



## CONSTITUTIONAL AND LAW REFORM COMMISSION

### ***STRENGTHENING GOVERNMENT SYSTEMS AND PROCESSES IN PNG: ICAC AND OTHER ISSUES***

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#### **Introduction**

A couple of months ago, on the eve of the election of the new Government of Papua New Guinea (PNG), I spoke at the PNG Update Conference, about my thoughts on some of the important actions that the new government of Prime Minister Hon. Peter O'Neill should take to fight corruption and improve governance. At this seminar I would like to share with you the progress that the new Government has made in addressing these issues and the potential of these interventions to pave the way for a major reform of the system of government.

It is important to stress that attempts to improve governance through policy and law are not new to the Prime Minister and his Government. Prior to the 2017 National Elections, the O'Neill Government made some positive strides towards improving governance, albeit not enough. In this new term, the new Government (but the same Prime Minister) has promised to complete some of these outstanding initiatives. This is the main focus of my talk.

#### **The Elephant in the Room**

There is a general consensus that PNG is in a deep financial crisis. The country is in desperate need of help from both within and outside PNG. The political and bureaucratic leadership is working hard to sustain the country under this financial climate.

The Government has reached out to the international community for financial assistance. There are some positive responses, which is encouraging for the country. However, this is a temporary measure and not sustainable. The real challenge is dealing with the elephant in the room – corruption – which permeates all aspects of PNG society. Unless PNG tackles this problem head on, any external or internal interventions to financially rescue the country will be futile.

The new Government has acknowledged that improving governance is crucial to the future of PNG. The Government is now embarking on several initiatives to improve the governance systems to restore confidence in the government and its systems and processes. The Constitutional and Law Reform Commission (CLRC) has been party to many of these initiatives and it is in this context that I would like to share with you these proposals.

## **Fighting Corruption**

If PNG is to improve governance and encourage investment in the private sector, and strengthen its bureaucracy to deliver basic and other services to the people, the new Government must first of all combat corruption, as its number one priority.

Corruption is a major problem for PNG. In 2016, it ranked 136 on the Transparency International's Corruption Perception Index, the same ranking as Guatemala, Kyrgyzstan, Lebanon, Myanmar and Nigeria. As one of the most corrupt countries in the world, PNG has a huge task ahead to improve this image. PNG signed onto the United Nations Convention Against Corruption on 22 December 2004 and ratified it on 16 July 2007.

In 2011, the Government launched the National Anti-Corruption Strategy. After the 2102 National Elections, the O'Neill Government supported the establishment of an inter-government anti-corruption unit called 'Task Force Sweep' to investigate and prosecute crimes of corruption. This team was disbanded about two years later when the Prime Minister was implicated in a corruption scandal.

The Government, however, in 2014 proceeded to request that Parliament approve the establishment of the Independent Commission Against Corruption (ICAC) by amending the Constitution. A new Division VIII.3 under Section 220 of the Constitution was inserted into the Constitution through *Constitutional Amendment No. 40*, enabling the establishment of ICAC. This constitutional amendment paves the way for the enactment of an Organic Law on the Independent Commission Against Corruption and its full establishment.

In 2015, the Parliament took carriage of the proposed ICAC Organic Law Bill. The Bill was referred to the Parliamentary Committee, and unfortunately that's where it stayed.

The current Government has firmly resolved to tackle corruption. At the formation of the new Government (the Alotau Camp eventually formed Government on 4<sup>th</sup> August 2017), adopted the Alotau Accord II, a political strategic plan to guide the Government through the five-year term of the new Parliament.

The Alotau Accord II sets out five priority areas for the new Government. These are:

1. Economic growth – revenue generation, debt management and expenditure review; economic participation and empowerment, ownership rights and equitable benefit sharing, and business focus.
2. Infrastructure – continuing to develop and maintain key productive infrastructure assets including opening up missing road links and bridges, increasing communication access for rural areas, utilities upgrade (water and electricity), housing, and air and sea ports.
3. Law & order – create safer and more secure communities, increase police numbers and discipline, strengthen all levels of courts (including village courts and official), complete rural lock ups and minimise prison breaks.
4. Education – continue the Free Education Policy but focus more on increasing quality of teacher training, children’s learning, and infrastructure development including classrooms.
5. Health – continue the free basic health care and subsidised specialized health care policy and improve health indicators.

The leaders at the Alotau Camp agreed that:

In support of these priority areas, we also undertake to deliver key reforms to strengthen our systems and processes of service delivery and accountability. These include more autonomy for provinces and districts, electoral reforms, good governance, telecommunication, climate change and gender equality and women[s] empowerment.

The Government acknowledged that to deliver on these five priorities, it needed to reform and strengthen the systems and processes of government. A key element of this strategy is to improve good governance – meaning fighting corruption!

The Prime Minister has publicly announced that the Government would like to introduce the Organic Law on ICAC either in this month’s sitting of Parliament, or in February 2018. The Minister for Justice and Attorney General, Hon. Davis Steven has been tasked with finalising the ICAC Bill for presentation to Parliament.

The key elements of the Organic Law on ICAC are:

1. Purpose – the main purpose of ICAC is to prevent, reduce and combat corrupt conduct.
2. Jurisdiction – ICAC’s primary jurisdiction is to investigate and prosecute “corrupt conduct” of “public officials”. The definitions of these two terms are broad and cover a wide range of corrupt conduct by public servants and public leaders.
3. Powers and functions – ICAC has a wide range of powers and can investigate and prosecute those guilty of corrupt conduct, either with the support of other agencies or on its own.
4. Composition of the Commission – ICAC will comprise three Commissioners who must be persons of integrity and can be non-citizens.

5. Whistleblowers – there are strong provisions for the protection of whistleblowers.

There are three main criticisms of the draft Organic Law on ICAC: (1) power to Arrest; (2) power to Prosecute; and (3) unexplained wealth. The Government has listened and sought advice from the Police and the Public Prosecutor on the first two matters. In relation to the first issue, the Police have explained that the Constitution and recent Supreme Court decisions declare that only the Police can make arrests when there are allegations of crimes.

With regards to the second issue, the Public Prosecutor has indicated that he will not be sharing this constitutional function with another agency. Only the Public Prosecutor has the power to delegate his powers of prosecution to another agency or person.

The final point is covered by the Leadership Code, which is handled by the Ombudsman Commission. It is the Ombudsman Commission that can seek explanations from the leaders about unexplained wealth. For the public generally, the *Proceeds of Crimes Act* is already in place to capture such instances.

In my view, the most critical goal at the moment is to establish ICAC and get it operational. The Constitutional Amendment establishing ICAC is already in force. PNG needs only to enact the Organic Law on ICAC to fully implement and operationalise ICAC. It is encouraging to note that the Government is serious about ICAC and wants to see it established sooner rather than later.

### **Complementary Reforms**

Apart from its efforts to operationalise ICAC, the current Government is also intent on pushing ahead with a number of important reforms to improve governance. These are discussed briefly below.

#### **1. Governance Structures**

Papua New Guinea has been described as a weak state because of its frail government structures. The primary target of criticisms has been the public service. It has been argued that the governance structures have been weakened to the point where they are not able to push back the tide of corruption and abuse in the government system. The last Government attempted to tackle this problem by down-sizing and disbanding several government agencies and institutions, for example through the merging of National Cultural Commission and National Museum and Art Gallery, and the demise of the Office of Tourism, Arts and Culture.

The Government has also clarified and demarcated the roles, functions and powers of the Departments of Treasury and Finance. The CLRC and these two Departments and other stakeholders worked on amendments to the *Public Finances (Management) Act 1995*. After almost 18 months, the proposals were enacted by Parliament in 2016.

The amendments to the *Public Finances (Management) Act* is a significant milestone for the Government, as it now enables the two Departments to effectively carry out their functions. The amendments strengthen the monitoring efforts of the two Departments in order to curb corruption in the public service.

One of the greatest fears of public servants that prevents them from exposing corrupt practices in the public service is job security. In mid-2017, the CLRC proposed the formulation of a Whistleblower legislation to complement the Organic Law on ICAC. After a series of discussions with the relevant government agencies, the Government has now agreed that the Organic Law on ICAC provides sufficient provisions to protect whistleblowers.

## 2. Leadership

Papua New Guinea has a strong Leadership Code (*Organic Law on the Duties and Responsibilities of Leadership*) that exhorts our leaders to maintain a high standard of leadership. In the last couple of years, we have witnessed the erosion of this standard through legislative tampering and new behaviours not covered by the Code.

To address this problem, the Ombudsman Commission, together with CLRC and other stakeholders, are developing a number of proposals to strengthen the work of the Commission and protect our leaders. The reforms relate to the *Organic Law on the Ombudsman Commission* and the *Organic Law on the Duties and Responsibilities of Leadership*. This work is nearing completion and will hopefully soon be presented to the new Government for approval and enactment by Parliament.

Another proposal that was initiated by the O'Neill Government in 2012 to promote quality leadership was the review of the *Organic Law on the Integrity of Political Parties and Candidates* (OLIPPC). The review was conducted between 2012-2013 by the Registry of Political Parties and Candidates, CLRC, and other stakeholders.

The aims of the review were: (1) improve OLIPPC in response to the Supreme Court decision in 2010 nullifying provisions of OLIPPC; (2) strengthen and improve the governance of political parties; (3) strengthen provisions relating to the conduct of candidates and elected leaders.

A draft constitutional amendment was presented to the Government in 2013, and was accepted with several alterations. The draft constitutional amendment was gazetted in 2015 but no action was taken to enact the draft Amendment Bill to OLIPPC.

The current Government has now taken this legislative proposal onboard and has directed relevant government agencies, including the CLRC, to resubmit the draft amendments to Government for approval and enactment by

Parliament in February 2018. The Government is confident that the Bill will be passed by Parliament when it is introduced.

### 3. Reforming Decentralised Governments

In 2013, the Government, through the Head of State, issued a Constitutional Directive to the CLRC to review the *Organic Law on Provincial Governments and Local-level Governments* (OLPGLLG) with the support of the Department of Provincial and Local Government Affairs (DPLGA). The Government acknowledged that the reforms to the provincial government system in 1995 had failed.

The CLRC was directed to review the administrative, legal and financial structures of provincial and local-level governments and recommend appropriate proposals for reform. The CLRC and DPLGA took 12 months to complete the review, which included nation-wide consultations and discussions with leaders and government agencies. In May 2015, six months after the public consultations, the CLRC and DPLGA submitted their Final Report to the Government, and it was endorsed by Parliament in June of the same year.

The key recommendations of the CLRC and DPLGA are:

- Having one level of subnational government – provincial governments only (third level to be established under autonomy)
- Criteria for obtaining autonomy
- Strengthening District Development Authorities (DDAs) and ensuring transparency and accountability
- Streamlining the District Support Improvement Program and Provincial Support Improvement Program into the national and provincial budgetary processes
- Strengthening audits at the subnational level
- Clarifying the roles of municipal authorities, DDAs and provincial governments
- Improving planning and implementation of national, provincial and district development plans
- Reintroduction of provincial constituencies
- Reintroduce office of Speaker of Provincial Assemblies
- Re-composition of Provincial Assemblies
- Restructuring resource benefits and development

It is the firm view of the CLRC and DPLGA that when the findings of the CLRC/DPLGA are implemented, we will see improvements in the delivery of basic services to our people. The current Government has resolved to proceed with these proposals this year. The Government is looking at introducing the new Organic Law on Decentralization in Parliament in the first quarter of 2018.

### 3. Human Rights

Papua New Guinea has been advocating for the establishment of a Human Rights Commission (HRC) since the 1990s. A number of attempts were made by successive governments to amend the Constitution and establish the HRC, with a draft Organic Law on the Human Rights Commission being completed around 2010. No serious attempts were made to implement the initiative.

The Government is now pushing for the reinstatement of the initiative. In October, the Minister for Justice and Attorney General Hon. Davis Steven, promised that his Department and other relevant agencies will now work on drafting the relevant Bills to establish the Human Rights Commission. This is a positive gesture and the Government needs to be supported on this agenda.

### 4. 2017 National Elections

PNG has now, through the Electoral Commission, finally completed its 2017 National Elections. Although it has been marred with controversies, PNG must be commended for concluding its 2017 elections. A number of commentators, including myself, have raised concerns about the adequacy of provisions of the Organic Law on National and Local Government Elections (electoral law).

The Government has acknowledged that there is a need to reform electoral law and improve the electoral process. The Prime Minister publicly announced two weeks ago that the CLRC will now take the lead in reviewing and reforming electoral law, with other agencies such as the Electoral Commission, DPLGA, Registry of Political Parties and Candidates, Department of Prime Minister and National Executive Council also to be involved. These agencies have now met and are now plotting the way forward for reforming electoral law.

The Electoral Commission has identified a number of areas for review and reform. These include:

- duration of the polling period
- nomination fees
- counting period and process
- composition of Commission (to three members)
- prosecution of election offences
- Temporary Special Measures for women into Parliament.

As soon as the CLRC and its partners have finalised the terms of reference for the review of electoral law, it will begin engaging with the relevant stakeholders and other interested parties. The current proposal is that the review of electoral law should begin in earnest in February 2018.

## **Conclusion**

As a national leader and the head of a government agency, I am pleased that the Government at the Alotau Camp had already envisioned many of the items that I suggested the new Government of Prime Minister Peter O'Neill should address. It is my hope that the current Government keeps pushing ahead with these major legislative reforms. When the Government reforms the governance structures it will provide a strong and stable platform for the development of PNG.

The reform of these laws and the enactment of the proposed laws will lay the foundation for strengthening the government, particularly as it pursues its Vision 2050 goals and the country's aspirations contained in the National Responsible Sustainable Development Policy. The combined effect of this and other legislative reforms in the next couple of years will also enable the Government and PNG to achieve the Sustainable Development Goals.