

LAW REFORM COMMISSION

OF

PAPUA NEW GUINEA

WHAT SHOULD BE DONE ABOUT
CORRUPTION AND BRIBERY?

WORKING PAPER NO:19

OCTOBER 1982

The Law Reform Commission of Papua New Guinea was established by the LAW REFORM COMMISSION ACT 1975 and began functioning in May 1975.

THE COMMISSIONERS ARE -

Joseph Aisa - Acting Chairman
Rosa Au
Father Cherubim Dambui
Hosea Mina
Pastor Timothy Palitu
Michael Vee

Pomat Paliau is Secretary to the Commission.

Comments, suggestions and criticisms of the proposals contained in the Working Paper are invited and should be sent to the following address by Friday, 31st December 1982:

The Secretary,
Law Reform Commission,
Post Office Wards Strip,
WAIGANI,
Papua New Guinea.

This Working Paper was prepared for the Commission by Ross DeVere, Principal Legal Officer.

WHAT SHOULD BE DONE ABOUT CORRUPTION AND BRIBERY?

CONTENTS

INTRODUCTION

WHAT IS 'CORRUPTION' AND 'BRIBERY'?

THE EXISTING LAW:

- the Criminal Code
- the Leadership Code
- other Offences

WHAT SHOULD BE DONE?

- Enact an Organic Law on Elections
- Strengthen the Institutions most concerned with detecting and prosecuting corruption:

- The Public Prosecutor
- The Police Fraud Squad
- The Auditor General's Office
- The Parliamentary Public Accounts Committee

- Improve Discipline within the Public Sector
- Increase the Penalties for Breaches of Leadership Code
- Create a Permanent Commission against Corruption
- Enact New Laws Against Corruption
- Abolish Sectoral Programme Fund Grants to Groups and Individuals
- Empower Principal Magistrates to try Corruption cases
- Redefine 'Leader' to include other Senior Officials

CONCLUSION

APPENDIX

WHAT SHOULD BE DONE ABOUT CORRUPTION AND BRIBERY?

WORKING PAPER NO.19

INTRODUCTION

On 2nd January 1982 the then Minister for Justice the Hon. John Yaka, M.P. called for the Law Reform Commission to enquire into the legislation governing corruption and bribery and in particular -

- "1. The Constitutional ramifications relating to corruption and bribery and misuse of positions and power.
2. The criminal law on corruption and bribery with a view to amending the existing legislation or proposing new legislations if they are deemed necessary; and
3. The extent of corruption and bribery in both national government and Provincial Governments and in both the public and private sectors of the economy; and
4. The best way or ways to stop or reduce the spread of corruption and bribery generally; and
5. The best way or ways to stop the spread of corruption and bribery amongst those leaders who are not subject to the Leadership Code, and who handle public funds or otherwise."

In recent years there has been increasing public concern over the spread of corruption in Papua New Guinea. This paper attempts to consider the possible courses of action open to government in order to contain the spread of corruption and bribery.

WHAT IS 'CORRUPTION' AND 'BRIBERY'?

This paper is concerned with the illegal financial activities of leaders and others in positions of responsibility in government. It is not concerned with corruption in a broader sense nor with the illegal but non-financial activities of government leaders or government agencies generally.

The law 'bribery and corruption' means giving or offering any reward to any person to influence his conduct; or the receipt of such reward.¹ In Papua New Guinea a number of related offences have been created. In the *Criminal Code, the Organic Law on Leadership* (the Leadership Code) and the *Electoral Act*, "corruption" is not itself defined, but "a person acts 'corruptly' if he offers a fee or reward deliberately and with the intention that the person to whom the offer is made should enter into a corrupt bargain even if the offeror himself has no intention of carrying out the transaction and accepting the favour which he has sought."²

The *Criminal Code* uses the term 'bribery' only in relation to members of parliament and electoral offences. Many if not most of the matters complained of in the Reference from the Minister are cases of theft, fraud and misappropriation of public funds by a variety of people. They are not cases of corruption and bribery in the narrow legal sense.

-
1. Osborne, *A Concise Law Dictionary*, 5th edition
London, Sweet & Maxwell, 1964, page 56
 2. R v Smith [1960] 2Q.B. 423 C.A., [1960] 1 All ER 256

THE EXISTING LAW:

The Criminal Code

The *Criminal Code* Ch.262 of the *Revised Laws* contains a number of offences relating to corruption and bribery. The titles of the relevant divisions and sections are as follows:

PART II Division 3 - OFFENCES AGAINST THE EXECUTIVE AND LEGISLATIVE POWER

- 61. Member of the Parliament receiving bribes
- 62. Bribery of member of the Parliament

PART III Division 2 - CORRUPTION AND ABUSE OF OFFICE

- 87. Official corruption
- 88. Extortion by public officers
- 89. Public officers interested in contracts
- 90. Officers charged with administration of property of a special character or with special duties
- 91. False claims by officials
- 92. Abuse of office
- 93. Corruption of valuator
- 94. False certificates by public officers
- 95. Administering extra-judicial oaths
- 96. False assumption of authority
- 97. Personating public officers

Division 3 - CORRUPT AND IMPROPER PRACTICES AT ELECTIONS

- 98. Interpretation of Division 3
- 99. Personation
- 100. Double voting
- 101. Treating
- 102. Undue influence
- 103. Bribery
- 104. Further penalty for corruption practices
- 105. Illegal practices

- 106. Other illegal practices
- 107. Prosecution for corruption and illegal practices
- 108. Interference at elections
- 109. Electors attempting to violate secrecy of ballot, etc.
- 110. Stuffing ballot-boxes
- 111. Offences by presiding officers at elections
- 112. False answers to questions at elections
- 113. Interfering with secrecy at elections
- 114. Breaking seal of packets used at elections
- 115. Offences at elections when voting is by post
- 116. False electoral claims

Division 4 - SELLING AND TRAFFICKING IN OFFICES

- 117. Bargaining for offices in Public Service

Division 5 - OFFENCES RELATING TO THE ADMINISTRATION
OF JUSTICE

- 118. Interpretation of Division 5
- 119. Judicial corruption
- 120. Official corruption not judicial but relating to offences
- 121. Perjury
- 122. Fabricating evidence
- 123. Corruption of witnesses
- 124. Deceiving witnesses
- 125. Destroying evidence
- 126. Preventing witnesses from attending
- 127. Conspiracy to bring false accusation
- 128. Conspiring to defeat justice
- 129. Compounding crimes
- 130. Compounding penal actions
- 131. Advertising reward for the return of stolen property, etc.
- 132. Magistrate acting oppressively or when interested
- 133. Delay to take person arrested before magistrate
- 134. Bringing fictitious action on penal law
- 135. Inserting advertisement without authority of court
- 136. Attempting to pervert justice

Finally there are "secret commissions" given as a reward for favours done in the business world. This group of offences appears in the Queensland *Criminal Code* but not in the *Criminal Code* of Papua New Guinea. However, PART XIII of the *Companies Act* covers a number of fraudulent activities in relation to companies.

In 1978 a new part to the *Criminal Code* was proposed, to be entitled 'Corrupt Business Practices'. However, the drafting was criticised as being too vague and the proposal was dropped.

Thus bribery of members of parliament, official corruption and abuse of office, electoral corruption and corruption in the administration of justice are recognized in the *Criminal Code*. These categories may be useful in their respective fields, but they do not cover all the cases of corruption and bribery that give rise to concern at present. The provisions of the *Criminal Code* relating to theft, misappropriation of public funds and fraud seem more relevant. Following *Opai Kunangel's Case*⁵ there was a call for the prosecution of leaders under the *Criminal Code* as well as under the Leadership Code. But as Mr. Justice Gajewicz observed in the same case:⁴

"Theft and fraud are not new phenomena. It has long been recognized that criminal law cannot adequately deal with those crimes. The numerous legislative changes of the law relating to theft and cognate offences in England and elsewhere are the best examples of that recognition."

Thus the decision of the founding fathers to rely on a strong Leadership Code to limit the spread of corruption and bribery was a sound idea.

3. Unreported Supreme Court Judgment S C 231 of 6th August 1982.

4. Ibid, page 45.

The Organic Law on Leadership

A common factor with many of the offences related to corruption under the *Criminal Code* is that there are frequently problems of proof. If both parties are satisfied with their illegal bargain then it usually results in the loss of public funds and no one person complains of the fraud. As Lord Denning said of the acceptance of bribes⁵:

"Through all the pages of history, you will find that those in possession of influence or power have accepted bribes. The most conspicuous case among Lord Chancellors was Lord Bacon: though Lord Macclesfield runs him a close second. They accepted "presents" in return for favours granted by them. Of all abuses of power this is the most difficult to discover or to suppress: because both briber and bribed are concerned to keep it secret. It takes place on an enormous scale, as has been shown in the last few years."

The proof of corruption is a detailed process that requires meticulous investigation by the police and professional prosecution by the Public Prosecutor.

To minimise these problems the *Organic Law on Leadership*, the Leadership Code tries to look at the results of corruption rather than the corrupt act itself.

Leaders are required to lodge annual returns of income and property with the Ombudsman Commission and to answer questions concerning the financial interests of themselves and their families. New offences are created by the Organic Law and leaders can be prosecuted for breaches of the Code.

5. The Right Honourable Lord Denning, 'Misuse of Power', Vol. 55, no.10, *Australian Law Journal* (October 1981) p.720, 721. 1980 BBC Dimbleby Memorial Lecture.

The Section headings for Part II, "Responsibilities of Leadership" are as follows:

4. Statement of income, etc.
5. Use of office for personal benefit, etc.
6. Personal interest
7. Company directorships, etc.
8. Shareholdings
9. Engaging in other paid employment
10. Interests in contracts
11. Acceptance, etc., of bribes
12. Acceptance, etc., of loans, etc.
13. Misappropriation of funds of Papua New Guinea
14. Personal advantage not to be gained from official information
15. Disclosure of interest before debate or voting
16. Agents, etc.

Other Offences

Prosecutions under other Acts have also occurred:

- (a) The *Customs Act* Ch.101 of the *Revised Laws*, contains provisions regarding the bribing of customs officers.
- (b) The *Public Service Act* S.65(1)(g) Ch.67 of the *Revised Laws* also makes it an offence for a public servant to accept a fee, reward, gratuity or gift other than his official remuneration. The offences can be treated as a disciplinary matter to be dealt with by the departmental head or his delegate.

In addition the *Public Finances (Control and Audit) Act*, Ch.36 of the *Revised Laws*, lays down the general financial scheme for the accounting and auditing of public funds. These provisions are amplified in the *Public Finances Regulation 1974* and *Financial Instructions* issued under the Act.

The National Fiscal Commission Report of 14th January 1982 concerning the 1981 Sectoral Programme Funds called for this Act to be vigorously enforced. (See Appendix). The Act allows the Minister for Finance to surcharge an accountable officer for any loss of public moneys that occurs because of his neglect of duty.

WHAT SHOULD BE DONE?

One difficulty in prosecuting corruption cases is that as corruption becomes prevalent, fewer people are inclined to regard it as a serious matter. A state of mind is reached where the latest evidence of corruption is matched with previous cases of corruption rather than with the situation before corruption became so widespread. This state of mind allows a person to think that the latest case of corruption is really not too bad, after all. Thus the earlier Village Economic Development Fund abuses prepared public opinion for the later problems with the Sectoral Programme Fund grants.

Most serious are 'chains' of corruption in which people from top to bottom in an organization know of corrupt practices and do nothing to stop them, receiving some part of the illegal profits in return for their silence.⁶

A number of possible and partial solutions are listed in the following pages, but they will not succeed unless the majority of people insist that corrupt practices are firmly discouraged in Papua New Guinea.

Enact an Organic Law on Elections

The Constitutional Planning Committee called for laws on this subject to guarantee honesty and fairness in elections. The Report stated:⁷

-
6. An extreme example of this was the bad old institution of 'tea money' in the Hongkong Police. Small 'contributions' from a large number of people, mostly shopkeepers, were passed up the chain of command. All links in the chain kept a small percentage, but a corrupt minority in the senior levels of the force became very rich. Due to the operations of the Independent Commission of Inquiry against Corruption it is believed that this practice ceased some years ago (see below).
 7. *Final Report of the Constitutional Planning Committee 1974*, Part 1, Port Moresby, Chapter 6, page 17.

"Restrictions on financing parties and candidates"

115. Over recent years in many countries there have been increasingly determined efforts to find ways of preventing the corruption of political parties and election candidates. The problem is an exceedingly difficult one to solve and it is unlikely that any country has found the complete answer in the various kinds of legislation that have been adopted. We believe, however, that this should not discourage Papua New Guinea from making its own efforts to prevent corruption of this nature: and we believe that the time to act is now, when we are about to become an independent state and before corruption has the chance to take root.

116. The problem, as we see it, is twofold: firstly, to prevent parties and candidates from receiving financial and other material assistance on such a scale that there is a grave danger of their becoming the tools, whether consciously or not, of their benefactors, and in particular to prevent foreign interests from distorting our electoral process in this manner; secondly, to prevent a situation where most of our people are virtually excluded from national political office because they are unable to raise sufficient funds to compete effectively against their wealthier countrymen."

The Constitution is concerned with the integrity of both political parties and of candidates and the enactment of carefully considered organic laws should do a great deal to foster higher standards in public life.⁸

8. Ombudsman Commission of Papua New Guinea, *Annual Report for the Period 1 July 1980 to 30 June 1981, Report No.6*, Konedobu, page 90.

Strengthen the Institutions Most Concerned with Detecting
& Prosecuting Corruption:

The Public Prosecutor's Office

Eventually most cases of corruption have to be referred to the Public Prosecutor, whether they be offences under the *Criminal Code*, *Leadership Code* or some other act.

The Public Prosecutor's office is burdened with a considerable case load and a small and often inexperienced staff. The office suffers from a rapid turnover in personnel and the work is often difficult, with much travel and little support. Since Independence the Public Prosecutors' Annual Reports have drawn attention to the increased work load resulting from the additional constitutional duties under the *Leadership Code*. In one report the Public Prosecutor called for his professional staff to be doubled to 32 lawyers.⁹ The judges have also called for the Public Prosecutor's office to be strengthened in the following terms:¹⁰

"4. Public Prosecutor's Office

We think it necessary that the present numerical strength of this office be immediately increased effectively to cope with the expanding volume of its work. It has, for example, proved impossible to reduce the number of outstanding criminal cases at Waigani this year, largely because of a continuous shortage of State Prosecutors."

9. Public Prosecutor of Papua New Guinea, *Annual Report (1979-1980)* page 6

10. *1980 Annual Report by the Judges, Papua New Guinea*, page 3

The Police Fraud Squad

The Police Department acquires considerable information on various corrupt practices which is available to the Public Prosecutor's office and the Ombudsman Commission on a routine basis. However, because of the low priority given to the prosecution of corruption offences and doubtless for other reasons such as problems of proof etc., there are few successful prosecutions.

In May 1982 the Parliamentary Public Accounts Committee was told that the Fraud Squad had a 10 year backlog of work.¹¹ More recently efforts have been made to recruit specialists overseas to improve the efficiency of the Squad and to train officers within the country. But the investigation and proof of fraud is meticulous and time consuming work and there are few specialists available from overseas.

11. The *Papua New Guinea Post Courier* for Wednesday, 5 May 1982 contained the following story:

" 'FRAUD SQUAD' 'has 10-year backlog'

PNG's 10-man fraud squad has a 10-year backlog of work, assistant police commissioner Mr David Tasion said yesterday. He said his department had been given a K500,000 upgrading grant - but had not yet decided how to use it to help the fraud squad. Mr. Tasion was answering questions at a Parliamentary Public Accounts Committee hearing."

The report then summarized the evidence given to the Committee.

The Auditor General's Office

The Auditor General's Office also has great difficulty in attracting competent and qualified staff.¹² Since Independence the establishment of provincial governments and the expansion of government commercial activities have led to rapid expansion in the work of the Auditor-General's Office.

The 1981 Annual Report of the Auditor-General is a sobering document that details the accounting problems of individual departments and instrumentalities.¹³

The Parliamentary Public Accounts Committee

The Parliamentary Public Accounts Committee has done valuable work in revealing corruption and inefficiency.¹⁴ But there seems to be very little follow-up to the Committee's discoveries. The Committee itself has pointed to its lack of trained support staff as one reason for this. Nevertheless the public hearings of the Committee are a valuable way of revealing problems within the public service and statutory bodies. The recent practice of holding meetings *in camera* should be discouraged.

12. Bernard Paliou, "Audit Office in Chaos," vol.4, no.38
Niugini Nius, 25 August 1982.

13. *Report of the Auditor-General: on the public accounts and on the control of and on transactions with or concerning the public moneys and property of Papua New Guinea: For the Period Ended 31st December 1981.*

14. For an example of the important work done by this Committee, see Neville Togarewa, "Public Accounts queries NIDA's future" No.111 *Times of Papua New Guinea*, Friday 17 September 1982, page 24.

Improve Discipline within the Public Sector

If government can improve discipline within the public sector generally it would significantly reduce the problems and temptations of corruption. Disciplinary offences within the public service are the responsibility of the departmental heads and their delegates under the *Public Service Act*. In many cases where there is no criminal prosecution it would nevertheless be possible to proceed against an offender through departmental channels. If these procedures could be used more effectively the incidence of corruption both within and outside the public sector would almost certainly decrease. This is because of the importance of the public sector in the economy of Papua New Guinea.

The careful control of appointments to the public service, statutory authorities and business corporations in which government has a controlling interest should exclude corrupt officials from positions of trust where they can do considerable damage to the public interest. The unfortunate practice of transferring corrupt officials from departmental positions to other posts within the gift of the government should cease.

Increase Penalties for Breaches of the Leadership Code

As the judges have pointed out, the consequences of the offence of misconduct in office are inadequate to deal with the types of cases that have come before Leadership Tribunals.¹⁵ Corrupt officials have repeatedly shown that they can escape prosecution simply by resigning.¹⁶ In 1979 Mr. Somare, then as now Prime Minister, proposed a new and tougher Leadership Code, but was unable to have it passed by parliament.

15. *In the Matter of Mopio*, Leadership Tribunal Reference No.1 of 1981 at page 56.

16. *Opai Kwangel Amin. op.cit.*, Joseph Auna (Unreported S.C. 188)
The problems with the Leadership Code go back to 1977 when the Ombudsman Commission referred two cases of misconduct in office to the Public Prosecutor. The Public Prosecutor successfully prosecuted the two leaders for breaches of the Leadership Code and they were suspended from office but the government then found new jobs for them. The Public Prosecutor stated that he only had limited resources and that he had to set priorities: thereafter prosecutions under the Leadership Code received a low priority. Consequently the Leadership Code has not been vigorously enforced and only the most corrupt of leaders have been prosecuted.

The 1980 Annual Report of the Ombudsman Commission listed a number of offences against the Leadership Code committed by leaders and warned that if the leaders did not mend their ways prosecutions would be launched.¹⁷ Except in a few cases this has not taken place.¹⁸ Recently the Chief Ombudsman has again called for amendments to the Organic Law on Leaders and has again expressed his concern over breaches of this law.¹⁹ The Prime Minister has said that the new government will proceed with amendments to the Leadership Code early in 1983.²⁰

-
17. Ombudsman Commission of Papua New Guinea, *Annual Report for the Period 1 July 1979 to 30 June 1980*, Report No.5, page 83.
 18. Ombudsman Commission of Papua New Guinea, *Annual Report for the Period 1 July 1980 to 30 June 1981*, Report No.6, page 89.
 19. Neville Togarewa, "Tougher Leadership Code is priority - Kilage." No.103, *Times of Papua New Guinea*, Friday 20 August 1982, page 1. The article also points out the difficulty of amending an organic law mainly because of the need for an absolute majority of 77 votes on three separate occasions in parliament.
 20. NBC National News, Saturday Evening 25th September 1982. "Leadership Code Tighter" *Papua New Guinea Post Courier*, Tuesday 28th September 1982, page 1.

Create a Permanent Commission Against Corruption

The Hongkong government created an Independent Commission against Corruption (ICAC) on 15th February 1974 in an attempt to limit corruption in the colony. Prior to this the detection and investigation of corruption were the responsibility of the police Anti-Corruption Office. But the police had problems of their own with corruption and it was considered advisable to establish a separate organization isolated from the police force. Whilst the ICAC may not have completely eradicated corruption in Hongkong it has broken up the 'chains' of corruption that had grown in various organizations, the police included.

The ICAC is empowered to investigate the financial affairs of persons suspected of corrupt practices in great detail. This work is particularly time consuming, as the Commission noted in its 1980 Report at page 25:²¹

"39. A number of the 1980 investigations tied-up considerable manpower and resources, requiring protracted enquiry into complex matters. Large numbers of bank accounts had to be looked at, innumerable transactions in those accounts examined, share dealings traced and reconciled with known income, property transactions investigated, and so on. Others necessitated interviewing large numbers of witnesses; several hundred in some cases. Even with intense effort, such investigations take a long time to conclude and this is often the subject of criticism.

40. In some instances, this criticism may be well-intentioned, even if uninformed. In others, particularly where the suspect has himself refused to answer any question, no matter how innocuous, criticism about the delay is frequently intended to deter the ICAC from carrying out a thorough investigation. Detailed enquiry is perhaps the last thing some people under investigation desire."

21. P.B. Williams, O.B.E., *Annual Report on the Activities of the Independent Commission against Corruption for 1980*, Hongkong.

The ICAC is also deeply involved in community education about the evils of corruption.

But the financial burden of the ICAC is large. The ICAC employs a thousand full-time staff members and in the year 1980-81 had an estimated expenditure of \$77,168,000 Hongkong, that is about one million kina.²²

It is also expensive in terms of skilled manpower. Of the 509 investigators, 87 were expatriate: 44 of these were seconded police officers from various UK forces and another 17 were retired UK police officers. In the 1980 recruitment from the United Kingdom, 22 serving police officers were recruited. All of them had more than ten years experience and a number had 20 or more years service.²³

The organization is a good example of the lengths to which an energetic administration is prepared to go in an effort to stamp out corruption, but it has been criticised for "... its Star Chamber tactics, its operational competence and its persistent failure to catch the really big bribe-takers who are still loose in the Hongkong Government."²⁴ It should be clearly understood that the investigations of such bodies as the ICAC inevitably erode constitutionally guaranteed human rights, in particular the right to privacy.

In deciding whether Papua New Guinea should consider establishing such an organization it would be necessary to know much more about the money at present lost through corrupt practices. At present the available information is incomplete.

22. Ibid page 70

23. Ibid page 38

24. Philip Bowring, "Shroff," 'Hongkong's hearts fall at ease,' *Far East Economic Review*, 13 August 1982, page 111

The establishment of a permanent commission into corruption could be contrasted with a commission of inquiry under the *Commissions of Inquiry Act*, Ch.31 of the *Revised Laws*. For example in March 1982 the then Leader of the Opposition and now Prime Minister Mr. Somare said that a Royal Commission should be appointed to look into the mismanagement of the government.²⁵ Mismanagement, that is bad or wrongful management, may not be a broad enough term to include corruption, bribery, theft, fraud or misappropriation. But it is probable that such an inquiry would soon be obliged to take note of instances of the above named offences.

In Papua New Guinea, commissions of inquiry have not been regarded favourably in recent years since an increasingly expensive string of such inquiries culminated in the sensational findings of the Inquiry into the Waigani Fire.²⁶ Perhaps if strict time limits were applied to any further inquiries they might once again become a valuable instrument of public administration.

Enact New Laws Against Corruption

Anti-corruption bills were proposed and discussed during the 1970s, but were dropped in favour of the enactment of a strong Leadership Code in the Constitution.

It is interesting to note that the Hongkong Independent Commission against Corruption in 1980 concluded 347 prosecutions under the following two laws, neither of which have an exact equivalent in Papua New Guinea:

25. -, "There'll be a judgment day, warns Pangu Party," *Niugini Nius, Weekender*, Saturday 6 March, 1982.

26. The Annual Report by the Chief Magistrate, October 1980, page 12 reported that in 1979 alone there were four major Commissions of Inquiry conducted, all of which ran for more than six months.

Report of the Commission of Inquiry into the Cause of the Fire which occurred on 19th January 1979 at the Central Government Office Building at Waigani and into Related Security Matters, Port Moresby, 1980.

<i>Prevention of Bribery Ordinance, Hongkong</i>		Concluded Prosecutions
S 3	soliciting or accepting an advantage by a Crown servant	17
S 4(2)	bribery	29
S 9(1)	corrupt transactions with agents	32
9(3)	agents using receipts etc. to mislead principals	1
S 4(1)		
S 8(1)	bribery of public servants by persons having dealings with public bodies	37
S 9(2)	corrupt transactions with agents	15
<i>ICAC Ordinance, Hongkong</i>		
S 13B	false reports to officers	10
S 13C	falsely pretending to be an officer	<u>1</u>
	Sub Total:	<u>142</u>

However, the great majority of the prosecutions were for:

conspiracy contrary to common law	106
Offences contrary to the <i>Theft Ordinance</i>	82
Other offences	<u>17</u>
Sub Total:	<u>205</u>

In other words the majority of cases were already covered by laws existing before the enactment of the anti-corruption legislation.

The enactment of further laws against corruption and bribery may have some value. For example, at present the acceptance of fees, rewards, gratuities and gifts by public servants is an offence under the *Criminal Code* and the *Public Service Act*. It is difficult to decide whether or not the present laws are effective in Papua New Guinea, but their enforcement is less than rigorous. By contrast Section 10(1) of the Hongkong *Prevention of Bribery Ordinance* (H.201 of the Revised Edition 1980) takes a firm approach to this problem:

"Possession of Unexplained property 10(1) Any person who, being or having been a Crown servant -

- (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or
- (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments.

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence."

The above-named offence if enacted in Papua New Guinea, would seem to come under the exception to the general rule laid down in Section 37(4)(a) of the Constitution:

"a person charged with an offence -

- (a) shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge..."

That is, the fact of how the accused could maintain a standard of living beyond his means is a matter 'peculiarly within his knowledge' and therefore he has to prove that he did so honestly.

In Constitutional Reference No.3 of 1978²⁷ it was held that the fact whether an accused took part a tribal fight was not a fact peculiarly within his own knowledge, but would be known to perhaps hundreds of others. Therefore S11(3) of the *Inter-Group Fighting Act* was invalid because it placed on an accused the onus of proving that he did not take part in the actual fighting contrary to S37(4) of the Constitution.

However in Supreme Court References 1 and 2 of 1980²⁸, the respective courts were less disposed to invalidate legislation making the passing of valueless cheques an offence. It is submitted that in the light of these last two cases a new offence such as "possession of unexplained property", if enacted in Papua New Guinea, would satisfy the requirements of Section 37(4)(a) of the Constitution.

Thus it is concluded that there would be some benefit in enacting further anti-corruption laws, but that a drive against corruption would not have to wait until new laws were passed by parliament.

27. [1978] P.N.G.L.R. 421

28. SCR No.1 of 1980. Unreported SC 193 of 6 March 1981
SCR No.2 of 1980. Unreported SC 192 of 6 March 1981

Abolish Sectoral Programme Fund Grants to Groups and Individuals

Part of the sectoral programme funds are meant to help finance projects of groups and individuals throughout the provinces. The projects are supposed to be studied and recommended for financial assistance by the appropriate departmental investigating officers in the field.

The National Executive Council decisions in early 1981 empowered the then Ministers for Transport and Primary Industries to allocate funds directly to individuals and groups "after consulting with provincial governments, the National Planning Committee and national MPs." In practice large sums of money were granted directly to members of the last Parliament and fake 'organisations' invented by members in order to qualify for such grants without consultation with any other bodies. No action was taken on the report of the Finance Department inspectors.²⁹

The NEC decisions authorizing such grants and any similar arrangements under other votes should be revoked. Otherwise it might be advisable to consider abolishing the sectoral programme funds altogether. Quite apart from these illegal practices their administration appears to be ineffective. The National Fiscal Commission's recommendations of 14th January 1982 included the following paragraph:³⁰

"3. Future of Sectoral Programmes. The effectiveness of the sectoral programmes need to be subject to an objective inter departmental enquiry including adequate provincial representation as to whether the aims and objectives were indeed being attained and, if not, whether the programme should be continued or abandoned."

29. *Investigations of Sectoral Programme for the year 1981 of the Department of Primary Industry and the Department of Transport & Civil Aviation, 11th January 1982.*

30. *National Fiscal Commission, Report on the Dispute between Sandaun Provincial Government and the National Government over the Distribution of Sectoral Programme Fund, 14th January 1982. The Appendix to this paper summarises the NRC's recommendation.*

Until the growth of a public morality that recognises that public money is the property of all the people of Papua New Guinea, finance officers will have to be firm and refuse to pay out public funds for doubtful projects. They will also need the full support of their superiors when they are pressed to do otherwise.

Empower Principal Magistrates to try Corruption Cases

Principal magistrates (Magistrates Grade V) could be empowered to hear and determine charges of corruption. The corruption offences would join the group of indictable offences that can be tried summarily and a larger number of persons would thus be able to hear such cases. Corruption cases can become quite involved and legal representation would often be essential. This may place further burdens on the Public Prosecutor's office, not to mention the Public Solicitor's office or the accused who retains a lawyer at his own expense. The magistracy is already empowered to hear most cases of theft and fraud.

Redefine 'Leader' to include other Senior Officials

The definition of 'Leader' under the Organic Law could be expanded to include such senior departmental officials as deputy and assistant secretaries of departments. It should particularly include the managers of all government corporations and all corporations in which government owns the controlling interest. Section 26(3) of the *Constitution* states:

"An Organic Law or an Act of the Parliament may declare any public office (including an office in a provincial government body or a local government body) to be an office to and in relation to which this Division applies."

CONCLUSION

The purpose of this working paper has been to survey the range of options available to reduce the spread of corruption and bribery in Papua New Guinea. It has not been possible to discuss all the matters raised by this very broad Reference. For example the extent of the problem in the provincial governments may never be known.

Offences that could be described as 'corruption and bribery' include the provisions of the *Criminal Code* relating to theft, fraud and misappropriation of public funds. These are at least as appropriate to the matters complained of in the Reference as are the provisions relating to corruption. The creation of new offences is probably desirable but a drive to limit the spread of corruption and bribery would not have to wait upon new legislation.

Virtually all the proposals contained in the paper have their disadvantages, the main one being the need for a large number of skilled professionals to implement them. The institutions most closely concerned suffer from a lack of qualified and suitably experienced staff. They need strengthening so they can function more effectively. Strengthening should go some way towards the successful prosecution of corruption offences. Determination to press charges against 'big men' is needed, for some offences have been so blatant that little in the way of investigatory skills would appear to be necessary to secure convictions.

This study has once again revealed the overwhelming need to control the allocation and disbursement of public funds. The financial controls which are now available are not used effectively. Financial responsibility and discipline will have to be imposed on all people concerned so that many corrupt practices are stopped at their source. If government decides to act against corrupt practices it would be wise to start soon before they become the normal way of doing business in Papua New Guinea. Once these practices become ingrained they will be harder to eradicate.

Finally, any campaign against corruption should involve the whole community. Because of lack of qualified and suitably experienced staff in the institutions most closely concerned, it would be ineffective to leave the problem to these institutions alone, for in the final analysis they are not problems that can be solved only by the criminal law. The whole community has to realize that corruption and bribery affects every member by diverting money away from urgent community needs into the pockets of a few people. Thus the role of community education in limiting the spread of corruption should not be overlooked.

The Law Reform Commission requests that comments on this paper be forwarded by 31st December 1982 so that a final report can be prepared.

A P P E N D I X

SUMMARY OF THE RECOMMENDATIONS
OF THE NFC REPORT OF 14 JAN 82

The National Fiscal Commission Report of 14 January, 1982 was debated on the second last sitting day of the last Parliament. The Report has otherwise been ignored by all parties and lapsed without any action being taken on its recommendations. The Report was criticised in Parliament for its lack of specific evidence of misuse of public funds, but if acted on it offered some hope that the blatant misuse of sectoral programme funds during 1981 would not be repeated.

The NFC's Report recommended the following action :-

1. The method of distributing 1981 sectoral programme funds should not be repeated.
2. The legality of Cabinet decisions NG 61/80 and NG 18/81 should be tested in the Supreme Court by either the national or a provincial government.
3. The Auditor General should report immediately and fully on the acquittal and accounting of sectoral programme funds for 1980 and 1981.
4. The Ombudsman Commission should investigate for breaches of the Leadership Code in the handling of these funds.
5. The 1982 sectoral programme funds should be distributed in accordance with Resolution 14 of the Premiers Council Conference and after the following steps had been taken:
 - (a) genuine consultation with provincial government, such consultation taking place in provincial assemblies and executive councils.
 - (b) formal agreements concluded.
 - (c) normal procedures followed to ensure accountability under the *Public Finance (Control and Audit) Act* and related legislation.
6. The effectiveness of sectoral programmes in achieving their stated aims should be studied.

7. Genuine cooperation between the national and provincial governments should be encouraged.

Finally the Report recommended that breaches of the *Public Finance (Control and Audit) Act* should be vigorously pursued.