



UN CONVENTION
AGAINST CORRUPTION
CIVIL SOCIETY REVIEW:
PAPUA NEW GUINEA 2012

Context and purpose

The UN Convention against Corruption (UNCAC) was adopted in 2003 and entered into force in December 2005. It is the first legally binding anti-corruption agreement applicable on a global basis. To date, 160 states have become parties to the convention. States have committed to implement a wide and detailed range of anti-corruption measures that affect their laws, institutions and practices. These measures promote prevention, criminalisation and law enforcement, international cooperation, asset recovery, technical assistance and information exchange.

Concurrent with UNCAC's entry into force in 2005, a Conference of the States Parties to the Convention (CoSP) was established to review and facilitate required activities. In November 2009 the CoSP agreed on a review mechanism that was to be "transparent, efficient, non-intrusive, inclusive and impartial". It also agreed to two five-year review cycles, with the first on chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation), and the second cycle on chapters II (Preventive Measures) and V (Asset Recovery). The mechanism included an Implementation Review Group, which met for the first time in June-July 2010 in Vienna and selected the order of countries to be reviewed in the first five-year cycle, including the 26 countries (originally 30) in the first year of review.

UNCAC Article 13 requires States Parties to take appropriate measures including "to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption" and to strengthen that participation by measures such as "enhancing the transparency of and promoting the contribution of the public in decision-making processes and ensuring that the public has effective access to information; [and] respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption". Further articles call on each State Party to develop anti-corruption policies that promote the participation of society (Article 5); and to enhance transparency in their public administration (Article 10). Article 63 (4) (c) requires the CoSP to agree on procedures and methods of work, including cooperation with relevant non-governmental organisations.

In accordance with Resolution 3/1 on the review mechanism and the annex on terms of reference for the mechanism, all States Parties provide information to the conference secretariat on their compliance with the UNCAC, based upon a "comprehensive self-assessment checklist". In addition, States Parties participate in a review conducted by two other States Parties on their compliance with the convention. The reviewing States Parties then prepare a country review report, in close cooperation and coordination with the State Party under review, and finalise it upon agreement. The result is a full review report and an executive summary, the latter of which is required to be published. The secretariat, using the country review report, is then required to "compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the technical review reports and include them, organised by theme, in a thematic implementation report and regional supplementary agenda for submission to the Implementation Review Group." The terms of reference call for governments to conduct broad consultation with stakeholders during preparation of the self-assessment and to facilitate engagement with stakeholders if a country visit is undertaken by the review team.

The inclusion of civil society in the UNCAC review process is of crucial importance for accountability and transparency, as well as for the credibility and effectiveness of the review process. Thus, civil society organisations around the world are actively seeking to contribute to this process in different ways. As part of a project on enhancing civil society's role in monitoring corruption, funded by the UN Democracy Fund (UNDEF), Transparency International (TI) has offered small grants for civil society organisations (CSOs) engaged in monitoring and advocating around the UNCAC review process. This aims to support the preparation of UNCAC implementation review reports by CSOs for input into the review process.

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Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of May 2012. Nevertheless, Transparency International PNG and the UNCAC Coalition cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

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Introduction

Papua New Guinea (PNG) acceded to the UNCAC in July 2007.

This report reviews PNG's implementation and enforcement of selected articles in chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation) of the UNCAC. The report is intended as a contribution to the UNCAC peer review process currently underway covering those two chapters. PNG was selected by the UNCAC Implementation Review Group in July 2010 by a drawing of lots for review in the first year of the process. An earlier draft of this report was provided to the government of PNG.

Scope. The UNCAC articles that receive particular attention in this report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), illicit enrichment (Article 20), bribery in the private sector (Article 21), money laundering (Article 23), liability of legal persons (Article 26), witness protection (Article 32), whistleblower protection (Article 33), and mutual legal assistance (Article 46).

Structure. Section I of the report is an executive summary, with the condensed findings, conclusions and recommendations about the review process and the availability of information, as well as about implementation and enforcement of selected UNCAC articles. Section II covers in more detail the findings about the review process in PNG, as well as access to information issues. Section III reviews implementation and enforcement of the UNCAC, including key issues related to the legal framework and to the enforcement system, with examples of good and bad practice. Section IV covers recent developments and Section V elaborates on recommended priority actions.

Methodology. The report was prepared by Transparency International Papua New Guinea (TIPNG) with funding from the UN Democracy Fund (UNDEF). The group made efforts to obtain information for the reports from government offices and to engage in dialogue with government officials. As part of this dialogue, a draft of the report was made available to the government.

The report was prepared using a questionnaire and report template designed by Transparency International (TI) for the use of civil society organisations (CSOs). These tools reflected, but simplified, the United Nations Office on Drugs and Crime (UNODC) checklist and called for relatively short assessments as compared with the detailed official checklist self-assessments. The questionnaire and report template asked a set of questions about the review process and, in the section on implementation and enforcement, asked for examples of good practices and areas in need of improvement in selected areas, namely with respect to UNCAC Articles 15, 16, 17, 20, 21, 23, 26, 32, 33 and 46.

The report preparation process went through a number of steps, with respondents first filling out the simplified questionnaire and then preparing the draft report.

The draft report was shared with the government for comments. A final draft of the report was then sent to the government prior to publication, with the aim of continuing the dialogue beyond the first-round country review process.

In preparing this report, the author took into account the recent review of PNG in the context of a Thematic Review on Criminalisation of Bribery within the Asian Development Bank (ADB)/OECD Anti-Corruption Initiative for Asia and the Pacific, published in 2010.¹

¹ The Criminalisation of Bribery in Asia and the Pacific. Framework and Practices in 28 Asian and Pacific jurisdictions – Thematic Review and Final Report, pp. 399-416, <http://www.oecd.org/dataoecd/2/27/46485272.pdf>.

I. Executive summary

As far as compliance with UNCAC obligations is concerned, PNG is at just below satisfactory level, with confusion caused by overlapping legislation. A critical challenge for the key agencies engaged in anti-corruption efforts is the lack of financial resources. There has been some progress since August 2011, when the National Anti-Corruption Strategy (NACS) was approved by the National Executive Council. In his inaugural speech to Parliament, the prime minister committed to the fight against corruption. He announced that his governorship would establish the Independent Commission against Corruption (ICAC) and consider other legislation, including the Whistleblowers Act.

Assessment of the review process

Conduct of process

The following table provides an overall assessment of transparency, country visits and civil society participation in the UNCAC review of PNG.

Table 1: Transparency and CSO participation in the review process

Did the government make public the contact details of the country focal point?	Indirectly
Was civil society consulted in the preparation of the self-assessment?	N/A*
Was the self-assessment published online or provided to CSOs?	N/A*
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	Yes
Was civil society invited to provide input to the official reviewers?	Yes
Has the government committed to publishing the full country report?	Yes

* The PNG government has not yet completed its self-assessment.

The review process in PNG was conducted in a rather inclusive way. A country visit took place during which CSOs were invited to provide inputs to the review team. It should be noted that the country visit took place before completion of the self-assessment by the government of PNG, which is an unusual situation.

Availability of information

Information necessary for this report was made available by government officials, although not in a timely manner. The National Anti-Corruption Authority (NACA) provided TIPNG with detailed information on cases prosecuted. This report has been compiled on cases investigated and prosecuted as of July 2011 and is captured in Appendix A.

Access to public servants tasked with implementing UNCAC was straightforward, largely due to TIPNG's good working relationship with them

Implementation and enforcement

Criminal legislation, such as the Proceeds of Crime Act 2005, ensures that active and passive bribery and other forms of corrupt behaviour are prohibited. However, there are significant gaps in implementation and overlaps across the various laws, creating tension between and/or overlap of sanctions.

The complexity of the UNCAC as well as the endemic nature of corruption in PNG necessitates the introduction, implementation and enforcement of substantive policies bringing legislative, institutional and attitude change. The government commits, through the NACS, to reviewing existing legislation to ensure relevant legal instruments are in place to support anti-corruption efforts and to fulfil PNG's UNCAC obligations.

The NACS also identified as a priority action the need to strengthen the capacity of the Financial Intelligence Unit (FIU), the NACA and the other anti-corruption and enforcement agencies such as the Ombudsman Commission. In addition, the NACS is considering the establishment of a strong anti-corruption body such as an ICAC. The creation of such a commission would demonstrate political commitment on the part of the current government.

A key area of concern is the delay in the implementation of the NACS. Now that the NACS has been approved, its implementation will lead to the self-assessment being completed by PNG. Part of TIPNG's advocacy plan relates to ensuring that this occurs soon.

On the enforcement side, under the auspices of the Fraud and Anti-Corruption Directorate via NACA and FIU, law-enforcement personnel are pursuing major corruption cases and making improvements in that regard, despite restrictions on resources and funding. But the NACA and FIU face shortages in government funding that hamper investigations and officer morale.

The FIU, although established pursuant to the Proceeds of Crime Act 2005, has yet to complete a full investigation and prosecution of any matter, due to restrictions related to inadequate resourcing and manpower. NACA is hampered by the lengthy delays in prosecution, as the courts in PNG are chronically slow, leading to blowouts of costs.

Other inadequacies include lack of staff skill and training to investigate corruption cases; procedural delays in processes and proceedings, especially regarding prosecutions in court; overlapping agency responsibilities; delays in investigations which leads to further delays in prosecution; lack of public awareness-raising on corruption issues and the enforcement system; and lack of de facto protection of whistleblowers and witnesses.

Recommendations for priority actions

- Implement the National Anti-Corruption Strategy (NACS).
- Provide resources to existing anti-corruption agencies to investigate prosecute and/or otherwise enforce existing laws.
- Adopt legislation to establish an independent Anti-Corruption Commission.
- Amend existing legislation (apart from the newer Proceeds of Crime Act) to ensure that sanctions are consistent.
- Introduce legislation on whistleblowers, witness protection and freedom of information. Whistleblower legislation has been drafted and is awaiting Cabinet approval. Witness protection and freedom of information legislation has yet to be drafted.

II. Assessment of the review process for Papua New Guinea

A. Conduct of process

The government of PNG agreed to a country visit and the representatives of UNODC. Malawi and Tajikistan met with the PNG public service agencies that implement the UNCAC locally. CSO representatives were invited to a roundtable discussion, during which TIPNG provided input to the review team.

It was clear from this meeting that the self-assessment had not yet been finalised. The officials explained that this was due to the current steps the government is taking to put in place the NACS. The NACS has now been endorsed by the Oneil-Namah government following a public media announcement of the government's intention to combat corruption.

Government policy-makers indicated that the government will publish the full country review report, once completed.

B. Availability of information

Information was made available to TIPNG, but only at a late stage in the preparation of this report. Government bureaucratic processes, such as inter-office protocols, contributed to the government's delay in making information available. However, due to TIPNG's existing relationships with many government agencies, there was good cooperation during the preparation of this report.

III. Implementation and enforcement of the UNCAC

A. Key issues related to the legal framework

This section covers PNG's compliance with the mandatory provisions of UNCAC chapter III on Criminalisation and Enforcement, and chapter IV on International Cooperation. It highlights areas showing good practices and areas with deficiencies.

1. Areas showing good practice

Implementation by PNG of the following UNCAC article is quite satisfactory.

UNCAC Article 23: Laundering proceeds of crime. Legislation on money laundering and enforcement procedures is contained in the comprehensive Proceeds of Crime Act. This act ensures that the money handlers, namely banks and other financial institutions, are held criminally liable for large cash transactions whose source is questionable (sections 13-20). Banks and other financial institutions have now introduced internal procedures to ensure that all large transactions are transparent and accountable. They must report to the FIU any transactions of more than K10,000 (c. US \$4,700) domestically and internationally, made in cash or electronically. Failure to do so may result in a sanction of K250,000 (c. US \$117,000) for the financial institution, or a fine of K50,000 (c. US \$23,000) or five years' imprisonment for an individual. To date, there have been no known prosecutions of financial institutions.

UNCAC Article 46: Mutual legal assistance. The Mutual Legal Assistance in Criminal Matters Act was enacted in 2005.²

2. Areas with deficiencies

There are deficiencies in PNG's implementation of the following UNCAC articles.

UNCAC Article 15: Bribery of national public officials. One deficiency is the overlapping of bribery offences under domestic law. At present, bribery is prohibited under the Criminal Code and Excise Act as well as under the Customs Act, Food Sanitation Act, the Public Health Act and the Liquor Licensing Act. Moreover, PNG legislation is incomplete. It does not cover expressly all modes of committing active bribery ("offer, promise or giving" of a bribe to a public official); the situation when a bribe is offered to but not received by an official or when an official rejects a bribe; or bribery through the use of intermediaries.³

UNCAC Article 16: Bribery of foreign public officials. There is no law criminalising bribery of foreign public officials in PNG.

UNCAC Article 20: Illicit enrichment. The leadership code requires Parliamentarians to submit annual returns. The code falls under the jurisdiction of the Ombudsman Commission. However, no legislation appears to exist that directly calls for monitoring illicit enrichment of public and private sectors other than common law which, according to the Constitution⁴, applies in PNG.

UNCAC Article 26: Liability of legal persons.

The Interpretation Act defines the term "person" as "including a corporation sole, and a body politic or corporate". However, as stressed by the 2010 ADB-OECD review⁵, there is no reported case law in which a company has been prosecuted for a criminal offence, and whether and how corporate criminal liability for bribery would be imposed in practice is unclear.

UNCAC Article 32: Protection of witnesses, experts and victims; and Article 33: protection of reporting persons. There is no legislation in force to protect whistleblowers, be they witnesses or victims of corruption. Draft whistleblower legislation exists, but is yet to be endorsed by the National Executive Council (i.e. the Cabinet) before it is sent to Parliament.

B. Key issues related to enforcement

This section evaluates the enforcement of UNCAC-related offences in PNG. It provides an overview of the enforcement mechanisms in place, and analyses the statistical data provided by governmental institutions.

The NACA has been operating since 2006. Its secretariat is staffed with a contracted director funded under the NACA budget, and it has an office on loan from the Police Service. NACA consists of 10 agencies: Department of Treasury, Office of the Auditor General, Customs, Internal Revenue Commission, Department of Personnel Management, Public Prosecutor, Solicitor General, Ombudsman Commission, Police, and the Department of Provincial and Local Government Affairs.

The FIU is established within the Royal Papua New Guinea Constabulary. According to Sections 23 and 24 of the Proceeds of Crime Act 2005, its basic functions include liaising with financial institutions on suspicious cash transactions and providing reports and recommendations to all relevant persons, including the Police Minister. The FIU also investigates matters for the purposes of the act and provides training and guidelines on transaction record-keeping and reporting.

² Available at: <http://www.paclii.org>.

³ The Criminalisation of Bribery in Asia and the Pacific. Framework and Practices in 28 Asian and Pacific jurisdictions – Thematic Review and Final Report, p. 413, <http://www.oecd.org/dataoecd/2/27/46485272.pdf>.

⁴ Schedule 2 part 2 of the National Constitution of the Independent State of Papua New Guinea.

⁵ The Criminalisation of Bribery in Asia and the Pacific. Framework and Practices in 28 Asian and Pacific jurisdictions – Thematic Review and Final Report, p. 418, <http://www.oecd.org/dataoecd/2/27/46485272.pdf>.

1. Statistics

Information on statistics and cases was provided by NACA. The following text represents a summary of the data provided concerning criminal prosecutions conducted in four provinces; Southern Highlands Province, Gulf Province, New Ireland Province (Nimarmar RLLG Lihir) and the East Sepik Province.

Southern Highlands Province

In the Southern Highlands Province alone, over PGK 10 million (US \$4.9 million) was misappropriated between 2006 and 2011. Of the 32 arrests, 10 Cases have been finalized at the National Court while 18 cases have yet to be heard both at committal and national courts.

A bulk of this money was misappropriated by the Government officials at the local and provincial level, and by current and former members of parliament.

It should be noted that misappropriation is a common charge imposed and therefore processes of monitoring district funding needs to be reviewed to improve accountability.

Gulf Province

Since 2009 a total of eight arrests have been made. of these, three cases await committal proceedings, two have been committed to stand trial and three have been withdrawn. Defendants range from contractors, provincial government and administration officials. The charge amounts exceed a total of PGK 1 million (US \$490,000) from misappropriation, conspiracy to defraud, false pretence and abuse of office.

East Sepik Province

Since 2009 a total of eight arrests have been made, six of which are awaiting trial at PNG's National court and two cases still pending committal hearings. Defendants range from provincial administration and government officials to local level government officials with over PGK 6 million kina (US \$2.94 million) being misappropriated.

Nimamar LLG Lihir, New Ireland Province

Since 2009, a total of five arrests were made and have been committed to stand trial in the National court. A total of PGK 300,000 (US \$147,000) was either misappropriated, taken under false pretense or through conspiracy to defraud. All defendants are local level government officials.

2. Cases

The Ombudsman Commission referred the case of Finance Minister Patrick Pruaitch to a leadership tribunal⁶ for prosecution over several allegations of misconduct, including the misuse of electoral allowances. Mr Pruaitch was suspended from office after the Supreme Court ruled that under the law an official referred to a leadership tribunal for allegations of official misconduct is automatically suspended from office. The suspension was later overturned and Pruaitch reappointed while the allegations are still to be heard in court.⁷

⁶ A leadership tribunal hears alleged cases of misconduct by ministers and senior public officials (Section 27 of the Organic Law on the Duties and Responsibilities of Leadership [Papua New Guinea], 16 September 1975), available at: <http://www.unhcr.org/refworld/docid/3ae6b54d10.html> (accessed 14 May 2012).

⁷ Pacific Island News Association, 24 June 2011, "Pruaitch as PNG Treasurer sends 'wrong message' – analyst" (<http://www.pina.com.fj/?p=pacnews&m=read&o=18497256074e04082f6e5a88acd363>); Radio Australia, 8 May 2012, "Sir Michael Somare confirms he's not contesting PNG elections", (<http://www.radioaustralia.net.au/international/radio/program/pacific-beat/sir-michael-somare-confirms-hes-not-contesting-png-elections/939510>)

On 20 March 2011 former Prime Minister Somare was found guilty by a leadership tribunal of 13 charges of misconduct in office for submitting annual financial statements late or incomplete.⁸ His penalty was a two-week suspension.⁹

The case of Arthur Somare, former Prime Minister Somare's son and former minister for national planning, was referred to the public prosecutor in March 2006 for misapplication of funds meant for his electorate. He retained his parliamentary seat and was reappointed to the cabinet as head of the Ministry for Public Enterprise, Information, and Development in July 2006. The inquiry has spanned over six years, after the MP has repeatedly challenged his referral by the Ombudsman Commission first, and then the Office of the Public Prosecutor. The Tribunal has been adjourned to 14 May 2012.¹⁰

3. Areas showing good practice

Under the auspices of the Fraud and Anti-Corruption Directorate via NACA and FIU, law-enforcement personnel are pursuing major corruption cases and making improvements in that regard, despite restrictions on resources and funding.

4. Areas with deficiencies

The NACA and FIU face shortages in government funding that hamper investigations and officer morale.

The FIU, although established pursuant to the Proceeds of Crime Act 2005, has yet to complete a full investigation and prosecution of any matter, due to restrictions related to inadequate resourcing and manpower. NACA is hampered by the lengthy delays in prosecution, as the courts in PNG are chronically slow, leading to blowouts of costs.

There is no specialist agency to prevent and then combat corruption through law enforcement (UNCAC Articles 6 and 36). While the FIU and NACA do undertake this role to a certain extent, neither has adequate resources and their approach is not coordinated. An independent commission against corruption would be better placed to do this on a larger and more coordinated scale, given sufficient resources.

There are also the following inadequacies:

- Growing acceptance of corruption by government officials as a norm in some parts of law enforcement;
- Lack of priority given to corruption cases by law enforcement;
- Inadequate resources given to agencies who enforce anti-bribery and anti-corruption laws;
- Lack of staff skill and training to investigate corruption cases;
- Procedural delays in processes and proceedings, especially regarding prosecutions in court;
- Overlapping agency responsibilities;
- Delays in investigations which leads to further delays in prosecution;
- Lack of public awareness-raising on corruption issues and the enforcement system;
- Lack of de facto protection of whistleblowers and witnesses.

⁸ Radio New Zealand International, 21 March 2011, "PNG's Somare guilty of 13 charges says Leadership Tribunal" (<http://www.rnzi.com/pages/news.php?op=read&id=59491>).

⁹ In re Michael Somare; Recommendation on penalty [2011] PGLT 1; N4230 (24 March 2011) (<http://www.paclii.org/pg/cases/PGLT/2011/1.html>); Radio New Zealand International, 25 March 2011, "Lawyer for PNG's PM welcomes sentence given to Somare" (<http://www.rnzi.com/pages/news.php?op=read&id=59601>).

¹⁰ 2007 Human Rights Report: Papua New Guinea; Island Business, 30 April 2012, "PNG leadership tribunal adjourned" (http://www.islandsbusiness.com/news/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=130/focusContentID=28242/tableName=mediaRelease/overrideSkinName=newsArticle-full.tpl).

IV. Recent developments

The endorsement of the NACS by the government is the most significant development in fighting corruption in PNG in recent years. It is the foundation for any significant fulfilment of PNG's UNCAC obligations, as well as the catalyst for reporting through the UNCAC self-monitoring mechanism. Through this anti-corruption policy, specialised agencies can be empowered by the government's commitment to adequately fund them and support their work.

Whistleblower's legislation has been drafted by the Department of Justice and Attorney General, and is awaiting Cabinet approval before being sent to Parliament. It is hoped that the new government in August 2012, there will be sufficient members of parliament that can vote passage of this legislation in parliament.

V. Recommendations for priority actions

Legislative changes need to be effected in order for the agencies to investigate and prosecute persons appropriately.

The following priority actions are recommended:

1. Implement the National Anti-Corruption Strategy (NACS).
2. Provide resources to existing anti-corruption agencies to investigate prosecute and/or otherwise enforce existing laws.
3. Adopt legislation to establish an independent Anti-Corruption Commission.
4. Amend existing legislation (apart from the newer Proceeds of Crime Act) to ensure that sanctions are consistent.
5. Introduce legislation on whistleblowers, witness protection and freedom of information. Whistleblower legislation has been drafted and is awaiting Cabinet approval. Witness protection and freedom of information legislation has yet to be drafted.

TIPNG's focus is on ensuring that the NACS is implemented, which will go a long way to prioritising the fight against corruption amongst political leaders. This will lead to increases in resourcing, ensure that investigators and prosecutors are adequately skilled, and strengthen existing anti-corruption agencies such as the FIU and the Police Fraud and Anti-Corruption Directorate. The NACA and the Ombudsman Commission will be better able to deal with corruption issues amongst public officials and to coordinate the fight against corruption more effectively.

As mentioned earlier, there is a need to tackle what appears to be a creeping indifference to corruption in public service, law enforcement, the judiciary and society in general. Changing public opinion can only happen by prioritising policies on accountability and transparency in agencies, and enforcing existing legislation.

Acknowledgments:

This report has been prepared with a grant from the United Nations Democracy Fund (UNDEF) and the support of the Transparency International-Secretariat (TI-S).

