



Pacific Judicial  
Integrity Program

# Judicial Officers' Fraud and Corruption Online Course

Via Zoom - 18, 25 & 31 May, 8 & 15 June 2023



**FEDERAL COURT  
OF AUSTRALIA**



Papua New Guinea  
**Centre for Judicial Excellence**



# **Session 3 : Bribery & Official Corruption**

Thursday 31 May, 2023

*Justice Teresa Berrigan*

*National and Supreme Courts of Papua New Guinea*

# Session 3: Bribery & Official Corruption Agenda



1. Welcome & Introduction (5 minutes)
2. Justice Berrigan's presentation (20-30 minutes)
3. Questions & Answers on presentation (10 minutes)
4. Discussion Questions on Bribery & Official Corruption Case Scenario  
(30 minutes)
5. Introduction to next week's session & scenario (5 minutes)
6. Session Wrap-Up (5 minutes)

# Bribery

Giving or receiving, or offering to give or receive, anything of value in connection with the improper performance of a position of trust.



# Official Corruption and Abuse of Office



These offences recognise that those who are entrusted to exercise the power and authority of public office must be accountable to the public: see *Attorney-General's Reference (No 3 of 2003)* [2005] 1 QB 73; *The State v Yawijah* (2019) N7767; *The State v Joel Luma* (2020) N8798.

They recognise that official corruption or abuse may occur at any level of public service or public office, albeit in general terms, the more senior the official the more serious the offending: *Luma*.

# Official Corruption

## S 87(1), Criminal Code, PNG



(1) A person who—

(a) being—

(i) employed in the Public Service, or the holder of any public office; and

(ii) charged with the performance of any duty by virtue of that employment or office, (not being a duty touching the administration of justice),

corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of any thing done or omitted to be done, or to be done or omitted to be done by him in the discharge of the duties of his office; or

(b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on or for any person, any property or benefit on account of any such act or omission on the part of a person in the Public Service or holding a public office, is guilty of a crime.

Penalty: Imprisonment for a term not exceeding seven years, and a fine at the discretion of the court.

In the case of a judicial officer, the maximum is 14 years, and a fine at the discretion of the court: s 119 Criminal Code, PNG



# Elements, s 87(1)(a)(i)(ii), Criminal Code



The State must prove beyond reasonable doubt that the accused:

- (a) being employed in the Public Service or the holder of any public office;
- (b) charged with the performance of any duty by virtue of that employment or office (not being a duty touching the administration of justice);
- (c) corruptly;
- (d) asks, receives or obtains, or agrees or attempts to receive or obtain;
- (e) any property or benefit;
- (f) for himself or any other person;
- (g) on account of any thing done or omitted to be done, or to be done or omitted to be done by him;
- (h) in the discharge of the duties of his office.

# Being employed in the Public Service or the holder of any public office



S 83A(c), Criminal Code “person employed in the Public Service” **includes**—

- (a) a member of any of the State Services established under or by authority of Section 188 (*Establishment of the State Services*) of the *Constitution*; and
- (b) a constitutional office-holder as defined in Section 221 (*Definitions*) of the *Constitution*; and
- (c) a member of or person employed by a constitutional institution, being any office or institution established or provided for by the Constitution including the Head of State, a Minister or the National Executive Council; and
- (d) a member of the National Parliament or of a provincial assembly; and
- (e) a person employed under the *Official Personal Staff Act 1980* or the *Parliamentary Members’ Personal Staff Act 1988*; and
- (f) a person employed by a provincial government; and
- (g) a member, officer or employee of a body or corporation established by statute;

S 83A(c) provides an inclusive definition: *Reference by the Attorney General of Papua New Guinea and Principal Legal Adviser to the National Executive Council (2021) SC211*

Charged with the performance  
of any duty by virtue of that employment or office

The accused must be charged with the  
performance of a duty by virtue of that  
employment or office:

*The State v Waesa Mollo* [1988] PNGLR 49.

**Asks, receives or obtains, or agrees or attempts to receive or obtain**



It is not necessary to prove that the accused actually received the benefit, it is enough that they asked, agreed or attempted to receive it:

*The State v Terence Hetinu (2020) N9250.*

# Any property or benefit

The benefit does not have to be financial.

The word “benefit” in the phrase “property or benefit of any kind” should be given its natural meaning. It is not limited to a proprietary benefit of any kind: *see R v Smith* [1993] 1 Qd R 541



# For himself or any other person



The benefit can be sought or obtained for someone else.

# On account of any thing done or omitted to be done, or to be done or omitted to be done by him



- “On account of” bears its ordinary meaning: “because of”, “by reason of”, or “in recognition of”: *Hetinu; Smith (supra)*
- The asking, receiving or agreeing may be for any thing done or omitted to be done
  - Eg, *State v Runny Dau* (2021) N9253, a customs officer deliberately failed to screen a container leaving the port, which contained counterfeit cigarettes
- The thing may be done/omitted to be done in the past, at the time, or in the future

# On account of any thing done or omitted to be done, or to be done or omitted to be done by him



- The accused does not have to implement the agreement or even intend to implement the agreement.
- The offence lies not in the act done or omitted, or to be done or omitted but in the asking or receiving of the benefit “on account of” such an act: *Herscu v The Queen* (1991) 173 CLR 276.

“It is not required, of course, that the receiver of the benefit should subsequently fully implement the plot or even perhaps genuinely intend to do so at the time that he receives the benefit but an arrangement or actions having the features described in the subsection must be arrived at or performed”: *R v Lewis* [1994] 1 Qd R 613.

# In the discharge of the duties of his or her office



The thing to be done or omitted to be done must be in the discharge of “the duties of his office”, i.e. it must be connected or concerned with the duties of the public office held



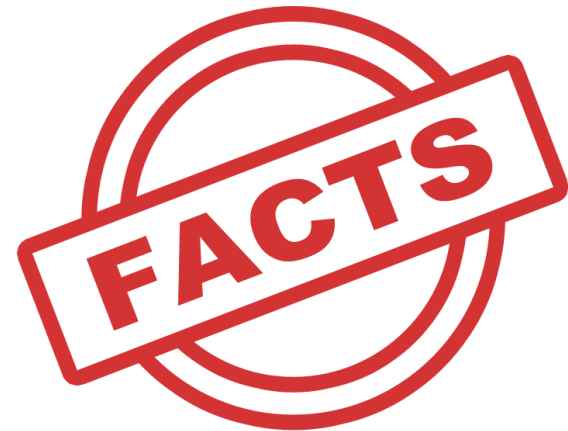
# *The State v Waesa Mollo* [1988] PNGLR 49



Two persons were charged with official corruption.

Major Loa was charged that whilst being employed in the Public Service as a Major in the PNGDF, and charged by virtue of such employment with acting as the Chairman of PNGDF Savings and Loans Society, he corruptly received the sum of K2000 on account of him purchasing, in the discharge of the duties, a property in which Mr Mollo had a proprietary interest.

Mr Mollo was charged with giving him the K2000 for that purpose.



# *The State v Waesa Mollo* [1988] PNGLR 49



Both accused were acquitted.

- **Proof is required of the duty imposed by the holding of the particular office and the corrupt use of the particular office held for gain.**
- Major Loa was a member of the Society and Director and Acting Chairman of the Board of the Society in his private capacity, and in a society which was not a governmental body. If he had the duty to negotiate and purchase Mr Mollo's property for the Society he did so, not as a Major in the Defence Force but as an official of a private corporation with which he was involved in his private rather than official capacity.
- Therefore, the receipt of moneys was not in connection with the corrupt use of any office held in the Public Service.
- It followed that Mr Mollo did not give him the monies for the discharge of any duty held by the Major in the public services.

# But it is not necessary for an offence to be committed by both persons



The conduct does not have to be mutual.

Nor does it have to be successful.

“Whilst the two offences in s 87 are reflections of one another, it is not necessary that an offence be committed by both persons before one can be convicted.... In the case of an offence under s 87(1) **it is the fact that the office-holder asks for or agrees or attempts to receive property or a benefit that is critical.** If he does that and the other elements are established it is immaterial that the person in respect of whom the request or attempt is made does not respond positively in any way to the approach, or that although the other person may give the appearance of agreeing, he had no intention other than to expose the criminal conduct of the office-holder in so doing, or that he simply intended to appropriate the gift or benefit and not fulfill his part of the “bargain”: *Herscu*

# The manner of the discharge may be authorised or unauthorised



“The section is concerned with the violation or attempted violation of official duty rather than with the actual performance of official duty. **Official corruption necessarily involves impropriety and it is not to be supposed that s.[87](#) is limited to those cases where the act or omission in question would, apart from the corrupt influence, be proper.”: *Herscu*.**

*Hetinu*: The offender whilst being employed in the Public Service as the Election Manager of the National Capital District (NCD), charged with the responsibility of organising and conducting elections in the NCD, corruptly received monies in the sum of K184,300 on account of paying polling officials to ensure the election of one Michael Kandiu to the NCD Regional Seat.

# The manner of the discharge may be authorised or unauthorised



## **S v Doreen Tatut (2021) N9023**

Ms Tatut was a Lodgement Officer in the Titles Section of the Department of Lands and Physical Planning. The complainant went to the Department to apply for a replacement title for his property. Ms Tatut served him. The complainant paid the requisite K500 application fee and was issued an official receipt. The offender then asked the complainant to give her some cash so that she would get the title for him. He gave her K450 in cash.

The matter was only reported to police because Ms Tatut was unable to issue the title document because of a caveat/mortgage over it.

# Corruptly: Dishonestly or Improperly?



“Corruptly” is not defined in the PNG Criminal Code.

Its meaning has been the subject of much judicial debate in different jurisdictions.

In PNG the weight of authority says that it means **dishonestly**: *State v Toamara* [1989] PNGLR 24; *State v Mataio* (2004) N2531; *State v Duncan* (2015) N5010 but cf *Hetinu*.

In Australia, the weight of authority says that “corruption is not to be equated with dishonesty and dishonesty does not necessarily connote corruption”: *Re Lane*, QSC, Ryan J, 9 October 1992, unreported.

“A power was used corruptly if it was used to obtain some private advantage or for any purpose foreign to the power”: *Re Austin* (1994) 1 Qd R 255; *DPP (Cth) v Hogarth* (1995) 93 A Crim R 452.

The word “corruptly” means the discharge of the person’s duty for an **improper purpose**: *Willers v R* (1995) 81 A Crim R 219.

# “Corruption is like a cancer”

“It is deadly because it can kill a nation if it is not dealt with swiftly and sternly. It is like a cancer that grows in the human body and if not treated quickly, can grow big and cause death. Its impact on the society must never be underestimated. It has far reaching consequences. A nation's progress and development is dependent on its work force and if public officials who make up the bulk of the work force in this country indulge in corrupt activities, their actions can bring down the entire nation.”: *S v Konny* (2012) N4691

“The corruption in this case is particularly insidious and difficult to detect. Officials demand monies for simply doing their job. This case is the perfect example of the type of cancer that grows until, like the situation in some countries, it becomes so entrenched that it simply becomes accepted as a necessary part of dealing with the public service.”: *Tatut*

# Abuse of Office



S 92 of the Criminal Code creates the offence of abuse of office:

(1) A person employed in the Public Service who, in abuse of the authority of his office does, or directs to be done, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour.

Penalty: Subject to Subsection (2), imprisonment for a term not exceeding two years.

(2) If an act prohibited by Subsection (1) is done, or directed to be done, as the case may be, for purposes of gain, the offender is liable to imprisonment for a term not exceeding three years.”

# Elements

To establish the offence of abuse of office contrary to s. 92(1) of the *Criminal Code* the State must prove beyond reasonable doubt that the accused:

- Whilst employed in the Public Service;
- In abuse of the authority of his or her office;
- Did or directed to be done any arbitrary act;
- Prejudicial to the rights of another.

If the State also pleads and proves in aggravation that it was done for the purposes of gain, this will attract a higher maximum penalty under s 92(2).

# Whilst employed in the Public Service



See again the broad definition of “public service”.

# Broad in Nature

S 92 of the *Criminal Code* is cast in broad terms.

“[T]he circumstances in which the offence may be committed are broad and the conduct which may give rise to it is diverse”: *Attorney-General’s Reference (No 3 of 2003)* [2005] 1 QB 73 at [61]; *Luma*.



# Did or directed to be done any arbitrary act



An arbitrary act is one that is not based on a reason, system, or plan, or is unfair or done without restriction and without considering other people: *The State v Joel Luma* (2020) N8798.

# Prejudicial to the rights of another



“Prejudicial”: to be harmful to someone or something; detrimental.

It may be prejudicial to the rights of a natural person, a corporation or the State.



# In abuse of the authority of his or her office



Abuse of authority will occur when bad, improper or wrongful use is made of the authority of the public office: *Luma; State v O'Neill* (2021) N9213.

# In abuse of the authority of his or her office



## NB

- The abuse must be wilful.
- It must be so serious that it is worthy of condemnation and criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.
- The conduct must fall so far below acceptable standards as to amount to an abuse of the public's trust in the officer holder.
- But it need not involve gain, or dishonesty, or conflict of interest, although the presence of these may provide evidence of the abuse.

*Luma; R v Quach* (2010) 201 A Crime R 522; *Attorney General's Reference No 3 of 2003; R v Chapman* [2015] 2 Cr App R 10 adopted; *R v Boulanger* [2006] 2 SCR 49; and *Potape v State* (2015) SC1613 considered.

## State v Joel Luma

The accused was the Secretary of the Department of Works. As Secretary he was authorised to approve the expenditure of Department monies up to K300,000. The State alleged that the accused approved 44 contracts for pothole patching material from one particular company to a value of K9,594,860.79 in abuse of the authority of his office contrary to s 92(1) of the *Criminal Code*. There was no evidence that he had any relationship with the company awarded the contracts, and no evidence that he benefited financially or otherwise from his conduct.

He was found guilty of approving 16 contracts to the value of K4,309,000 in abuse of office. He deliberately avoided the normal procurement processes. He concealed the contracts from the First Assistant Secretary Operations. He deliberately structured the contracts to fall just below his financial limit as Secretary of the Department in each case, to circumvent the tender process required under the *Public Finance (Management) Act*, and knowingly issued certificates of inexpediency in his position as Secretary without any such authority and without any justification. He directed his First Assistant Secretary, Finance to pay the company on the basis that the Central Supply and Tenders Board had been unable to meet for three weeks to consider the Department's submission, and no legal clearance was required as the contracts fell within his K300,000 jurisdiction.

# Questions arising from presentation?



# Discussion



## **Session 3: Bribery and Official Corruption Scenario Discussion**

Scenario & Questions have been emailed to you

# Next Week: Session 4 - Case Management

- Thursday 8 June
- 12-2pm (GMT +10:00)
- New Zoom link to be sent
- Session 4 Case Management Case Scenario that will be emailed to you
- Come to session ready to discuss
- **Judicial Facilitator:** Chief Judge Devereaux/ Judge Farr



# Due to varying locations, local time zones for the discussion are as follows:

Thursday 8 June, 2023	
11:00am	Koror, Palau
12:00pm	Brisbane, Australia Port Moresby, Papua New Guinea
1:00pm	Pohnpei, Federated States of Micronesia Honiara, Solomon Islands Port Vila, Vanuatu
2:00pm	Suva, Fiji Tarawa, Kiribati Yaren, Nauru Majuro, Republic of Marshall Islands
3:00pm	Nukualofa, Tonga Apia, Samoa Nukunonu, Tokelau

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**See you next week!**