

THE EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE FOR THE PREVENTION OF CORRUPT ACTIVITIES BY PUBLIC OFFICIALS

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I. INTRODUCTION

Recent years have witnessed a growing awareness of the nature and extent of the threat posed by transnational criminal activities. The initial concentration on organised international drug trafficking for instance, or terrorism, has gradually started to broaden to include other criminal areas. Areas such as fraud, corruption, counterfeiting and money laundering yield high profits. Such forms of organised transnational criminality is characterised by the ability to diversify operations and engage in new activities or in new geographical areas as soon as they appear promising.

Corruption in public life is not a new phenomenon of the 1990s. However it has taken an alarming dimension in recent years. Such activities became a global concern as countries around the world began to realise that corruption, fraud, counterfeiting and money laundering has become a multi-dimensional, national and international problem. As a result, it has hindered development, created poverty, destroyed confidence in the legal and political system, and undermined good governance.

Having identified this problem, countries around the world moved into introducing anti-corruption bodies such as Interpol, Europol and Transparency International. Countries such as Australia,

Singapore and Hong Kong for instance, have ready introduced anti-corruption agencies of their own. As we acknowledge that corruption in the public service has flourished to an extent that almost nothing can stop its continuous germination, what can the authorities do to minimise, or rather terminate entirely, corruption in the public service?

In my paper I will look at the level of corruption as I see it in my country (PNG). I will look at individuals and agencies engaged in this illegal activity. I will also look at the laws and legislation that deal with corruption matters and explain the role of anti-corruption agencies such as the Ombudsman Commission and the police force; the problems faced by these organisations in carrying out their duties; and suggest ways to improve on the current system of combating corruption.

II. LEVEL OF CORRUPTION

Corruption in the public service is not new. In PNG it has reached the stage where politicians and senior bureaucrats are frequently taking bribes, especially from foreign companies intending to do business in the country. Those that are already operating in the country also contribute to this illegal activity. It has reached the stage where corruption has become part of everyday life in the public service. This is evident from the statistics (appendix A) that those who have been prosecuted for corruption related offences are people who occupied high offices.

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Our records shows that politicians tend to be the ones up-front accepting bribes in return for favours (eg, awarding government contracts to a road construction company whose owner is a friend of the Minister for Works). Major foreign companies are also the main source of corruption. They offer tempting gifts and favors with the intent to lure those in authority to submit to their demands. Cash transaction is the main form of corruption in the country.

III. PROBLEMS ASSOCIATED WITH CORRUPTION

- (i) Bad organisational structure
- (ii) Poor recruitment policy
- (iii) No Code of Ethics / old Code of Ethics
- (iv) Low salary / no promotion
- (v) Laws and legislation (draconian/ weak)
- (vi) Desire for wealth (greed, selfishness)
- (vii) Inadequate training
- (viii) Inadequate auditing and management system
- (ix) Lack of non-formal penalties (transfers, publication)
- (x) Organisational culture

IV. LAWS AND LEGISLATION

Besides other relevant legislation, the Criminal Code deals with almost all the serious crimes committed in the country. It imposes a maximum penalty of life imprisonment.

V. THE ANTI-CORRUPTION COMMISSION AGENCIES

There are two distinct anti-corruption agencies operating in the country, the police and the Ombudsman Commission. However, a number of organisations, through their unique functions, indirectly assist these two agencies in the fight against corruption. I will take you through these organisations later in this report.

But first, let us look at what the police and the Ombudsman Commission do.

A. Police Force

A division of the police force known as the Fraud Squad is responsible for investigations into matters concerning fraud and corruption. They have been successful in getting a number of convictions, some of which have received long term custodial sentences. Although the Constitution guarantees independence for the police force (eg, it is not subject to direction or control by anyone) it is really at the will of the politicians.

1. Appointment of the Police Commissioner

The Police Commissioner is appointed by the Cabinet though recommendation of the Minister of Police. Therefore, it is always the Minister's candidate who gets appointed to the position. Past experience shows that Police Commissioners have been subject to direction and control by politicians through the Office of the Police Minister. Therefore, unless an independent appointment committee is set up to appoint the Police Commissioner, there is no guarantee that the police force is independent, as the Constitution allows.

Our police force is a member of Interpol, which means it has connections with other international police forces who are also members of Interpol.

B. Ombudsman Commission

The Ombudsman Commission was established under Section 217 of the Constitution. There are three (3) Members of the Commission (MOC); the Chief Ombudsman and two Ombudsman.

1. Appointment

The members of the Commission are appointed by the Head of State (Governor General) acting to and according to the

advice of an Ombudsman Appointment Committee consisting of:

- (i) Prime Minister
- (ii) Chief Justice
- (iii) Leader of the Opposition
- (iv) Chairman of the Permanent Parliamentary Committee on Appointments
- (v) Chairman of the Public Service Commission.

2. Qualification

The Chief Ombudsman must be a person of very high personal qualities. It does not necessarily mean being a person with a particular qualification.

3. Ombudsman

The Constitutional Planning Committees Report, to the then House of Assembly, recommended that the two Ombudsmen should have the qualification of an accountant and a lawyer. However the Constitution does not clearly indicate whether the Ombudsman should acquire specific qualification. Therefore, anyone can be appointed as Ombudsman.

4. Salary

The salary terms and conditions of the Chief Ombudsman shall not be less than or inferior to the salary and other conditions of a Judge, other than the Chief Justice and Deputy Chief Justice. Likewise, the salary terms and conditions of the Ombudsman shall not be less than or inferior to the salary and other conditions of a public prosecutor.

5. Term and Removal from Office

The term of office is six (6) years. There are only two grounds upon which an Ombudsman can be removed from office. First, by reason of physical and or mental disability, and secondly, removed in accordance with Division 2 (Leadership Code) of the Constitution.

6. Functions

The Ombudsman Commission has three primary functions conferred by Section 219 of the Constitution. They are:

- (i) To investigate alleged wrongful conduct and defective administrative practice by government departments, statutory authorities and other governmental bodies: the so-called traditional role of the Ombudsman; and
- (ii) To investigate alleged or suspected discriminatory practices; and
- (iii) To supervise enforcement of the national Leadership Code.

My paper is based on the third item - the Leadership Code which, in the absence of an Independent Anti-corruption Commission, operates as a de facto anti-corruption agency in the country.

VI. LEADERSHIP CODE

The Leadership Code, and the Ombudsman Commission charged to enforce it, both came into being at our independence in September 1975. At the time of our independence, few Papua New Guineans were exposed to western influence, foreign ideals or were proficient in the English language. The majority of our people were, and still are, living in villages, practicing their traditional economy of barter and give and take, where social obligations are so closely knit that leadership is a natural outcome of such social interactions. Today, PNG has leaders in many different areas of involvement who look after our interest at the national and provincial levels, as well as at the local and village community levels.

Our constitutional planners saw that as an independent country, we could go through a period of adjustment where our leaders would have to be strong and

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committed in order to steer our country through all kinds of influence, both good and bad, so that the dominant culture of the west would not undermine our sovereignty and independence.

It was for this reason that our constitutional planners decided that we should write into the Constitution a Leadership Code which would regulate the behaviour of our national leaders, who not only have the responsibility of guiding, but also of determining, the destiny of our people. The third goal of our Constitution accommodates this:

“We declare our third goal to be for PNG to be politically and economically independent, and our economy basically self-reliant. We accordingly call for our leaders to be committed to these national goals and directive principles, to ensure that their freedom to make decisions is not restricted by obligations to or relationship with others, and to make all of their decisions in the national interest...”

A. What is a Leadership Code?

The Leadership Code is a set of rules which have been written into the national constitution and the Organic Law on the Duties and Responsibilities of Leadership (OLDRL) to serve one purpose only. That purpose is to regulate the behaviour and conduct of our national leaders who occupy positions of power, authority and influence. Breach of these rules may result in the leader being prosecuted in the Leadership Tribunal for misconduct in office.

B. Who does the Leadership Code apply to?

Section 26 (1) of the Constitution provides that the Leadership Code applies to a wide range of public office holders. In short, the Leadership Code applies to the

upper echelons of public office-holders. The only high public office holder excluded from the ambit of the Leadership Code is the Governor General, who is the Queen's representative as Head of State.

C. Why the Leadership Code applies only to Leaders

We believe that the success of the nation depends ultimately on the leaders and the people. Therefore, as the leaders are people who occupy positions of power, authority and influence, they are vulnerable to the offer of tempting gifts and favours from outside forces. In accepting the offer, the leader will no doubt compromise their position thus placing themselves in a potential conflict of interest situation. Therefore, in order to ensure that our national leaders do not fall victim to the outside force, the Leadership Code was drafted specifically to regulate the conduct of the leaders whilst performing their official duties' as well as their private life.

D. How is the Leadership Code Enforced?

The Ombudsman Commission conducts investigations into allegations against a leader, and when it finds that there is a *prima facie* case of misconduct in office, it is obliged under the Constitution to refer the matter to the Office of the Public Prosecutor for prosecution before an Independent Leadership Tribunal. The Tribunal consists of the chairman, who is a judge of the National Court, and two senior members from the magisterial service, all appointed by the Chief Justice. Offences considered as “misconduct in office” range from immoral behaviour to criminal offences capable of being prosecuted both in civil and criminal courts.

Section 27 of the Constitution very broadly defines general acts of misconduct in office. In addition, the Organic Law on

the Duties and Responsibilities of Leadership, which was enacted to implement the Leadership Code, prescribes in detail some very specific acts that constitute or amount to misconduct in office. These are not exhaustive provisions of the Organic Law, nor are they quoted word for word from the relevant law.

E. Double Prosecution

It is not a bar for those found guilty in the Leadership Tribunal to be tried before the Criminal Court or vice-versa, based on the same facts. The Tribunal is considered an administrative proceedings and not a criminal proceeding as such. Therefore, the question of double jeopardy is immaterial under our law.

F. Standard of Proof

The standard of proof required in the Leadership Tribunal is proof on the balance of probability. Although this is the case, judges sitting as chairman of the tribunals have aired serious concerns on the standard of proof and insist that in any leadership tribunal, the standard of proof should be raised to almost equivalent to that of the case brought before the criminal courts, although rules of evidence do not apply in the Tribunal proceedings.

G. Penalties

The maximum penalty for anyone found guilty by the Leadership Tribunal is dismissal from office. The dismissal remains in force for three years from the date the Governor General signs the instrument of dismissal from office. This means that the person cannot hold any public office for a period of three years. The Alternative Penalties Act also provides for lesser penalties if the Tribunal considers that the offence committed is not so serious to order dismissal from office.

H. Independence

The Ombudsman Commission is

established directly under Section 217 (5) of the Constitution, which states that in the performance of its functions, the Commission, is not subject to direction or control by any person or authority. Section 217 (6) states that the proceedings of the Commission are not subject to review in any way except by the Supreme Court or the National Court, and only on the grounds that it had exceeded its jurisdiction. History shows that the Ombudsman Commission has been vigilant in its defence of the independence the Constitution has conferred upon it.

I. Cartoon Incident

In March 1992, the three Members of the Commission were summonsed before the bar of the National Parliament to give an explanation for the inclusion in the annual report of the Ombudsman Commission of several cartoons dealing with the ethical standards of parliamentarians and ministers in particular. The cartoons were considered by the Parliamentary Privilege Committee to be offensive, and an apology was sought from the Ombudsman Commission. However, the then Chief Ombudsman, Sir Charles Maino, declined to apologise. Instead, he gave what was in effect a measured and rational explanation to the MPs on the educational value of the cartoons and the need to maintain ethical standards in public life. Subsequently there were in parliament some rather undignified attacks made on the Ombudsman Commission, and a draft resolution was circulated which called for the immediate sacking and imprisonment of the three Members of the Commission. Fortunately, it was soon realised that the Parliament had no power of imprisonment nor did it have the power to remove the members of the Commission.

J. How does the Leadership Code Fight Corruption?

Corruption takes place between two

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persons, the giver and the taker. In almost all cases, takers are people who occupy positions of trust, authority and influence. Therefore, the Leadership Code acts as a regulator and prevents policy makers and those in high offices from making decisions which will benefit themselves, their families, friends and relatives. The Leadership Code also helps to eliminate those who seek to compromise their position for the benefit of others whose aim is to manipulate and underpin the legitimate process. In fact, the Ombudsman Commission is referred to as the watchdog of the nation and is a very much feared anti-corruption agency in the country.

VII. OTHER ORGANISATIONS WHICH HELP FIGHT CORRUPTION

The following organisations also play important roles in the fight against corruption in the country. They are:

- (i) Judiciary
- (ii) Correctional Institution Services (CIS)
- (iii) Auditor General
- (iv) Media
- (v) Transparency International

A. Judiciary (Courts)

There are five different court systems in the country:

- (i) Supreme Court
- (ii) National Court
- (iii) District Court
- (iv) Local Court
- (v) Juvenile Court
- (vi) Village Court

The Supreme Court is the highest court in the country. It sits to hear appeals and judicial reviews on the decisions of the national courts. The courts play an important role in deterring the level and

extent of the criminal activities by imposing punishment provided by law. Such punishment may include a custodial sentence, fine, good behaviour bond, parole or even confined to 'Boys Town' (if a juvenile). These are measures the courts can take to deter the further commission of serious crimes.

So far, since the establishment of the court system in the country, the neutrality and independence of the judiciary has always been maintained. It is a requirement under the Constitution that the courts are given independence and are neutral at all times. The courts have a separate budget, which they get through submission in Parliament.

The problems of speedy administration of trial depends entirely on the effectiveness of the institutions involved in the criminal justice process, such as the public prosecutor, public solicitor, CIS, police and courts working together. Right now we have a shortage in the number of judges available to sit on trials and have them processed.

Sentencing to goal remains the last available resort, depending upon the circumstance of the case. Alternatives to goal are quite popular, such as fines and probation, but the lack of available resources such as probation officers, halfway-houses and rehabilitation centers, make it quite difficult for alternative sentencing options to be considered.

Constant and immediate communication and cooperation amongst government agencies and statutory organisations is non-existent. This is because some institutions felt that the laws under which they operate guarantees their independence; eg, they are not subject to direction or control by anyone, or that they are not obliged to disclose to anyone the

nature and extent of their affairs, except to the Parliament. This is bad in the administration of criminal justice because such situations do not help the anti-corruption agencies to fight corruption. There should be constant dialogue between each criminal justice agency and administrative organisation. As I have indicated earlier, problems of co-operation and co-ordination occur due to the creation of institutions to be independent from any influence.

1. International Co-operation in Corruption Cases

At the Legal front, we are currently corroborating with neighboring South Pacific countries and South-East Asian countries for the purpose of facilitating international co-operation on money laundering, environmental pollution, sharing of expertise, etc.

In so far as the extradition treaty is concerned, we do not have in place an extradition law or a treaty with other neighboring South Pacific and Asian countries. However, we do operate under the commonwealth banner for the purpose of the extradition of fugitives and other related matters. Meanwhile, government lawyers are currently putting together a draft bill, soon to go before Parliament, for the enactment of our own law in dealing with extradition cases.

B. Correctional Institutional Service (CIS)

The main function of this institution is to rehabilitate prisoners to live a normal life when they return to the community. The rehabilitation programs conducted in this institution are:

- (i) Education
- (ii) Religious programs
- (iii) Conflict resolution courses
- (iv) Prison industry

(v) Community out-reach

The institution plays an important role in changing one's life through these programs.

C. Auditor General

The Office of the Auditor General was created by an Act of Parliament. The duties of this office are mainly to audit the books of government departments and statutory bodies which exercise governmental functions. The Auditor General tables his/her report in Parliament annually, with findings and recommendations.

Auditors play an important role in exposing, or rather revealing, what can be stealing, misappropriation or even an abuse of power by those in authority (eg, approval granted for the funding of a certain project without following tendering procedures). Exposure by the Office of the Auditor General helps organisations such as the police and the Ombudsman Commission in many ways. It shows where the inquiry should start, and generally sets the foundation for an indepth investigation.

D. Media

Media also plays an important role in exposing shady and questionable deals, negotiations and agreements made in secret and in confidence by certain public officials which are considered improper and bad in substance. Independence for the media is guaranteed under the Constitution. Therefore there are no sanctions whatsoever, resulting in its right to report on almost anything.

In PNG, we have a private run television station called EMTV. It is the only electronic media we have in the country. There is also a government owned radio station called the National Broadcasting Commission (NBC). It has its headquarters based in the capital, Port

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Moresby, with stations located in all the 19 provinces. There are also two private owned radio stations called NAUFM and YUMIFM.

There are four print media publications in the country. They are the Post Courier, The National, The Times and Wantok. The Post Courier and The National are printed daily from Mondays to Fridays, whilst the Times and Wantok are printed once a week. Exposure by the media immediately sets the clock ticking the moment it is published, thus it greatly assists the police and the Ombudsman Commission. Unfortunately, I was unable to collect data on the media reports. However, I can say that about two to three corruption related matters are exposed by the media each month.

E. Transparency International

Transparency International was introduced in PNG in 1998. Although the institution is quite new in the country, it made its presence known when it organised a number of seminars and workshops in the nation's capital, Port Moresby, to explain what it can do to help fight corruption in the country.

F. Independent Anti-corruption Commission

The Government will shortly be introducing in Parliament an Independent Anti-corruption Commission bill. We expect this to happen before the end of the year.

VIII. PROBLEMS FACED BY ANTI-CORRUPTION AGENCIES

Problems faced by anti-corruption agencies vary very much from country to country. For instance, some countries have laws which gives their anti-corruption agencies autonomy, independence and the powers that other anti-corruption agencies

do not have in their countries. For example, some have the power of search, arrest and seizure without warrants, whilst others don't. Extradition laws, for instance, are one of the main barriers in some countries. For this and other reasons, it cannot be said that anti-corruption agencies operating in their respective countries face similar problems as those in other countries. Nevertheless, I have listed below some problems faced by my organisation in its fight against corruption:

- (i) Poorly resourced in terms of budget allocation
- (ii) Poorly staffed
- (iii) Lack of skilled staff
- (iv) Inadequate training for staff
- (v) Bad organisational structure

IX. SUGGESTIONS FOR IMPROVEMENT

- (i) That PNG take all the steps necessary to rectify the problem areas mentioned in this report.
- (ii) That PNG should introduce an Independent Anti-Corruption Commission, given powers similar to that of the Ombudsman Commission. This organisation should have the powers of search, arrest and seizure of properties (without warrant) which are considered illegal.

X. CONCLUSION

Though we have come a long way since our independence, we are still trying to impress upon those who are affected by the Leadership Code the significance of the law and what it means in practice. We still have problems in our hands, that is why I am here in search of the answers to our problems.

ANNEXURE A

LEADERSHIP TRIBUNAL

YEAR	OFFICE	RESULT
1976	MP (1)	Dismissed
1978	Statutory Body (2) Suspended (1)	Reprimanded (1)
1981	MP (1)	Dismissed
1982	MP (1)	Resigned
1983	MP (1)	Dismissed
1985	Statutory Body (1) Manager - NPF	Fined
1988	MP (1) PNGBC - Chairman	Fined Fined
1989	MP (1)	Dismissed
1990	MP (1)	Resigned (later jailed five years on the same crime)
1991	MP (1) MP (1)	Resigned (later jailed for the same offence. Resigned prior to dismissal)
1992	MP (2) MP (4)	Resigned Dismissed
1993	MP (1)	Resigned
1995	MP (1) MP (1) MP (1)	Dismissed (later jailed for the same crime) Fined Dismissed
1996	MP (1)	Jailed

* MP = Minister of Parliament

OFFICE	DISMISSED	RESIGNED	REPRIMANDED	FINE	SUSPENDED	TOTAL
MPS	10	7	-	2	-	19
OTHERS	-		1	2	1	4