1) If an application is made under section 19 for a warrant for a thing relevant to an investigation or proceeding in a foreign country, the Court may issue the warrant authorising the authorised officer, with such assistance, and by such force, as is necessary and reasonable:

(a) to enter the land or premises; and

(b) to search the land or premises for that thing and to seize it.

(2) The Court may issue the warrant only if it is satisfied that:

(a) a proceeding or investigation for a criminal matter involving a serious offence or in relation to terrorist property has commenced in the foreign country; and

(b) the thing for which the warrant is applied is relevant to the investigation or proceeding; and

- (c) there are reasonable grounds for issuing the warrant.
- (3) A warrant issued under this section must include:
  - (a) a statement of the purpose for which the warrant is issued, including a reference to the nature of the relevant offence; and
  - (b) a description of the kind of thing authorised to be seized; and
  - (c) a time at which the warrant ceases to have effect; and
  - (d) a statement whether entry is authorised at any time or at specified times.

### **21. Seizing other things**

If, in the course of searching under a warrant issued under section 20 for a thing of a kind specified in the warrant, an authorised officer finds another thing, the warrant is taken to authorise the officer to seize the other thing if the officer believes, on reasonable grounds, the other thing:

- (a) to be relevant to the proceeding or investigation in the foreign country or to provide evidence about the commission of a criminal offence in Vanuatu; and
- (b) to be likely to be concealed, lost or destroyed if it is not seized.

### **22. Custody of things seized**

- (1) If an authorised officer seizes a thing under this Part, the authorised officer must deliver the thing into the custody and control of the Commissioner of Police.
- (2) If a thing is delivered into the custody and control of the Commissioner of Police under subsection (1), the Commissioner of Police must tell the Attorney General that the thing has been so delivered and arrange for the thing to be kept in safe custody.
- (3) The Attorney General may give to the Commissioner of Police a direction in writing (including a direction that the thing be sent to an authority of a foreign country) about how the thing is to be dealt with.

## **PART 7 - ASSISTANCE REGARDING PROCEEDS OF CRIME**

### **Division 1 - Requests by Vanuatu**

#### **38. Requests by Vanuatu for enforcement of orders**

- (1) The Attorney General may request an appropriate authority of a foreign country to make arrangements for the enforcement of:
  - (a) a forfeiture order in connection with a serious offence, made in Vanuatu under the Proceeds of Crime Act against property that is believed to be located in the foreign country; or
  - (ab) a forfeiture order in connection with terrorist property made in Vanuatu under the Counter Terrorism and Transnational Organised Crime Act; or
  - (b) a pecuniary penalty order in connection with a serious offence, made in Vanuatu, if some or all of the property available to satisfy the order is believed to be located in the foreign country; or
  - (c) a restraining order in connection with a serious offence, made in Vanuatu against property that is believed to be located in that foreign country.
- (2) The Attorney General may enter an arrangement with the foreign country to share with the country the amount forfeited under subsection (1)(a) or paid under subsection (1)(b).

#### **39. Requests for issue of orders in foreign countries**

If a proceeding or investigation has commenced in Vanuatu for a serious offence or in relation to terrorist property, the Attorney General may ask an appropriate authority of a

foreign country for the issue, in connection with the offence or terrorist property, of an instrument similar in nature to any of the following instruments under the Proceeds of Crime Act:

- (a) a search warrant for tainted property;
- (b) a restraining order;
- (c) a production order for a property-tracking document;
- (d) a search warrant for a property-tracking document.

## **Division 2 – Requests by foreign countries**

### **40. Requests by foreign countries for enforcement of orders**

(1) Subsection (2) applies if:

(a) a foreign country requests the Attorney General to make arrangements for the enforcement of:

(i) a foreign forfeiture order, in connection with a serious offence or terrorist property, against property that is believed to be located in Vanuatu; or

(ii) a foreign pecuniary penalty order, in connection with a serious offence, if some or all of the property available to satisfy the order is believed to be located in Vanuatu; and

(b) the Attorney General is satisfied that:

a person has been convicted of the offence; and

(ii) the conviction and the order are not subject to further appeal in the foreign country.

(2) The Attorney General may apply for the registration of the order in the Court.

(3) If a foreign country requests the Attorney General to make arrangements for the enforcement of a foreign restraining order, in connection with a serious offence or terrorist property, against property that is believed to be located in Vanuatu, the Attorney General may apply for the registration of the order in the Court.

### **41. Registration of foreign orders**

If the Attorney General applies to the Court for registration of a foreign order under section 40, the Court must register the order accordingly.

### **42. Effect of registration**

(1) A foreign forfeiture order registered in the Court under section 41 has effect, and may be enforced, as if it were a forfeiture order made by the Court under the Proceeds of Crime Act or the Counter Terrorism and Transnational Organised Crime Act at the time of registration.

(2) A foreign pecuniary penalty order registered in the Court under section 41 has effect, and may be enforced, as if it were a pecuniary penalty order made by the Court under the Proceeds of Crime Act at the time of registration and requiring the payment to the State of the amount payable under the order.

(3) The Attorney General may enter an arrangement with a foreign country to share with that country the amount forfeited under subsection (1) or paid under subsection (2).

(4) A foreign restraining order registered in the Court under section 41 has effect, and may be enforced, as if it were a restraining order made by the Court under the Proceeds of Crime Act at the time of registration.

### **43. Amendments of orders**

If a foreign pecuniary penalty order or a foreign restraining order is registered in the Court under section 41:

(a) a copy of any amendments to the order (whether before or after registration) may be registered in the same way as the order; and

(b) the amendments do not, for this Act and the Proceeds of Crime Act, have effect until they are registered.

#### **44. How an order is registered**

(1) An order or an amendment of an order may be registered in the Court by registering a copy of:

(a) the appropriate order or amendment sealed by the Court or other authority that made the order or amendment; or

(b) the order or amendment authenticated under section 61(2).

(2) A facsimile copy of a sealed or authenticated copy of an order or an amendment of an order is to be treated as if it were a sealed or authenticated copy.

(3) However, registration effected by facsimile copy ceases to have effect at the end of 21 days unless a sealed or authenticated copy of the order has been registered by then.

#### **45. Cancellation of registration**

(1) The Attorney General may apply to the Court for cancellation of the registration of a foreign pecuniary penalty order or a foreign restraining order that has been registered in the Court.

(2) If the Attorney General applies to the Court for cancellation of a registration under subsection (1), the Court must cancel the registration accordingly.

#### **46. Requests for search and seizure warrants for tainted property**

The Attorney General may direct an authorised officer to apply to the Court under the Proceeds of Crime Act for a search warrant for property if:

(a) a proceeding or investigation has commenced in a foreign country for a serious offence or terrorist property; and

(b) the Attorney General believes, on reasonable grounds, that tainted property or terrorist property for the offence is located in Vanuatu; and

(c) the foreign country requests the Attorney General to obtain the issue of a search warrant for the property.

#### **47. Requests for restraining orders**

The Attorney General may apply to the Court for a restraining order under the Proceeds of Crime Act against property connected with a serious offence or terrorist property if:

(a) a proceeding has commenced, or the Attorney General believes, on reasonable grounds, that a proceeding is about to commence, in a foreign country for the offence; and

(b) the Attorney General believes, on reasonable grounds, that property that may be made or is about to be made the subject of a foreign restraining order is located in Vanuatu; and

(c) the foreign country requests the Attorney General to obtain the issue of a restraining order against the property.

#### **48. Requests for information gathering orders**

(1) Subsection (2) applies if:

(a) a proceeding or investigation has commenced in a foreign country for a serious offence or terrorist property; and

(b) any document of the type described in section 79(1) or (2) of the Proceeds of Crime Act connected with the offence is reasonably believed to be located in Vanuatu; and

(c) the foreign country requests the Attorney General to obtain the issue of:

(i) an order requiring the documents to be produced or made available for inspection under the law of Vanuatu; or

(ii) a search warrant for obtaining the documents.

(2) The Attorney General may direct an authorised officer to apply to the Court for:

(a) a production order under the Proceeds of Crime Act in connection with the offence to obtain possession of the property-tracking document; or

(b) a search warrant under that Act for obtaining the documents.

## **SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH**

1. (3) Assistance in criminal matters under this Scheme includes assistance in

a) identifying and locating persons;

b) serving documents;

c) examining witnesses;

d) search and seizure;

e) obtaining evidence;

f) facilitating the personal appearance of witnesses;

g) effecting a temporary transfer of persons in custody to appear as a witness;

h) obtaining production of judicial or official records;

i) tracing, seizing and confiscating the proceeds or instrumentalities of crime; and

j) preserving computer data.

## **CRIMINAL MATTER**

3. (1) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted.

(2) "Offence", in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof.

(3) "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order

(a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been

(i) derived or obtained, whether directly or indirectly, from; or

(ii) used in, or in connection with, the commission of an offence;

(b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or

(c) imposing a pecuniary penalty calculated by reference to the value of any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii).

## **IDENTIFYING AND LOCATING PERSONS**

16. (1) A request under this Scheme may seek assistance in identifying or locating persons believed to be within the requested country.

(2) The request shall indicate the purpose for which the information is requested and shall contain such information as is available to the Central Authority of the requesting

country as to the whereabouts of the person concerned and such other information as it possesses as may facilitate the identification of that person.

### **SERVICE OF DOCUMENTS**

17. (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.

(2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(3) The Central Authority of the requested country shall endeavour to have the documents served:

(a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or

(b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.

(4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

(5) A person served in compliance with a request with a summons to appear as a witness in the requesting country and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country notwithstanding any contrary statement in the summons.

### **EXAMINATION OF WITNESSES**

18. (1) A request under this Scheme may seek assistance in the examination of witnesses in the requested country.

(2) The request shall specify, as appropriate and so far as the circumstances of the case permit:

(a) the names and addresses or the official designations of the witnesses to be examined;

(b) the questions to be put to the witnesses or the subject matter about which they are to be examined;

(c) whether it is desired that the witnesses be examined orally or in writing;

(d) whether it is desired that the oath be administered to the witnesses (or, as the law of the requested country allows, that they be required to make their solemn affirmation);

(e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and

(f) any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country.

(3) The request may ask that, so far as the law of the requested country permits, the accused person or his legal representative may attend the examination of the witness and ask questions of the witness.

### **SEARCH AND SEIZURE**

19. (1) A request under this Scheme may seek assistance in the search for, and seizure of property or computer data in the requested country.

(2) The request shall specify the property or computer data to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required to be adduced in an

application under the law of the requested country for any necessary warrant or authorization to effect the search and seizure.

(3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property or computer data seized.

#### **OTHER ASSISTANCE IN OBTAINING EVIDENCE**

20. (1) A request under this Scheme may seek other assistance in obtaining evidence.

(2) The request shall specify, as appropriate and so far as the circumstance of the case permit:

(a) the documents, records, property or computer data to be inspected, preserved, photographed, copied or transmitted;

(b) the samples of any property or computer data to be taken, examined or transmitted; and

(c) the site to be viewed or photographed.

#### **PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS**

22. (1) A request under this Scheme may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.

(2) For the purposes of this paragraph "judicial records" means judgements, orders and decisions of courts and other documents held by judicial authorities and "official records" means documents held by government departments or agencies or prosecution authorities.

(3) The requested country shall provide copies of judicial or official records which are publicly available.

(4) The requested country may provide copies of judicial or official records not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

453. State Law confirmed that there had been no proceeds of crime-related MLA request (incoming/outgoing).

#### **(b) Observations on the implementation of the article**

454. During the country visit, it was confirmed that Part 3, sections 11(1)(a) and 12(1)(a), of MACMA would cover the examining of objects and sites. "Document", as defined in the MACMA, also includes "relevant documents and records, including government, bank, financial, corporate or business records".

455. It was noted that Part 7 of the MLA Act covers "assistance regarding proceeds of crime". To the extent that this covers the provisions of UNCAC Chapter V (asset recovery), this Part could be deemed applicable. However, the reviewing experts were of the view this was *prima facie* restricted and does not fully cover UNCAC Chapter V. However, the next cycle of the Implementation Review Mechanism will focus on this Chapter and thus the extent of such coverage.

## Article 46 Mutual legal assistance

### Paragraph 4

*4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.*

#### (a) Summary of information relevant to reviewing the implementation of the article

456. Vanuatu indicated that it has partially implemented the provision under review and noted that Vanuatu requires an MLA request before transmitting information.

#### (b) Observations on the implementation of the article

457. The reviewing experts noted that Vanuatu may wish to allow for information to be transmitted to another State where such information may assist.

## Article 46 Mutual legal assistance

### Paragraphs 5 - 7

*5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

*6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.*

*7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.*

#### (a) Observations on the implementation of the article

458. During the country visit, it was confirmed that it would not be an issue to comply with a MLA request where the said information is to remain confidential/ temporarily/ with restrictions in its use. However, no such request has been entertained by Vanuatu, to date.

## **Article 46 Mutual legal assistance**

### **Paragraph 8**

*8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

459. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Part 4 of the Mutual Assistance in Criminal Matters Act (sections 18-22, cited above)  
Section 44 of the Proceeds of Crime Act, No. 30 of 2005  
Sections 13D and 14, Financial Transactions Reporting Act, No. 28 of 2005

#### **Proceeds of Crime Act**

#### **Division 2 - Search for and seizure of tainted property in relation to foreign offences or terrorist property**

#### **44. Application of this Division**

(1) If, under section 19 of the Mutual Assistance Act, an authorised officer is directed to apply to the Court for a search warrant for tainted property in relation to a foreign serious offence or for terrorist property, this Division applies to:

- (a) the application; and
- (b) any warrant issued as a result of the application.

(2) In this Division:

- (a) references to tainted property are taken to be references to tainted property in relation to a foreign serious offence; and
- (b) references to an offence are taken to be references to a foreign serious offence.

#### **Financial Transactions Reporting Act**

#### **13D. Power to examine**

(1) A member of the Unit or any person authorised in writing by the Attorney General may examine the records and inquire into the business and affairs of any financial institution for the purpose of ensuring compliance by the financial institution with Parts 2, 2A and 3.

(2) Without limiting subsection (1), the member or authorised person may do all or any of the following:

- (a) at any reasonable time, enter any premises, in which the member or authorised person believes, on reasonable grounds, that there are records relevant to ensuring compliance by a financial institution with Part 2, 2A or 3;
- (b) use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system;
- (c) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other intelligible output and remove the printout or other output for examination or copying;
- (d) use or cause to be used any copying equipment in the premises to make copies of any record.

(3) The owner or occupier of premises referred to in subsection (1) and any person found there:

- (a) must give the member or authorised person all reasonable assistance to enable him or her to carry out his or her duties; and
- (b) must provide the member or authorised person with any information that he or she may reasonably require for that purpose.
- (4) The Unit may transmit any information from, or derived from, such examination to an assisting entity if the Unit has reasonable grounds to suspect that the information is or may be relevant to:
  - (a) the detection, investigation or prosecution of a person for a money laundering offence, a financing of terrorism offence or any other serious offence; or
  - (b) the commission of a money laundering offence, a financing of terrorism offence or any other serious offence; or
  - (c) an act preparatory to a financing of terrorism offence; or
  - (d) the enforcement of this Act, the Proceeds of Crime Act [Cap. 284] or any other Act prescribed by the regulations.
- (5) If a person:
  - (a) obstructs or hinders or fails to cooperate with the member or any authorised person in the lawful exercise of the powers under subsection (1); or
  - (b) does not comply with subsection (3);
 the person is guilty of an offence and is punishable on conviction:
  - (i) in the case of an individual - by a fine not exceeding VT 2.5 million or imprisonment for a term not exceeding 2 years, or both; or
  - (ii) in the case of a body corporate - by a fine not exceeding VT 10 million.

#### **14. Search warrants**

- (1) A member of the Unit may apply to a judge of the Supreme Court for a warrant:
  - a) to enter premises belonging to, or in the possession or control of, a financial institution or any officer or employee of the institution; and
  - b) to search the premises and remove any document, material or thing on the premises.
- (2) The judge must grant the application if he or she is satisfied that there are reasonable grounds for believing that:
  - a) the financial institution has failed to make a report under Part 2 or 2A or keep a record under Part 3; or
  - b) an officer or employee of a financial institution is committing, has committed or is about to commit a financing of terrorism or a money laundering offence.

460. State Law confirmed that bank secrecy has been lifted through orders from the Supreme Court.

#### **(b) Observations on the implementation of the article**

461. The reviewing experts noted the information provided for above and it was confirmed during the country visit that bank secrecy has been lifted because of Supreme Court orders.

462. Section 13D of FTRA on the power to examine records and inquire into the business and affairs of any financial institution is limited to Parts 2 (obligation to report suspicious transactions), 2A (financial transactions reporting) and 3 (obligations to keep records and verify identity). Section 14 addresses the application of a Supreme Court warrant, also where there may be a financing of terrorism or money laundering offence. UNCAC article 46(8) is broader than this. Despite the confirmation that bank secrecy has

been lifted by Supreme Court orders, such a decision is at the discretion of the judge(s). For this reason, the reviewing experts recommended that Vanuatu adopting a legislative provision that ensures that MLA cannot be declined on the ground of bank secrecy (beyond money laundering offences).

## **Article 46 Mutual legal assistance**

### **Paragraph 9**

*(a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;*

*(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;*

*(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

463. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Vanuatu requires dual criminality under Parts 4 (ASSISTANCE FOR SEARCH AND SEIZURE) and 7 (ASSISTANCE REGARDING PROCEEDS OF CRIME), noting that a "serious offence" is defined in section 1 that provides for dual criminality (b) -

"serious offence" means an offence:

(a) against a law of Vanuatu for which the maximum penalty is imprisonment for at least 12 months; or

(b) against a law of another country constituted by an act or omission that, had it occurred in Vanuatu, would have constituted an offence for which the maximum penalty is imprisonment for at least 12 months;

Section 2 also on "Objects of Act" provides -

The objects of this Act are:

(a) to regulate the provision by Vanuatu of international assistance in criminal matters when a request is made by a foreign country for any of the following:

...

(iii) the forfeiture or confiscation of property for the commission of a serious offence against the law of the foreign country;

(iv) the restraining of dealings in property that may be forfeited or confiscated because of the commission of a serious offence against the law of the foreign country;

...

However, for the other Parts of the Act, Vanuatu does arguably not require dual criminality. No requests have been received or have been sent dealing with a Part other than those above, requiring dual criminality.

## **Mutual Assistance in Criminal Matters Act**

(Sections 5-7, cited above)

### **8. Refusal of assistance generally**

A request by a foreign country for assistance under this Act must be refused if, in the opinion of the Attorney General:

- (a) the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, a political offence; or
- (b) there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for a political offence; or
- (c) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions; or
- (d) the granting of the request would prejudice the sovereignty, security or national interest of Vanuatu; or
- (e) the request relates to the prosecution of a person for an offence if, for that offence or another offence constituted by the same act or omission as that offence, the person:
  - (i) has been acquitted or pardoned by a competent tribunal or authority in the foreign country; or
  - (ii) has undergone the punishment provided by the law of that country.

### **9. Refusal of assistance— death penalty**

(1) A request by a foreign country for assistance under this Act may be refused if:

- (a) it relates to the prosecution or punishment of a person charged with, or convicted of, an offence for which the death penalty may be imposed in the foreign country; and
- (b) the Attorney General is not of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

(2) A request by a foreign country for assistance under this Act may be refused if the Attorney General:

- (a) believes that the provision of the assistance may result in the death penalty being imposed on a person; and
- (b) after taking into consideration the interests of international criminal cooperation, is of the opinion that in the circumstances of the case the request should not be granted.

### **10. Refusal of assistance— Attorney General's discretion**

A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney General:

- (a) the request relates to the prosecution or punishment of a person for an act or omission that, if it had occurred in Vanuatu, would not have constituted an offence against Vanuatu law; or
- (b) the request relates to the prosecution or punishment of a person:
  - (i) for an act or omission that occurred, or is alleged to have occurred, outside the foreign country; and
  - (ii) if a similar act or omission occurring outside Vanuatu in similar circumstances would not have constituted an offence against Vanuatu law; or
- (c) the request relates to the prosecution or punishment of a person for an act or omission and the person responsible could no longer be prosecuted by reason of lapse of time or any other reason if:
  - (i) it had occurred in Vanuatu at the same time; and

- (ii) it had constituted an offence against Vanuatu law; or
- (d) the provision of the assistance could prejudice an investigation or proceeding for a criminal matter in Vanuatu; or
- (e) the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in or outside Vanuatu); or
- (f) the provision of the assistance would result in manifest unfairness or a denial of human rights; or
- (g) the provision of the assistance would impose an excessive burden on the resources of Vanuatu; or
- (h) it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted.

**(b) Observations on the implementation of the article**

464. It was noted that Vanuatu requires dual criminality under Parts 4 (ASSISTANCE FOR SEARCH AND SEIZURE) and 7 (ASSISTANCE REGARDING PROCEEDS OF CRIME), but not for other Parts of MACMA. The principle of reciprocity was deemed to be applicable to other Parts of the Act.
465. During the country visit, it was provided that the principle of dual criminality was upheld by the Supreme Court in relation to Part 4 of MACMA (*Matter concerning Partners of PKF*, 2008).

**Article 46 Mutual legal assistance**

**Paragraphs 10 and 11**

*10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:*

*(a) The person freely gives his or her informed consent;*

*(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

*11. For the purposes of paragraph 10 of this article:*

*(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;*

*(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*

*(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*

*(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

**(a) Summary of information relevant to reviewing the implementation of the article**

466. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Part 5 of the Mutual Assistance in Criminal Matters Act  
Sections 25-27, SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

**Mutual Assistance in Criminal Matters Act  
PART 5 - ARRANGEMENTS FOR PERSONS TO GIVE EVIDENCE OR ASSIST INVESTIGATIONS**

**Division 1 - Requests by Vanuatu**

**23. Requests for removal of certain persons to Vanuatu**

(1) The Attorney General may request a foreign country to authorise the attendance at a hearing, for a proceeding that has commenced in Vanuatu, of a person who is in the foreign country if:

- (a) the proceeding relates to a criminal matter; and
- (b) the Attorney General is of the opinion that the person:
  - (i) is a foreign prisoner; and
  - (ii) is capable of giving evidence relevant to the proceeding; and
  - (iii) has consented to being removed to Vanuatu to give evidence in the proceeding.

(2) The Attorney General may request a foreign country to authorise the removal of a person who is in the foreign country to Vanuatu to give assistance in an investigation that has commenced in Vanuatu if:

- (a) the investigation relates to a criminal matter; and
- (b) the Attorney General is of the opinion that the person:
  - (i) is a foreign prisoner; and
  - (ii) is capable of giving assistance in the investigation; and
  - (iii) has consented to being removed to Vanuatu to give assistance in the investigation.

(3) If the Attorney General makes a request under subsection (1) or (2), the Attorney General may arrange with an appropriate authority of the foreign country for:

- (a) the removal of the person to Vanuatu; and
- (b) the custody of the person while in Vanuatu; and
- (c) the return of the person to the foreign country; and
- (d) other relevant matters.

**24. Custody of certain persons**

(1) This section applies:

- (a) to a person who is to be brought to Vanuatu from a foreign country in response to a request under section 23; and
- (b) if the foreign country requests that the person be kept in custody while he or she is in Vanuatu.

(2) The person must be kept in such custody as the Attorney General directs in writing while the person is in Vanuatu, or travelling to or from Vanuatu, under the request.

## **25. Immunities**

(1) If a person is in Vanuatu:

(a) because of a request under section 23; or

(b) to give evidence in a proceeding, or to give assistance in an investigation, because of a request made by or for the Attorney General (except a request under section 23) for international assistance in a criminal matter; the person must not:

(c) be detained, prosecuted or punished in Vanuatu for any offence committed, or alleged to have been committed, before he or she left the foreign country in response to the request; or

(d) be subjected to any civil suit for any act or omission of the person that occurred, or is alleged to have occurred, before he or she left the foreign country under the request, being a civil suit to which the person could not be subjected if the person were not in Vanuatu; or

(e) be required to give evidence in any proceeding in Vanuatu other than any proceeding to which the request relates; or

(f) be required, in any proceeding to which the request relates, to answer any question that the person would not be required to answer in a proceeding relating to a criminal matter in the foreign country; or

(g) be required, in any proceeding to which the request relates, to produce any document or article that the person would not be required to produce in a proceeding in the foreign country relating to a criminal matter.

(2) A foreign law immunity certificate is admissible in proceedings as evidence of the matters stated in the certificate.

(3) Subsection (1) ceases to apply to a person if:

(a) the person has left Vanuatu; or

(b) the person has had the opportunity of leaving Vanuatu and has remained in Vanuatu otherwise than:

(i) for the purpose to which the request relates; or

(ii) to give evidence in a proceeding in Vanuatu certified by the Attorney General, in writing, to be a proceeding in which it is desirable that the person give evidence; or

(iii) to give assistance in an investigation in Vanuatu certified by the Attorney General, in writing, to be an investigation in which it is desirable that the person give assistance.

(4) A certificate given by the Attorney General for subsection (3)(b)(ii) or (3)(b)(iii) has effect from the day specified in it (which may be a day before the day on which the certificate is given).

## **26. Status of person prosecuted for offence committed after leaving foreign country**

(1) This section applies to a person who has come to Vanuatu in response to a request under section 23.

(2) The person is taken, for this Act, to be in Vanuatu because of the request during any period when he or she remains in Vanuatu to be tried for a criminal offence against the law of Vanuatu that he or she is alleged to have committed after he or she left the foreign country.

(3) Without limiting subsection (2), the person must be kept in such custody as the Attorney General directs under section 24.

## **27. Limitation on use of evidence given by certain persons**

(1) This section applies to a person who is in Vanuatu to give evidence in a proceeding or assistance in an investigation:

- (a) either:
- (i) because of a request under section 23; or
  - (ii) because of a request (other than a request under that subsection) made by the Attorney General for international assistance in a criminal matter; and
- (b) if the person has given the evidence or assistance in the proceeding to which the request related or in a proceeding certified by the Attorney General, in writing, to be a proceeding in which it is desirable that the person give evidence.
- (2) The evidence must not be admitted or otherwise used in a prosecution of the person for an offence against Vanuatu law, other than for perjury in giving that evidence.
- (3) Anything the person says or does when giving the assistance is not to be admitted or otherwise used in any prosecution of the person for an offence against Vanuatu law.

### **28. Conditions of imprisonment**

For a person who is in Vanuatu because of a request under section 23 and who has been committed to prison in Vanuatu under a direction of the Attorney General under section 24, the laws of Vanuatu about the following matters apply (so far as they are capable of application):

- (a) the conditions of imprisonment of persons imprisoned for offences against Vanuatu law; and
- (b) the treatment of the persons during imprisonment; and
- (c) the transfer of the persons from prison to prison.

### **29. Release of certain persons upon request by foreign country**

The Attorney General must direct that a person be released from custody if:

- (a) the person is being held in custody under a direction of the Attorney General under section 24; and
- (b) the foreign country from which the person has been brought requests the release of the person from custody.

### **30. Arrest of person who has escaped from custody**

- (1) Any police officer may arrest a person without warrant if the Attorney General believes, on reasonable grounds, that the person:
- (a) has been brought to Vanuatu in response to a request under section 23; and
  - (b) has escaped from lawful custody while in Vanuatu because of the request.
- (2) The police officer must take the person before the Court as soon as practicable.
- (3) If the Court is satisfied that the person has escaped from lawful custody, the Court may issue a warrant authorising any police officer to return the person to lawful custody.

## **Division 2 - Requests by foreign countries**

### **31. Requests for assistance by foreign countries**

This Division applies if:

- (a) a proceeding or an investigation about a criminal matter has commenced in a foreign country; and
- (b) the foreign country requests the removal of a prisoner who is in Vanuatu (whether or not in custody) to the foreign country to attend at the proceeding or to assist in the investigation; and
- (c) the Attorney General believes, on reasonable grounds, that the prisoner is capable of giving evidence relevant to the proceeding or assistance relevant to the investigation; and

- (d) the Attorney General is satisfied that:
- (i) the prisoner has consented to giving evidence or assistance in the foreign country; and
  - (ii) the foreign country has given adequate (whether or not unqualified) undertakings about the matters mentioned in section 33.

### **32. Travel of prisoner or person**

- (1) If the prisoner is being held in custody, the Attorney General may:
- (a) direct that the prisoner be released from prison to travel to the foreign country to give evidence at the proceeding or assistance in the investigation; and
  - (b) subject to the making or giving of any necessary directions or approvals for the release of the prisoner - arrange for the prisoner to travel to the foreign country in the custody of a police or prison officer appointed by the Attorney General for the purpose.
- (2) If the prisoner has been released from custody on a parole or other order or licence to be at large, the Attorney General may:
- (a) approve the travel of the prisoner to the foreign country to give evidence or assistance and obtain any necessary approvals, authorities, permissions or variations to the order or licence; and
  - (b) subject to obtaining the approvals, authorities, permissions or variations, arrange for the prisoner to travel to the foreign country.
- (3) The Attorney General may arrange for a person (other than a prisoner) who is in Vanuatu to travel to a foreign country if:
- (a) a proceeding or an investigation about a criminal matter has commenced in the foreign country; and
  - (b) the foreign country requests that the person travel to the foreign country to give evidence at the proceeding or assistance at the investigation; and
  - (c) the Attorney General believes, on reasonable grounds, that the person is capable of giving evidence relevant to the proceeding or assistance relevant to the investigation; and
  - (d) the Attorney General is satisfied that:
    - (i) the person has consented to travel to the foreign country to give evidence or assistance; and
    - (ii) the foreign country has given adequate (whether or not unqualified) undertakings about the matters mentioned in section 33.

### **33. Undertakings to be given**

- (1) For sections 31(d)(ii) and 32(3)(d)(ii), this section sets out the matters about which undertakings are to be given.
- (2) The person will not:
- (a) be detained, prosecuted or punished for an offence against the law of the foreign country committed, or alleged to have been committed, before the person's departure from Vanuatu; or
  - (b) be subjected to civil suit for an act or omission of the person that occurred, or is alleged to have occurred, before the person's departure from Vanuatu, being a civil suit to which the person could not be subjected if the person were not in the foreign country; or
  - (c) be required to give evidence in a proceeding in the foreign country other than the proceeding to which the request relates; unless:
  - (d) the person has left the foreign country; or

(e) the person has had the opportunity of leaving the foreign country and has remained in that country for a purpose other than giving evidence in the proceeding to which the request relates.

(3) Evidence given by the person in the proceeding to which the request relates will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against a law of the foreign country other than for perjury in giving that evidence.

(4) The person will be returned to Vanuatu under arrangements agreed by the Attorney General.

(5) If the person is being held in custody in Vanuatu and the Attorney General requests the foreign country to make arrangements to keep the person in custody while the person is in the foreign country:

(a) appropriate arrangements will be made for that purpose; and

(b) the person will not be released from custody in the foreign country unless the Attorney General notifies an appropriate authority of the foreign country that the person is entitled to be released from custody under Vanuatu law; and

(c) if the person is released in the foreign country after notice by the Attorney General under paragraph (b) - the foreign country will pay for the person's accommodation and expenses pending the completion of the proceeding to which the request relates.

(6) The Attorney General may require undertakings about any other matters that he or she thinks appropriate.

#### **34. Effect of removal to foreign country on prisoner's term of imprisonment**

(1) This section applies to a prisoner who:

(a) is serving a term of imprisonment for an offence against a law of Vanuatu; and

(b) is released from a prison because of a request by a foreign country under section 31.

(2) The prisoner is taken, while in custody because of the request (including custody outside Vanuatu), to be continuing to serve the term of imprisonment.

### **SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH**

#### **PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY**

25. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required; and

(c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.

(3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and

(a) ask whether they agree to appear;

(b) inform the Central Authority of the requesting country of their answer; and

(c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

(4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

## **PERSONAL APPEARANCE OF PERSONS IN CUSTODY**

26. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify:

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required.

(3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.

(4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.

(5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

(6) Where persons in custody are transferred, the requested country shall notify the requesting country of:

(a) the dates upon which the persons are due under the law of the requested country to be released from custody; and

(b) the dates by which the requested country requires the return of the persons and shall notify any variations in such dates.

(7) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub-paragraph (6).

(8) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.

(9) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.

(10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agreed.

## **IMMUNITY OF PERSONS APPEARING**

27. (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.

(2) The immunity provided for in that paragraph shall cease:

(a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it;

(b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

**(b) Observations on the implementation of the article**

467. The reviewing experts deemed the provision under review to have been legislatively implemented.

**Article 46 Mutual legal assistance**

**Paragraph 12**

*12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

**(a) Summary of information relevant to reviewing the implementation of the article**

468. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 25(1) of the Mutual Assistance on Criminal Matters Act (cited above)

**(b) Observations on the implementation of the article**

469. Section 25 of MACMA covers if a person is in Vanuatu. The reviewing experts recommended that Vanuatu require that a detained person who is to be transferred overseas not be prosecuted, detained, punished or subjected to any other restrictions of his/her personal liberty in that country in respect of acts, omissions or convictions prior to his/her departure.

**Article 46 Mutual legal assistance**

**Paragraph 13**

*13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent Authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances,*

*where the States Parties agree, through the International Criminal Police Organization, if possible.*

**(a) Summary of information relevant to reviewing the implementation of the article**

470. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

The Attorney General deals with MLA requests, thus as the central authority. However, an instrument to this effect has not been deposited, to date.

Sections 5-7 of the Mutual Assistance in Criminal Matters Act (cited above)

471. As noted above, State Law deals with MLA on behalf of the Attorney-General.

**(b) Observations on the implementation of the article**

472. The reviewing experts recommended that the Secretary-General of the United Nations be notified of Vanuatu's MLA central authority.

**Article 46 Mutual legal assistance**

**Paragraph 14**

*14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.*

**(a) Summary of information relevant to reviewing the implementation of the article**

473. Vanuatu indicated that it has not implemented the provision under review and noted that in practice, English is the language used for MLA requests.

**(b) Observations on the implementation of the article**

474. The reviewing experts recommended that the Secretary-General of the United Nations be notified that Vanuatu accepts MLA requests in English. Vanuatu may also wish to consider accepting oral requests in urgent circumstances with a written request forthcoming.

## Article 46 Mutual legal assistance

### Paragraphs 15 and 16

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

#### (a) Summary of information relevant to reviewing the implementation of the article

475. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Section 6 of the Mutual Assistance in Criminal Matters Act (cited above)  
Section 14, SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

#### **SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH CONTENTS REQUEST FOR ASSISTANCE**

14. (1) Except in the case of a request for the preservation of computer data under Article 1 (3) (j) of this Scheme, a request under the Scheme shall:

- (a) specify the nature of the assistance requested;
- (b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;
- (c) indicate any time-limit within which compliance with the request is desired, stating reasons;
- (d) contain the following information:
  - (i) the identity of the agency or authority initiating the request;
  - (ii) the nature of the criminal matter; and
  - (iii) whether or not criminal proceedings have been instituted.
- (e) where criminal proceedings have been instituted, contain the following information:
  - (i) the court exercising jurisdiction in the proceedings;
  - (ii) the identity of the accused person;
  - (iii) the offences of which he stands accused, and a summary of the facts;
  - (iv) the stage reached in the proceedings; and

- (v) any date fixed for further stages in the proceedings.
- (f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts.
- (2) A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.

**(b) Observations on the implementation of the article**

476. The reviewing experts deemed the provision to have been legislatively implemented.

**Article 46 Mutual legal assistance**

**Paragraph 17**

*17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.*

**(a) Summary of information relevant to reviewing the implementation of the article**

477. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 5 -7 of the Mutual Assistance in Criminal Matters Act (cited above)

**(b) Observations on the implementation of the article**

478. The reviewing experts noted the discretion given to the Attorney General and it was confirmed that no internal procedures are in place for guiding such discretion. The experts recommended that Vanuatu consider developing internal procedures to guide the manner in which such discretion, as well as “any conditions” (i.e. section 7, MLA Act) that are to be followed by the Attorney General.

**Article 46 Mutual legal assistance**

**Paragraph 18**

*18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

479. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 15 (cited above) and 55 of the Mutual Assistance in Criminal Matters Act

## **Mutual Assistance in Criminal Matters Act**

### **55. Form of testimony**

(1) The testimony may be recorded in any of the following ways:

- (a) in writing;
- (b) on audio tape;
- (c) on video tape.

(2) The testimony need not:

- (a) be in the form of an affidavit; or
- (b) constitute a transcript of a proceeding in a foreign court.

(3) The testimony must be endorsed with, or be accompanied by, a certificate to the effect that:

- (a) it is an accurate record of the evidence given; and
- (b) it was taken in the manner required by section 54.

(4) The certificate must:

- (a) purport to be signed or certified by a judge, magistrate or court officer of the foreign country to which the request was made; and
- (b) purport to bear an official or public seal of:
  - (i) the country; or
  - (ii) an authority of the country responsible for matters relating to justice (that is, a Minister of State, a Ministry or Department of Government, or an officer of the Government).

480. State Law confirmed that evidence could be taken by video conference, but this has not been done, to date (however, it has been considered).

### **(b) Observations on the implementation of the article**

481. The reviewing experts noted that Vanuatu may wish to consider the possibility of conducted hearings by a judicial authority of the requesting State party that is also attended by a judicial authority of Vanuatu.

## **Article 46 Mutual legal assistance**

### **Paragraph 19**

*19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

482. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 62 and 63 of the Mutual Assistance in Criminal Matters Act  
Section 12, SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL  
MATTERS WITHIN THE COMMONWEALTH

**Mutual Assistance in Criminal Matters Act**

**62. Restriction on use of information etc.**

(1) Any material (whether it is evidence, a document, an article or a thing) that is sent to Vanuatu by a foreign country:

(a) because of a request made by the Attorney General under this Act; and

(b) for a proceeding or investigation in a criminal matter;

is not to be used intentionally for any other purpose without the approval of the Attorney General.

(2) The material is inadmissible in evidence in any proceeding other than the proceeding for which it was obtained unless the Attorney General approves its use for that other proceeding.

(3) Any information, document, article or thing obtained directly or indirectly from a person by making use of the material:

(a) otherwise than for the proceeding or investigation for which it was obtained; and

(b) without the approval of the Attorney General;

is inadmissible in evidence in any other proceeding and may not be used for any other investigation.

(4) A person who contravenes subsection (1) or (3) is guilty of an offence punishable by:

(a) if the person is a natural person - a fine not exceeding VT 1,200,000 or imprisonment for not more than 2 years, or both; or

(b) if the person is a body corporate - a fine not exceeding VT 6,000,000.

(5) For this section, disclosure of any material is taken to be a use of that material.

**63. Requests for international assistance not to be disclosed**

(1) Subsection (2) applies to a person who, because of his or her office or employment, has knowledge of:

(a) the contents of a request for international assistance made by a foreign country to Vanuatu under this Act; or

(b) the fact that such a request has been made; or

(c) the fact that such a request has been granted or refused.

(2) The person must not intentionally disclose those contents or that fact unless:

(a) it is necessary to do so in the performance of his or her duties; or

(b) the Attorney General has given his or her approval to the disclosure of those contents or that fact.

(3) A person who contravenes subsection (2) is guilty of an offence punishable by:

(a) if the person is a natural person - a fine not exceeding VT 1,200,000 or imprisonment for not more than 2 years, or both; or

(b) if the person is a body corporate - a fine not exceeding VT 6,000,000.

**SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS  
WITHIN THE COMMONWEALTH**

**LIMITATION OF USE OF INFORMATION OR EVIDENCE**

12. The requesting country shall not use any information or evidence obtained in response to a request for assistance under this Scheme in connection with any matter

other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country.

**(b) Observations on the implementation of the article**

483. The reviewing experts deemed Vanuatu to have legislatively implemented the provision under review.

**Article 46 Mutual legal assistance**

**Paragraph 20**

*20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

484. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Section 63 of the Mutual Assistance on Criminal Matters Act (cited above)  
Section 11, SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL  
MATTERS WITHIN THE COMMONWEALTH

**SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS  
WITHIN THE COMMONWEALTH  
CONFIDENTIALITY**

11. The Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

**(b) Observations on the implementation of the article**

485. The reviewing experts deemed Vanuatu to have legislatively implemented the provision under review.

## **Article 46 Mutual legal assistance**

### **Paragraph 21**

*21. Mutual legal assistance may be refused:*

*(a) If the request is not made in conformity with the provisions of this article;*

*(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*

*(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*

*(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

486. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 8, 9 and 10 of Mutual Assistance on Criminal Matters Act (cited above)

#### **(b) Observations on the implementation of the article**

487. The reviewing experts deemed the provision under review to have been legislatively implemented.

## **Article 46 Mutual legal assistance**

### **Paragraph 22**

*22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

488. Vanuatu indicated that it has not implemented the provision under review. Fiscal matters are not listed as a ground for refusal (section 8 of MACMA, cited above).

#### **(b) Observations on the implementation of the article**

489. The reviewing experts noted the applicability of Vanuatu's legal provisions cited under paragraph 8 of UNCAC article 46, in particular, in relation to money laundering offences. For this reason, the reviewers recommended that Vanuatu legislatively not allow an MLA request to be refused on the sole ground that it involves fiscal matters (beyond the existing provisions in relation to money laundering offences).

## **Article 46 Mutual legal assistance**

### **Paragraph 23**

*23. Reasons shall be given for any refusal of mutual legal assistance.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

490. Vanuatu indicated that it has not implemented the provision under review.

At the discretion of the Attorney-General (section 10, MACMA), but no specific provision exists to require reasons to be given for MLA refusal.

Section 31 of the SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH also only requires consultations, not reasons for refusal to be given.

#### **(b) Observations on the implementation of the article**

491. The reviewing experts recommended that Vanuatu give reasons for any MLA refusal.

## **Article 46 Mutual legal assistance**

### **Paragraph 24**

*24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

492. Vanuatu indicated that it has not implemented the provision under review and mentioned that no deadlines exist as provided for in law or as a matter of practice.

#### **(b) Observations on the implementation of the article**

493. The reviewing experts recommended that Vanuatu provide for procedures (legislatively or otherwise) that guide the execution of MLA requests in a time-bound manner and that may also provide requesting States with information on the status and progress on the measures being undertaken.

## **Article 46 Mutual legal assistance**

### **Paragraph 25**

*25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

**(a) Summary of information relevant to reviewing the implementation of the article**

494. Vanuatu indicated that it has implemented the provision under review and cited the following measure.

Section 10 (d) of the Mutual Assistance on Criminal Matters Act (cited above)

**(b) Observations on the implementation of the article**

495. The reviewing experts deemed the provision under review to have been legislatively implemented.

**Article 46 Mutual legal assistance**

**Paragraph 26**

*26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

496. Vanuatu indicated that it has partially implemented the provision under review and cited the following information.

No legal provision provides for such consultations to take place, but consultations via email do take place with the requesting State and State Law.

Section 31, SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

**CONSULTATION**

31. The Central Authorities of the requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.

**(b) Observations on the implementation of the article**

497. The reviewing experts commended the practice of consulting with the requesting State and noted section 31 on consultation under the Scheme relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth (noting its restrictive scope). Therefore, the experts therefore noted that Vanuatu may therefore wish to legislatively provide for such consultations.

## Article 46 Mutual legal assistance

### Paragraph 27

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

#### (a) Summary of information relevant to reviewing the implementation of the article

498. Vanuatu indicated that it has partially implemented the provision under review and cited the following measures.

Sections 25 and 26 of the Mutual Assistance in Criminal Matters Act (cited above)

#### (b) Observations on the implementation of the article

499. Sections 25 and 26 of MACMA cover a person in Vanuatu. The reviewing experts recommended that Vanuatu require that a person who is a witness, expert or other person who is to be transferred overseas, pursuant to an MLA request, not be prosecuted, detained, punished or subjected to any other restrictions of his/her personal liberty in that country in respect of acts, omissions or convictions prior to his/her departure.

## Article 46 Mutual legal assistance

### Paragraph 28

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

#### (a) Summary of information relevant to reviewing the implementation of the article

500. Vanuatu indicated that it has not implemented the provision under review.

Expenses are not covered by the Mutual Assistance in Criminal Matters Act. They have also not been dealt with to date, but were of concern and needed to be addressed.

Section 13 of the SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH covers "expenses for compliance".

#### **EXPENSES OF COMPLIANCE**

13. (1) Except as provided in the following provisions of this paragraph, 13. (1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against the requesting country for expenses incurred by the Central Authority or other competent authorities of the requested country.

(2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.

(3) If in the opinion of the requested country, the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

**(b) Observations on the implementation of the article**

501. The reviewing experts noted that with respect to Commonwealth countries, section 13 on the expenses of compliance of the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth would be applicable; this has restricted scope. The experts therefore recommended that Vanuatu take legislative measures or adopt guidelines to ensure a more consistent approach to the determination of the costs associated with executing MLA requests, which may further include consultations between the requesting and requested States.

**Article 46 Mutual legal assistance**

**Subparagraph 29 (a)**

*29. The requested State Party:*

*(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;*

**(a) Summary of information relevant to reviewing the implementation of the article**

502. Vanuatu indicated that it has implemented the provision under review and cited the following measures.

Sections 1, 12 and 14 of the Mutual Assistance on Criminal Matters Act (cited above)

**(b) Observations on the implementation of the article**

503. The reviewing experts deemed Vanuatu to have legislatively implemented the provision under review.

## **Article 46 Mutual legal assistance**

### **Subparagraph 29 (b)**

*29. The requested State Party:*

*(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

504. Vanuatu indicated that it has not implemented the provision under review, also not in practice.

#### **(b) Observations on the implementation of the article**

505. The reviewing experts noted that Vanuatu may wish to consider providing to the requesting State copies of government records, documents or information that are not available to the general public.

## **Article 46 Mutual legal assistance**

### **Paragraph 30**

*30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

506. Vanuatu indicated that it has not implemented the provision under review, but agreements or arrangements are currently being considered by Vanuatu.

#### **(b) Observations on the implementation of the article**

507. The reviewing experts noted that Vanuatu, in principle, could use UNCAC as a legal basis for MLA. However, it may wish to further consider concluding bilateral or additional multilateral agreements or arrangements, if it deems so necessary.

#### **(c) Challenges**

508. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Inter-agency co-ordination;
2. Limited capacity (e.g. human/technological/institution/other);
3. Limited resources for implementation (e.g. human/financial/other).

**(e) Technical assistance needs**

509. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Legal advice - No MLA procedures currently exist;
2. Capacity-building programmes for authorities responsible for international cooperation in criminal matters; in particular, for the Transnational Crime Unit (TCU);
3. Other assistance - specific requests:
  - 1) International cooperation record-keeping - system of filing incoming/ outgoing requests, legal basis, specific request, who is deal with it (i.e. Police, FIU), timeline, information provided, reasons for refusing assistance, etc.
  - 2) Development of extradition and MLA templates that can be sent to States requesting Vanuatu's assistance, so that the requesting States comply with all the necessary requirements of Vanuatu.
  - 3) Easy to follow guidelines on how to deal with international cooperation requests for staff internally in the Government.

510. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

**Article 47 Transfer of criminal proceedings**

*States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

511. Vanuatu indicated that it has not implemented the provision under review.

**(b) Observations on the implementation of the article**

512. The reviewing experts recommended that Vanuatu consider the possibility of transferring criminal proceedings where it is in the interests of the proper administration of justice. This may also require Vanuatu to introduce necessary legislative measures to enable the possibility of transferring criminal proceedings to other States.

**(c) Challenges**

513. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Inadequacy of existing normative measures (constitution, laws, regulations, etc).

**(e) Technical assistance needs**

514. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Other assistance - legislative drafting;
2. Legal advice.

515. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

## **Article 48 Law enforcement cooperation**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;*

*(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:*

*(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;*

*(ii) The movement of proceeds of crime or property derived from the commission of such offences;*

*(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;*

*(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;*

*(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;*

*(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;*

*(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.*

*2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.*

*3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.*

**(a) Summary of information relevant to reviewing the implementation of the article**

516. Vanuatu has established channels of communication with the Australian Federal Police (AFP) in relation to law enforcement cooperation, in particular through TCU. Vanuatu is not a member of INTERPOL, but has access to INTERPOL channels through AFP, INTERPOL Fiji or INTERPOL New Zealand.

517. Vanuatu provided the following measures and information, as well as information taken from the Annual Report (2010-2012) of VFIU.

Section 34A of the Police Act

**Police Act**

**34A. International agreements**

(1) Prior to the posting of an overseas contingent, the Minister must, wherever possible, enter into an agreement with the country or countries affected or the relevant international body (if any).

(2) The agreement must set out –

(a) the command, control and administrative arrangements necessary for the good order, discipline and maintenance of the overseas contingent; and

(b) the level of cooperation, compliance and consultation required by the overseas contingent with the relevant international body, or the military, police and civilian authorities of the country or countries affected.

(3) Despite any agreement entered into, the overseas contingent remains at all times subject to the Constitution, this Act and the other laws of Vanuatu.

(4) Any agreement dealing with an overseas contingent that is in force on the commencement of this section is taken to be an agreement entered into under this section.

**Annual Report (2010-2012) of VFIU**

### **3.5 Global Partnership in AML/CFT**

The global adverse impact of money laundering and financing of terrorism has brought the international community together and implementing greater emphasis on exchange of information and development expertise of AML/CFT issues.

#### **3.5.1 Asia Pacific Group on Money Laundering (APG)**

The Vanuatu Government via its relevant departments and statutory bodies is a founding and active member of the APG. The objective of the APG is ensuring all its members comply and implement the necessary FATF standards and pledge its support and commitment toward the global fight against money laundering and financing of terrorism. The APG also conduct evaluation on each member's implementation effort.

Vanuatu has under gone two significant mutual evaluations in 2000 and 2006 respectively. From the recent evaluation, Vanuatu was noted to require further improvement in its compliance effort and a list of recommendations was suggested to Vanuatu.

In addition, the APG has assisted the various Vanuatu government departments and agencies in capacity building and compliance trainings and assistance, by seeking and coordinating available resources and technical assistance from sponsor agencies.

#### **3.5.2 Egmont Group of FIUs (Egmont Group)**

The Vanuatu FIU has been an active member of the Egmont Group of FIUs since 2003.

Egmont Group is an international association of FIUs with the goal to provide a forum for FIUs to improve and support their respective national anti-money laundering and counter-financing of terrorism program and outreach. All members foster the widest possible cooperation and exchange of information amongst them on the basis of reciprocity or mutual agreement.

In the reviewed period, Vanuatu FIU continued to receive and action requests from Egmont members. Reciprocally, Vanuatu FIU sends requests to its colleagues to assist its analysis purposes.

### 3.5.3 International Network

Simultaneously, Vanuatu FIU has established networks with international law enforcement and supervisory bodies in information exchange.

Since 2010, the Vanuatu FIU has supported various exchange of information which led to successful money laundering and financing of terrorism investigations and prosecutions.

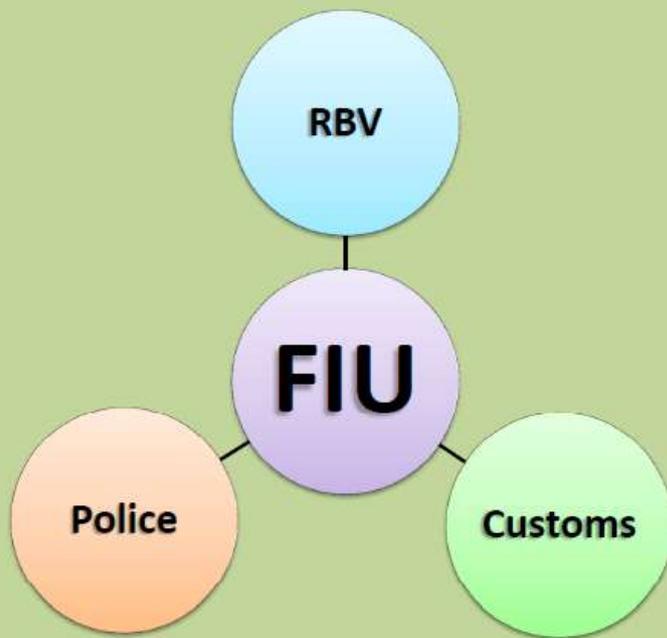
### 3.6 Exchange of Information

In the three years (2010 - 2012), Vanuatu FIU has received and sent requests:

Table 7.0

Period	VFIU Receive Request	VFIU Approve Request	VFIU Send Request	VFIU Receive Response
2010	126	120	53	53
2011	48	48	64	62
2012	69	69	78	69

Source: VFIU



Similarly, VFIU has signed several agreements with its overseas partners. In the same period, VFIU signed an Memorandum of Understanding with PNG FIU and Solomon Island FIU respectively. These MOUs further strengthen the sharing of information on transnational organised crimes and money laundering.

In 2011, the association of pacific island FIU was formally signed into existence and VFIU was a founding signatory.

Personnel of AFP have also been located within the Vanuatu Police Force and TCU, as liaison officers. Vanuatu police officers have also been seconded into AFP.

**(b) Observations on the implementation of the article**

518. It was further provided that VFIU has signed 7 MOUs with foreign FIUs. These MOUs also allow foreign law enforcement authorities to request and receive (upon approval) information required.
519. Since 2011, when the Pacific FIU Association (that now includes 8 PICs) was signed, intelligence has been shared on an average of once a year.
520. The Vanuatu Police Force is part of the Pacific Transnational Crime Commission (PTCC). The Commission includes i.e. Marshall Islands, Federated States of Micronesia, Fiji, Samoa, Solomon Islands and Papua New Guinea.
521. As part of the Pacific Transnational Crime Network (PTCN), AFP through its Law Enforcement Cooperation Program (LECP) established TCU. TCU is a team of only 5 dedicated law enforcement officers, drawing on resources from the Police, Customs, Immigration and other boarder protection authorities, working proactively to develop law enforcement intelligence and undertake targeted investigations into transnational organised crime threats.
522. TCU confirmed that international cooperation takes place through various channels. These include the arrangement with AFP on direct cooperation with their law enforcement agencies, multilateral agreement that established PTCN, multilateral arrangement in place between Chiefs of Police in the region, arrangements established through the Forum Secretariat, Melanesian Spearhead Group, INTERPOL Fiji and INTERPOL New Zealand. These channels allow for informal communication to take place between TCU and other international agencies. TCU replies to requests for information using the same form in which it was received (i.e. through AFP, then it would be sent back to the AFP through the Police Commissioner). All information is sent to requesting agencies through the Police Commissioner. It was confirmed, during the country visit, that this was a quick process with little/no amendment from the Commissioner and yielded results. The rate at which information is provided varies, but on an average, it normally takes between 1-3 months to respond.
523. TCU confirmed that they have conducted inquiries on the identity, whereabouts and activities of suspects, such as in the fraud case of 2011 where two Bulgarian nationals were involved. Information has also been provided on the movement of proceeds of crime to Australia, such as in 2004 where an STR was sent to VFIU who forwarded this onto TCU. VFIU then froze an account for TCU, but the freezing order expired before the money could be taken into possession. TCU also informed the reviewers that it made inquiries into the movement of property/equipment used in corruption-related offences. However, the latest example of this related to a cocaine bust aboard a yacht in Port Vila, which also involved the item being sent to Australia for analysis and destruction. Numerous such examples exist, as TCU confirmed that they do not have the adequate facilities to carry out such an analysis/ investigation. Further information has been exchanged in relation to specific means and methods used to commit UNCAC-related offences. For example, the information on how the two Bulgarian nationals tried to commit fraud using an ATM in Port Vila was sent to AFP and neighboring countries. Information on their movements was also relayed, leading to their subsequent capture in

Noumea. For early identification of corruption-related offences, information is also exchanged and other measures taken to inform relevant international agencies.

524. Coordination has further been enhanced through the exchange of personnel and other experts. Apart from the information provided for above, personnel in TCU have been seconded to Fiji and also Samoa through PTCN.

525. The current framework for facilitating international cooperation was deemed to be sufficient. However, it was noted that UNCAC could also be considered as a basis for mutual law enforcement cooperation in respect of the offences covered by this Convention.

526. The reviewing experts deemed that Vanuatu appears to be cooperating within its means to respond to UNCAC-related offences, even where modern technology is used; Vanuatu relies on its international partners for assistance.

**(c) Successes and good practices**

527. Vanuatu's international law enforcement cooperation, as facilitated through TCU, is to be commended, and deemed to be effective and fruitful in the region.

**(c) Challenges**

528. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Inter-agency co-ordination;
2. Limited capacity (e.g. human/technological/institution/other);
3. Limited resources for implementation (e.g. human/financial/other).

**(e) Technical assistance needs**

529. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Technological assistance (e.g. set-up and management of databases/information-sharing systems);
2. Capacity-building programmes for authorities responsible for cross-border law enforcement cooperation;
3. Model agreement(s)/arrangement(s).

530. Vanuatu indicated that AFP has provided technological, capacity-building and other assistance.

## **Article 49 Joint investigations**

*States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

531. Vanuatu indicated that it has implemented the provision under review and cited the following measure.

Section 34A of the Police Act (cited above)

532. Vanuatu indicated that it has arrangements with AFP to carry out joint investigations on a case-by-case basis.

533. Vanuatu provided the following examples of implementation.

A recent example (August 2013) of a joint operation by the Vanuatu Police and Mobile Force, Customs Department, AFP and the United States Drug Enforcement Administration on a yacht in Port Vila - an estimated 750 kilograms of cocaine was hidden in the lower engine compartments and around the keel and hull. This was seized and, after being tested in Australia, will be destroyed by AFP. It was estimated that the drugs were worth 370 million Australian dollars (USD330 million).

VFIU confirmed that it had assisted the Police in preparing for one joint investigation.

### **(b) Observations on the implementation of the article**

534. TCU confirmed, as above, that international cooperation takes place through various channels. These include the arrangement with AFP on direct cooperation with their law enforcement agencies, multilateral agreement that established PTCN, multilateral arrangement in place between Chiefs of Police in the region, arrangements established through the Forum Secretariat, Melanesian Spearhead Group, INTERPOL Fiji and INTERPOL New Zealand. These channels allow for informal communication to take place between TCU and other international agencies.

### **(c) Challenges**

535. Vanuatu identified the following challenge and issue in fully implementing the provision under review:

1. Limited resources for implementation (e.g. human/financial/other).

**(e) Technical assistance needs**

536. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Model agreement(s)/arrangement(s);
2. Capacity-building programmes for authorities responsible for cross-border law enforcement cooperation.

537. Vanuatu indicated that AFP has provided capacity-building and other assistance.

**Article 50 Special investigative techniques**

*1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.*

*2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.*

*3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.*

*4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.*

**(a) Summary of information relevant to reviewing the implementation of the article**

538. Vanuatu indicated that it has partially implemented the provision under review and cited the following measure.

Section 34A of the Police Act (cited above)

539. Vanuatu has arrangements with AFP on the carrying out of special investigative techniques.

**(b) Observations on the implementation of the article**

540. During the country visit, the reviewing experts were informed of a law that is being considered on controlled delivery. To date, Vanuatu uses existing arrangements/agreements (as cited above for international cooperation), in particular, arrangements

between Police Commissioners to use special investigative techniques on a case-by-case basis.

541. The experts were informed of one example of wire-tapping. However, this related to a murder case and required the Prime Minister's approval in order to conduct the operation, as no wire-tapping law exists. In general, there is no legislation in place providing for the use of special investigative techniques.

542. The experts recommended that Vanuatu amend relevant legislation in order to introduce special investigative techniques and provide corresponding training to law enforcement personnel. Vanuatu should also take into consideration financial arrangements and undertakings with requesting States when exercising such techniques.

**(c) Challenges**

543. Vanuatu identified the following challenges and issues in fully implementing the provision under review:

1. Inter-agency co-ordination;
2. Limited capacity (e.g. human/technological/institution/other);
3. Limited awareness of state-of-the-art special investigative techniques;
4. Limited resources for implementation (e.g. human/financial/other).

**(e) Technical assistance needs**

544. Vanuatu indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Summary of good practices/lessons learned;
2. Capacity-building programmes for authorities responsible for designing and managing the use of special investigative techniques;
3. Legal advice;
4. Capacity-building programmes for authorities responsible for international cooperation in criminal/investigative matters.

545. Vanuatu indicated that no forms of technical assistance mentioned above have already been provided.

ANNEX 1:

**UN Convention against Corruption – Review of  
Vanuatu  
Port Vila, 28-30 October 2013**

<b>Date</b>	<b>Time</b>	<b>Office/Department</b>	<b>Contact/ Focus</b>
<b>Monday, 28 October 2013</b>	<b>8:30 – 9:30</b>	<b>Prime Ministers’ Office</b>	<b>John Ezra/Sector Analyst/DSSPAC <i>Courtesy Visit</i></b>
	<b>9.30 – 10:00</b>	<b>Attorney-General’s Office/ State Law</b>	<b>Alatoi-Ishmael KALSAKAU/Attorney- General <i>Courtesy Visit</i></b>
	<b>10:00 – 11:30</b>	<b>Attorney-General’s Office/ State Law</b>	<b>Viran <i>Focus: UNCAC Chapter IV: International Cooperation</i></b>
	<b>11:30 – 12:00</b>	<b>Public Service Commission</b>	<b>Charity Bona-Titiulu, Manager, Corporate Service Unit, PSC <i>Focus: UNCAC Chapter III: Criminalization and law enforcement</i></b>
<b>LUNCH BREAK</b>			
	<b>Parallel meetings</b>		
	<b>14:00 – 16:00</b>	<b>Public Prosecution’s Office</b>	<b>14:15 – 14:45</b>
		<b>Kayleen TAVOA/Public Prosecutor <i>UNCAC Chapter III</i></b>	<b>Reserve Bank</b>
			<b>Peter Tari/Acting Governor of the Reserve Bank <i>UNCAC Chapter III</i></b>
			<b>15:00 – 15:30</b>
			<b>Vanuatu Financial Services Commission</b>

				<b>John Stephens &amp; Serah</b> <i>UNCAC Chapter III</i>
<b>Tuesday, 29 October 2013</b>	8.30 – 9.30	<b>Financial Intelligence Unit</b>	<b>Floyed Mera/ Manager, FIU</b> <i>UNCAC Chapters III and IV</i>	
	9:45 – 10:30	<b>Vanuatu Police Force/ Fraud/CID</b>	<b>James TARI (Fraud)</b> <b>George TWOMEY (CID)</b> <i>UNCAC Chapter III</i>	
	10:30 – 11.30	<b>Transnational Crime Unit</b>	<b>Allenrow BANI, Manager TCU</b> <i>UNCAC Chapter IV</i>	
	11.30 – 12:00	<b>Correctional Services</b>	<b>Daniel TAVOA/Manager, CS</b> <i>UNCAC Chapter III</i>	
<b>LUNCH BREAK</b>				
	13:30 – 14:15	<b>Ombudsman Office</b>	<b>Alan, Director of Investigations</b> <i>UNCAC Chapter III</i>	
	14:30 – 15:30	<b>Transparency &amp; Social Accountability</b>	<b>Marie Noelle/ Senior Staff and Rebecca</b> <i>UNCAC Chapter III</i>	
	15:45 – 16:30	<b>Vanuatu Chamber of Commerce</b>	<b>Astrid BOULEKONE, CEO VCCE</b> <i>UNCAC Chapter III</i>	
	16:45 – 17:30	<b>National Council of Women</b>	<b>Blandine BOULEKONE, Coordinator, VNCW</b> <i>UNCAC Chapter III</i>	
<b>Wednesday, 30 October 2013</b>		<b>Time for the reviewers to work on the report and discuss key findings of the review</b>		
	15:00 – 16:00	<b>Prime Ministers' Office (Various Stakeholders)</b>	<b>Wrap-up Session/ Review Team introduce their findings/ discuss the executive summary</b>	