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**THE ACCOUNTABILITY ARRANGEMENTS IN TONGA'S PUBLIC
SERVICE COMMISSION**

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Abstract

The role of the Public Service Commission of Tonga and their decision-making powers requires the basic elements of good governance which include accountability, transparency and efficiency. This paper will be closely examining the accountability element and how it applies to the Public Service Commission of Tonga. The paper will focus on the legal framework of the Commission and its accountability arrangements. This paper will take an analytical and descriptive approach in examining the legal framework of the Commission. The aim is to see how and what types of accountability arrangements are involved. Further, whether those arrangements satisfy Bovens narrow definition of accountability that will be relied upon. It will also determine whether accountability effectively applies within the Commission. The paper does not intend to provide solutions for the shortfalls under the legal framework of the Commission but will in one or two instances indicate obvious solutions. This paper argues that accountability is indeed an important element in the proper functioning of the Public Service Commission as a central and independent body charged with the function of managing human resources directly for twenty government ministries and agencies. The paper further argues that such an important element must have a clear and robust framework within its legal framework to enable the Commission to effectively be held accountable. The paper does however acknowledge that accountability is not as straightforward. A very helpful lens used to carry out the analysis will be the conceptual framework of accountability as set out by Mark Bovens.

Key words:

Public Service Commission, Accountability, Tonga

Word length

The text of this paper (excluding abstract, table of contents and footnotes) comprises exactly 12,4087 words.

I Introduction

The role of Tonga's Public Service Commission (the 'Commission') is very important. Not only do they manage, review and oversee numerous government departments and agencies human resource activities, their operations also create various accountability relationships between the Commission and other stakeholders in the process. These accountability relationships operate both within the Commission's legal framework in a formal setting and also outside the legal framework in an informal setting. However, both have an influencing impact on how the Commission can be held accountable for its decision-making powers.

Accountability is not a new concept to Tonga. Having a monarchy and chiefly political system, accountability could be seen in its early days as a one-way relationship which was bottom up. Where people were accountable to the King and those at the top of the hierarchical system. Tonga has a highly stratified society where a person was once only defined by their status in the society as opposed to their qualifications or skills and position in an organisation. The social system of the country had the King and the Royal Family at the top of the hierarchy with the nobles in the middle and the commoners at the lowest level.¹ Today, the notion of accountability has evolved so much that modern political discourse considers that it enables a fairer and equal form of governance and has rearranged the accountability relationship whereby those higher up in the system are accountable to the general population or those considered to be lowest in the hierarchy.² It follows from this that in Tonga, commoners are now holding those higher up in the pyramid accountable depending on their roles and functions. The biggest public service strike in Tonga in 2005³ could be seen as the major stepping stone to this shift in the accountability structure. While the triggers of the strike were in relation to matters of salary, mismanagement and economic issues, it did urge for political reform which pushed for a more democratic system and also a reform of the monarch's absolute rule.⁴

The public sector comprises the most number of employees in Tonga.⁵ They have a duty to serve the people and to provide public services which benefit the society as a whole. For years before the establishment of the Commission, the public sector often faced criticism from the general public for lacking the basic elements of good governance. These include accountability, transparency and efficiency. Even after the establishment of the Commission, the public service continued to reflect poor ratings on a range of key governance indicators compared to its neighbouring Pacific countries. Of particular concern were the indicators for "voice and accountability and control and corruption".⁶

¹ "See generally" Stephanie Lawson "The Monarchy Versus Democracy in the Kingdom of Tonga" in *Tradition versus Democracy in the South Pacific: Fiji Tonga and Western Samoa* (Cambridge, Asia Pacific Studies, Cambridge, 1996) 79-116.

² Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 (4) ELJ 447 at 449.

³ Heather Young Leslie "Tonga" (2007) 19 (1) CP 262 at 263

⁴ At 269.

⁵ 2016 records indicate a total number of 5,054 public servants for a population of just over 100,000. Ministry of Information and Communication of Tonga website <http://www.mic.gov.to/news-today/press-releases/6155-new-public-service-remuneration-structure-approved-by-the-government-of-tonga>

⁶ Desmond Ueese Amosa "Public sector reform in Tonga – the show must go on" (2007) 22 (3) PEB 183 at 184.

The birth of the Commission in 2003 was an important step for the Government in working towards addressing these issues despite the obvious realisation that it would not be resolved overnight. A starting point was in relation to the concerns on inefficiencies and ineffectiveness of public service delivery and performance. This was considered an obstacle to the country's overall economic and social growth. It was for these reasons that a public service reform was considered necessary. Of importance to the public service was the aim of improving productivity while ensuring cost containment and also focusing on the management of performance and accountability.⁷ Essentially, the aims of the reform included the strengthening of accountability within the public service. Other important aims included reducing duplication of tasks and streamlining service delivery in the hopes of improving effectiveness.⁸ The successful implementation of this public service reform relied upon contributions from all relevant stakeholders and coordination between the relevant parties involved but especially from the Government.⁹

This paper will examine and analyse the concept of accountability and the different accountability arrangements as it applies to the Commission. The focus will be on the Commission's legal framework, although it will be worth mentioning a few instances outside the legal framework. A useful lens in carrying out this examination and analysis will be the conceptual framework of accountability as set out by Mark Bovens. The lens is useful as it considers the definition of accountability both broadly and narrowly. It further covers a variety of accountability arrangements that could appropriately be applied to the Commission and its governance. The paper will first provide a description of the Commission, why they were established, their main functions, operations and reporting obligations. The intention is to enable a better understanding on the operations of the Commission. The paper intends to apply Bovens narrow definition of accountability as being suitable for the purpose of its analysis. The intention being to evaluate the accountability arrangements of the Commission and how they operate. Further, to evaluate how and when the Commission can be held to account. Accountability will therefore be evaluated in the narrow sense as "*a relationship between an actor and a forum in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences*".¹⁰ For most part of this paper, the terms 'actor' and 'forum' will be used interchangeably with who they apply to within the legal framework of the Commission.

The paper will then move on to identify the different formal accountability relationships of the Commission and consider two of the informal accountability relationships, namely the public and the media. The paper will analyse how these accountability relationships impact on the Commission both positively and negatively. The paper will also analyse the different kinds of accountability that could apply to the Commission's different accountability relationships based on the nature of the Commission as a forum and as an actor. Further on the nature of the conduct and obligations involved. The paper does not intend to resolve the shortfalls that will be

⁷ "ADB: First Consultative Group meeting for the Kingdom of Tonga" (19 April 2002) M2 Presswire <https://search-proquest-com.helicon.vuw.ac.nz/docview/443924705?accountid=14782&rfr_id=info%3Axi%2Fsid%3Aprimo>

⁸ *Tonga: Economic Update and Outlook 2012* (Asian Development Bank, Pacific Studies Series, 2013) at 59.

⁹ Amosa, above n 6, at 187-188.

¹⁰ Bovens, above n 2, at 450.

identified but will provide some obvious solutions on the outset. The examination and analysis will bring about why accountability is an essential element in the proper functioning of the Commission.

I argue that a robust accountability framework is essential to achieving the purpose of the Commission's establishment and to enable it to effectively and efficiently carry out its important roles to the many stakeholders involved. Despite this, it recognizes that accountability is not as straightforward as it seems.

II The Commission

A Introduction

The Commission is a government agency and was established in 2003 pursuant to the Public Service Act 2002 (the 'legal framework'). This was one of the Government's major initiative as part of its Economic Public Sector Reform Program in 2001 with the assistance of the Asian Development Bank.¹¹ The program among other goals was designed to identify lapses in the performance of the core public sectors and improve their delivery of public services.¹² This in turn hoped to allow Government to effectively carry out its mandate and improve the public services contribution to the country's overall economic and social welfare.¹³ The program was designed to put in place the necessary legal and regulatory framework and also improve the institutional capacity.¹⁴ The area of concern seemed to lie heavily on human resources and their management. The Commission was therefore established to manage the human resource activities which was considered a step forward from the previous establishment that involved claims of "malpractice, favouritism and nepotism".¹⁵

The Commission became the central and independent statutory body to take over the human resource management functions and manage human resource activities directly.¹⁶ This covers the human resources of not only the Commission but also that of the twenty government ministries and agencies (the 'public service') bound by its legal framework. While this in itself encompasses a great responsibility, the Commission is also responsible as an advisor to Government on the managing of the public services;¹⁷ to the Prime Minister on implementing "public employment policies"¹⁸; and to the Chief Executive Officers of the public service in relation to the development and implementation of practices and procedures appropriate for their human resource.¹⁹

¹¹ Amosa, above n 6, at 184.

¹² At 186.

¹³ "Corporate Plan 2016-2019 FY" (1 August 2016) Public Service Commission <<http://www.psc.gov.to>> at 3.

¹⁴ "ADB: Reform package for Tonga aims at macroeconomic stability" (28 May 2002) M2 Presswire <<http://go.galegroup.com/helicon.vuw.ac.nz/ps/i.do?&id=GALE|A86393252&v=2.1&u=vuw&it=r&p=ITOF&sw=w&authCount=1>>

¹⁵ Amosa, above n 6, at 187.

¹⁶ "Corporate Plan 2016-2019 FY", above n 13, at 4.

¹⁷ Public Service (Amendment) Act 2010 (Tonga), s 6 (b) [PS Amendment Act 2010].

¹⁸ At s 6 (d).

¹⁹ At s 6 (j).

This set up within the Commission’s legal framework identifies accountability as an important element for the Commission and its proper functioning. It further identifies the extensive functions and responsibilities of the Commission towards a large number of public service employees, to the general public and also to the Government both directly and indirectly. It is therefore important that the Commission is able to be held accountable and responsible for its decisions. The way in which the Commission becomes accountable and responsible for their conduct could be better understood through a close study of the accountability arrangements within the legal framework of the Commission.

Tonga’s public service has a reputation for being inefficient and ineffective.²⁰ Further, they have been criticised in the past for lacking principles of sound governance.²¹ The inefficiency stems from the fact that at most times there were more people than required to carry out a particular task.²² Often the implementation of services was slow and inaccurate. Ineffectiveness on the other hand stems from the government ministries and agencies inability to provide public services to the standards expected of them.²³ Prior to the implementation of the reform program, the public sector was seen to be “highly centralized and bureaucratic with considerable redundancy” therefore lacking the basic elements of good governance being “accountability, transparency and efficiency”.²⁴

Having said this, the establishment of the Commission was not only a means to an end but also a long-term solution in the making. The implementation of the reform continues to date and with the commitment of all relevant stakeholders and with the guidance of the Government, the goals of the reform are expected to impact on public service delivery and performance as an ongoing exercise.

B Their operations

The Commission comprises 5 members who are referred to as Commissioners of which one is the Chairman and another the Deputy Chairman.²⁵ The Commission may also appoint the necessary employees to assist in their performance of functions and duties under the legal framework.²⁶ The Chairman is the head of the Commission and is responsible for its “efficient and effective operation”.²⁷ Despite having said this, the Chairman does not make decisions autonomously but works collectively with the rest of the Commissioners as a collective body.

The Commissioners are appointed by the Prime Minister with the consent of the Cabinet.²⁸ Should any of the Commissioners be unable to perform their duties, provide a written notice of resignation or commit any serious misconduct, they can be removed from office following the same

²⁰ Amosa, above n 6, at 183.

²¹ At 184.

²² At 183.

²³ At 183.

²⁴ *Tonga: Economic Update and Outlook 2012*, above n 8, at 69.

²⁵ PS Amendment Act 2010, above n 17, at s 5(2) and s 5 (3).

²⁶ Public Service Act 2002 (Tonga), at s 11 [PS Act 2002].

²⁷ At s 5 (12) (a).

²⁸ At s 5 (3).

appointment procedure.²⁹ A Commissioner should “have at least five years’ experience as a senior administrator or held appropriate executive management office for more than five years”. In addition to this, a Commissioner must have “special knowledge, experience or skills relevant to the functions of the Commission”.³⁰ A person who is an “un-discharged bankrupt, convicted of an indictable offence, is insolvent and is an existing public servant or Minister” cannot be appointed as a Commissioner.³¹ If while in office a Commissioner is convicted of an indictable offence, declared bankrupt, passes away, resigns or is terminated, their position is vacated.³² A Commissioner can serve up to 5 years and may be re-appointed but to a limit of only two terms.³³

C Their functions

The principal functions of the Commission were revised under its amended legal framework in 2010.³⁴ The Commission also operates pursuant to the Public service regulations of 2003 and 2006 and the Public service code of conduct of 2004.³⁵ An important function of the Commission is to ensure that the public services uphold public service principles.³⁶ In relation to accountability, public service employees are accountable both to the public and government. When providing services to the public, it must be ethical and accountable for their actions.³⁷ Further, it must “demonstrate at all times respect, integrity, honesty, diligence and accountability”.³⁸ The same goes for when they are dealing with the Government in terms of providing advice and in implementing Government “policies and programs”.³⁹ They are further required to carry out their duties in a way that is effective, efficient and transparent in a “non-political and impartial way”.⁴⁰ The Commission therefore has a major responsibility in ensuring that the public services it controls under its legal framework upholds these main public service principles among others.

The principal functions of the Commission can be seen to function in three different ways; “as a human resource ‘service agency’, as a policy maker and as a regulator”.⁴¹ It covers:⁴²

the development of human resource employment policies, standards and practices and oversight of their implementation. It determines the designation of respective employees and other terms and conditions of employment including the remuneration. It covers the appointment, promotion and discipline of individual public servants including resolving

²⁹ At s 5 (13).

³⁰ At s 5 (4).

³¹ At s 5 (5).

³² At s 5 (7).

³³ At s 5 (6).

³⁴ PS Amendment Act 2010, above n 17, at s 6.

³⁵ Public Service (Disciplinary Procedures) Regulations 2003 (Tonga); Public Service (Grievance and Dispute Procedures) Regulations 2006 (Tonga); Code of Conduct for the Public Service 2004 (Tonga) [Regulations and Code].

³⁶ At s 6 (e).

³⁷ At s 4C (c).

³⁸ At s 4C (l).

³⁹ At s 4C (f).

⁴⁰ At s 4C (m).

⁴¹ “Corporate Plan 2016-2019 FY”, above n 13, at 5.

⁴² At 4.

of disputes and grievances. Lastly, it covers the creation of policy for and oversight of public service performance both institutional and individual.

While the Commission can be seen to operate in 3 different ways, its functions indicate a substantial amount of the Commission's work focusing on its human resource service agency role.⁴³ The Commission after all was established to manage human resources directly and to take over the human resource management functions of the former establishment which was welcomed. The impact being that a sounder environment for the management of human resources would be achieved and a greater independence in decision making.⁴⁴

D Their reporting obligation

The Chairman of the Commission is obliged to provide a report to the Prime Minister on an annual basis. This is in relation "to the operations of the Commission and on the efficiency and effectiveness of the Public Service".⁴⁵ The Public Service refers to government ministries and government agencies outlined in Schedule 1 of the legal framework. With the most recent amendment, the Public Service contains fifteen ministries and five government agencies including the Commission.⁴⁶

There are other reporting obligations within the legal framework however do not directly concern the Commission. It is concerned with reporting by the public service employees (to the relevant Chief Executive Officer) and Chief Executive Officers (to the relevant Minister) to their direct supervisors.⁴⁷ This will not be discussed in detail here. It can however be indirectly related to the Commission as they are empowered to demand and obtain this same information under the legal framework.⁴⁸

III Accountability

A Introduction

The concept of accountability has evolved throughout the years. History provides that accountability is tied to the word "accounting" and covers "bookkeeping" and "financial administration".⁴⁹ Its root however goes back to a time where Kings held their subjects to account for what they possessed which during that time largely consisted of land.⁵⁰ This exercise of account giving was evaluated and recorded in a book.⁵¹ The exercise was considered a way of creating the basis of governance by the royals.⁵² Today, modern political and scholarly works

⁴³ At 5.

⁴⁴ Amosa, above n 6, at 187.

⁴⁵ PS Amendment Act 2010, above n 17, at s 8 (1).

⁴⁶ Public Service Commission Amendment Act 2012 (Tonga); Public Service Commission Amendment No. 4 Act 2016 (Tonga).

⁴⁷ PS Amendment Act 2010, above n 17, at s 13F (1)

⁴⁸ PS Act 2002, above n 26, at s 7.

⁴⁹ Bovens, above n 2, at 448-449.

⁵⁰ At 448.

⁵¹ At 448.

⁵² At 448.

indicate an evolution of the term accountability to cover both a broad and narrow scope.⁵³ Having said this, accountability can mean different things to different people. Authors are claimed to make out their own definition of accountability in their own way based on different aspects thereby creating a division on what accountability entails.⁵⁴

In the broad sense, accountability is considered to cover a variety of other well-defined concepts such as “good governance, transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity”.⁵⁵ In other instances, accountability is referred to as a “normative concept” which includes standards for the assessment of how public actors behave.⁵⁶ In this aspect, accountability is a virtuous quality in public officials or public institutions.⁵⁷ This broad definition of accountability brings about its own problems such as the inability to establish whether a person or an institution is subject to accountability.⁵⁸ Further, there is no clearly defined standard for accountable behaviour as there are a variety of different factors involved and have to be taken into account.⁵⁹

In the narrow sense, accountability is seen as a “social relation or mechanism” which takes into account the operation of “institutional arrangements”.⁶⁰ Instead of focusing on whether public officials or institutions have acted in a way that reflects accountability, the narrow definition looks at whether the public official or institutions “can be held accountable *ex post facto* by” those that account is to be given to.⁶¹

B The narrow definition

As earlier mentioned, Bovens narrow definition of accountability is:⁶²

A relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.

On the outset, the definition requires that there be a relationship between two bodies, one an actor and the other a forum. The actor can either be an “individual or an organisation”. Similarly, the forum can also be a “specific person or an agency”.⁶³ The definition also describes three important events that must take place in order for the relationship to qualify as an accountable one. First, there must be an obligation by the actor to explain to the forum regarding its conduct; secondly, that the forum is able to question the actor in terms of the explanations provided; and

⁵³ At 449.

⁵⁴ Mark Bovens “Two Concepts of Accountability” (2010) 33 (5) WEP 946 at 946-947.

⁵⁵ At 946.

⁵⁶ At 947.

⁵⁷ At 947.

⁵⁸ At 948.

⁵⁹ At 947.

⁶⁰ At 948 and 951.

⁶¹ At 948.

⁶² Bovens, above n 2, at 450.

⁶³ At 450.

lastly, that the forum is also able to make a finding over the actor's conduct and make a decision based on the explanations provided.⁶⁴ The decision of the forum could either be positive or negative.⁶⁵ In light of this, the relationship indicates the forum having power over an actor and the ability to determine their fate. Equally important is that the actor must have information that could properly justify their actions or decisions. Determining accountability within the Commission is important various reasons as will be discovered later in this paper. However, it is far from being straightforward as it would seem.

IV The Commission's Accountability Relationships

A Introduction

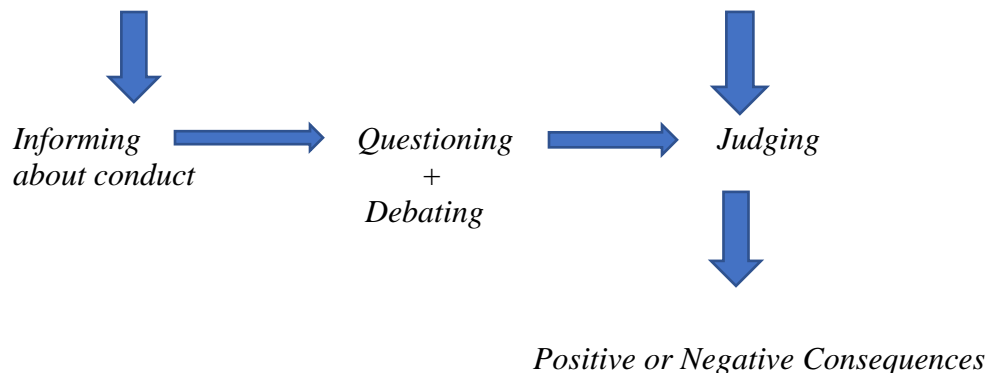
In applying the narrow definition to the Commission's set up, there are various actors and forums within the Commission's legal framework. The Commission can be seen as playing both actor to different forums and also forum to different actors. The Commission's principal functions as a human resource service agency, a policy maker and as a regulator would imply that the Commission has a fundamental role as forum to determine the fate of its public servants. In turn, this can contribute to either the success or failure of the functioning of the Commission. On the reverse side, the Commission as actor is subject to other forums who play equally important roles in determining the fate of the Commission.

The different accountability relationships of the Commission under its legal framework and as per Bovens narrow definition could be better understood in the following diagram:⁶⁶

Relationship 1: Public service employees as **actor** → Commission as **forum**

Relationship 2: Commission as **actor** → Prime Minister as **forum (forum 1)**

Relationship 3: Commission as **actor** → Public Service Tribunal as **forum (forum 2)**



⁶⁴ At 451.

⁶⁵ At 451.

⁶⁶ Bovens, above n 2, at 454. Diagram although slightly modified to reflect the Commission's different accountability relationships within its legal framework mirrors Bovens Accountability figure illustration.

B The Commission as a 'forum'

1 Public Service Employees (actor)

Accountability as a social relation identifies the Commission as a forum. The actor in this instance are the public service employees under the legal framework and includes the Chief Executive Officers of the twenty government ministries and agencies. The employees of the Commission itself is also included.⁶⁷ The Commission as forum is responsible for the “appointment, promotion, confirmation, discipline of employees”.⁶⁸ This is carried out in consultation with direct supervisors of the public service employees which could either be the Chief Executive Officers in the case of the subordinate employees or the Minister of the relevant department, in respect of the Chief Executive Officers.⁶⁹ Despite this, the Commission has the final say taking into consideration any consultations made.

In the case of disciplinary matters, the actor is disclosed the relevant information relating to the disciplinary matter that is before the forum. It is important to note here that it is only in instances of serious disciplinary cases or the repetition of minor breaches of discipline that this accountability relation applies.⁷⁰ For minor breaches, there is a different forum involved but will not be discussed here. There is an obligation for the actor to respond either agreeing or disputing the information which is provided to the forum. The actor is further obligated to provide any other information or explanation that would enable the forum to make a decision.⁷¹ Should the actor fail to provide any response to the information subject of the disciplinary hearing within the specified time, the forum may proceed without the reply.⁷² It is therefore important for the actor to respond, as that is their opportunity to either justify or defend their conduct. This process caters for the opportunity for the forum to question the legitimacy of the conduct of the actor. The passing of judgment by the forum over the actor is provided for in their function which in the disciplinary scenario can include dismissal together with other penalties prescribed by relevant regulation.⁷³

Similarly, in the case of promotions, the actor is required to provide explanations to the forum on what entitles them to be promoted. The forum can consider this explanation together with policy directions of the Government and can question the actor to determine the judgment to be passed in whether to award a promotion or not. The same applies to instances involving appointments of public service employees or their confirmation.

The case of *Halalilika 'Etika v Public Service Commission* showed the three events of account giving in this accountability relationship between the Commission and 'Etika (a public

⁶⁷ PS Act 2002, above n 26, at Schedule I.

⁶⁸ PS Amendment Act 2010, above n 17, s 6 (f).

⁶⁹ At s 6 (j), (k), (m) and (s).

⁷⁰ Public Service (Disciplinary Procedures) (Amendment) Regulations 2010 (Tonga), regulation 7 [PS (DP) Amendment Regulations 2010].

⁷¹ At regulation 7 (1) (c) and (e).

⁷² At regulation 7 (3).

⁷³ At regulations 10. These include “reprimand, stoppage of pay by way of restitution (in whole or in part) of loss or damage caused by the employee, stoppage of a future increment, removal of an increment or increments, transfer to another post or locality, demotion, suspension, or any other action that the Commission may consider necessary”.

servant).⁷⁴ The facts of the case illustrates these three events of the actual account giving which involved extensive correspondences between the parties reflecting the information provided by 'Etika to the Commission, the Commission questioning the information provided, before judgment was eventually passed by the Commission as forum.⁷⁵ These instances led to the case being put before the Public Service Tribunal but was not as a result of the accountability arrangements mentioned. The Tribunal has a different accountability relationship with the Commission and which will be considered later in the paper.

A major strength of the legal framework is identified here in that it provides for a general cover and grasp of this accountability relationship as per the narrow and social relation definition relied on. The legal framework has properly captured the three events of the actual account giving between the Commission and the public service employees as forum and actor respectively. Detailed provisions in the Commissions Regulations provide for this.⁷⁶ This includes the obligation of the actor to inform the forum of their conduct, the opportunity of the forum to question the actor in relation to their conduct and also the opportunity for the forum to pass judgment on the conduct of the actor. The most applicable and obvious accountability scenarios is in relation to the disciplining of the public service employees for breaches of conduct and actions in contravention to the legal framework; the appointment; promotion and confirmation of public service employees.

C The Commission as an 'actor'

1 The Prime Minister (forum 1)

The accountability relationship further identifies the Commission as an actor. In this instance, the forum is the Prime Minister. The Prime Minister carries out the appointment and removal of the Commissioners. It is important to note here that the authority of the Prime Minister in its function to appoint and remove any of the Commissioners is not absolute but is conditional on the consent of the Cabinet.⁷⁷ One issue here is the question of whether the Cabinet should be the forum as they determine whether the appointment or removal of a Commissioner takes place. In applying the narrow definition of accountability, the answer would be no. The three events that determine a relationship being that of an accountable one would not be satisfied under the legal framework if the question ever arose. This is irrespective of there being any formal or information relationship between the Commission and the Cabinet.

The composition of the Commission includes there being a Chairman and Deputy Chairman with the remaining three as Commissioners.⁷⁸ The Chairman is the head of the Commission and is responsible for the "efficient and effective operation of the Commission".⁷⁹ The Chairman is named specifically as the person to provide the annual report to the forum which would reflect the developments on the "operation of the Commission and on the efficiency and effectiveness of

⁷⁴ "See generally" *Halalilika 'Etika v Public Service Commission* PST Appeal 2/17 20 July 2017.

⁷⁵ *Halalilika 'Etika v Public Service Commission* PST Appeal 2/17 20 July 2017, at [14] - [24].

⁷⁶ PS (DP) Amendment Regulations 2010, above n 70, regulation 7.

⁷⁷ PS Amendment Act 2010, above n 17, s 5 (3) and s 5 (13).

⁷⁸ At s 5(3).

⁷⁹ At s 5(12) (a)

the public service.”⁸⁰ This may cause confusion as I argue that the reporting obligation is by the Commission to the Prime Minister and not the Chairman of the Commission to the Prime Minister. The general set up and operation of the Commission is a collective task thereby holding all the five members including the Chairman as being responsible and accountable collectively. This is further supported by various instances within the legal framework that determines this. This includes the establishment of the Commission which comprises all the Commissioners together;⁸¹ the quorum requirement for decisions of the Commission of at least three members;⁸² and the objects of the legal framework which is to “define the powers, functions and responsibilities of the Prime Minister, the Commission, relevant Ministers and Chief Executive Officers”.⁸³ There is no specific powers and functions of the Chairman as an individual.

As established above, the Commission as the actor is obligated to report to the forum. This report will include decisions that the Commission have made collectively in relation to their functions and in relation to the public services provided by the twenty government ministries and agencies subject to the legal framework. The report may also include results achieved according to objectives of the Commission, financial reporting and challenges that the Commission may have faced during the particular year in question and how or whether they were addressed.⁸⁴ There is no specific provision in the legal framework of how the report is further handled between the actor and the forum, however, the powers and functions of the forum under the legal framework can be interpreted to provide that opportunity for the forum to question the actor on the report. These powers and functions include the forums responsibility to ensure that the Commissioners comply with their wide scope of functions prescribed under the legal framework.⁸⁵

Further the forum also has an actor capacity in that he is obliged to report to Cabinet on the activities of the Commission.⁸⁶ It is only natural that the Prime Minister as forum in this instance will need to ensure the adequacy, accuracy and legitimacy of the report in order to carry out his powers and functions under the legal framework. This can be achieved by questioning the contents of the report provided to him by the actor where necessary.

The power of the forum to remove the actor is the most obvious and formal method in which the forum may pass judgment on the actor’s conduct. This is specifically in relation to the actor being unable to perform its duties and also if the actor commits serious misconduct.⁸⁷ The procedures for determining serious misconduct and inability to perform duties is also not prescribed in the legal framework and therefore may pose difficulties of knowing how the forum determines this. Despite this, appointments of the Commissioners are done in accordance with due process.⁸⁸ The term *due process* is unfortunately not defined in the legal framework. It

⁸⁰ At s 8.

⁸¹ At s 5 (1) and (2).

⁸² At s 5 (11).

⁸³ At s 4B (c).

⁸⁴ PS Amendment Act 2010, above n 17, at s 8 (1). This is purely inferred from the nature of the report that is to be provided by the Commission to the Prime Minister which will include information in relation “to the operations of the Commission and on the efficiency and effectiveness of the Public Service”.

⁸⁵ At s 4A (b).

⁸⁶ At s 4A (c).

⁸⁷ At s 5(13) (a) and (c).

⁸⁸ At s 4A (a).

would be reasonable however, if the removal of the actor is also carried out in accordance with due process, albeit it not being expressly provided.

In this accountability relationship, I consider this a major weakness in the legal framework which requires attention. In satisfying the three events of account giving, the second event of there being an opportunity to interrogate and question the actor on their conduct and information provided is not prescribed by the legal framework of the Commission. The absence of such an opportunity to question and interrogate can create problems.

On one side, the question arises whether this formal relation qualifies as an accountability relationship and mechanism. As determined earlier, the process of account giving comprises three events that must take place which can be summarized to include ‘informing, debating and consequences’.⁸⁹ The absence of the second event of debating can result in there being an incomplete process of account giving thus leaning more towards the process of accountability failing.

An incomplete process of account giving further affects the ability of the forum to expose the reasons for the ineffectiveness and inefficiencies within the administration. The accountability relationship becomes a routine and focused on procedures and conformance to those procedures as opposed to identifying what aspects of the performance can be improved to ensure effective and efficient performance of the organisation. On the other hand, too much emphasis on a complete process of account giving could focus too much on procedures and conformance and could result in the relationship being a “rule-obsessed bureaucracy”.⁹⁰ I beg to differ however and argue that a complete process *would* enable the identification of the cause of the failure of performance and not necessarily only on conformance to the process. The actor and forum have the responsibility to further respond to the causes of the failure following the process of account giving.

A further problem is that without the opportunity for the forum to question and interrogate the actor, the actor is unable to respond to explain, admit or justify their conduct. The accountability relationship becomes that of only ‘informing’ and ‘consequences’ without any ‘debating’. This can become seriously detrimental to the administration of the Commission by putting more power in the hands of the forum and lacking the necessary ‘checks and balances’ to prevent corruption and abuse of power.⁹¹ There needs to be clear provisions enabling the accountability framework to effectively apply within the Commission.

It stems from here the importance of accountability in enabling a learning process for both the actor and forum in their role to ensure effective and efficient administration of the organisation by doing things better in future.⁹² The accountability arrangements act as a means for actors and forums to learn from their mistakes and either not repeat them in future or to amend or vary their policies and procedures to improve the effectiveness and efficiency of the operations.⁹³ This is

⁸⁹ Bovens, above n 2, at 454.

⁹⁰ At 467.

⁹¹ At 463.

⁹² At 466.

⁹³ At 464.

accommodated through the three events of account giving where informing, debating and consequences are all present. The developments of regulations in later years following the establishment of the 2002 legal framework reflect this outcome of the learning process.⁹⁴ Revisions and reforms taken by the Commission and set out in their Corporate Plans are also a result of this learning process where the Commission learns from previous challenges and creates new strategic ways to bridge those gaps all for the improvement of the administration.⁹⁵

The lack of accountability arrangements to ensure the possibility of debating before consequences blocks out any real opportunity for the actor to reflect back on their conduct and be given a chance to learn from their mistakes and improve on them. Essentially, the actor will not know where it was that they went wrong. While the consequences can have preventative effects in the accountability arrangements, both actor and forum need to be aware of what exactly led to the conduct to determine the best preventative effect that could apply and to actually have a lasting impact going forward. The achievement of this leans more to the side of having clear express provisions within the legal framework to enable the second event of the actual account giving. Therefore, I argue that the legal framework of the Commission should expressly provide for the second event in the accountability relation specifically between the Prime Minister and Commission to prevent the mentioned problems.

This is very different from the accountability relationship as seen earlier between the Commission and public service employees where all three events were present and prescribed for under the legal framework.

2 The Public Service Tribunal (forum 2)

There is a further accountability relationship identified in the Commission's legal framework which is between the Commission and Public Service Tribunal (Tribunal). The Commission remains as actor and a different forum is involved which is the Tribunal. As a social relation, the actor is an organisation and the forum is an agency comprising three members one of which is the Chairman.⁹⁶ The Tribunal is established pursuant to the Public Service (Amendment) 2010 Act and has the primary role of hearing appeals regarding any decisions made by the Commission in relation to the employees covered under its legal framework or any of their applicable regulations.⁹⁷

The actor here is obligated to render account to the forum when appeals submitted to the forum are made in relation to the actor's decisions.⁹⁸ The decisions made by the actor are limited to the public service employees under the legal framework. As such the appeals would be in relation to decisions of appointments, promotions, transfers, confirmations, disciplinary matters and dismissals of the public service employees. The documents to be submitted by the aggrieved employee to the forum should include the details of the decision made by the actor. While the

⁹⁴ The establishment of the Public Service (Grievance and Dispute Procedures) Regulations 2006 came about following the public service strike in 2005 after the realisation that there were no proper regulations to deal with public service employees grievances and disputes.

⁹⁵ "See generally" "Corporate Plan 2016-2019 FY", above n 13.

⁹⁶ PS Amendment Act 2010, above n 17, at s 21B (1).

⁹⁷ At s 21A.

⁹⁸ PS (DP) Regulations 2010, above n 70, at regulation 22 (1).

decision of the actor may already set out the reasonings or justifications, the forum is empowered to request from the actor any other documents within their power and control in respect of the matter that is before the forum.⁹⁹ The actor is obligated to comply with such requests. During the hearing of the matter, the actor may be represented in person or through a solicitor.¹⁰⁰ With the permission of the forum, the actor may also appoint other persons to conduct the case on their behalf.¹⁰¹ It is through the hearing process that the forum has the opportunity to question the actor to determine the legitimacy of its conduct being complained of. This will also enable the forum to reach a decision which it must provide in writing to the actor and the aggrieved employee setting out “a summary of the facts and reasons on which the decision is based.”¹⁰² The decision by the forum is the judgment passed by the forum over the actor for its conduct. The effect of the judgment on the actor is that the decision of the actor can be ordered by the forum to be affirmed, varied or set aside.¹⁰³ Again using the case of *Halalilika ‘Etika v Public Service Commission*, the Tribunal as forum affirmed the decision of the actor to withhold the granting of incremental credits awaiting transitional arrangements which were still ongoing.¹⁰⁴ ‘Etika had appealed a decision of the Commission on the grounds that the decision was unconstitutional, against legitimate expectations, unreasonable and based on no rational grounds.¹⁰⁵ The Tribunal after having questioned the conduct of the actor and the information involved was satisfied that the grounds of appeal failed and that proper considerations were taken by the actor. On most of the grounds claimed by ‘Etika, the Tribunal found them “premature” as the transitional arrangement based on legislative action had not been completed.¹⁰⁶

Similar to the accountability relationship of the Commission and the public service employees, the legal framework also expressly covers the three events of the actual account giving under this accountability relationship between the Commission and the Tribunal. The legal framework covers the obligation for the Commission as actor to explain to the Tribunal as forum in relation to their decisions or conduct. The legal framework also covers the opportunity for the forum to question the actor in respect of their decision or conduct through the hearing process. Lastly, the legal framework also provides for the possibility of the forum to make a finding over the actor’s decision and conduct.

It may seem that the accountability relationships of the Commission and the public service employees and also of the Commission and the Tribunal sufficiently meet the requirements of the narrow definition of accountability. I however argue that even with the satisfaction of all three events, in any accountability relationship, problems can still arise. Therefore, the problems are not only where the three events of account giving are not met. This goes without saying the positive impacts of where the three events are prescribed by law as discussed earlier in the accountability relationship between the Commission and the public service employees.

⁹⁹ At regulation 22 (1).

¹⁰⁰ At regulation 26.

¹⁰¹ At regulation 26.

¹⁰² At regulation 28 (3).

¹⁰³ PS Amendment Act 2010, above n 17, at s 21F (1).

¹⁰⁴ *Halalilika ‘Etika v Public Service Commission*, above n 75, at [52].

¹⁰⁵ At [2].

¹⁰⁶ At [28] - [37].

We see this happening in the case of *Hon. Fanetupouvava'u Tu'ivakano & Ors v PSC*.¹⁰⁷ The issues result from the two different accountability relationships involved. One is between the Commission and public service employees and who are the parties in this case. The second is between the Commission and the Tribunal. In the first relationship, while the three events of account giving were fulfilled as per the legal framework, the decision by the Commission as forum to re-deploy the actors (public service employees) resulted in this appeal by the named public service employees against the Commission. The ground of appeal were for non-compliance with procedural requirements, breach of the principles of natural justice, failing to take into account relevant considerations and the forum's decision being unreasonable and unfair.¹⁰⁸ This was after following the grievance procedures in respect of the actors dissatisfaction with the forum's decision.¹⁰⁹ The facts indicate that the Commission as forum had given the discretion to the Head of Department for the Ministry of Foreign Affairs to re-deploy their staffs (actors) to other Ministries.¹¹⁰ Based on the Tribunal's assessment, the decision had no legal basis and was not done in accordance with the legal framework despite both the Head of Department and the Commission already being advised against it by the Attorney General.¹¹¹

The second accountability relationship between the Commission as actor and Tribunal as forum, again the three events are present. However, the outcome could be perceived positively in that at the end of the case, the actor was shown where the error of their conduct was and was also reminded to comply with the laws in relation to redeployment of staff.¹¹² Despite this, the actor was still faced with the consequence of the Tribunal's cancellation of their decision.¹¹³ The preventative effect comes in to play through this consequence in the hopes that such instances will not be repeated in future by the actor. This is seen to not only end there but would extend as a lesson to be learnt by Heads of Departments particularly in relation to redeployment of staffs as they also contribute to such decisions being made.

It is evident from this, that the three events of account giving while important in the accountability relationship and accountability arrangements can also be faced with problems. This does not however diminish the importance of ensuring that the three events are necessary in the accountability arrangements as the impacts may be more adverse in arrangements that are lacking one of the events than when all three events are met.

As such, a re-emphasis on improvement to the legal framework of the Commission may be necessary to factor in the second step of the actual account giving. This will ensure that the same opportunity given within the accountability relationship between the Commission and public service employees and Commission and Tribunal could also be provided for the accountability relationship between the Commission and the Prime Minister. Additionally, from the case of *Hon Fanetupouvava'u Tu'ivakano & Ors v PSC*, the importance of consultation and taking advice from other informal forums like the Attorney General,¹¹⁴ by the Commission could play a

¹⁰⁷ PST Appeal 2/16 9 December 2016.

¹⁰⁸ At [4].

¹⁰⁹ At [2].

¹¹⁰ At [17].

¹¹¹ At [82].

¹¹² At [78].

¹¹³ At [84].

¹¹⁴ At [9].

vital role in ensuring effective accountability within the administration of the organisation. If the Commission had heeded the advice of the Attorney General and his caution over implementing the re-deployment of the staff involved could have avoided costs and time lost in litigating such matters. The case however is a good example of illustrating that no one is above the law and that no one person despite their status in the hierarchical order can do as they please.

In light of the above, the accountability arrangements under the narrow and social relation definition is important as it acts to prevent one person having all the power and possibly abusing that power. It provides the necessary ‘checks and balances’ to avoid this. The same could be said in the case of *Claude Temoanarau Tupou v Public Service Commission*.¹¹⁵ In this case, one of the Tribunal’s orders was for the Commission to disregard any direction from the Minister in relation to how the recruiting process is to take place as it is the Commission’s duty to make that decision pursuant to the legal framework.¹¹⁶ It would seem that the Commission had taken the directive of the Minister to re-advertise a public service employee position which was already considered by a recruitment panel in line with due process.¹¹⁷ The Tribunal considered the Commission’s conduct in this aspect to having relinquished its powers under the legal framework which was in fact unlawful.¹¹⁸

I cannot emphasise enough on the need for improvements to the legal framework of the Commission. The improvements should aim at making it more clear and robust to ensure that while the three steps of the actual account giving are present, there is lesser room or no room at all for those entrusted with the decision-making powers to carefully implement those powers within the confines of the legal framework. Despite this, it may not be necessarily the legal framework that requires improvement but rather the understanding of those entrusted with the decision-making powers to clearly understand their role, powers and duties. It may therefore also call for ongoing training for those involved in order to be educated and fully understand their respective mandates under the legal framework.

D Informal Accountability Relationships

1 Introduction

The above two instances of where the Commission is actor to both the Prime Minister and the Public Service Tribunal are formal accountability relationships prescribed by the legal framework. It is important to note and worth mentioning at this point that there are other potential forums although not in the formal sense which have been gaining power and has the potential to call the Commission to account as per the narrow definition.¹¹⁹ They also have the potential to indirectly and informally subject the Commission to other forms of accountability in its current formal and direct accountability relationships which will be assessed later on in the paper.

¹¹⁵ PST Appeal 2/15 28 January 2016.

¹¹⁶ At [166].

¹¹⁷ At [162].

¹¹⁸ At [162].

¹¹⁹ “See generally” Bovens, above n 2, at 455.

2 The public

In strictly applying the narrow definition of accountability, there is no direct and formal accountability relationship between the Commission and the general public. The actor and forum in a relationship with the general public is limited to the government ministries and agencies that deal directly with the people that seek their services. As a matter of principle, the government ministries and agencies are accountable for their actions to the public in providing satisfactory services.¹²⁰ They are further required to act respectfully and with “respect, integrity, honesty, diligence” and accountability when dealing with the public.¹²¹ As such, public service employees are the ones obligated to provide explanations to the public and not necessarily the Commission. In that instance, the public becomes a forum to the public service employees and their performance. The way in which the public receive the performance of the public service employees can impact on the formal accountability relationship between the Commission and the public service employees. The public will have various avenues to raise their concerns over public service employee’s performance and these avenues may end up being raised directly with the Commission either through a complaint or even through the media. This ignites the accountability relationship between the Commission and public service employees thereby enabling the application of the three steps determining the judgments that the public service employees may face from the Commission.

3 The media

The media is another informal forum that can influence the accountability of the Commission and impact on the Commission’s functioning. Similar to the public, they have no direct and formal accountability relationship to the Commission. The Commission is also not obligated to account to them, however as a matter of transparency and for the purpose of clarifying the decisions that are within their governance, the Commission may be required to provide explanations to the media. The media in turn reports this information publicly and judgment will then be passed by those receiving that information. While the media have no direct power over the Commission, the contents of what they report and publish may have the power to influence the judgments passed in the formal accountability relationship where the Commission is the actor. This may be more applicable to the accountability relationship with the Prime Minister. The judgment will not be made purely on what the media publishes however, the information will can be the subject matter of questioning from the formal forum to the Commission.

In light of the above, the argument leans towards the public and the media becoming influential forums on the Commission. This is despite their informal accountability relationship to the Commission. They do however, provide a means for the formal forums to raise questions and pass judgment as per the narrow definition.

¹²⁰ PS Amendment Act 2010, above n 17, at s 4C (c).

¹²¹ At s 4C (l).

V The Commission's Accountability Types

A Introduction

Bovens sets out four questions in determining the different types of accountability in any social relation. It looks at the type of forum, the type of actor, the type of conduct or information and the type of obligation involved within the accountability relationship.¹²² Determining these can pose difficulties because various people tend to be involved. One difficulty could be from the actor's point of view where there is more than one forum where account is to be given to.¹²³ As established above, the Commission under its legal framework confronts two different forums who require two different kinds of information and passes two different judgments on the conduct of the Commission.¹²⁴ The Commission as actor in this scenario is required to provide different information to the different forums it has to account to and can face different judgements from the different forums involved. The second difficulty is from the forums point of view where they face too many actors.¹²⁵ This is where many potential actors are involved or contributed to a particular decision or conduct. It poses a difficulty in determining who exactly should be brought to account and to what extent could the potential actor that contributed or was involved should account for.¹²⁶ These problems however can be overcome by the different criteria that differentiate the type of accountabilities based on the nature of the forum, actor, conduct and obligation involved. This will be explored as per the different accountability relationships identified for the Commission.

B Political and Administrative Accountability

In the accountability relationship between the Commission (forum) and the public service employees (actor), the nature of the Commission as forum could see a *political* form of accountability being applicable. This is where accountability is carried out along the chain of where the Commission is principal to the public service employees as agent.¹²⁷ Along the same chain includes the relationship of the Prime Minister as principal to the Commission as agent and also the relationship of the Cabinet as principal to the Prime Minister as agent. The reports and conduct of the public service employees that are to be reported to the Commission and which will be subject to questioning and judgment of the Commission as forum will comprise much of the same report that the Commission as actor will report to the Prime Minister as forum. The same report is that which the Prime Minister as actor will be required to be reported to the Cabinet as forum and also subject to questioning and judgment by the Cabinet. As such, each link in this chain not only includes a principal-agent relationship but also that of a forum and actor.¹²⁸

¹²² Bovens, above n 2, at 454-455.

¹²³ At 455.

¹²⁴ "See generally" Bovens, above n 2, at 455.

¹²⁵ Bovens, above n 2, at 457.

¹²⁶ At 457.

¹²⁷ At 455.

¹²⁸ At 455.

The accountability relationship between the Prime Minister (forum) and Commission (actor) also sees *political* accountability being applicable based on the nature of the Prime Minister. As determined earlier, the forum herein has the function to report to Cabinet of the activities of the actor.¹²⁹ How often and on what activities are not specified in the legal framework however it can be inferred that the contents of the annual report required for the actor to provide to the forum constitutes the activities that the forum will report to Cabinet. The Cabinet Ministers may or may not provide account to the voters from their respective constituencies in respect of the same account rendered to them by the Prime Minister.¹³⁰ Similar to the accountability relationship of the Commission and public service employees, accountability is applied along a sequence of ‘principal-agent’ relationships which can also be translated into forums and actors.¹³¹ In this scenario, the Commission and Prime Minister (forum and actor), Prime Minister and Cabinet (forum and actor) and Cabinet and voters (forum and actor).

A different form of accountability however applies to the accountability relationship of the Tribunal (forum) and the Commission (actor) based on the nature of the Tribunal. This is *administrative* accountability. The forum here plays an administrative role in scrutinizing the decisions of the actor as prescribed under their legal framework.¹³² It further plays an independent and external control role over the actor as it has the power to affirm, vary or set aside the decision of the actor.¹³³ For this reason, it is an important type of accountability for the Commission.

C Individual, Collective, Hierarchical and Corporate Accountability

In the first accountability relationship of the Commission (forum) and the public service employees (actor), based on the nature of the actor, an *individual* form of accountability can apply. This is mainly because the actor in this scenario are individuals and not a collective body or organisation. The individual is judged on their individual contribution as opposed to the formal position they hold.¹³⁴ This type of accountability differs from that of hierarchical accountability and corporate accountability in that the individual official is not protected by the organisation or the highest official in the chain of command.¹³⁵ Further the organisation or the highest official will not have to take all the blame.¹³⁶ This type of accountability is also different from that of collective accountability in that it comes from a moral standpoint where the individual official is appropriately held accountable for his personal contribution to the conduct of the organisation that is in question.¹³⁷

Despite the above, a *hierarchical* form of accountability based on the nature of the actor may also apply. It would involve holding the highest official in the structure responsible.¹³⁸ This

¹²⁹ PS Amendment Act 2010, above n 17, at s 8.

¹³⁰ Bovens, above n 2, at 455.

¹³¹ At 455.

¹³² At 456.

¹³³ At 456.

¹³⁴ At 459.

¹³⁵ At 458.

¹³⁶ At 458.

¹³⁷ At 458-459.

¹³⁸ At 458.

however did not sit well with the Commission in the case of *Busby Kautoke v PSC* where Kautoke as the Chief Executive Officer of the Prime Minister's Office at the time was held accountable by the Commission for a large amount of money unaccounted for.¹³⁹ As Head of Department, the Commission claimed Kautoke to be responsible for this however on appeal to the Public Service Tribunal, the Tribunal did not agree with the Commission as Kautoke was not the direct supervisor of the staff's involved in managing the accounts.¹⁴⁰ The Tribunal had found that it was the direct supervisor's responsibility to ensure proper accounting details and records were maintained. It was one of the determining factors in the Tribunal reaching its decision against the Commission and setting aside their decision to terminate Kautoke's employment.¹⁴¹

The accountability relationship of the Prime Minister (forum) and the Commission (actor) places both a *hierarchical* and *collective* accountability being applicable. Hierarchical because the Commissioners, specifically the head of the Commission, as the highest authority assumes responsibility for ensuring the efficient and effective operation of the Commission.¹⁴² For most public institutions, this is the formal mode of accountability where it follows "the strict lines of the chain of command".¹⁴³ In this sense, the actor is not necessarily the organisation (Commission) but rather the Chairman of the Commission who is specifically responsible as expressly prescribed by the legal framework. Collective accountability on the other hand is where the forum can choose one of the Commissioners, instead of taking the highest authority, and holding them accountable for the conduct of the Commission as a whole purely because they are a member of the Commission.¹⁴⁴ This form of accountability is considered to be morally inappropriate because of the many factors that need to be considered including the legal implications that could follow.¹⁴⁵ While this form of accountability may apply in this accountability relationship, I would agree that this form of accountability would only be effective in specific circumstances.¹⁴⁶ I do not believe it appropriate that the Prime Minister should ever pick one of the members of the Commissioners and hold them personally liable for the conduct of the Commission as a whole, unless of course there was clear evidence of the members involvement or the agreement of the member. Therefore, while applicable, may not be the most form appropriate in this accountability relationship.

The accountability relationship of the Tribunal (forum) and the Commission (actor), sees a *corporate* form of accountability being applicable. The actor is a statutory body and holds an independent legal status operating as an organisation thereby making it possible to be held accountable.¹⁴⁷ Accounts provided by the actor to the forum in respect of its conduct, which are the decisions it makes in respect of its employees, is subject to the forums questioning before making judgment. The legal framework does not provide for the accountability of specific and individual officials but rather the Commission as an independent legal body having made the

¹³⁹ PST Appeal 2/12 9 December 2016.

¹⁴⁰ At [68].

¹⁴¹ At [74].

¹⁴² PS Amendment Act 2010, above n 17, at s 5 (12) (a).

¹⁴³ Bovens, above n 2, at 458.

¹⁴⁴ At 458-459.

¹⁴⁵ At 459.

¹⁴⁶ At 459.

¹⁴⁷ At 458.

decision as a uniform actor and thus the proceedings before the forum always names the actor in its corporate status, the Public Service Commission.¹⁴⁸

D Procedural Accountability

The nature of the conduct involved in the accountability relationship between the Commission and the public service employees, the Prime Minister and Commission and the Tribunal and the Commission all indicate a *procedural* form of accountability being applicable.

As seen earlier, the public service employees are accountable both to the Government and the public in terms of providing “honest, comprehensive, accurate and timely advice and in implementing the Government’s policies and programs”.¹⁴⁹ It must “demonstrate at all times respect, integrity, honesty, diligence and accountability”.¹⁵⁰ The public service must also perform duties “in a manner that meets and promotes effectiveness, efficiency and transparency in a nonpolitical and impartial manner”.¹⁵¹ There are clearly defined codes of conduct for the public service employees to comply with and regulations set out the procedures of dealing with breaches of those conduct.¹⁵² This is where procedures are clearly set out under the legal framework, code and regulation which the public service employees must comply with, failing which, will be subject to judgment by the forum and where applicable, sanctions imposed.¹⁵³

In the accountability relationship between the Prime Minister (forum) and the Commission (actor), this is evident through the procedural requirement prescribed by the legal framework for the actor to provide an annual report to the forum which would indicate the “efficiency and effective operation of the Commission” which is a clearly defined responsibility on the actor.¹⁵⁴ Further, if the actor is unable to meet this requirement, procedurally the forum may impose sanctions on the actor as a consequence including their removal from office.

For the accountability relationship between the Tribunal (forum) and Commission (actor), the legal framework specifically requires that procedurally, the forum can hear appeals in relation to the conduct of the actor and the impact is that the forum when passing judgment may either “affirm, vary or set aside the decision of the actor”.¹⁵⁵ Procedurally, the actor is also required to provide account to the forum in respect of the decision it has made and which is subject to the forums scrutiny and assessment.

E Vertical and Diagonal Accountability

Based on the nature of the obligation, a *vertical* form of accountability can be seen to apply to all the formal accountability relationships of the Commission discussed.

¹⁴⁸ As seen in the cases discussed in this paper that were before the Public Service Tribunal.

¹⁴⁹ PS Amendment Act 2010, above n 17, at s 4C (f).

¹⁵⁰ At s 4C (l).

¹⁵¹ At s 4C (m).

¹⁵² Regulations and Codes, above n 35.

¹⁵³ Bovens, above n 2, at 459.

¹⁵⁴ PS Amendment Act 2010, above n 17, at s 8.

¹⁵⁵ At s 21F (1).

In the accountability relationship between the Commission (forum) and the public service employees (actor), the actors individually are required to provide account to the forum based on the responsibilities and functions clearly set out for them under the legal framework, code and regulations. As such, the Commission formally holds power over the public service employees not only as prescribed under its legal framework but also based on their hierarchical relationship.¹⁵⁶ This is where the forum is the highest official in the chain of command responsible for ensuring the public service employees uphold public service principles.¹⁵⁷ These principles include the performance of the public service employees which must at all times be effective, efficient and transparent and must demonstrate certain conduct outlined under its legal framework when dealing with members of the public and the Government.¹⁵⁸

In the accountability relationship between the Prime Minister (forum) and Commission (actor), the forum has a formal authority over the actor in that the forum is the person with the power to appoint and remove the actor, despite it being conditional.¹⁵⁹ The provisions of the legal framework obligate the actor to provide an annual report to the forum in addition to the hierarchical relationship the forum and actor have in this scenario.

The accountability relationship between the Tribunal (forum) and Commission (actor) introduces another form of accountability that could apply in addition to vertical accountability. This is diagonal accountability. Vertical accountability is evident in that the actor is obliged to provide account to the Tribunal when a notice of appeal has been put before them as forum. This is prescribed for by the legal framework. As such, the forum has formal authority over the actor in that it has the power to affirm, vary or set aside the decision of the actor.¹⁶⁰ In other instances, this may be due to a hierarchical relationship between the actor and forum however in this situation, there is no hierarchical relationship between the actor and forum. This is where diagonal accountability comes in.

In diagonal accountability, the forum does not hold any direct hierarchical relationship to the actor however it does have some power to enforce compliance by the actor.¹⁶¹ Compliance may however be suspended should the actor decide to apply to the courts for judicial review. An example of this is the case of *Busby Kautoke v PSC* whereby the tribunal had found in favour of Kautoke and set aside the decision to terminate by the Commission.¹⁶² The decision was based on a procedural flaw and did not consider the grounds of appeal. The Commission had applied to the Supreme Court and was granted leave for judicial review of the decision by the Tribunal.¹⁶³ The Supreme Court had found in favour of the Commission setting aside the ruling of the Tribunal and further directing them to rehear the Appellants appeal.¹⁶⁴

¹⁵⁶ Bovens, above n 2, at 460.

¹⁵⁷ PS Amendment Act 2010, above n 17, at s 6(e).

¹⁵⁸ At s 6.

¹⁵⁹ Bovens, above n 2, at 460.

¹⁶⁰ At 460.

¹⁶¹ At 460.

¹⁶² PST Appeal 2/12, above n 139, at [2].

¹⁶³ At [3].

¹⁶⁴ At [3].

Having used this example, there is another accountability relationship identified here between the Court and the Commission where the Court is another forum that the Commission as actor is obligated to provide account to. In this particular situation, it was voluntarily as the Commission sought to appeal the decision of the forum made in respect of Kautoke's case. The Court as forum however, will not be discussed here.

F Analysis

The legal framework has assisted in identifying the different types of accountabilities that could apply in the Commission's different formal accountability relationships. These have assisted in determining the nature of the forum, actor, conduct and obligation involved. There are various types of accountability that could apply in public governance. Of importance in the framework of the Commission is that of political accountability based on the nature of the different forums discussed above. This was clear in the accountability relationships between the Commission and public service employees and between the Prime Minister and Commission with their principal-agent nature. It is considered an important type of accountability in democracies of which Tonga is. It is further important because there is a chain linking different actors and forums which have different responsibilities but at the end are indirectly accountable to the voters who are seen to have given them that authority along the chain.

It stems from here the claim that accountability assists in the democratic process in monitoring and controlling government actions.¹⁶⁵ The Prime Minister as the head of Government for Tonga is responsible for the effective and efficient function of the government of the day. In the accountability relations discussed above where the Prime Minister is involved as the forum, the accountability arrangements enable the voters and the people's elected representatives to make informed decisions to judge the conduct of the head of Government. The voters and people's elected representatives hold the position of potential forums who will at the end be entitled to pass judgment. Either by voter's decision to elect other popular representatives or the people's elected representatives decision to elect other popular candidates for Prime Minister.

The biggest public servant's strike that took place in Tonga in 2005 is a good example but perhaps an extreme result of where accountability arrangements failed within public governance. It also shows how the accountability arrangements can influence the democratic process. The 2005 strike had "held the government hostage for six weeks" and affected many public services.¹⁶⁶ The strike was a result of great dissatisfaction of public servants with salary revisions that the Government had passed. The salary revisions saw high positions in the public service being awarded with high pay raises while those in the bottom tiers received nothing.¹⁶⁷ The strikers which were mostly public servants comprised six percent of the national population at the time, an estimated six thousand people.¹⁶⁸ They rejected the salary revisions devised by a "Higher Salary Review Committee" and demanded that a change in the salary scale be carried out with the inclusion of actual public servants in the discussions.¹⁶⁹ As the initial discussions

¹⁶⁵ Bovens, above n 2, at 463.

¹⁶⁶ Leslie, above n 3, at 262.

¹⁶⁷ At 263.

¹⁶⁸ At 263.

¹⁶⁹ At 265.

between the strikers and the government developed, there seemed to be a tug and war which had the strikers standing firm in their demand for salary scale review and the government insisting that formal processes within the Commission be followed.¹⁷⁰ This resulted in no immediate resolutions being met. Instead the strikers called for the dismissal of the Prime Minister at the time who was the King's youngest son.¹⁷¹ As the government continued to maintain their position, the demands from the strikers increased to include the resignation of the cabinet and having a more democratic system in Tonga in which Tongan's would take part "in running the country by having the right to elect the members of cabinet, including the government ministers".¹⁷² The memorandum of understanding that was signed between the strikers and government and that eventually put an end to the strike included the pay raise adjustment for public servants according to what they wanted, strikers being paid for the duration of their strike, no disciplinary action for those that were involved and provisions against government downsizing.¹⁷³ Lastly, but also an important part of the memorandum was the inclusion that those involved in the negotiations would raise the strikers demand for a fully elected government by the people with the rest of the cabinet ministers to be seriously considered.¹⁷⁴

Another form of accountability identified based on the nature of the forum in the relationship between the Commission and Public Service Tribunal is administrative accountability. The tribunal as a *qasi-legal* forum plays an independent and external administrative supervision and controlling role over the Commission as prescribed by the legal framework. This is despite it having no direct hierarchical or principal-agent relationship with the Commission.

On the other hand, based on the nature of the actor, more types of accountabilities were identified which included corporate accountability, hierarchical accountability, collective accountability and individual accountability. Corporate accountability was more in line in the accountability relationship between the Tribunal and the Commission. This type of accountability helps administrative forums like the Tribunal do away with the complications of identifying and validating of individual actors.¹⁷⁵ Hierarchical and collective accountability was considered more in line within the accountability relationship of the Prime Minister and Commission. This was considered based on the specific provisions of the legal framework to name the Chairman as being the head responsible for the Commission's operation and further, having specific reporting obligations to the Prime Minister. Having said this, the Chairman being the highest official in the chain of command is considered to take all the responsibility and to take the blame. While the legal framework provided consideration of the applicability of collective accountability, it was not considered appropriate based on moral reasons. In the accountability relationship between the Commission and the public service employees, individual accountability was considered appropriate based on the nature of the public service employees as individuals.

¹⁷⁰ At 264.

¹⁷¹ At 268.

¹⁷² At 268.

¹⁷³ At 269.

¹⁷⁴ At 269.

¹⁷⁵ Bovens, above n 2, at 458.

Based on the nature of the conduct in all the accountability relationships in which the Commission is involved lies procedural accountability. The legal framework together with its appropriate codes and regulations clearly provide the procedures in which this form of accountability is determined.

Lastly, based on the nature of the obligation involved, vertical accountability was seen as standing out. This being because most of the obligations of the actor to provide account to the forum are prescribed by law. The forum in each instance was seen to formally hold power over the actor through the provisions of the Act. Further, because of the hierarchical relationship between the actor and forum, particularly in the different relationships involving the Prime Minister and public service employees. However, the accountability relationship between the Tribunal and the Commission reflected more of a diagonal accountability particularly because of there being no direct hierarchical relationship between them as forum and actor.

VI Conclusion

The accountability arrangements under the legal framework of the Commission is generally at a stage where accountability can effectively be implemented. It does not however mean that it is perfect which has been reflected through the problems identified and explored in the paper.

The Commission holds a very important role in the management of the human resources activities of the twenty government ministries and agencies which make up most of the public sector in Tonga. The Commission holds other important functions in reporting and advising the Government of their operations and on the efficiency and effectiveness of the public service employees. The Commission is also responsible to ensure that the public service employees provide satisfactory services to the public and they remain ethical and are accountable for their actions. The long-standing criticism against public service delivery and performance saw the establishment of the Commission as a means of ironing out the deficiencies in the public service delivery and performance.¹⁷⁶ Their core function being that of a human resource 'service agency' addressed the concern on human resource activities of the public services and their management. The important and very wide-ranging scope of responsibilities of the Commission deems it important to have a very robust accountability framework to hold the relevant people to account for the important decisions it makes that affect the operations and people involved. It stems from this that the importance of this exercise arose; to consider the accountability relationships and arrangements under the legal framework of the Commission, to evaluate those accountability arrangements and to assess its strengths and weaknesses. We were also able to identify the effectiveness of the accountability arrangements for the Commission.

This paper has examined and analysed the concept of accountability together with the different accountability arrangements and applied them to the legal framework of the Commission. Bovens conceptual framework of accountability was very useful and applicable in this exercise. This helped to identify the different accountability relationships the Commission has together with the different accountability arrangements that applied. The narrow definition of accountability was identified as the most suitable for this paper. It was applicable in examining

¹⁷⁶ Amosa, above n 6, at 186.

the arrangements of the Commission and how they operated. Further it was applicable in examining how and when the Commission could be held accountable.

We were able to analyse the Public Service Commission's accountability relation as an actor to two different forums being the Prime Minister, its employer, and the Public Service Tribunal as an independent and external body exercising administrative supervision and control over the conduct of the Commission. The analysis discovered that while the three events of the actual account giving was generally met, one of the events was expressly lacking in the accountability relationship between the Commission and the Prime Minister. This identified potential problems which include the failure of the process of account giving as per the narrow definition; the inability of the forum to expose inefficiencies and ineffectiveness within its administration; the inability of the actor to justify and explain their conduct; and the inability for the actor and forum to improve from the conduct and apply the appropriate judgment over the actor and their conduct. Despite this revelation, it was also noted that problems could still occur when the three events are prescribed for in the accountability arrangements of the Commission through its legal framework. The consequences however leaned more towards human error in judgment.

The Commission's accountability relation as a forum to the public service employees as actors was also analysed. It identified the three events of the actual account giving process being fully provided for under the Act. This however did not mean that a robust and strong accountability framework existed within the Commission as there were still issues that arose and which were reflected in the cases referred to.

Informal forums were able to be identified as a matter of information. It was established that while they had no direct or formal accountability relationship with the Commission, their actions which could amount to a forum, albeit being informal, had an indirect impact on the accountability arrangements of the Commission. They had the power to influence what the Commission could be held accountable for in its accountability relationship with their formal forums.

The different types of accountability applicable to the Commission was able to be identified based on the nature of the Commission as both forum and actor and also based on the nature of conduct and obligations involved under the different accountability relationships of the Commission. The accountability relationship between the Commission as actor and Prime Minister as forum and also Commission as forum and public service employees as individual actors reflected a political accountability based on the nature of the forum. The nature of the actor however saw different types of accountabilities apply including that of hierarchical accountability and individual accountability. Collective accountability was considered however concluded as being unsuitable for the accountability arrangements of the Commission. Based on the nature of the conduct, procedural accountability was common for both accountability relationships. Lastly vertical accountability was common for both based on the nature of the obligation. On a different note, the accountability relationship between the Commission as actor and the Public Service Tribunal as forum saw very different types of accountability. It is clear that the nature of the forum, actor, conduct and obligation are the defining elements of which type of accountability is to apply.

In carrying out the analysis against Bovens evaluative criteria, I was able to see the common answers for the importance of accountability which included its assistance in the democratic process, providing the necessary ‘checks and balances’ to avoid abuse of power and also as a learning process for both actor and forum in order to improve the performance of the administration.

Accountability remains as an essential element to the proper functioning of the Commission. However, in order for the effective implementation of accountability, a clear and robust accountability framework is equally important within the Commission’s legal framework. It has been identified that that is lacking in some aspects. The Commission can only effectively and efficiently perform its duties and functions with the necessary accountability frameworks which allow it to be held accountable for its actions towards the various forums it has accountability relationships with as discussed in this paper. As seen, accountability however is not a straight forward concept. It has many aspects that require the proper tailoring of the Commission’s legal framework to meet. While Bovens conceptual framework generally applies to the accountability arrangements within the legal framework of the Commission, I can safely conclude that it is far from perfect.

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