



**NATIONAL ANTI-CORRUPTION STRATEGY  
TECHNICAL WORKING GROUP**

**PUBLIC DISCUSSION PAPER**

**DEVELOPMENT OF PAPUA NEW GUINEA'S  
PROPOSED  
ANTI-CORRUPTION AGENCY**

**May 2013**

## INTRODUCTION

### Background

This discussion paper has been developed by the **National Anti-Corruption Strategy Technical Working Group** for the purposes of engaging Papua New Guineans in the Government's development of a dedicated anti-corruption agency (ACA). It is important that Papua New Guineans have a chance to have a say in shaping one of the strategic institutions in the Government's widespread efforts to stem corruption in our country.

PNG's **National Anti-Corruption Strategy** was adopted by Parliament in November 2011, which provides a comprehensive road map for the many actions that PNG will take to tackle corruption. The Strategy included as an action item exploring options for establishing a strong ACA. The Prime Minister, the Hon. Peter O'Neill CMG, has confirmed that the creation of an or Independent Commission Against Corruption (ICAC) is an important Government priority. The National Anti-Corruption Strategy Task Force (comprised of various PNG agency heads) has responsibility for overseeing the implementation of the *National Anti-Corruption Strategy*, and the National Anti-Corruption Strategy Technical Working Group is an inter-agency group of technical officers that assists the National Anti-Corruption Strategy Task Force.

PNG's attempt to establish an ICAC goes back more than a decade. A draft ICAC Bill was first developed in 1997, but political support was not reached and it fell short of being passed by Parliament. In 2011, the PNG Government developed new draft legislation to establish an ICAC. However, that legislation was not tabled in Parliament because of the political impasse that existed in the country at that time.

The **National Anti-Corruption Plan of Action 2012-2015** (the 'Plan of Action'), published in April 2013, is designed to support the implementation of the *National Anti-Corruption Strategy*. The Plan of Action indicates the Government's commitment to revisiting the draft ICAC legislation with a view to streamlining it, and then establishing a "National Integrity Commission" (an ACA or ICAC), to tackle corruption.

### What can we learn from our experiences?

As mentioned, PNG has been considering creating an ICAC for a number of years now, and two draft Bills have been produced. The National Anti-Corruption Strategy Technical Working Group has drawn on the experiences learnt through the development of those Bills and previous public consultations in developing this Discussion Paper. This Paper seeks to build on the work that has already been done, particularly on the 2011 draft legislation.

The Technical Working Group benefits from having expert officers have dealt with corruption related issues over long periods of time in their careers, and that expertise has been drawn upon in developing this paper. It will now benefit from the input of other Papua New Guineans from all walks of life, who

may have also been impacted by corruption, and will have valuable contributions to make about how an ICAC can tackle it.

### What can we learn from experience in other countries?

PNG can also learn from the experience of other countries in setting up and running ACAs.

International reviews of anti-corruption agencies show that most ACAs have been ineffective and have failed to live up to expectations. While many countries around the world have established ACAs based on the very successful Hong Kong, Singapore, and New South Wales models, the success of those agencies has usually not been replicated, because of significantly different operating environments in other countries.

One of the most common reasons why ACAs fail is that Governments do not undertake a thorough policy planning processes regarding the need for, appropriate model for, and powers of, the ACA. Hence, it is vital that PNG's ICAC should be based on international best practice – suitably adapted for PNG's national circumstances – and learning from other countries' experiences. This will give PNG's ICAC the best chance of succeeding, which is particularly important given PNG's high levels of corruption.

The Government recognizes this, and realises that the establishment of an ICAC necessitates careful and detailed consideration of what functions and powers the ICAC should have and how it should be structured. This policy development process will benefit from extensive consultation, both within and outside Government, and that is the purpose of this paper.

### International Best Practice

In addition to this paper, the National Anti-Corruption Strategy Technical Working Group has developed a complementary background paper that outlines International Best Practice for ACA development, the ***Best Practices Principles for Anti-Corruption Agencies***.

The ***best practice design principles*** are then used in this Discussion Paper, to inform the analysis of ACA operational success, as discussed at the pages of this Discussion Paper indicated below.

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This Discussion Paper considers how the best practices have been incorporated into PNG’s draft ICAC legislation, and what may be most appropriate for PNG’s circumstances, taking into account best practice and PNG’s current institutional arrangements.

The **draft 2011 Proposed Law to alter the Constitution** in relation to the ICAC and the **draft 2011 Organic Law on the Independent Commission Against Corruption**, are provided as accompanying documents.

These have been marked up with **proposed amended changes** and **further issues that require consideration** to reflect the policy issues discussed in this paper.

<b>Your views</b>
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This Discussion Paper raises proposals and questions for public input focusing on the **legislative framework** for PNG’s ICAC. Broad input into these issues will assist to inform Government decision-making and the development and finalisation of the ICAC legislation going forward.

This is an important initiative to help address the high levels of corruption in PNG – an issue that affects us all. The appropriate development of PNG’s new ICAC will be strengthened by active public participation.

The National Anti-Corruption Strategy Technical Working Group encourages Government agencies at all levels of Government, Members of Parliament, academics, the private sector, community based and professional organisations, the churches and private individuals to contribute their views on these issues.

## Where to next?

In addition to the legal framework, a range of **practical operational issues** will need to be considered regarding the ICAC's operations, such as how it will be internally structured, how many staff it should have, what their roles should be, whether there should be regional offices and what budgetary allocation will be necessary to ensure that it can successfully operate. **Your views** on these more practical issues are welcome as well, since their thorough consideration will be equally as important in ensuring the ICAC succeeds.

Following this consultation process, the Government will make decisions regarding how the ICAC should be set up, and will then finalise legislation to create the ICAC. This will require the passage of both a Constitutional amendment and an Organic Law through Parliament. In parallel to this legislative process, the Government will also develop a budget proposal for the ICAC, to ensure that it can recruit sufficient numbers of skilled staff and has the other necessary resources to operate successfully.

## How to contribute

Comments on the issues raised in this Discussion Paper and the draft legislation can be provided to the National Anti-Corruption Strategy Technical Working Group by **30 June 2013** to:

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# WHAT SHOULD PNG'S NEW ANTI-CORRUPTION AGENCY LOOK LIKE?

## 1. Clear legal mission or mandate, with clearly delineated roles and functions

### Principles

**MANDATE:** "ACAs shall have clear mandates to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies."<sup>1</sup>

### What this means in practice

The role of PNG's ICAC needs to be clearly expressed in legislation. International experience demonstrates that ACAs are usually not effective – particularly in rural developing countries with limited resources – if too many functions are conferred on them. Not all anti-corruption functions should be invested in one ACA – they are usually spread across a range of agencies.

Prevention functions can encompass:

- setting and promoting public sector ethical standards (eg Codes of Conduct, prevention of conflicts of interest, assets declarations and their verification)
- enforceable powers to issue directions to public sector agencies to implement new procedures to reduce corruption risks.

Education functions can be aimed at developing formal educational material and undertaking awareness raising among the general public, the private sector and/or the public sector.

Investigation functions involve receiving complaints or reports about possible corruption, investigating them and preparing evidence for criminal, administrative or civil proceedings where appropriate, or referring the complaints to other agencies to follow up.

Prosecution functions involve prosecuting corruption-related offences through the courts.

The scope of corruption that the ACA can deal with also needs to be clearly expressed in legislation. It could, for example, just focus on the public sector, or also incorporate judicial or Parliamentary corruption, or private sector corruption. It needs to be able to exercise guided discretion as to which cases it takes on and which it refers to other agencies, to avoid being overwhelmed.

PNG's ***National Anti-Corruption Plan of Action*** envisages that PNG's ICAC will have a mandate over corruption by public authorities, public officials, and departmental heads in relation to:

- Investigation
- Prevention

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<sup>1</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

- Making, promoting and enforcing ethical standards across the public sector and government instrumentalities
- Promoting the integrity of government systems and processes by ensuring that their operability gives effect to good governance and ethical and effective public administration.
- Awareness raising across government agencies

### **Constitutional framework**

In order to have a clear legal mission or mandate, with clearly delineated roles and functions, we need to ensure that the proposal fits within PNG's Constitutional framework. Together, the Constitution and Organic Laws constitute the Supreme Law of PNG. Ordinary Acts of Parliament are then read subject to the ICAC Organic Law. It is in that sense that the Constitution must be amended to provide for the ICAC.

Certain of the elements of the ICAC legislative package are Constitutional matters and, as such, they can only be addressed if there is a sufficient Constitutional basis for them. The amendments to the Constitution will form the basis upon which an Organic Law can set out the details of the ICAC. It is also important to note that the ICAC Organic Law can amend other Organic Laws, to ensure consistency in operations. This will then form the legislative basis to address best practice design principles for PNG's ICAC.

In that respect, two draft Bills are required, being:

- (i) A Constitutional amendment (referred to as the CA); and
- (ii) An Organic Law on the ICAC (referred to as the Organic Law).

The CA will formally establish the ICAC and set out some fundamental aspects of its operations, such as what positions will constitute its members, how members are appointed and its basic functions. The Organic Law then provides the detail of how the ICAC will operate.

The existing draft CA and draft Organic Law are discussed below.

### **Draft ICAC legislation**

**Clause 220B of the draft CA** provides that the purpose of the ICAC is to help achieve the National Goals and Directive Principles and other development plans of PNG by endeavouring to strengthen anti-corruption measures and eliminate corrupt conduct.

Clause 220C of the **draft CA** provides as follows:

- (1) Subject to any Organic Law or an Act of Parliament made for the purposes of Subsection (2), the **functions** of the Independent Commission Against Corruption are:-
  - (a) to receive and consider complaints against corrupt conduct and investigate such of those complaints as it considers practicable; and

- (b) to investigate, on its own initiative or on complaint by a person affected, any case of an alleged or suspected corrupt conduct within the meaning of a Law prohibiting such conduct; and
- (c) to encourage and support public and private sector organization in the –
  - (i) development, establishment and review;
  - (ii) establishment, application or the coordination of the implementation, of practices and procedures for the elimination of corruption; and
- (d) to promote greater awareness of and educate the people of Papua New Guinea against the evils and the prevention of corrupt conduct; and
- (e) any other functions conferred on it by or under an Organic Law or an Act of Parliament.

**Clause 26 of the draft Organic Law** provides that the **functions** of the Commission are:

- a) to receive and consider any complaint against *alleged or suspected corrupt conduct* by any affected person or any person who has information or is aware of such conduct and to investigate such of those complaints as the Commissioner considers appropriate;
- b) in accordance with any referral of any complaint, act, omission or cases of alleged or suspected corrupt conduct referred to it by the Minister, to investigate on such matters as referred and report to the Minister with such recommendations in order to deal with any findings, if any, of corrupt conduct;
- c) to investigate on its own initiative if it has information or being brought to its attention any alleged or suspected corrupt conduct; and
- d) in accordance with any of its recommendations made following its investigations conducted and findings made under paras (a) , (b) or (c), to refer any information, document or evidence gathered to any one or more of any of the relevant authorities, including:
  - i. the Royal Papua New Guinea Police Constabulary
  - ii. the Ombudsman Commission
  - iii. the Office of the Public Prosecutor
  - iv. the Office of the Auditor General
  - v. the Human Rights Commission, and
  - vi. any other body prescribed under the Regulations, including a foreign body,

to act upon any such recommendations on any findings of corrupt conduct, if any.

- e) For the purposes of strengthening anti-corruption measures and the elimination of corrupt conduct:
  - i. to examine and review the practices, procedures and anti-corruption policies and strategies, if any, of government bodies and public authorities in order to facilitate the discovery of corrupt conduct, if any, and to ensure the revision of work practices; procedures, policies and strategies which, in the opinion of the Commissioner, may be conducive to corrupt conduct;
  - ii. develop anti-corruption strategies, policies and practices and give advice to government bodies and public authorities of any recommended changes in the practices and procedures compatible with the effective discharge of duties of such government bodies and public authorities, which the Commissioner thinks necessary to reduce the likelihood of corrupt conduct;
  - iii. to oversee, coordinate, monitor and evaluate the implementation of the anti-corruption strategies, policies, practices and procedures referred to in paras i and ii; and
  - iv. to educate and disseminate information and knowledge to the people about the prevention and combating of corruption; and
- f) to perform such other functions conferred on it by or under the Organic Law or Act of Parliament.

The definition of **corrupt conduct** set out in **clause 37 of the draft Organic Law** is as follows:

(1) For the purposes of Division VIII.3 of the Constitution and this Organic Law, **corrupt conduct** is:

- a) any conduct of any person that adversely affects the honest or impartial exercise of official duties by a public official or a public authority
- b) any conduct by a public official that constitutes or involves the dishonest exercise of any of his or her official duties or displays a conflict of interest,
- c) any offer of a bribe to any person for him or her to undertake or refrain from undertaking his or her duties;
- d) any solicitation or request for payment by a person in order for that person to undertake his or her duties;
- e) any conduct that amounts to a breach of the public procurement and management of public finances guidelines or laws;
- f) any conduct that may amount to misconduct in office under the Leadership Code
- g) any misappropriation, embezzlement or other diversion of public funds, or
- h) illicit enrichment, that is a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income
- i) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) In addition, conduct may amount to official corrupt conduct even though the conduct occurred outside Papua New Guinea, where the conduct is intended to adversely affect the exercise of an official function by any public official, any group or body of public officials or any public authority within Papua New Guinea.

(3) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

The definitions of **public authority**, **public official** and **government body** set out in **clause 3 of the draft Organic Law** are:

**“Public authority”** means any authority however described that receives function whether in whole or in part and either directly or indirectly from the Government of Papua New Guinea.

**“Public official”** means any person who is employed or contracted by or to a public authority, whether on a full-time or part-time basis and whether for remuneration or otherwise and includes former employees and contractors, and includes a member of a government body.

**“Government body”** means

- (a) the National Government
- (b) a Provincial Government
- (c) a Local-Level Government
- (d) an arm, department, agency or instrumentality of the National Government or a Provincial or Local-Level Government
- (e) a State Service

- (f) a body set up by statute (statute) or administrative act for governmental or administrative purposes, and without limiting the generality of the foregoing, includes a member of the National Executive Council and a Constitutional Office Holder.

Division VIII.3 of the Constitution will be the Division that deals with the ICAC, and will contain sections 220A – 220D.

### **Issues and proposals**

#### Types of corruptions that ICAC will deal with

**The draft CA and clause 37 of draft Organic Law** generally provide that ICAC's powers relate to corruption in relation to **public officials** employed or contracted by public authorities.

In relation to the draft CA dealing with the purposes of the ICAC, it is perhaps unrealistic to expect it to endeavour to eliminate corrupt conduct – no country has ever achieved this, and most likely never will. Perhaps the purpose instead should be to aim to contributing to reducing corrupt conduct (noting that a whole range of other agencies across Government, the private sector and the public also have responsibilities for this as well, not just the ICAC).

However, some of the drafting regarding these definitions is unclear and there are inconsistencies between the draft CA and the draft Organic Law. These could be further clarified to ensure that:

- it is broad enough to pick up all the kinds of corruption-related conduct currently criminalised under PNG law and required to be criminalised under UNCAC
- it covers conduct that amounts to misconduct in office under the *Organic Law on the Duties and Responsibilities of Leadership* (only the Constitution is currently mentioned in the draft law)
- it covers any conduct by non-public officials which relates to, or *could allow, encourage or cause*, corrupt conduct by public officials
- it includes all corrupt conduct by Members of Parliament and all others covered by the Leadership Code under the Constitution, not just conduct that may amount to misconduct in office (as defined under section 27(5) of the Constitution), and not just Constitutional office holders (as defined in section 221 of the Constitution)
- it covers corrupt conduct by:
  - a) public officials' family members and associates (cf the definition in the *Organic Law on the Duties and Responsibilities of Leadership*)
  - b) staff of members of Members of Parliament
  - c) Parliamentary staff
  - d) All Magistrates (who are not covered by the Leadership Code other than the Chief Magistrate)
  - e) personal staff of the Judiciary
  - f) other staff employed by the National Judicial Support Services and Magisterial Services
- it covers all 'corrupt conduct' committed outside of PNG (currently only applies to parts of the definition of corrupt conduct).

- It also covers conduct that *could* adversely affect the honest and impartial exercise of official duties.

International experience also demonstrates that it is important to make sure that the ICAC is not obliged to investigate every complaint made to it (or it will not be able to deal with its caseload) and that it has the discretion to refer whichever matters it considers appropriate to other agencies for their own investigation and action.

For example, under section 19(3) of the *Organic Law on the Duties and Responsibilities of Leadership*, the Ombudsman Commission can decide not to investigate a complaint, or to defer or discontinue it, if it is trivial, frivolous, vexatious or not made in good faith; or, the complaint has been too long delayed to justify an investigation, the subject matter of the complaint is outside the jurisdiction of the Commission; or its resources are insufficient for adequate investigation.

Under the **clause 26(a) of draft Organic Law**, the Commission can investigate those complaints considered appropriate, but this power is currently vested only in the Commissioner, which would require him/her to personally screen every complaint, which is impractical. This provision could be modified so that the Commissioner can delegate this power as appropriate. One option would be for the cases to be screened by lower level staff, who make a recommendation to one of a number of delegated senior officers to make a decision, with decisions regarding cases that are likely to require considerable resources or involve high level corruption (to be defined) being made by the Commissioner personally. There is also an issue about whether this function should be vested in the Commissioner or the Commission (see clause 16).

Currently, under the **clause 26(d) of draft Organic Law**, the ICAC can only refer matters to the authorities that are listed in the Bill or prescribed. This may need to be broadened out.

#### Past corrupt conduct

There is also an issue as to whether the ICAC should have the power to investigate corrupt conduct that occurred before the ICAC came into operation. Clause 2 of the draft Organic Law currently provides that it only applies to corrupt conduct that occurs after the commencement of the Organic Law, but that it does not prevent other agencies from investigating corrupt conduct that occurred before the commencement of the Organic Law.

It is important that the ICAC is not completely overwhelmed with complaints when it first starts, or it is unlikely to be effective. On the other hand, conduct that has occurred in the past and can already be investigated and prosecuted under existing PNG laws should not be exempt from being pursued by PNG law enforcement authorities.

Balancing out these competing interests, one option may be for the ICAC only to be able to receive complaints regarding corrupt conduct at least part of which occurred after the ICAC commenced operations. However, cases concerning corrupt conduct which is already under investigation by existing PNG or international law enforcement authorities should still be able to be referred to the ICAC for it to take over the investigation and possible prosecution of those cases.

This would ensure that PNG benefited from the expertise and dedicated anti-corruption resources that the ICAC will bring to its task, while not swamping the ICAC with too many cases while it is still establishing itself. The ability to transfer to the ICAC cases already under investigation at the time of the ICAC's creation will be particularly important in relation to Task Force Sweep investigations, since it is anticipated that the ICAC will take over the work of that Task Force, most of which are existing police investigations.

Breadth of functions that ICAC should undertake

The functions anticipated for the ICAC are different under the **National Anti-Corruption Plan of Action** (for a period of time), **the draft CA** and the **draft Organic Law**, as set out in the following table:

Function	NAC Plan of Action	Draft CA	Draft Organic Law
Prevention	- making and enforcing public sector ethical standards - strengthening systems of agency practices and governance to incorporate anti-corruption and integrity	Encourage & support public & private sector organisations in development, establishment, application, implementation & review of practices to eliminate corruption	Overseeing and coordinating strengthened systems and practices to facilitate discovery and prevention of corrupt conduct and monitoring and evaluating their implementation
Education & awareness raising	public sector awareness raising	Promote greater awareness of and education the people of PNG against the evils and prevention of corrupt conduct	General anti-corruption education and information dissemination 'to the people'
Investigation	Investigating and exposing corruption – wide investigative and prosecution powers	Receive & investigate complaints of corrupt conduct, or initiate its own investigations of corrupt conduct	Receive & investigate complaints of corrupt conduct, or initiate its own investigations of corrupt conduct

International experience suggests that it is unwise to vest a new ACA with too many functions, or there are serious risks of the agency being overwhelmed and unable to fulfill its mandate, particularly in developing countries or countries with poor levels of governance and high levels of corruption.

In relation to the **prevention functions**, the National Anti-Corruption Plan of Action's proposal incorporated the making and enforcement of general public service ethical standards. Implementing this would require further consideration of the current roles of the Public Service Commission, the Department of Personnel Management and the Institute of Public Administration, to ensure role clarity and cooperation between relevant agencies. Enforcing public sector ethical standards may be too challenging a task for a newly formed ICAC, and this is already the responsibility of existing bodies.

The draft CA, however, proposes a very broad prevention role for the ICAC, encompassing both private sector and public sector development, coordination, implementation and review of practices and procedures to eliminate corruption.

On the other hand, the preventative functions proposed under the draft Organic Law are slightly narrower, being restricted to the oversight, coordination and monitoring of public sector anti-corruption system strengthening. This would allow the ICAC to make recommendations about ways to strengthen systems to detect and prevent corruption, based on trends observed during investigations, but leave the actual implementation to other agencies, while still providing an oversight role of monitoring and evaluation. This may be more realistic for the ICAC, at least in the short term, until it is well established. Once successfully operating, consideration could be given to expanding its functions at a later stage.

In relation to ***education and awareness raising functions***, international experience demonstrates that education and public awareness raising requires very high levels of resources and are extremely challenging in rural based developing countries like PNG. It has been suggested that a better strategy is to build coalitions with civil society and media, as PNG is already doing. So it may not be advisable to vest ICAC with general public awareness raising responsibility, particularly in its initial phases when it is a new agency and will need to establish itself. However, the ICAC should be able to liaise with other agencies and bodies, to promote general awareness raising and education.

However, vesting an ACA with *public sector awareness raising* is desirable, providing it has sufficient independence and resources. Public sector awareness raising is particularly important in PNG, as demonstrated by successive Auditor-General's Reports showing the low levels of financial management and high levels of non-compliance in the public sector.

In relation to the ***investigative functions***, the draft Organic Law has been drafted under the policy assumption that the ICAC will only undertake a preliminary initial investigation, but will refer matters to other Government agencies for more detailed investigation and action. The National Anti-Corruption Plan of Action states that the ICAC will have wide investigative and prosecution powers, and hence conduct its own thorough investigations and prosecute offences.

International experience demonstrates that ACAs are likely to fail unless they have a full range of powerful investigative tools. Some ACAs also have ***prosecution*** powers, but if they do not, then there needs to be highly effective independent prosecution services available to refer cases to. These issues are discussed in more detail below in **sections 11 and 12**.

The functions currently set out under **clause 220C of the draft CA** and **clause 37 of the draft Organic Law** will need to be reconsidered. It may be desirable for the Constitution to provide the ICAC with wide-ranging functions so that it can exercise those into the future, but for some guidance to be provided as to which of those functions should be the primary focus in the shorter term.

### **Questions to consider**

Is it appropriate for the ICAC to have the following **functions**:

- Prevention: recommending and coordinating strengthened public sector systems and practices to facilitate the discovery and prevention of corrupt conduct in the public sector, and monitoring and evaluating their implementation

- Anti-corruption awareness raising and training in the public sector
- Investigation of reported or suspected corrupt conduct, including the power to initiate its own investigations.

In terms of the types of conduct the ICAC focuses on, should the ICAC concentrate on **corrupt conduct by public officials** (as widely defined above), and include:

- Similar to the Ombudsman Commission, the power to decide which cases it will and will not investigate, based on a range of relevant considerations, such as:
  - a) Whether the matter has the potential to expose significant or systemic corruption
  - b) Whether the matter involves a matter of public interest
  - c) The monetary value of the alleged corrupt conduct
  - d) Whether the corrupt conduct could have a negative impact on a significant number of people who are supposed to receive services from the agency
  - e) The impact that it will have on the ICAC's resources
  - f) How long ago the alleged corrupt conduct occurred, and
  - g) Whether the complaint was made in good faith.
- The power to refer cases to other PNG agencies or another international government agency.

Should the ICAC's powers to investigate corrupt conduct be limited to:

- complaints regarding corrupt conduct at least part of which occurred after the ICAC commenced operations, and
- matters which are referred to the ICAC by other PNG or international agencies, regardless of when the corrupt conduct occurred.

## 2. Structural independence, guaranteed by law

### **Principles**

**PERMANENCE:** "ACAs shall, in accordance with the basic legal principles of their countries, be established by proper and stable legal framework, such as the Constitution or a special law to ensure continuity of the ACA"<sup>2</sup>

**UNCAC Articles 6 and 36** require that ACAs have the necessary independence, in accordance with the fundamental principles of their legal systems, to enable them to carry out their functions effectively and free from any undue influence.

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<sup>2</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

## What this means in practice

This means that an ACA should be under a law, preferably that is higher up in the Constitutional legal hierarchy, in a way that entrenches the existence of an ACA, so that it cannot be abolished at the whim of an Executive Government.

## ICAC legislation

The **draft CA** would establish ICAC under the Constitution and the details of its operations will be set out in an Organic Law, which then makes it more difficult to abolish the ICAC. This provides the necessary degree of structural security, since Organic Laws are subject to the same protections under the Constitution regarding their repeal or amendment as amendments to the Constitution. This is different from ordinary Acts of Parliament, which can be passed and amended by a simple majority of Parliament.

The draft CA provides:

### Clause 220A

- The ICAC consists of three members, being one Commissioner and two Deputy Commissioners, with at least one member being required to be female
- The members are appointed by the Governor General acting on the advice of an Appointments Committee (discussed in **Section 3** below)
- Establishes an Advisory Committee (discussed in **section 8** below)

### Clauses 220B and 220C

- Set out the purposes and functions of the ICAC (discussed in **section 1** above)

### Clause 220D

- Deals with annual reports by ICAC (discussed in **section 8** below).

## Questions to consider

Does the draft CA adequately protect the ICAC, and should any other issues be covered in the Constitution rather than the Organic Law?

## **3. Operational independence, guaranteed by law**

### Principles

**APPOINTMENT:** “ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence”<sup>3</sup>

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<sup>3</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

**REMOVAL:** “ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice)”<sup>4</sup>

**UNCAC Articles 6 and 36** require that ACAs have the necessary independence, in accordance with the fundamental principles of their legal systems, to enable them to carry out their functions effectively and free from any undue influence.

### **What this means in practice**

Operational independence seeks to ensure that an ACA is strengthened against interference in its day to day operations or decisions regarding investigations by the Executive Government or other government agencies. This is so that it can independently make decisions, particularly regarding investigations, without being subject to pressure. Adequate control over **staffing** and **budgeting** are other aspects of independence, considered in **sections 5 and 9**.

One way to bolster independence is to ensure a degree of separation from the Executive Government in decisions regarding the appointment and dismissal of the **ACA head**. International experience indicates that it is preferable for the ACA’s senior executives to be appointed through a transparent process, insulated from political interference and made on the basis of high-level consensus among different power-holders, so that people of integrity are likely to be selected, and protected while in office.

### **ICAC legislation**

The **draft CA** expressly provides under clause 220A(4)(b) that the Commission is not subject to the direction or control of any person or authority. This allows the ICAC to determine its own work agenda and how it performs its mandated functions, which is particularly important regarding investigations and criminal proceedings.

Clause 5 of the **draft Organic Law** specifies that the Commissioners are Constitutional office holders for the purpose of Division IX (should be Part IX) of the Constitution. This brings with it certain protections for office holders, under section 223 of the Constitution:

- (1) Subject to this Constitution, Organic Laws shall make provision for and in respect of the qualifications, appointment and terms and conditions of employment of constitutional office-holders.
- (2) In particular, Organic Laws shall make provision guaranteeing the rights and independence of constitutional office-holders by, amongst other things–
  - (a) specifying the grounds on which, and the procedures by which, they may be dismissed or removed from office, but only by, or in accordance with the recommendation of, an independent and impartial tribunal; and
  - (b) providing that at the end of their periods of office they are entitled, unless they have been dismissed from office, to suitable further employment by a governmental body, or to adequate and suitable pensions or other retirement benefits, or both, subject to such reasonable requirements and conditions (if any) as are laid down by an Organic Law.

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<sup>4</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

(3) A constitutional office-holder may not be suspended, dismissed or removed from office during his term of office except in accordance with a Constitutional Law.

(4) The total emoluments of a constitutional office-holder shall not be reduced while he is in office, except—

- (a) as part of a general reduction applicable equally or proportionately to all constitutional office-holders or, if he is a member of a State Service, to members of that service; or
- (b) as a result of taxation that does not discriminate against him as a constitutional office-holder, or against constitutional office-holders generally.

(5) The office of a constitutional office-holder may not be abolished while there is a substantive holder of the office but this subsection does not apply to the abolition of any additional constitutional office created by an Act of the Parliament.

(6) Nothing in this section prevents the making by or under an Organic Law or an Act of the Parliament of reasonable provision for the appointment of a person to act temporarily in the office of a constitutional office-holder.

Section 220A of the **draft CA** provides for an Appointments Committee to advise the head of State on the appointment of members of the Commission:

- (1) There shall be an Independent Commission Against Corruption consisting of a Commissioner and two Deputy Commissioners of whom at least one member shall be a female.
- (2) The members of the Commission shall be appointed by the Head of State, acting with, and in accordance with, the advice of an Appointments Committee consisting of-
  - (a) the Prime Minister, who shall be Chairman; and
  - (b) the Chief Justice; and
  - (c) the Leader of the Opposition; and
  - (d) the Commissioner of Police; and
  - (e) two persons of standing in the community, of whom one shall be a female, appointed by the Head of State, acting with, and in accordance with, the advice of the National Executive Council, by notice in the National Gazette.
- (3) The attendance of all members at a meeting of the Appointments Committee, shall constitute a quorum and the Committee may determine its own procedures.

The draft CA does not deal with members' dismissal from office, however, consistent with section 223 of the Constitution, this is provided for in the draft Organic Law.

The **draft Organic Law** provides for protecting the independence of Commissioners through:

- Clause 5 – the office of the Commissioner and Deputy Commissioners to be Constitutional Office Holders
- Clause 6(1) – the Appointments Committee must be satisfied that the proposed appointee as a member of the Commission is qualified (under clause 7) and not disqualified (under clause 8), and then makes a recommendation for appointment to the Head of State (being the Governor General)

- Clause 6(2) – members of the Commission being appointed for 5 years and eligible for re-appointment, and to hold office on the terms and conditions recommended by the Salaries and Remuneration Commission and determined by Parliament
- Clause 6(4) – terms and conditions of Commissioners not to be reduced without their consent (although this is not necessary because of the effect of section 223 of the Constitution, discussed above)
- Clause 7 – eligibility for appointment as a Commissioner if he or she:
  - a) Is, in the opinion of the Appointments Committee, a person of integrity, independence of mind and good reputation,
  - b) Has at least 10 years’ experience (for Commissioner) or 5 years’ experience (for Deputy Commissioner) as an investigator or similar with a police force, Ombudsman, anti-corruption body or similar body, including a foreign body
- Clause 8 – disqualification for appointment (or to remain as) as a Commissioner if he or she:
  - a) Is a member or candidate for National Parliament, or a Provincial or Local Level Government
  - b) Is a member of a Local Level Government Special Purposes Authority
  - c) Is an officer holder, or candidate for election as an office holder, in a registered political party
  - d) Is an undischarged bankrupt or insolvent
  - e) Is of unsound mind (as defined)
  - f) Is under a sentence of death or imprisonment imposed before or after the commencement of this Law
  - g) Has been found guilty of any offence involving corrupt conduct, whether under the law of PNG or a foreign law, or
  - h) Has been found guilty of misconduct in office under the *Organic Law on the Duties and Responsibilities of Leadership*.
- Clause 12 – the head of State can only remove a Commissioner acting on the advice of the Appointments Committee for:
  - a) Corrupt conduct (as defined under this Organic Law)
  - b) Incapacity to perform satisfactorily his or her functions; or
  - c) Material contravention or failure to comply with the requirements of this Organic Law or any other Organic Law or Act conferring functions on a member of the Commission.
- Clause 18 provides that the Chief Executive Officer is appointed by the Head of State acting on the advice of the National Executive Council, for a term not exceeding 4 years, and is eligible for reappointment, with terms and conditions to be determined by the Salaries and Remuneration Commission. The clause also provides for the Chief Executive Officer to be a constitutional office holder.
- Clause 19 sets out that the Chief Executive Officer’s appointment automatically terminates in certain circumstances, which are not aligned with those for the Commissioners. However, it then provides that the Head of State, act in accordance with the advice of the National Security Council, may at any time terminate the appointment of the Chief Executive Office for inability, inefficiency, incapacity or misbehavior.

## Issues and proposals

### Appointment of Commissioners

The draft legislation requires the Head of State to act on the advice of the Appointments Committee in appointing members of the ICAC. That Committee consists of the Prime Minister, the Chief Justice, the Leader of the Opposition, the Commissioner of Police and two persons of standing in the community (chosen by the National Executive Council and appointed by the Head of State).

This is similar to the process for appointing the Chief Ombudsman under section 217 of the Constitution, but includes wider public representation. One issue to consider is whether the requirements for the two public members should be more narrowly specified (eg specific criteria, background, membership of particular bodies etc), so as to ensure that such persons cannot be accused of not being independent of the Executive Government. If the independence of the appointment process is undermined, this would have serious ramifications for the perceived integrity of the ICAC. Another option would be for the Appointments Committee to seek recommendations of potentially suitable candidates from certain peak bodies and other agencies, such as the Law Society, to assist in its duties.

### Removal of Commissioners

Commissioners can only be removed or suspended on the recommendation of the Appointments Committee under clause 12, which provides an independence safeguard. Consideration should be given to whether removal should be possible upon the commission of *any* indictable offence (not just corrupt conduct), or even *any offence*, so as to uphold the integrity of the office.

Further consideration needs to be given to the interaction between clauses 8 and 12, which are not consistent in their grounds, and it needs to be clarified how Commissioners are removed if they are found (presumably by the Appointments Committee) to have met one of the disqualification criteria.

Finally, section 223(2)(b) of the *Constitution* provides that Organic Laws concerning Constitutional office holders must entrench a right to further suitable employment after their term of office has expired. This needs to be included in clause 5.

### Terms and conditions of Commissioners

Clause 6(2)(b) provides for the remuneration of members of the Commission to be set by the Salaries and Remuneration Commission (under section 216A of the *Constitution*), which provides the necessary degree of independence from Executive control. The fact that Commissioners are Constitutional officer holders will prevent their remuneration from being reduced while in office (section 223(4) of the *Constitution*), making clause 6(4) redundant.

However, it may be possible to strengthen these provisions by including a requirement that the Commissioner's remuneration be not less than that of a Judge, and that of the Deputy Commissioners, not less than those of the Public Prosecutor, similar to the requirements under section 217 of the *Constitution* that relate to the Chief Ombudsman and other Ombudsmen.

## Chief Executive Officer

The draft Organic Law currently creates the office of the Chief Executive Officer. One of the principles discussed below is that ICACs should be able to choose their own staff. For example, under the New South Wales, Queensland and Hong Kong legislation, the ICAC can appoint its own staff, including all senior staff, at its full discretion. Therefore, it may be preferable to remove mention of the Chief Executive Officer from the draft legislation altogether, and leave it entirely up to the ICAC to decide how to structure the ICAC's staffing arrangements, including which senior officers it should have and what their terms and conditions of employment should be. This would give the ICAC more flexibility to recruit the staff it thinks it needs, depending on the nature of its final functions.

However, if the provisions regarding the Chief Executive Officer remain in the Organic Law, there are some issues that remain to be addressed. To bolster the ICAC's independence, it would be preferable for the Chief Executive Officer to be appointed and dismissed by the Commission. The draft Organic Law does not contain any provisions dealing with qualifications or criteria for appointment of the Chief Executive Officer. It may be preferable for these to be included, to ensure that an appropriate person is appointed. Further, the grounds for the Chief Executive Officer's dismissal (and the desirability of them being more consistent with those for the Commission's members) needs further consideration, given the current inconsistencies in clause 19.

## Questions to consider

- Does the proposed selection and removal process for Commissioners involve enough independence from the Executive Government to safeguard independence?
- In particular, should particular qualifications be specified for the two members of the public who form part of the Appointments Committee, and if so, what should they be?
- Should the Commissioners' remuneration be guaranteed, by being not less than that of a Judge (in the case of the Commissioner) or the Public Prosecutor (in the case of a Deputy Commissioner)?
- Is there any need to create the role of the Chief Executive Officer in the legislation at all, or should all staffing matters simply be left to the ICAC to determine?

#### 4. Measures in place to ensure the high integrity of members and staff

##### Principles

**ETHICAL CONDUCT:** “ACAs shall adopt codes of conduct requiring the highest standards of ethical conduct from their staff and a strong compliance regime.”<sup>5</sup>

**INTERNAL ACCOUNTABILITY:** “ACAs shall develop and establish clear rules and standard operating procedures, including monitoring and disciplinary mechanisms, to minimize any misconduct and abuse of power by ACAs.”<sup>6</sup>

##### What this means in practice

It is vital that ACAs make sure they have both Commissioners and staff who maintain the highest ethical standards, and who can be trusted.

##### ICAC legislation

The provisions dealing with the appointment, qualification and removal of Commissioners in the draft Organic Law have been discussed above.

In addition to that, the **draft CA** and the **draft Organic Law** contain the following relevant provisions designed to prevent conflicts of interest and maintain high ethical standards:

##### Draft CA section 220A(4) – Advisory Committee

- S220A (4) In the performance of its functions under Section 220C, the Commission:-
- (a) shall be assisted by an Advisory Committee consisting of -
    - (i) the Commissioner who shall be Chairman; and
    - (ii) the Chief Executive Officer; and
    - (iii) the Chief Ombudsman; and
    - (iv) the Police Commissioner; and
    - (v) the Public Prosecutor; and
    - (vi) two persons of standing in the community, of whom one shall be a female, appointed by the Head of State, acting with, and in accordance with the advice of the National Executive Council, by notice in the National Gazette, and
  - (b) is not subject to direction or control by any person or authority.

##### Draft Organic Law Clause 25 – Advisory Committee

- (1) The functions of the Advisory Committee are to:-
  - (a) advise the members of the Commission on any aspect of corrupt conduct in Papua New Guinea or internationally, particularly in relation to measures to combat corrupt conduct, public education and awareness raising; and
  - (b) provide reports to the Commissioner on matters relevant to the functions of the Commission;

<sup>5</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

<sup>6</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

- (c) keep operational, staffing and administrative policies of the Commission under review; and
  - (d) consider the annual estimates of expenditure of the Commission; and
  - (e) review the annual report of the Commission before it is submitted to the Minister.
- (2) The Advisory Committee shall meet at least four times a year, being once every three months and at such other times as the Chairman considers necessary.
- (3) In a meeting:-
- (a) five members constitute a quorum; and
  - (b) the Advisory Committee may determine its own procedures.

#### Draft Organic Law Clause 9 – special conditions of employment

(1) A member of the Commission shall not:

- a) Actively engage in politics
- b) Subject to subsection 2, engage either directly or indirectly in the management or control of a corporation or other body of persons carrying on business for profit, or
- c) Directly or indirectly engage in any paid employment outside the duties of his or her office without the consent in writing of the Minister, or
- d) Subject to subsection 3, acquire by gift or otherwise, or use or hold in any other manner any interest in any land in PNG, or solicit, accept or receive any benefit in addition to his terms and conditions of employment, or
- e) Except with the consent of the Minister, or because of illness, absent himself or herself from duty for more than 14 consecutive days or more than 28 days in any period of 12 months.

(2) Nothing in subsection 1(b) prevents a member of the Commission from holding office in a professional body in relation to which his or her qualifications are relevant.

(3) subject to any Organic Law made for the purposes of Division III.2 (Leadership Code) of the Constitution, a member of the Commission may purchase, lease or otherwise acquire land in the same manner and subject to the same conditions as any citizen.

#### **Issues and proposals**

The role of the **Advisory Committee** is discussed in **section 8** below.

While the provisions dealing with Commissioners' integrity are robust, there are no provisions in the current draft Organic Law designed to address the integrity of the ICAC's staff and in particular the Chief Executive Officer.

Consideration could be given to including a clause dealing with special conditions of employment for the Chief Executive Office similar to that which applies to Commissioners, if the Chief Executive Officer's position is to remain in the legislation.

Consideration could also be given to requiring (either under the Organic Law or via Regulations) the ICAC to:

- Determine a Code of Ethics and enforcement mechanisms for its staff

- Undertake integrity screening before employing staff to ensure they have high ethical standards
- Implement a complaints handling mechanism for complaints made against staff

### **Questions to consider**

Should the draft Organic Law require:

- A specific clause dealing with special conditions of employment for its Chief Executive Officer, similar to that covering members of the ICAC?
- The ICAC to put in place:
  - A code of ethics and enforcement mechanisms for its staff?
  - Integrity screening of staff prior to employment?
  - A complaints handling mechanism for complaints made against staff?
- Should the ICAC be required to consult with other specified relevant agencies (such as the RPNGC, the Ombudsman Commission, the National Intelligence Organisation and the Public Prosecutor) before establishing such mechanisms?

## **5. Flexibility and independence to set own terms and conditions for staff**

### **Principles**

**REMUNERATION:** “ACA employees shall be remunerated at a level that would allow for the employment of sufficient number of qualified staff.”<sup>7</sup>

**AUTHORITY OVER HUMAN RESOURCES:** ACAs shall have the power to recruit and dismiss their own staff according to internal clear and transparent procedures.<sup>8</sup>

### **What this means in practice**

In order to attract highly skilled and capable staff with the highest levels of personal integrity and to maintain operational independence, international experience has demonstrated that it is essential for ACA staff to be recruited by the ACA, unshackled from standard public service terms and conditions, particularly regarding salary, engagement and termination. There should also be the ability to second other public officials to the ACA.

### **ICAC legislation**

**Clause 23 of the draft Organic Law** provides:

1. The Commission may employ such persons as the members of the Commission consider necessary to assist in the performance of the powers and functions of the Commission.

<sup>7</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

<sup>8</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

2. Subject to the *Salaries and Conditions Monitoring Committee Act 1988*, the terms and conditions of engagement of an employee are determined by the members of the Commission.
3. Where an employee of the Commission was, immediately before his engagement, an officer of the Public Service, his service as an employee of the Commission will count as service in the Public Service for the purpose of determining that the employee's rights (if any) in respect of –
  - (a) leave of absence on the grounds of illness; and
  - (b) furlough or pay in lieu of furlough (including pay to dependents on the death of the employee).
4. Subsection (1) does not prevent:
  - i. the Commission from engaging other persons as a consultant or adviser or on a contract or otherwise; or
  - ii. any person being seconded to the Commission to assist the members of the Commission undertake the functions of the Commission.
5. The staff of the Commission are subject to the control and direction of the Chief Executive Officer, who is deemed to be a Departmental Head for the purposes of the *Public Service (Management) Act 1995*.

### **Issues and proposals**

The current provisions in the draft Organic Law appear to provide the Commission with sufficient flexibility to recruit and dismiss its own staff, and determine their terms and conditions (including salary and termination). However, the definition of 'staff' needs to be clarified and used consistently across the draft Law, so that it is clear whether it encompasses contractors, consultants, advisers or just employees.

The consequences of deeming the Chief Executive Officer to be a departmental head for the purposes of the *Public Service (Management) Act 1995* may require further consideration, as well as clarification as to whether staff are members of the public service, and if so, what standard public service conditions of service (if any) apply to them.

It is recommended that the wording of subclauses 23(1) and (2) be changed from "members of the Commission" to "the Commission" in terms of who is responsible for the decisions. Otherwise, it could be construed that all members of the Commission must be in agreement with such decisions, whereas clause 16 of the draft Law allow decisions to be taken by a majority of the members present.

### **Questions to consider**

Should staff of the ICAC be subject to at least some standard public service conditions of service, or should the ICAC be able to entirely determine its own terms and conditions for staff?

## 6. Measures to ensure continuity in operations

### Principles

**CONTINUITY:** "In the event of suspension, dismissal, resignation, retirement or end of tenure, all powers of the ACA head shall be delegated by law to an appropriate official in the ACA within a reasonable period of time until the appointment of the new ACA head."<sup>9</sup>

### What this means in practice

It is important that a Commissioner's powers are delegated in the event of a vacancy in office, to ensure that the Commission can continue to function.

### ICAC legislation

**Clause 13 of the draft Organic Law** provides that:

- 1) The office of a member of the Commission becomes vacant if the member: –
  - a) dies; or
  - b) resigns in accordance with Section 10; or
  - c) retires in accordance with Section 11; or
  - d) is not re-appointed at the end of a term of office; or
  - e) is removed from office in accordance with Section 12; or
  - f) is not qualified to remain a member of the Commission by virtue of Section 8; or
  - g) is declared by the Head of State acting with, and in accordance with, the advice of the Appointments Committee to have contravened Section 9.
- 2) A vacancy in the office of a member of the Commission shall be filled as soon as possible and, in any event, not later than 90 days of the office falling vacant.

**Clause 14 of the draft Organic law** provides that:

The Minister may appoint a Deputy Commissioner to be the Acting Commissioner or a suitably qualified person to be an Acting Deputy Commissioner:

- a) to fill temporarily a vacancy in the office of the Commissioner or a Deputy Commissioner, as the case may be; or
- b) in the case of the absence from duty for any reason of the Commissioner or a Deputy Commissioner, as the case may be.

**Clause 15 of the draft Organic Law** provides that:

An act or decision of the Commission is not invalid by reason only of –

- a) a defect or irregularity in, or in connection with, the appointment or removal of a member of the Commission; or
- b) a vacancy in, or absence from, an office of a member of the Commission.

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<sup>9</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

**Clause 16 of the draft Organic Law** provides that:

- (1) The Commission shall meet as often as the business of the Commission requires and at such times and places as the Commissioner directs or as requested by the Deputy Commissioners.
- (2) Subject to Subsection (4), the Commission may determine the procedures for the conduct of meetings.
- (3) The first meeting of the members of the Commission must be held within one month of the appointment of the members of the Commission, thereafter, the members of the Commission are to meet on a regular basis as determined by the Commissioner.
- (4) Three members of the Commission constitute a quorum.
- (5) Matters arising shall be decided by a majority of the members present and voting.

**Clause 17 of the draft Organic Law** provides that the Commissioner or a Deputy Commissioner shall preside at all meetings.

### **Issues and proposals**

Clauses 13 and 14 provide protection against the ICAC being unable to operate because it has too few members. However, one issue is whether the acting appointment of a Commissioner should be made by the Appointments Committee rather than the Minister, so as to ensure that the independence from the Executive Government remains, even for acting appointments. On the other hand, if a vacancy occurs without notice, it will be quicker for the Minister to make an acting appointment rather than wait for the Appointments Committee to be able to do so, particularly to allow the appointment of an expired member to act in the position, pending either the replacement or reappointment of that member.

Additionally, it should be clarified whether any person appointed on an acting basis needs to meet the qualification requirements for the substantive position, or include other specified qualification requirements. This would prevent unsuitable people being appointed to the Commission on an acting basis. Further, perhaps a maximum period for an acting appointment should be specified in the legislation.

Clause 16 contains some inconsistencies that need to be resolved regarding how regularly the Commission is to meet, and further consideration of a quorum consisting of three members. This would then require all three members of the Commission to be present for any decisions to be made, which may not be practical. An alternative may be for a quorum to consist of 2 members and the Commissioner to have a casting vote on the day if necessary, as provided for in section 14 of the *Organic Law on the Ombudsman Commission*.

### **Questions to consider**

- Should acting appointments to the Commission be made by the Appointments Committee rather than the Minister?
- Should there be qualification requirements specified for acting Commissioner appointments, and if so, should they be the same as the substantive positions?

- Should all three members of the Commission be required to be present before the Commission can make any decisions?

## 7. Adequate legal protections for members and staff

### Principles

**IMMUNITY:** “ACA heads and employees shall have immunity from civil and criminal proceedings for acts committed within the performance of their mandate. ACA heads and employees shall be protected from malicious civil and criminal proceedings.”<sup>10</sup>

### What this means in practice

The ACA and its staff should be protected from civil and criminal liability for actions performed within their mandate as long as those actions have been carried out under the authority of the ACA and in good faith. This is designed to protect staff from being intimidated through collateral legal proceedings. However, this protection should not prevent the judicial review of the legality of ACA decisions.

### ICAC Bill

**Clause 45(1) of the draft Organic Law** provides the following protection to members of the Commission:

A member of the Commission has, in the exercise of his or her duty as a Commissioner or Deputy Commissioner, the same protection and immunity as a Judge of the National Court.

And in relation to staff, **clause 46** provides as follows:

- (1) A member of the Commission, the Chief Executive Officer or a member of the staff of the Commission is not liable for any act or omission done in good faith under or for the purposes of this Organic Law.
- (2) A member of the Commission, the Chief Executive Officer or a member of the staff of the Commission may not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to his or her knowledge in the exercise of his or her functions under this Organic Law.

**Clause 48** also prevents Commission decisions being challenged in court:

- (1) Subject to Subsection (2), a decision made by the Commission or a member of the Commission under this Organic Law:
  - (a) is final and conclusive; and
  - (b) may not be challenged, appealed against, reviewed, quashed or called in question in any court; and
  - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

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<sup>10</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

- (2) Subsection (1) does not apply to a decision of the Commission under Section 23.

### **Issues and proposals**

These provisions protect ICAC members and staff from proceedings attacking their conduct in the course of their functions. However, the provisions should be broadened out to cover any function carried out for the purposes of their duties, not just under the Organic Law, in case staff or members exercise functions or powers under other Acts, and it should be clarified that they apply to both civil and criminal proceedings, as well as to all people acting at the direction of the ICAC (not just staff).

There is a question as to whether the legality of ICAC decisions (as opposed to the merits of the decisions) should still be able to be determined through judicial review, as a means of safeguarding accountability, and make sure that the ICAC is acting within its powers.

There may be a question as to whether the breadth of draft Article 48 – preventing judicial review – is appropriate, in light of section 155(4) of the *Constitution* giving the Supreme Court to undertake judicial review and issue prerogative writs. Constitutionally, judicial review is usually available where a public body has exceeded its powers, committed an error of law, committed a breach of natural justice, reached a decision which no reasonable decision-maker could have reached, abused its power or taken into account irrelevant considerations in its decision making process (*Somare v Ombudsman Commission* (unreported, 3 June 2011). The five writs that the Court can make are Certiorari (quashing a decision), Prohibition (prohibiting certain future conduct), Mandamus (compelling certain conduct), Injunction (preventing or mandating certain conduct) and Quo Warranto (requiring a person to demonstrate they are entitled to exercise certain powers or functions).

By way of comparison, under section 217(6) of the *Constitution*, the proceedings of the Ombudsman Commission are not subject to review in any way, except by the Supreme Court or the National Court on the grounds that it has exceeded its jurisdiction. This may be a more suitable formulation for the ICAC.

### **Questions to consider**

- Should the protection of members and staff extend to all functions and powers exercised in good faith, rather than just those under the Organic Law?
- Should judicial review of Commission decisions be confined in the same way as that of the Ombudsman Commission, rather than eliminated altogether?

## **8. A strong regime of oversight and accountability**

### **Principles**

**EXTERNAL ACCOUNTABILITY:** “ACAs shall strictly adhere to the rule of law and be accountable to mechanisms established to prevent any abuse of power”<sup>11</sup>

**PUBLIC REPORTING:** “ACAs shall formally report at least annually on their activities to the public”<sup>12</sup>

<sup>11</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

**PUBLIC COMMUNICATION AND ENGAGEMENT:** “ACAs shall communicate and engage with the public regularly in order to ensure public confidence in its independence, fairness and effectiveness”<sup>13</sup>

### **What this means in practice**

International experience shows that it is essential to have strong checks and balances and external scrutiny to ensure that ACAs cannot abuse their independence, and that they operate in an unbiased manner. Accountability systems also help track performance, and help to establish credibility and stronger public support.

The usual kinds of accountability mechanisms are:

- Annual reporting (including, for example, summaries of ongoing cases where arrests have taken place, decisions taken and results) to the relevant oversight body and to the public
- Being monitored by an independent oversight body
- Access to judicial review of the ICAC’s decisions (discussed above)
- External audit requirements
- Providing public information on their work
- Clear procedures for case initiation and management, facilitated by case management systems
- Ability to conduct hearings in public.

### **ICAC legislation**

**Draft CA - section 220A(4) – Advisory Committee**

- S220A (4) In the performance of its functions under Section 220C, the Commission:-
- (a) shall be assisted by an Advisory Committee consisting of -
    - (i) the Commissioner who shall be Chairman; and
    - (ii) the Chief Executive Officer; and
    - (iii) the Chief Ombudsman; and
    - (iv) the Police Commissioner; and
    - (v) the Public Prosecutor; and
    - (vi) two persons of standing in the community, of whom one shall be a female, appointed by the Head of State, acting with, and in accordance with the advice of the National Executive Council, by notice in the National Gazette, and
  - (b) is not subject to direction or control by any person or authority.

**Clause 25 of the draft Organic Law** provides for the functions the Advisory Committee:

- (1) The functions of the Advisory Committee are to:
  - a) advise the members of the Commission on any aspect of corrupt conduct in Papua New Guinea or internationally, particularly in relation to measures to combat corrupt conduct, public education and awareness raising; and

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<sup>12</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

<sup>13</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

- b) provide reports to the Commissioner on matters relevant to the functions of the Commission; and
- c) keep operational, staffing and administrative policies of the Commission under review; and
- d) consider the annual estimates of expenditure of the Commission; and
- e) review the Annual Report of the Commission before it is submitted to the Minister.

(2) The Advisory Committee is to meet at least four times a year, being once every three months and at such other times as the Chairman considers necessary.

(3) In a meeting:

- a) Five members constitutes a quorum; and
- b) The Advisory Committee may determine its own procedures.

**Clause 30 of the draft Organic Law** provides that the Commission must conduct hearings in private, but can give directions allowing certain persons to be present.

**Section 220D of the draft CA** provides:

1) As soon as practicable after 31 December each year, the Advisory Committee referred to in Section 220B shall, after receiving from the Commission a copy of the Report of the Commission for the year preceding the report for its comments give to the Minister with any comments the Committee may make, for presentation to the Parliament, a report on the functions and workings of the Commission, with such recommendations as to improvement as the Commission or the Committee thinks proper.

(2) Nothing in Subsection (1) prevents the Commission from making on its own initiative, other reports on any aspect of the functions and workings of the Commission.

## **Issues and proposals**

### **Oversight body – Advisory Committee**

It is usually recommended that members of oversight bodies consist of a range of people from different backgrounds, to ensure its non-partisan nature, or otherwise be a Parliamentary committee. In PNG, there is some doubt as to whether a Parliamentary committee would function effectively, and it may be preferable to have an oversight committee consisting of a range of representation of the Executive Government, Parliament, civil society, professional associations, or other key national authorities. The Advisory Committee is intended to perform this role.

The draft Constitutional amendment establishes an Advisory Committee and sets out its members. It may be more appropriate for the Commissioner and Chief Executive Officer to participate as observers rather than as members, since their inclusion on the Advisory Committee would mean that in practice, they are advising themselves. The remaining existing proposed members are the Chief Ombudsman, the Police Commissioner, the Public Prosecutor and 2 members of the public appointed by the National Executive Council.

The composition of the proposed Advisory Committee may require further consideration, to make sure it is sufficiently representative and independent, and to clarify the qualifications and term of

appointment for the appointed members (as opposed to ex officio members). In particular, it would probably not be appropriate for there to be any overlap in membership of the Advisory Committee and the Appointments Committee. The Police Commissioner is currently a member of each Committee.

Additionally, the functions of the Advisory Committee may require further consideration. An oversight body could possibly also have powers to:

- consider financial and resource needs of the ICAC and make recommendations to the Government.
- organize public meetings or media conferences to share their views on the ICAC's progress and priorities
- review the ICAC's operations
- Review the ICAC's annual report, question the ICAC's members on it and provide a public report on its operations.

#### Other means of accountability

The Commission would be subject to audit by the Auditor General under the *Audit Act 1989*.

Although Article 25 of the draft Organic Law anticipates an annual report being provided to the Minister and section 220D of the draft Constitutional amendment anticipates the Advisory Committee considering an annual report, there is currently no express requirement in the draft Laws for the ICAC to make an annual report. Such an annual reporting requirement should be inserted, so that together with a requirement that it be provided to the Minister (for tabling in Parliament), the Advisory Committee and published (so that it is publicly available) by 31 March each year.

The discretion to hold hearings in public, where appropriate, is also another element of public accountability, and can help to instill public confidence in the ICAC. This is not currently contemplated in the draft legislation and should be included.

#### Questions to consider

- Who should be the members of the proposed Advisory Committee?
- How should they be appointed and what should their qualifications be?
- How long should they be appointed for?
- What should the functions of the Advisory Committee be?
- Should the Advisory Committee's name be changed, if it is to mainly perform an oversight role?
- Should the Commission be required to publish an annual report, and if so, should it be published for the public and provided to Advisory Committee and the Minister (for tabling in Parliament)?
- What should the annual report contain?
- Should the ICAC have the option of conducting hearings in public, in order to enhance transparency and accountability?

## 9. Be properly resourced, with security of continued levels of funding

### Principles

**ADEQUATE AND RELIABLE RESOURCES:** “ACAs shall have sufficient financial resources to carry out their tasks, taking into account the country’s budgetary resources, population size and land area. ACAs shall be entitled to timely, planned, reliable and adequate resources for the gradual capacity development and improvement of the ACA’s operations and fulfillment of the ACA’s mandate.”<sup>14</sup>

**FINANCIAL AUTONOMY:** ACAs shall receive a budgetary allocation over which ACAs have full management and control without prejudice to the appropriate accounting standards and auditing requirements.<sup>15</sup>

### What this means in practice

Internationally, many ACAs have failed due to a lack of resources. Strong commitment is required to allocate an ACA the human and financial resources that it requires to be successful. While full financial independence cannot be achieved, international studies show that sustainable funding needs to be secured and legislation should prevent unfettered discretion of the Executive over the level of funding.

Some options for an ACA’s budget are:

- Giving the ACA the ability to propose a budget directly to the Parliament (rather than being dependent on the Executive)
- A guarantee of budgetary stability, with the annual budget being guaranteed either by law or by the Constitution, and the ACA being required to submit accounts and be subject to external audit
- Allow the ACA to retain a certain percentage of recovered proceeds of crime.

### ICAC legislation

There are not currently any specific provisions in the draft CA or the draft Organic Law dealing with the ICAC’s budget.

However, under section 225 of the *Constitution*, by virtue of the Commissioners being Constitutional office holders, the National Government is obliged to ensure that all reasonable staff and facilities are provided to enable and facilitate the proper and convenient performance of the Commissioners’ functions.

### Issues and proposals

No PNG agency has the ability to acquire a budget directly from Parliament. However, under section 209 of the *Constitution* and section 22 of the *Public Finances (Management) Act 1995*, the National Budget is comprised of separate appropriations for Parliament, the Judiciary, general public services and

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<sup>14</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

<sup>15</sup> Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

the development budget. Under section 209(2B) of the *Constitution*, the Speaker of Parliament and the Chief Justice must submit to the Prime Minister estimates of expenditure for the following year. It could be considered whether the ICAC could have a separate budget allocation under this provision, in the same way that the Judiciary and Parliament.

Another option would be to allow the ICAC to retain a certain percentage of proceeds of crime which it recovered, rather than the entire amount being forfeited to the State's consolidated revenue.

The ICAC will be required to submit accounts and be subject to audit, under the *Audit Act 1989*.

### **Questions to consider**

- Should the ICAC be able to propose its own budget and obtain its budget through a separate appropriation, as do the Judiciary and the Parliament, under section 209 of the Constitution?
- Should the ICAC be able to retain a certain percentage of recovered proceeds of crime, to supplement its budget allocation?

## **10. The public must have confidence that they can safely report suspected corruption**

### **Principles**

**COLLABORATION:** ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation.

UNCAC requires that States consider protecting persons who report suspected corruption to authorities in good faith and on reasonable grounds.

### **What this means in practice**

The general public should be able to easily report suspected corruption to ACAs, including anonymously, and ACAs should generally keep complainants' identities confidential. They should generally also be protected from being sued by those against whom allegations are made. Persons who cooperate in providing information as part of an inquiry should generally also have these same assurances. This will encourage people to report corruption.

Some countries go so far as to make reporting of corruption compulsory. In particular, there could be obligatory reporting for other public sector agencies. For example, the NSW ICAC Act makes it compulsory for principal officers of public authorities, Ministers and certain others to report to ICAC any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct.

The public and others who either report to the relevant agencies, or cooperate with requests for information, where they have acted in good faith and on reasonable grounds, should be assured of no adverse consequences if the information provided does not lead to further action. Any arrangements,

legislation or regulations enacted in accordance with this article should spell out “reasonable grounds” that the offences concerned have been committed.

### **ICAC legislation**

There are not currently any provisions in the draft ICAC Organic Law protecting the identity of complainants, or encouraging people to report corruption. There is nothing in the draft Law specifying how complaints can be made.

However, **clause 40 of the draft Organic Law** would create an offence for knowingly making false reports of alleged corrupt conduct to the Commission. This may discourage complainants from coming forward.

### **Issues and proposals**

The Government is currently developing *Corrupt Conduct Disclosure (Protection) Bill*, to protect persons who report corrupt conduct to relevant authorities, which could include the ICAC. The interaction between this Bill and the draft Organic Law will be further considered to ensure that adequate protection is provided to persons who report corrupt conduct, and to clarify where such conduct should be reported.

One option is to incorporate whistleblower protections for the reporting of suspected corrupt conduct to ICAC into the ICAC legislation, but to have separate legislation dealing with whistleblower protection for any suspected misconduct committed during the course of public sector employment reported to other public sector agencies, including their employing agency, the Public Service Commission, the Police, the Auditor General, or the Ombudsman Commission.

### **Questions to consider**

- Should the ICAC legislation specify how complaints can be made (including that they can be made anonymously)?
- Should there be an obligation for the ICAC to keep the identity of any complainant or person who provides information during an investigation confidential?
- Should certain persons (particularly high level public officials) be obliged to report suspected corrupt conduct to the ICAC, and if so who?
- Should the whistleblower protections for reporting to ICAC be incorporated into the ICAC legislation, separately from the remaining whistleblower protections to be included into the *Corrupt Conduct Disclosure (Protection) Bill*?

## **11. Have its own strong investigatory tools**

### **Principles**

An ACA must have the necessary powers to conduct proper investigations. At the minimum, the ACA must have:

- the ability to commence an inquiry on its own initiative, and
- the power to subpoena witnesses to obtain documentation and information or give testimonies or other evidence.<sup>16</sup>

### **What this means in practice**

An ACA needs strong, contemporary law enforcement powers if it is to seriously pursue corruption. The draft Organic Law has been drafted on the basis that the Commission would conduct some of its own investigations, but generally rely on the police to carry out most of the investigative functions in relation to corruption inquiries.

### **ICAC legislation**

Under **clause 28-36, the draft Organic Law** gives the Commission the powers to:

- issue a notice requiring the provision of information, documents or evidence
- issue a notice requiring a person to attend and give evidence before the Commission, or to attend and produce documents
- examine persons on oath or affirmation
- issue a direction preventing publication of any information about the hearing
- require a person to surrender travel documents

It is an offence to fail to comply with a notice. If the notice specifies that the person must not disclose its existence or any information about it, and if the person does so, an offence is also committed. A person appearing before the Commission is entitled to legal representation. The person being examined must answer the questions, but can claim privilege against self-incrimination to prevent that evidence being used in other proceedings.

### **Issues and proposals**

It is unusual for an effective ACA not to have strong investigatory powers. Many ACAs are conferred with police powers. The range of powers that have been conferred on ACAs internationally include:

- requiring the production of documents
- requiring the giving of evidence
- issuing search warrants
- issuing arrest warrants
- having access to banking and financial records
- being able to monitor financial transactions
- having access to financial and criminal intelligence
- obtaining access to information about, and being able to monitor, income and assets
- having the right to access immigration, customs, company registration, land ownership and other necessary government records

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<sup>16</sup> UNODC, *Technical Guide to UNCAC*, p.9.

- having access to, or be able to undertake, action to restrain and forfeit assets
- carrying out covert surveillance
- intercepting communications
- conducting undercover investigations
- protecting witnesses, and
- seizing passports.

Considerable legislative amendments would be required to ensure that the ICAC has at least some of these powers. However, without them, the ICAC is not likely to be effective. Relying on the police to exercise their own powers and then provide the ICAC with the relevant criminal intelligence risks long delays and the compromise of investigations.

If the ICAC were to be conferred with coercive powers like telephone interception, this would require a strong oversight regime to ensure that the powers were strictly used only when appropriate, and were not abused. In relation to telephone interception in particular, amendments would be required to the *Protection of Private Communications Act 1973*. That Act allows a Judge to authorize the issue of a warrant for the interception of private communications in certain circumstances.

The provision allowing the ICAC to require a person to surrender travel documents may require more consideration. The way it is presently drafted, anyone could be required to surrender travel documents to the Commission, regardless of whether they were under investigation or required to cooperate with the Commission. The Commission could be given the power to demand the surrender of travel documents only in relation to persons currently under investigation by or a witness before the Commission. Additionally, the review mechanism is currently by application to the Minister. It may be more appropriate to vest an express review power in the judiciary, to ensure independent oversight of the function. Further, there is no enforcement mechanism if a person fails to comply.

The ability for the ICAC to access financial intelligence information and take advantage of the powers under the *Proceeds of Crime Act 2005* is another area that requires further consideration. The way the Act is currently drafted, the Commission would need to request the FIU (currently part of the RPNGC) or the Public Prosecutor to take certain proceeds of crime action. Legislative amendments may be required to either ensure that other agencies can cooperate with the Commission, or to give the Commission access to certain powers under the relevant Act. At a minimum, consideration should be given to enabling the Commission to make conviction-based restraint and forfeiture applications so as to recover assets stolen during the commission of corrupt conduct on conviction.

### **Questions to consider**

- Which of these investigative and coercive powers is it appropriate for PNG's ICAC to possess?
- Could the Organic Law allow for these kinds of powers to be conferred by regulation, to allow the easier adoption of new investigative techniques with changes to the law and technology, given the long process involved in making amendments to Constitutional laws?

## 12. There are effective prosecution services, either within or separately from the ACA

### Principles

There must be strong and effective prosecution services available, either within or independently of the ACA.<sup>17</sup>

### What this means in practice

There is little point in the ACA undertaking effective criminal investigations if there are low prospects of obtaining a conviction for an offence. So either the ACA must have prosecution powers or there must be a strong, independent prosecutions authority capable of taking on the corruption prosecutions.

Internationally, most ACAs rely on separate prosecutors' offices. However, there have been some very successful examples of ACAs undertaking their own prosecutions, such as in Indonesia.

### ICAC legislation

The **draft legislation** does not confer the Commission with any prosecution functions.

However, the **National Anti-Corruption Plan of Action** envisages the creation of an Office of the Special Prosecutor on Corruption.

### Issues and proposals

The **National Anti-Corruption Plan of Action** states that many commissions of inquiry and official investigations have not resulted in offenders being prosecuted. This is a source of much frustration for ordinary Papua New Guineans and undermines the public confidence in the rule of law and the Government's ability to tackle corruption. Because of this, the Plan of Action proposes that the **Office of the Special Prosecutor on Corruption** be responsible for prosecuting corruption cases stemming from commissions of enquiry and special investigations, or assisting police prosecutions on corruption.

Under section 177 of the *Constitution*, the Public Prosecutor currently exclusively controls the exercise and performance of the prosecution function of the State. Although some other officers and agencies (eg the Auditor General, the Bank of PNG and Customs) have power to bring their own prosecutions, the National Court has held that this is always subject to the control of the Public Prosecutor, even if the legislation concerned does not expressly provide for that (*Wilson Kamut v AUS-PNG Research & Resources Impex Limited*, MP No 937 of 2006, 2 February 2007 Cannings J, paras 117 to 120).

There is a question as to whether the proposed Office of the Special Prosecutor on Corruption should sit within the Office of the Public Prosecutor (and be subject to the direction of the Public Prosecutor, or not, as the case may be), form part of the ICAC or be established as a separate agency. The expense of setting up a new agency with responsibilities overlapping with the Public Prosecutor and the ICAC may

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<sup>17</sup> UNDP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.121.

not be desirable, and could lead to additional duplication and coordination challenges, when the aim of an ICAC is to concentrate anti-corruption efforts.

If the Office of the Special Prosecutor on Corruption were not to be subject to the control of the Public Prosecutor, a Constitutional amendment would be required. Similarly, if that Office were to form part of the ICAC, then a Constitutional amendment would be need to be considered, if the aim was to ensure that the Commission had prosecutorial independence. Otherwise, the prosecution of corruption offences investigated by the ICAC prosecuted by the Special Prosecutor would be subject to the control of the Public Prosecutor.

An alternative could be for the ICAC to have the power to prosecute corruption related offences if the Public Prosecutor did not prosecute them after the ICAC has referred them. This would still require a Constitutional amendment. This could be similar to the Ombudsman Commission's residual powers under section 27(3) of the *Organic Law on the Duties and Responsibilities of Leadership* to refer a 'misconduct in office' matter to the appropriate tribunal if the Public Prosecutor fails to do so (although noting in practice that it is extremely rare for the Ombudsman Commission to exercise this power). Similarly, under section 5 of the *Audit Act 1989*, the Auditor General can refer a matter of misappropriation, fraud or misuse of public money to the Public Prosecutor, and if the Public Prosecutor fails to take action after 60 days, can prosecute the matter himself (although there are some issues with regarding the adequacy of the drafting of this provision).

On a related but separate issue, currently, police prosecute simple offences, indictable offences punishable summarily and conduct committal proceedings for indictable offences, in the District Court. There is a question as to whether the ICAC or the Office of the Special Prosecutor on Corruption should have the option of commencing the prosecution of particular corruption offences, or leave them exclusively to the police prosecutors to deal with.

Police prosecutors have limited resources and expertise to deal with the complex fraud cases that corruption often involves. Existing fraud committal proceedings are often not well prepared now, with the evidence often not meeting the standard of proof required for a criminal conviction, requiring additional investigation and collation of evidence before the matters can proceed in the National Court. This challenge could be minimised by investigators and prosecutors working more closely together, whether that be through formal legal means through the ICAC or through closer informal cooperation between the Office of the Public Prosecutor, the ICAC and the RPNGC.

The Public Prosecutor has the option of undertaking any prosecution and committal in the District Court now, but does not usually do so, due to resource constraints, even though that may be desirable with some complex committal proceedings.

### **Questions to consider**

- Should the Office of the Special Prosecutor on Corruption be subject to the direction and control of the Public Prosecutor?
- Should the Office of the Special Prosecutor on Corruption form part of the ICAC or the OPP?

- Should the ICAC have a residual power to prosecute corruption-related offences where the Office of Public Prosecutor fails to do so?
- Should the Office of the Special Prosecutor on Corruption and/or the ICAC have the discretion to commence prosecutions in the District Court in relation to corruption-related offences?

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

**Principles**

**COLLABORATION:** “ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation.”<sup>18</sup>

**What this means in practice**

An ACA’s success depends to a great extent on cooperative relationships and collaboration with other government agencies. Unfortunately, international experience shows that good levels of inter-agency cooperation are rare, and ACAs are regularly frustrated by their inability to secure information, cooperation and prosecutions.

In most cases, the legal framework for **inter-institutional collaboration** is not carefully addressed at the start, which seriously hinders the ACA’s performance. Unless there are clear coordination mechanisms that promote inter-agency cooperation, the creation of an ACA can lead to redundancy, duplication of efforts and waste of resources, especially in countries with scarce resources, less mature political systems and powerful patronage networks.

ACAs must have the **legal ability to exchange information** with appropriate bodies, domestically and internationally, involved in anti-corruption work, including law enforcement authorities and other agencies such as central banks, financial intelligence units, tax and customs administration, the police forces and security services. Most other Government agencies should be obliged to provide information upon the request of the ICAC. Malaysia, Singapore and Hong Kong have these kinds of requirements.

**ICAC legislation**

The **draft Organic Law** provides some provisions dealing with cooperation and information sharing:

**Clause 27: Cooperation with other agencies**

- (1) In the performance of their functions under this Organic Law, the members of the Commission are, so far as is practicable and in accordance with relevant laws, to work in cooperation with other bodies who are engaged in anti-corruption activities or in the investigation or prosecution of corrupt conduct.
- (2) For the purposes of Subsection (1) such bodies include, but are not limited to:
  - a) the Royal Papua New Guinea Constabulary;

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<sup>18</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

- b) the Ombudsman Commission;
- c) the Office of the Public Prosecutor;
- d) the Office of the Auditor-General;
- e) the Solicitor-General;
- f) such bodies, authorities and persons in foreign countries that perform functions similar to the Commission.

**Clause 34: Information sharing to assist Commission’s functions**

(1) A member of the Commission may give to:

- a) the Royal Papua New Guinea Constabulary; or
- b) the Ombudsman Commission; or
- c) the Office of the Public Prosecutor; or
- d) the Office of the Auditor-General; or
- e) the Solicitor-General; or
- f) any other agency or authority, including a foreign agency or authority, that is prescribed by the Regulations;

any information that is in the Commission’s possession that will enable that other body to assist the Commission in the performance of its functions.

(2) A member of the Commission may receive information from anybody, agency or authority where the provision of that information is not inconsistent with any other Act or Organic Law.

**Clause 35: Information sharing to assist the functions of another body**

(1) A member of the Commission may give to:

- a) the Royal Papua New Guinea Constabulary; or
- b) the Ombudsman Commission; or
- c) the Office of the Public Prosecutor; or
- d) the Office of the Auditor-General; or
- e) the Human Rights Commission; or
- f) the Solicitor-General; or
- g) any other agency or authority, including a foreign agency or authority, that is prescribed by the Regulations;

any information that is in the Commission’s possession and that is relevant to the activities or functions of that other body:

- i) if it appears to the Commissioner to be relevant to do so; and
- j) to do so would not be contrary to another Organic Law or Act.

**Issues and proposals**

In addition to **draft clause 27**, it should be considered whether a more formal cooperation mechanism needs to be established under the draft Organic Law, or at least there be a legislative requirement for the ICAC’s role to include facilitating inter-agency cooperation. International best practice from other countries can be drawn on to assist with this exercise. It should also be made clear that the Commission’s staff, as well as its members, have a duty to cooperate.

**Draft clauses 34 and 35** provide a basis for information sharing between some government agencies, although not necessarily across all the relevant agencies. These provisions will be reviewed to ensure that they cover the full range of relevant agencies (such as Customs, the Internal Revenue Commission and the Financial Intelligence Unit).

Additionally, consequential amendments may be required to other legislation to ensure that those agencies can exchange information with the ICAC.

Closer consideration needs to be given to the interaction of these provisions with the secrecy provisions contained in draft clauses 29, 33, 42 and 47, to make sure that those provisions would not prevent the authorized disclosure of information to other agencies.

Some Government agencies that hold relevant records should be legally obliged to provide information at the request of the ICAC, such as the Investment Promotion Authority and Land Titles Office.

Additionally, consideration could be given obliging certain officers in certain agencies to report suspected corrupt conduct to the ICAC, and making it an offence not to do so.

The Department of Justice & Attorney General is currently reviewing the issue of information exchange between government agencies as part of the review of the *Proceeds of Crime Act 2005*, and the same issues are relevant in that context.

The specific relationship with the **Ombudsman Commission** is considered below under **section 16**.

### **Questions to consider**

- Which agencies does the ICAC need to be able to exchange information with, and how does the existing legal framework need to be amended to ensure that this can occur?
- Which agencies should be legally obliged to provide the ICAC with relevant records on request?
- What is the most appropriate legal means of ensuring that there is effective inter-agency cooperation?

## **14. Effective informal international cooperation and mutual legal assistance mechanisms**

### **Principles**

**COLLABORATION:** “ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation.”<sup>19</sup>

### **What this means in practice**

Offenders can easily cross borders, physically or virtually, to break up transactions and obscure investigative trails, to seek a safe haven and to shelter the proceeds of crime. Prevention, investigation, prosecution, punishment, recovery and return of illicit gains cannot be achieved without effective international cooperation.

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<sup>19</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

PNG has legal obligations under UNCAC to ensure that it provides international criminal cooperation in relation to a range of areas, such as extradition, mutual legal assistance and informal law enforcement cooperation.

### **ICAC legislation**

While the draft legislation does not provide any specific provisions dealing with international cooperation, the *Extradition Act 2005* and the *Mutual Assistance in Criminal Matters Act 2005* are already in place, and various law enforcement and regulatory agencies already cooperate at an informal level internationally in the exchange of intelligence and for other operational purposes.

### **Issues and proposals**

Further consideration needs to be given to whether there is the need to amend the current legislative regime to ensure that it allows the ICAC to engage in formal and informal international cooperation in relation to corrupt conduct investigations.

PNG is already a party to the United Nations Convention Against Corruption (UNCAC) and is currently undergoing a mutual evaluation of its compliance with Chapter 3 (criminalization and law enforcement) and Chapter 4 (international cooperation) of UNCAC. The report is expected to be finalised in late 2013. This report will assist in informing decisions about whether further legislative amendments are required in relation to international cooperation for corruption-related offences.

### **Questions to consider**

- Should the ICAC should have the ability to informally share information with law enforcement agencies in other jurisdictions outside of the formal mutual legal assistance process?
- Does it need to be made clearer that the ICAC can exchange information and cooperate more generally with relevant international agencies?

## **15. All forms of corruption should be criminalised**

### **Principles**

ACAs with law enforcement functions will only be able to undertake effective action against corruption offenders if the law criminalizes all corruption-related offences.<sup>20</sup>

### **What this means in practice**

To be successful, ACAs require a comprehensive legal framework that criminalises a wide range of corruption offences and provides for adequate and effective sanctions. Chapter 3 of UNCAC – to which PNG is already a party – sets out the various corruption related conduct that should be criminalised.

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<sup>20</sup> UNDP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, p29.

Consideration also needs to be given as to the jurisdictional reach of existing or new offences, consistent with Article 42 of UNCAC.

### **ICAC legislation**

It is not the intention to create specific corruption-related offences in the draft Organic Law. Rather, offences are already in existence, mainly in the Criminal Code.

However, the definition of ‘corrupt conduct’ contained in **clause 37(2) of the draft Organic Law** requires further consideration to ensure that it is broad enough to cover the full range of jurisdictional links between PNG and a suspected corruption offence.

### **Issues and proposals**

PNG is currently undergoing a mutual evaluation of its compliance with Chapter 3 (criminalization and law enforcement) and Chapter 4 (international cooperation) of UNCAC. The report is expected to finalised in late 2013.

This report will assist in informing decisions about whether further legislative amendments are required to criminalise other corruption-related conduct, together with other existing thematic reviews.

### **Questions to consider**

It will be considered whether any legislative amendments are required to create new offences or amend existing offences once the UNCAC Mutual Evaluation Report has been received.

## **16. Powers to investigate unexplained wealth and unexplained wealth offences**

### **Principles**

Give ACAs the power to investigation unexplained wealth, and consider the criminalisation of illicit enrichment.<sup>21</sup>

### **What this means in practice**

An ICAC can be given the power to investigate unexplained wealth, or illicit enrichment. An ACA’s powers to monitor wealth effectively are considerably enhanced where the law provides for an “illicit enrichment” offence.

### **ICAC legislation**

The definition of “corrupt conduct” in clause 37 of the **draft Organic Law** includes, in para (h), illicit enrichment, being a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. The Commission would then have the power to

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<sup>21</sup> UNDP, *Practitioners’ Guide: Capacity Assessment of Anti-Corruption Agencies*, p.29; UNCAC Article 20.

investigate this, under clause 26 of the draft Law. The Commission could use its powers under clauses 28 to request documents or examine a person regarding that suspected illicit enrichment, including requesting information from other agencies such as the Ombudsman Commission under clause 34 of the draft Law.

No offence of illicit enrichment currently exists in PNG.

## **Issues and proposals**

### **Power of ACA to investigate unexplained wealth or unjust enrichment**

Under section 4 of the *Organic Law on the Duties and Responsibilities of Leadership*, public officials covered by section 26 of the *Constitution* under the Leadership Code are required to lodge annual assets declarations with the Ombudsman Commission, covering the official, his or her spouse and any children under voting age. The Ombudsman Commission is required under section 17 of that Law to examine the declarations and can require further information to be provided.

Additionally, under section 27 of the *Constitution* and the *Organic Law on the Duties and Responsibilities of Leadership*, various conduct concerning breaches of ethics and integrity and conflicts of interest is defined as being the 'offence' of 'misconduct in office' by those covered by the Leadership Code. Failure to provide the required assets declaration, or providing false or misleading information in such a declaration, is also misconduct in office under section 4(5) of the *Organic Law on the Duties and Responsibilities of Leadership*.

The Ombudsman Commission can receive complaints about and investigate such misconduct in office, and, if appropriate, refer the matter to the Public Prosecutor for prosecution before a Leadership Tribunal. The Leadership Tribunal can recommend that a person be dismissed from office or, if there was no serious culpability and dismissal is not warranted in the public good, recommend another penalty.

Some of the conduct defined as being 'misconduct in office' could amount to criminal proceedings (eg accepting a bribe or misappropriation), but Leadership Tribunal proceedings are civil proceedings rather than criminal proceedings, and cannot result in imprisonment. Section 30 of the *Organic Law on the Duties and Responsibilities of Leadership* expressly provides that the result of any proceedings in respect of a charge of misconduct in office is not a bar to proceedings in respect of the same act under any other provision of the *Constitution* or any other law.

Hence, it could be possible for parallel investigations to be taking place by the Ombudsman Commission and the ACA. There may be the need for more clarity about how these two bodies cooperate, to ensure that they do not cut across each other's operations and can refer appropriate cases between each other as appropriate.

In particular, there may need to be an express provision in the *Organic Law on the Duties and Responsibilities of Leadership* allowing the Ombudsman Commission to share information with the ACA. This would then allow the ACA to investigate any corrupt conduct that may have arisen, including that

discovered through the apparent illicit enrichment of a public official which the Ombudsman Commission picks up from his or her asset declaration or becomes aware of through other means.

Additionally, some further consideration may be needed to the definition of illicit enrichment under clause 37(1)(i) of the draft ICAC Organic Law.

#### Possible creation of an offence of illicit enrichment

The power to investigate illicit enrichment or unexplained wealth may lead the ACA to the discovery of corruption related criminal offences. However, in some countries, illicit enrichment has also been expressly created as a criminal offence, which has proven to be a very effective tool in tackling corruption.

Illicit enrichment offences make it an offence for a public official to have a significant increase in assets that he or she cannot reasonably explain in relation to his or her lawful income. The prosecution must prove that the wealth is beyond the official's lawful income. The official then must prove that the wealth was funded through lawful means.

Such offences have been helpful in addressing circumstances where an official's wealth is so disproportionate to their personal income, but no specific instance of criminal offending can be proven beyond reasonable doubt. It is also a useful charge in circumstances where there is a risk that public officials may use their position to intimidate witnesses or destroy evidence. It is also a useful deterrent to corruption among public officials.

Given the very high levels of public official corruption in PNG, such an offence could be considered. However, it would be important that safeguards be included to preserve the presumption of innocence entrenched as a fundamental right under section 37(4)(a) of the *Constitution*. That section, however, does allow a law to place on an accused person the burden of proving particular facts which are, or would be, peculiarly within his knowledge.

Such an offence, combined with the already available powers under the *Proceeds of Crime Act 2005* to seize the proceeds of corruption-related crime, would provide powerful weapons to fight corruption.

#### Questions to consider

- How should the interaction between the ACA and the Ombudsman Commission be clarified and strengthened?
- Should there be a new offence created of illicit enrichment?
- Should such an offence apply to all public officials, not just those subject to the Leadership Code?