

Revised Submission to the Constitutional Laws, Acts and Subordinate Legislations Parliamentary Committee

on the

Organic Law on an Independent Commission Against Corruption

Presented by ACT NOW!

July 14, 2020

About ACT NOW!

ACT NOW! is a community advocacy organisation, registered in 2009.

For the past 10-years we have been advocating for a better future for everyone - a Gutpela Sindaun Bilong Olgeta.

We believe there are three-central pillars to achieving a just and fair society in Papua New Guinea. These are

[1] a model of development that is based on our National Goals of integral human development, equality and participation, national sovereignty and self-reliance, and wise use of natural resources and the environment;

[2] the promotion and protection of customary and the vital role it plays at the centre of our economic, social and cultural wellbeing; and

[3] effective measures to stop the misuse and mismanagement of government revenues and public resources.

Campaign for an ICAC

ACT NOW! has been campaigning since 2010 for the establishment of a robust, well-funded and truly independent ICAC.

In 2013, ACT NOW! made a submission to the National Anti-Corruption Strategy Technical Working Group on the proposed establishment of an ICAC and after the national election in 2017 we organised a public petition calling on the new government to establish an ICAC within its first 100 days.

An ICAC is one of the core recommendations made in our Policy Proposals for Open and Accountable Government.¹

We have also published and distributed a number brochures and factsheets explaining what an ICAC is and why it is needed and we have spoken out in the media calling on politicians to act on their promises to establish an ICAC.

All the while, the costs to Papua New Guinea of corruption and white collar crime have only been increasing and those costs are disproportionately borne by the most disadvantaged in our society.

Costs of corruption

Corruption drains the public purse of vitally needed funding for quality health, education and other government services, but its impacts are felt even more widely.

Corruption undermines the economy, our democracy, and the rule of law, it undermines trust in government, and erodes the effectiveness of government departments and service delivery. Corruption leads to environmental degradation, land grabbing and the exploration of natural resources; it also undermines our traditional laws, customs and our communities.

The Police Minister has estimated that between K2 and 3 billion are lost to white collar crime and corruption every year and approximately K1 billion of these funds end up in offshore bank accounts.² Sam Koim, now Commissioner General for the Internal Revenue Commission, estimated in 2013 that around 40 per cent of the government's annual budget was lost to corruption, waste and mismanagement.³

The loss of government revenue is just one aspect of the total economic impact we as a nation suffer as result of corruption.

The global financial services company Price Waterhouse Coopers (PWC) has developed a simple algorithm that uses the annual Corruption Perception Index (CPI) published by Transparency International to estimate the effects of corruption on a country's Gross Domestic Product (GDP).

ACT NOW! has used the PWC algorithm to show the profound impact that improving PNG's CPI score could have on our economy and people's livelihoods.⁴

Just a one point improvement in CPI could be worth more than K1,000 for every woman, man and child in the country, that is equivalent to a US\$3 billion boost to our economy.

Improving PNG's CPI score, which is the worst in our region, to match that of the next worst country, the Philippines, could be worth US\$24 billion a year.

The ICAC Bill

The ICAC must be fully funded, autonomous and free from political interference. As well as investigating complaints of corruption and prosecuting offenders it must be empowered to initiate and support education and awareness programs aimed at prevention.

The current draft law has many strengths but there are also some important weaknesses that need to be addressed.

1. APPOINTMENT OF THE COMMISSIONERS

Both the ICAC Commissioners and the ICAC Oversight Committee will be appointed by an Appointments Committee.

The ICAC Bill says in Section 133, the Appointments Committee will comprise the Prime Minister, Leader of the Opposition, the Chief Justice, Chairman of the Public Service Commission and the Chairperson of the PNG Council of Churches.

Having two politicians on the Appointments Committee is completely unacceptable and **FUNDAMENTALLY UNDERMINES** the basic principle of an ICAC that it must be **INDEPENDENT** and free from **POLITICAL INTERFREENCE**.

The flaw of including two politicians on the Committee is compounded when we look at Section 139, which deals with the quorum for Committee meetings. The quorum is set at just three members.

Any argument that having both the Prime Minister and the Leader of the Opposition on the Committee somehow balances the political scales is nonsense. Members of Parliament are

always swinging back and forth between the government and opposition and today's Leader of the Opposition might easily be a government Minister tomorrow and vice versa.

This Committee will have a crucial role in ensuring the political independence and integrity of the ICAC. It is therefore critically important that the Committee is formed of suitably qualified and respected persons with absolutely no political affiliations or connections.

This need for independence is reflected in the clauses relating to appointments to the Oversight Committee. Section 142(1) clearly states that in relation to the Oversight Commission, a person is not eligible for appointment if he or she *'is, or has been, a member of the National Parliament or a Provincial Assembly'*. If this is a necessary criteria in relation to the Oversight Committee it is illogical and contradictory for the same rule not to apply to the Appointments Committee.

The positions of the Prime Minister and Leader of the Opposition on the Appointments Committee must be replaced with two civil society / business representatives.

Failure to amend this provision will mean any public trust in the ICAC will be fatally undermined before it has even been established.

2. UNEXPLAINED WEALTH

The definition of 'corrupt conduct' in Sections 5, 6 and 7 does not include unexplained wealth.

The following wording was in paragraph 1.7(1)(f) of the original draft bill but has been removed:

"the possession by a public official or one or more of his family members of unexplained wealth, being a disproportionate value in the property of the public official or family member or members compared to his, her or their lawful income".

The definition of 'corrupt conduct' is extremely important and goes to the heart of whether the ICAC will be successful. The inclusion of a clause relating to unexplained wealth should be seen as essential, particularly as it is common in Papua New Guinea.

The argument of the State Solicitor and the Department of Justice that the clause had to be removed because the powers of the ICAC to investigate corrupt conduct will not be retrospective is illogical and contradictory. Simply inserting the words to the effect of *'acquired since the establishment of the ICAC'* or similar should be sufficient.

The original intent of paragraph 1.7(1)(f) should be reinstated.

3. POWER OF THE PRIME MINISTER TO BLOCK INVESTIGATIONS

Section 54(5) of the draft Bill gives an absolute power to the Prime Minister to effectively block investigations into corrupt conduct where he determines the matters under investigation should be kept secret.

It is very dangerous for the Prime Minister to be given such a broad and absolute power. It effectively means the Prime Minister can obstruct almost any investigation and the use of that power cannot be challenged.

Section 54(5) should be removed entirely. If a power to exclude an investigation on the grounds of national security is necessary, it should be the Commissioner who should make that determination. If the Prime Minister, or anyone else, disagrees with the Commissioner's decision, that could be challenged through the Courts.

4. SELF INCRIMINATION

Section 59 contains a sufficient and appropriate privilege protecting a person from having a self-incriminating statement used against them in any civil or criminal proceedings.

However, in change from earlier drafts of the Bill, Section 70(3) has extended the privilege against self-incrimination to cover documents provided by a person during an investigation.

This change seriously undermines the ability of the Commission to use summonsed documents, such as bank statements for example, in any criminal or civil proceedings. This could lead to the bizarre situation where the Commission could publicly report a finding of corrupt conduct but the corrupt person could not be charged with a criminal offence and the money could not be recovered.

It is not appropriate and will undermine the work of the Commission and the administration of justice if the privilege is applied to documents produced by a person.

Section 70(3) should be removed.

The Whistleblower Act

The law to establish an ICAC should not be looked at in isolation. Corruption is now so systemic and systematic in PNG, so entrenched and pervasive, that a single new institution will not be enough to bring it under control. Instead we need a comprehensive and far-reaching set of reforms, including a comprehensive law to protect, encourage and empower whistleblowers.

Unfortunately the Whistleblower Act passed by Parliament in January this year is woefully inadequate; it offers no effective protection and is likely to actively discourage people from coming forward.

ACT NOW! has consulted with the international expert on whistleblowing laws and the author of the 2018 Best Practice Guide For Whistleblower Legislation⁵, Marie Terracol. Ms. Terracol has confirmed the analysis published last month on the PNGi website that shows the PNG law fails to meet 21 out of 24 of the international benchmarks.⁶

We urge the Committee to urgently look at reviewing the Whistleblower Act and ensuring amendments that will make it an effective tool alongside the new ICAC to help fight the curse of corruption.

END

¹ A full copy of the Proposals is available for download: <https://actnowpng.org/publications/Reports>

² Bryan Kramer, 'K3 Billion a Year Lost in White Collar Fraud,' PNG Attitude, 13 November 2019 (accessed on 24/2/2020): <https://www.pngattitude.com/2019/11/k3-billion-a-year-lost-in-white-collar-fraud.html>

³ Pius Bonji, 'PNG Loses Billions to Government Corruption,' ABC News Online, 29 August 2013 (accessed on 24.2.2020): <https://www.abc.net.au/news/2013-08-27/an-png-billions-lost/4916656>

⁴ Our paper on The Economic Costs of Corruption is attached below

⁵ Available at <https://www.transparency.org/en/publications/international-principles-for-whistleblower-legislation>

⁶ See <https://pngicentral.org/reports/whistleblower-law-completely-unfit-for-purpose>, accessed on 7 July, 2020