

A Submission to the National Anti-Corruption Strategy Technical Working Group
on the proposed establishment of an Anti-Corruption Agency in Papua New
Guinea known as an Independent Commission Against Corruption



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Background:

The following are observations from ACT NOW! in response to the National Anti-Corruption Strategy Technical Working Groups' call in June 2013, for public submission on the proposed establishment of an Anti-Corruption Agency (ACA) in Papua New Guinea, to be known as Independent Commission Against Corruption (ICAC).

The Consultative Documents:

The PNG Government released four documents in its current consultative process on the development of the ICAC as follows:

- a. Public Discussion Paper – Development of Papua New Guinea's Proposed Anti-Corruption Agency (Discussion Paper)
- b. Background Paper – International Best Practice for Anti-Corruption Agencies (Background Paper)
- c. Proposed Law to alter the Constitution entitled Constitutional Amendment (Independent Commission Against Corruption) Law (marked up) (Proposed Constitution Amendment)
- d. Proposed Organic Law entitled Organic Law on the Independent Commission Against Corruption (marked up) (Proposed Organic Law)

Endorsement:

ACT NOW! endorses the pre-requisite design principles that should be met to ensure the effectiveness of the ICAC ACA as set out in the Background Paper, namely

- A clear legal mandate and mission, with clearly delineated roles and functions;
- Structural independence, guaranteed by law (including protection from abolition);
- Operational independence, guaranteed by law;
- Measures in place to ensure the high integrity of members and staff;
- Flexibility and independence to set own terms and conditions for staff, to attract high quality candidates and retain operational independence;

- Measures to ensure continuity in operations;
- Adequate legal protections for members and staff;

- A strong regime of oversight and accountability;

- Proper resourcing, with security of continued levels of funding;

- The public's confidence that they can safely report suspected corruption;

- Their own strong investigatory tools;

- Prosecutorial powers, or rely on separate effective prosecutorial agencies;

- Effective inter-agency cooperation at an operational level, both with the judiciary, law enforcement agencies and other public agencies;

- Effective informal international cooperation and mutual legal assistance mechanisms available;

- The benefit of broad corruption offences, consistent with UNCAC; and

- Powers to investigate unexplained wealth, and possibly unexplained wealth offences.

Observations and Analysis:

A National Anti-Corruption Strategy was adopted in November 2011 by the Parliament, which is to be implemented by the National Anti-Corruption Task Force. In 2013, a National Anti-Corruption Plan of Action 2012-2015 was published. Neither of these documents has been included in the list of consultative documents, nor any reference made to these in the Discussion Paper. No explanation is given on why this is the case.

ACT NOW! requests the public be given immediate access to both the National Anti-Corruption Strategy and Plan of Action.

From the documents provided, we note that the following points are unclear:

1. The PNG Government does not express a preferred scenario from the multiple possible scenarios it lists in the Discussion Paper.¹

2. It is unclear whether the few marked up changes made in the Proposed Constitution Amendment and the Proposed Organic Law reflect the extent of the changes that are intended to be made, or whether following this

¹ Discussion Paper, page 5

consultation exercise a further revised draft will be presented by the Government for comment.

ACT NOW! requests the Technical Working Group clarify the process that will be followed after this consultation period and confirm that further consultation on more complete drafts will be allowed. This is particularly necessary when the Government decides on its policy position in relation to matters of possible contention.

Effective Implementation of International Law:

3. PNG is a party to the United Nations Convention Against Corruption (UNCAC), and should therefore endeavour to implement that Convention in the most effective way possible. This should include not only the implementation of mandatory obligations, but also, where appropriate, consider adopting non-binding obligations, for example the definition and establishment of the offence of illicit enrichment provided at Article 20 of the UNCAC.
4. The Discussion Paper and Background Paper suggest that the PNG government is committed to implementing international best practice for its new ICAC².

Definition of Corruption:

5. Section 37 of the Proposed Organic Law defines corrupt conduct. No offences are created by the Proposed Organic Law with the proposed arrangement that the relevant offences already exist in the Criminal Code. This will need to be cross-referenced to ensure no gaps exist.
6. The Discussion Paper contends that the Government of PNG is currently conducting a mutual evaluation of its compliance with Chapters 3 and 4 of the UNCAC, which will identify whether current laws adequately criminalise the corrupt behaviour subject to the Convention.³ This evaluation is to be completed in late 2013. It is suggested that the anti-corruption laws must not be finalised prior to the completion of this evaluation. This is so that an adequate gap analysis can be undertaken to ensure all corrupt practices are criminalised and defined to guarantee the effectiveness of the ICAC.

Independence of the ICAC

7. A key element to ensuring the independence of the ICAC is to provide for adequate and consistent funding. The current amendments do not make any provision for funding.

² Discussion Paper page 3

³ See Discussion Paper page 43

Part 9 of the Discussion Paper refers to possible solutions to the funding situation but does not provide sufficient information on how this could be achieved or what the preference of the Government of PNG is, in this regard.⁴

8. The Proposed Organic Law deals at length with the establishment of the Commission, including appointment, disqualification and removal of Commissioners. It also deals at length with the appointment of staff of the Commission. How these procedural matters are dealt with will need to reflect the likelihood of political interference that may adversely affect the independence of the ICAC.

Effective Functioning of the ICAC

9. The functions of the Commission – prevention, awareness raising and investigation – are provided for as functions at section 26 of the Proposed Organic Law.
10. Division 6 of the Proposed Organic Law provides for the investigative powers of the ICAC. These powers provide for the provision of notices to produce information or documents, or to attend the Commission to give evidence. The failure to comply with a notice is an offence. The Commission also has the power to examine persons under oath. The level of investigative powers that would be available to the ICAC is currently undecided, however depending on the amount and breadth of powers provided; adequate safeguards to protect the public would also be necessary.
11. The current proposal does not provide the ICAC with prosecutorial powers. This reflects the position in some other jurisdictions. However the Discussion Paper concedes that in the past, inquiries have not resulted in prosecution, which diminishes public confidence.⁵ Some level of check and balance needs to be included to ensure, where appropriate, investigations of corruption are followed through to prosecution where it is in the public interest to do so. The Discussion Paper makes reference to the establishment of an ‘Office of the Special Prosecutor on Corruption’, which may be an adequate solution however would result in significant additional costs.⁶ It would be beneficial for the legislation establishing that Office to be included in this package of amendments.

Accountability of the ICAC

12. It is important to ensure the ICAC is adequately accountable in its work, to avoid adverse political influence or corrupt behaviour within the Commission itself.

⁴ See Discussion Paper page 32

⁵ See Discussion Paper page 37

⁶ Ibid

Accountability also improves public confidence, which in turn improves the effectiveness of the Commission. Mandatory public reporting and transparent decision-making could achieve such accountability.

13. In the Proposed Organic Law, public hearings are only provided for where it is considered in the public interest to do so, however the Discussion Paper implies this may be subject to change.⁷ It will be necessary to balance the need for public accountability and confidence of the ICAC with the need to protect the reputation of alleged offenders and the anonymity of witnesses.
14. If strong coercive investigative powers were to be considered appropriate for the ICAC a more robust system of accountability may need to be in place to ensure that no abuses, or perceived abuses, of that power could occur. In New South Wales (NSW) Australia the need for increased accountability on the use of powers of the ICAC in NSW resulted in the introduction of an 'Independent Inspector of the ICAC' to oversee the use of investigative powers and to handle complaints made against ICAC investigators. A solution such as this would result in additional budget, and so would need to be balanced against the likely need for such a position.
15. It is also necessary to consider whether decisions of the ICAC should be subject to judicial review, and whether a limitation on that review should be imposed. The Discussion Paper implies that it would be preferable to limit the review of decisions in the same way that the review of decisions of the PNG Ombudsman is limited.⁸ Currently decisions of the PNG Ombudsman can only be reviewed on the grounds that jurisdiction has been exceeded. However, the Proposed Organic Law prohibits judicial review entirely (section 48). Judicial review can provide an opportunity for ensuring the Commission does not misunderstand or exceed its mandate as provided by law.

End...

⁷ See Discussion Paper page 31

⁸ See Discussion Paper page 28