

Commonwealth Association of Legislative Counsel

# THE LOOPHOLE



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**THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel**

***Issue No. 2 of 2018***

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The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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## Editor's Notes

This issue features articles on legislative approaches to corruption based on presentations by three speakers at the 2017 CALC Conference in Melbourne. This topic attracted widespread interest, which is an all too sad indication of the pervasiveness of corruption and the challenges in dealing with it.

We begin with Paul Salembier's paper ("De-institutionalizing Corruption"). In true analytical fashion he first defines corruption, demonstrates why it is a problem and then sets to work connecting the problem to particular drafting practices, notably the use of subjective terminology and the creation of unnecessary discretion. In doing so, he provides some compelling arguments against these drafting practices.

We next turn to articles that have a more specific focus. Estelle Appiah ("Legislative Approaches to the Challenge of Corruption") takes us to Ghana and provides a comprehensive and detailed account of its history in dealing with corruption and the wide variety of anti-corruption measures, including legislation, taken in that country to address it. These measures are also very much intertwined with regional and international agreements and conventions and are complemented by quasi-legislative measures such as guidelines, codes and manuals as well as peer-review and self-assessment mechanisms. Finally, Estelle too provides guidance to legislative counsel on particular drafting techniques and drafting particular types of provisions. Her article is valuable resource for legislative counsel everywhere when it comes to drafting anti-corruption legislation.

Deana Silverstone ("Drafting Legislative Provisions to Combat Corruption") concludes the discussion of anti-corruption measures in terms of a particular economic sector: the petroleum industry. Petroleum activities take place throughout the world, and the corrupt practices she describes are by no means confined to this sector. The examples of legislative measures (recently adopted in East Timor, Kenya, South Sudan and Tanzania) that she looks at are undoubtedly widely applicable. Her paper should be of great interest throughout the Commonwealth and beyond.

This issue concludes with two book reviews. Eamonn Moran reviews Joe Kimble's most recent collection of essays entitled *Seeing Through Legalese* and John Wilson reviews the recently updated *Commonwealth Legislative Drafting Manual* prepared by Roger Rose. These books are evidence of the continuing vitality of practical scholarly work on legal and legislative drafting.

Finally, I encourage you to take a look at the notices of upcoming conferences on the next page. They too demonstrate what a challenging and vital field legislative drafting is.

John Mark Keyes  
Ottawa, May, 2018

## Upcoming Conferences

### ***Delivering Brexit: Legislative Sprint or Marathon? – Europe Regional Conference (Jersey)***

The first CALC conference for the Europe region will take place Thursday 20<sup>th</sup> – Friday 21<sup>st</sup> September, 2018. The theme of the conference is Brexit from a legislative drafting perspective with particular emphasis on how it might affect territories outside of the UK. Though it is a regional conference, we will be pleased to have delegates from the overseas territories and anyone else interested in this important and topical matter.

The topics covered will be:

- Examining the sprint: reflecting on the withdrawal legislation – looking at the UK perspective,
- The longer journey: legislating post-Brexit – focusing on key areas such as biosecurity, financial services and sanctions,
- Brexit: how are the Crown Dependencies and the Overseas Territories placed in the race?
- Land borders with the EU: legislative implications and views from our neighbours,
- Statutory Interpretation post-Brexit: Henry VIII takes up the baton – Brexit and delegated powers.

The conference will also include an optional visit to Jersey's States Greffe and Legislative Drafting Office and a tour of the Assembly building (States Chamber) on the morning of the first day. The conference will finish with a dinner on the Friday evening. There will be optional activities on the Saturday and Sunday which will include a trip to the world-famous Jersey Zoo founded by Gerald Durrell, a visit to the War Tunnels to learn about Jersey's occupation during WW2 and a boat trip to the magical neighbouring Island of Sark.

Registration will open shortly and further details will appear on the CALC website at <http://www.calc.ngo/conferences>.

### ***Charting Legislative Courses in a Complex World – CIAJ Legislative Drafting Conference***

The 2018 bi-annual Legislative Drafting Conference of the Canadian Institute for the Administration of Justice (CIAJ) will take place in **Ottawa (Canada) on September 13-14, 2018**. It will tackle one of the most pervasive challenges in modern legislation: complexity, beginning with its principal drivers in public policy. Why does our world generate legislative complexity? And how can legislation address this complexity intelligibly, coherently and effectively? The keynote address will be given by Professor Robert Geyer of

Lancaster University and Chief Justice Richard Wagner of the Supreme Court of Canada will be the guest of honour at the conference reception. Conference sessions will also focus on examples of today's complexity challenges in international trading relationships, cannabis de-criminalization and the interaction of state law with indigenous legal traditions. Other sessions will focus on pragmatic drafting solutions to particular facets of these challenges, such as interjurisdictional coherence, resolving policy blockages, drafting for clients with limited policy-resources and achieving legislative coherence over time. The conference will include a wide range of speakers from Canada, the UK and beyond.

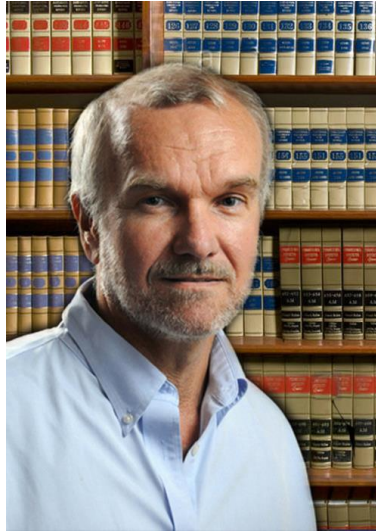
Further details about the conference and how to register for it are available at <https://ciaj-icaj.ca/en/training-programs/2018-legislative-drafting/>.

### ***Clarity 2018 Conference***

The next conference of Clarity International (the international association promoting plain legal language) will be held in **Montreal (Canada) on 25-27 October 2018**. The theme for Clarity 2018 is *Plain Language in Modern Times*. The Chief Justice of Canada, the Right Honourable Richard Wagner, is the guest of honour. Over 3 days through workshops, talks, training sessions, discussion panels and plenary meeting participants (including legislative counsel) will have the opportunity to reflect on and discuss issues surrounding the use of plain legal language. See the Clarity 2018 website <https://clarity2018.org/> for more details and to register.

## De-institutionalizing Corruption

Paul Salembier<sup>1</sup>



### Abstract

*This article looks at how certain legislative drafting practices can increase the potential for corruption in government activities and suggests mechanisms by which this risk can be reduced.*

### Introduction

The aim of this paper is to demonstrate how legislative counsel can employ their skills to reduce the incidence of corruption in a particular jurisdiction and how, conversely, they can increase the potential for corruption – and can indeed institutionalize it – by the way they draft that jurisdiction’s laws.

The premise underlying this contention is that legislative counsel cannot only determine the words in which a legal rule is drafted, but that they can, and often do, influence the manner in which legal rules are designed.

Before examining this issue, though, let’s define the term “corruption”. First, what is corruption?

### Defining corruption

Dictionaries describe corruption in terms of dishonest, fraudulent or illegal behaviour by persons in power, such as government officials or police officers, typically involving

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<sup>1</sup> Adjunct professor in the Faculty of Law, Queen’s University (Kingston, Canada) and a former General Counsel with Canada’s Department of Justice who now works as a legislative drafter in the private sector. He is also the author of *Legal and Legislative Drafting* (LexisNexis), the second edition of which is to be published in May 2018.

bribery.<sup>2</sup> And, indeed, the taking of bribes by public officials is how the public typically interprets the idea of corruption. Corruption goes beyond this, however.

Bribe-taking merely anchors one end of a continuum of activities that can be described as corrupt, to one degree or another. Further down the scale, few would argue that the use of the state's powers by a government official to confer a benefit on a spouse or relative is not also an exercise in corruption.

A corrupt benefit can also be deferred. Many an eyebrow is raised when a government official who has been charged with giving grants or loans to a particular industry, or making purchases from it, later takes a job with the same industry. While the official might have been hired on account of his or her acquired knowledge and experience, there is often a suspicion that a *quid pro quo* was at work, particularly if the official is hired at an inflated salary.

Corruption also extends to the use of discretionary powers by a government official in a manner designed to benefit the political party at whose behest the official was appointed. Canada has had official enquiries into actions of this sort,<sup>3</sup> and is not unique in that regard.

While a corrupt decision made by an official may be designed to deliver a financial benefit, it could also be directed simply to sustaining the power and status of the official or of a particular political party.<sup>4</sup> A government official who uses his or her powers to benefit those who have control over appointments to his or her position, or to benefit those who contribute to the political party in power, are examples of this.

On a more subtle level, corruption can consist of a manipulation of rules or policies in a way that distorts their intent, or undermines the functioning of the state. This might be done in a way that benefits the corrupt official at the expense of the public good,<sup>5</sup> such as a customs official charged with inspecting shipping containers who determines that merely looking at the outside of the container is sufficient to constitute an "inspection", or a government official charged with reviewing legislation on behalf of the government who decides that "reviewing" does not require reporting on significant defects in the legislation.<sup>6</sup> In the first

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<sup>2</sup> Oxford Dictionaries at <http://www.oxforddictionaries.com/definition/english/corruption>; Merriam-Webster Dictionary at <http://www.merriam-webster.com/dictionary/corruption>.

<sup>3</sup> See *Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities*, Justice John Gomery, November 1, 2005. See also "Jacques Corriveau found guilty on 3 fraud-related charges in Liberal sponsorship scandal", *The Canadian Press*, Nov. 1, 2016 at: <https://www.thestar.com/news/canada/2016/11/01/jacques-corriveau-found-guilty-on-3-fraud-related-charges-in-liberal-sponsorship-scandal.html>.

<sup>4</sup> Transparency International: How do you define corruption?: [http://www.transparency.org/whoweare/organisation/faqs\\_on\\_corruption/2](http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2).

<sup>5</sup> *Ibid.*

<sup>6</sup> Similar allegations were made by a lawyer of the Canadian Department of Justice in an action before the Federal Court of Canada: *Schmidt v. Canada (Attorney General)*, 2018 FCA 55. The action was dismissed and the dismissal was upheld on appeal.

case, the inspector's distortion of the rule allows him or her to do the job without lifting a finger; in the latter case, it allows the official to do the job without incurring the displeasure of those who would have to cure any defects reported on. Such actions would arguably constitute "the abuse of public power for private benefit", as the World Bank puts it.<sup>7</sup>

In cases like these, the legal rules or policies cease to have their intended effect and fail to achieve their original aims. In this more subtle expression, the resulting corruption is closer to the meaning we give the term when we describe a computer file as being "corrupted": as a result of a change made to the file, it no longer does what it was intended to do.

So why worry about corruption?

### **The Cost of Corruption**

Controlling corruption is important to a state's economic well-being.

Investors (both domestic and foreign) demand as a condition precedent to investment that the rules regulating the target industry be both predictable and equitably applied. Investors will not enter an industry unless they can ascertain with some certainty what the rules are that will govern their participation and unless they have some confidence that those rules will be applied evenly and impartially. A mining company will not invest billions in constructing a mine unless it knows what mining laws will govern its operations, and is confident that a competitor will not be given preferential treatment. Controlling corruption promotes economic growth by ensuring that a level playing field is established for participation in a particular industry and that the rules for participants in that industry are ascertainable and predictable.

Corruption creates unpredictability, and unpredictability creates or increases risk, which can either increase the cost of entering an industry or make it unprofitable to do so at all. A study on the impact of regulation on investment concluded that unclear regulation has a cost:

Opacity ... generates the equivalent of a risk premium in the interest rates of a country's debt holdings. ... the premium on an Indonesian government-bond issue, relative to an American or Singaporean one, is more than ten percentage points.<sup>8</sup>

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<sup>7</sup> K. Deininger and P. Mpuga, "Does Greater Accountability Improve the Quality of Delivery of Public Services? Evidence from Uganda", World Bank Policy Research Working Paper

<sup>8</sup> From 'Emerging-Market Indicators – Transparency', in *The Economist*, March 3, 2001, p. 100. However, as Michael Asimow notes in "Non-legislative Rulemaking and Regulatory Reform", 1985 *Duke L.J.* 381 at 387, there is also a cost in clarifying unclear rules:

Certainly, greater precision entails significant costs, including the bureaucratic costs of formulating a rule. Formulation costs are often steep, because the staff members who have dealt with the problem may themselves be uncertain precisely why and how they do what they do.

Nonetheless, Asimow observes that most commentators believe the benefits of clarification outweigh the costs (at 387, note 35).

James D. Wolfensohn, past President of the World Bank, in fact identified corruption as “the single largest deterrent to private sector investing”.<sup>9</sup> Because corruption increases the cost of participation in an activity, it deters investors. It also leads to economic inefficiency and waste:

Gains obtained through corruption are unlikely to be transferred to the investment sector, as ill-gotten money is either used in conspicuous consumption or is transferred to foreign bank accounts. Such transfers represent a capital leakage from the domestic economy. Furthermore, corruption generates inefficiency in allocation, by permitting the least efficient contractor with the highest ability to bribe to be the recipient of government contracts. In addition, since the cost of bribes is included in the price of the goods produced, demand tends to be reduced, the structure of production becomes biased, and consumption falls below efficiency levels.<sup>10</sup>

In a study quantifying the effect of corruption, Professor Shang-Jin Wei of the Kennedy School of Government, Harvard University, examined bilateral investment from traditional source countries into 45 host countries during the period 1990-91. Using the Business International index<sup>11</sup> as a measure of corruption, Wei concluded that a one-grade increase in the corruption level is associated with a 16% reduction in the flow of foreign direct investment – roughly equivalent to the effect of a 3% increase in the marginal tax rate.<sup>12</sup> On this basis, a worsening of the corruption level (at that time) from that of Singapore to that of Mexico would equate to a 21% increase in the tax rate on investors. According to an estimate by economist Andy Xie, corruption costs the Chinese economy up to 10% of its GDP every year.<sup>13</sup>

Corruption also decreases the returns that a state derives from a given level of investment. When corruption distorts the approval process for an investment project, the rate of return to

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<sup>9</sup> In ‘The State and Civil Society in the Fight Against Corruption: Defining the Challenge’, a paper delivered to the 8th International Anti-Corruption Conference, 7-11 September, 1997.

<sup>10</sup> *Confronting Corruption: The Elements of a National Integrity System*, by Jeremy Pope, published by Transparency International, citing David J. Gould and Jos A. Amaro-Reyes, “The Effects of Corruption on Administrative Performance: Illustrations from Developing Countries”, World Bank Staff Working Papers Number 580; Management and Development Series Number 7 (1983).

<sup>11</sup> Based on surveys conducted from 1980-83 by Business International Corporation, now a subsidiary of the Economist Intelligence Unit. The International Country Risk Guide index represents corruption as an integer from 1 (most corrupt) to 10 (least corrupt), according to the degree to which business transactions involve corruption or questionable payments.

<sup>12</sup> Shang-Jin Wei, “How Taxing is Corruption on International Investors?”, Harvard University, February, 1997 (mimeograph). Other studies have also found that countries with higher rates of corruption have a lower ratio of investment to income: P. Mauro, ‘Corruption and Growth’ (1995), 110 *Quarterly Journal of Economics* 681.

<sup>13</sup> A. Xie, “Riding the Dragon”, *China International Business*, June 7, 2010.

the state on an investment ceases to be the determining factor in the approval's cost-benefit analysis. This can also reduce the rate of return a state derives from existing infrastructure.<sup>14</sup>

Even the best regulatory system cannot eliminate corruption, of course. What it can do is avoid institutionalizing it.

There are a number of ways in which legislative counsel can minimize the potential for corruption.

### **Distortions in implementation**

Corruption will sometimes occur because a government official simply ignores the law. A requirement to test drinking water daily and to advise municipal officials of contaminants will be completely subverted if an official doesn't bother to test and simply enters fabricated figures in the testing logbook. No amount of care taken at the drafting end of law-making can prevent a government official from simply ignoring the law.

On the other hand, slightly more care in drafting the shipping container inspection rule referred to earlier, changing a draft from "inspect each shipping container" to "inspect *the contents of* each shipping container", might have made it significantly more difficult for the work-averse inspector to declare "Mission accomplished!" after merely viewing the exteriors of the containers in question.

For the most part, to avoid this sort of latitude of interpretation legislative counsel have to be precise with their language – to find out exactly what sort of rule their clients want and to draft that rule clearly and unambiguously. This, of course, is what all legislative counsel should aspire to, and exhorting them to "draft more precisely" is unlikely to have much of an impact on the prospect of this sort of corruption.

There are, however, at least two areas in which legislative counsel can make a significant contribution to determinacy in the law.

### **Subjective rules**

The first area involves the use of subjective modifiers like "reasonable",<sup>15</sup> "excessive",<sup>16</sup> "unduly"<sup>17</sup> and "significant"<sup>18</sup> – in other words, words that are incapable of any fixed

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<sup>14</sup> V. Tanzi and H. Davoodi, "Roads to Nowhere: How Corruption in Public Investment Hurts Growth" (1998), 12 *Economic Issues*, IMF.

<sup>15</sup> Found over 2000 times in the statutes of Canada.

<sup>16</sup> Found 235 times in the statutes of Canada.

<sup>17</sup> Found 71 times in the statutes of Canada.

<sup>18</sup> Found 1096 times in the statutes of Canada.

meaning because they denote a quality that is inherently subjective.<sup>19</sup> Because they are subjective, their assessment will vary from person to person, and the use of such terms in legal rules gives officials charged with implementing those rules an opportunity to distort the application of the rules for their own purposes.

Consider the following:

- x. For the purposes of this Act and the regulations, an enforcement officer may, at any *reasonable* time, direct that any shipping container be moved to a place specified by the officer and the officer may, for a *reasonable* time, detain the container.<sup>20</sup>

When subject modifiers such as this are used, the latitude of meaning inherent in the word “reasonable” in effect grants a discretion to the enforcement officer to determine certain aspects of the rule: in this case, *when* shipping containers may be ordered moved, and *how long* they can be detained.

This discretion, of course, gives rise to the potential for corruption. The way the rule is written, it would allow an unscrupulous enforcement officer to essentially hold goods in a shipping container “hostage” pending receipt of a cash contribution. Even in the absence of an extortionate element, an extreme interpretation of such a provision could cause a real financial hardship to a shipper whose goods are subject to a lengthy detention. In the latter case, the effect would be to “corrupt” the original legislative intent. While a shipper could of course make an application for judicial review of as prejudicial interpretation, unless the prejudice suffered is significant it will not be financially advantageous to do so, and a corrupted application of the rule such as this might therefore continue indefinitely.

When a legislative counsel who is requested to draft such a rule asks what “at any reasonable time” means, the instructing officer will usually say something like “Well, that means during business hours at the container port”. The response to what “for a reasonable time” means, will be something like “Long enough to inspect its contents”. Substituting those criteria for the subjective modifier creates a more precise rule:

- x. For the purposes of this Act and the regulations, an enforcement officer may, at any time *during the business hours at the container port*, direct that any shipping container be moved to a place specified by the officer and the officer may detain the container *long enough to inspect its contents*.<sup>21</sup>

The resulting rule has much less latitude and, more importantly, does not give the enforcement officer the discretion to essentially fill in essential components of the rule. As a

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<sup>19</sup> Other examples are “adequate”, “appropriate”, “considerable”, “practicable”, “proper”, “expedient”, “feasible”, “genuine”, “immoral”, “important”, “loud”, “relevant”, “rude”, “satisfactory”, “suitable”, “unduly”, “unusual” and “valuable”.

<sup>20</sup> *Canadian Environmental Protection Act, 1999* (Canada), S.C. 1999, c. 33, s. 218(7.1).

<sup>21</sup> *Canadian Environmental Protection Act, 1999* (Canada), S.C. 1999, c. 33, s. 218(7.1).

result, the potential for corruption, either by extorting payment or by distorting legislative intent, is substantially reduced.

An unrelated but nonetheless important by-product of subjectively drafted rules is that they give rise to litigation. Consider the following rule:

- x. Whenever a passenger railway company and a freight railway company are unable to agree in respect of any matter raised in the negotiation of any agreement concerning the use of the railway company's railway, land or facilities, the passenger railway company may, *after reasonable efforts to resolve the matter have been made*, apply to the Agency to decide the matter.<sup>22</sup>

The use of the subjective modifier here resulted in 12 months of litigation merely to determine whether 8 months of negotiations were sufficient to trigger the clause allowing an application to be made to the Agency in question.<sup>23</sup>

When the use of a subjective modifier like this necessitates litigation to determine the meaning of the provision in question, it renders the underlying regulatory regime inefficient, and raises enforcement costs for government and participation costs and risks for industry.

### Unnecessary Discretion

As we've seen in examining the use of subjective modifiers, a potential for corruption arises whenever a government official is given a discretion to determine what the content of a legal rule is to be. From this, it would follow that the potential for corruption can be minimized simply by minimizing discretion in legal rules.

This is undoubtedly true. But it is also, true, of course, that some discretion is required for a legal system to operate smoothly. The trick, then, is to distinguish between discretion that is required and discretion that is not. Aside from avoiding subjective modifiers, as we've just discussed, there are other instances in which legislative counsel can influence the design of legal rules in such a way as to minimize discretion and the resultant potential for its misuse.

Consider the following provision:

- x. Where the net value of the estate of an intestate does not, *in the opinion of the Minister*, exceed seventy-five thousand dollars or such other amount as may be fixed by order of the Governor in Council, the estate shall go to the survivor.<sup>24</sup>

Normally, the value of an asset is either clear (in the case of cash or securities), or is determined by the valuation of one or more experts. The case above is an example of an unnecessary discretion being given, where none is needed. While situations like this may be

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<sup>22</sup> *Canada Transportation Act*, S.C. 1996 (Canada), c. 10, s. 152.1(1).

<sup>23</sup> Canadian Transportation Agency Decision No. 195-R-2013, May 17, 2013.

<sup>24</sup> *Indian Act* (Canada), R.S.C., 1985, c. I-5, s. 48 (1)

rare, legislative counsel should nonetheless be on the lookout for situations in which a discretion of this sort is requested but not needed.

A more common area of discretion occurs in the granting of permits. Permits are a legislative mechanism used to grant exemptions from what would otherwise be a prohibited activity.<sup>25</sup> A permitting provision can grant a government official a very wide discretion in granting the exemption in question and in establishing rules that will apply once the exemption is granted:

- x. (1) The Minister may, on application, issue permits for the purposes of this Act.
- (2) Subject to the regulations, the Minister may include in a permit any condition that he or she considers appropriate.<sup>26</sup>

One possible effect of exemption powers in a regulatory system is to redirect regulated parties' efforts from compliance to lobbying. Instead of attempting to comply with what is (presumably) a rule designed to achieve a certain policy objective, parties will instead focus on lobbying the official in question for an exemption whenever the cost of persuasion is cheaper than the cost of compliance.<sup>27</sup> Economist Andy Xie explains how exemptions affect attempts to control pollution in China:

Unchecked greed is the main driver for China's environmental degradation. Without the rule of law, why would any business want to pay for pollution control? It is much cheaper to buy off local government officials.<sup>28</sup>

This has an obviously negative effect on attainment of the state's legislative objectives.

Moreover, if the state permits an official to make secret (unpublished and inaccessible) exceptions to legislative rules, it sets the stage for the same kind of corruption that is accorded by unchecked discretionary powers in the rules themselves: a power to make secret exceptions to a rule begets the temptation to accept secret benefits for making those exceptions.

Now, there are many situations in which some discretion is necessary. There are many other cases, however, in which a discretionary permitting scheme is instituted where no real discretion is required. Consider this provision, for example:

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<sup>25</sup> A permit is pointless if the activity in question is not otherwise restricted. It makes no sense to provide for the granting of fishing permits, for example, where fishing without a permit is not otherwise prohibited.

<sup>26</sup> *Antarctic Environmental Protection Act* (Canada), S.C. 2003, c. 20, ss. 21(1) and (4).

<sup>27</sup> Consider, for example, the May 25, 2001 collapse of a banquet hall in Jerusalem, in which 24 wedding guests died. Newspaper reports (*Times of London*, May 25, 2001) attributed the 'chaotically designed building' to the Israeli system of *protektzia*, in which contacts and family connections substituted for impartial rules in obtaining government building approvals.

<sup>28</sup> "Only the rule of law can ensure sustained prosperity in China", *South China Morning Post*, Sept. 25, 2014.

- x. The superintendent may, on receipt of an application, issue a permit authorizing the applicant to pass the vessel through the Brighton Road Swing Bridge.<sup>29</sup>

If the instructing officer in this case were asked how the superintendent would decide whether to grant the permit in question, the answer might well be as simple as “It would be granted so long as the vessel is not more than 20 ft in width, because that is the width of the opening at the Brighton Road Swing Bridge.” In cases such as this, the discretion – with its potential for corruption – can be avoided by simply drafting the rule to make passage through the bridge a right where the criterion in question is met.

Consider another slightly more nuanced example:

- (3) The superintendent may issue a permit to a person to start and maintain a fire in a park and such permit shall be subject to any terms and conditions stated thereon by the superintendent<sup>30</sup>

Here, if asked, the instructing officer would likely tell the legislative counsel that the criteria for permitting fires are set out in ministry guidelines – stating that fires are allowed only if the fire risk is at or below medium, for example, and that the terms and conditions referred to are standard and conditions terms inserted into every permit. Again, the discretionary element in the rule can be avoided by simply enunciating the criteria and the terms and conditions in the legislation itself, rather than leaving them in what are often unpublished guidelines.

The point I am trying to make here is that the establishment of a permit scheme does not automatically entail the conferral of a discretionary permission-granting power. Legislation can establish objectively ascertainable criteria governing applications for permits, and provide that any applicant who meets those criteria is *entitled* to the permit,<sup>31</sup> or that permits will be issued to the applicants who rank highest according to those criteria,<sup>32</sup> such as in the following:

- 6 (1) The Executive Director shall issue a permit, for a period of not greater than three years, to an association if

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<sup>29</sup> *Historic Canals Regulations* (Canada), SOR/93-220, s. 34.

<sup>30</sup> *National Parks of Canada Fire Protection Regulations* (Canada), SOR/80-946, s. 4

<sup>31</sup> This distinction was emphasized by the Supreme Court in *Bridge v. The Queen*, [1953] 1 S.C.R. 8, at 13. See also *Re By-Law 92, Town of Winnipeg Beach* (1919), 50 D.L.R. 712, at 715 (Man. C.A.). While a discretion to withhold a permit to an applicant who otherwise met the conditions set out in regulations was upheld in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, in that case the permit-granting authority was set out in the Act, and not the regulations, and was drafted in clearly discretionary terms. For examples of permit entitlement provisions in existing regulations, see *Nunavut Archaeological and Palaeontological Sites Regulations*, SOR/2001-220, ss. 8(2) and 9(2); *Canadian Aviation Regulations*, SOR/96-433, ss. 201.01(6) and 201.03(3); *Small Vessel Regulations*, C.R.C. 1978, c. 1487, s. 23(1); *Federal Halocarbon Regulations*, SOR/99-255, s. 29(2).

<sup>32</sup> As in the former *Yukon Timber Regulations* (Canada), C.R.C. 1978, c. 1528; repealed by SOR/2003-126, s. 4(2).

(a) the information provided in accordance with section 5 demonstrates that the association is able to conduct pari-mutuel betting in accordance with the Act and these Regulations; and

(b) the methods described in accordance with paragraph 5(g) demonstrate that the association is capable of presenting the information referred to in that paragraph in a manner that is easily accessible to the public.<sup>33</sup>

The existence of objectively ascertainable criteria changes the permitting scheme from an exercise of discretionary power to a simple factual ascertainment as to whether the regulated party meets the applicable criteria.<sup>34</sup>

The fact that a party satisfying the legislated criteria is entitled to a permit does not obviate the utility of the scheme: by establishing a permitting scheme a regulating authority can keep track of who is engaging in the regulated activity, and by requiring regulated parties to apply for a permit, the state can more easily monitor their fulfilment of the legislated criteria.

### Arguments of Administrative Practicality

An argument frequently raised by instructing officials is that it is necessary to use vague or subjective language, or to confer a discretion to decide what the rule is to be, because it is not practical to set out the rules to be followed in the law itself, either because of the variety of the circumstances in which the law will be applied or on account of the technical nature of its content.<sup>35</sup> These are often referred to as arguments of administrative practicality.

There is a difference, however, between situations in which it is *difficult* to set out a legislative rule in advance and those in which it is *impossible* to do so. In most cases where law-making authorities grant discretionary powers, they also establish guidelines that govern the exercise of the power. The very existence of such guidelines, though, belies any contention that the subject-matter is too complex, or the circumstances too varied, to permit rules to be legislated, since the content of the rules is (eventually) set out in those operational guidelines.

In other words, the existence of policy manuals or guidelines intended to assist the exercise of a discretion undermines any claim that the subject-matter of the decision is so complex that it cannot be reduced to rules. In such a case, a legislative counsel's response to an instructing official who gives such an explanation should be "if it can be set out in a policy manual, it can be set out in a statute or regulation." Length or degree of detail is not a sufficient reason to resort to discretionary powers, as regulations can be added to statutory

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<sup>33</sup> *Pari-Mutuel Betting Supervision Regulations (Canada)*, SOR/91-365, s. 6.

<sup>34</sup> See for example *Lamoureux v. City of Beaconsfield*, [1978] 1 S.C.R. 134 at 142.

<sup>35</sup> See for example *Jackson v. Ontario (Minister of Natural Resources)*, [2009] O.J. No. 5166, 47 C.E.L.R. (3d) 8, 2 Admin. L.R. (5th) 248, 264 O.A.C. 275 at para. 36 (Ont. C.A.).

schemes to provide any required detail, and it is not unusual for regulations to be lengthy.<sup>36</sup> In practice, it is rare to find a legislative function, involving the establishment of rules of conduct, that cannot be exercised by way of formal rules.

While instructing officials may argue in favour of keeping criteria in a policy manual so that the criteria can be changed more easily and quickly, this very aspect raises concerns from a rule of law perspective that are additional to those related to discretion and corruption. Where the content of a legal rule (set out in a policy manual) is revised frequently, or where revisions are not publicized or not publicized expeditiously, citizens and regulated industries are unable to properly adapt their conduct to comply with the rule, and a failure of rule of law occurs. Making effective law is not always easy, and a law that is convenient for the regulator is not necessarily a good law from the point of view of businesses in the regulated industry or for citizens generally.

In his discussion of the control of discretion in American administrative agencies, Michael Asimow describes the benefits that can be realized when rules are formulated to control the exercise of discretionary powers:

For the agency, the very process of considering how a particular [discretionary] power might be structured often results in a productive process of self-criticism and the generation of alternatives and fresh points of view. If an agency can reach consensus on how to confine discretion, the personnel who must exercise it are more likely to do so consistently and fairly. In addition, policy statements tend to minimize the inevitable distortions of agency priorities that result from a multilevel delegation within an institution. Moreover, an informed public is more likely to conform voluntarily to the law, thus minimizing enforcement costs.<sup>37</sup>

In situations in which it is not possible to avoid conferring a discretionary power, it may nonetheless be possible to lessen the potential for corruption by conferring the discretion on a body of persons, rather a single individual. Decisions made by a group are generally less amenable to outside influence, as the number of decision-makers that must be influenced multiplies.<sup>38</sup> By way of example, judging in Olympic figure-skating competitions is done by

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<sup>36</sup> See for example, *Fisheries Regulations*, SOR/93-53, *Food and Drug Regulations*, C.R.C. 1978, c. 870.

<sup>37</sup> M. Asimow, "Nonlegislative Rulemaking and Regulatory Reform", 1985 *Duke L.J.* 381 at 388.

<sup>38</sup> See Hon. B. McLachlin, now retired Chief Justice of the Supreme Court of Canada, in "Rules and Discretion in the Governance of Canada", (1992) 56 *Sask. L. Rev.* 167 at 172. An exception to the protection afforded by multiple decision-makers can arise where the decision benefits the political party to whom the members of the Cabinet belong, or when the decision-making is not truly joint, but is instead dictated by one member of the group. And under certain circumstances remote from government decision-making, the principle might not hold: S. Li, C. Buhren and B. Frank, "Group decision making in a corruption experiment: China and Germany compared." EALE Conferences, North America, Sept. 2012. Available at: <[https://www.researchgate.net/publication/271909279\\_Group\\_Decision\\_Making\\_in\\_a\\_Corruption\\_Experiment\\_China\\_and\\_Germany\\_Compared](https://www.researchgate.net/publication/271909279_Group_Decision_Making_in_a_Corruption_Experiment_China_and_Germany_Compared)>

a group of judges and, while this has not completely removed the possibility of corruption,<sup>39</sup> I don't think anyone would argue in favour of using single judges in that sport.

### **Concluding Observations**

I'm certainly not suggesting by my comments above that the existence of a discretionary decision-making power in legislation automatically opens the door to injustice, discrimination and corruption. That being said, by focussing on drafting clear and precise rules, avoiding the use of subjective language and assisting clients to design legislative schemes that minimize discretion, legislative counsel can reduce the degree to which government officials can dictate the content of legal rules and can thereby avoid institutionalizing the potential for corruption in the law itself.

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<sup>39</sup> Associated Press (February 12, 2002). "NBC commentators surprised, shocked by judges": <http://www.espn.com/oly/winter02/figure/news?id=1330413>.

## Legislative Approaches to the Challenge of Corruption

Estelle Appiah<sup>1</sup>



### Abstract

*The United Nations Convention Against Corruption(UNCAC) and international bodies such as the Financial Action Task Force(FATF), have provided benchmarks for anti-corruption globally. Legislative counsel, as keepers of the statute book, are duty bound to be mindful that legislation provides an adequate safety net to protect a citizen from corrupt practices. The questions that legislative counsel need to ask themselves are: how do they draft defensively for corruption and what is their responsibility in the context of constitutional principles of good governance?*

*This paper seeks to explore ways that legislative counsel can ingeniously protect the statute book strategically and from a technical perspective to prevent corruption. The paper discusses the vital elements that are necessary to deal with corruption and the responsibility of legislative counsel to inform about administrative measures to deal with corruption, such as public awareness, media strategy and the involvement of civil society. The paper also considers the role of legislative counsel in peer review mechanisms for international anti-corruption standards.*

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## Introduction

This paper refers to the provisions on corruption in the current *Constitution of the Republic of Ghana*<sup>2</sup> and details the recommendations for the review of the Constitutional provisions on corruption from the Constitution Review Commission (CRC).<sup>3</sup>

It provides the background to corruption in Ghana and makes reference to the national instruments on the topic by reference to selected laws. The sub-regional responses and international responses on corruption are mentioned as are the National Anti-Corruption Action Plan (NACAP).<sup>4</sup> Other anti-corruption initiatives are referred to as well as the principles of the Rule of Law. Key principles for the statute book to combat corruption are shared and the role of legislative counsel to draft defensively to combat corruption is examined. Finally, the mechanism for anti-corruption strategies is provided.

## Constitutional anti-corruption provisions

The *Constitution of the Republic of Ghana*, which came into force on the 7th January 1993, has a raft of articles on corruption:

- Article 35(8) enjoins the State to eradicate corruption.<sup>5</sup>
- Article 37(1) provides that the State is to secure and protect a social order based on probity and accountability.<sup>6</sup>
- Article 41(f) enjoins every person to protect and preserve public property and expose waste.<sup>7</sup>
- Article 55(11) provides that the State is to provide equal access to political parties.<sup>8</sup>
- Article 103(3) is the basis for the Public Accounts Committee of Parliament which is chaired by the minority.
- Article 163 provides that the state-owned media is to facilitate the presentation of divergent views.<sup>9</sup>

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<sup>2</sup>The Fourth Republican Constitution (1992).

<sup>3</sup>[http://ghana.gov.gh/images/documents/crc\\_report.pdf](http://ghana.gov.gh/images/documents/crc_report.pdf).

<sup>4</sup>National Working Group, 2011. Report available at <http://www.chraighana.com/wp-content/uploads/2012/08/nacap.pdf>.

<sup>5</sup>Article 35(8): *The State shall take steps to eradicate corrupt practices and the abuse of power.*

<sup>6</sup>Article 37(1): *The State shall endeavour to secure and protect a social order founded on the ideals and principles of freedom, equality, justice, probity and accountability as enshrined in Chapter 5 of this Constitution; and in particular, the State shall direct its policy towards ensuring that every citizen has equality of rights, obligations and opportunities before the law.*

<sup>7</sup>Article 41(f): *to protect and preserve public property and expose and combat misuse and waste of public funds and property;*

<sup>8</sup>Article 55(11): *The state shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media.*

<sup>9</sup>Article 163: *All state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.*

- Article 218(e) gives the Commission on Human Rights and Administrative Justice (CHRAJ) power to investigate alleged or suspected corruption.<sup>10</sup>
- Chapter 24 provides for the Code of Conduct for Public Officers and has provisions on conflict of interest, the declaration of assets and liabilities, and provides that complaints on corruption can be submitted to the CHRAJ.

### Constitution Review Commission

The CRC was established by a Constitutional Instrument<sup>11</sup> as a Commission of Inquiry to conduct a consultative review of the Constitution by the late President John Evans Atta Mills, who said that the review

... cumulatively, must move the Constitution from a political document to a developmental document, shifting from the politics of democracy to the economics of democracy, so that Ghanaians may look at it as the source of renewed hope for the future.<sup>12</sup>

The mandate of the Commission was to ascertain from the people of Ghana their views on the operation of the Constitution and help identify its strengths and weaknesses. The exercise was also to articulate their concerns as regards required amendments and make recommendations to the government for consideration. The CRC was to submit draft Bills for the entrenched and non-entrenched provisions. It received 83,161 submissions from citizens of Ghana in the country as well as from citizens in the Diaspora.

In December 2011, the Commission presented its final report to the President.<sup>13</sup> It contained recommendations in line with the issues and concerns that the people of Ghana overwhelmingly declared should be undertaken. These were to help the Constitution engender national unity, peace and development, as well as to “put national development planning on a firm and non-political pedestal.”<sup>14</sup>

The CRC report on corruption alluded to the mismanagement of government projects, the lack of enforcement of laws and the fact that the principal legislation on corruption, the *Criminal Offences Act, 1960* (Act 29), did not define corruption specifically. The CRC observed that corruption is not confined to the public sector and that private business is

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<sup>10</sup>Article 218(e): *The functions of the Commission shall be defined and prescribed by Act of Parliament and shall include the duty ... (e) to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and the Auditor-General, resulting from such investigations;*

<sup>11</sup> 2010 (C.I.) 64.

<sup>12</sup> *Ghana Web*, 28 May 2013: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/CeDI-Africa-Calls-on-the-President-to-Review-275198>.

<sup>13</sup> National Anti-corruption Action Plan, December 20, 2011. Available at: <http://www.chraighana.com/wp-content/uploads/2012/08/nacap.pdf>.

<sup>14</sup> *Ibid.*

involved in corrupt practices through the bribery of customs authorities and the police, the smuggling of illegal commodities and the avoidance of tax payments. Illegal procurement was acknowledged as was the acquisition of public contracts through crooked means and capital flight.

### **Constitutional Review Commission Recommendations**

The CRC recommendations were that a Conduct of Public Officers Bill be enacted and that there be a review of the *Criminal Offences Act, 1960 (Act 29)* to define corruption. It was also recommended that the [Evidence Act, 1975](#) (NRCD 323) be amended to shift the burden of proof in bribery matters.

Other recommendations were that a Right to Information Bill be enacted and that the [Mutual Legal Assistance Act, 2010](#) (Act 807) be implemented. The CRC also recommended a review of the [Internal Audit Agency Act, 2003](#) (Act 658) to be more effective to combat corruption within public bodies.

The weaknesses in the [Public Procurement Act 2003](#) (Act 663) were mentioned with recommendations to close loopholes, particularly on sole sourcing to avoid corruption. The review and amendment of the procurement legislation has now been done and the *Public Procurement (Amendment) Act, 2016* (Act 914) is in force.

The rest of the recommendations focused on the need to strengthen the Judicial Council<sup>15</sup> to make it more efficient to weed out bad nuts in the judiciary and that the follow-up actions for Commissions of Inquiry should be clarified to enable prosecutions.

### **Ghana's history of anti-corruption legislation**

Ghana has had a history of anti-corruption legislation under civilian and military regimes. In the time of the Provisional National Defence Council (PNDC), there was the *Economic Crimes Agenda and the Citizens Vetting Committee Law, 1982* (PNDCL 1). There was also the *National Investigations Committee Law 1982* (PNDCL 2). These laws enquired into lifestyles and investigated economic crimes. After the Constitution came into force, the [Public Office Holders \(Declaration of Assets and Disqualification\) Act, 1998](#) (Act 550) was enacted. Key anti-corruption interventions can be found at the end of this article in Appendix 1.

The challenges of corruption in Ghana are many: embezzlement, misappropriation, diversion of public funds and bribery of government officials are some. The inflation of contracts, over-invoicing and the abuse of sole source procurement contribute to the increased cost of doing business. Added to that, there is the lack of transparency. Patronage

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<sup>15</sup>The website of the Judicial Council is: <https://www.judicial.gov.gh/index.php/judicial-council>.

and nepotism lead to the abuse and misuse of office and there is the trading of influence and speculation. The corrupt practices lead to capital flight and hinder development.

Judicial corruption revealed by an investigative journalism expose in 2015 showed the extent of corruption by judicial officers and staff.<sup>16</sup> The weak anti-corruption agency, the Commission on Human Rights and Administrative Justice (CHRAJ)<sup>17</sup> (an independent constitutional body) has failed to take action on conflict of interest. The impunity of corruption has led to poor examples for the youth, the future leaders and creates the impression that corruption is acceptable.

The absence of a special prosecutor has resulted in politically exposed persons not being prosecuted due to the fact that the Attorney-General is also the Minister for Justice under article 88 of the Constitution. In that role, the Attorney-General is a Minister of State and the principal legal adviser to the Government. This situation has compromised the independence of the Attorney-General.<sup>18</sup>

The current administration of the New Patriotic Party provided in its election manifesto for the 2016 Presidential and Parliamentary elections that it would see to the enactment of a [Special Prosecutors Bill](#) if elected into office. Accordingly, the Office of the [Special Prosecutors Act, 2017](#) (Act 959) is now in force. It is expected that there will be more prosecutions of public officers past and present. It has been emphasised that corruption is not a partisan matter and that protection of the public purse is a social common good that depends on the contribution of each person. This includes legislative counsel who, as the keepers of the statute book, are mandated to draft defensively against corruption.

The national security risks of corruption have brought into focus the need to have anti-money laundering legislation for good governance. Accordingly, the [Anti-Money Laundering Act](#) (Act 749) was enacted in 2008. The possible use of tainted funds for political activity has been a concern, more so because there is no public funding of political activity. Amongst others, money is laundered from the narcotic trade in Ghana and the potential for the country to be a narco-state poses issues of national security. Money laundering leads to a distortion of the economy that may create dissatisfaction and lead to the breakdown of law and order. Laundered money may provide funds for internal conflict and the potential for tainted funds to be used to finance terrorism is another potential threat to the security of the state.

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<sup>16</sup>See *Guardian Africa Network*, 24 September 2015: <https://www.theguardian.com/world/2015/sep/24/anas-aremeya-anas-ghana-corruption> and *Ghana Web*, 8 September 2015: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Anas-uncovers-34-Judges-in-corruption-scandal-380603>.

<sup>17</sup>The Commission is established under the [Commission on Human Rights and Administrative Justice Act, 1993](#) (Act 456).

<sup>18</sup>This view is also shared by a former Attorney General, Dr. Yao Obed Asamoah: see *Myjoyonline*, 19 December 2014: <https://www.myjoyonline.com/news/2014/December-19th/ghana-needs-an-office-of-independent-public-prosecutor-obed-asamoah.php>.

## Ghana's anti-corruption legislation

The national anti-corruption laws enacted since the commencement of the Fourth Republic in 1993 are as follows:

- [Public Procurement Act 2003](#) (Act 663)
- [Internal Audit Agency Act 2003](#) (Act 658);
- [Whistleblower Act 2007](#) (Act 720);
- [Anti-Money Laundering Act 2008](#) (Act 749);
- [Economic and Organised Crime Act 2010](#) (Act 804);
- [Mutual Legal Assistance Act 2010](#) (Act 807);
- [Anti-Money Laundering \(Amdt\) Act 2014](#) (Act 874);
- [Public Procurement \(Amdt\) Act 2016](#) (Act 914);
- [Companies \(Amdt\) Act 2016](#) (Act 920);
- [Public Financial Management Act 2016](#) (Act 921);
- [Office of the Special Prosecutor Act, 2017](#) (Act 959).

The *Companies (Amendment) Act 2016* (Act 920) provides for the inclusion of the names and particulars of the beneficial owners of a company in the register of members in a central register. The ability of companies to hide their business dealings behind a web of shell companies has provided a cloak of secrecy that has fuelled corruption and money laundering. The government has therefore provided this legislation to expose political persons and provide easy access to data entered in the register so that businesses can identify who really owns the company they are dealing with. Law enforcement agencies will have ease of access to critical information to carry out their mandate and a company is required to provide information on the beneficial owners of the company in its annual return.

A politically exposed person is defined in the Act to include a head of state or head of government, a politician, a senior public official, a senior military officer or a senior officer of a public corporation.

The long title of the *Public Financial Management Act 2016* (Act 921) is:

An Act to regulate the financial management of the public sector within a macroeconomic and fiscal framework; to define responsibilities of persons entrusted with the management and control of public funds, assets, liabilities and resources, to ensure that public funds are sustainable and consistent with the level of public debt; to provide for accounting and audit of public funds and to provide for related matters

This Act provides comprehensively for the management of public funds and replaces the [Financial Administration Act, 2003](#) (Act 654) and the [Loans Act, 1970](#) (Act 335).

As regards impending legislation, a number of anti-corruption Bills have been prepared but not enacted. The Extradition Bill that updates the [Extradition Act 1960](#) (Act 22) received Cabinet approval to be laid in Parliament in mid-2016 but lapsed when Parliament was

prorogued. The Conduct of Public Officers Bill that provides more robust legislation on asset declaration and conflict of interest was introduced in the last Parliament, but lapsed when the session ended.<sup>19</sup>

The Whistleblower (Amendment) Bill seeks to amend the [Whistleblower Act, 2006](#), (Act 720). It provides protection for disclosures and although a ground-breaking piece of legislation at the time, weaknesses in the Act have become apparent.<sup>20</sup>

Many people are not aware that there is legal protection for ordinary people to make disclosures in the public interest without fear of victimisation.<sup>21</sup> It is acknowledged that whistleblowing plays a significant role in passing critical information from the lower levels of an organisation to higher officials. Whistleblowers are agents of accountability who provide evidence of corruption and exercise the freedom to warn. The amendment broadens the scope of the law to make it clearly applicable to the private sector to include the illegal tapping of electricity and the illegal connection to water supplies for example.

The Non-Profit Organisations Bill, which deals with the prevention of abuse by non-profit entities,<sup>22</sup> has stalled since it reached an advanced stage in the enactment process in 2011 and was not re-introduced in Parliament.<sup>23</sup>

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<sup>19</sup>See Government of Ghana Media Center, "Parliament defers debate on Public Officers Bill": <http://www.ghana.gov.gh/index.php/media-center/news/1278-parliament-defers-debate-on-conduct-of-public-officers-bill>.

<sup>20</sup>See *Business Ghana*, 4 July 2010: <https://www.businessghana.com/site/news/general/117011/Whistleblower-Act-to-be-amended>; Ghana Anti-corruption Coalition, *Report: Mobilising Grass-Root Level Participation for Effective implementation of Anti-Corruption Laws: A Focus on the Whistleblower Act 2006 (Act 720)*, (Accra, 2013): <http://www.gaccgh.org/publications/Mobilising%20Grass%20Root%20Level%20Participation%20for%20Effective%20Implementation%20of%20Anti-Corruption%20Laws%20.pdf>.

<sup>21</sup>See sections 12, 13 and 15 of the [Whistleblower Act, 2006](#) (Act 720).

<sup>22</sup>*Ghana Web*, 28 April 2005: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/NGOs-In-Ghana-Profit-Making-Organisations-80271>.

<sup>23</sup>Joint submission of Concerned NGOs/CSOs in Ghana, "Position on Trust Bill and NGO Policy Guidelines" (2007): [http://www.posdev.org/library/ngo\\_position\\_final\\_1st\\_june/ngo\\_position\\_final\\_eng.pdf](http://www.posdev.org/library/ngo_position_final_1st_june/ngo_position_final_eng.pdf)

The Government of Ghana in 1993 attempted to introduce an NGO bill to regulate NGOs/CSOs which was found to be unfavourable for the effective functioning and growth of NGOs/CSOs in the country. Consequently, the bill was withdrawn. In 2000, Government collaborated with NGOs/CSOs through a series of workshops, seminars and meetings to produce a policy document – Draft National Policy for Strategic Partnership with NGOs/CSOs – to regulate NGO activities in the country. The first document was released in 2000 and revised in 2004.

The Right to Information Bill<sup>24</sup> was drafted in 1999, reviewed in 2003, 2005 and 2007, but not presented to Parliament until February 2010.<sup>25</sup> As it lapsed, it was presented to Parliament again in 2013, but it lapsed once more in 2016. It seeks to provide for the implementation of the right to information guaranteed under article 21(1)(f) of the Constitution. It underpins transparency, openness, effective participation of the population in the processes of governance, accountability and the curtailment of corruption. It is expected to place an obligation on public and private agencies to provide information that undoubtedly will expose corrupt practices if implemented as intended. The President of the Republic of Ghana at the 61<sup>st</sup> Independence celebrations in March 2018 has stated that despite the several attempts for this anti-corruption framework to be put in place, it will be enacted into law before the end of 2018.<sup>26</sup>

The proposed amendment in the Criminal Offences (Amendment) Bill<sup>27</sup> is to redefine corruption to accord with the standard in the [UN Convention against Corruption](#) (UNCAC).

### **Regional and international responses to corruption**

As regards regional responses to corruption, the Economic Community of West African States (ECOWAS)<sup>28</sup> has built effective systems to enhance regional co-operation in crime prevention and control. Article 57 (1) of the [Treaty of ECOWAS](#) states that “the Member States undertake to co-operate in judicial and legal matters.”

Other regional initiatives can be found in:

- [ECOWAS Convention on Mutual Assistance in Criminal Matters](#)(1992);
- [ECOWAS Convention on Extradition](#) (1994);

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<sup>24</sup>Government of Ghana Media Center: <http://www.ghana.gov.gh/index.php/media-center/news/2565-parliament-begins-consideration-of-rti-bill>; <http://www.ghana.gov.gh/index.php/news/3860-right-to-information-bill-soon-to-be-passed-president>; <http://www.ghana.gov.gh/index.php/news/3860-right-to-information-bill-soon-to-be-passed-president>; *Ghana Web*, 13 January 2018: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Government-will-pass-the-Right-to-Information-Bill-soon-Minister-617039>; *Graphic Online*, 21 July 2017: <https://www.graphic.com.gh/daily-graphic-editorials/right-to-information-bill-must-be-passed-now.html>.

<sup>25</sup>Government of Ghana Media Center: <http://www.ghana.gov.gh/index.php/media-center/news/2565-parliament-begins-consideration-of-rti-bill>.

<sup>26</sup>*CitiFMonline*, 6 March 2018: <http://citifmonline.com/2018/03/06/akufo-addos-61st-independence-day-anniversary-speech-full-text/>

There is, however, one piece of the anti-corruption framework that is yet to be put in place: The Right to Information Bill. It would increase transparency and add another critical weapon to the armoury in the fight against corruption. After many years of hesitation, we intend to bring a Bill again to Parliament, and work to get it passed into law before the end of this Meeting of Parliament.

<sup>27</sup>*Ghana Web*, 10 March 2017: <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Criminal-Offences-Act-to-be-amended-to-deter-corrupt-acts-517600>.

<sup>28</sup>Information about ECOWAS can be found on its website: <http://www.ecowas.int/>.

- Inter-Governmental Action Group against Money Laundering and Terrorism Financing in West Africa (GIABA).<sup>29</sup>

The international anti-corruption instruments ratified and adopted by the Republic of Ghana are:

- [UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances](#) (Vienna, 1988);
- [UN Convention Against Transnational Organised Crime](#) (Palermo, 2000);
- [UN Convention Against Corruption](#) (New York, 2004);
- [African Union Convention on Preventing and Combating Corruption](#) (Maputo, 2003);
- [Financial Action Task Force \(FATF\) Recommendations](#)<sup>30</sup> (Paris, 2012, updated 2016; accepted by ECOWAS).

### Quasi-legislative responses to corruption

In 2011 CHRAJ put together a [National Anti-Corruption Action Plan](#) (NACAP) to integrate anti-corruption measures in programmes for the public sector and for key private sector actors for a period from 2012-202. The Plan enabled collective action against corruption and the sustained co-ordination of effort and judicious use of resources to deal with the canker. NACAP adopts a long-term strategy that uses prevention, education, investigation and enforcement in a de-politicised framework. Its launch coincided with the Second National Conference on Integrity in October 2011. The communiqué from that conference summarises its findings and is attached as Appendix 2.

Other anti-corruption initiatives include the *Guidelines on Conflict of Interest for Public Officers* produced by CHRAJ that formed the basis for the Conduct of Public Officers Bill and the [Code of Conduct for Judges and Magistrates](#) produced by the Judicial Service.<sup>31</sup> The meetings of the Public Accounts Committee of Parliament are now open to the public. In 2009 the Ministry of Justice produced an anti-corruption manual entitled [Comparative Analysis of Anti-Corruption Laws of Ghana compared with UN Convention Against Corruption and the AU Convention on Preventing and Combating Corruption](#).

A Medium Term National Strategy to combat money-laundering and terrorist financing was prepared for 2012-2014 and support has been given to investigative journalism training and protection. Public education on money-laundering was heightened especially due to the

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<sup>29</sup>Information about the Group can be found on the ECOWAS website: <http://www.ecowas.int/institutions/the-inter-governmental-action-group-against-money-laundering-and-terrorism-financing-in-west-africa-giaba/>.

<sup>30</sup>FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, updated October 2016, FATF, Paris, France.

<sup>31</sup>Available on the website of the Judicial Training Institute, Ghana: <http://www.jtighana.org/Educational/coc.html>.

December 2016 public elections. There have also been peer reviews of the FATF rules and the UN Convention Against Corruption.

Peer review mechanisms have been a very effective tool to ensure that the implementation of international treaties on corruption is complete. After the ratification of an international treaty, transformation, law enforcement and self-regulation follow. The mutual evaluation system enables transformation to be taken to the next level whereby state parties with common interests check on each other for compliance with the international standard. Civil society also plays a role in peer review by the submission of alternate reports that may provide insight into what the government may want to cover up.

The characteristics of peer review are that it is transparent, efficient, non-intrusive and impartial. It does not produce any form of ranking and should provide an opportunity to share good practices and challenges. It should complement existing international and regional review mechanisms and should avoid overlaps and duplication of other peer reviews. A complete peer review process should cover mandatory and non-mandatory provisions and include a country visit to validate findings. Information is gathered from an open source, the public sector, private sector and civil society and concludes with recommendations made for compliance with possible identified technical assistance requirements.

The self-assessment that forms the basis of the mutual evaluation stimulates broader national involvement in anti-corruption efforts, encourages inter-institutional dialogue and provides policy makers with detailed information and analysis.<sup>32</sup> It can be used as an anti-corruption advocacy tool. Regional peer review initiatives have been taken by ECOWAS through GIABA, the inter- governmental action group against money laundering and the financing of terrorism.<sup>33</sup> The mutual peer review of Ghana in 2009 resulted in legislative changes to plug loopholes. Legislative counsel, who most often have the best knowledge of the statute book, may be exposed to criticism in a peer review process on corruption if they have not drafted defensively.

The Rule of Law supports transparency, and in accordance with that principle, there should be public hearings and open competitive behaviour. The rule of law also promotes fairness in decision-making, which means that every effort should be made to ensure that decisions should be made by more than one person and that the decision makers be free from any appearance of bias or conflicts of interest. Any legislative gaps should be identified and plugged to ensure that legislative provisions adhere to the principles that underpin the rule of law. In order to have effective checks and balances, there should be adequate reporting arrangements. In addition, human rights norms and standards should apply and the

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<sup>32</sup>See UN Office on Drugs and Crime, *Comprehensive Self-Assessment Checklist on the Implementation of the United Nations Convention Against Corruption*, available at: <https://www.unodc.org/unodc/en/corruption/self-assessment.html>.

<sup>33</sup>See above, n. 29.

fundamental principle that the law is supreme and no one is above it should be clearly understood by all.

Equality before the law should be manifested in law enforcement and there should be rule according to law, rule under law and rule according to higher law. The principles of the Rule of Law should be observed by legislative counsel as keepers of the statute book. Legislative counsel are in a unique position to apply its tenets. They are most often the policy advisers for legislation in the justice sector and are therefore well placed to make recommendations for digitisation in legislation for example. Digitisation rules out manual systems and enables machine-readable data. This removes the human factor to reduce the opportunity for corruption by intermediaries who offer to expedite services for a fee.

### **Role for legislative counsel**

Legislative counsel are also well placed to prompt the preparation of subsidiary legislation for laws that pose corruption threats, such as for procurement. The lack of implementation detail that is provided in regulations affords public officers the opportunity to abuse their discretion and be corrupt.

The key principles for the statute book to avoid corruption about which legislative counsel should be mindful are accountability and transparency. There must be provision for the Rule of Law in drafted legislation and the assurance that there is proper use of executive power. In the preparation of legislation, legislative counsel should advise instructing officers to avoid complicated rules that encourage shortcuts and provide the opportunity for middlemen to act as intermediaries and facilitators for a fee, for example in the registration of land.

In order to combat corruption by a public officer, discretion in legislation should be curbed and sole decisions avoided. The responsibility of a decision maker should be split and team work should be encouraged. The watchdog role of civil society can play an effective role in the combat of corruption. Legislative counsel can recommend to an instructing officer that civil society be included in the membership of a board or among those to be present at a public hearing, such as when development plans are to be discussed. Whenever public hearings can be organised they should be encouraged and supported by legislation.

The implications of conflict of interest should be clearly spelt out. Legislation should stipulate that public officers must act in a fiduciary position and exercise a duty of care to identify, assess and manage possible conflict of interest. The following is the standard provision on conflict of interest that is of general application in legislation in Ghana:

#### Disclosure of interest

- (1) A member of the Board who has an interest in a matter for consideration shall
  - (a) disclose the nature of the interest and the disclosure shall form part of the record of the consideration of the matter; and

(b) not be present at or participate in the deliberations of the Board in respect of the matter.

(2) A member ceases to be a member of the Board if that member has an interest in a matter before the Board and

(a) fails to disclose that interest, or

(b) participates in the deliberations of the matter.

Legislation should require written decisions and the rotation of personnel in offices where bribery may flourish, such as in a land registration office. This should be standard as should periods for tenure of office.

Legislative counsel are required to write defensively, and to that end the level or rank of an employee, for example on a statutory board, should be stipulated in legislation. Similarly, the qualification of an individual for a statutory office should be stated. It is incumbent on legislative counsel to make sure that reporting relationships are adequate and that legislation is drafted clearly. In order to ensure that a chief executive is not given too much power, the legislative counsel should make sure that subsidiary legislation is prepared and enacted to prevent the exploitation of weak systems because checks and balances are missing.

Legislative counsel should always be on the look out to improve transparency by providing for the disclosure of interest for example. A strategy for inclusion is to provide for public hearings and have open competitive behavior. Decisions taken by more than one person should be properly reported.

Legislative counsel are in a privileged position to advocate for good governance principles. These include the promotion of investigative journalism, support of the media and the use of self-regulation whereby professional associations and disciplinary committees can enforce standards on corruption, such as in the advertising industry. Instructing officers should be encouraged to inform sponsors to put in place Codes of Conduct where applicable, and to maintain ethical standards. When the population is aware that their human rights include the right to information, people can become the watchdogs for corrupt practices.

Legislative counsel should be involved in mutual evaluations since they hold the key to statutes and are best placed to carry out a gap analysis of anti-corruption legislation. It is incumbent on anyone concerned with the legal framework for anti-corruption to provide mechanisms for the enforcement of proceeds of crime legislation. Any opportunity to advocate for or provide for "naming and shaming" those convicted of corruption should be taken.

Sometimes legislative counsel, in their multiple roles, are asked to advise on legal education. In this regard, financial crime courses can be proposed that will enable the inclusion of money-laundering since legal practitioners are generally accountable institutions for the purpose of suspicious transactions.

The need for discretion to be curbed in the drafting of legislation is a *sine qua non*, but what does that entail? Essentially, it means that it is necessary to

- say who can do what,
- say who will oversee,
- stipulate criteria,
- state justification required for decision making,
- state that written reasons are to be given,
- stipulate procedure and require feedback,
- prevent arbitrary decision making,
- specify timelines.

Accountability in legislation can take two forms. It may provide for upward accountability or downward accountability.

Upward accountability is ongoing and enables an aggrieved party access to accountability measures. The aggrieved person is given the power of appeal to a higher authority and a decision of a junior person is subject to the review by a higher person.

Downward accountability is accountability to a lesser body, such as the shareholders at a general meeting or to constituents. A similar situation is a local government context where accountability is to the members of the local community. Legislative counsel should be familiar with both forms of accountability and provide for it in legislation to avoid corruption.

## **Conclusion**

To conclude, the canker of corruption can only be contained by the leaders in a political setting where there is

**W** Willingness

**A** Ability

**R** Readiness

Legislative counsel must draft defensively if they are to achieve their goal to advance the rule of law and maintain the integrity of the statute book. Corruption is the antithesis of what they strive to uphold and legislative counsel must therefore show willingness, ability and readiness to advance the rule of law and deter corruption by creative legal writing.

**Appendix 1 – Key Anti-Corruption Interventions in Ghana (1957-2017)**

<b>PERIOD</b>	<b>KEY INTERVENTION</b>
1957-1966	First criminal legislation on corruption was enacted: The <i>Criminal Offences Act, 1960</i> (Act 29) and the <i>Criminal and Other Offences (Procedure) Act, 1960</i> (Act 30).
1967-1974	A Commission of Inquiry into Bribery and Corruption under the chairmanship of Justice P.D. Anin, popularly known as the Justice Anin Commission was established. Several other Commissions were established within the period to investigate individual public officers alleged to have committed corrupt acts. <i>The Police Service Act, 1970</i> (Act 350) was enacted
1979-1991	House Cleaning Exercises; Public Tribunals; Citizens' Vetting Committees were set up during the era of military rule to combat corruption.
1992-2000	The 1992 Constitution, which sought to integrate anti-corruption into national development was adopted. The Constitution formed the basis for the adoption of further measures to combat corruption including: The Representation of the People Law, 1992 (PNDC 284) Commission on Human Rights and Administrative Justice (CHRAJ) the lead anti-corruption agency was established under Act 456 of 1993 The First National Conference on Integrity was held in 1998 on the theme "Towards a collective plan of action for the creation of a National Integrity system". It resulted in the formation of the Ghana Anti-Corruption Coalition of civil society organisations that prepared the First National Plan of Action Plan Against Corruption in 2000. Other Independent governance institutions and the Serious Fraud Office (SFO) were established. A number of Laws were enacted including: <i>Political Office Holders (Declaration and Disqualification) Act, 1998</i> (Act 550). <i>Audit Service Act 2000, Act (584)</i> <i>Political Parties Act, 2000</i> (Act 574) The National Institutional Renewal Programme (NIRP) and other public sector reforms were also initiated during the period to assess the effectiveness of public institutions including the anti-corruption agencies.
2001-2008	Zero Tolerance for Corruption policy was launched by the Government. Some key anti-corruption laws were enacted. They include: <i>Financial Administration Act 2003</i> (Act 654) <i>Internal Audit Agency Act, 2003</i> (Act 658) <i>Public Procurement Act, 2003</i> (Act 663) <i>Whistleblowers Act, 2006</i> (Act 720) <i>Anti-Money Laundering Act, 2008</i> (Act 749)

	<p>At the international level, the UNCAC and AU Convention were ratified in December 2005 as additional instruments to the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption which had been ratified earlier.</p> <p>The CHRAJ also issued Guidelines on Conflict of Interest to assist Public Officials identify and manage Conflict of Interest</p>
2009-2011	<p>The Code of Conduct for Public Officers of Ghana was launched.</p> <p>Anti-Corruption manual produced by the Ministry of Justice 2009</p> <p>Anti-corruption legislation enacted during the period includes:</p> <p><i>The Economic and Organised Crime Office Act, 2010, (Act 804);</i></p> <p><i>The Mutual Legal Assistance Act, 2010 (Act 807);</i></p> <p><i>The CHRAJ (Investigations Procedure) Regulations (C.I. 67)</i></p> <p><i>Anti-Money Laundering Regulations, 2011 (L.I. 1987)</i></p> <p>Consolidated the measures and initiatives undertaken to build a strong national integrity system in Ghana, and</p> <p>Charted the way forward to establish a strong national integrity system to reduce the opportunity for corruption for 2012-2021</p> <p><i>Anti-Money Laundering (Amdt) Act, 2014 (Act 874)</i></p> <p><i>Public Procurement (Amdt) Act, 2016 (Act 914)</i></p> <p><i>Companies (Amdt) Act, 2016 (Act 920)</i></p> <p><i>Public Financial Management Act, 2016 (Act 921)</i></p> <p><i>Office of the Special Prosecutor Act, 2017 (Act 959)</i></p>

## Appendix 2 – Second National Conference on Integrity – Building a Robust Ethics Infrastructure to Promote Integrity in Ghana

**12 – 14<sup>TH</sup> October, 2011.**

### **Communiqué**

The Second National Conference on Integrity on the theme “***Building a Robust Ethics Infrastructure to Promote Integrity in Ghana***” organised by the Commission on Human Rights and Administrative Justice supported by DANIDA at the College of Physicians and Surgeons, Accra, between the 12-14<sup>th</sup> October 2011 focused on

- Consolidating the measures and initiatives undertaken to build a strong national integrity system in Ghana, and
- Charting a way forward to establish a strong national integrity system to reduce the opportunity for corruption

*Recalling* the significant steps taken towards building a strong integrity system and generally improving the overall governance situation in the country at the First National Conference on Integrity in 1998 on the theme “Towards a collective plan of action for the creation of a National Integrity system”,

*Aware* that Chapter 6 of the 4<sup>th</sup> Republican Constitution of the Republic of Ghana directs the State to take steps to eradicate corrupt practices and the abuse of power and endeavour to secure and protect a social order founded on probity and accountability,

*Mindful* that Chapter 24 of the Constitution provides a Code of Conduct for Public Officers, and

*Noting* that Parliament ratified the United Nations Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption on the 31<sup>st</sup> October 2003.

The participants at the Conference:

1. Appreciated the participation of H.E. John Dramani Mahama, Vice President of the Republic of Ghana for accepting the invitation of CHRAJ to participate in the Conference and for the inauguration of the National Working Group on the Development of a National Anti-Corruption Action Plan in December 2009;
2. Advised that much remains to be done to promote integrity since the First Integrity Conference in 1998;
3. Acknowledged that high ethical standards are needed in public life to reduce the opportunity for corruption and enhance the principles of probity, transparency and accountability and accepted that there is a need to strengthen the moral fibre of Ghanaian society;
4. Affirmed that transparency must be coupled with accountability to achieve integrity in the public interest;
5. Confirmed that an ethical infrastructure must embrace a values system and disciplinary approach;
6. Observed that the perception about corruption improved marginally from 2009 – 2010 on the Transparency International Corruption Perception Index;
7. Expressed satisfaction that the First National Conference on Integrity saw the creation of the Ghana Anti-Corruption Coalition which provides a forum for the government, public and private sector institutions as well as civil society organisations to collaborate and combat corruption;
8. Commended the Ghana Anti-Corruption Coalition for the First National Plan of Action Against Corruption 2001-5;
9. Advised that, in accordance with Chapter 2 of UNCAC, more preventive measures on corruption be used rather than the over reliance on enforcement mechanisms;

10. Welcomed that CHRAJ has developed Guidelines on Conflict of Interest to Assist Public Officials, Identify, Manage and Resolve Conflicts of Interest and a Code of Conduct for Public Officers in Ghana;
11. Approved that the Judiciary has established a Code of Conduct for its officers and Ethics and Integrity Committees as well as Client Service and Public Complaint Units for the Judiciary and Judicial Service;
12. Endorsed the need for Judicial accountability and activism and the assurance of independence of the Judiciary;
13. Welcomed that CHRAJ has established an Anti-Corruption Department;
14. Proposed that the government adequately resource CHRAJ as the independent anti-corruption institution to effectively discharge its anti-corruption mandate;
15. Approved that anti-corruption laws have been enacted since the First National Conference on Integrity;
16. Noted however, that there are gaps in the anti-corruption laws and that the Financial Administration Tribunal has not been established;
17. Advised that the Attorney-General and Minister for Justice see to the enactment of the Code of Conduct for Public Officer's Bill, the Whistleblower (Amendment) Bill and the preparation of legislation on witness protection to assist in the prosecution of corruption cases;
18. Observed that the Freedom of Information Bill has not been enacted and urged the swift passage of the Bill by Parliament;
19. Appealed that anti-corruption laws be enforced by the relevant agencies without fear or favour;
20. Urged the Attorney-General and Minister for Justice to consider an amendment to the Criminal Offences Act, 1960 (Act 29) to widen the definition of corruption in conformity with the UNCAC and the AU Convention;
21. Expressed concern that the subsidiary legislation for some of the anti-corruption laws has not been made;
22. Recommended that there should be more covert investigations to detect corruption;
23. Proposed that an Independent Public Prosecutor be appointed to prosecute corruption cases;
24. Advised that the asset declaration regime for public officers be made more robust and that the declarations be verified and subject to public scrutiny;
25. Urged that the internal controls in public agencies be improved to check corrupt practices;

26. Approved that the hearings of the Public Accounts Committee of Parliament have been made public;
27. Appealed that the Public Accounts Committee should ensure that follow-up activities of its operations are carried out;
28. Entreated that public anti-corruption agencies receive more funding and resources;
29. Acknowledged the need for enhanced international co-operation to deal with trans-national corruption;
30. Agreed that the public awareness campaign on corruption of CHRAJ be improved and that it should cater for the disabled in society;
31. Proposed that the Statistical Service consider a periodic national survey on the knowledge of respondents on corruption issues;
32. Recommended that the media should play a greater role in exposing corruption but with more professionalism and integrity;
33. Noted that the role of civil society in fighting corruption should be encouraged but should be matched with technical ability and integrity to effectively monitor and detect corruption;
34. Decided that children and the youth be introduced to ethics and integrity education and training to imbibe the culture of integrity before their moral values are corrupted;
35. Identified the need for capacity building and training of public officials engaged in the fight against corruption
36. Observed that under the strategic plan, NACAP will pursue a National Integrity Programme;
37. Recommended that Parliament adopt the NACAP and pass the outstanding anti-corruption Bills and make the outstanding Legislative Instruments;
38. Considered the presentations from the Malaysia Anti-Corruption Commission, Directorate on Corruption and Economic Crime, Botswana and the Anti-Corruption Commission of Sierra Leone and urged CHRAJ and other relevant institutions to adopt their best practices;
39. Recommended that collaboration between stakeholders on corruption in the public and private sector needs to be improved for the more effective eradication of corruption and abuse of office;
40. Called for the de-politicisation of corruption and crime issues;
41. Concluded that the political will is crucial to the successful implementation of the NACAP and the enforcement of the Code of Conduct and the Guidelines on Conflict of Interests.

Finally, expressed gratitude to DANIDA for the sponsorship of the Conference.

Dated 14<sup>th</sup> October 2011, at the Second National Conference on Integrity, held in Accra at the College of Physicians and Surgeons.

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# Drafting Legislative Provisions to Combat Corruption in Petroleum Activities

Deana Silverstone<sup>1</sup>



## Abstract:

*This article discusses legislative measures to combat corruption in the form of bribery and kickbacks, theft of state assets, conflict of interest by government regulators and bureaucratic, systemic corruption, as these activities affect government oversight of petroleum activities. It reviews recent legislative developments in a range of jurisdictions, including East Timor, Kenya, South Sudan and Tanzania*

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## Petroleum Activities and Corruption: Scope of this Paper

This paper is mainly concerned with corruption in the sense of bribery and kickbacks, theft of state assets, conflict of interest by government regulators and bureaucratic, systemic corruption, as these activities affect government oversight of “petroleum activities”. What is meant by that term is often referred to as the “upstream” aspect of these activities, namely the exploration, drilling, production and transport to export delivery point of crude petroleum and associated activities and events. The possible legislative measures to combat them that are discussed in this paper relate to these activities. This paper does not discuss specific anti-bribery and anti-corruption legislation aimed at private sector activities or industry perpetrators, referred to below.<sup>2</sup> References to legislation or draft legislation in this paper are primarily to recently passed legislation in emerging economies or new oil producing countries, the reason being that corruption prevention is often an important

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<sup>1</sup> Canadian lawyer with extensive experience in drafting legal frameworks to implement reform in the petroleum sector and advising on various aspects of management and development of petroleum activities.

<sup>2</sup> At page 37ff under the heading “Areas in the Life Cycle of Petroleum Activities Vulnerable to Corruption”.

consideration in the drafting of such instruments and there may not be in place specific anti-corruption legislation, policies or enforcement mechanisms applicable to all industries at the time of drafting of the petroleum-related legislation.

### **What is Corruption and What are its Effects?**

Corruption – generally defined as the abuse of entrusted power for private gain<sup>3</sup> – is associated with the exploration and production of petroleum and related activities for a variety of reasons.<sup>4</sup> These reasons include

- resource-rich emerging markets vulnerable to corruption and weak in governance,
- state-owned and managed resources necessitating frequent dealings with government officials, and
- bureaucratic involvement providing many opportunities for bribery, the temptation for accepting bribes by these officials compounded by low salaries.

Added to these reasons is the fact that large sums of money are involved in both the investment aspect of petroleum activities and the production end, money that is often unaccounted for and inadequately supervised after reception by either the state-owned petroleum corporation or other government ministries entrusted with its safe-keeping and management. In many new oil-producing countries with emerging economies, huge sums of money are paid to governments representing revenues and profits from production and the fees and other charges regarding applications for licences and other approvals. Only a very small portion of this money may find its way to alleviating poverty or the often execrable conditions in which people live – the very people in whose name the resources are managed.<sup>5</sup>

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<sup>3</sup> From the website of Transparency International, a global, politically non-partisan movement focused on eliminating corruption: <http://www.transparency.org/>. This definition is also used by the World Bank: [Report on Helping Countries Combat Corruption - The Role of the World Bank, Poverty Reduction and Economic Management](#), The World Bank, September 1997, (hereinafter referred to as the "World Bank Report") at 8. The term is used here in the sense of abuse of power in the public domain.

<sup>4</sup> Bribe Payers Index, a Transparency International initiative, identified companies in the oil and gas sector as being perceived to be more likely to bribe than those in other sectors; the sector was in the bottom 25% of 19 sectors. On the other hand, others have noted that companies associated with petroleum activities are not more corrupt than other industries, but certain characteristics of these activities and where they are being performed (often in countries identified as [fragile states](#) or cash poor and in desperate need of funds) lend themselves to corrupt practices: Ernst and Young Report, [Managing Bribery and Corruption Risks in the Oil and Gas Industry](#), Feb/ 2016 at 5.

<sup>5</sup> A sad example is South Sudan. According to an article in the [March 5 2017 edition of the New York Times](#), [w]hen South Sudan gained independence, it was churning out 300,000 barrels of crude oil per day, generating billions of dollars that were supposed to be spent on schools, roads, playgrounds, health clinics, water treatment facilities, police stations, all the gear of a functioning state. But look around most of South Sudan and you won't see any of that. The reason? The oil revenue was stolen. Top officials have been accused of amassing fortunes, and they and their families were often spotted in Nairobi, the capital of Kenya next door, driving the snazziest cars — \$100,000 Land Rovers and gleaming Humvees that hogged up the road.

The negative effects of corruption have been well-documented. Apart from the obvious ones – deflecting revenues and funds from badly needed infrastructure projects and social and economic programs<sup>6</sup> and putting these monies in the pockets of a few – corruption is also, according to the World Bank, bad for development:

It leads governments to intervene where they need not, and it undermines their ability to enact and implement policies in areas in which government intervention is clearly needed—whether environmental regulation, health and safety regulation, social safety nets, macroeconomic stabilization, or contract enforcement.<sup>7</sup>

According to Transparency International, the global civil society organisation leading the fight against corruption,

corruption corrodes the social fabric of society. It undermines people's trust in the political system, in its institutions and its leadership. A distrustful or apathetic public can then become yet another hurdle to challenging corruption.<sup>8</sup>

Corruption can be broken down into a variety of activities:

- Bribery (payment for granting of government contracts, government benefits, lower taxes, licenses, time extensions, legal outcomes, etc.);
- Theft of state assets by government officials charged with their stewardship. The theft can be either large scale in the form of "spontaneous" privatization of state assets by enterprise managers or petty theft of items such as office equipment and stationery, vehicles, and fuel; It can also take the form of theft of government financial resources by officials pocketing tax revenues or fees (often with the collusion of the payer, in effect combining theft with bribery), stealing cash from treasuries, extending advances to themselves that are never repaid, or drawing pay for fictitious "ghost" workers, a pattern well documented in the reports of audit authorities;
- Political and bureaucratic corruption controlled through election laws, campaign finance regulations, and conflict of interest rules for parliamentarians and other government officials;
- Isolated and systemic corruption (isolated meaning committed rarely by individuals and systemic meaning widespread and inherent in the bureaucracy);
- Corruption in the private sector.<sup>9</sup>

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<sup>6</sup> Experts estimate that in Nigeria alone a staggering \$400 billion of oil revenue has been stolen or misused since 1960. Despite a 50 year oil boom which has transformed Nigeria's economy into the largest in Africa, 80% of its citizens live on less than \$2 a day: Global Witness, "Oil, Gas and Mining", available at <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/#more>.

<sup>7</sup> World Bank Report, above n. 3.

<sup>8</sup> Transparency International, "FAQs on Corruption", available at [http://www.transparency.org/whoweare/organisation/faqs\\_on\\_corruption](http://www.transparency.org/whoweare/organisation/faqs_on_corruption).

<sup>9</sup> Summarized from the World Bank Report, above n. 3 at 9-12.

## **Areas in the Life Cycle of Petroleum Activities Vulnerable to Corruption**

Key areas vulnerable to bribes, kick-backs and other forms of corruption involving regulators involved in oversight of petroleum activities are:

- granting of rights to explore for and produce petroleum, or to conduct any related activities, such as reconnaissance and pipeline transportation;
- bid procedures;
- procurement procedures;
- requirements by the contractor to pay for these rights, including signing bonuses and other fees;
- enforcement of operational, safety and environmental standards;
- collection of revenues from production, including fees, monetary penalties;
- management of revenue, including the creation and oversight of funds;
- receiving and keeping information and records;

## **The Role of Legislation**

Legislative safeguards can provide one tool for combatting the corruption associated with extraction and production of petroleum. They must also be combined with other, non-legislative mechanisms that include policies and processes to ensure compliance with the law so that the latter is not just a paper exercise. A country can have the best laws in the world, but if they are not implemented and enforced they mean nothing. The role of a strong judicial system in enforcement of legislation cannot be underestimated.<sup>10</sup> Nonetheless, the role of the legislative counsel in proposing and formulating effective and practical provisions to fight corruption in the petroleum industry is an important one.<sup>11</sup>

Provisions aimed at combatting corruption in the petroleum industry discussed in this paper relate to:

- transparent management of revenues and other funds;
- public dissemination of key petroleum-related information;
- open bidding procedures for awarding licenses and other authorizations,
- criteria limiting the discretion of decision-makers in approval and authorization granting roles;
- public consultation in areas that have an impact on the economic, social or environmental well-being of communities in the vicinity of petroleum activities;

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<sup>10</sup> World Bank Report, above n. 3, at 43-44.

<sup>11</sup> According to Ann Seidman, Robert B. Seidman and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change*, (Kluwer Law International: Boston, 2001) at 375, "Good laws alone do no guarantee development and good governance; poor laws, however, do constitute a major cause of their defeat."

- declarations by senior management of self-interest in petroleum-related projects over which they have decision-making powers and disclosure of interests of public officials in such projects while acting as regulators of the sector;
- the criteria for and subject matter of audits to assess different aspects of the value-chain of petroleum activities;
- the qualifications and competence requirements of senior officials in governmental bodies or government-owned corporations that have a role in developing and managing petroleum activities; and
- the make-up of regulatory bodies having an oversight role of the sector.

### **Specific Anti-bribery and Anti-corruption Legislation (ABAC)**

In response to the growing risks of corruption in the oil and gas industry involving international companies operating in fragile economies, certain countries have enacted specific Anti-Bribery and Anti-Corruption Legislation (ABAC) that extend extraterritorially.<sup>12</sup> Such legislation is aimed at companies subject to the jurisdiction of the countries enacting the legislation and governs their behaviour in other countries – ones in which they are investors or operators. While this legislation is clearly relevant to any discussion on managing or controlling corruption, the focus of this paper, as noted earlier, is not the potential bribers, but rather those vulnerable to bribes or other forms of corruption – the regulator and other government officials involved in overseeing petroleum activities.

### **Legislative Provisions to Combat Corruption**

#### ***Transparent Management of Revenues and Other Funds***

Accountability and transparency relating to the revenues and payments resulting from drilling and production of petroleum are key factors to be addressed in designing a legislative regime that regulates management and development of upstream petroleum activities and that is aimed at minimizing or controlling corruption. As already noted, large sums of money are involved in petroleum activities, including fees and other charges relating to licensing, signing bonuses relating to the conclusion of petroleum agreements, revenues and payments relating to production-sharing contracts and royalties relating to concession regimes. To combat corruption, all should be accounted for, publicized and traceable: what comes into government bank accounts and what flows out; what the money is used for, how it is allocated and to whom. Transparent and effective management of

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<sup>12</sup> For example, The UK *Bribery Act* (UKBA), the US *Foreign Corrupt Practices Act* (FCPA), the Canadian *Corruption of Foreign Public Officials Act* (CFPOA) and other similar anti-corruption legislation around the world prohibits corporations and individuals from engaging in bribery and requires corporations to maintain accurate financial records. Greater transparency of payments to governments is also demanded by the US Dodd-Frank *Wall Street Reform and Consumer Protection Act*. Companies registered with the US Securities and Exchange Commission (SEC) are required to disclose in their annual reports payments made to any non-US government for purposes of the commercial development of oil, natural gas or minerals.

revenues and other funds deriving from petroleum activities goes to the heart of combatting corruption because secrecy provides an environment where hidden payments, bribes and kickbacks can flourish.

Usually there is separate legislation dealing with petroleum-revenue management, apart from other aspects of petroleum management and development. Ministries and agencies responsible for finance and budgets are most often the lead government bodies responsible for implementing this legislation.<sup>13</sup> The legislation generally lays down the key parameters for the accounting, collecting, reporting, saving and utilizing petroleum revenues due the Government.<sup>14</sup> A detailed review of these Acts is outside the scope of this paper. One provision however, sometimes set out in the legislation dealing with regulation of petroleum activities (as well as in the separate petroleum revenue management legislation if it exists) will be highlighted here as a leading practice relating to revenue management.

The provision in question refers to the Extractive Industries Transparency Initiative (EITI) Standard – the international standard for transparency and accountability around a country's oil, gas and mineral resources, which, when implemented, ensures transparency on how a country's natural resources are governed: how the rights are issued, how the resources are monetised and how they benefit the citizens and the economy.<sup>15</sup> The Natural Resources Governance Institute describes the standard as follows:

In countries participating in the EITI, companies are required to publish what they pay to governments and governments are required to publish what they receive from companies. These figures are then reconciled by an independent administrator.<sup>16</sup>

Examples of provisions referencing this standard are found in the South Sudan *Petroleum Act 2012* (“South Sudan Act”) and the East Timor Decree-Law No. 32/2016 *Offshore Petroleum Operations in Timor Leste*, set out as follows:

South Sudan Act, s. 78(1) and (2)

**78.** (1) Licensees, contractors and sub-contractors shall annually disclose information on all payments and deemed payments made to the Government and Government

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<sup>13</sup> See for example, Ghana's *Petroleum Revenue Management Act, 2011* (Act 815) and South Sudan *Petroleum Revenue Management Act 2013*.

<sup>14</sup> Joe Amoako-Tuffour, Public Participation in the Making of Ghana's Petroleum Revenue Management Law, Natural Resource Charter Technical Advisory Group, October 2011, available at <http://www.resourcegovernance.org/sites/default/files/documents/ghana-public-participation.pdf>

<sup>15</sup> EITI website, <https://eiti.org/standard/overview>.

<sup>16</sup> Natural Resource Governance Institute, “Extractive Industries Transparency Initiative”, January 2010, available at: <http://www.resourcegovernance.org/analysis-tools/publications/extractive-industries-transparency-initiative-eiti>. The Institute is a non-profit independent organization that provides policy advice and advocacy on resource governance.

agencies, monetary or in kind in connection with petroleum activities, in accordance with applicable law.

(2) All disclosures under this Section shall be reported to an independent administrative body and shall be published and verified in accordance with the principles of the Extractive Industries Transparency Initiative as prescribed in the regulations.

East Timor Decree-Law No.32/2016, Article 97

**97.** The contractor shall comply with the reporting requirements related to the Timor-Leste Extractive Industry Transparency Initiative (EITI), as applicable from time to time in accordance with Applicable Law in Timor-Leste.

The Kenya Petroleum (Exploration, Development and Production) Bill, 2015 (“Kenya Bill”) takes a different approach to arrive at the same result. It does not mention the EITI standard, but subsection 121(2) of the Bill sets out the principles found in the standard:

Kenya Bill, s. 121(2):

**121.** (2) For reporting purposes, the transparency and accountability framework for the upstream petroleum sector shall be disaggregated into each petroleum agreement, non-exclusive permit, drilling permit, production permit, and plug and abandonment permit in the following categories—

- (a) payment type by each contractor (i.e., taxes, fees, royalties, and other charges);
- (b) production volumes by each contractor measured at the delivery point of sale;
- (c) transfers of all upstream petroleum sector revenues from national Government to County Governments and communities, including royalties; and
- (d) all contractor contributions in cash or in kind to County Governments and local communities.

All of the above examples provide slightly different ways of adopting or referencing the EITI standard. The South Sudan Act states that all payments and deemed payments shall be disclosed in accordance with EITI principles “as prescribed in the regulations”. The East Timor Decree states that all contractors shall comply with the reporting requirements of the Standard as applicable from time to time in Applicable Law in Timor Leste (the definition of “Applicable Law in Timor-Leste” includes regulations). As noted, the Kenya Bill does not mention the EITI standard, but it does set out the principles directly in the legislation with which the contractor must comply.

Which is the better approach? All are aimed at combatting corruption by requiring reporting and publication of payments and related information. It is submitted that all have their merits, but the better approach would be to reference the standard regardless of whether or not the principles are explicitly set out in the legislation. Because the EITI standard is

universally known and accepted in the extractive industry sector, referencing it in the legislation demonstrates the government's commitment to a leading practice in the area of transparency and accountability and provides a clear message to potential investors on the Government's intentions in this respect.

### ***Public Dissemination of Key Petroleum-Related Information***

A maxim attributed to Sir Francis Bacon states that "Knowledge is power" and the maxim is especially applicable to key petroleum-related information. To have an equal playing field among potential investors, the same information should be available to all interested parties, and the more available in the public domain the better. Provisions in legislation that guarantee access to key petroleum-related information are a means of combatting corruption by providing the same knowledge base to all potential investors and an open and transparent environment that discourages backroom deals and kick-back arrangements. Use of the internet by the regulatory authority is especially valuable and efficient in terms of disseminating such information. Recently drafted Petroleum legislation often includes extensive provisions on the dissemination of information, including the use of the regulator's web page to publish it.

For example, the South Sudan Act, s. 79 provides that:

**79.** (1) The Minister shall make available to the public, both on the Ministry website and by any other appropriate means to inform interested persons:

- (a) all key oil sector production, revenue, and expenditure data, petroleum agreements and licenses;
- (b) regulations and procedures related to the petroleum sector;
- (c) justification of award of petroleum agreements, the beneficial ownership information for the contractor and documented proof of the requisite technical competence, sufficient experience, history of compliance and ethical conduct and financial capacity of the contractor;
- (d) annual production permits;
- (e) any model petroleum agreement referred to in Section 71;
- (f) the key parameters of each petroleum agreement, to the extent such parameters differ from an already published model petroleum agreement, including the cost oil management and limits, the production-sharing formulas and mechanisms any bonuses, taxes or fees, royalties, any exemptions or favourable tax treatment and any stability clauses; and
- (g) except for the information and data referred to in Section 76 (5), information relating to petroleum activities, including information on petroleum agreements and relevant treaties as prescribed in the regulations.

(2) The information referred to in subsections (1)(c), (d) and (f) of this Section shall also be published in the Gazette.

The reference to subsection 76(5) in section 79 provides an exemption from publication of matter deemed to be confidential, except that under subsection 78(3) confidentiality clauses that prevent disclosure of information on any payments made and revenues received in connection with petroleum activities will be void to the extent required for disclosure according to the EITI standard, referred to earlier.<sup>17</sup>

The South Sudan legislation compared to other recent African petroleum legislation goes far in setting out publication requirements. It requires publication of complete petroleum agreements (on the web page of the Ministry of Petroleum and Mining). The Tanzania *Petroleum Act 2015* (“Tanzania Act”) and the Uganda *Petroleum (Exploration, Development and Production) Act* (“Uganda Act”) require only “details” of the agreements to be made public,<sup>18</sup> which implies a summary, and Somalia<sup>19</sup> requires publication of the authorizations, not the agreements themselves. However, the secret to successful legislation and the credibility of the government enacting it is in its implementation and to date there has been no publication on the South Sudan web page of any petroleum agreement.

### ***Open Bidding Procedures for Awarding Licenses and Other Authorizations***

The requirement in legislation for open bidding procedures in awarding licenses and other authorizations is another key tool in combatting corruption relating to petroleum activities. The procedure is in direct contrast to a system allowing for sole source awarding of such authorizations with no published criteria to limit the discretion of the decision-maker and where the lack of any open, competitive process invites bribery and like abuses.

A common legislative provision setting out the requirement for open bidding as the rule, with some leeway for sole sourcing can be found in section 49 of the Tanzania Act:

**49.(1)** Petroleum agreements shall not be entered into unless a transparent and competitive public tendering process is completed.

(2) The Minister shall cause to be published in a newspaper of wide circulation, invitation of tender or subject to subsection (3) the intention to initiate direct negotiations.

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<sup>17</sup> This exception regarding confidentiality clauses is a concern for the EITI Secretariat. For a discussion of how these clauses are perceived as a barrier to transparency see: Anwar Ravat and Sridar P. Kannan, *Implementing EITI for Impact - A Handbook for Policy Makers and Stakeholders Oil, Gas and Mining Unit* (World Bank, Oil, Gas and Mining Unit (SEGOM), Sustainable Energy Department (SEG), Sustainable Development Network Vice-Presidency (SDN): Washington) at 55-57 (available at [https://eiti.org/sites/default/files/documents/Implementing%20EITI%20for%20Impact\\_Handbook%20for%20Policy%20Makers%20and%20Stakeholders.pdf](https://eiti.org/sites/default/files/documents/Implementing%20EITI%20for%20Impact_Handbook%20for%20Policy%20Makers%20and%20Stakeholders.pdf)).

<sup>18</sup> The *Tanzania Act*, s. 92, The *Uganda Act*, s. 152.

<sup>19</sup> *Somalia Petroleum Law 2008*, art. 38.

(3) Where all or part of the area tendered in a competitive public tender process for an award of an agreement has not become effective, and it is for the public interest, the Minister may, upon the advice of PURA and approval of the Cabinet, initiate direct negotiations with qualified and eligible company.

(4) The Minister may, by regulations, prescribe the manner of conducting tendering process.<sup>20</sup>

The South Sudan Act appears to be the only recent African piece of legislation that contains no exception to the requirement for an open bidding process regarding petroleum agreements and provides, without exception, that:

**18.** (2) Petroleum agreements shall be entered into following an open, transparent, non-discriminatory and competitive tender process conducted in accordance with applicable law governing public procurement.

It is submitted that ideally there should be no exception to the open bidding requirement as in the South Sudan legislation. However, the effectiveness of this requirement depends on its implementation and a requirement without an exception maybe too strict a limitation on many new oil-producing countries and thus end up being counter-productive as far as application goes.

It should also be noted that with respect to the South Sudan Act and subcontracts with suppliers under subsection 63(1), open bidding is required only for contracts over a prescribed amount. Subsection 63(1) provides:

**63.** (1) Subject to the provisions in this Chapter, procurement of goods and services that exceed a prescribed threshold value shall follow open, transparent, non-discriminatory and competitive tendering procedures as prescribed in the regulations.

To date no amount has been prescribed, with the result that there can be sole-sourcing of these types of contracts in every case. Since establishing the limit is within the total discretion of the Government and it has not acted to establish any limits by regulation, one would have to question the commitment of the Government to the open bidding process at least for these types of contracts.

### ***Criteria Limiting the Discretion of Decision-Makers in Approval and Authorization Granting Roles***

Any grant by Parliament of unlimited discretion by decision-makers is an invitation to corruption because there is no accountability by the decision-maker.<sup>21</sup> While there is often,

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<sup>20</sup> Similar requirements for open bidding procedures with similar exceptions for sole-sourcing are found in sections 52-53, Uganda Act, sections 54(2) and (3), Kenya Bill, sections 10(3) and (5), Ghana Petroleum (Exploration and Production) Act, 2016.

<sup>21</sup> Seidman, Seidman and Abeyesekere, above n. 11 at 351

in Common Law jurisdictions, the process known as judicial review or prerogative writs whereby discretionary decisions may be reviewed on the grounds of reasonableness,<sup>22</sup> in countries with poorly developed or nascent judicial systems, this right may, in reality, be meaningless.<sup>23</sup>

One area of responsibility relating to the management of petroleum activities that usually grants a wide discretion to regulators, and is thus a tempting arena for corruption, is that of authorization granting. Without criteria to limit the decision-maker's discretion, the latter is free to decide on granting authorizations relating to a whole host of petroleum activities based on arbitrary considerations, which could include nepotism, favoritism, bribes or a combination of any of these. As already noted, a requirement for an open-bidding process greatly diminishes the opportunity for corrupt practices. Another safeguard is to ensure that any decision made by the regulator is limited by statutory, objective criteria. The criteria can be in the governing legislation or by regulation. If the latter, there has to be an enabling power to prescribe them. For example, section 129 of the Kenya Bill contains the following regulation-making powers to prescribe criteria surrounding approvals under the Act:

**129.** [T]he Cabinet Secretary may make regulations with respect to the following—

...

- (f) terms and conditions for the application and approval of non-exclusive exploration permit;
- (g) terms and conditions for the application and approval of drilling permits;
- (h) terms and conditions for the application and approval of production permits;
- (k) terms and conditions for the application and approval of plugging and abandonment permits;
- (x) criteria for the evaluation of the petroleum agreement applications and approval of requests for extensions of petroleum agreements;

An example of statutory criteria limiting the discretion of the regulator is found in the Tanzania Act, respecting construction approvals for petroleum carriage facilities:

**127.** (1) Any person intending to construct a petroleum installation or petroleum carriage facility shall apply in writing to EWURA<sup>24</sup> for an approval.

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<sup>22</sup> See, for example, *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at paras. 27ff.

<sup>23</sup> For example, Marie Chêne, Transparency International, Anti-Corruption Resource Centre, "[Overview of Corruption and Anti-corruption in Somalia](#)", states:

...multiple, overlapping and contradictory sources of law have created confusion over jurisdiction... Lack of judicial training, public distrust of formal systems and Islamic efforts to impose fundamentalist beliefs add to the general confusion and contribute to an uneven delivery of justice.

<sup>24</sup> EWURA stands for the Energy and Water Utilities Regulatory Authority, one several regulatory authorities under the Tanzania Act.

...

(4) EWURA shall, before granting approval, consider:

- (a) relevant Government laws, policies and plans;
- (b) technical and financial capability of the applicant; and
- (c) any public interest which in EWURA's opinion, may be affected by the granting the approval.

(5) EWURA shall, within thirty days from the date of receipt of an application, notify the applicant in writing of the approval of application.

### ***Public Consultation in Areas in the Vicinity of Petroleum Activities***

Transparency International highlights citizenship empowerment as one of five key ingredients to stop corruption.<sup>25</sup> The World Bank also lists "Power of the People" as one of the ways to combat corruption because it "create(s) pathways that give citizens relevant tools to engage and participate in their governments – identify priorities, problems and find solutions."<sup>26</sup>

To be effective in the fight against corruption, the provision should consist of two elements:

- i. The requirement for consultation before a decision is made; and
- ii. The obligation on the part of the decision-maker to take the results of the consultation into account.

Item 2) might seem self-evident but it is submitted that its explicit inclusion is important in new oil-producing countries with emerging economies and weak governance where it might be sufficient to those in power to give the appearance of having consulted local communities and civil society groups without actually taking their views seriously.

An example of a provision on consultation that includes both elements above can be found in the South Sudan Act in subsection 59(4), which relates to environmental and social impact assessments and states that:

**59.** (4) The assessments...shall:

...

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<sup>25</sup> Transparency International, "How to Stop Corruption: Five Key Ingredients", available at [http://www.transparency.org/news/feature/how\\_to\\_stop\\_corruption\\_5\\_key\\_ingredients](http://www.transparency.org/news/feature/how_to_stop_corruption_5_key_ingredients). The other four are: effective law enforcement supported by a strong legal framework, reform of public administration and finance management and promotion of transparency and access to information.

<sup>26</sup> World Bank, Governance for Development Blog, <http://blogs.worldbank.org/governance/here-are-10-ways-fight-corruption>.

- (b) include consultation with the public, including local communities;
- (c) evaluate, after consideration of the consultations conducted under subsection (b) of this Section, the preliminary geological, geophysical and geochemical data and the actual and potential impact of petroleum activities on various interests in the relevant area, including local communities, the environment, sites of historical importance, trade, agriculture and other industries and past, present or potential conflict.

Another role that consultation can play in the fight against corruption is to give the local community a role in monitoring government management of petroleum revenues. For example, in the Kenya Bill, the split between the government share of profit oil between the national and county governments is payable to a trust fund managed by a board of trustees established by the County Government in consultation with the local community.<sup>27</sup>

### ***Declarations and Disclosures by Senior Management and Public Officials***

#### *Declarations of Assets and Liabilities*

Statutory provisions requiring declarations by senior management of assets and liabilities can have several purposes with the ultimate goal of preventing or discouraging corruption. The main purposes of asset declarations include the following:

- to increase transparency and the trust of citizens in public administration by disclosing information about assets of politicians and civil servants and showing they have nothing to hide;
- to help heads of public institutions prevent conflicts of interest among their employees and to resolve such situations when they arise in order to promote integrity within their institutions;
- to monitor wealth variations of individual politicians and civil servants in order to dissuade them from misconduct and protect them from false accusations, and to help clarify the full scope of illicit enrichment or other illegal activity by providing additional evidence.<sup>28</sup>

Provisions regarding declarations of this type vary widely as to whether disclosure should be made public in whole, in part or not at all, the degree of disclosure and how far the

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<sup>27</sup> Section 94(4) the Kenya Bill:

(4) The local community's share shall be equivalent to five percent of the Government's share and shall be payable to a trust fund managed by a board of trustees established by the County Government in consultation with the local community.

The World Bank in its blog on 10 Ways to Fight Corruption, *ibid.*, also mentions this monitoring role through consultation.

<sup>28</sup> OECD, "Asset Declarations for Public Officials: A Tool to Prevent Corruption", (OECD Publishing: 2011), available at <http://dx.doi.org/10.1787/9789264095281-en>.

requirement extends within the official's circle of family and friends.<sup>29</sup> Often provisions of this type are found in specialized statutes targeting corruption or more general legislation relating to the civil service. However, they can also be found in sector related legislation, such as petroleum legislation; the legislative examples cited here are taken from the latter type of legislation.

Subsection 97(1) of the South Sudan Act is relatively widely drafted to include disclosure of the official in question, spouses, children and others in the domestic circle and to apply to assets and liabilities within and outside of South Sudan. It does not provide for public disclosure.<sup>30</sup>

**97.** (1) Members of the Commission<sup>31</sup> and any senior public service officials employed in the governing of petroleum activities shall, upon assumption of their offices and annually, make a confidential declaration of their assets and liabilities including those of their spouses, children and other persons in their domestic relations to the Anti-Corruption Commission and the Audit Chamber in accordance with the applicable law.

(2) The requirement to make a declaration includes assets and liabilities inside the Republic and in foreign countries or territories. This provision shall apply similarly with respect to the Chairperson, the members of the board of directors and senior employees of the National Petroleum and Gas Corporation.

#### *Disclosure of Interests*

Disclosure of interest in petroleum-related projects over which an official has decision-making powers is another weapon against corruption related to the declaration of financial interests by government officials discussed above. This concept is meant to address the consequences of conflicts of interest,<sup>32</sup> such as the temptation to rule in favor of a project in which the decision-maker has an interest. Perhaps even more damaging is the appearance of

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<sup>29</sup> Open Society Foundations, Right2Info.org, "Asset Declarations" (2012), available at <http://www.right2info.org/testing/deleted-stuff/asset-declarations>. This site brings together information on the constitutional and legal framework for the right of access to information as well case law from more than 80 countries, organized and analyzed by topic.

<sup>30</sup> According to a 2012 World Bank survey referred to on the website cited in the previous footnote, 137 of 176 jurisdictions studied (78%) had financial disclosure systems and of these, only 43% of countries provided the public with open access to public officials' financial disclosures.

<sup>31</sup> The Commission is the National Oil and Gas Commission, a statutory body having a policy role over petroleum activities in South Sudan.

<sup>32</sup> According to Paul Catchick, all acts of corruption contain an inherent conflict of interest: see "Conflict of Interest: Gateway to Corruption", paper presented at the 2014 Association of Certified Fraud Examiners, European Fraud Conference, available at [http://www.acfe.com/uploadedFiles/ACFE\\_Website/Content/european/Course\\_Materials/2014/cpp/2B-Paul-Catchick.pdf](http://www.acfe.com/uploadedFiles/ACFE_Website/Content/european/Course_Materials/2014/cpp/2B-Paul-Catchick.pdf).

bias and unfairness, which can affect a country's attractiveness as an investment opportunity.<sup>33</sup>

The key elements to be addressed in an effective legislative provision on this topic are:

- wide applicability to all officials having a decision-making authority respecting particular projects;
- disclosure of interest by the official before the decision-making takes place;
- complete withdrawal from any deliberations relating to the matter;
- written record of the disclosure and withdrawal.

An example of a legislative provision covering disclosure of interest is section 26 of the Kenya Bill, which provides that:

**26.** (1) A member of the Board<sup>34</sup> who has a direct or indirect interest in a matter being considered or to be considered by the Board shall, as soon as possible after the relevant facts concerning the matter have come to his knowledge, disclose the nature of his interest to the Board and shall not be present during any deliberations on the matter. “

(2) A disclosure of interest made by a member of the Board under subsection (1) shall be recorded in the minutes of the meeting of the Board and the member shall in respect of that matter—

(a) remove himself during any deliberations on the matter;

(b) not participate in any decision taken by the Board on the matter; and

(c) refrain from attempting to influence or coerce any other member to decide in his favour.<sup>35</sup>

Section 98 of the South Sudan Act casts a wider net and also contains an exception from withdrawal where no prejudice will be caused by the officer's interest:

**98.** (1) Any public official including a member of the Commission or an employee of the Ministry, whether engaged in full-time or part-time functions or as an external agent, who has or is likely to have a direct, or indirect interest, in a subject matter submitted before him or her for consideration, shall disclose in writing, to his or her superior official, the nature of such interest, as may connect him or her to the subject matter put before him or her.

(2) If the superior official is disqualified, the matter may not be decided by any directly subordinate official in the same public body.

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<sup>33</sup> P.A. Donwa, C.O. Mgbame, O.M. Julius, "Corruption in the Oil and Gas Industry: Implication for Economic Growth" (2015), 11 *European Scientific Journal*, No.22 ISSN: 1857 – 7881 (Print) e - ISSN 1857- 7431 212

<sup>34</sup> Board means the Board of Directors of the Upstream Petroleum Regulatory Authority, the main regulatory authority over petroleum activities.

<sup>35</sup> The Uganda Act, s. 6, has a similar provision.

(3) A person who is subject to disclosure of interest under subsection (1) of this Section, shall not take part in any deliberation or decision to be taken with respect to the subject matter.

(4) The rules governing disqualification in subsection (3) of this Section shall not apply if it is apparent that the connection of the person who is subject to disclosure of interest under subsection (1) of this Section with the subject matter will not influence his or her decision and it is apparent that neither public nor private interests indicate that he or she should be disqualified from taking part in any deliberation or decision on the subject matter.

It is submitted that the broad applicability of the South Sudan provision (to any official likely to have a direct or indirect interest and anyone reporting to that person) is the more effective approach to combat corruption. However, the strict approach to withdrawal or disqualification on disclosure of an interest in the Kenya Bill and Uganda Act is preferable because the perception of bias could remain even if there may not be actual prejudice caused by the interested official being part of the deliberations. The perception of unfairness can be just as corrosive as actual unfairness.

#### ***Audits: Criteria and Subject Matter***

The audits referred to here are of government activities,<sup>36</sup> not industry. A major purpose of the audits is to prevent, discover and, in the latter case, eliminate the opportunities for corruption.

An audit on government activities should cover not only financial matters, but also other activities. This is because corruption can affect areas not directly involving the collection of revenues or payments, one example being environmental and safety matters where, as noted earlier, bribes and other inducements to government officials charged with enforcing environmental and safety regulations could affect the carrying out of their duties.<sup>37</sup>

Section 233 of the Tanzania Act provides for audit of the regulatory authority, but only of its financial accounts:

**233.** (1) The Controller and Auditor-General shall, in each financial year, audit the accounts of PURA in accordance with the Public Audit Act.

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<sup>36</sup> Muhammad Akram Khan makes the distinction between industry audits and audits of public sector activities and the value of each in combatting corruption in his paper "Role of Audit in Fighting Corruption", Prepared For Ad Hoc Group Meeting On "Ethics, Integrity, and Accountability in the Public Sector: Re-building Public Trust in Government through the Implementation of the UN Convention against Corruption", 26-27 September 2006, St. Petersburg, Russia, available at: <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN025122.pdf>.

<sup>37</sup> See World Bank Report, above at n. 3.

(2) The Board shall ensure that it submit a statement of accounts three months after the end of each financial year to the Controller and Auditor- General for auditing.

The Uganda Act, s. 40 contains a similar provision on audit of the regulator’s financial accounts.

Section 41 of the Kenya Bill also has a provision for yearly audit of the financial books of the regulator, but broadens the powers of the auditor general to go further if it is necessary:

**41.** (9) Nothing in this Act shall be construed to prohibit the Auditor-General from carrying out an inspection of the Authority’s accounts or records whenever it appears to him to be desirable and the Auditor-General shall carry out such inspection at least once every six months.

(10) Notwithstanding anything in this Act, the Auditor-General may submit to the Cabinet Secretary a special report on any matter incidental to his powers under this Act, and the provisions of the Public Finance Management Act on the same issue shall apply *mutatis mutandis* to any report made under this section.

It is submitted that any audit provision should provide the auditor-general or the person responsible for audit in any particular jurisdiction be provided with the added discretionary powers to perform audits other than purely financial, as provided by subsections 41(9) and (10) of the Kenya Bill. The wording of those sections is broad enough to give the auditor the discretion to perform a “corruption audit”, a form of audit discussed by Muhammad Akram Khan<sup>38</sup> which concentrates on discovering not actual corruption, which is hard to capture,<sup>39</sup> but the opportunities for corruption – weaknesses in the procedures and systems established by the regulator. The term “corruption audit” need not form part of the legislative provision. Rather, the terms of the audit itself can specify its object, in words such as:

One of the objectives of this audit is to assess the opportunities of corruption in ... (name the function or operation under audit) of the ... (name) the organization and to evaluate the efficacy of the existing control environment in preventing it.<sup>40</sup>

### ***Qualification, Competence and Composition Requirements of Regulators***

Qualifications and competence requirements of senior officials in governmental bodies or government-owned corporations that have a role in developing and managing petroleum activities can assist in combatting corruption. Legislative provisions are an appropriate tool

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<sup>38</sup> See Khan, above n. 36.

<sup>39</sup> As pointed out by Khan, *ibid.* at 5, actual corruption rarely involves documented proof and [i]t is, therefore, important to know that the auditors cannot quantify corruption...[t]hey can only indicate the existence of opportunities for corruption. Such a report can become basis for corrective action by the government to forestall corruption in future or minimize the opportunities for corruption.

<sup>40</sup> Khan, above n. 36 at 10.

in establishing binding requirements on these matters and they are often found in legislation dealing with regulation of petroleum activities.

A general principle regarding hiring on merit is found in the South Sudan Act, section 97:

**96.** Any recruitment for employment in the petroleum sector shall be based on relevant qualifications and conducted in accordance with public service procedures.

Also, subsections 10(5) and (6) of the South Sudan Act state competency requirements for the Chairman, Deputy Chairman and members of the Commission:

**10.** (5) Members of the Commission shall be appointed based on integrity, competence and ethnic and regional diversity.

(6) The Chairperson and Deputy Chairperson shall have experience and expertise in the petroleum sector.

Section 18 of the Kenya Bill sets out extensive requirements for competency, leadership and integrity for the Chairman and five of the other eight members of the Board of Directors of the regulatory authority. It provides that such a person can only be appointed if he/she:

**18.** (2) ...

(b) holds a degree from a university recognized in Kenya or its equivalent in the fields of petroleum geosciences, engineering, economics, finance, law, business administration or management, or in matters of health, safety and environment;

(c) has at least seven years relevant professional experience in petroleum industry disciplines; and

(d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.

The composition of the regulatory body can also play a role in combatting corruption and legislation can limit the discretion of the appointing person or body in this respect. Instead of being able to appoint anyone, legislative provisions can specify from which disciplines and from what organizations the members must come from. For example, in subsection 10(1) of the South Sudan Act, the composition of the National Oil and Gas Commission specifies that members must be from:

(a) the Land Commission;

(b) the Ministry;

(c) the Ministry of Finance and Economic Planning;

(d) a member from the ministry responsible for the environment;

(e) a member from a recognized university in the Republic specialized in the earth sciences; and

(f) a member from each of the three oil producing states.

All of these provisions are relevant to the prevention and combatting of corruption.<sup>41</sup> Competency and integrity of decisions makers are crucial elements in establishing the credibility of the regulatory body, in determining whether its decisions will be fair and effective and in ensuring that its members can withstand the temptations of corrupt practices aimed at them. A key condition is that they apply to all appointments, not just the Chairperson and that, of course, they are actually implemented and not ignored when appointments are made. Another key factor is support for these provisions by appropriate supporting documentation, such as Codes of Conduct<sup>42</sup> and, as already noted, adequate training.

## **Conclusions**

Legislation that contains provisions aimed at combatting corruption is important in the fight against corruption in the regulation of petroleum activities. It represents a tangible, clear and public intention by the Government to address the issue. The choice of legislation over other instruments, such as guidelines or policy directions, is the most forceful and transparent expression of the Government's intent. It indicates the Government's serious commitment to approach this issue as part of its mandate to manage and develop the sector, rather than simply overseeing operational requirements to ensure maximum recovery of the resource.

The legislative provisions highlighted in this paper represent a first step in what has been called a long process<sup>43</sup> and one of many steps needed to accomplish this goal. Also, as has also been pointed out in reference to the role of audits, and which could equally apply to other proposed requirements outlined in this paper and to the limitations faced by the drafters of such provisions:

Corruption requires a multifaceted attack. It requires, for example, a set of regulations against corrupt practices, a code of conduct for employees and vendors, awareness raising campaigns, training of staff, internal controls, sanctions and incentives, protection of whistleblowers and an open approach towards information reporting. Audit is only one such mechanism. The auditors can succeed only if the enabling environment exists for fighting corruption. Effective corruption control requires

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<sup>41</sup> The OECD also suggests the need for a legislative requirement for ethics training for government officials as a part of a program to combat corruption: "Ethics Training for Public Officials", (OECD: 2013) at 12, available at <http://www.oecd.org/corruption/acn/library/EthicsTrainingforPublicOfficialsBrochureEN.pdf>.

<sup>42</sup> For a thorough discussion with references on the importance of Codes of Conduct to combat corruption, see the Transparency International comments of July 2012 at [http://www.transparency.org/news/feature/calling\\_out\\_public\\_officials\\_on\\_corruption\\_codes\\_of\\_conduct](http://www.transparency.org/news/feature/calling_out_public_officials_on_corruption_codes_of_conduct)

<sup>43</sup> World Bank Report, above at n. 3 at 17.

commitment and involvement of all agencies, employees, customers, external service providers, in brief, all citizens of the society.<sup>44</sup>

And above all, political will – the commitment by the government in power from the top and from there communicated downward, along with the allocation of resources to put this commitment into effect – are key factors to any success in combatting corruption.<sup>45</sup>

As part and parcel of this commitment, it almost goes without saying that there must be complete and effective implementation of the legislative provisions described above – meaning that legislative provisions alone, however well drafted, are useless if they are not implemented and enforced. The phenomenon known as the Oil Curse<sup>46</sup> demonstrates this statement: countries rich in resources that are among the poorest in the world because of the failure to control corruption, part of which results from not implementing provisions that would assist in preventing or combatting corruption.

### Appendix – Compilation of Provisions

Item	Topic	Statutory Provision
1.	Transparent Management of Revenues and Other Funds	<p><b><u>South Sudan Act, ss. 78(1) and (2)</u></b></p> <p>78. (1) Licensees, contractors and sub-contractors shall annually disclose information on all payments and deemed payments made to the Government and Government agencies, monetary or in kind in connection with petroleum activities, in accordance with applicable law.</p> <p>(2) All disclosures under this Section shall be reported to an independent administrative body and shall be published and verified in accordance with the principles of the Extractive Industries Transparency Initiative as prescribed in the regulations.</p>
		<p><b><u>East Timor Decree-Law No.32/2016, Offshore Petroleum operations in Timor-Leste, Article 97</u></b></p> <p>97. The contractor shall comply with the reporting requirements related to the Timor-Leste Extractive Industry Transparency Initiative (EITI), as applicable from time to time in accordance with Applicable Law in Timor-Leste.</p>
		<p><b><u>Kenya Bill, s. 121(2)</u></b></p> <p>121. (2) For reporting purposes, the transparency and accountability framework for the upstream petroleum sector shall be disaggregated into each petroleum</p>

<sup>44</sup> Khan, above n. 36.

<sup>45</sup> World Bank Report, above n. 3 at 5.

<sup>46</sup> Solrun Dregelid, "[The oil curse](#)", *Science Nordic*, October 25, 2013:

Statistically speaking, oil rich countries have lower economic growth, more authoritarian rule and less equality than countries without sizeable oil resources.

Also see Publish What You Pay, which works to address the "resource curse": <http://www.publishwhatyoupay.org/about/>.

Item	Topic	Statutory Provision
		<p>agreement, non-exclusive permit, drilling permit, production permit, and plug and abandonment permit in the following categories—</p> <ul style="list-style-type: none"> <li>(a) payment type by each contractor (i.e., taxes, fees, royalties, and other charges);</li> <li>(b) production volumes by each contractor measured at the delivery point of sale;</li> <li>(c) transfers of all upstream petroleum sector revenues from national Government to County Governments and communities, including royalties; and</li> <li>(d) all contractor contributions in cash or in kind to County Governments and local communities.</li> </ul>
<p><b>2.</b></p>	<p><b>Public Dissemination of Key Petroleum-Related Information</b></p>	<p><u>South Sudan Act, s. 79</u></p> <p><b>79.</b> (1) The Minister shall make available to the public, both on the Ministry website and by any other appropriate means to inform interested persons:</p> <ul style="list-style-type: none"> <li>(a) all key oil sector production, revenue, and expenditure data, petroleum agreements and licenses;</li> <li>(b) regulations and procedures related to the petroleum sector;</li> <li>(c) justification of award of petroleum agreements, the beneficial ownership information for the contractor and documented proof of the requisite technical competence, sufficient experience, history of compliance and ethical conduct and financial capacity of the contractor;</li> <li>(d) annual production permits;</li> <li>(e) any model petroleum agreement referred to in Section 71;</li> <li>(f) the key parameters of each petroleum agreement, to the extent such parameters differ from an already published model petroleum agreement, including the cost oil management and limits, the production-sharing formulas and mechanisms any bonuses, taxes or fees, royalties, any exemptions or favourable tax treatment and any stability clauses; and</li> <li>(g) except for the information and data referred to in Section 76 (5), information relating to petroleum activities, including information on petroleum agreements and relevant treaties as prescribed in the regulations.</li> </ul> <p>(2) The information referred to in subsections (1)(c), (d) and (f) of this Section shall also be published in the Gazette.</p>

<p><b>3.</b></p>	<p><b>Open Bidding Procedures for Awarding of Licenses and Other Authorizations</b></p>	<p><u><b>South Sudan Act s. 18(2)</b></u></p> <p>18. (2) Petroleum agreements shall be entered into following an open, transparent, non-discriminatory and competitive tender process conducted in accordance with applicable law governing public procurement.</p> <hr/> <p><u><b>Tanzania Act s. 49</b></u></p> <p>49.(1) Petroleum agreements shall not be entered unless a transparent and competitive public tendering process is completed.</p> <p>(2) The Minister shall cause to be published in a newspaper of wide circulation, invitation of tender or subject to subsection(3) the intention to initiate direct negotiations.</p> <p>(3) Where all or part of the area tendered in a competitive public tender process for an award of an agreement has not become effective, and it is for the public interest, the Minister may, upon the advice of PURA and approval of the Cabinet, initiate direct negotiations with qualified and eligible company.</p> <p>(4) The Minister may, by regulations, prescribe the manner of conducting tendering process.</p>
		<p><u><b>South Sudan Act s. 63(1)</b></u></p> <p>63. (1) Subject to the provisions in this Chapter, procurement of goods and services that exceed a prescribed threshold value shall follow open, transparent, non-discriminatory and competitive tendering procedures as prescribed in the regulations.</p>
<p><b>4.</b></p>	<p><b>Criteria Limiting the Discretion of Decision-Makers in Approval and Authorization Granting Roles</b></p>	<p><u><b>Kenya Bill s. 129</b></u></p> <p>129. [T]he Cabinet Secretary may make regulations with respect to the following—</p> <ul style="list-style-type: none"> <li>(f) terms and conditions for the application and approval of non-exclusive exploration permit;</li> <li>(g) terms and conditions for the application and approval of drilling permits;</li> <li>(h) terms and conditions for the application and approval of production permits;</li> <li>(k) terms and conditions for the application and approval of plugging and abandonment permits;</li> <li>(x) criteria for the evaluation of the petroleum agreement applications and approval of requests for extensions of petroleum agreements;</li> </ul> <hr/> <p><u><b>Tanzania Act, s. 127</b></u></p> <p>127. (1) Any person intending to construct a petroleum installation or petroleum carriage facility shall apply in writing to EWURA for an approval.</p> <p>(4) EWURA shall, before granting approval, consider:</p> <ul style="list-style-type: none"> <li>(a) relevant Government laws, policies and plans;</li> <li>(b) technical and financial capability of the applicant; and</li> <li>(c) any public interest which in EWURA’s opinion, may be affected by the granting the approval.</li> </ul>

<p><b>5.</b></p>	<p><b>Public Consultation in Areas Having an Impact on the Economic, Social or Environmental Well-Being of Communities in the Vicinity of Petroleum Activities</b></p>	<p><u><b>South Sudan Act, s. 59(4)</b></u></p> <p>59. (4) The assessments...shall:</p> <p>(b) include consultation with the public, including local communities;</p> <p>(c) evaluate, after consideration of the consultations conducted under subsection (b) of this Section, the preliminary geological, geophysical and geochemical data and the actual and potential impact of petroleum activities on various interests in the relevant area, including local communities, the environment, sites of historical importance, trade, agriculture and other industries and past, present or potential conflict.</p> <hr/> <p><u><b>Kenya Bill, s. 94(4)</b></u></p> <p>94. (4) The local community’s share shall be equivalent to five percent of the Government’s share and shall be payable to a trust fund managed by a board of trustees established by the County Government in consultation with the local community.”. The World Bank in its blog on 10 Ways to Fight Corruption referred to at footnote 19 also mentions this monitoring role through consultation.</p>
<p><b>6.</b></p>	<p><b>Declarations of Assets and Liabilities and Disclosure of Interests</b></p>	<p><b>i. Declarations of Assets and Liabilities</b></p> <p><u><b>South Sudan Act, s. 97(1)</b></u></p> <p>97. (1) Members of the Commission and any senior public service officials employed in the governing of petroleum activities shall, upon assumption of their offices and annually, make a confidential declaration of their assets and liabilities including those of their spouses, children and other persons in their domestic relations to the Anti-Corruption Commission and the Audit Chamber in accordance with the applicable law.</p> <p>(2) The requirement to make a declaration includes assets and liabilities inside the Republic and in foreign countries or territories. This provision shall apply similarly with respect to the Chairperson, the members of the board of directors and senior employees of the National Petroleum and Gas Corporation.</p> <hr/> <p><b>ii. Disclosure of Interests</b></p> <p><u><b>Kenya Bill, s. 26</b></u></p> <p>26. (1) A member of the Board who has a direct or indirect interest in a matter being considered or to be considered by the Board shall, as soon as possible after the relevant facts concerning the matter have come to his knowledge, disclose the nature of his interest to the Board and shall not be present during any deliberations on the matter.</p> <p>(2) A disclosure of interest made by a member of the Board under subsection (1) shall be recorded in the minutes of the meeting of the Board and the member shall in respect of that matter—</p> <p>(a) remove himself during any deliberations on the matter;</p> <p>(b) not participate in any decision taken by the Board on the matter; and</p> <p>(c) refrain from attempting to influence or coerce any other member to decide in his favour.</p>

		<p><b><u>South Sudan Act, S. 98</u></b></p> <p><b>98.</b> (1) Any public official including a member of the Commission or an employee of the Ministry, whether engaged in full-time or part-time functions or as an external agent, who has or is likely to have a direct, or indirect interest, in a subject matter submitted before him or her for consideration, shall disclose in writing, to his or her superior official, the nature of such interest, as may connect him or her to the subject matter put before him or her.</p> <p>(2) If the superior official is disqualified, the matter may not be decided by any directly subordinate official in the same public body.</p> <p>(3) A person who is subject to disclosure of interest under subsection (1) of this Section, shall not take part in any deliberation or decision to be taken with respect to the subject matter.</p> <p>(4) The rules governing disqualification in subsection (3) of this Section shall not apply if it is apparent that the connection of the person who is subject to disclosure of interest under subsection (1) of this Section with the subject matter will not influence his or her decision and it is apparent that neither public nor private interests indicate that he or she should be disqualified from taking part in any deliberation or decision on the subject matter.</p>
<p><b>7.</b></p>	<p><b>Audits: Criteria and Subject Matter</b></p>	<p><b><u>Tanzania Act, Section 233</u></b></p> <p><b>233.</b>(1) The Controller and Auditor-General shall, in each financial year, audit the accounts of PURA in accordance with the Public Audit Act.</p> <p>(2) The Board shall ensure that it submit a statement of accounts three months after the end of each financial year to the Controller and Auditor- General for auditing.</p> <p><b><u>Kenya Bill, Section 41 (9)</u></b></p> <p><b>41.</b> (9) Nothing in this Act shall be construed to prohibit the Auditor-General from carrying out an inspection of the Authority’s accounts or records whenever it appears to him to be desirable and the Auditor-General shall carry out such inspection at least once every six months.</p> <p>(10) Notwithstanding anything in this Act, the Auditor-General may submit to the Cabinet Secretary a special report on any matter incidental to his powers under this Act, and the provisions of the Public Finance Management Act on the same issue shall apply mutatis mutandis to any report made under this section.</p>
<p><b>8.</b></p>	<p><b>Qualifications and Competence Requirements of Regulators and Make-Up of Regulatory Bodies</b></p>	<p><b><u>South Sudan Act, s. 97</u></b></p> <p><b>96.</b> Any recruitment for employment in the petroleum sector shall be based on relevant qualifications and conducted in accordance with public service procedures.</p> <p><b><u>South Sudan Act ss. 10(5) and (6)</u></b></p> <p><b>10.</b> (5) Members of the Commission shall be appointed based on integrity, competence and ethnic and regional diversity.</p> <p>(6) The Chairperson and Deputy Chairperson shall have experience and expertise in the petroleum sector.</p>

		<p><b><u>Kenya Bill, Section 18</u></b></p> <p><b>18.</b> (2) A person shall be qualified for appointment as a Chairperson under subsection (1) (a) or a member under sub-section (1) (e) if such person—</p> <ul style="list-style-type: none"><li>(b) holds a degree from a university recognized in Kenya or its equivalent in the fields of petroleum geosciences, engineering, economics, finance, law, business administration or management, or in matters of health, safety and environment;</li><li>(c) has at least seven years relevant professional experience in petroleum industry disciplines; and</li><li>(d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.</li></ul> <hr/> <p><b><u>South Sudan Act s. 10(1)</u></b></p> <p><b>10.</b> (1) The Commission shall consist of 11 members, 3 of whom shall be the Chairperson, the Deputy Chairperson and the Secretary. The remaining 9 members shall be from relevant national ministries, institutions and the oil producing states who shall be selected as follows:</p> <ul style="list-style-type: none"><li>(a) a member from the Land Commission;</li><li>(b) a member from the Ministry;</li><li>(c) a member from the Ministry of Finance and Economic Planning;</li><li>(d) a member from the ministry responsible for the environment;</li><li>(e) a member from a recognized university in the Republic specialized in the earth sciences; and</li><li>(f) a member from each of the three oil producing states.</li></ul>
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## Book Reviews

### Seeing Through Legalese: More Essays on Plain Language

*Joseph Kimble, published by Carolina Academic Press: Durham (NC), 2017*

**Reviewed by Eamonn Moran<sup>1</sup>**

Joseph Kimble requires no introduction to an audience of legislative drafters. He has devoted his entire professional life to teaching legal writing and is one of the leading movers and shakers in the plain language world. His latest book *Seeing Through Legalese: More Essays on Plain Language* published in 2017 by Carolina Academic Press, his third on legal writing, is a collection of essays penned by him since 2006. A number of the essays arose out of the experience gained by Joe in re-drafting the Federal Rules of Civil Procedure and Federal Rules of Evidence in the United States.

Part One of the book is devoted to legal drafting and that will be the part of most interest and value to legislative drafters. It contains a detailed statement of lessons learnt in drafting the Federal Rules of Civil Procedure. It highlights the challenges involved in rewriting legislation, without changing its meaning, when the legislation contains example after example of repetitious material, ambiguous provisions, long sentences, excessive cross-referencing and frequent uses of the “shall” word. Joe shows side by side the old and new provisions enabling the reader to contrast and compare. He shows the value in re-organising a document, using lists, breaking up long sentences, avoiding repetition and the use of unnecessary words, keeping the subject and verb close to each other, avoiding multiple negatives, minimising cross-references, using informative headings and, of course, avoiding the use of “shall”. Examples are also giving from the re-written Federal Rules of Evidence.

There is an interesting essay devoted to attacking the criticisms of plain language offered by Jack Stark. One by one Stark’s contentions are stated and then demolished. I am quoted in that essay as saying “We shouldn’t still be having to defend plain language in the twenty-first century”. That is firmly still my view.

There is an essay with tips on writing for law journals and an essay on editing. The latter cleverly shows editorial marks on the essay itself. The reader will also learn where it is best to place citations and will also have the chance to read some interviews conducted with the author as well as remarks made by the author on accepting various awards presented to him in the course of his illustrious career.

*Seeing Through Legalese* would be a valuable addition to the library of any legislative drafter. Like all drafters and former drafters, I found myself thinking I would have done some of the re-drafting differently. I remain unconvinced by the appropriateness of replacing the “shall” in “A judgment shall not contain a recital of pleadings” with a “should”. And I still prefer not limiting conjunctions to after the penultimate paragraph. Inevitably too, given its nature as a collection of essays, you come across some repetition of

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<sup>1</sup> President, Clarity International. Past-president, CALC.

points. However, overall this is a terrific book that I thoroughly recommend. Joe Kimble deservedly is a legend in the plain language world and we all have much to learn from him.

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## Commonwealth Legislative Drafting Manual

**Roger Rose, published by the Commonwealth Secretariat: London, 2017**

**Reviewed by John Wilson<sup>1</sup>**

Handbooks on legislative drafting generally fall into two categories – those that teach the technique of law drafting, and those that recommend particular drafting styles and practices. A recent example of the former is Professor Helen Xanthaki's *Drafting Legislation: Art and Technology of Rules for Regulation*,<sup>2</sup> which was reviewed at length by Dr Duncan Berry in the *Loophole*.<sup>3</sup> A recent example of the latter is the publication now under review – Roger Rose's revision and update of the *Commonwealth Legislative Drafting Manual*, published by the Commonwealth Secretariat in November 2017.<sup>4</sup>

The Manual joins a growing number of publications which seek to recommend – if not impose – some uniformity of legislative style for a particular jurisdiction or group of jurisdictions.<sup>5</sup> The main difference with the Commonwealth Manual is that it aims to cover the whole Commonwealth, with its widely different needs and practices. As Patricia Scotland, the Commonwealth Secretary-General, says in her Foreword, it is “a landmark tool for promoting the rule of law and development [which] brings together an abundance of Commonwealth experience in legislative drafting.”

The range of experience is indeed wide, and includes that of the author Roger Rose, with a background in East Africa and Malaysia; a working group composed of senior CALC members: Brenda King of Northern Ireland, Adrian Hogarth of London, Theresa Johnson of Hong Kong and Peter Quiggin of Canberra; and staff of the Commonwealth Secretariat. There is no mention of specific inputs from the Caribbean, the Pacific, Canada, India or New Zealand; but the Manual went out in draft to the Attorneys General of all Commonwealth jurisdictions and it does appear to reflect a broad consensus on good legislative practice as at present adopted in most Commonwealth jurisdictions.

The Manual also has a good pedigree as it was initiated by Kutlu Fuad when Director of the Legal Division of the Commonwealth Secretariat and builds on the work of the Hon. Justice Vincent Crabbe. The influence of Keith Patchett, the originator of the Commonwealth

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<sup>2</sup> Hart Publishing: Oxford, 2015.

<sup>3</sup> [The Loophole](#), June 2017 (2017.2) 2.

<sup>4</sup> Copies can be obtained from [www.thecommonwealth-ilibrary.org](http://www.thecommonwealth-ilibrary.org) and the Manual can be read [on-line](#). See also the list of Drafting Manuals on the CALC website: [www.calc.ngo/drafting-manuals](http://www.calc.ngo/drafting-manuals).

<sup>5</sup> Other recent examples include *Drafting Legislation in Hong Kong*, published by the Law Drafting Division of the HKSARG in 2012; M Daley's 2013 Legislative Drafting Manual for Belize, the [Plain English Manual](#) of the Australian OPC; the [Drafting Guidance](#) put out by the London OPC in 2014 and revised in December 2017. See also the UWI/IMPACT 2016 publication *Drafting Legislation in CARICOM Member States – A Manual on Legislative Style and Practices*, in which this reviewer had a hand.

Secretariat's [Training Materials on Legislative Drafting](#) can also be detected in many of its propositions.<sup>6</sup>

Is the Manual really applicable to all the Commonwealth? Some Commonwealth jurisdictions have elements of sharia law, Roman-Dutch law or Scots law. Some have their own distinct local usages and customary law. Some take up an entire continent, while others are the smallest island countries in the world. As the Preface points out, the Manual does not seek to be a comprehensive guide to drafting practice around the Commonwealth. It is aimed particularly at drafters in the early stages of their careers and in emerging jurisdictions. Nor does it purport to impose prescriptive rules. But as “a Commonwealth product largely in the common law tradition” it will help drafters develop their skill and provide “a sense of the shared heritage across the Commonwealth.”

But is there any need for such a manual and is it a good idea? There are those in CALC who say that drafting style manuals are a waste of time and in fact counter-productive in suppressing individual creativity. Elizabeth Gardiner, First Parliamentary Counsel in the UK, gave a talk to the Statute Law Society in March, 2018 called “Drafting Guidance: Why Bother?” But she meant it ironically, as the Office of Parliamentary Counsel has recently re-issued its Drafting Guidance. Members of the office are asked to have regard to the guidance, which “is meant to help them in their task of making it as easy as possible for readers to understand the bills that we produce”. A style manual achieves a degree of consistency in the products of a drafting office, making loopholes less likely and the law easier to read.

Having a Commonwealth style manual will not achieve complete uniformity of drafting style around the Commonwealth, but it should mean there will be some similarity in the approach to legislation. New arrivals in a drafting office can more easily fit in, which is an important consideration in a world where legislative counsel regularly move around jurisdictions, especially the smaller ones. Home-based drafting consultants can be comfortable with the drafting style of client jurisdictions. People reading the laws of Commonwealth countries can expect to find features in common among them. Adopting a precedent from another Commonwealth country becomes more appropriate. And reciprocal recognition and enforcement of each other's laws becomes more likely. For these reasons, there is an increasing trend towards “model” laws being drafted for regions, and even for the whole Commonwealth. In the absence of such laws, this Manual is a good substitute and does the job very well.

The Manual is well laid out, and well proof-read (apart from a few capitalisation issues on the Contents page). The cover is imaginative (though a picture of a ball-point pen making corrections might be regarded as somewhat outdated in this computer age...). Particularly pleasing is the succinct way in which the Manual espouses the principles of Plain English

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<sup>6</sup> These materials are available at <http://oasis.col.org/handle/11599/459>.

drafting, including disposing of the “shall/must” argument in a few clear lines. It is good on gender-neutral drafting and does not find the need to use “they” as a singular pronoun. It is good on the avoidance of provisos. It accepts that in a list there is no need for “and” or “or” except before the final item in the list. The Manual gives many bad examples to support its statements of good principles; but very generously (though frustratingly for some readers, perhaps) does not name the sources of the bad examples.

The Manual finds “sandwich clauses” generally acceptable, which will come as a surprise to some and a relief to others.<sup>7</sup> It explains why “dangling modifiers” should be avoided; (your reviewer recognised them, but had never called them by that name.)

The Manual invites readers to contact the Commonwealth Secretariat with corrections, amendments or updates. This reviewer’s suggestions include:

- place more emphasis on the need for an Arrangement of Clauses or Table of Contents in a draft of any length;
- in the section on penalties, include having the penalty provision at the foot of a section, rather than in the body of the provision;
- instead of the formulation “A person must not...”, suggest using “It is an offence for a person to...”;
- in the Plain English rules, include using “if...” instead of “where...”;
- set out more fully the arguments for and against having Purpose clauses;
- include the use of the dash as a punctuation mark in pairs of contrasting phrases;
- include an index and a bibliography.

The Manual does have a one-page Appendix on Drafting Instructions, and this is one area in which it could usefully be expanded. Or perhaps a separate handbook could be issued, giving guidance to Commonwealth administrative officers, particularly in emerging jurisdictions, on the legislative process and the preparation of drafting instructions.<sup>8</sup>

The Manual does not deal with matters of layout, sequence of clauses, etc., as these are generally covered by local requirements and sometimes even by legislation. The authors accept that it needs to be read in context in each jurisdiction and that it will be supplemented by local and regional manuals. But the Manual does achieve what it sets out to do, which is to help Commonwealth drafters “realise the full potential of legislation and the rule of law to contribute to our common growth and development”.

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<sup>7</sup> See para. 7.2.1 on p. 40: “there seems no good reason to avoid this format unless it can be seen to cause possible difficulty in understanding.”

<sup>8</sup> See for example the Australian Office of Parliamentary Counsel’s [Giving Written Drafting Instructions to OPC](#), (Canberra, 2016) and the UK Cabinet Office [Guide to Making Legislation](#), (London, 2013). For a regional precedent, see *The Legislative Process and Drafting Instructions: A Manual for Instructing Officers in CARICOM Member States* published by the University of the West Indies in 2016.

