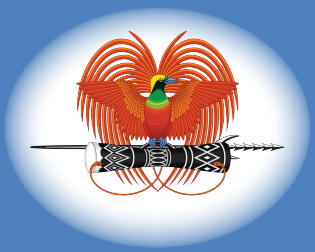

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ARTICLES

The State Policy on Leadership in Papua New Guinea

Dr Eric Kwa[*]

Introduction

Papua New Guinea (PNG) gained Independence on 16 September 1975. By global standards, it was a young nation when it gained Independence.[1] As an emerging State, it needed guidelines to help it to achieve a certain level of change that would bring happiness and prosperity to the people of PNG. These guidelines find their form in the National Goals and Directive Principles (NGDP). The NGDP are located in the Preamble of the *Constitution*. The success of PNG depends primarily on the kind of leadership that adheres to the values and principles enshrined in the NGDP and the *Constitution*.

The NGDP are also referred to as national goals that the people of PNG must aspire to achieve as an independent country. In their totality, they are the State Policy of PNG.[2] The State Policy covers various aspects of the PNG State and its operations. This paper looks at the NGDP and attempts to identify the extent to which they can assist in addressing leadership issues in PNG. As the country heads into the General Elections in 2022, the social media has been ablaze with the issue of leadership. There seems to be no let-up in criticisms of past and current leaders by aspiring politicians and dissatisfied political opponents of those in power and Government. The key thread that runs through all these leadership debates is "**corruption**". Everyone on the anti- corruption bandwagon seems to firmly hold the view that they have some kind of magic bullet to defeat this evil called corruption.[3]

In this paper, I offer some advice on fixing our leadership deficiencies from the constitutional perspective. I do not intend to get into the myriad debates on corruption and leadership. In my view, Papua New Guineans can still make our country a better place to be, if we only redirect and refocus our attention to the *Constitution* and find the wisdom of our founding fathers and mothers who dreamt of a prosperous and successful country called 'Papua New Guinea'. The answers to our localized leadership debacle are found within our constitutional framework, if only we look closer.

---

[*] Attorney General and Secretary for the Department of Justice and Attorney General.

[1] PNG emerged as an independent State at a time when many former colonies of the Western powers in Africa, Asia and the Pacific had or were rejecting colonialism and embracing independence.

[2] Ghai, Y., Law, *Politics and Government in the Pacific Island States* (Suva: Institute of Pacific Studies, University of the South Pacific, 1988) 49.

[3] See the discussion on this topic in PNG in Ayius A., and May, R., *Corruption in Papua New Guinea: Towards an Understanding of the Issue* (*Special Publication No.47*) (Port Moresby: National Research Institute, 2007).

Leadership matters!

Leadership is a complex issue and as a topic, has attracted much attention by various sectors of the community. However, a commentator said "[L]eadership appears to be a rather sophisticated concept".[4] Leadership can be defined in various ways and take various forms. Bernard Narokobi, one of the leading thinkers of PNG, puts it this way, "[I]n any situation, whether at school, in college or university, or in a village, different situations provide backdrop for leaders to emerge."[5] Whatever the definition (and in whatever situation), it is generally agreed that leadership entails power.[6] Power has two essential elements. These are motive and resources.[7] According to Burns, the two are interrelated. As such, if motive is lacking, resources diminish. Conversely, if there are no resources, motive lies idle. This power is exercised through, what Tichy and Bennis describe as "judgement". They argue that 'judgement' is "the essence of effective leadership." This means that "making judgement calls is the essential job of a leader."[8]

What then are the qualities of leadership? There are various commentaries on the subject. For the present purpose, four different commentaries on leadership qualities are presented with the aim of identifying the common qualities of leadership.

Cronin lists seven qualities which are attributes of leadership. These are: (1) knowledge; (2) sense of priority (Vision, ability to infuse important, transcending value into an enterprise); (3) integrity (character, intellectual honesty); (4) compassion; (5) create and resolve conflict; (6) creativity and entrepreneurship; and (7) knowledge of oneself.[9] Narokobi, on the other hand, lists 15 leadership qualities, which he argues, are essential for the modern leaders of PNG.[10] These qualities are:

- Faultlessness,
- Sobriety,
- Self-control,
- Wisdom, prudence, discretion,
- Orderliness,
- Hospitality,
- Teaching,
- Integrity,
- Stepping aside,
- Delegating responsibilities,
- Having one spouse,
- Family management,
- Not loving money, and
- Maturity in the faith

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4 Stogdill, R., *Handbook on Leadership: A Survey of Theory and Research* (London: The Free Press, 1974) 7.

5 Narokobi, B., *Leadership in Papua New Guinea* (Madang: DWU Press, 2005) 13.

6 Burns, J. M., *Leadership* (New York: Harper & Row Publishers, 1978) 9 and Etzioni, A., *The Spirit of Community: The Reinvention of the American Society* (New York: Simon & Schuster, 1993) 18.

7 Id, p9.

8 Tichy, M. N. and Bennis, G. W., *Judgement: How Winning Leaders Make Great Calls* (New York: Penguin Books, 2007) 1.

9 Cronin, T., "The Qualities of an Effective Leadership" (at cram.com, accessed 10/2/22). Also see Cronin, T., and Genovese, A. M., *Leadership Matters: Unleashing the Power of Paradox* (Boulder: Paradigm Publishers, 2012).

10 Narokobi, n5, supra, at pp19-31.

In my own Kowai culture, as in other cultures in PNG[11], leadership qualities also include: (1) generosity; (2) humility; (3) peace loving; (4) strength; (5) and wisdom.[12] We may also include Christian qualities of leadership given that 96% of Papua New Guineans subscribe to the Christian faith. More importantly, in 2021, the Government embarked on an agenda to declare PNG "a Christian Country" by directing the Constitutional and Law Reform Commission (CLRC) to consult the people and gauge their views on this agenda. The Final Report of the CLRC shows that the majority of Papua New Guineans supported the Government's proposal to declare PNG a Christian Country.[13] If PNG is declared a Christian Country, then what does the Bible say about leadership qualities. For the purposes of this paper, seven Christian qualities of leadership are presented. These qualities with their biblical references are:

1. Compassion (Mark 8: 1-3);
2. Gentle (Luke 18: 15-17);
3. Authority/power (Mark 4: 35-5: 1-43);
4. Firm/strong (Luke 19: 45-48);
5. Respectful (Luke 2: 51; Matt 22: 21);
6. Humility (Luke 19: 1-10 (5-7)); and
7. Love (John 17).

When these four different views on leadership qualities are compared, seven qualities stand out, with one identified by Narokobi and the other by Cronin. This is shown in the table below.

Table 1. The Key Qualities of Leadership[14]

	Narokobi	**Bible (Christian)**	**Cronin**	**Kowai**	**Common**
1	Integrity	Respectful	Integrity		Integrity
2	Wisdom (Orderliness (***wise***))	Gentle	Create and resolve conflict (***wisdom***) (Creativity and entrepreneurship (***orderliness/wise***))	Wisdom	Wisdom
3	Sobriety (***discipline***) (Self-control (***discipline***), Faultlessness (***discipline***))	Firm/strong	Knowledge of oneself (***self-control/discipline***)	Strength (***power/authority***)	Self-control/ Discipline
4	Hospitality				

[11] Weiner, A., *The Trobrianders of Papua New Guinea* (New York: Harcourt Brace Jovanovich College Publishers, 1987) and Arabagali, D., *Datagaliwabe Was Working in the Huli* (Port Moresby: Treid Pacific (PNG) Ltd, 1999).

[12] Kwa, E., Aikung, F., Samuel, P., Kwa, V. and Aikung, E., *Kowai Wisdom: The Wisdom of the Kowai People of Siassi Island, Morobe Province, Papua New Guinea* (Port Moresby: 110 Ltd, 2021) 62. The paramount leader of the Kowai people is called "Baimbuk". I am proud to be the current Baimbuk of my people since 2006.

[13] Constitutional and Law Reform Commission., *Constitutional Directive No.4: Declaring Papua New Guinea a Christian Country: Final Report* (Port Moresby: Constitutional and Law Reform Commission, 2021).

[14] When I reviewed the qualities identified by Narokobi, the Bible, Cronin and the Kowais, I was able to establish nine leadership qualities which are shown in Table 1, above.

	(***generous/compassion)*** (Not loving money (***compassion***))	Compassion	Compassion (***love***)	Peaceful (***gentle***)	Compassion
5	Teaching (***humility***) (Stepping aside (***humility***)	Humble		Humble	Humble
6	Delegating responsibility (***knowledg***e)	Authority or Power (***knowledge***)	Knowledge		Knowledge
7	Having one spouse (***love***) (Family management (***love***))	Love		Generous (***love***)	Generous/Love
8	Maturity in faith			Maturity	
9			Sense of priority (***vision***)	Vision	

When comparing the list of leadership qualities identified by Narokobi (14); the Bible (7); Cronin (7); and the Kowai (5), four leadership qualities are identified by the Kowais, Narokobi, Cronin and the Bible. The fifth quality (humility) is identified only by Narokobi, the Bible and the Kowais. The sixth quality (knowledge) is identified only by Narokobi, the Bible and Cronin. The final two qualities are identified by Narokobi only (faith) and Cronin only (vision).

What do these leadership qualities mean? Let us consider each of these qualities briefly.

1. **Integrity**
   According to the Oxford English Dictionary, integrity is "the quality of being honest and having strong moral principles". In other words, a leader must be of high standing and a morally upright person.

2. **Wisdom**
   The term according to the Oxford English Dictionary entails the quality of "having experience, knowledge and good judgement". In simple terms, a leader must be wise in his or her decision making because of his or her knowledge and experience in life.

3. **Discipline**
   According to Narokobi, this quality involves self-control. Controlling one's own behaviour is based on rules and practices. A leader must restrain his or her actions within the boundaries of the law or code of conduct.[15]

4. **Compassion**
   This quality involves having concern for others who are at a disadvantaged position. A leader must have sympathy for the suffering of others.

5. **Humility**
   The Pidgin description of this term has more meaning than the English definition. In Pidgin, humility is "*daun pasin*", meaning "always regarding oneself lower than the others." A leader must always consider himself or herself lower than the people.

[15] See the attributes of this quality in Julius Chan., *Playing the Game: Life and Politics in Papua New Guinea* (Brisbane: University of Queensland, 2016) 106.

6. **Knowledge**
   This quality is about the acquisition of information and ideas through education or experience. A leader must have the ability to learn and acquire information to guide his or her decisions and behaviour.

7. **Love**
   This quality involves a strong and deep feeling for others. A leader must be deeply affectionate for his or her people and others.

8. **Faith in God**
   In the context of PNG, a leader must be God fearing. According to Narokobi, a leader must be mature in the faith because he or she is accountable to God who judges his or her actions. By fearing God, a leader is restraint from doing evil (corrupt) deeds. The fact that a leader who does evil (which is an abomination to God), will spend eternity in hell, which should deter him or her from engaging in corrupt practices.

9. **Visionary**
   This quality involves the ability to scan the future and devise or adopt plans to achieve the desired outcomes in the future.

To be successful in life, a group, an organisation, or a country, a leader must possess these qualities. Leadership having these qualities promote progress, improvement, utilizing opportunities, and success.

Leadership and the CPC

The issue of leadership was a thorny issue in the years preceding independence. PNG gained independence at a time when many countries in the Asia, Africa and Pacific regions were starting to come to terms with their new-found roles as independent States in the global community. Some of these new States were experiencing serious political and social crises as their leaders begun to wield power and access wealth which were not available to them during the colonial era. The Constitutional Planning Committee (CPC)[16] was aware of the problems of corruption, bribery, misappropriation of funds and abuse of power generally that existed both in the third world and the developed countries.[17] On corruption, it noted that:

> Corruption in public life is, of course, a world-wide problem which has reached very serious proportions in a substantial number of countries – developing and industrialized alike.[18]

The prevalence of these problems in many countries had a lot of impact on the people of PNG. The CPC's concern was expressed in its Final Report. The CPC identified the sources of the problems of corruption, bribery and the other evils of society as ***weak and poor leadership***. The importance of this issue is reflected by its position in its Final Report. The

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16 The CPC was established by the House of Assembly in 1972 to carry out this task. The CPC was tasked with the responsibility of formulating a constitution for an independent Papua New Guinea. The CPC took 18 months to complete its task. It presented its final report in 1974. See Kwa, E. L., *Constitutional Law of Papua New Guinea* (Sydney: Law Book Co, 2001) and Kwa, E. L. and Wolfers, E., *The Constitution of Papua New Guinea* (Port Moresby: 110 Ltd, 2021) xv.

17 See Rynkiewich, M. A., "Big-Man Politics: Strong Leadership in a Weak State" in Rynkiewich, M. A. and Seib, AR (eds)., *Politics in Papua New Guinea: Continuities, Changes and Challenges* (Point No.24) (Goroka: The Melanesian Institute, 2000) 17.

18 Constitutional Planning Committee., *Final Report of the Constitutional Planning Committee 1974: Part 1* (Port Moresby: Government Printer, 1974) 3/3.

whole of Chapter 2 of the Final Report is dedicated to the issue of leadership. According to the CPC:

> The success of a nation, we believe, depends ultimately on its people and leaders. No amount of careful planning in governmental institutions or scientific disciplines will achieve liberation and fulfilment of the citizens of our country unless the leaders - those who hold official positions of power, authority or influence - have bold vision, work hard and are resolutely dedicated to the service of their people.[19]

To the CPC, the prosperity and success of the country depended very much on the leaders and the people themselves. The view taken by the CPC is quite profound as it pushed the issue of leadership back to the people of PNG. The issue of leadership was therefore a subject to be addressed collectively by these two groups – the people and the leaders themselves.

The CPC envisioned that the successful development of the country was to be based on the collaborative efforts of the people and their leaders. As the saying goes "the leader is the mirror of the voters or constituency". To assist these two groups in this relationship, the CPC provided the NGDP. The NGDP were to act as a guide to the people and their leaders in promoting quality leadership which would consequently lead to the successful development of Papua New Guinea.

The National Goals and Directive Principles

The NGDP are not unique only to PNG. Other countries such as India, Sri Lanka, Nigeria and Uganda have also set out in their constitution similar goals and directive principles.[20] In formulating the NGDP, the CPC expanded upon the Eight Point Plan which was adopted by the House of Assembly in 1973.[21] The Eight Point Plan served as the fundamental guideline for the development of PNG. The CPC said:

> There are several basic principles which lie behind these aims. These have been summed up in the ideas of Equality, Self-Reliance and Rural Development. In evolving the National Goals and Directive Principles of Policy which we propose should be incorporated in the Constitution, we have taken full account of the Eight Aims. The Goals and Directive Principles we recommend are broader and more comprehensive than the Aims in that they provide for the full development of our people, whereas the Aims emphasize the economic aspects of our society.[22]

The NGDP are therefore, a cleverly woven development policy reflecting the aims and aspirations of the people and leaders of PNG.[23] There are five National Goals. In numerical order, they are:

1. *Integral Human Development – Liberation and Fulfilment*

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19 Id, p3/1.

20 *Constitution of the Republic of India*, Part IV, "Directive Principles of State Policy", *Constitution of the Republic of Nigeria*, Chapter 11, "Fundamental Objectives and Directive Principles of State Policy", *Constitution of the Islamic Republic of Pakistan*, Chapter 2, "Principles of Policy" and the *Constitution of the Republic of Uganda*, Chapter 3, "National Objectives and Directive Principles of State policy".

21 See the discussion of the implementation of the Eight Aims by Utula Samana, "The Eight Aims, Development and Decentralisation: The Morobe Experience" in King, P., Lee, W. and Warakai, V., *Papua New Guinea's Eight Point Plan and National Goals after a Decade: From Rhetoric to Reality (Papers from the Fifteenth Waigani Seminar)* (Port Moresby, University of Papua New Guinea Press, 1985) pp.209-222.

22 CPC, n18, at p2/2.

23 For a detailed historical background of the NGDP, see Narokobi, B., *Life and Leadership in Melanesia* (Suva: Institute of Pacific Studies, USP and UPNG, 1983) 94.

All activities of the state should be directed towards the personal liberation and fulfilment of every citizen, so that each man and woman will have the opportunity of improving himself or herself as a whole person and achieving integral human development.

2. Equality and Participation
All citizens should have an equal opportunity to participate in, and benefit from, the development of our country.

3. National Sovereignty and Self-Reliance
Papua New Guinea should be politically and economically independent and its economy should be basically self-reliant.

4. Natural Resources and the Environment
The natural resources and the environment of Papua New Guinea should be conserved and used for the collective benefit of the people: and should be replenished for future generations.

5. Papua New Guinean Ways
Development should take place primarily through the use of Papua New Guinean forms of social, political and economic organization.

These five Goals and their respective directive principles act as the signposts for the evolution of PNG as a nation State.[24] The NGDP "set the agenda for all aspects of government in Papua New Guinea, and represent a clear break with the colonial past.[25] They seek control over foreign investment, and the protection of the environment and the Papua New Guinean way of life."[26] The NGDP are aimed at promoting "national identity, integrity and self-respect."[27] Generally, it is agreed that the NGDP are to be the "guiding lamp" for the working of the government and its instrumentalities.[28]

The National Goals and Directive Principles and Leadership

The operation of the NGDP affects every citizen in PNG. As a Papua New Guinean, every citizen must aim to be fully developed as an individual; actively participate in all activities of government; aspire to become self-reliant in the political, social and economic arenas; wisely use and manage the natural resources and the environment and promote, and encourage the Papua New Guinean ways of making decisions and implementing those decisions. By pursuing these aims through participation in relevant State structures, the citizen is actively participating in the development of the country. If this is the setting of the NGDP, how then does the issue of leadership come into the picture? The NGDP do impact on the issue of leadership in many ways. When we unpack each of the NGDP, the following attributes or principles of leadership can be identified.

Goal 1 implores a leader to be a fully developed person. The leader must be physically, emotionally and spiritually developed to contribute to the common good. The leader must be a person of integrity and humility.

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24 For a detailed discussion on the NGDP, see Kari, S. S., *Decolonization and the Birth of Papua New Guinea's Constitution 1959-1975 with Five National Goals and Directive Principles* (Goroka: NGDP Consultancy and Publishing Services, 2009).

25 See Wolfers, P. E., *Race Relations and Colonial Rule in Papua New Guinea* (Port Moresby: UPNG Press & Bookshop, 1975).

26 Brunton, B., *Constitutionality and Resource Development in Papua New Guinea* (Discussion Paper #77) (Port Moresby: National Research Institute, 1994) 3.

27 *The State v. NTN Pty Ltd* [1992] PNGLR 1 at 17.

28 Weisbrot, D., Paliwala, A. and Sawyer A., (ed)., *Law and Social Change in Papua New Guinea* (Sydney: Butterworths, 1982) 7.

Goal 2 talks about the equality and participation of every Papua New Guinean in all aspect of development of the country. The leader must be compassionate and knowledgeable, and be cognizant and promote the equal participation of the citizens in the national affairs of the country.

Goal 3 encourages Papua New Guineans to be self-reliant by being free from all forms of influence and control by others. When a leader is free from all forms of influence and control, particularly from foreigners and even 'wantoks' and relatives, he will focus on delivering goods and services, fairly to the people. This goal requires a leader to be self-disciplined and strong.

Goal 4 requires leaders to exercise wisdom in the management and utilization of their natural resources. This goal requires the leaders of the country, at whatever the level, to ensure that the natural resources and the environment are used wisely for the benefit of the present and future generations.

Goal 5 declares that leaders must be knowledgeable and visionary to be able to promote and encourage the development of PNG primarily through Papua New Guinean ways.

An analysis of the NGDP reveals that they contain the nine attributes of leadership as identified above. This is clearly shown by Table 2 below.

Table 2: Leadership Qualities and NGDP

Leadership Qualities	**National Goals and Directive Principles**
1. Integrity	Goal 1, 2, 3, 4 & 5
2. Wisdom	Goal 1, 2, 3, 4 & 5
3. Discipline	Goal 1, 2, 3, 4 & 5
4. Compassion	Goal 1, 2, 4
5. Humility	Goal 1, 2, 3 & 4
6. Knowledge	Goal 1, 2, 3, 4 & 5
7. Love	Goal 1, 2, 3
8. Faith in God	Goal 1, 2, 4
9. Visionary	Goal 1, 2, 3, 4 & 5

Looking at Table 2, it becomes crystal clear that the NGDP do promote and encourage quality leadership which can steer PNG to prosperity and success. The NGDP encourage every Papua New Guinean to strive to become quality leaders. A citizen denied access to State institutions, services, or facilities which promote these leadership qualities, becomes disoriented, incapacitated either physically or mentally, experiences inequality, and is left behind in the process of development. The end result is that the citizen lacks any meaningful and active participation in the development of the country.

Groups of people, whether they be a race, nation, religion, tribe, local-level government, district or province, within the country, must not be denied access to any government institution or facilities which encourages and enhances their capabilities to actively and meaningfully participate in the development of the country. Any group of people that lack the government facilities that provide goods and services for their development, become powerless, frustrated and express their dissatisfaction through violent means. These outward expressions of dissatisfaction reflect the absence of quality leadership in the group.

Leadership Standards

In its effort to protect the leadership of the young nation, the CPC provided the Leadership Code (*Organic Law on the Duties and Responsibilities of Leadership*) under Section 27 of the *Constitution* to guide the leaders. The Leadership Code applies to all officials who hold leadership roles in the public service as defined under Section 26 of the *Constitution*. So, what is the purpose of the Leadership Code? The Supreme Court answered this question in *SCR No 2 of 1992; Re The Leadership Code*[29], where it said, "we accept the referrer's submission that the entire thrust and the primary purpose of the Code is to preserve the people of Papua New Guinea from misconduct by its leaders". The Supreme Court added that:

> We accept also that, more specifically, the purpose of the Code is to ensure as far as possible that the leaders specified in *Constitution* s26 do not offend in the various ways prescribed by the provisions of *Constitution* s27, and that these provisions are geared towards advancing the purpose of protecting the people from the improper and corrupt conduct of their leaders and to ensure, as far as possible, that such breaches are not committed in the first place.

The framers of the *Constitution* envisioned that the Leadership Code would assist leaders avoid unacceptable or improper behavior. They therefore set *a very high standard of leadership* for the public service. So, what is that high standard of leadership? The high standard of leadership, it is suggested, consists of the nine qualities that have been identified above.

Leaders, including public service leaders, living and promoting the nine qualities of leadership, would prevent ***weak and poor leadership*** (identified by the CPC) from corrupting and destroying the prospects of the country becoming a strong and wealthy nation. The pre-independence leaders of PNG were concerned about the potential for abuse of the public offices by future leaders of the country by suggesting that those who breached the Leadership Code should be immediately dismissed from office.[30] They also suggested that the leaders who become Members of Parliament must meet the high standards stipulated by Section 103 of the *Constitution*.[31]

The framers of the *Constitution* were also aware that without an enforcement institution, the Leadership Code would be toothless in ensuring that the country was protected from corrupt leaders. They therefore recommended the creation of the Ombudsman Commission which is

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29 [1992] PNGLR 336. See also *Special Reference by the Attorney General pursuant to Constitution, Section 19* (2016) SC1534.

30 See *SCR No 1 of 1978; Re Tribunal established under the Organic Law on the Duties and Responsibilities of Leadership S27 and Leo Robert Morgan* [1978] PNGLR 460; *In the matter of Gerard Sigulogo* [1988-89] 384; *Application by John Mua Nilkare, Review Pursuant to S155(4) of the Constitution* [1998] PNGLR 472; *Peipul v The Leadership Tribunal* (2002) SC706; *Gore v Lua* (2015) N5981.

31 See *Yali v Yama* (2018) N7145; *Tabar v Wong* (2018) N7121 and *Anisi v Aimo* (2013) SC1237.

established under Section 217-219 of the *Constitution* and empowered it to enforce the Leadership Code.[32]

Since the inception of the Ombudsman Commission in 1975, it has been able to prosecute 96 national leaders. The first leader to be prosecuted after independence was Moses Sasakila, for corruption, in 1976.[33] The number of prosecutions and referrals after *Sasakila* are highlighted in Table 3 below (as presented by the Ombudsman Commission).[34]

Table 3: Leaders Referred to Leadership Tribunal by Ombudsman Commission since 1975

1975-1985

No.	Name	Organisation	Matter
1.	Moses Sasakila	Minister for Culture	Set aside after being guilty and dismissed
2.	Brian Grey	General Manager - NAC	Guilty – Reprimanded
3.	Ako Toua	Electricity Commission Commissioner	Guilty – Suspended
4.	Leo Morgan	Acting Secretary - Department of Works and Supply	Guilty-Suspended
5.	James Mopio	Kairuku Hiri MP	Guilty – Dismissed
6.	Opai Kunangal	Minister for Commerce	Resigned after appointment of tribunal
7.	Pius Kerepia	Secretary - Department of Works & Supply	Guilty
8.	IIinome Tarua	PNG High Commissioner to London	Guilty
9	Michael Pondros	Minister for Public Utilities	Guilty – Dismissed
10.	Lennie Aparima	Minister for Public Service	Not Guilty
11.	Ezekiel Brown	Managing Director - National Provident Fund	Guilty – Fined

1986-1995

No.	Name	Organisation	Matter
12.	Julius Chan	Deputy PM & Finance Minister	Not Guilty
13.	John Kaputin	Member of Parliament	Guilty – Fined
14.	Obum Makarai	Chairman - PNG Banking Corporation	Guilty – Fined
15.	Kedea Uru	Chairman - National Broadcasting Corporation	Not Guilty
16.	Gerald Sigulogo	MP	Guilty – Dismissed
17.	Susuve Laumea	Chief of staff at Office of Prime Minister	Public Prosecutor failed to refer matter to tribunal – no further action taken
18.	Gabriel Ramoi	Member of Parliament	Resigned after appointment of tribunal
19.	Eserom Burege	Member of Parliament	Resigned after appointment of tribunal
20.	Ted Diro	Deputy Prime Minister & Forest Minister	Guilty – Resigned before dismissal effected
21.	Tom Amaiu	Member of Parliament	Resigned after appointment of tribunal
22.	Tony Ila	Member of Parliament	Guilty – Resigned before decision on penalty

32 See *Organic Law on the Ombudsman Commission*.
33 *Independent Leadership Tribunal; Ex Parte Sasakila, The State v* [1976] PNGLR 491.
34 *Post Courier*, Thursday 21st October 2021.

23.	Timothy Bonga	Member of Parliament	Resigned – Later Guilty – Dismissed
24.	Peter Garong	Member of Parliament	Resigned – Later Guilty- Dismissed
25.	Galeng Leng	Member of Parliament	Resigned – Later died in office
26.	Melchior Pep	Member of Parliament	Resigned – Later Guilty – Dismissed
27.	Phillip Laki	Member of Parliament	Guilty – Recommended for Dismissal – Resigned before dismissal effected
28.	Andrew Posai	Forest Minister	Guilty – Dismissed
29.	John Nilkare	Provincial Affairs Minister	Guilty – Dismissed – Fined
30.	Paul Pora	Civil Aviation Minister	Guilty – Fined.

1996-2005

No.	**Name**	**Organisation**	**Matter**
31.	Jeffery Balakau	Governor for Enga	Guilty – Dismissed.
32.	Gabriel Dusava	Secretary - Dept of Foreign Affairs	Guilty – Dismissed.
33.	Yaip Avini	Minister for Health	Lost office through criminal conviction.
34.	Joseph Onguglo	Minister for Education	Resigned after tribunal commence hearing.
35.	Albert Karo	Member of Parliament	Lost office through election.
36.	Peter Yama	Minister for Works & Transport	Lost office through election- Later Guilty – Dismissed and Fined, later reinstated as Usino Bundi MP – appeal by Public Prosecutor still pending.
37.	Amos Yamandi	Member of Parliament	Lost office in election.
38.	Jerry Singirok	PNGDF Commander	Guilty – Dismissed.
39.	Michael Gene	Secretary for Department of Justice & AG	Appointment revoked prior to appointment of tribunal.
40.	Jim Kas	Governor for Madang	Guilty – Dismissed.
41.	Peter Peipul	Deputy Leader of the Opposition	Guilty – Dismissed – Fined.
42.	Anderson Agiru	Governor for Southern Highlands	Guilty – Dismissed.
43.	John Wakon	Commissioner for Police	Appointment Revoked.
44.	Kuk Kuli	Member of Parliament	Resigned after appointment of tribunal.
45.	Benard Molok	Member of Parliament	Resigned after appointment of tribunal.
46.	Jacob Wama	Member of Parliament	Resigned after appointment of tribunal.
47.	John Kamb	Minister for Communications	Not Guilty.
48.	Bevan Tambi	Member of Parliament	Resigned after appointment of tribunal.
49.	Peti Lafanama	Governor for Eastern Highlands	Guilty – Dismissed – Fined.
50.	Peter Waieng	Member of Parliament	Resigned after appointment of tribunal.
51.	Anderson Agiru	Governor for Southern Highlands	Guilty – Dismissed.
52.	Vincent Auali	Minister for Corporatisation & Privatisation.	Resigned after appointment of tribunal.
53.	Peter Arul	MP	Resigned after appointment of tribunal.
54.	Bernard Hagoria	Member of Parliament	Guilty – Dismissed.
55.	Mao Zeming	Member of Parliament	Guilty – Dismissed.
56.	Iairo Lasaro	Member of Parliament	Lost office in election.
57.	Yauwe Riyong	Member of Parliament	Lost office in election.

58.	John Tekwie	Member of Parliament	Lost office in election.
59.	Thomas Pelika	Member of Parliament	Lost office in election.
60.	Andrew Kumbakor	Minister for Finance	Not Guilty.
61.	Michael Nali	Member of Parliament	Guilty – Fined
62.	Alfred Daniel	Electoral Commissioner	Appointment expired after tribunal.
63.	Ces Iewago	Managing Director - Public Superannuation Funds	Appointment revoked prior to tribunal.
64.	Michael Nali	Member of Parliament	Guilty – Dismissed, review upheld and redirected to hearing.
65.	Daniel Kakaraya	Managing Director - Mineral Resource	Matter pending as Kakaraya not subject to leadership Code.
66.	Mark Wani	Auditor General	Guilty – Dismissed – Judicial review successful.
67.	Raho Hitolo	Ombudsman	Tribunal disbanded due to lack of jurisdiction.
68.	Mark Sevua	National & Supreme Court Judge	Matter referred to JLSC – Not reappointed – Now deceased.
69.	Peter Ipatas	Governor of Enga	Guilty of 16 of 23 allegations- Fined K1000. For each allegation.
70	Gallus Yumbui	Member of Parliament	Guilty of four out of six – Dismissed.
71.	Charlie Benjamin	Member of Parliament	Guilty of 19 allegations – recommended for dismissal.
72.	Gabriel Kapris	Minister for Works	Guilty of two allegations – Fined.
73.	Ano Pala Iso	Clerk of Parliament	Assumed Rigo MP in 2007 (Pending Public Prosecutors Decision).
74.	Puka Temu	Minister for Lands	Guilty of four counts – Fined.
75.	James Yali	Governor of Madang	(Disqualified)
76.	Andrew Baing	Deputy Leader of the Opposition	Deputy Opposition Leader (Guilty of three allegations)

2016-2021

No.	**Name**	**Organisation**	**Matter**
77.	John Simon	Member of Parliament	Suspended with pay, and later cleared in February, 2020
77.	Philip Nagua	PNG Auditor General	Pending, currently not subject to leadership code
78.	Bernard Sakora	Judge of the National & Supreme Court	Matter referred to JLSC, resigned after appointment of tribunal
79.	Trevor Meauri	Acting Secretary - Department of Defence	Pending, currently not subject to leadership code
80	Simon Pentanu	Speaker - Bougainville House of Representative	Pending
81	Simon Dasiona	Member of Parliament - ABG South North Nasioi	Pending
82	Thomas Keriri	Minister for Finance & Treasury – ABG	Pending
83	Steven Suako	Member of Parliament - ABG	Pending
84	Philip Kuhena	Member of Parliament - ABG	Pending
85	Robin Wilson	Minister for Finance & Treasury -ABG	Pending
86	John Kepas	Member of Parliament -	Pending

		ABG	
87	Marc Avai	Administrator - Gulf Provincial	Pending
88	Sir Puka Temu	Minister for Bougainville Affairs	Completed. Not guilty.
89	Peter O'Neill	Member of Parliament	Pending
90	Anna Bais	Secretary - Department of Community Development	Pending
91	Mehrra Kipefa	Member of Parliament	Pending
92	Paul Unas	CEO and Managing Director of NMSA	Pending
93	Solan Mirisim	Minister for Forestry	Completed. Found guilty on one count and fined.
94	Sam Basil	Deputy Prime Minister	Completed. Not guilty.
95	Patrick Pruaitch	Member of Parliament	Completed. Not guilty.
96	Belden Namah	Member of Parliament	Completed. Not guilty.

In the first 10 years of independence, only 11 leaders were referred to the Leadership Tribunal by the Ombudsman Commission. In the second decade, 19 leaders were referred by the Ombudsman Commission to the Leadership Tribunal. In the third decade, 46 leaders were referred by the Ombudsman Commission. From 2016 to 2021, a total of 21 leaders were referred by the Ombudsman Commission. The trend is quite glaring – as the country has developed or progressed in age, more and more of our leaders have either been found to be guilty of leadership failures or accused of leadership abuses. This partly explains why there is widespread discontent about leadership at all levels throughout the country.

What we hardly hear or read about is the crisis of leadership among citizens themselves. It is suggested that poor administrative and political leadership is a mirror of the quality of leadership individual citizens possess. If the public possess poor leadership qualities, then those who govern them will also reflect the same characteristics because they have been appointed (chosen in many cases) to those positions by the people who lack the qualities to make a good judgment.

In response to the rapid increase in corruption and misconduct by the public service leaders, the Parliament amended the *Constitution* in 2014 to establish the Independent Commission Against Corruption (ICAC). The amendment to Section 220A to 220H of the *Constitution* creating ICAC, was meant to be supplemented by an Organic Law on ICAC.[35] The ICAC's primary role is to fight against corruption both in the public and private sectors, although the major focus of the institution is on public servants.

After five years, the Parliament finally enacted the *Organic Law on the Independent Commission Against Corruption* (OLICAC) in November 2020.[36] The passage of the OLICAC now paves the way for the establishment of ICAC. It is envisioned that when the ICAC is fully operational, it will assist the Ombudsman Commission to effectively fight corruption in the country.

The increase in the number of prosecutions and referrals of public service leaders by the Ombudsman Commission and the recent establishment of the ICAC clearly suggest that many of our leaders lack many of the nine leadership qualities of a good leader. The rampant

35 *Constitutional (Amendment No.40) (Independent Commission Against Corruption) Law* 2014.

36 See, Hon. Davis Steven, "Parliamentary Speech on the Organic Law on the Independent Commission Against Corruption," (2020) 2(1) *Attorney General's Law Journal* 61.

law and order problems, the high incidences of violence and death, and corruption at all levels of society, is a clear testimony of this fact. Papua New Guineans are crying out for quality leaders because they see all around them misery and pain. This attitude is misconceived because quality leadership starts with the citizen himself or herself. As educationists proudly declare "education starts at home not at school". The same is true for leadership. Leadership qualities are ingrained in individual homes, villages, schools and towns. These qualities are then exposed on a larger and wider scale at the local, provincial and national levels where power and authority are exercised more openly and readily.

It is suggested that most of the impediments to attaining quality leadership are caused by those who wield power and authority. The majority of the people lack adequate health, education and other social facilities and are denied access to the government and its instrumentalities, because their leaders have been denied the necessary resources to assist them. Applying the power test by Burns, it is apparent that the PNG leadership lacks motivation and therefore, is not able to adequately manage and apply the resources to enhance the livelihood of the grassroots people.

The reality of the situation is that power is being abused by those who have been entrusted with the responsibility of exercising them for the common good. Past and present leadership of the country have lost the CPC visions and have gone astray. Generally, the country's leadership has become greedy and selfish and unashamedly use State institutions openly to satisfy their greed through *corrupt* activities. It is no wonder the call is growing stronger for leadership of integrity.

Conclusion

The CPC, in its wisdom, intricately weaved the NGDP so that they address almost all the issues relating to Leadership, the State and its instrumentalities, and its people. The CPC was aware of the problems of leadership that arose at that time and those which would arise in the future. It therefore enshrined the nine qualities of good and honest leadership in the *Constitution*. To counter the problem of ***weak and poor leadership***, the framers of the *Constitution* proposed that the people who will lead this country must possess the following leadership qualities to be strong and diligent in their roles and duties in the service to the country and its people:

1. Integrity,
2. Wise,
3. Self-Disciplined,
4. Compassionate,
5. Humble,
6. Knowledgeable,
7. Loving,
8. Faith in God, and
9. Visionary.

These qualities must be pursued by individuals and groups of people alike. Every citizen has a responsibility of attaining these qualities of leadership. Old and young people alike must strive towards these qualities of leadership. In the process, the citizens become active partners with the State and its institutions in the development of the country.

The leadership in PNG is in a crisis because both the leaders and the people have not adhered to the proverbs the CPC enshrined in the *Constitution*. There is obviously a need for renewal and reorientation of our views about leadership in PNG. If the people want to change their leadership, they too must be prepared to change. For PNG and its people to experience a fundamental change that will lead to success and prosperity, they must refocus on the State Policy on Leadership and meaningfully aim to implement the values inherent in them.

The CPC was mindful of the difficulty of implementing the NGDP:

> We are well aware that it is one thing to establish inspiring goals for the nation, and sound principles to guide the government and our people in seeking to achieve these goals, yet quite another for effective steps to be taken which are directed towards achieving these goals (CPC 1974: 2/15).

However, the CPC was confident that this State Policy was achievable. The CPC envisioned that PNG could succeed in attaining these Goals through a:

> Fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinea forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People.[37]

The CPC therefore, recommended that:

> To the extent that this is practicable, we have tried, in our recommendations, to facilitate the implementation of the Directive Principles in this Chapter, which, in turn, are aimed at promoting the achievement of the National Goals. Thus, our recommendation that all activities of the State and its institutions should be based on the Directive Principles and directed towards achieving the National Goals is designed to help to reorient the thinking and attitudes of everyone who is a member of an elected body or who works in a government department or authority, and to redirect the policies of those bodies towards the goal (ibid).

If PNG is to succeed as a country, the people and their leaders need to heed the wisdom of the CPC. Papua New Guineans have gone astray of the State Policy on Leadership. The *Constitution* calls for a collaborative effort by all governmental bodies and the people in implementing the State Policy on Leadership embedded in the NGDP.

The leadership issue is every citizen's business. There is no time to point fingers at each other. The wisdom of our founding fathers and mothers is that every Papua New Guinean must actively participate in making bold decisions which are visionary and which will produce results for the common good. Partnership through leadership builds society. Divisions based on individualism tears apart society. The country has seen the rampant rise of "self" which is manifested in greed and selfishness or corruption. The time for change is now, not tomorrow. Papua New Guineans have to re-examine themselves with a view to changing their attitudes and views of this country to ensure everyone makes Papua New Guinea the best place on planet earth.

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[37] Weisbrot, n28, p27.

Methamphetamine a dangerous drug under the *Dangerous Drugs Act*

Nichodemus Mosoro[*]

Introduction

In 2021, the Royal Papua New Guinea Constabulary (police) investigated and prosecuted for the first time a methamphetamine case in Papua New Guinea (PNG) which was styled, *State v Jamie David Pang* (DC:NO:1846-1847/2021) (*Pang case*).[1] This was a reflection of exceptional police work, but it was not without its challenges.[2] The main challenges were the existence of appropriate offences to which charges could be laid, and the required advocacy skills to navigate a complex legal issue.

Being uncertain as to the charges, the National Narcotics Bureau (Bureau) was requested under the *National Narcotics Control Board Act* 1992 to provide advice. The Bureau acted independently and offered advice to police on the applicable offence provisions provided under the *Dangerous Drug Act* 1952.[3]

In the *Pang case*, the preliminary issue was whether methamphetamine was listed as a dangerous drug under the *Dangerous Drug Act*. This gave an opportunity to the District Court to contribute jurisprudence on matters involving a pre-independence legislation adopted under the *Constitution*. It was also a case that tested the District Court's jurisdiction, judicial temperament and capability. It also pointed significantly to the limited capacity of the police to assist the court on pertinent constitutional and legislative issues. The need for police to upskill their research and advocacy skills was evident, as well as for lawyers to supervise or assist the District Court.

This paper is a reflection on the District Courts judgement in the *Pang case,* particularly in relation to how the Magistrate could have been better assisted. As will be discussed, relevant discourse on applicable laws and the legislative process were not taken into account resulting in a virtual misapprehension of the law.

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[*] Mr. Nichodemus Mosoro was the Acting Director-General of the National Narcotics Bureau from 2018 to 2022. The discussions in this article are from actual criminal investigations to which the National Narcotics Bureau provided assistance to the Police. The extracts from those investigations and legal advices have been reproduced in this article with the permission of relevant authorities**.**

[1] Zarriga, M. (21 November 2021). Hotel-turned drug lab. *The National*. Retrieved from https://www.thenational.com.pg/hotel-turned-drug-lab/. See also EMTV. (17 November 2021). *Pang Detained* [Video file]. Retrieved from https://emtv.com.pg/pang-detained/ , See also ABC News. (24 November 2021). *Australian Jamie Pang caught up in drug bust, after alleged meth lab, illegal firearms discovered in his hotel* [Video file]. Retrieved from https://www.google.com/amp/s/amp.abc.net.au/article/100643446

[2] According to report however, methamphetamine had been discovered in the possession of individuals before the K90m drug bust in POM, 12 October 2021, *Post Courier.* Retrieved from https://postcourier.com.pg/k90m-drug-bust-in-pom.

[3] Chapter 228 of the Revised Laws of Papua New Guinea.

Methamphetamine Offences

On 16th November 2021, a search of the Sanctuary Hotel in Port Moresby, National Capital District, by police with a search warrant discovered a clandestine laboratory allegedly used for the manufacture of methamphetamine.[4] In conducting the search, high powered firearms and ammunition were seized as well as equipment resembling a make shift laboratory. The production of methamphetamine was plausible when a white powder-like substance was obtained. There was also heavy presence of hazardous chemicals.[5]

The basic precursors used in the manufacture of methamphetamine are ephedrine, pseudoephedrine and 1-phenyl-2-propane (P-2-P). [6] These are found in decongestions such as cough syrups while the latter is used legitimately in the manufacture of medical amphetamines. These plus other chemicals such as hydrochloric acid, anhydrous ammonia, phenylpropanolamine, red phosphorus, iodine and hypo phosphorous acid are used interchangeably to make methamphetamines in various quantities and quality.[7] Some of those chemicals were located in the room by which the clandestine laboratory was discovered. These chemicals can be readily accessed in pharmacies, hardware or industrial outlets, and some would require a license or prescription whilst others easily purchased off the shelves or illegally sourced.

Standard police forensic analysis would later reveal that the white powder like substance was methamphetamine. According to the United Nations Office on Drugs and Crime (UNODC), methamphetamine is described as 'part of the group of drugs called amphetamine-type stimulants (ATS). It is a synthetic drug that is usually manufactured in illegal laboratories. Methamphetamine comes as a powder, tablet or as crystals that look like shards of glass. It can be swallowed, sniffed or snorted, smoked or injected'.[8] It is a highly addictive stimulant that poses serious health risks to the person consuming it,[9] and has been reported to fuel anti-social behavior and perpetuate organized crime.[10]

The manufacture of methamphetamine would require independent verification that the equipment seized were in fact used for the alleged chemical process. The court would be interested in whether there were traces of methamphetamine on the equipment, finger prints, and presence of precursor chemicals.

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4 Zarriga, M., n1 supra.

5 Yamasombi, D., personal communication, 17 November, 2021.

6 International Narcotics Control Board (2019). *Precursors and chemicals frequently used in the illicit manufacture of narcotic drugs and psychotropic substances*. Retrieved from https://www.incb.org/documents/Publications/AnnualReports/AR2019/Precursors_Report/English_ebook_PRE2019.pdf

7 United Nations International Narcotics Control Board. (2017). *Extent of licit trade in precursors and the latest trends in precursor trafficking*. Retrieved from https://www.incb.org/documents/PRECURSORS/TECHNICAL_REPORTS/2017/Report_breakdown/English/7a_Extent_of_licit_trade_in_precursors_2017.pdf and United Nations Office On Drugs & Crime. (2014). *Precursor Trends And Manufacturing Methods*. Retrieved from https://www.unodc.org/documents/southeastasiaandpacific/2014/05/gsda/clean/2014_Global_Synthetic_Drugs_Assessment_CH9.pdf

8 United Nations Office On Drugs And Crime (2022). *Methamphetamine*. Retrieved from https://www.unodc.org/drugs/en/get-the-facts/methamphetamine.html

9 American Addiction Centre. (2022). *Meth Relapse*. Retrieved from https://drugabuse.com/drugs/methamphetamine/relapse/

10 Sousa-Santos.J "Drug trafficking in the Pacific Islands: The impact of transnational crime." (2022). *Lowy Institute Analysis*, 5-11.

The accused, Mr. Jamie David Pang was then arrested for possessing the marketable quantity of methamphetamine in his room at the Sanctuary Hotel. After arresting Mr. Pang, police referred to the *Dangerous Drugs Act*, but had difficulty framing the charges. This was because the offence provisions in relation to possession and manufacturing of a dangerous drug applied only to dangerous drugs that were prescribed in that Act. There had to be a list that prescribed the type of dangerous drugs, and it should include methamphetamine if the charges were to be substantiated.

Under Section 1(a) of the *Dangerous Drugs Act*, ''dangerous drugs" means a substance specified in the Schedule. The offences include making or possessing a 'dangerous drug' and is provided under Section 3(1) of that Act. It states:

> A person who-
> (a) cultivates a plant from which a dangerous drug can be made; or
> (b) **makes** (emphasis added) a dangerous drug; or
> (c) exports a dangerous drug; or
> (d) is in **possession** (emphasis added) of or conveys a dangerous drug or a plant or part of a plant from which a dangerous drug can be made,
> is guilty of an offence unless he is authorized to do so by or under some other Act.
> Penalty: Imprisonment of a term of not less than three months and exceeding two years.

Mr. Pang's lawyer after reading a copy of the *Dangerous Drugs Act* from the Pacific Islands Legal Information Institute or *PacLII*, realized that methamphetamine was not listed as a dangerous drug. He then brought this to the attention of the police and stated that his client could not be charged under Section 3 of the Act. Counsel also indicated to make a no case submission if the matter proceeded.

The Bureau when consulted, advised the police that legislation accessed from *PacLII* must be confirmed with official copies of the legislation. From experience, a number of legislation accessed on *PacLII* were not updated. This has been the observation from the bench as well.[11] Even so, the *PacLII* website has a disclaimer stating that legislation accessed on the website must be verified with official copies from the country concerned. In PNG, official copies of legislation and other legal materials are maintained by the Department of Justice & Attorney-General (DJAG) Library, the First Legislative Counsel and the National Court Library.

In conducting further research, at the Bureau confirmed that the version of the Act on *PacLII* did not have methamphetamine listed in the Schedule. However, when consulting the official copy of the Act at the DJAG Library, the Bureau discovered a subsidiary legislation to the *Dangerous Drugs Act* which listed methamphetamine. This subsidiary legislation came into force under a Gazettal Notice issued from the pre-independence legislation – *Dangerous Drugs Act*. Armed with this information, the Bureau, in a letter dated 30th November 2021, provided preliminary advice to the police to charge Mr. Pang given that 'methamphetamine' was listed in the subsidiary legislation. [12]

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[11] As a practicable illustration of *PacLII's* operability and reliability, see the observations by Justice Cannings in the case of *Gawi v Public Service Commission* (2014) N5473 where his honor who could not be assisted by counsel, could not find a copy of the *Public Service General Orders* on *PacLII* and opted to access the Department of Personnel Management's website, which had an official copy. Also note that *PacLII* has a disclaimer notice on the accuracy of the legislation and other legal materials provided.

[12] The relevant law offices that were requested to confirm the advice supplied by the Bureau were the Public Prosecutor, State Solicitor and the First Legislative Counsel. The position of the Bureau was later

The Bureau had the necessary standing to provide such advice under Section 13(1)(c) of the *National Narcotics Control Board Act* and other enabling provisions to government agencies and other organisations that required advice from it. Generally, these provisions authorize the Bureau to maintain records of precursor chemicals or dangerous drugs for policy, law reform, education and awareness purposes as well as the United Nations Convention on Narcotic Drugs 1961 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. This advice may be shared with other government agencies including law enforcement agencies upon request. This is a function also performed by the Pharmacy Board (established under the *Medicines and Cosmetics Act* 1999), in relation to United Nations International Narcotics Control Board reporting requirements.

An analysis of Pre-Independence Legislation and Methamphetamine

The Bureau's preliminary research revealed that "methamphetamine" was declared as a 'dangerous drug' by the *Papua New Guinea Gazette No.4* dated 20th January 1972 under the *Dangerous Drugs Ordinance* 1952-68. The Bureau took the view that according to Schedule 2.6 of the *Constitution*, the *Dangerous Drugs Ordinance* was also 'adopted' in 1975 as an Act of the Parliament of PNG. The Bureau's position was based on the fact that Schedule 2.6(1)(d) defines 'pre-independence laws' to include "subordinate legislative enactments under any such laws that were in force in the country immediately before the repeal, or immediately before Independence Day, as the case may be." Also pursuant to Schedule 2.6(2), the *Dangerous Drugs Ordinance* as a 'pre-independence law' was adopted as an Act of Parliament "immediately after Independence Day". As a matter of due process, this means that the gazettal notice of the declaration which included 'methamphetamine' continued to be in force in PNG from Independence Day under the *Dangerous Drugs Act*.

Moreover, the *Constitution* intended to preserve the application of pre-independence legislation by making necessary adjustments to suit the PNG context. Schedule 2.7(1) of the *Constitution* provides that "a law adopted by Schedule 2.6 (adoption of pre-independence laws) takes effect subject to such changes as to names, titles, offices, persons and institutions, and to such other formal and non-substantive changes, as are necessary to adapt it to the circumstances of the country and the Constitutional Laws." This was to effectively facilitate the transition of pre-independence laws into the PNG legal system immediately on Independence Day. There were no material adjustments to the *Dangerous Drugs Ordinance* since its adoption as the *Dangerous Drugs Act*.

The Bureau also referred the police to relevant provisions of the *Interpretation Act* that reenforced its view that the use of 'adopted subordinate enactments' which also included 'subsidiary legislation' was valid. These provisions include:

1. The *Dangerous Drugs Ordinance 1952-1968* could be cited in formal correspondences as 'adopted' legislation. This would not derogate in any way the substantive nature of Section 61 and Section 93B & C of the *Interpretation Act*.
2. It was important to also note that Section 2 of the *Interpretation Act* applied to adopted laws.

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confirmed by the Attorney-General, the Public Prosecutor and the State Solicitor. This advice was also shared with the PNG Customs Service who were also pursuing a charge against Mr. Pang under the *Customs Act*.

3. The definitions of "adopted Act", "adopted law", "adopted subordinate enactment", and "pre-independence law" were defined by the *Interpretation Act.*
4. Section 1 of the *Interpretation Act* defines "subordinate enactment" as an "instrument (whether of a legislative nature or not) made under an Act". The subsidiary legislation falls within the meaning of 'subordinate enactment' or 'subordinate legislation'.
5. Section 4(e)(iii) of the *Interpretation Act*, provides that the issue of a "Government Gazette or a Gazette of any date"…being a date not earlier than 1 July 1971 and later than 15th September 1975, shall be read as a reference to an issue of the Papua New Guinea Government Gazette of that date. This provisions clearly captures the pre-independence Gazette which was the subject of the police charge on methamphetamine.
6. Section 79 of the *Interpretation Act* states that 'the act or thing to be done is deemed to be made under the instrument itself'. This provision clearly protects the declaration made in the Gazettal Notice in 1972.
7. Section 89(2) and in particular Section 89(4) of the *Interpretation Act* provide that any discrepancy between an instrument and a gazette itself shall not invalidate 'the act, matter or thing' being done in reliance of the gazettal.[13]

The Bureau's support provided helpful insight into the legislative process concerning the pre-independence legislation, but in hindsight, it was limited if the court asked for further clarification from the police on how the pre-independence legislation came to be part of PNG's legal system. So, despite the existence of the pre-independence legislation and gazettal notice explicitly making reference to methamphetamine, and the law being valid under the *Constitution*, there had to be further information of evidentiary value. There was therefore an obvious disconnection in the narrative.

The Bureau then turned to the State Solicitor for further legal analysis of the legislative process. The legal advice was unfortunately received after the conclusion of the *Pang case*. An abstract of that legal advice dated 01st April 2022 is set out below:

"a. Definition of dangerous drugs under the *Dangerous Drugs Ordinance* ("Ordinance") passed by the pre-independence Administration in 1952 states that for a substance to be a dangerous drug:
   (i) it must be listed in Schedule 1; or
   (ii) it must be declared under s. 2 of the Act and published in the National Gazette;
b. Schedule 1 of the Act did not contain Methamphetamine, so in 1972 there was a declaration made pursuant to s. 2 of the *Ordinance* and it was published in the National Gazette No.4 dated 20th January 1972. In this declaration, methamphetamine was listed. Hence, for purposes of the *Ordinance* it was a dangerous drug;
c. The *Ordinance* was repealed by s.3 of the *Laws Repeal Act 1975* and subsequently brought back into operation by Schedule 2.6 of the *Constitution* as *Dangerous Drugs Act* Ch.288;
d. The vacuum left by the repealed Acts was immediately filled by Sch.2.6 of the *Constitution*. By operation of subsection (2) of Schedule 2.6, all pre-Independence laws including subordinate legislative enactments are, by virtue of that section, adopted as Acts of the Parliament and apply to the extent to which they applied immediately or purported to apply before Independence Day. The Schedule itself sets out the definition of the term pre-

[13] As an observation, the *Interpretation Act* is a useful piece of legislation when it comes to interpreting legislation, or when there is uncertainty arising from amendments or repeal of legislation amidst pending court proceedings.

Independence laws namely, 'a law that was repealed by the *Laws Repeal Act 1975* made by the pre-Independence House of Assembly of Papua New Guinea'; and

e. This means that the *Dangerous Drugs Act* Ch.228 and its list of dangerous substances under Schedule 1 or under the declaration, continued to apply as subordinate legislative enactment under the *Dangerous Drugs Act* to the extent to which they applied immediately before Independence Day.

5. ….[M]ethamphetamine is listed in the declaration made pursuant to s.5 of the Ordinance. This provision was adopted in s.2 of the *Dangerous Drugs Act* Ch.228. Hence, by operation of Schedule 2.6(2) of the *Constitution*, the Act and its subordinate legislative enactments remain effective."

This legal advice made it much clearer, and could have served the foundation for a stronger argument by police had it been a part of the submissions at the District Court.[14]

Private Members Bill to amend the Dangerous Drugs Act

In an effort to address the offences and especially the penalties in relation to dangerous drugs, a Private Member's Bill was introduced in Parliament in September 2021. That Bill resulted in a repeal of Section 3 of the *Dangerous Drugs Act* and increased the penalty from two years to 40 years imprisonment. At the outset, that demonstrated political will and the concern in addressing the rise in hard drugs being manufactured or coming into PNG.[15] However, as to the operability of this legislation, it would need to be tested by criminal practitioners who might have a concern regarding the policy rationale for the offences as well as its compatibility with sentencing guidelines (i.e., a penalty must be proportionate to the offence being committed).

The problem with the penalty from the amendment is that it does not give any room for the court to decide on varying quantities of type of drugs, toxicity, cultivation, manufacturing or possession. This would mean that a person who is found guilty of cultivating three plants of marijuana or in possession of 2 grams of cocaine is liable to pay K1 million or be imprisoned for 40 years, similar to a person found guilty with significantly larger quantities. The sentencing guidelines adopted by PNG's criminal justice system would not be able to gel well with these legislative provisions. The constitutionality of the said provision can be tested against Section 11(2) of the *Criminal Code* and Section 37(7) of the *Constitution*. This can be the subject of further debate later.

The Private Member's Bill was developed without any legal policy process or consultations with relevant stakeholders, therefore, the effect on ongoing investigations and criminal prosecutions was not taken into account. This created much apprehension by the police on whether the accused could still be charged under Section 3 of the Act.

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14 After the judgment in the Pang case was handed down and in preparation for a potential review, the Bureau formally instructed the State Solicitor for independent advice. The said advice was provided without the District Court judgment, and therefore added objectivity to the subsequent debate. As mentioned above, the State Solicitor's advice was that the subsidiary legislation was valid.

15 In 2020, PNG experienced the biggest drug bust. K160 million worth of cocaine was seized at Papa Lea Lea. The Bureau was responsible for providing legal and strategic advice to police and stakeholders on evidentiary gathering especially under a mutual assistance request to Australia with the assistance of the Legal Policy & Governance Branch of the DJAG. See Zarriga, M. (August 2020). "Drug bust". *The National*. Retrieved from https://www.thenational.com.pg/drug-bust/

In terms of using the provisions of the *Dangerous Drugs Act* that have been repealed, Section 67 of the *Interpretation Act* applies. This provision states that criminal or civil matters on foot will not be affected by the amendments or repeal of such provisions and can continue. Section 65 of the *Interpretation Act* also preserves the application of the existing provisions of the *Dangerous Drugs Act* pending the brining into operation of the new law.

The Bureau advised the police that under Section 67 of the *Interpretation Act*, the charges had been laid prior to the repeal and therefore could be sustained. This was adequately supported by Sections 63(1)(b), (c), (d) and (e) of the *Interpretation Act* with respect to "Effect of repeal" which states:

> (1) The repeal of a provision does not-
>
> (a) ...
>
> (b) affect the previous operation of the repealed provision, or anything duly done or suffered under the repealed provision; or
>
> (c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the repealed provision; or
>
> (d) affect any penalty, forfeiture, or punishment incurred in respect of an offence committed against the repealed provision; or
>
> (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment,
>
> and any such investigation, legal proceeding, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repeal had not been made.

A case on point is *State v Jerry Kiwai* (2014) N5640. In that case, the court held that Section 63 of the *Interpretation Act* means that ongoing criminal proceedings initiated under a repealed offence provision can continue unaffected, provided that the offence was committed when the provision concerned was still in force. The court observed that:

> In my view, therefore, the charges on indictment against the accused under the repealed provision is valid in that the provisions of section 169 of the Act, under which the accused stands charged, is saved pursuant to sections 63(1)(b), (c), (d) and (e) and 67 of the *Interpretation Act*. I will now proceed with the judgment on verdict.[16]

The Bureau also referred the police to Section 37(7) of the *Constitution*, as the underlying constitutional provision in such matters. This constitutional provision, usually pleaded by the defense, stipulates that:

> No person shall be convicted of an offence on account of any act that did not, at the time when it took place, constitute an offence, and no penalty shall be imposed for an offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.

This means that a person should be charged only for an act or omission if the subject of the charge is an offence under law. In the *Pang case*, Section 37(7) of the *Constitution* was complied with in that Section 3 of the *Dangerous Drug Act* was still in force. Another legislative provision relevant to the case was Section 11 of the *Criminal Code* which states that:

> (1) A person cannot be punished for doing or omitting to do an act unless—

[16] Also note the case of *State v Kutetoa* (2005) N2814 and the case of *State v Kape Sulu* (2003) N2456. There are a number of useful principles stated by the court in relation to the application of those provisions mentioned.

(a) the act or omission constituted an offence under the law in force when it occurred; and

(b) doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when he is charged with the offence.

(2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender cannot be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law.

Based on the existing legal framework, the accused was arrested on the 16th November 2021 and charged for possessing a certain quantity of methamphetamine. At the material time, the possession of methamphetamine, was an offence under Section 3(1)(d) of the *Dangerous Drugs Act*. The repeal of Section 3 of the *Dangerous Drugs Act* which came into effect on 13th January 2022 did not affect the status of the offence and charge.

At the time of his arrest, Mr. Pang was found in possession of materials that are used to manufacture methamphetamine. Based on circumstantial evidence, the manufacture of the said drug did occur on or before the 16th November 2021. Mr. Pang was therefore liable to be charged under Section 3(1)(b) of the *Dangerous Drugs Act* for manufacturing methamphetamine. The accused was consequently charged on the 07th December 2021 for the production and possession of methamphetamine. This was clearly before the 13th of January 2022, the date by which the repeal came into force.

On the same occasion, the NEC also approved the *Controlled Substance Bill* 2021 to be tabled in Parliament. The *Controlled Substance Bill* also had a provision to repeal Section 3 of the *Dangerous Drugs Act*. The *Controlled Substance Act* was also passed unanimously by Parliament in December 2021.

The Judgment in State v Jamie David Pang

It should be noted that in the *Pang case,* a number of relevant information and documents were not tendered by the police as evidence, or through their submissions especially in relation to the application of the pre-independence law. These included: (1) the official copy of the *Dangerous Drugs Act* bearing the subsidiary legislation and the gazettal notice; (2) the legislative process in adopting pre-independence laws, or any applicable cases (that may include in affidavits from those responsible for the legislative process); (3) the legal advice from the State Solicitor which pointed out the application of the *Laws Repeal Act* 1975 (which was obtained post-judgement); and (4) the Bureau's legal advice on the *Interpretation Act*.

The Magistrate in the *Pang case* had the benefit of knowing that there existed a subordinate legislation which mentioned methamphetamine. A judicial officer having gone through legal training and in that position could have been able to deduce that the matter is of significance to the legal system and warrants deliberate judgement. However, a differing view was immediately held. The ruling was that the subsidiary legislation that contained a list of drugs which included methamphetamine was invalid. His Worship could not appreciate how the subsidiary legislation came to apply under the *Dangerous Drug Act*. The concern was that there was no 'head of power' or enabling provision expressly provided in the *Dangerous Drugs Act* to make or support the existence of the subsidiary legislation. The required assistance in terms of explaining the gazettal notices or providing evidence of the legislative process was not provided.

His Worship also ruled that even the Deputy Administrator responsible for making the declarations in the said gazettal did not have the authority to make those declarations in the first place, as Section 5 of the *Dangerous Drugs Ordinance* expressly stated that any declaration was to be made by the Administrator. There was a case being referred to by his Worship regarding a contract of employment namely *Wilson Thompson v National Capital District Commission* (2004) N2686. In that case, his Honor Justice Kandakasi (as he then was) ruled the contract of employment to be invalid given that the individuals who executed it did not have the authority to do so. Whilst that point is clear, the issue here is whether the Deputy Administrator had the authority to make those declarations in the first place. Apparently, the Magistrate's consideration was only limited to what the law had expressly stated without regard to any further information that could have supported the Deputy Administrator's exercise of that power. This may have required evidence of a provision that delegated such a role or an instrument of delegation. This was not in evidence. This point of law was material to the substantive proceedings, and provided an opportunity for further deliberation.

A key evidentiary document that would have had a persuasive value was the official copy of the PNG legislation. This included a compilation of the legislation's historical developments from original enactment, gazettal, repeal or amendments. This compilation could be as thick as a text book.[17] According to the DJAG's Chief Librarian, such documents are bound up nicely in a thick green cover which can be easily removed to include further documents, insert amendments or repeal to the legislation by pasting or crossing out provisions or wordings with immediate references.

The official legislation was borrowed from the DJAG Law Library and given to the police with verbal advice as to how to present it to the Magistrate. Official copies of other legislation from the same period with their historical information as compiled were also provided to the police so as to demonstrate to the court the consistency and professionalism involved in maintaining official copies of PNG's legislation. Unfortunately, according to the Magistrate, this did not happen. He said:

> I must first establish and acquaint myself the process involved on the transitional period from post-independence to pre-independence with laws on the face of, what is before the court, considering the fact that both parties did not guide me properly on this.

His Worship further observed that:

> [i]n the absence of any gazettal notice or ministerial approval or certification to enact as subsidiary legislation, it creates doubts in the minds of the court. It was for this reason; the prosecution was asked to produce the books that she got the extracts from and to deliberate further on it, but advised court that, the books are too old and heavy to carry them.

In hindsight, case law in relation to similar circumstances, involving the application of Schedule 2.6 of the *Constitution*, the *Interpretation Act* and the *Laws Repeal Act* 1975 could have helped. A case that could have potentially been referred to was *Capek v The Yacht 'Freja'* [1980] PNGLR 161. In this case, the court held that the *Colonial Courts of Admiralty Act* 1980 applied to PNG immediately before Independence under 'adoption, application and continuation' under the 'combined effect' of the *Laws Repeal Act* 1975, the *Papua New Guinea Independence Act* 1975 and the *Constitution,* Schedule 2.6(2).

[17] Mr Raphael Luman from the Office of Public Prosecutor, personal communication (25 November, 2021).

A case that also affirmed the State Solicitor's advice (which did not refer to any case law) was *SCR No 1 of 1976 (P); Peter v South Pacific Brewery Ltd* [1976] PNGLR 537. This was an application by the District Court under Section 18 of the *Constitution* regarding the validity of Section 131 of the *District Courts Act* 1963. The issue was whether Section 131 was unconstitutional and therefore invalid to the extent that it allowed the District Court to proceed *ex-parte* to hear and determine the case in the absence of the defendant. The Supreme Court was asked to clarify whether Section 131 undermined Section 37(5) of the *Constitution* which provides for the *ex-parte* jurisdiction to hear all other summary offences. The other consequential issue that was brought up was the validity of the *District Courts Act* 1963 as a 'pre-independence legislation'. In relation to the issue in the *Pang case*, the court said:

> it is important to note the legal arrangements which were made to ensure that all laws in the country must stem from its autochthonous or homegrown *Constitution*. (*Constitution*, s. 24, Report of the Constitutional Planning Committee, Chapter 15, par.14). The first step was the enactment by the pre-Independence House of Assembly of the *Laws Repeal Act* 1975 which came into operation immediately prior to the expiry of Independence Day, 15th September, 1975. The purpose of that Act, which was achieved by one simple section and without reference to particular enactments, was the repeal in bulk, as it were, of all the legislation and subordinate legislation of Papua New Guinea, and any other country applying to Papua New Guinea immediately before the commencement of the Act. It was then by force of s.20(3) and Sch.2.6 of the *Constitution*, which came into effect on 16th September, 1975, that all pre-independence laws, which means for the purposes of this case all laws repealed by the *Laws Repeal Act* 1975, were adopted as Acts of the Parliament, and were brought into application to the extent to which they applied immediately before Independence Day. Just as the repeal was of the legislation in its entirety, so also was the adoption of that legislation under the *Constitution* and, of course, the *District Courts Act* was included in that adoption. Further, as the provision contained in Sch.2.6 is expressly made subject to any Constitutional law, it is clear that the adopted laws are subject to the same constitutional limitations as an Act of Parliament, and in particular, for the purposes of this case, ss 10 and 11. Section 11 provides that the *Constitution* and the Organic Laws are the Supreme Law of Papua New Guinea and, subject to s.10 all Acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency, invalid and ineffective.[18]

In upholding the validity of the *District Court Act* 1963, the court held that:

> Immediately prior to 16th September, 1975 the *District Courts Act* 1963 (as amended) was in operation as a pre-independence Law. Section 3 of the *Laws Repeal Act* 1975 of the House of Assembly, repealed this law as at 15th September, 1975. It was adopted as an Act of the National Parliament as from 16th September, 1975 by Sch.2.6 (2) of the *Constitution*.[19]

An important constitutional provision which should have guided the District Court is section 24 of the *Constitution*. The Supreme Court stated that Section 24 of the *Constitution*, should always guide judicial officers in statutory interpretation and when establishing the legal basis for legislation. This was not considered in the *Pang case*. The existing guidance under the *Constitution* if referred to would have prompted the use of extraneous materials such as official records of debates and of votes and proceedings (including those from the pre-independence House of Assembly), documents, and papers or Hansards.

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18 The case can be accessed at http://www.paclii.org/pg/cases/PGSC/1976/28.html.

19 Ibid.

Instructions to Review the Pang Case

When the Bureau was informed that the District Court had dismissed the case against Mr. Pang, it approached the Office of the Public Prosecutor to seek advice on the options available to the State. The Public Prosecutor's Office advised that it could not institute an *ex-officio indictment* given that the matter in question was not a result of a committal proceeding, but was within the jurisdiction of the District Court.[20] However, it was uncertain as to whether the District Court had exclusive jurisdiction, or that such a matter can be appealed by the State as would persons who have been convicted and sentenced. Therefore, it was considered most appropriate to seek the assistance of the Supreme Court. The Bureau therefore advised the Attorney-General to instruct the Solicitor-General under the *Attorney-General Act* to refer the matter to the Supreme Court for determination.

The Attorney General was advised through the Solicitor-General to consider the following courses of action:

1. Make an application under Section 19 of the *Constitution* for a Supreme Court Reference to determine the validity of the *Dangerous Drugs Act*, in particular the subordinate legislation.
2. Make an application to the Supreme Court pursuant to Section 26 of the *Supreme Court Act* for an opinion on the point of law in question. Expressly this provision is in relation to indictable offences, however, substantively it may be available for all criminal offences that require clarification.
3. Under Section 28 of the *Supreme Court Act,* the Attorney General could seek orders from the Supreme Court to order a new trial. This provision expressly allows for an appeal against conviction. However, can this apply to an appeal against dismissal on a point of law? Research on applicable case law will assist as well as practice directions by the Supreme Court. The case of *Oscar Tugein v Michael Gotaha* [1984] PNGLR 137 provides some main grounds for a retrail:

    a) the public interest in bringing justice to those guilty of serious crimes and ensuring that they do not escape because of technical blunders by the trial judge in the conduct of the trial;
    b) the expense and inconvenience to witnesses who would be involved in a new trial when weighed against the strength of the evidence;
    c) the seriousness and prevalence of the particular offence;
    d) the consideration that the criminal trial is an ordeal which the defendant ought not to be condemned to go through for a second time through no fault of his own unless the interest of justice require that he should do so;
    e) the length of time elapsing between the offence and the new trial if ordered; and
    f) the strength and availability of the evidence.[21]

The challenge in utilising these grounds as referred to in the *Oscar Tugen case* is that there is express reference to the National Court or trial Judge, and not the District Court. Also importantly, are such grounds applicable to District Court matters either indictable offences triable summarily or criminal matters within the District Court's jurisdiction? The Supreme Court could assist if it has jurisdiction in such matters. The Supreme Court could also issue

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20 Luman R., personal communication (26 January, 2022).

21 These were discussed by Mamu in Mamu, B.L. *Supreme Court (PNG) Practice & Procedure* (Port Moresby: Kairos Press, 2016)

directions under Section 185 of the *Supreme Court Act* with respect to practice or procedure where it is lacking with respect to a matter.

Another option would have been to seek a judicial review of the court's decision and have the decision quashed and reverted to the District Court for a rehearing. The Supreme Court could also be asked to clarify the following issues:

1. Is the subsidiary legislation valid?
2. What is "subsidiary legislation" compared to the definition of "subordinate enactments etc…? What is the process of making subsidiary legislation?
3. Did the Deputy Administrator have authority to make any declaration of dangerous drugs under the *Dangerous Drugs Ordinance* 1952-1968?
4. Whether a decision of the District Court in such matters can be appealed? If so, where should the matter be appealed at? The National Court, Supreme Court or the District Court comprising of different senior Magistrates?
5. Whether such District Court decisions can be reviewed pursuant to judicial review?
6. Can such matters at the District Court be stayed pending the interpretative jurisdiction of the National or Supreme Court on points of law?
7. The evidence has not been determined yet, so is the matter res-judicata? Should the police discard the evidence? In the *Pang case*, the merits of the matter were not determined. In that the matter did not proceed to trial but was dismissed by the Magistrate who took issue with the existence of the subsidiary legislation to the *Dangerous Drugs Act*.
8. What would become of all or any decision made under the subsidiary legislation in question since its inception if the subsidiary legislation is declared as invalid. As an example, the Pharmacy Board also has the responsibility to regulate the importation of narcotics and psychotropic substances used for therapeutic purposes and provide quarterly reports to the International Narcotics Control Board (INCB). In 2015, minimum requirements for a drug import certificate for Narcotic and Psychotropic Substances was issued by the National Department of Health pursuant to Section 5(2)(b) of the *Dangerous Drug Act*. By virtue of the District Court ruling, what would be the impact to these requirements and any decisions that were made?[22]

Conclusion

According to legal opinion, the subordinate legislation under the *Dangerous Drugs Act* which lists methamphetamine as a dangerous drug is valid. However, the District Court in the *Pang case* did not take judicial notice of the subordinate legislation as submitted by the police prosecution and thus ruled that it was invalid *ab initio*. Technically, this means that the *Dangerous Drugs Act* and the subordinate legislation is ineffective and must not be used.

Given that the District Court ruled that the Deputy Administrator under the colonial administration did not have authority in the first place, the effect would be that the subordinate legislation containing the list of dangerous drugs never existed. This will have repercussions on other authorities that have jurisdiction under the subordinate legislation and

[22] The *National Medicines Policy 2014* also has a chapter that calls for the regulation of narcotic drugs and psychotropic substances which is based on the *Dangerous Drugs Act.*

their functions concerning those various chemicals or compounds listed. These include the health sector, agriculture, food or scientific industry. The subordinate legislation falls within the portfolio responsibility of the Minister for Health. It is therefore only a matter of time when the authority of those stakeholders will be questioned. The *Peter v South Pacific Brewery Ltd case* refers to the need for judicial officers to exercise 'judicial ingenuity' in the dispensation of justice and not to be 'narrowly legalistic' which can compromise the 'spirit of the letter of the law'.[23]

This is a matter worth pursing in the Supreme Court to develop the country's jurisprudence in legislation in particular dangerous drugs. It will give clarity to the court's jurisdiction in such matters, restate the legislative process when pre-independence legislation is involved and give guidance to law enforcement in such matters in the future.

Finally, there are important lessons from the District Court case that actors in the criminal justice system must take note.[24] They must adopt appropriate interventions to address the notable capacity gaps both from an individual, systemic and policy perspective to maintain the integrity of the justice system. In that manner, other stakeholders can be assisted meaningfully in making a lasting difference in the country's efforts against illegal drugs.

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23 Supra, n17.

24 The likely legal implications associated with the preliminary issue required personnel with the skills and veracity to pay attention to details. It is not insurmountable, and only takes the persistent application of sound advocacy skills and the prerequisite judicial temperament. The kind of attitude required from judicial officers in these constitutional matters is the ability to ask the right questions and seek the fullest extent of available evidentiary support to clear any doubt and dispense justice. As an observation, the type of legal issue raised could potentially be for the higher judiciary.

The Constitutionality of the Police Force and the Commissioner of Police

Leslie B. Mamu[*]

Introduction

This article emanates from an opinion provided by the Office of the Public Solicitor (OPS) to a client who wanted the OPS to file a special reference under Section 19 of the *Constitution* relating to three special questions. The first one was whether the Police Force is a constitutional institution for the purposes of Section 221 of the *Constitution*? The second was whether the Commissioner of Police is a constitutional office-holder? And the third was whether Part IX which comprises Sections 221, 222, 223, 224 and 225 of the *Constitution* apply to the Police Force?

When considering the instructions and the questions raised, the OPS was guided by the principles:

1. Only a special class of persons can bring constitutional questions in a Supreme Court reference (s19 and s18 of the *Constitution*); and
2. The subject constitutional provision is ambiguous to invoke the power of the Supreme Court to interpret it.

It is well known in the Papua New Guinea (PNG) jurisdiction that previous decided cases often lend considerable assistance in this exercise. In fact, the Supreme Court has on many occasions refused to answer questions for not being *'constitutional questions'*. There is a difference between applying a provision of the *Constitution* to an issue and constructing or interpreting the provision to say what it means. Also, if the subject provision is clear and requires no amount of construction (interpretation), any proposed reference will be academic, lacking utility and is futile. This article is intended to help readers understand the constitutional status of the Police Force and the Commissioner of Police.

What is a Constitutional Office?

In attending to the questions posed by the client, the OPS sought guidance from two Supreme Court cases, namely *Reference by the Public Solicitor Pursuant to Constitution, Section 19(1), In re* (2019) SC1871 and *SCR No 1 of 1978; Re Ombudsman Commission Investigations of the Public Solicitor* [1978] PNGLR 345. These two cases distinguished a constitutional office from a State Service. The Supreme Court clarified that the *Constitution* establishes State Services under Section 188 of the *Constitution* as separate and distinct creatures from Constitutional Offices which are created under Section 221 of the *Constitution*. Section 188 of the *Constitution* establishes the following State Services:

1. the National Public Service;
2. the Police Force;
3. the Papua New Guinea Defence Force; and
4. the Parliamentary Service.

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[*] Public Solicitor of Papua New Guinea.

In both cases, the Supreme Court shed light on the difference between a State Service and a constitutional office. In both SC136 and SC1871, the Supreme Court pointed out that the Office of the Public Solicitor is not a State Service, but a constitutional office since it is established by section 176(1) of the *Constitution* as an Office. In SC1871, the Supreme Court also said that since the Office of Public Solicitor is a constitutional office, the Public Solicitor is therefore a constitutional office-holder as evident in Section 221 of the *Constitution*.[1]

As recently as 2022, the Supreme Court pronounced in *Reference by the Public Solicitor re Jurisdiction of the Public Services Commission and the Powers and Functions of the Auditor-General* (2022) SC2299, that the Office of Auditor General is not a State Service nor is it part of the National Public Service since it is a constitutional office. The court said that Section 213 of the *Constitution* establishes the Office of Auditor General. The provision reads:

> 213. Establishment of the Office of Auditor-General.
> (1) An office of Auditor-General is hereby established.

In light of these judicial pronouncements, is the Police Force a State Service or a constitutional office?

What is a Constitutional Institution?

The pronouncements by the Supreme Court and Section 188 of the *Constitution* clearly show that the Police Force is a State Service and not a constitutional office. It is however a constitutional institution in so far as the definition under Section 221 of the *Constitution* is concerned. According to this provision, 'constitutional institution' 'means any office or institution established or provided for by this *Constitution*, other than an office of Head of State or of a Minister, or the National Executive Council.'

The phrase *"institution established or provided for by this Constitution"* in this definition may equally extend to the Police Force since it is established and provided for by the *Constitution* under Section 188. Part IX refers to constitutional offices and constitutional institutions, but unlike constitutional offices, Section 221 does not elaborate or enumerate the list of constitutional institutions. If indeed the Police Force is a constitutional institution, then the only provisions that apply to it are Sections 222 (*Other provisions relating to constitutional office-holders and constitutional institutions*), 224 (*Special provision for constitutional institutions*) and 225 (*Provision of facilities, etc*). Section 223 does not apply to constitutional institutions since it expressly applies to constitutional office-holders. Section 223 is set out in full below.

> 223. General provision for constitutional office-holders.
> (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

[1] Section 221 of the *Constitution* provides the definition of "constitutional office-holder" which includes the Public Prosecutor and the Public Solicitor.

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.

(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.

If the Police Force falls in the definition of a constitutional institution, what effect does it have on the office of Commissioner of Police? This leads to the next question of whether the Commissioner of Police is a constitutional office-holder.

The status of the Commissioner of Police

The *Constitution*, Section 198, calls for the creation of an office for the Commissioner of Police. It states:

> There shall be, within the Police Force, an office of Commissioner of Police, who shall be responsible for the superintendence, efficient organization and control of the Force in accordance with an Act of the Parliament.

It is instructive to note that Section 198 does not establish the Office of Commissioner of Police. It merely directs that within Section 188(1)(b) (State Service (Police Force)), an office of the Commissioner of Police must be established so that there is superintendence, efficient organization and control of the Police Force. It is Section 9 of the *Police Act* 1998 that establishes the office of Commissioner of Police. Section 9(1) reads:

> The office of the Commissioner of Police established under the former Act is continued under this Act.

The Office of Commissioner of Police is a creature of statute (Police Act) and not a constitutional office. It goes without saying, that the Commissioner of Police, is therefore, not a constitutional office-holder. Whilst the Police Force is a constitutional establishment making it a constitutional institution, it does not make the Commissioner of Police a constitutional office-holder. It is important to note that Section 221 provides an exhaustive list of constitutional office-holders whose offices are also established by the *Constitution*. These constitutional office-holders are:

1. Judges.
2. Public Prosecutor.
3. Public Solicitor.
4. Chief Magistrate.
5. Ombudsman Commissioners.

6. Electoral Commissioner.
7. Clerk of Parliament.
8. Public Service Commissioners.
9. Auditor General.
10. ICAC Commissioners.[2]

Other constitutional office-holders may be declared by an Organic Law or an Act of Parliament. It is evident that the *Police Act* does not declare the office of Commissioner of Police to be a constitutional office, and rightly so, because it cannot be a separate constitutional establishment. It can only be a statutory office within the State Service (Police Force). It is similar to the Office of Solicitor General and Office of State Solicitor which are established by Sections 10 and 13A of the *Attorney-General Act* 1989 respectively and fall within the National Public Service, which is, one of the State Services. These two provisions are stated as follows:

> 10. Establishment of the Office of the Solicitor General.
> (1) The Office of Solicitor-General of Papua New Guinea is hereby established as an office within the National Public Service.
>
> 13A. Establishment of the Office of the State Solicitor.
> (1) There is established within the National Public Service, the Office of the State Solicitor.

The Commissioner of Police, the Solicitor General and the State Solicitor occupy offices that are established by statutes within State Services. Just because the *Constitution* mentions or provides for the office of the Commissioner of Police, this does not render it a constitutional office. A classic example is the Office of Attorney-General. Section 156(1)(a) of the *Constitution* makes express stipulation concerning the Attorney-General, and Section 156(2) authorizes the establishment of his Office by an Act of Parliament. Section 156(1)(a) states that:

> 156. The Law Officers.
> (1) The Law Officers of Papua New Guinea are-
> (a) the principal legal adviser to the National Executive; and
> (b) the Public Prosecutor; and
> (c) the Public Solicitor.
> (2) An Act of the Parliament shall make provision for and in respect of the office referred to in Subsection (1)(a).

The Office of the Attorney General is provided under Section 2 of the *Attorney-General Act*. It provides that 'the Office of the Attorney General of Papua New Guinea is hereby established'.

It should be reiterated that just because the *Constitution* makes stipulations for the establishment of an office, this does not render the establishment itself as a constitutional office. The office must be expressly authorised by the *Constitution* and where Parliament intends to establish a constitutional office by an Organic Law or Act of Parliament for purposes of Part IX, that law must expressly state that it establishes such an office. This is the case with the Constitutional and Law Reform Commission. Section 3 of the *Constitutional and Law Reform Commission Act* 2004 (CLRC Act) states:

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[2] The Independent Commission Against Corruption (ICAC) is established under Section 220A of the *Constitution* and complemented by the *Organic Law on the Independent Commission Against Corruption* which was enacted in 2020. Section 220A was amended in 2014 and the Organic Law was enacted in 2020. Section 220A and the Organic Law on ICAC declare that ICAC is a constitutional office and the Commissioners of ICAC are constitutional office-holders as specified in Section 220AC.

3. Establishment of the Commission.
   (1) The Constitutional and Law Reform Commission of Papua New Guinea is hereby established.
   (2) The Commission is a constitutional office to which Part IX (Constitutional Office Holders and Constitutional Institutions) of the *Constitution* applies.

The CLRC Act is a law authorized by Sections 21(2) and 260, and Schedule 2.13 and 2.14 of the *Constitution*. The CLRC is not a constitutional office in the traditional and conventional sense because it is not established by the *Constitution*. It does not share the same nature as the constitutional offices referred to in Section 221(a) to (h) of the *Constitution*. It is a creature of statute (CLRC Act) but a declared constitutional office for a specific purpose.

Ascribing and assigning constitutional status to this statutory commission (CLRC) is specifically "for the purposes of Part IX". This part in the *Constitution* provides a machinery for constitutional offices to utilize. Section 221 does not authorize Parliament to establish constitutional offices in addition to those established by the *Constitution* outside of the purpose referred to in Part IX. The provision (Section 221) simply provides a platform to elevate and ascribe constitutional status to enable such offices to access the machinery provided under Part IX. It is different from provisions such as Section 188(2) which authorizes Parliament to establish additional State Services through Acts of Parliament:

188 Establishment of the State Services.
   (2) Acts of the Parliament may make provision for or in respect of other State Services.

An example is the Correctional Service which is an additional State Service established under the *Correctional Service Act* 1995. Section 5 of the Act is very clear. It states that:

5. Status of Correctional Service.
   The Correctional Service is, for the purposes of Section 188 (*establishment of the State Services*) of the- *Constitution*, a State Service.

Conclusion

In summary, it can be said that the Police Force, having been established by the *Constitution* as a State Service is a constitutional institution for the purposes of Part IX of the *Constitution*. However, the Commissioner of Police is not a constitutional office-holder since his office is not established by the *Constitution* but the *Police Act*. Section 223 of the *Constitution* applies specifically to constitutional office-holders and so does not apply to the Police Force or Commissioner of Police.

Correction of Appointment made under Regulatory Statutory Authorities (Appointment to Certain Offices) Act 2004

Watson Simiong[*]

Introduction

Section 208B of the *Constitution* is the basis for the appointment and re-appointment of all Regulatory Statutory Authorities ('RSA') Chief Executive Officers ('CEOs'). This constitutional provision states that the appointment process of the RSA CEOs shall be prescribed by an Act of Parliament. The prescribed legislation is the *Regulatory Statutory Authorities (Appointment to Certain Offices) Act* 2004 (RSAA). Since the appointment of a RSA CEO is subject to the RSAA, it must be made in accordance with the RSAA to be valid. Failure to comply with the procedure under the RSAA may amount to an error and render a ground for judicial review by the National Court. While appointment of the RSA CEOs is subject to the RSA Act, certain requirements for the appointments are provided in the respective agency's enabling legislation complementing the appointment process.

This paper addresses the issue of whether an error in the appointment process of a RSA CEO can be corrected after the appointment is made?

Appointment of a RSA CEO under the RSAA

If there is an error in the appointment of a RSA CEO, it can be corrected. The RSAA governs the appointment process of the RSA CEOs while other requirements such as age limit is covered in respective enabling legislation. Where the enabling legislation is silent on age limit, then the *Public Services (Management) Act* 1995 (PSMA) applies since the RSA CEOs are part of the Public Service.

For the RSAA to apply in the appointment of the CEO, the enabling legislation of the subject authority must expressly adopt its application. In the event that it is silent, a declaration must be made by the relevant Minister and published in the National Gazette[1] to subject the appointment process to the RSAA.

This is the case with the appointment of the Immigration and Citizenship Services Authority (ICSA) CEO or the Chief Migration Officer (CMO), an authority established by the *Immigration and Citizenship Services Act* 2010 (ICS Act). The administration, the appointment of the Board Members and the staff of ICSA are all governed by ICS Act while the appointment, suspension and dismissal the CMO is governed by the RSAA. This is provided in Section 22(1) of the ICS Act as follows:

> ..there shall be a Chief Migration Officer whose manner of appointment, suspension and dismissal is as specified in the *Regulatory Statutory Authorities (Appointment to Certain Offices) Act* 2004.

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[1] Section 3(1) and (2) of the RSA Act.

A similar set up can also be seen with the Papua New Guinea Sports Foundation (PNGFA). Section 27(1) of the *Papua New Guinea Sports Foundation Act* 2006 (PNGSF Act) subjects the appointment of the Executive Director to the RSAA while the CEO's age limit is set in Section 27(3) of the PNGSF Act. These provisions provide that:

(1) The Executive Director shall be appointed, suspended or dismissed in a manner as specified in the Regulatory Statutory Authorities (Appointment to Certain Offices) Act 2004.
…
(3) A person who has attained the age of 60 years shall not be appointed or re-appointed as Executive Director and a person shall not be appointed or re-appointed as Executive Director for a period that extends beyond the date on which the person will attain the age of 60 years.

Similar arrangements apply to other RSA.

The appointment process

The process of appointment and re-appointment of RSA CEOs begins with recommendations from its Board and concludes with the Head of State making the appointment, of course, on the advice of the National Executive Council (NEC). This process is captured under Part 2 of the RSAA: The following is a summary of this process:

1. A vacancy is declared and advertised in the National Gazette and in at least one daily newspaper inviting applicants;[2]
2. The Board, complies with merit-based appointment and recommends to the Public Service Commission (PSC) its five preferred candidates in order of preference;[3]
3. The PSC conducts its own merit-based assessment on the five candidates and submits its list of three candidates in order of preference to the NEC;[4]
4. The NEC considers the list from the PSC and appoints a person from the list and advises the Head of State to execute a contract of employment with the successful candidate;[5]
5. This appointment is published in the National Gazette; and
6. The Head of State executes the contract of employment with the appointee.[6]

Vacancy in the position of RSA CEO and the Appointment process

A vacancy may occur in the position of a CEO in four circumstances. These are:

(1) when his or her term lapses;
(2) the incumbent is medically unfit to perform his or her duty;
(3) CEO is suspended and removed from office for misconduct7;
(4) or dies.

When a vacancy occurs, it sets in motion the appointment process under the RSAA. As alluded to above, the appointment must be made in accordance with the RSAA and where there is a breach in the appointment process, the appointment can be challenged in court through a judicial review.

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2 Section 4(1) of the RSA Act.
3 Section 4(2) of the RSA Act.
4 Section 6(1) of the RSA Act.
5 Section 6(3) of the RSA Act.
6 The NEC decision making the appointment will also direct the First Legislative Counsel to prepare the instrument of appointment for execution by the Head of State.
7 Section 8 of the RSA Act.

There are three main grounds for challenging the appointment of a CEO. These are: (1) breach of the appointment process; (2) the failure by the PSC to conduct a merit-based appointment; and (3) where the NEC appoints a person not on the list from the PSC. Each scenario is discussed below.

In the first instance, the Board is required to comply with the merit-based appointment process set out in Section 5 of the RSA Act. This provision provides that:

> Regulations may prescribe a merit-based appointment process which shall involve the following:–
> (a) the advertisement of a vacancy in an office in the prescribed format together with minimum person specification for applicants to the position;
> (b) the assessment of each applicant's curriculum vitae, submitted in a prescribed format, and their competency to perform the prescribed duties as measured against the minimum person specification for the position;
> (c) a ranked ordered assessment of all applicants for the advertised position in terms of their relative competency to perform the prescribed duties;
> (d) the merit-based assessment described in this section shall be the primary consideration of the Public Services Commission in making a recommendation to the Board; and
> (e) all other considerations not related to the processes described in this section shall have no bearing in the recommendation of the Public Services Commission and of the Board.

This provision requires that the Board must:

1. Advertise the position of the RSA CEO in at least one of the daily newspapers when the vacancy is about to occur or occurs at the end of the term of the incumbent;
2. Considers a shortlist of five candidates in order of preference from the Pre-Selection Committee of the RSA. This Committee would have reviewed all the applications (received by the Human Resources Division of the RSA) based on the selection criteria set by the DPM; and
3. Must submit a list of its preference (from the shortlist of five candidates) to the PSC for its review.

It is incumbent on the Board to ensure that it complies with this provision of the RSA Act. In the case of *Mitio v Gardner*[8], the court found that the appointment process under the RSAA was not followed. The Board relied on the Coffee Industry Corporation (CIC) constitution to recommend its most preferred candidate to the NEC for appointment. In quashing the CIC Board's decision, the court said:

> The *Regulatory Statutory Authorities (Appointment to Certain Offices) Act* and the CIC Limited Constitution, which is the 'other instrument of incorporation' referred to in s. 3(2)(b) of the *Regulatory Statutory Authorities (Appointment to Certain Offices) Act* must be read subject to Part VIIA (Regulatory Statutory Authorities) of the *Constitution*. Any appointments, suspensions and dismissal of Chief Executive Officers or a non ex officio member of the Board, must be done in accordance with Section 3(2)(c) of the *Regulatory Statutory Authorities (Appointment to Certain Offices) Act* and Part VIIA (Regulatory Statutory Authorities) of the *Constitution*… I find that the defendants did not follow the procedure set out in ss. 4, 5, 6, 7, 8, 9, 10 of the *Regulatory Statutory Authorities (Appointment to Certain Offices) Act.*

Sections 4, 5 and 6 of the RSAA outlines the merit-based process which the Board follows in making its recommendation to the NEC for the appointment of a CEO. Where the Board fails to comply with these provisions, its decision can be challenged in court.

[8] (2005) N2792.

The second scenario is where the PSC fails to conduct a merit-based assessment on the list submitted to it by a RSA Board. The PSC's involvement in the appointment process is provided in Section 6(1) and (2) of the RSA Act. The states that:

> (1) On the receipt of a list under Section 4(2), the Public Services Commission shall prepare a list, using the merit-based process, of not less than three suitable candidates in the order of preference, either from the list submitted by the Board or from the original applicants to the position, and shall submit its recommendations to the Board.
> (2) On the receipt of the recommendations under Subsection (1), the Board shall either–
>
> (a) forward the list to the relevant Minister who shall submit his recommendation to the National Executive Council for its consideration within one month of the receipt of the list from the Board; or
>
> (b) determine that the position be re-advertised and shall advise the Public Service Commission accordingly.

The PSC's involvement in the appointment process can be summarised as follows:

1. The PSC conducts its own merit-based assessment of the five candidates submitted by the RSA Board;
2. Where the PSC disagrees with the list, it may select a candidate from the original list of applicants; and
3. When making its recommendations to the Minister through the Board, the PSC may:
   (a) list in the order of preference, three candidates for NEC's consideration; or
   (b) advice the Board to re-start the appointment process if none of the candidates meet the requirement or the list has been submitted in breach of the process.

In *Luma v Tetaga,*[9] the court quashed the appointment of a Departmental Head and ordered the re-commencement of the process because the PSC's list contained a candidate whose name was not in the initial list submitted by the DPM and the Central Agency Coordinating Committee (CACC). Based on the PSC recommendation, he was recommended by the NEC for appointment as the Departmental Head. The court said:

> The Public Service Commission must not come up with a list out of the blue. It must have regard to the requirements stated by law and in this case all the relevant laws mentioned earlier together with the Regulations.

Although the case deals with the appointment of a Departmental Head whose appointment process is subject to the PSMA, the principle of following requirements set out in the law applies in the appointment of RSA CEOs appointed under the RSA Act.

Finally, where the NEC recommends to the Head of State a person whose name is not on the list provided by the PSC, the appointment process will be deemed as unlawful. The NEC's involvement in the appointment process is provided for in Section 6(3) of the RSA Act. This subsection reads:

> The National Executive Council may, in considering the submission from the Minister under Subsection (2)(a)–
> (a) select one of the candidates recommended by the Minister and shall advise the Head of State to make the appointment of the selected candidate to the position; or
> (b) reject any recommendation for appointment in which case, the Board shall re-advertise the position.

In summary:

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9 (2007) N3275.

1. The NEC considers the list submitted by PSC through the Minister and recommends one of the candidates for appointment and advises the Head of State accordingly; and
2. The same NEC decision recommending to the Head of State for the appointment will also direct the First Legislative Counsel to prepare the instrument of appointment to be published in the National Gazette and direct DPM to prepare the contract of employment for execution.

Who can correct the error in the appointment of a RSA CEO?

As already stated, the process under the RSA Act is completed when the Head of State on the advice of the NEC makes the appointment and it is published in the National Gazette. However, if the appointment was made in breach of the processes under the RSA Act, it cannot be corrected by any party in the appointment process except the same appointing authority making the appointment. In this case, the Head of State, acting on the advice of the NEC made the appointment. The question then arises, can the NEC through the Head of State change its decision when an error has been identified? The answer is yes, because it is empowered to do so under the *Interpretation Act* 1975 (Interpretation Act). Under section 35 of the *Interpretation Act*, the power to make a decision includes the power to alter that decision. Section 35 of the *Interpretation Act* provides:

> Where a statutory provision confers a power to make an instrument or decision (other than a decision of a court), the power includes power exercisable in the same manner and subject to the same conditions (if any) to alter the instrument or decision.

The Head of State, as the appointing authority, can alter his decision using the same process that was followed when he made his earlier decision. However, before the decision to appoint is altered, the portfolio Minister, facilitates the revocation of the appointment as stated in section 7 of the RSA Act. The process can be outlined as:

> (1) Where, in relation to a Regulatory Statutory Authority, the Board believes that grounds exist for the dismissal of the chief executive officer, it shall cause an investigation into the conduct, activities or performance of the chief executive officer.
>
> (2) The grounds for dismissal referred to in Subsection (1) shall be consistent with the grounds for dismissal as specified in the chief executive officer's contract of employment which include breach of contract, misconduct, poor performance, incompetence and ill health, as prescribed in the Regulations.
>
> (3) Where the Board has made an investigation under Subsection (1), it shall submit a report on its investigation together with its recommendations to the Public Services Commission.
>
> (4) On the receipt of a report under Subsection (3), the Public Services Commission –
>
> (a) shall consider the evidence provided and the recommendations of the Board; and
>
> (b) may make, or cause to be made, and consider such further investigations (if any) as it considers necessary; and
>
> (c) shall, on the basis of the report and the results of further investigations (if any), inform the Board by way of a recommendation whether or not the appointment of the chief executive officer should be revoked.
>
> (5) The Board shall convey its recommendation to the Minister and, in the event that the National Executive Council approves the recommendation of the Minister to revoke the appointment of the chief executive officer, the National Executive Council shall advise the Head of State to revoke the appointment of the chief executive officer.

Although this provision in strict sense applies to the revocation of appointment by reason of misconduct in office, it also applies to the revocation of appointment to correct an error in the

appointment process. This means the Minister through the NEC will recommend to the Head of State to revoke the appointment. In revoking the appointment, the NEC will also direct the Board to re-commence the appointment process.

In the absence of a RSA Board or where the Board is unable to perform its function, the DPM facilitates the appointment process as provided in Section 13 of the RSA Act. Moreover, during the re-commencement of the appointment process, DPM facilitates an acting appointment pursuant to the RSA Act to ensure continuity in the administration of the subject authority.

Tourism through National Sporting Events in PNG: The need to Reform its Institutional and Legislative Frameworks

Lois Stanley[*] *and Elizabeth Chepon*[**]

Introduction

The concept of the PNG Games was first developed and introduced by the PNG Sports Foundation in 2003. It is a bi-annual event with the mission to promote and develop national unity and provincial pride through participation in sports. It is administered by the PNG Games Host Organizing Committee and is governed by the PNG Games Charter.

In the past eight years, athletics has been kept alive by a small group of people with very little support.[1] Such organizations as the National Gaming Control Board, the PNG Sports Foundation and other sponsors were very supportive of the PNG athletes during the national championships held in Lae in 2010 and 2011. Papua New Guinea has also participated in championships held abroad such as the World Junior Championships, World Youth Championships, Oceania Championship, Oceania Regionals, the Asian Grand Prix, Gold Coast Marathon, Arafura Games and the London Olympic Games.[2] In addition, the 2015 Pacific Games staged in PNG which saw the government allocate a total funding of K1.2billion towards upgrading of sports infrastructure. The aim of the government is to leverage sporting events and activities into the future by providing direct and indirect benefits to the country.[3] However, much collaborative dialogue between relevant key stakeholders is still required if the government wants to see tourism as a key economic sector.

This paper will discuss the social and economic benefits of the PNG Games and explore a new strategy called 'sport tourism' given the focus of the government on improving sports infrastructure. The Vision 2050 includes tourism as one of the key economic sectors. Therefore, the National Tourism Master Plan 2007-2017 pointed out that inter-agency corporation and coordination is the cornerstone for growth of the tourism industry.[4] The full potential of tourism will not be realized unless the issues of safety and security[5] are addressed by all stakeholders. In this case, sports have so far counteracted social issues and promoted tourism. This can be strengthened through the regulatory and legislative frameworks that will cement the partnership to bring the phenomenal results for both the tourism industry and the Sports Foundation in PNG.

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1 Tony Green, Athletics PNG Annual Report, December 2011.

2 Ibid.

3 Medium Term Development Plan II.

4 PNG Tourism Investment Guide.

5 Simboy, East Boroko, "Rising kina threatens tourism", Post-Courier, Tuesday, 28 August, 2012.

Impacts of National mega-events through sports: its social and economic benefits

The PNG Games

The first PNG Games was held in Goroka, Eastern Highlands Province in 2003. The second PNG Games was held in Port Moresby in the National Capital District in 2005 and the third was held in Lae, Morobe Province in 2007. The fourth PNG Games was held again in Port Moresby in 2009 and the fifth was held in Kokopo, East New Britain Province in 2012.

The sixth PNG Games was held in Lae in 2014 and the seventh was held in Kimbe, West New Britain Province in 2017. In between these two games, PNG hosted the South Pacific Games in Port Moresby in 2015.

The sixth PNG Games in Lae, saw the largest turnout of provinces as all 22 provinces were represented at the Games. A total of 10,000 athletes and officials attended the event covering 28 sporting codes. At the last PNG Games in Kimbe, a total of 19 provinces were represented and participated in 24 sporting codes. At the PNG Games in Kimbe, Southern Highlands Province (SHP) won the bid to host the 8th PNG Games. Since 2017, as will be discussed below, SHP has been struggling to host the 8th PNG Games.

Social Benefits

Life is not only about profit and loss. If a government is able to assist in creating enjoyment, whether through sports, an art exhibition, or fireworks display on New Year's Eve then, within reason, it should not be done just because the economic benefits are not great. There is actually more to life than economics.[6] Sports contributes largely to social cohesion; it encourages good health, motivates the youths and children who are active in sports. Sports also promotes healthy foods, such as fruits and vegetables. Sports participation teaches teenagers how to compete in a real world.

There are competitions in schools, in the villages, in the workforce and in other areas of life. These competitions do not have to be about winning or losing as playing sports helps the people to understand how competition can work in a friendly environment.[7] Youth sports can also help to deter or eliminate negative behavior, such as joining a gang, because competitive sports provide an outlet for expression of feelings, friendship and controlled aggression. Teens who have positive influences (and friends) feel less of a need to participate in risky behaviors.[8]

The stance taken by the national government to support sports at various levels throughout the country is a step in the right direction. National mega events such as the PNG Games are a perfect platform to promote national unity amongst many sporting talents from the 22 provinces. Athletes participating in the 6th PNG Games in Lae, were assisted to find opportunities to reach the top level of their codes such as Games Ambassador Toea Wisil. Apart from the sporting events, different planned programmes are promoted to instill oneness and patriotism in athletes to take to the international sporting arena. The Host Organizing

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6 Greg Jericho, The Guardian - 26 July, 2013 12:21 am https://skift.com/2013/07/26/the-economic-benefits-of-big-sporting-events-on-tourism-arent-that-beneficial/.

7 What Are the Benefits of Competitive Sports for Youth? by Sarah Davis, Last Updated: Jan 11, 2014 http://www.livestrong.com/article/134568-what-are-benefits-competitive-sports-youth/ as at August 1, 2016.

8 Ibid.

Committee synchronizes sports with cultural activities, integrating the games theme to harmonize and enhance provincial athletes and officials to be well prepared for future PNG Games.[9]

The PNG Games provides the best platform for the recognition of grassroots sports people. When athletes are exposed to the proper environment, they invest time and energy into their sporting code. One would be hard pressed to find anything that gives them the opportunity for holistic benefits that are provided by competitive sports.[10] Friendships between different athletes and provinces can also be fostered. Moreover, through PNG Games the host province is given the opportunity to realize the importance of sports and recreation at the provincial level.

Economic Benefits of Sports Tourism

Sporting events can be seen as a secondary product of tourism as stated in the National Tourism Guide. Sport tourism is defined as travel which involves observing or participating in a sporting event.[11] PNG has not received many tourists other than cultural visitors. One may wonder in what ways sports and sports events can contribute to tourism and the economy. 'Sport tourism does not only result from the visiting and expenditure from tourists but also involves the development of local infrastructure such as stadiums, hotels, transportation networks, roads, telecommunication, airports and other infrastructure. Such developments provide long term benefits to communities where they have been established'.[12]

Mega sporting events provide a platform to incorporate social and cultural features of the host community or city or country into the overall tourist experience. These events are good occasions to showcase the cultural heritage of the country such as its history, historical sites, food, music, art, architecture, and overall, what makes the host unique and interesting to entice the visitors to want to return in the near future.[13] For instance, the Eighth PNG Games which will be held in SHP will be hosted in the true spirit of grass roots sports where participating provinces will begin to enjoy the cultural flavors of Southern Highlands. SHP has a unique cultural diversity, where the province will be proud to share with other provinces.[14] This is sports promoting tourism in the SHP.

The 2015 Pacific Games pushed for the development of several sporting facilities and stadiums namely: Taurama Aquatic Centre, Sir John Guise Stadium, Games Village, Rita Flynn Netball Courts, and the Sir Hubert Murray Stadium.[15] Clearly, construction of these infrastructures adds value to the economy, people are employed, and money is spent. This has

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9 Posted on October 8, 2014 by pnggames http://www.pnggames.org.pg/png-games-nurture-athletes/ as at July 6, 2016.

10 March 8, 2014 http://gbstpeters.com.au/2014/03/the-benefits-of-competitive-athletic-sports-participation-for-your-life/, as at August 1, 2016.

11 Saturday, 20 September, 2014 - 08:00 http://financialtribune.com/articles/travel/913/benefits-sport-tourism.

12 Anand Rampersad http://www.guardian.co.tt/sport/2015-09-07/lots-economic-benefits-can-come-sport-tourism.

13 Ibid.

14 Southern Highlands Province wins 2018 PNG Games in Kimbe http://www.shp2018png-games.org/about.html.

15 https://www.hausples.com.pg/news/Infrastructural Developments in PNG Pushing Growth (hausples.com.pg). PNG Real Estate News, Trends & Ideas, Infrastructural Developments in PNG Pushing Growth/2015.

also led to an increase in the number of real estate businesses in Port Moresby and the other three major cities (Lae, Mt. Hagen and Kokopo) in the last 10 years. This boosts the economy of PNG. With smaller one-off events such as the PNG Games, the benefits are easier to identify, mostly they are in hotel accommodation and perhaps restaurant or takeaway sales. Some experts believe small-scale events are more beneficial to host economies, as they bear less expense.[16]

Funding for PNG Games

The prompt release of funds by the provincial and national governments will expedite the progress of preparations for mega sporting events. The update by the SHP PNG Games Host Organising Committee in (accordance with the Games Charter) highlights the hardship in the overall preparation of the games. The real area of concern is the availability of funds for the games. The upgrading and refurbishment of sporting facilities must be achieved within a specified time frame. In the case of SHP, the Host Organizing Committee had to work hard with limited funds to put in place the plans that will ensure that the preparations for the games is well coordinated and effectively administrated.

This is the gap that needs legislative support to strengthen it so that the government remains committed to this worthy cause in the long term. The *Organic Law on Provincial and Local-level Governments* (OLPGLLG) should provide a provision for Provincial and the Local-Level governments to fund regional sporting events such as the PNG Games. Such a provision will obligate the two levels of government to provide financial and other resources to the games. This approach will ensure that the PNG Games are successfully hosted bi-annually.

Tourism as a growth sector through sports

Tourism is declared as one of the key economic sectors including, manufacturing, agriculture, forestry and fisheries. It is envisaged that these sectors will generate in the long term, approximately 70 per cent of the GDP with the balance coming from mining, petroleum and gas ventures in the non-renewal sector.[17] In order to achieve this result, sporting events must be featured as one of the key drivers of economic growth. This will require more dialogue and collaboration amongst relevant key stakeholders such as the national government and sub-national governments.

The review of the OLPGLLG conducted by Constitutional and Law Reform Commission (CLRC) in collaboration with the Department of Provincial and Local-level Government Affairs (DPLGA)[18] highlighted the need for the government to support the development of growth centres. The proposal was that District Development Authorities with the support of the national and provincial governments should establish service and growth centres that will enable people to access services and do business in their own districts. Providing this enabling environment will ensure that when sporting events are held at the provincial or district level, it will attract visitors and also regional and local audience. One of the positive outcomes that arises is that the district or province then becomes a new tourism destination.

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16 Note 11, supra.

17 Government of Papua New Guinea, *Papua New Guinea Vision 2050* (Port Moresby: 2009).

18 See generally Constitutional and Law Reform Commission, *Review of the Organic Law on Provincial Governments and Local-level Governments* (Port Moresby, 2013).

According to the Tourism Investment Guide, the authors have identified a set of secondary tourism product segments such as Meetings, Incentives, Conferences, Exhibitions and Special Events (MICE), cruising, fishing, bird watching and flora and fauna. It is suggested that 'sport tourism' should be placed under a special agency and developed. This approach will allow for growth centres which will enable the people to participate meaningfully in economic development.

As per the current law on tourism development, it is defined as 'any business or industry that is wholly or partly engaged in providing services: (a) for visitors and tourists to Papua New Guinea; or (b) for persons travelling within the country for the purpose of holidays, recreation or amusement, or both, by way of transport, hotel accommodation, tour guides, attractions, sports and entertainments'.[19] The products mentioned in this definition, if developed further through collaborative effort amongst relevant key stakeholders, the key results expected under the PNG Medium Term Development Plan 2016-2017 should have been achieved. There is huge potential in the tourism sector particularly through 'sports tourism'. The Table below shows key indicators and targets in the tourism sector.[20]

Indicators	**Baseline**		**Targets**
	Value	**Year**	**2017**
Number of tourists visiting the country per year	64,127	2014	80,000
Number of business travellers visiting the country per year	66,639	2014	85,000
Number of persons employed	20,000	2013	26,000
Total tourism receipt (billion Kina)	1.8	2013	3.0

The tourism industry in PNG is still underdeveloped although it has great potential for growth. One of TPA's objectives is to coordinate policy and government agency input to support tourism development at the national and provincial levels. The legislative framework for tourism development is already available – all it needs is the political and the administrative support in order for the sector to expand and contribute more to the economy.

The need to strengthen tourism regulatory and legislative frameworks

PNG positions itself as a unique tourist destination in the world. While much is being said about other tourism products, there is no mention of sporting events as a factor that influences tourism. Sports tourism will, if given sufficient attention, enable the resource owners at district and local levels the opportunity to participate meaningfully in economic growth. Through sports new tourist destinations are being opened up which will require necessary legislative and administrative support.

Tourism related activities have significantly increased which therefore calls for a legislative review. In addition, the authority mandated to regulate and monitor these activities lacks adequate administrative support. One of the proposed legislative changes is to create regional offices of the TPA throughout the country. In order for these regional offices to function

19 Section 2, *Tourism Promotion Authority Act* 1993.

20 Department of National Planning and Monitoring, *PNG Medium Term Development Plan 2016-2017* (Port Moresby: 2015) 76.

effectively, they require support from the sub-national level, particularly from political leaders at the provincial and local-level governments. The powers and functions of the sub-national governments are clearly provided for under Sections 42 and 44 of the OLPGLLG. Section 42 sets out a list of activities that provincial governments can legislate - included on that list is 'tourism'.

The OLPGLLG has given the law-making powers to the provincial governments to enact laws on tourism. In addition, Section 44 of the OLPGLLG also provides another list of activities that a local-level government can make laws on. Included on this list is a provision for 'local tourist facilities and services'. For these activities to be implemented effectively, provincial and local-level governments must urgently enact their respective tourism laws. Once the legislative environment is established, the delegated regulatory and monitory aspects of these facilities and services can be policed by the relevant local agencies with the support of the respective regional offices.

Mega events such as the PNG Games and other seasonal domestic sport competitions, national championships and local and regional sports have a huge potential for the host particularly in terms of infrastructure and revenue (generated through the number of visitors into and from within the host province). Whilst facilities and services are being constructed to provide avenues to accommodate such events, issues such as law and order, health and safety standards must not be compromised. Instead, the regulator must set certain minimum standard for the service providers who must be rewarded when this standard is met.

Conclusion

There are few events that can unite the country. Sporting events such as the recent 15th Pacific Games and PNG Games are examples of this unique opportunity. Developing a strategy by using sports events to promote tourism is fundamental to the industry's development. The Government's tourism policy has highlighted tourism industry as a key economic sector of focus for economic development. If this is so, can major sporting events such as the PNG Games and other international sporting events be included as a secondary product under the tourism sector? Being one of the key economic sectors, tourism needs the support of industry players and relevant key stakeholders and partners to strengthen its current internal structures and systems within its established regulatory and legislative frameworks. Tourism through mega-sporting events if strengthened and developed to a level that meets certain minimum standard recognized both internationally and domestically, will achieve the goals of the country contained in the Vision 2050, PNG Development Strategic Plan 2010-2030 and the Medium-Term Development Plan.

Promoting tourism through sports has the potential for growth through seasonal domestic sport competitions, national championships and local and regional sports. The increase in the number of tourist or visitor arrivals both locally, nationally and internationally in attending major sporting events will have a huge positive impact on the host financially and socially.

Making Access to Health Care a Basic Right under the Papua New Guinea Constitution

Nichodemus Mosoro[*]

Introduction

Papua New Guineans continue to die from treatable illnesses and experience recurring medical conditions as a result of limited or lack of basic health care facilities or medicines. Malaria, tuberculosis, pneumonia, typhoid and inadequate prenatal care continue to add to premature deaths and mortality rates.[1]

Better health care however remains a high priority for government. A number of policies and laws have been put in place by successive governments with the aim of improving health care.[2] These include the National Goals and Directive Principles (NGDP) under the *Constitution*, legislation and numerous development plans such as the National Strategic Plan 2010-50 (Vision 2050), the National Health Plan 2021-2030, the Sustainable Development Goals and the Medium-Term Development Plans.

Although a priority, the achievement of these health care ambitions depend on funding, resources and adequate health care professionals. The health sector must therefore continue to compete with other basic services or socio-economic priorities for funding and other resources. Essentially, funding is provided to health care, but it is the governance and management aspect that need attention.

Whilst the country's development needs and socio-economic challenges must be addressed, basic health care remains inadequate. This will continue if mismanagement, malpractice and corruption remain prevalent. Whilst a certain percentage of health care services are provided by Churches, non-government organizations, the private sector and development partners, government must not be complacent as the primary health care provider.

Efforts in the health sector aimed at improving health care service delivery and access include the enactment of the *Provincial Health Authorities Act* 2007 (PHA Act). This new paradigm in the 'age of the market state'[3] provides a facility into which health care and its management can be liberalised and provided through public-private partnerships in a bid to better standards and accessibility. However, this approach cannot succeed without repercussions to the health care needs of society where profitability and corporate sustenance considerations

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1 Whilst specific data is needed to verify the main causes of death there are number of reports from mainstream media and external sources that indicate weaknesses in the health care system. See for example https://www.postcourier.com.pg/mother-dies-result-no-proper-health-care-remote-village/ (accessed 12/01/24).

2 See also the Millennium Development Goals at https://www.un.org/millenniumgoals/

3 Faunce, Thomas. *Who owns our health?: medical professionalism, law and leadership beyond the age of the market state* (Sydney, University of New South Wales Press Ltd, 2007) 174. Faunce describes the 'age of the market state… to refer to a period of state promotion of global privatization that is half physically realised or imminent and half ideologically immanent in health care policy and institutions.'

prevail. Although not immediately apparent, this is likely to affect the delivery of health care services unless health care is accorded adequate protection.

The NGDP are redundant in offering protection and providing an impetus under which government can ameliorate its health care efforts towards the people. In that generally, the NGDP are 'non-justiciable'. Therefore, entrenching 'access to health care' as a fundamental right under the *Constitution* will not only oblige the government to duly address health care needs, but also require the government to 'justify' its position when health care needs are not met. This provision will serve as a prelude under which accountability and justice may be served through the intervention of the judiciary or alternate dispute resolution mechanisms.

In discussing this constitutional and human rights paradigm, the paper will highlight the existing means of giving effect to the NGDP pertaining to health care with a view to establishing its ineffectiveness. Thus, focusing on the essence of categorizing health care as a 'basic right' and giving it appropriate 'content' for purposes of implementation. The question of resource constraint and enforceability will also be considered with reference to the *South African Constitution*, which provides an example of how these countervailing issues may be correlated to health care in PNG.

The NGDP and Protecting Health Care Access

The NGDP, particularly Directive 1(4) regarding 'integral human development', calls for:

> … improvement in the level of nutrition and the standard of public health to enable [Papua New Guineans] to attain self-fulfillment.

Although this directive may attract criticism from both health and constitutional jurists as lacking in content,[4] Schedule 1.5 of the *Constitution* provides that 'all provisions of, and all words, expressions and propositions in, a Constitutional Law shall be given their fair and liberal meaning.' It is suggested that Directive 1(4) is taken to include the various facets of the right to health which includes 'curative and preventive services provided to the individual …as well as population-based services such as immunizations.'[5] Although the directive is non-justiciable[6], it has to be observed by 'all persons and bodies, corporate and unincorporate' when dealing with the health of Papua New Guineans. This is a conventional process that has sufficed in providing *guidance* especially to the government in formulating health policies, reforms and delivering health care services.

The NGDP cannot be enforced *proprio vigore* (by its own force) but can be given effect to in accordance with Section 25(3) of the *Constitution.* This provision provides that:

> Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced,

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4 Kristen Hessler and Allen Buchanan, 'Specifying the Content of the Human Right to Health Care' in Rosamon Rhodes, Margaret P. Battin and Anita Silvers (eds), *Medicine and Social Justice, Essays on the Distribution of Health Care* (Melbourne: Oxford University Press, 2002) 84 at 86.

5 Ibid.

6 See Section 25(1) and Schedule 1.7 of the *Constitution* regarding 'non-justiciable' which states that: Where a Constitutional Law declares a question to be non-justiciable, the question may not be heard or determined by any court or tribunal, but nothing in this section limits the jurisdiction of the Ombudsman Commission or of any other tribunal established for the purposes of Division III.2 (*leadership code*). See generally Kwa, E., *Constitutional Law of Papua New Guinea* (Sydney: Law Book Co, 2001).

> without failing to give effect to the intention of the Parliament or to this *Constitution*, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.

The application of this constitutional provision was considered by the Supreme Court in *Supreme Court Reference No 2 of 1992*.[7] Kidu, CJ, stated that the NGDP can be given effect to under Section 25(3) provided that their application is not contrary to the intention of Parliament or the *Constitution*. His honour then referred to NGDP 5 regarding 'Papua New Guinean ways' and how it was given effect to under the *Customs Recognition Act.*[8] That is, 'custom' as an integral part of 'Papua New Guinean ways' can be considered in determining penalties in criminal cases, which give effect to NGDP 5.

Dr. Narokobi observed that a careful interpretation of Sections 25 and 63 of the *Constitution* may support the implementation of the NGDP.[9] He submits that the liberal interpretation of Sections 25 and 63 strongly suggests that the NGDP can be implemented indirectly and that bodies established by the *Constitution* have a duty to facilitate their implementation. The view expressed by the learned scholar and now Judge demonstrates that the enforceability of the NGDP is not limited to the courts, but also through other administrative or alternative dispute resolution methods where the attainment of justice is imperative. This view is encouraging, as essentially this paper hopes to explore some of the means by which the NGDP are enforced specifically to address health care.

Narokobi's research concludes that there is no case law that 'reconciles the non-justiciable and justiciable aspects of the NGDP and Basic Social Obligations'.[10] Therefore, the issue of the NGDP being non-justiciable continues to be a point of contention. A case on point that held that the NGDP are non-justiciable despite the existence of Sections 25 and 63 of the *Constitution* is *Medaing v Ramu Nico Management (MCC) Ltd*.[11] Although Narokobi offers an alternate view to the interpretation of Sections 25 and 63 of the *Constitution* that favours the implementation of the NGDP, judicial pronouncements such as the Medaing case perpetuates the judicial view that the law must be explicit if basic services such as health care are to be made enforceable.

In the health context, Directive 1(4) is given effect through the enactment of the PHA Act,[12] which gives further content to health care by explaining the obligations of the PHA Act under Section 11. Section 11 is set out in full below:

> 11. Purpose of Provincial Health Authorities.
>
> Subject to the provisions of a provincial health partnership agreement, the purpose of a provincial health authority shall be to-
>
> (*a*) provide relief to sick and injured persons through the provision of care and treatment; and
>
> (*b*) promote, protect and maintain the health of the community; and
>
> (*c*) make the provincial health authority accountable to the local community; and

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7 [1992] PNGLR 336.

8 Chapter 19 of the Revised Laws of PNG.

9 Vergil Narokobi "The Implementation of Papua New Guinea's National Goals and Directive Principles and Basic Social Obligations' (PhD Thesis, Victoria University of Wellington, 2016). See also Kari, SS., *Decolonisation and the Birth of Papua New Guinea's Constitution 1959-1975* (Goroka: NGDP Consultancy Services, 2009).

10 Id at 33.

11 (2011) SC114.

12 See Section 3 of the PHA Act and Section 38 of the *Constitution*.

(*d*) encourage the local community to participate in planning and in the decision-making process in relation to the provincial health authority; and
(*e*) deliver public health services appropriate and acceptable to the local community; and
(*f*) deliver curative services from the premises of a provincial hospital or provincial health authority or other place as the case may be which are appropriate and acceptable to the local community.

This provision inadvertently serves to indicate the grounds under which a citizen may enforce the right to access health care against a PHA as a separate legal entity. This approach is more transparent than allowing the NGDP to exist on its own as a directive. In that, it provides a means under which the people can be involved in the process of decision making that affects them. This also offers a sense of security should a province so choose to establish a PHA.[13]

However, for present purposes, the protection that needs to be ascertained is that which is 'independent' from the control of government. This is particularly important given that an Act of Parliament will continue to be susceptible to 'parliamentary supremacy' which can be changed by a 'simple majority of votes' to suit contemporary political interests, or a 'provincial health partnership agreement' that favours market ethics rather than virtue ethics. This can result in 'sporadic' health care considerations and the prevalence of the dire health care situation.

Entrenching the right to access health care

The PHA is a separate legal entity which 'is capable of doing and suffering all acts and things which bodies corporate may by law do or suffer'. It has the mandate to contract, raise funds and outsource health care functions to which it is responsible.[14] This indicates an evolution in the health sector for better delivery of health care services through potentially exposing the management and provision of health care to corporate participation. This may be a means by which the standard of health services is improved both in quality and accessibility. However, the need for the PHA to sustain itself and the 'profit-focused' concern of such ventures remains unaffected, which may disorientate the social ambitions of the government in addressing the people's basic needs as 'patients' as opposed to being 'consumers'.

Although the PHA Act clearly defines the types of health care which a citizen may expect to receive, there is no guarantee that those services will be distributed equally throughout the provinces. Under this new paradigm, the PHA are to be jointly funded by the national government and the provincial government. In resource rich provinces, benefits from mining royalties or other commercial projects are most likely to boost the ability of their PHA to provide better services compared to those that do not have the same opportunity.[15]

It is uncertain whether the national government will honor its commitment to fund PHA. The national government must honor its commitment by ensuring that the 'margin of appreciation' in health care service delivery is both proportionate and equal throughout the country. It is suggested that this approach can be best achieved through a centralised legal mechanism that is not dependent on differing provincial socio-economic situations, but is premised on distributive justice according to the national interest.

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13 Section 7 of the PHA Act indicates that establishing a provincial health authority is optional.
14 Section 13, PHA Act.
15 Section 98 of the *Organic Law on Provincial Governments and Local-level Governments* provides for the sharing of benefits from the development of natural resources within the jurisdiction of provinces.

For instance, a PHA may capitalize on budgetary shortfalls by introducing exorbitant fees for medical treatment. In other cases, health care may continue to be provided at a substandard level and not necessarily satisfy philanthropic health care needs where outsourced medical services are focused on economic interests.[16] This was the case in *Fly River Provincial Government and Pioneer Health Services Limited*.[17] The Fly River people were abandoned by Pioneer Health Services Ltd when the national government refused to assist the Fly River Provincial Government with additional funding to pay for the services rendered under a contract. The national government argued, however unsuccessfully, that the contract was void because the provincial government had not conformed to specific financial procedures and that the national government was not obliged to compensate for the services provided.

Enforceability may now be an option under the PHA Act should such a situation occur. However, for the ordinary villager, subsistence farmer or average Papua New Guinean, enforceability remains impracticable. As observed by Brunton and Colquhoun-Kerr, the appreciation of justice at least for the average Papua New Guinean is not 'according to colonial law, or justice according to the values of the legal system, but rather real or substantive justice, the justice of social and economic equality.'[18] This will remain ambitious unless better protection is accorded to the citizen to correlate with the government's efforts to improve health care service delivery in the 'age of the market state'. Health law jurists suggest that the best means of achieving this is through constitutional protection. For example, Faunce suggests that:

> A human right to health, based on either a domestic constitution or international human rights law, will be an important means by which health professionals in the age beyond the market state may be able to calibrate (that is, evaluate for coherence with foundational professional virtues and principles) health policy and legislation. The human right to health will be generally regarded as imposing duties on a market state to protect, respect and fulfill economic, social and cultural (rather than civil and political) obligations towards its citizens.[19]

Hence, an appropriate constitutional provision will serve independently to 'wrest global and domestic health care policy development from the profit-focused concern of that alliance of government and globalised industry.'[20] This would not restrict efforts in involving corporate players for the better, but will introduce a safeguard to the people who are guaranteed fulfillment of health care obligations by the government.[21] As will be seen, had health care been a fundamental right, the national government's response to the assistance request by the provincial government in the *Fly River case* could have been less political and more humanitarian.

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16 David Blumenthal and William Hsiao "Privatization and its Discontents-The Evolving Chinese Health Care System" (2005) 11 *The New England Journal of Medicine* 1165 at 1166.

17 (2000) SC705.

18 Brian Brunton and Duncan Colquhoun-Kerr, *The Annotated Constitution of Papua New Guinea* (Port Moresby, University of Papua New Guinea Press, 1984) 310.

19 Faunce, above, n3, 175. Faunce also describes 'health professional' to include policy makers and health lawyers.

20 Thomas A Faunce, 'Health and Human Rights' (2008) 13(2). *Australian Journal of Human Rights* 233 at 236.

21 George M S Muroa, 'The Extent of Constitutional Protection of Land Rights in Papua New Guinea' (1998) 4 *Melanesian Law Journal* 5 (http: www.paclii.org/journals/MLJ/1998/4.html/.) Muroa discussed the level of protection accorded to customary landownership under Section 59 of the *Constitution* which provided adequate safeguard against abuse and inconsiderate decisions by government.

Health Care as a Basic Right and its Contents

In order for health care to receive the same respect domestically as other 'basic rights' enshrined under Division 3 of the *Constitution,* it has to be *determined* as a 'basic right' and inducted into the *Constitution*. This may appear redundant to health professionals in PNG as well as the many citizens who unconsciously label health care as a basic right. Although this argument may emanate from the purported application of international human rights law, it has to be noted that international law does not have any *opinio juris* application to PNG unless it is ratified constitutionally or adopted through domestic legislation. It would be a misrepresentation of the *Constitution* and importantly to society to continuously assert that the right to health care is a 'basic right' as to date it remains a 'social directive' to government.

Henry Shue provides a useful analysis in determining whether health care can be inducted into the category of 'basic rights'. He states that:

> [T]he substance of a basic right can have its status only because, and so only if, its enjoyment is a constituent part of the enjoyment of every other right, as…enjoying not being assaulted is a component part of the enjoyment of anything else, such as assembling for a meeting.[22]

It can be suggested that 'health care' in PNG is a basic right in order to appreciate other goals and guarantees provided under the *Constitution*. These include NGDP No 1 (Integral Human Development), NGDP No 2 (Equality and Participation), NGDP No 5 (Papua New Guinea Ways), the 'Basic Rights' and the 'Basic Social Obligations in the Preamble and the 'Basic Rights' under Division 3. To reiterate, a citizen cannot enjoy the basic right to freedom, movement, or life, if health care is not also a fundamental right.[23]

However, 'the thesis that health care is necessary to securing people's abilities to enjoy other human rights does not eliminate the need to specify further the content of the human right to health care.'[24] Most jurisdictions have drawn the contents of their constitutional provision dealing with health care from Article 25 of the *Universal Declaration of Human Rights* (UNHR) It states:

> Everyone has the right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, *sickness* (emphasis added), disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[25]

An example of the entrenchment of this right is in the South African *Constitution*, particularly Section 27 which provides as follows:[26]

> 27. Health care, food, water and social security –
> (1) Everyone has the right to have access to-
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

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22 Note 4, above, at p90.
23 See *United States v. Carolene Products Company*, 304 U.S. 144 (1938) for a comparison.
24 See, n22, supra at p91.
25 Adopted by the United Nations General Assembly on 10 December 1948.
26 *Constitution of the Republic of South Africa Act*, (No. 108 of 1996).

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.

By contrast, the complexity associated with PNG's social and cultural structure, varying from province to province, makes it impracticable to devise an appropriate constitutional provision that can be effectively implemented. For the most part, Article 25 of the UNHR remains 'aspirational'[27] and this can be realised by making a comparison with the South African *Constitution.* For example, 'sufficient food and water' under Section 27(1)(b) cannot be replicated by PNG given the different acceptable social standards of living. A villager in rural PNG may consider as 'sufficient' accessing water from a river or borehole compared to a person in Port Moresby who considers 'sufficient'; affordable and uninterrupted water supply from a tap. As for Section 27(1)(c) 'social security' in PNG is premised on the extended family ties, clans and cultural groups that continue to exist in contemporary PNG.

This goes against arguments advocating for an *opinio juris* application of the UNHR as part of customary international law. As stated by Brigit Toebes:

> Irrespective of their available resources, States have to provide access to maternal and child health care, including family planning; immunization against the major infectious diseases; appropriate treatment of common diseases and injuries; essential drugs; and adequate supply of safe water and basic sanitation. In addition, they are to assure freedom from serious environmental health threats. [28]

The conclusion by Toebes did not address the cultural variances that exist in different countries that have an impact on the universal application of the human right to health care.[29] As Kinney observed:

> Such legalistic visions of the right to health may also not be appropriate or effective as there is still some uncertainty about the content of the international human right to health. Indeed, getting a handle on the content of the right to health is a necessary first step to effective implementation. But this is no easy task. To have meaning, the content of the right to health must be essentially the same for all nations and people. Yet implementation is dependent on the resources, as well as cultures, of individual countries. How do we articulate the right to health in countries with vastly different economic resources and cultural traditions?[30]

The content of the right to access health care is a practical issue that can be appropriately determined by the Constitutional and Law Reform Commission of Papua New Guinea. But as a theoretical suggestion, a general provision such as section 27(a) (health care services) together with Section 27(2) of South Africa may be considered. There is also the avenue to have the courts determine the scope of application of these provisions in accordance with Sections 18, 19 and Schedule 1.5 of the *Constitution*.

A similar provision to Section 27(3) of the South African *Constitution* may not only be directed to emergency medical treatment at a health care facility but also extend to the outbreak of infectious diseases in PNG. This contention follows from the many disease

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27 Dieter Giesen, 'A right to health care? A comparative perspective' in Andrew Grubb and Maxwell J. Mehlman (eds), *Justice and Health Care: Comparative Perspectives* (New York: Wiley, 1995) 287 at 289.
28 See, supra at 92.
29 Id at 93.
30 Kinney Eleanor D, 'International Human Rights to Health: What does this mean for our nation and the world?' (2001) 34 *Indiana Law Review,* 1457 at 1467.

outbreaks including the 'cholera outbreak' in the Morobe Province in 2009.[31] The term 'emergency' is defined under Section 226 of the *Constitution* as including '…outbreak of pestilence or infectious disease, or any other natural calamity whether similar to any such occurrence or not on such an extensive scale as to be likely to endanger the public safety or to deprive the community or any substantial proportion of the community of supplies or services essential to life.' There was much resentment against the government's intervention in addressing the cholera outbreak which claimed many lives in 2009.[32] A provision that provides for emergency medical treatment may have the government react quickly in providing the essential health services, or even better, develop strategies in advance to address disease outbreaks.

HIV/AIDS is also an epidemic in PNG where lack of 'human rights' protection has also led to discrimination and stigmatization of infected persons resulting in lack of treatment and early deaths. It has also been reported that lack of '…[anti]-discriminatory measures and failure to observe human rights fuel the epidemic, rather than containing and decreasing it.'[33] As a result of the Papua New Guinea National HIV/AIDS Medium Term Plan 1998-2002, the *HIV/AIDS Management and Prevention Act* 2003 was enacted to protect infected persons against discriminatory practices so they can voluntarily access treatment and counseling.

However, according to Stewart there is more that can be done to enhance the human rights protection already provided.[34] Stewart's analysis of existing constitutional provisions pertaining to 'equality of citizens' and the 'right to life' and 'right to privacy' can coincide with the present proposal of a 'basic right' to access health care. As mentioned above, the contents of the relevant provision may be determined to include the protection of persons suffering from HIV/AIDS and access to treatment. Such persons can have that right enforced if they are denied treatment.

Resource Constraints and Enforceability of the Right to Health Care

There are other social obligations besides health care which continue to influence political judgment with regard to resource distribution to the health sector. This situation may render enforceability of the right to access health care impractical where a particular health care service could not be provided given budgetary constraints. This has been realised in other jurisdictions that has led the courts to reserve judgment with deference to the authority charged with making budgetary appropriations in government run health care systems. For instance, in *R v Cambridge Health Authority; ex parte B,* it was contended that:

> Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage to the maximum number of patients. That is not a judgment, which the court can make.[35]

Similarly, in *R v Central Birmingham Health Authority; ex parte Collier*, it was held that 'it is not for this court, or any court, to substitute its own judgment for the judgment of those

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31 Editorial, 'Govt Response disappointing', The National, 07 September 2009 at http://www.TheNational.com.pg

32 Ibid.

33 National AIDS Council of Papua New Guinea, 'Review of Policy and Legislative Reform relating to HIV/AIDS in Papua New Guinea' (2001) 26.

34 Christine Stewart, 'Towards a Climate of Tolerance and Respect: Legislating for HIV/AIDS and Human Rights in Papua New Guinea' (2004) 8 *Journal of South Pacific Law* 2.

35 [1995] 2 All ER 129 at 137.

who are responsible for the allocation of resources… The courts of this country cannot arrange the [waiting] lists in the hospital…[36] These cases are indicative of the general judicial practice under administrative law where matters that involve 'polycentric'[37] considerations pertaining to governance are usually 'non-justiciable'. This is so given the institutional capacity of the courts to determine these issues in light of prevailing socio-economic implications and the doctrine of separation of powers.[38] So in effect, although the right to access health care may be an enforceable obligation under the *Constitution*, the question of determining resource allocation that is fundamental in implementing that obligation may remain 'non-justiciable'. This may cause mismanagement and human rights abuse in terms of health care to prevail through the non-intervention of the judiciary.

Nonetheless, the *Soobramoney v Minister of Health (Kwazlu-Natal)*[39] case illustrates how government as primary health care provider can still account for its decision in refusing treatment based on resource constraints. That case concerned the interpretation and application of Section 27(1) and (2) of the South African *Constitution*. Section 27(2) serves as a correlation under which management of available[40] resources is taken into account when the State is discharging its obligation to deliver health care services, let alone, the nature of the provision itself provided room under which the court was able to take into consideration the hospital 'guidelines' pertaining to the management of available dialysis machines to determine whether Section 27(2) was satisfied. It was held that the guideline followed by the hospital was a discharge of the State's obligation to deliver health care services 'within its available resources'. The 'margin of appreciation' was demonstrated through the use of the guideline which was consistent with available funding, nursing staff and viability of treatment per patient. There was no way the State could increase funding to address the needs of the appellant or any other person with a similar condition without affecting treatment to patients who could be cured and other obligations to which the State had.

It is important to observe that having a similar provision to that of South Africa allows the courts to consider 'guidelines' or other policy references on available resources in determining whether the human right to health care has been given due consideration in light of the 'margin of appreciation'. Or as put by Sir Thomas Bingham MR, '[t]he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.'[41] This balancing formula is indicated under Section 39(1) of the *Constitution* which states:

> The question, whether a law or act is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind, is to be determined in the light of the circumstances obtaining at the time when the decision on the question is made.

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36 Eng. C.A. Jan 6, 1988; See also Dieter, above n27 at 289.

37 See Peter Cane and Leighton McDonald, *Principles of Administrative Law, Legal Regulations of Governance* (Melbourne: Oxford University Press, 2008) 84.

38 See section 109 of the *Constitution*. See also Bhalla, R.S, *Administrative Law of Papua New Guinea* (Port Moresby: PNG Publishers, 2001) 37 and Kwa, E, Bhalla, S, Muroa, G, Linge, G, Tennent, D and Yapao, G (ed)., *The Development of Administrative Law in Papua New Guinea* (New Delhi: UBSPD, 2000).

39 *Soobramoney v Minister of Health CCT* 32/97 27 November 1997, available at http://www.law.wits.ac.za/judgements/soobram.html.

40 'Availability' means that the state party has sufficient facilities and services for the population given the country's state of development: General Comment 14, United Nations, Committee on Economic, Social and Cultural Rights, U.N.

41 See the discussion in Richard H.S.Tur, 'Resources and Rights: Court Decisions in the United Kingdom' in Rosamond Rhodes, Margaret P. Battin and Anita Silvers (eds.), *Medicine and Social Justice, Essays on the Distribution of Health Care* (Oxford: Oxford University Press, 2002) 157 at 166.

Hence, in determining whether the government's denial of health care is 'reasonably justifiable…', the courts can be assisted by the practices mentioned above. This is allowed under Section 39(3) of the *Constitution* where the courts can consider international human rights law and particularly, laws, practices, judicial decisions and opinions in other countries.

Enforceability

Including access to health care as a basic right under Division 3 will immediately bring it under the ambit of Section 57 of the *Constitution*. This provision provides that:

> 57. Enforcement of guaranteed rights and freedoms.
>
> (1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.
>
> (2) For the purposes of this section-
>
> (a) the Law Officers of Papua New Guinea; and
>
> (b) any other persons prescribed for the purpose by an Act of Parliament; and
>
> (c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question,
>
> have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.

This constitutional provision allows for the courts to act *motu proprio* (on its own initiative)[42] in ensuring that the human right to health care is fulfilled. This provision provides an avenue under which this right can be protected not only at the volition of those affected but also by others who have an interest in the fulfillment of the right to health care toward society and fellow citizens who are disadvantaged. This addresses the situation where most people, who are affected, are unable to have recourse to legal proceedings given the procedures involved and the legal costs. Hence, when the court discovers that this right has been violated, it can award compensation under Section 58 of the *Constitution*.

As observed above, health care as a basic right can be enforced through the Law Officers of PNG who are, the Attorney-General, the Public Prosecutor and the Public Solicitor, through relator actions or special references.

Conclusion

The introduction of *access to health care* as a 'basic right' under the *Constitution* will act as a 'shield'[43] by which the citizen is protected against 'unjustified' acts or omissions by the government that affect health care service delivery. It will also stand to protect the individual as well as the health care system against corporate influence that is imminent given the latest health reforms indicating the 'age of the market state' in the health sector.

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42 See for example *University of Papua New Guinea v More & Ors* [1985] PNGLR 48.

43 Tur, n41, supra at 166.

However, a contentious issue is whether a constitutional provision will in fact make a difference in the prevalent health care situation. As Brunton observed:

> Papua New Guinea's social and political development is of such complexity that altering the substantive constitutional law is unlikely to be an effective remedy. Indeed, changing the text of constitutional laws can be seen as deflecting attention away from issues of effective management and implementation. Changes in content do not necessarily produce results. Freedom comes only with hard work. This does not mean that changes must cease; rather it is the quality of change that is important.[44]

It is acknowledged that incorporating access to health care as a basic right provides 'a level of protection, but not a guarantee of invincibility.'[45] However, unlike other constitutional changes, introducing access to health care as a basic right provides an entrenched obligation for government to exercise virtuous judgment in the 'face of obstacles'[46], which is *resource availability*. Given the 'level of protection' accorded to health care under the *Constitution*, the government will be obliged to account for its actions in cases where health care needs have not been met. This was demonstrated in the *Soobromoney case*. In the PNG context, arguably it will be socially acceptable if the government could not purchase dialysis machines if there is also a need to build classrooms in a village to educate children. However, 'resource availability' cannot perpetuate as a pretext under which deaths from lack of basic treatment for diseases such as malaria or lack of prenatal care and immunization continues to be recurring contributors to the mortality rates.

Thus, '[h]aving a right requires a higher level of justification from government and its agencies…'[47] which in turn will ensure that proper management decisions are made for the benefit of Papua New Guineans. If not, then that right can be *easily enforced* like other human rights incorporated under the *Constitution* where compensation can be awarded to the affected individual or group, or that authorities are compelled to undertake certain health care responsibilities.

If the provision of health care remains 'non-justiciable', the likelihood of complacency, mismanagement and corruption prevailing and circumventing efforts at improving health standards will remain. Therefore, it is strongly recommended that with deference to other legislative efforts to address this situation, the independence and supremacy of the *Constitution* makes it an ideal vehicle to entrench the citizen's right to access health care in contemporary PNG.

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44 Brunton, n18 supra at 305.
45 Tur, id, n41.
46 Faunce, above n3 at 215.
47 Tur, id, n43, supra. Where he further states that 'the more important or fundamental the right, the greater the need for justification…'

CASE NOTES

The Power of the Parole Board: In the Matter of an Application for Enforcement of Human Rights; Dr. Theo Yasause v Commissioner of Correctional Service, The State and The Parole Board (2021)

Dr. Eric Kwa[*]

Introduction

The Parole Board is established under the *Parole Act* 1991 (the Act).[1] The preamble of the Act spells out the main purpose of the Statute, which is as follows: "Being an Act to provide for a system of parole which will contribute to the maintenance of a just, peaceful and safe society by facilitating the reintegration of offenders into the community as law-abiding people; and for related purposes." The facilitation of the reintegration of offenders into the community is to be undertaken by the Parole Board.

Prior to 2018, the Parole Board comprised of the Secretary for Justice or his nominee, the Commissioner of Correctional Services or his or her nominee and a person appointed by the Minister.[2] In 2018, the Board comprised:

1. The Secretary for the Department of Justice and Attorney General (or his or her nominee)[3],
2. The Commissioner for Correctional Services (or his or her nominee); and
3. A medical doctor recommended by the Secretary for the Department of Health.[4]

In 2019, Dr Eric Kwa (Chairman), Commissioner Stephen Pokanis (Member), and Dr. Monica Agali (Member) were appointed by the Minister for Justice and Attorney General as members of the ninth Parole Board. The first Board was appointed in 1992 after the enactment of the *Parole Act* in 1991. The first Board comprised Mr Nicholas Kirriwom (Chairman), Mr Kepas Paon (Member), and Mr Stephen Pirina (Member).

The functions of the Board are set out in Section 7 of the Act:

> 7. Functions of the Board.
> (1) The functions of the Board are, in accordance with the provisions of this Act–
> (*a*) to consider the cases of detainees who are eligible for parole in accordance with Section 17, and applications for parole under Section 22; and

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[*] Attorney General of Papua New Guinea and Secretary for Justice. Dr. Kwa is also, currently, the Chairman of the Parole Board of Papua New Guinea, which was a Defendant in the case, *In the Matter of an Application for Enforcement of Human Rights; Dr. Theo Yasause v Commissioner of Correctional Service, The State and The Parole Board* (2021) N9380.

1 No.16 of 1992.

2 Section 3 of the *Parole Act*.

3 See *Elly v Commissioner of the Correctional Service* (2018) N7629, in relation to the Chairman of the Board.

4 No.13 of 2018.

(*b*) to grant orders for the release of detainees on parole where appropriate; and
(*c*) such other functions as are specified or required under this Act or any other law.

(2) In the performance of its functions, the Board shall apply the following criteria: –
(*a*) the protection of the public is the paramount consideration;
(*b*) the detainee's release will cause no undue risk that he will reoffend before his sentence expires; and
(*c*) the detainee's release will contribute to the welfare and protection of the community by helping or furthering his reintegration into the community as a law-abiding person.

In the case of *In the Matter of an Application for Enforcement of Human Rights; Dr. Theo Yasause v Commissioner of Correctional Service, The State and The Parole Board*[5] the National Court was tasked to determine the exercise of the functions of the Board under Section 7 of the Act. The court was asked to explain when a prisoner was eligible to apply for parole under this provision. This paper examines the powers of the Parole Board and the decision of the National Court in the above case relating to the exercise of that power by the Board.

The Powers and Functions of the Parole Board

The Parole Board has the power under the *Parole Act* to do all things that are necessary or convenient for the performance of its functions. In the exercise of its functions, "the members of the Board have all the powers, authorities, protections and immunities conferred on a Commissioner under the *Commissions of Inquiry Act* 1951."[6] The functions of the Board are stipulated by Section 7 of the Act. Generally, the Board's primary role is to determine the cases of prisoners who are eligible for parole. In determining an application, the Board is directed under law to consider three important factors. They are:

1. The protection of the public is the paramount considerations
2. The detainee's release will cause no undue risk that he will reoffend before his sentence expires
3. The detainee's release will contribute to the welfare and protection of the community by helping or furthering his reintegration into the community as a law-abiding person.

When these three conditions are satisfied, the Board usually releases the prisoner. When one or more of these factors are unsatisfactory, the application is refused. When an application is refused, the detainee may reapply for parole after 12 months as prescribed under Section 22 of the Act. The Board has resolved that a prisoner can be allowed to apply for a third and final time if his second application is rejected by the Board. The functions of the Parole Board under this provision have been clarified in, *In the matter of Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea.*[7]

Type of Prisoners Eligible for Parole

There are three categories of prisoners who are eligible for parole under Section 17 of the Act.[8] These are: (1) prisoners who have been sentenced to a term of imprisonment of less than three years; (2) prisoners who have been sentenced to a term of imprisonment for more

5 (2021), N9380.
6 Section 8, *Parole Act*.
7 *In the matter of Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea* (2008), N3421.
8 Section 17, *Parole Act*.

than three years; and (3) prisoners who have been sentenced to life imprisonment and who have served more than 10 years in prison. This is simplified in the table below.

Categories of Prisoners Eligible for Parole prior to 2019 Amendment

1	Serving three years	Serve less than 12 months
2	Serving more than three years	Serve one third of sentence
3	Life sentence	Serve more than 10 years

The prisoners in the first category are eligible for parole if they have served less than one year in prison. In general, the prisoners under this category hardly apply for parole because of the short length of their incarceration. For the second category of prisoners, they must have served not less than one third of their sentence. In relation to the third category, the prisoners must have served more than 10 years of their sentence to be eligible for parole.

The amendment to the *Parole Act* in 2018, has however impacted eligibility in two ways. First, a person who is sentenced to life imprisonment will no longer be eligible for parole. And second, eligibility for all other prisoners (excluding those on death row) has now been determined at half the sentence. This means a prisoner must serve half of his or her prison sentence, before he or she is eligible for parole.

Case of Theo Yasause

The prisoner, Dr. Theo Yasause, was serving a sentence of 30 years for murder. The prisoner was a former Director General of the Clim[ate Change Office, who shot and killed the deceased with a pistol.[9] The prisoner was found guilty of murder under Section 300 of the *Criminal Code* on 28th September 2012 and sentenced on 29th November 2012 to prison for 30 years.

While in prison, Dr. Yasause had made several trips to the National and Supreme Courts seeking a number of orders, including appeal against his conviction and sentence[10], bail[11] and human rights abuse.[12] In all these cases, Dr. Yasause failed to obtain a positive result for himself.

In 2020, Dr. Yasause applied for parole, claiming that he was eligible for parole. The Parole Board (which I chaired) met on 4th October 2021 and calculated his eligibility under Section 17 and found that he was short by six months and therefore ineligible for parole application. The Board calculated Yasause's eligibility using the table below.

Period of Imprisonment	**Sentence**	**Starting date**
Length of sentence	30 years	From 02/2011
Length of period deducted (pre-sentence)	1 year 10 months (22 months	
Length of sentence suspended	Nil	
Length of sentence to be served (after deduction)	28 years two months	From 29/11/2012

9 See *State v Yasause* (2012), N4871.
10 *Theo Yasause v The State* (SCRA No 30 of 2013) (09.06.16, unreported).
11 *Yasause v Independent State of Papua New Guinea* (2014), SC1381.
12 *Yasause v Keko* (2017) N6853; *Yasause v Independent State of Papua New Guinea* (2017), N6857.

The Parole Board usually calculates the eligibility date for parole from the date of sentence to the end of the date for imprisonment; which means, the Board considered that from 29 November 2012, Dr. Yasause would serve 28 years, two months. Thus, his one third of the sentence, according to Section 17 of the Act, would be about nine years, three months. Consequently, the Board established that Dr. Yasause was short by nine months, meaning that his eligibility date would be February 2022.

When the decision of the Board was communicated to Dr. Yasause, he was not happy with this outcome. Instead of seeking a judicial review of the decision of the Board, he initiated a Human Rights proceeding in the National Court.

In his application for human rights enforcement, Dr. Yasause claimed that the Board had miscalculated his period of eligibility under the Act. Justice Cannings, sitting as the judge of the human rights track of the National Court, reviewed Dr. Yasause's application and agreed with him.

According to Cannings J, the Board should calculate the eligibility date from the head sentence (30 years) and not the reduced sentence (28 years, two months).[13] Based on this new calculation by the court, the Parole Board was ordered to meet and consider the application by Dr. Yasause on the grounds that he was already eligible for parole.

Implications of the Yasause Decision

The decision by Cannings J has wide ranging implications on the prisoners who are currently waiting to have their parole applications determined by the Parole Board. When calculating eligibility, the Parole Board applies the traditional method which is understood by the prisoners. However, with this decision, more prisoners will come forward to the Parole Board claiming that they are already eligible because of this new determination.

This decision affects the Correctional Services as well because they also use the Parole Board's calculations for eligibility to determine whether a prisoner is eligible to be released on remission under the *Correctional Services Act* 1995. Sections 117 and 120 of the *Correctional Services Act* provides the framework for the remission of prison sentence by the Commissioner of Correctional Services. These two provisions empower the Commissioner of Correctional Services to release a prisoner on remission if he or she behaves well and is thoroughly rehabilitated by the prison system. Section 120(1) of the *Correctional Services Act* empowers the Commissioner to grant a detainee remission equal to one third of the sentence. Thus, if a prisoner is sentenced to, say 10 years, and he or she is assessed by the Correctional officers, as a well behaved and reformed person, on recommendation, the Commissioner can deduct about three years from the total of 10 years. The question now would be, should the remission be calculated from the head or the reduced sentence?

Resolving the Eligibility Issue

In light of the decision by Cannings J, the Commissioner Stephen Pokanis has instructed the lawyers from the Solicitor General's Office to mount a challenge to this and other similar decisions in the Supreme Court. Hopefully the Supreme Court will clarify this issue quickly so that it will give clarity to the work of the Parole Board and the Correctional Service.

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13 See *In re Application of Enforcement of Human Rights, by Samalan Peter* (2014), N5631.

Judicial Review versus Human Rights

An important issue for resolution by the courts is the issue of whether a prisoner should seek judicial review of the decision of the Parole Board or seek the enforcement of his or her human rights. It is suggested that a prisoner is entitled to seek the enforcement of his or her human rights in the National Court where he or she is denied certain entitlements as a prisoner. This may include access to nutritious food[14]; medical treatment[15] adequate accommodation; visitation; and being informed of the decision of the Parole Board.[16]

However, it is my firm view that a prisoner is not entitled to seek the enforcement of his or her human rights where the Parole Board had taken a decision on his or her application for parole. The option available to a prisoner is to seek a judicial review of the decision of the Parole Board because the Board undertakes an administrative decision as a tribunal. As pointed out by Cannings J in the case of, *In the matter of Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea*:[17]

> There is a tribunal in place – the Parole Board – established by an Act of the Parliament – Parole Act 1991 – with statutory procedures and criteria to follow, which is required to do, in a careful, rigorous and fair way.

In the last couple of years, it has come to the notice of the Supreme Court that the National Court has abused its inherent power under Section 57 of the *Constitution* to make sparing decisions relating to human rights applications by prisoners. In *Independent State of Papua New Guinea v Siune*, the Supreme Court was critical of the propensity of the National Court to issue orders claiming breaches of human rights without proper regard to the facts and evidence. The Supreme Court held a similar view in *Independent State of Papua New Guinea v Tamate*.[18]

It is evident that after the tribunal – Parole Board, has made a decision; the prisoner must seek a judicial review of the decision under Order 16 of the *National Court Rules* in the National Court. An application for the enforcement of a human right cannot proceed if the prisoner has not exhausted the judicial review process under the *National Court Rules* and the *National Court Act*.

Conclusion

The powers and functions of the Parole Board - as a tribunal, set out under the *Parole Act*, are simple and easy to understand. The *Theo Yasause case*, reviewed here, however, raises three fundamental legal issues. These are: (1) eligibility period; (2) remission of sentence; and (3) challenging the decision of the Parole Board. These issues must be addressed either by the

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14 *Alabain v Commissioner of the Correctional Service* (2020) N8576 and *Liliura v Commissioner of the Correctional Service* (2019), N7917.

15 *Mal v Commander, Beon Correctional Institution* (2017) N6710. In contrast read *Independent State of Papua New Guinea v Siune* (2021), SC2070.

16 *In re Application for Enforcement of Human Rights under Section 57 of the Constitution, by Jacob Eddie* (2014), N5735.

17 *In the matter of Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea* (2008), N3421.

18 *Independent State of Papua New Guinea v Tamate* (2021), SC2132.

higher court or the Parliament. Hopefully the issue of eligibility will be resolved by the Supreme Court soon. The other two issues may have to be resolved by legislative reforms.

Non-justiciability of Parliament Procedures: Application Pursuant to Constitution, Section 18(1); Application by the Honourable Belden Namah MP (2021) SC2114

Dr Eric Kwa[*]

Introduction

The question of whether the courts can invoke their powers under Sections 155 and 158 of the *Constitution* to scrutnise the workings of Parliament was brought to the fore once again in SC2114 in 2021. In previous cases such as *Haiveta v Wingti (No3)*[1], *SCR No.3 of 1999; Re Calling of Parliament*[2], *SCR No.3 of 2000; Reference by the Head of State on the Advice of the National Executive Council*[3], *SCR No.1 of 2010, Re Organic Law on the Integrity of Political Parties and Candidates*[4], *Polye v Zurenuoc*[5] (Polye Case) and *Application by Peter O'Neill MP*[6], the Supreme Court had sparingly argued that it can examine the proceedings of Parliament and rectify the mistakes of Parliament. However, in SC2114, the Supreme Court took a different view – that the proceedings of Parliament are non-justiciable, particularly in relation to the manner in which the Parliament conducts itself when dealing with a Vote-of-no Confidence (VONC) under Section 142 of the *Constitution*.

How does the decision in SC2114 affect future VONC? Also, to what extent does the above Supreme Court decision relate to the appointment of a Prime Minister, say after a National Election, the death or resignation of an incumbent Prime Minister? The answers to these and other issues will be briefly explored in this paper.

Vote of No Confidence (VONC)

The questions that arose in SC2114 and the *Polye Case* revolve around the VONC. The VONC is based on a principle of parliamentary democracy – responsible government, where the legislature can hold the executive accountable for its actions. It is a mechanism prescribed by the *Constitution* to hold the government accountable. This trigger can be utilized by Members of Parliament (MP) to remove an unpopular and bad government.

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[*] Attorney General and Secretary for the Department of Justice and Attorney General.

1 [1994] PNGLR 197.
2 [1999] PNGLR 285.
3 (2002) SC722.
4 [2010] PNGLR 319.
5 (2016) SC2039.
6 (2020) SC2043.

When framing the *Constitution*, the Constitutional Planning Committee (CPC)[7] considered the election, composition and removal of the executive arm of government in great detail in Chapter 7 of its Final Report.[8] The CPC observed that:

> One of the major principles in our recommendations for the National Executive Council is that it should be responsible to the National Parliament. Basically, this means that Ministers are individually and collectively answerable to members of the parliament for their executive actions and policies, including the work of their departments. Ultimately, however, it means that Parliament must be able to change the government.

The CPC suggested that, the following conditions must be satisfied before a VONC can be moved against a Prime Minister. These are:

1. A motion must be moved by one-tenth of the MPs;
2. The motion must be moved one week before the vote;
3. The motion must be approved by an absolute majority of votes;
4. The motion must name the nominee for the post of the Prime Minister; and
5. The motion must not be moved in the first six months (now 18 months) after the election of a Prime Minister.

The CPC provided four justifications for its proposal on the VONC. It said:

- Firstly, it reduces the element of uncertainty that might follow the fall of a government; one Prime Minister automatically gives way to another.
- Secondly, it ensures that the Speaker does not exercise any discretion as to who should be appointed to succeed the outgoing Prime Minister.
- Thirdly, the Parliament has a real choice; members know who will become Prime Minister if the motion is successful.
- Fourthly, it should ensure that a motion of no confidence is moved in all seriousness.

The gist of the CPC proposals is found in Sections 141, 142 and 145 of the *Constitution*.[9] Section 141 talks about the collective responsibility of the national executive. Section 142 provides the procedure for removing a Prime Minister. The actual provision which provides for a VONC is Section 145, which is as follows:

> **Section 145 Motions of No Confidence**
> (1) For the purposes of Sections 142 (the Prime Minister) and 144 (other Ministers), a motion of no confidence is a motion—
> (a) that is expressed to be a motion of no confidence in the Prime Minister, the Ministry or a Minister, as the case may be; and
> (b) of which not less than one week's notice, signed by a number of members of the Parliament being not less than one-tenth of the total number of seats in the Parliament, has been given in accordance with the Standing Orders of the Parliament.
> (2) A motion of no confidence in the Prime Minister or the Ministry—
> (a) moved during the first four years of the life of Parliament shall not be allowed unless it nominates the next Prime Minister; and
> (b) moved within 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election shall not be allowed if it nominates the next Prime Minister.

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7 See Kwa, EL., *Constitutional Law of Papua New Guinea* (Sydney: Law Book Co, 2001) 5. Also see Kari, S.S., *Decolonisation and the Birth of Papua New Guinea's Constitution 1959-1975 with Five National Goals and Directive Principles* (Goroka: NGDP Consultancy and Publishing Services, 2009) and Kwa, EL and Wolfers, T., *The Constitution of Papua New Guinea with Commentary* (Port Moresby: 110 Ltd, 2021).

8 Constitutional Planning Committee., *Constitutional Planning Committee Final Report 1974* (Port Moresby: Government Printer, 1974).

9 See Henry Ivarature, "The hidden dimension to political instability: Insights from ministerial durations in Papua New Guinea from 1972 to 2017" (2022) 9/2 *Asia and the Pacific Policy Studies*, ANU (https://doi.org/10.1002/app5.352 or onlinelibrary.wiley.com, accessed 18/9/22).

(3) A motion of no confidence in the Prime Minister or the Ministry moved in accordance with Subsection (2)(a) may not be amended in respect of the name of the person nominated as the next Prime Minister except by substituting the name of some other person.
(4) A motion of no confidence in the Prime Minister or in the Ministry may not be moved during the period of eighteen months commencing on the date of the appointment of the Prime Minister.

The VONC mechanism was put under scrutiny by the Supreme Court in *Namah v O'Neill* (2015) SC1617. In this case, the Supreme Court was requested to determine whether an amendment to Section 145 to extend the grace period for a VONC from 18 months to 30 months was constitutional. The Supreme Court, after examining the history, purpose and principles of the VONC, ruled that the amendments were unconstitutional. A VONC can be moved within the first 18 months after the election of a Prime Minister. A VONC cannot however be moved 12 months prior to a general election.

Since Independence in 1975, there have been three successful VONC.[10] These were:

1. Election of Julius Chan on 11 March 1980 (removed Michael Somare as Prime Minister);
2. Election of Paias Wingti on 21 November 1985 (removed Michael Somare as Prime Minister); and
3. Election of Rabbie Namaliu on 4 July 1988 (removed Paias Wingti as Prime Minister).

Apart from these successful VONC, there were three other changes in government when the incumbent Prime Ministers resigned to avoid a VONC. These were:

1. Election of Julius Chan on 30 August 1994 after the resignation of Paias Wingti as Prime Minister;
2. Election of Mekere Morauta on 14 July 1999 after the resignation of Bill Skate as Prime Minister; and
3. Election of James Marape on 31 May 2019 after the resignation of Peter O'Neill as Prime Minister

In the year since the first VONC, incumbent Prime Ministers, fearing this procedure, have attempted innovative strategies to avoid the VONC. Examples include:

- Attempt by Paias Wingti to resign and get re-elected in the same sitting of Parliament which was declared unconstitutional by the Supreme Court[11];
- The long adjournment of Parliament by seven months to avoid a VONC by Bill Skate which was again declared unconstitutional by the Supreme Court[12];
- Amendment to Section 142 of the *Constitution* extending the grace period for a VONC from 18 months to 30 months (Peter O'Neill) which was declared by the Supreme Court as unconstitutional[13]; and
- Adjourning Parliament into the safe period (12 months prior to a National General Election) to avoid a VONC (Peter O'Neill) which was declared unconstitutional.[14]

The VONC procedure in the *Constitution* has played a critical role in the political history of PNG since 1975. The proceedings in the *Polye Case* and SC2114 are again examples of our political leaders vying for power through the VONC procedure.

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10 Standish, B, "The Dynamics of Papua New Guinea's Democracy: An Essay" (https://www.aph.gov.au, accessed 18/9/22).
11 *Haiveta v Wingti (No 3)* [1994] PNGLR 197.
12 *SCR No 3 of 1999; Reference by Ombudsman Commission* [1999] PNGLR 285.
13 *Namah v O'Neill* (2015) SC1617.
14 Polye Case, supra.

Facts of the Case (SC2114)

The facts in this case can be summarized as follows. The Parliament was ordered by the Supreme Court on 9th December 2020, to meet on Monday 14 December 2020, after it had adjourned from 13 November 2020 to 20th April 2021. The events of this case followed on the heels of the events that went before the Supreme Court in *Application by Hon Peter O'Neill MP* (SC2043).[15] To understand the facts of SC2114, one has to unpack the events in SC2043.

In SC2043, the Parliament had adjourned half way through its sitting (which began on 11th November) on 13th November 2020 to 1st of December 2020. This adjournment occurred after the Opposition successfully wrested power from the Government in Parliament. Relying on its new fortune, the Opposition used its numerical strength to adjourn Parliament to 1st December 2020. This meeting was presided by the Deputy Speaker of Parliament, Hon. Koni Iguan, the Member for Markham Open.

The Speaker of Parliament, Hon. Job Pomat, Member for Manus Open (who was absent at that time), disagreed with the decision of the Deputy Speaker and Parliament and said that the November Parliament session beginning on 11th November would continue on 16th November 2020. When the Parliament met on 17th November 2020, the Government had restored its numbers and was able to pass the 2021 National Budget and adjourn to 20th April 2021.

On 18th November, 2020, Hon. Peter O'Neill, who was the Member for Ialibu-Pangia Open, challenged the decision of Speaker Pomat and Parliament for the meeting on 17th November and adjournment to 20 April 2021. The Supreme Court agreed with Hon. Peter O'Neill, declaring that Speaker Pomat acted unconstitutionally and that the Parliament proceedings on 17th November were invalid. It therefore ordered the Parliament to reconvene on 14th December 2020.

Returning to the present case (SC2114), the Parliament did meet on 14th December 2020. It then adjourned to 16th December 2020, when it was able to change the membership of a number of Parliamentary Committees including the Private Business Committee. The Parliament also passed the 2021 Budget and adjourned to 20 April 2021.

When the Parliament met on Monday 14th December 2020, the Leader of the Opposition, Hon Belden Namah, presented a notice of a VONC to the Speaker, who is the Chairman of the Private Business Committee. On Wednesday, 16th December 2020, when the Parliament met, it passed the 2021 National Budget, completed its other businesses and rose at 11.35am to 20th April 2021.

Hon. Belden Namah, unhappy with the outcome of the Parliament proceeding, challenged the decision of Parliament to adjourn to 20th April 2021, without debating his notice of VONC, against the Prime Minister, Hon. James Marape.

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15 Ibid.

Key Questions before the Supreme Court

There were four questions that were originally presented to the Supreme Court for determination by Hon. Namah. However, during trial, one of the questions was withdrawn. The Supreme Court was therefore left to answer the following three questions:

1. Was there a breach of Sections 11, 111, 115, 142 and 145 of the *Constitution*, when the Parliament made an unreasonable decision to adjourn Parliament for an unsubstantiated reason, and which prevented the notice of motion of no confidence from being moved on the 16th December 2020, and deprived members of their right to move the motion of no confidence?
2. Did the Speaker breach Sections 111 and 115 of the *Constitution*, by depriving Members of Parliament of their right to move the motion of no confidence, and to debate and vote on the motion of no confidence with complete freedom?
3. Did the Speaker breach Section 115 of the *Constitution*, by depriving Parliament of its conduct of the motion of no confidence by failing to take steps to clear the notice of motion of no confidence in time for Parliament to consider it on the 16th December 2020?

The Supreme Court ruled that there was no breach of the *Constitution* by the Parliament and the Speaker when the Parliament was adjourned to April 2021.

Distinguishing the Polye Case

Hon Namah's arguments centered on the findings and principles in the Polye Case.[16] Basically, Mr. Namah argued that the actions of the Speaker and Government was contrary to the principles set down in the *Polye Case*.

The Supreme Court found in the *Polye Case* that every time a motion for a VONC was submitted to the Private Business Committee by the Opposition, it would consider the motion and exercise its powers to reject the motion. This practice persisted from 2014 to July 2016 (four times). When the Opposition made a final and last-ditch attempt to oust the Government in June 2016, the Parliament adjourned to August 2016 (*into the safe period*), protecting the Government from a VONC.

The Supreme Court observed the history of the VONC by the Parliament and concluded that there was a deliberate attempt by the Government to usurp the constitutional process to remain in power. The Supreme Court ruled that a motion of VONC "is not parochial in nature but one of national importance because of its ability to change government if it is successfully moved." It added that:

> Granted the five (5) technical requirements are met on the face of the Notice, it should be cleared by the Committee without difficulty, in little time in order for it to be tabled in Parliament by the Clerk without delay. Standing Order 22(4) and 130(4) correctly envisages a notice of motion of no confidence will take utmost priority over any other private members' business and be tabled in Parliament as the first item on Private Members Business Day.[17]

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16 Supra, n4, above.
17 Polye Case, supra, paragraph 42.

The five technical rules for a motion for a VONC that were established by the Supreme Court are; the Notice of Motion:

1. Is expressed to be a motion of no confidence in a named Prime Minister: *Constitution*, s145 (1)(a);
2. Must state the name of the alternate Prime Minister: *Constitution*, s145 (2)(a);
3. Must name the person and contain the signature of the person moving the motion: *Standing Order* 130(2);
4. Must name person and contain the signature of the person seconding the motion: *Standing Order* 130(2); and
5. Must name the persons and contain the signatures of not less than one – tenth of the Members of Parliament that support the motion: *Constitution*, s145 (1)(b).

When these five technical rules are satisfied, the Private Business Committee had no power to prevent the presentation of the motion of VONC to the Parliament. The Supreme Court held that where the Private Business Committee, had in its possession a valid motion of VONC, the Parliament must deal with this agenda as a priority in the next sitting day of Parliament.

The Supreme Court established that although the Notice of Motion lodged on 7th June 2016 was not of a parochial nature and did meet all the five technical rules, it was useless because Parliament had adjourned to the safe month of August. It therefore ruled that the adjournment was unconstitutional and invalid. The Supreme Court ordered the Parliament to meet within five days to deal with the motion of VONC. The Parliament did convene in July and the government defeated the VONC in the Prime Minister, Hon. Peter O'Neill.

The facts in SC2114 can be easily distinguished from the Polye Case. These include:

1. Although the Notice for VONC was delivered on Tuesday, the Private Business Committee could not deal with it because the Parliament had arisen at 11.30am on Wednesday to 20 April 2021. However, the safe period for the Marape Government began in July 2021. Thus, the VONC was still alive (so to speak)
2. The issue of whether the motion of VONC met the five technical rules could not be ascertained because the Private Business Committee had not yet dealt with the motion.
3. This was the first and only motion of VONC in the Marape Government, which was still within the purview of the Private Business Committee.
4. The Opposition still had the opportunity to lodge a new motion of VONC if it so wished because the safe period for the Government was after July 2021.

The Supreme Court agreed with our arguments[18] and ruled that the Speaker and the Parliament had not violated the *Constitution* when it adjourned the Parliament to 20th April 2021.

Some Considerations

The Supreme Court in SC2114 seems to have finally realized that it needed to steer clear of the politics of Parliament, particularly in relation to VONC. There are two considerations that, in my view, influenced the Supreme Court to take this new direction. They are: (1) separation of powers; and (2) non-justiciability of Parliamentary proceedings.

[18] As the Attorney General, I was the First Intervener in this Supreme Court case.

The Supreme Court had correctly held in *Mopio v Speaker of Parliament* [1977] PNGLR 420, that the proceedings of Parliament are non-justiciable. This decision was also based on the principle of separation of powers. However, after the Mopio case and recently (2020) in *Application by Hon. Peter O'Neill MP* (SC2043), the Supreme Court had not hesitated to exercise its constitutional powers under Sections 155 and 158 of the *Constitution* to reach beyond the principles of separation of powers and non-justiciability to fetter with the operations of the other two arms of government. This is exemplified in the Poyle Case; *SCR No3 of 1999; Reference by the Ombudsman Commission; SCR No1 of 2010; Re Organic Law on the Integrity of Political Parties and Candidates; Application by Hon Peter O'Neill MP; and Namah v O'Neill*.

In SC2114, the Supreme Court has finally reverted to its original position in the Mopio case. The leading judgment by the Chief Justice, Sir Gibbs Salika, reaffirms the Mopio decision. His honor was very explicit when he said at paragraph 40 and 41:

> I was a member of the Court in the Polye v Zurenuoc case. … With respect, I do not think we addressed s115 and s134 of the *Constitution* well in that decision. Having now given more thought to s115 and s134, I have come to the conclusion that by virtue of s115 and s134 of the *Constitution*, the procedures prescribed for Parliament or its committees are non-justiciable.

The Chief Justice is saying that the proceedings of Parliament and its committees are non-justiciable and therefore, the judiciary should not intrude into Parliamentary proceedings. The other four judges (Cannings J, Hartshorn J, Kariko J and Anis J) agreed with the proposition by the Chief Justice.

This is a major paradigm shift for the judiciary. This in my view, is the correct position. Based on the principle of separation of powers, the judiciary must refrain from overreaching its jurisdiction. Parliamentary proceedings must remain non-justiciable and not be subjected to the inadvertent adventures of the judiciary as exemplified in the abovementioned cases.

Conclusion

A motion for a VONC is a very serious constitutional matter as it involves the removal of a government. It is not parochial in nature. However, for it to proceed to Parliament, it must meet the five technical rules laid down by the Supreme Court in the *Polye Case*. When these five conditions are met, the Parliament must proceed to deliberate and vote on the motion of VONC.

Now that the rules for a VONC have been clarified by the Supreme Court, should it intervene in future cases of VONC? The full bench in SC2114 has ruled that the Supreme Court must not speedily rush to intervene in Parliamentary proceedings because they are non-justiciable. This is as I suggested is the correct position in law and must be maintained. However, how long this rule will last is anyone's guess.

POLICY PAPERS

Ceremonial Sitting in Honour of the late Honourable Justice Nicholas Kirriwom, CMG
21 April 2021, Waigani Supreme Court

(Speech Delivered by the Attorney General, Dr Eric Kwa, PhD)

Opening Address

May it please the Court, his Honour, the Chief Justice, Deputy Chief Justice, Judges, Chief Magistrate, Deputy Chief Magistrate, Magistrates, distinguished guests, members of the legal fraternity, family and friends of the late Honourable Justice Nicholas Kirriwom. It is a privilege to rise on behalf of the State Legal Services of Papua New Guinea and the law and justice sector of Papua New Guinea to pay tribute to the service and life of the late Justice Nicholas Kirriwom.

Address to the Court

His honour, has created a legacy that is quite admirable. A very senior member of the judiciary with vast legal experience that spans 43 years since his admission as a lawyer in 1978. The PNG legal fraternity and the judiciary have lost a wealth of experience that can only be built over a career span as that of the late judge.

His honour commenced his career as a legal officer of the Public Solicitor's Office from 1978 to 1986. Within a period of three years, he was promoted to Principal Legal Officer and Deputy Public Solicitor and immediately after, as Public Solicitor of Papua New Guinea. His career progression demonstrates his honour's ability to adopt quickly and his sharp legal skills that were required to perform such a prominent role in the law and justice sector. His honour also had experience in the private sector after his term as Public Solicitor.

From 1988 to 1992, he was the Principal of Kirriwom and Co. Lawyers. Earlier from 1987 to 1988, he was Managing Partner of Narokobi Mosoro Enda Lawyers and from 1986 to 1987 he was lawyer with Narokobi & Co Lawyers. Within a period of 10 years, his honour sailed through his career becoming Public Solicitor of Papua New Guinea, Managing Partner for a private firm to running his own law firm as principal.

This is no easy feat within such a short timeframe. Only a visionary with determination and passion could achieve such a colourful career. He was then appointed on 6th May 1997 as a judge and since then has diligently served in this capacity till his death while serving as Senior Resident Judge in Wewak and Judge Administrator of East Sepik, West Sepik and Manus Provinces.

His honour still had a desire to continue his academic aspirations. Despite him reaching the pinnacle of any lawyer's dream by becoming a judge of the National and Supreme Courts, he

pursued postgraduate studies. In 2018, he attained his Master of Laws in Dispute Resolution at the Bond University, Australia during which, he was awarded the Academic Excellence Award for attaining High Distinction (First in Class) in Common Law and Legal Skills.

This demonstrates his honour's ability to keep adapting to the changing circumstances and needs of society and pushing limits. It is truly an admirable trait and a great example. His Honour also had a heart for community issues and gave time from his busy schedule to a number of social platforms such as the Surfing Association of PNG and the Tupira Surf Club which he is the founder and patron of. Through his contribution to such platforms, he was able to bring the community together and assist the community to be engaged in productive activities. His honour initiated ongoing community development and improvement programs in health, education, economic and social sectors at the community level. In recognition for his contributions, he was knighted as Companion of the Most Distinguished Order of Saint Michael and Saint George (CMG) to the legal profession and judiciary.

As the clan chief of the Aringasua Clan from Meiwok Village, Bogia District in Madang Province, His honour was able to lead by example and truly reached the heights of his career that only comes with passion and dedication to the service of the people. So much can be learnt from the life of this stalwart of a man who is a great role model for the legal fraternity in PNG. His role in the public service came at a time when PNG was just birthed as a new nation. Being a young lawyer in the public service, his contribution in the law and justice sector cannot go unnoticed as he, amongst those in the early years of nation building that set the foundations of which we now stand upon.

His life as a senior judge also sets a great example. A judge that was able to still adapt to current situations and circumstances. His contribution to the expansion of PNG jurisprudence is also acknowledged. In paying this tribute, I also want to acknowledge the people in the life of his honour that enabled him to excel in his career and life goals. I honour his parents, his dear wife, Mrs. Kirriwom and his dear children and grandchildren and his people of the Aringasua Clan. With your undivided support and love, your son, husband, father, grandfather and chief gave his best and contributed immensely in service to the people of Papua New Guinea.

May God bless you all and give you the peace that only He can give.

Final Remarks

In closing, I would like to leave this challenge with those of us in the legal fraternity to aspire to build legacies as that of the late Justice Kirriwom.

We have recently lost late Justice Sagu and others who were still serving in the National Judiciary. This has created a huge void that needs to be filled. This void needs to be filled with men and women whose work ethic, professional life, community life and personal life emulate those of leaders such as the late Justice Kirriwom.

May late Honourable Justice Nicholas Kirriwom's soul rest in eternal peace until the golden day when we all meet.

Thank you.

Attorney General and Minister for Justice's Second Reading Speech to Parliament on the National Pandemic Bill 2020 and the Curfew (Amendment) Bill 2020

Mr. Speaker and Members of this honourable House, I stood before you two months ago and presented the Emergency Laws for enactment by this Parliament to support the ongoing implementation of PNG's COVID-19 Response. We have, over the last two months, in addressing the COVID-19 pandemic, learnt and gained experience in coordinating our national response with respect to this global pandemic. With the experiences gained, we are hopeful in preparing ourselves to better manage and coordinate PNG's COVID-19 response beyond the National Emergency, and any future responses to similar public health emergencies, to mitigate the adverse effects borne by the people of Papua New Guinea.

Mr. Speaker, today I stand again before this House, to present to Parliament, the *National Pandemic Bill* 2020 and the *Curfew (Amendment) Bill* 2020. The *National Pandemic Bill* and the *Curfew (Amendment) Bill* were promulgated in anticipation of a decision by Parliament on the extension of the State of Emergency (SOE). As you will appreciate, the COVID-19 pandemic still threatens public health and safety throughout the world. While PNG has been lucky enough to have only eight confirmed cases, this does not place us in the clear. Currently, our National Response during COVID-19 is based upon a legislative framework under the *Emergency (General Provisions) (COVID-19) Act* 2020 (Emergency Act). However, should the Members of this House decide to terminate the SOE, we, as responsible leaders, need to put in place a legal framework to support the ongoing response to COVID-19, or a similar public health emergency, should one occur. Hence, the need for the appropriate framework to support the Government's efforts to respond to the threat of COVID-19.

Mr. Speaker, the *National Pandemic Bill* also takes into account future public health emergencies of a similar scale as COVID-19. Our existing laws such as the *Quarantine Act* 1953 and the *Public Health Act* 1973 provide some basis for imposing special measures to support our National Response. However, these laws are antiquated and provide no comprehensive legal framework to support the ongoing response by the National Government. Further, there is a lack of coordination in the administrative mechanism which has the potential to interrupt the ongoing National Response or any future national responses.

Mr. Speaker, the proposed legislation was created for the purpose of responding to a Public Health Emergency, such as the COVID-19 global pandemic and to enable the delivery of a national response to this health emergency. It is intended to replicate certain provisions of the present Emergency Laws such as a central command body having an operational structure and the imposition of measures during the national response under lawful directions.

This Act will only be activated when a Declaration is made by the Head of State. The Declaration is made by the Head of State, acting on the advice, where a public health emergency exists. The Public Health Emergency comes to an end when it is revoked by the Head of State, acting on the advice of the National Executive Council, indicating the end of the Public Health Emergency. The period from which the Declaration is made to when the Declaration is revoked is referred to as the Declared Period.

Mr. Speaker, it must be noted for avoidance of doubt, that this Act is not an Emergency Law for the purposes of Part X of the *Constitution.*

Mr. Speaker, the salient features of the proposed law which are articulated in the appended Explanatory Notes are as follows:

- The title accurately reflects the policy intention behind having a dedicated legislation. Tying the purpose of the Bill to public health emergencies (within the definition by the World Health Organization) draws an important nexus to the severity of the public health threat and its potential to do harm on an international scale, as well as the threat to public health domestically.
- The purposes of the proposed law are listed from the outset: that is, to provide for a framework for a National Response to a Public Health Emergency. The preliminary provisions set out its scope and key definitions, and provides for a trigger (a Declaration made by the Head of State) which will activate the provisions of the proposed law.
- A national response to a declared Public Health Emergency is administered through a structure which mirrors the National Operations Centre set up for COVID-19. It establishes the office of the Controller (who is supported by a Deputy Controller) that runs a National Control Centre, set up to coordinate the national response. The requirements for the Controller are set out in detail. Part II sets out the command, administrative, and reporting structures and enables expert engagement as and when needed. The establishment of a Technical Advisory Council provides a framework necessary to support the notion of a coordinated whole-of-government approach.
- The proposed legislation provides for stakeholder engagement, and vests the coordination of such engagement in the Controller. It sets out accountability provisions pertinent to the engagement of government, the PNG Defence Force, international partners, the private sector, and non-governmental organizations.
- Parts IV and V provide a basis for the measures and enforcement powers necessary for the COVID-19 response, which are inherent features of any public health emergency response. These measures relate to public health and quarantine, and expressly apply to the proposed legislation over the provisions of the *Quarantine Act* and the *Public Health Act* to allow the Controller to impose measures relevant to the specific public health emergency. The *Quarantine Act* and *Public Health Act* will only apply where the proposed law does not make express provisions on a subject matter and insofar as they are not inconsistent with the proposed legislation.
- Enforcement powers relating to search, seizure, imposition of spot fines, and the issuance of directions are expressly provided for.
- The exercise of enforcement powers and imposition of measures are made subject to the purposes of the Act, the principle of proportionality, and the recognition of human rights principles.
- The proposed law sets out the relevant offences and their corresponding penalties. The offences are created specifically for the implementation of the proposed law, and operate together with other relevant laws, including the *Criminal Code Act* 1974. The penalties are hefty to provide a deterrent effect, and are court-imposed through the litigation process.
- The proposed legislation provides the necessary framework to allow for a mechanism for finance and procurement, to the exclusion of the *National Procurement Act* 2018 and the *Public Finances (Management) Act* 1995 for the duration of a declared period. The proposed law seeks to achieve a balance between ensuring that the process remains efficient, while preserving the necessary checks and balances to uphold the integrity of this process.
- The final provisions of the Bill contain transitional provisions relating to the present COVID-19 framework. Amongst other things, they provide for overall accountability through final report requirements; it saves actions for the duration of the declared period of a Public Health Emergency; and provides a sunset clause.

Mr. Speaker, I have been alerted to some concerns raised by some of our leaders and the public about the proposed Bill. I would like to raise them here and provide answers to these concerns so we allay the fears of our people:

1. Is the proposed law in conflict with our *Constitution*?
   NO. ***Because this law is subject to the Constitution as stipulated by Section 1 of the Bill***
2. Does the proposed law breach Constitutional Rights?
   NO. ***Because Constitutional rights that are listed in this Bill, which are QUALIFIED RIGHTS, are permitted to be regulated by a law such as this Bill. Again Section 1 of the Bill is designed to comply with Section 38 of the Constitution.***
3. Does the proposed law target certain groups of the population such as Churches?
   NO. ***The proposed law is targeted at people who are (a) infected; (2) at risk of being infected; and (3) travelling into our country at our borders.***
4. Does the proposed law impose mandatory conditions for vaccination?
   NO. ***Only for those who are infected or quarantined and who require vaccination on the advice of doctors.***
5. Does the proposed law pave the way for the one world order?
   NO. ***The Bill is uniquely Papua New Guinean and is not copied from other parts of the world.***
6. The proposed law has been crafted by foreigners to promote their interests?
   NO. ***The Bill was developed by Papua New Guineans at the Office of the First Legislative Counsel (Department of Prime Minister & National Executive Council) and the Office of the State Solicitor (Department of Justice and Attorney General).***
7. The proposed law will apply throughout the country?
   YES. ***But the proposed law empowers the Controller to also either reduce or remove restrictions in various parts of the country depending on the spread of the pandemic in the country.***

Mr. Speaker, I would like to assure the Members of this honorable House and the people of Papua New Guinea that we have not formulated this Bill casually or lightly. Our legal team and medical experts have worked tirelessly in the last two weeks to develop this Bill. I am confident that we have covered sufficient field in the Bill. I am aware that some members of the public are not happy that they were not consulted on the Bill. Public consultation, however, is not possible in the context of the SOE.

Mr. Speaker, let me reiterate that, the National Pandemic Bill 2020 will only be operational in a Declared Period of Public Health Emergency. It will cease to apply when the Head of State Declares an end to the Public Health Emergency. It will therefore operate only for a short period of time. Where the situation worsens in the country, and the need for another State of Emergency (SOE) arises, the Parliament can be recalled to approve the SOE.

Mr. Speaker, I also bring to your attention the *Curfew (Amendment) Bill*, a consequential amendment as a result of this Bill. The *Curfew Act* must be amended to exclude the application of its provisions to the *National Pandemic Bill*.

Mr. Speaker, I encourage our honorable leaders in this House to support our Government to enact these laws so that we can continue to protect our people from this global pandemic, and

also enable the application of these laws in the future, if and when another health pandemic confronts us, as a nation.

Hon. Davis Steven, LLB, MP
Deputy Prime Minister & Minister for Justice & Attorney General

Second Reading Speech by the Minister for Justice on the Lawyers (Amendment) Bill 2020

Mr. Speaker and Members of this honourable House, it is with great pleasure that I present to Parliament the *Lawyers (Amendment) Bill* 2020. The Bill sets out the proposed amendments to the *Lawyers Act* 1986.

Mr. Speaker, the Act was last amended in 1997. The legal profession has since grown significantly. The number of registered lawyers has increased from 456 in 1999 to more than 1200 at present. There are more than 350 law firms currently operating in the country.

Mr. Speaker, the expansion of the legal profession gives rise to an increase in issues related to the profession. First is the promotional issue of the profession. Second are the issues related to the regulation of the profession.

Regulatory Issues of the Profession

Mr. Speaker, the regulatory issues of the legal profession include allegations of continuous breaches of lawyers' standards, abuse of the practising certificates and growing concerns in relation to lack of professionalism by lawyers.

First, the allegation of continuous breaches of lawyers' standards is due to lawyers engaging in illegal practices. For example, there are allegations of lawyers charging inflated legal bills. The general public has also raised concerns about the general conduct of lawyers.

Second, allegations of abuse of practising certificates occurs mostly in cases where lawyers who are issued restricted practicing certificates to practice under their employers, carry out work as holders of unrestricted practising certificates. Lawyers get involved in such practices to lure clients and mislead the courts. Due to such illegal practice, the judges usually ask lawyers to present their practising certificates prior to appearing before the courts.

Third, allegations of lack of professionalism displayed by lawyers are made as lawyers fail to provide duty of care to the courts and their clients. The first duty of the lawyers is to assist the court in the dispensation of justice. The courts continue to raise concerns about some lawyers coming to court unprepared thereby, unable to assist the courts.

These allegations are mainly raised by the clients. Further, the judiciary has been vocal in raising the concern on misconduct and professional negligence by lawyers. These allegations paint a bad image of the legal profession in the country.

Promotional issue of the profession

Mr. Speaker, in terms of promotional issues of the profession, lawyers are concerned about the lack of initiative by the Law Society to promote the legal profession in the country. This includes no or few lawyer's conferences, continuing legal education, lack of policies and mechanisms in place to encourage locally owned law firms in the country and lack of presence of the Law Society in the provinces.

The promotional issues of the legal profession can be addressed by utilising the existing legal framework. Sections 7 and 8 of the *Lawyers Act* provide for the Law Society to undertake educational and training programmes for lawyers.

Mr. Speaker, legal reform and effective implementation of the existing systems will address the issues. Hence this proposed Bill.

Issues that the proposed Bill will address

Mr. Speaker, the proposed Bill addresses four key areas. They are:

1. Adjustment to the penalty fees.
2. Correction of grammatical errors, amendment to ambiguous legislative sentence structures in the law and improves clarity of provisions which are generalised.
3. Improvement to admission requirements.
4. Improvement to requirements for issuance of practising certificates.

1) Adjustment to the penalty fees

Mr. Speaker, the penalty fees for offences under the law are very low compared to the penalty fees for similar offences in other countries. Further, the penalty fees are very low in comparison with the current market value of the currency, hence, such low penalty fees will not have a deterrent effect on the members of the Law Society and other prospective perpetrators.

2) Correction of grammatical errors, amendment to ambiguous legislative sentence structure in the law and improves clarity of provisions in the which are generalised

Mr. Speaker, the grammatical errors, ambiguous legislative sentence structures in the law and provisions affect the effective application of the *Lawyers Act*. The proposed amendment provides more clarity to ensure effective interpretation and application of the Act.

3) Improvement to admission requirements

Mr. Speaker, the main reason to improve the admission requirements is to ensure only qualified persons are admitted to the Bar to maintain the high standard of the legal profession. This pertains to not just academic qualifications but the attributes and standing of the persons.

4) Improvement to requirements for issuance of practising certificates

Mr. Speaker, one of the main reasons for the proposed amendment is to improve requirements for issuance of practising certificates to ensure individuals with domestic or foreign academic qualifications who intend to practice law in the country must meet the academic and practice qualifications as well as being a fit and proper person. This proposed amendment is aimed at addressing complaints about fake lawyers engaging in activities that only qualified lawyers should do. There are also unreported cases of individuals who are practising as lawyers in the country without being admitted to the Bar, signing the Roll of Lawyers and holding valid and current practising certificates.

Mr. Speaker, finally, I take this opportunity to thank the leadership and management team of the PNG Law Society, in particular Mr. Robert Mellor – Secretary of PNG Law Society and

the Department of Justice and Attorney General, in particular Dr. Eric Kwa – Secretary and Attorney General, and all the hard-working staff of both organisations, for their efforts in making possible this draft Bill.

Mr. Speaker, with that, I humbly submit the Lawyers (Amendment) Bill 2020 to this honourable House.

Hon. Bryan Kramer, MP
Minister of Justice

Second Reading Speech by the Minister for Justice on the Attorney General (Amendment) Bill 2022

Mr. Speaker and members of this honorable House, it is with great pleasure that I graciously take this opportunity accorded to me to introduce, in today's Parliament Sitting, the *Attorney General (Amendment) Bill* 2022.

Mr. Speaker, the Government, over the years, has experienced varying degrees of change in the way we conduct State functions, even at times, the very process we created and strive to protect, become our own worst enemies. Therefore, as a government, we must be proactive in bringing change whilst maintaining the status quo for the sake of achieving good public policy for this country.

Mr. Speaker, the *Attorney General (Amendment) Bill* that is being introduced for tabling in this honorable House, intends to amend the *Attorney General Act* 1989 (Principal Act). The Principal Act is quite unique in that it establishes three specialized state legal offices, namely, the Office of the Attorney General; the Office of the Solicitor General; and the Office of the State Solicitor.

Mr. Speaker, the amendments are minor yet essential for purposes of removing any ambiguity and clarifies the application of the law and related issues to the dispensation of duties of the three state legal offices to strengthen the delivery of quality and efficient legal services to the Government, its instrumentalities and the people of Papua New Guinea (PNG).

Mr. Speaker, a past court decision established the position in law, that the Solicitor General has to provide evidence of instructions from the Attorney General in all matters before the courts. In practice, this has made it impractical for the Solicitor General to provide evidence of receiving instructions from the Attorney General before appearing for the State in any proceedings. This position has been abused by claimants bringing **Section 5 Notice** under the *Claims By and Against the State Act* who have questioned the Solicitor General's competence to represent the State in the absence of written instructions from the Attorney General. This, inadvertently obligated the Solicitor General to disclose confidential and privileged information received from the Attorney General regarding instructions to appear for the State.

Mr. Speaker, as such, this legislative reform was initiated by my Office, as the current Minister for Justice, and supported by the Department of Justice and Attorney General to bring forth these necessary changes. The policy rationale for the amendments is to strengthen the government business processes legislated by the *Attorney General Act*, which prescribes the mandatory duties, functions and responsibilities of the Department of Justice and Attorney General, and reports directly to and supports my Office as the Minister for Justice.

Mr. Speaker, the *Attorney General (Amendment) Bill* is designed to:

1. Provide additional powers to strengthen the functions of the Attorney General;
2. Demarcate functions of the Solicitor General;
3. Align the appointment process for the Solicitor General and State Solicitor;
4. Increase outdated penalty provisions;
5. Impose new penalty provision; and
6. Ensure enforcement and compliance of this Bill for purposes of administering justice related matters.

Mr. Speaker, the draft Bill contains:

1. Amendments to the duties, functions and responsibilities of the Attorney General with additional powers to strengthen its existing functions;
2. Creation of four new provisions that establishes the Attorney General's Advisory Committee to deliberate on brief-outs, vetting of lawyer's bill and out of court settlements;
3. Creation of a new provision specifically dealing with reporting between the offices of the Attorney General, Solicitor General and State Solicitor for more coordinated approach on legal matters for and on behalf of the State;
4. Amendments to the establishment of the Office of the Solicitor General;
5. Amendments to the appointment of the Solicitor General to enable appointment through the Judicial and Legal Services Commission with the inclusion of increasing the term of appointment from three years to five years to be consistent with that of the State Solicitor;
6. Amendments to the functions of the Solicitor General;
7. Amendments to the functions of the State Solicitor with the inclusion of appointment to office to be made by the Judicial and Legal Services Commission to be consistent with that of the Solicitor General;
8. Creation of a new transitional provision to validate any actions undertaken between the time periods of the existing legislation and the coming into operation of this draft Bill; and
9. Amendment for increased penalty provisions in the law for a deterrent effect to ensure compliance by relevant person(s).

The amendments are consistent with the *Constitution* and other pieces of legislation as vetted and cleared by the Office of the State Solicitor and done in accordance with the ministerial portfolio of the Minister for Justice, and further supports the Marape–Basil Government's fight against corruption and reduce public expenditure by the State for brief-outs and legal bills.

The intentions of these amendments are clearly to strengthen good governance in the Office of the Attorney General, limit the exposure of the State to abuse of brief-out matters and payment of exorbitant legal bills, ultimately safeguarding the State against unauthorized out of court settlements.

Mr. Speaker, with that, I commend the *Attorney General (Amendment) Bill* to this honorable House.

Hon. Bryan Kramer, MP
Minister for Justice

Second Reading Speech by the Minister for Justice on the Proceeds of Crime Bill 2022

Mr. Speaker and members of this honourable House. It gives me great pleasure to introduce the *Proceeds of Crime Bill* 2022 (the Bill). The Bill is a consolidation of the *Proceeds of Crime Act* 2005 (Principal Act) and the *Proceeds of Crime (Amendment) Act* 2015 (Amendment Act).

Mr. Speaker, in 2005, the National Parliament passed the Principal Act which was certified on the 23rd of January 2006. After having been in operation for almost six years, there was a comprehensive review of the Principal Act done between the years 2013 and 2014. In addition to this, the Asia Pacific Group on Money Laundering and the World Bank conducted a review of Papua New Guinea's (PNG) anti-money laundering legislative regime and provided their findings in the Mutual Evaluation Report for PNG. Subsequently, based on the multiple reviews conducted in the preceding years, a further amendment was passed by the National Parliament in July 2015 that saw the enactment of the Amendment Act which was certified on the 20th January, 2016, and the notice published in the National Gazette dated 4th of February 2016 to effect commencement.

Mr. Speaker, the Amendment Act legislated for a broad range of provisions to the Principal Act, including:

1. Strengthening of provisions concerning cross-border movement of currency and other items of value;
2. Adding new powers to the confiscation regime;
3. Strengthening of existing provisions in the confiscation regime;
4. Repealing the Money Laundering Offences, which were repealed from the Principal Act and inserted into the *Criminal Code* by the *Criminal Code (Money Laundering and Terrorist Financing) (Amendment) Act* 2015; and
5. Repealing Part 2 – Measures to Combat Money Laundering, which included the establishment and functions of the Financial Intelligence Unit within the Royal PNG Constabulary. This has been repealed and replaced with the new Anti-Money Laundering and Counter Terrorist Financing (AMLCTF) regulation and supervision regime of the *Anti-Money Laundering and Counter Terrorist Financing Act* 2015.

During the course of preparing the Amendment Act for certification and commencement, the legislative drafters identified errors or irregularities that were made when the Amendment Act was drafted. The errors and irregularities that were identified primarily relate to the numbering, order of divisions and typographical errors.

Given the errors, and considering the importance of the legislation, it was advised that the Principal Act must be reviewed together with the Amendment Act with a view to repeal and replace with a new *Proceeds of Crime Bill*.

Mr. Speaker, currently, both the Principal Act and Amendment Act contain irregularities and structural defects, specifically, the numbering of sections and missing sections that require re-drafting of the law. This does not, in any way, affect the application of the substantive provisions, however, it remains disorderly.

Mr. Speaker, at this juncture, I put forth the two-underlying purpose of the Bill:

1. First, upon the Amendment Act coming into operation, there were irregularities contained in the Principal Act in terms of the structure, specifically relating to the numbering of the provisions. This has impacted the effective use of the law in its entirety; and
2. Second, the Principal Act was not consolidated to include the amended provisions, hence, creating more ambiguity in its application by the relevant authorities concerned.

Mr. Speaker, because of these reasons, my Department, in consultation with relevant stakeholders commenced legislative review to consolidate the Principal Act and the Amendment Act and correct the structural defects.

Mr. Speaker, by consolidating the Principal Act and the Amendment Act, by operation of the law, it will consequently affect the repealing of the two pieces of legislation in their entirety upon the coming into operation of the *Proceeds of Crime Bill*.

Key feature of the revised Proceeds of Crime Bill 2022.

Mr. Speaker, the *Proceeds of Crime Bill* will address technical errors and irregularities, produce a user-friendly consolidated version of both the Principal and the Amendment Acts and will make future amendments easier.

By repealing and replacing the Principal and the Amendment Act, the section numbers, along with the subsection numbers, will change to fill empty sections. Additionally, the *Proceeds of Crime Bill* will capture the necessary transitional and application provisions; and all other consequential amendments.

Furthermore, it is proposed that the *Proceeds of Crime Bill* will be applied retrospectively to and in relation to conduct that occurred on or after 4th February 2016 (the date on which the *Proceeds of Crime (Amendment) Act* 2015 came into force). This does not raise any concerns from the perspective of a retrospective criminal liability because all offence provisions by the *Proceeds of Crime Bill* have been enforced since 4th February 2016.

Mr. Speaker, the only difference will be that the proposed Bill will have different section references because of missing sections and subsections that were repealed and never replaced. The section numbers of the *Proceeds of Crime Bill* will need to be renumbered to ensure that there are no empty sections. This will affect cross referencing within the Bill itself and other pieces of legislation. Therefore, all cross references within the *Proceeds of Crime Bill* and other pieces of legislation that refer to the Principal Act will be updated together with minor technical deficiencies to be addressed simultaneously through these amendments.

Unexplained Wealth Orders

Mr. Speaker, the *Proceeds of Crime Bill* also covers provisions on unexplained wealth orders which provides for "current or previous wealth" of a person. Under this regime, the unexplained wealth provisions will be used against a person whose wealth exceeds that which can be explained by their legitimate income. The State would need to demonstrate to the Court that it has legitimate grounds for suspecting that a person has unexplained wealth, to which the person suspected of having unexplained wealth must provide an appropriate explanation and prove that the wealth in question was accumulated legitimately.

Key features of the Unexplained Wealth Provisions

Mr. Speaker, the key features of the unexplained wealth provisions are as follows:

1. The unexplained wealth provisions will apply to "public officials" as defined under the *Organic Law on Independent Commission Against Corruption*.
2. The State may apply to the court for an "unexplained wealth order" against a public official. This application maybe made in conjunction with an application for a restraining order under the *Proceeds of Crime Bill* 2022, or at any other time. That is, a restraining order does not need to have been made in order to apply for an unexplained wealth declaration.
3. The court must make an order against a public official if the court is satisfied that there is a reasonable suspicion that:
    (i) the public official-
        - has engaged in one or more indictable offence related activities; or
        - has acquired, without giving sufficient consideration, property derived from an indictable offence related activity of someone else, whether or not the person knew or suspected the property was derived from the illegal activity; and
    (ii) any of the public official's current or previous wealth was acquired unlawfully.

Mr. Speaker, the value of the unexplained wealth is calculated by subtracting the person's lawfully acquired wealth from their total wealth. The amount calculated must be paid to the State under the *Proceeds of Crime Bill*.

Mr. Speaker, with that, I now commend the *Proceeds of Crime Bill* to this honourable House.

Hon. Bryan Kramer, MP
Minister for Justice

BOOK REVIEW

Eric L. Kwa and Professor Edward Wolfers, The Constitution of Papua New Guinea With Commentary[*]

Leslie Mamu[**]

This book review concerns the book titled "The Constitution of Papua New Guinea with Commentary" co-authored by Dr Eric Kwa and Emeritus Professor Edward Wolfers, CSM, CMG. The book is really a layout of the *Constitution* with its various amendments to date. This is complemented by endnotes that espouse to each provision pertinent case laws. There is also included a commentary on selected constitutional subjects. The authors are renowned experts in the area of constitutional law and are accordingly well placed to write and provide such useful material for judicial officers, lawyers and law students. In fact, they have done well by obtaining a copy of the *Constitution* from the First Legislative Counsel, the official custodian of the *Constitution* of PNG.

The approach adopted by the authors in laying out the provisions of the *Constitution* separately from the case authorities, which appear in the endnotes, helps the reader identify the exact provisions of the *Constitution* and what cases one should read for a better understanding of the subject provision. This is a useful material and guide as it cuts down on time for researching cases by pointing the reader to the case on point.

However, this book can only be useful to those who have access to the internet since there are no citations of the pertinent passage from each judgement. The authors may need to consider in their next edition to at least include the relevant excerpt from the judgments.

The commentary is very educational and enlightening on the subject matters it covers. The highlight of this commentary are the discussions on the following:

- Context and History of Papua New Guinea's emergence as a Sovereign Nation-State.
- How the *Constitution* was made.
- The *Constitution* and System of Government.

Their discussions on these areas are indeed engaging for any Papua New Guinean because it captures one's interest and curiosity in having a glimpse of what transpired in the days leading up to self-governance and eventual independence, the forces at play, and to know the players involved in this enviable venture. The authors seem to have achieved their purpose in this commentary because after reading, one walks away with an appreciation of the critical role of the *Constitution* in crossing over as an independent nation and the rationale behind its comprehensiveness.

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[*] Kwa E and Wolfers E., *Constitution of Papua New Guinea with Commentary* (Port Moresby: 110 Ltd, 2020).

[**] Public Solicitor of Papua New Guinea.

However, in the commentary, the authors could have done well by including the names of all those people who played a role in the subject matters. In this way, the authors would be doing tremendous justice and paying tribute to each of the main players, for instance, those that comprised the Constitutional Planning Committee or those that were involved in the two groups that toured the districts in conducting awareness and obtaining views from the people.

Overall, this is a good book and should be given to all governmental agencies, schools and placed in hotels and airports so it can be accessed by everyone especially the upcoming generation and visiting tourists. The story of the *Constitution* is a positive story and must be told to everyone.