



South Pacific
LAWYERS ASSOCIATION

newSPLAsh

Issue 10

PAPUA NEW GUINEA ISSUE



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PNG LAW SOCIETY FAST FACTS

Established: 1986

President: Sir Kina Bona KBE

Council members: Allan Mana, Robert Lindsay, Robert Bradshaw, Royale Thompson, Peter Kuman, Melvin Yalapan, Vincent Mirupasi and Alfred Manase.

Members: 1086

Committees:

- ◉ Lawyers' Statutory Committee
- ◉ Continuing Professional Development
- ◉ Publications
- ◉ Practising Certificate
- ◉ Admissions
- ◉ Building
- ◉ Social, Insurance
- ◉ President's Consultative Committee

■ A word from...

Sir Kina Bona KBE, President, Papua New Guinea Law Society



*Sir Kina Bona at the SPLA Conference, Port Vila,
November 2013*

Dear members of the South Pacific Lawyers' Association,

It would be remiss of me not to take this opportunity to thank the Law Council of Australia for taking the responsibility of ensuring the formation of the South Pacific Lawyers' Association and the ongoing secretarial duties and responsibilities of the organisation.

The South Pacific Lawyers' Association was formed by like-minded lawyers around the South Pacific to share, discuss and exchange ideas between the various law societies in the Pacific.

The Papua New Guinea Law Society is completely behind this move and, as President, I pledge to encourage and support

the SPLA in the interests of all lawyers and our people in the South Pacific.

Most of our law societies are new and some of our judiciaries are also new. Most of us are going through changes and development issues, especially our laws and customs.

Therefore, the establishment of the South Pacific Lawyers' Association is crucial at this point in time. It will enable our law societies to work together and share common problems and interests.

In conclusion, I must convey our sincere appreciation to the staff of the South Pacific Lawyers' Association Secretariat.

I hope you all enjoy this issue of **newSPLAsh!** ■

In profile...

The PNG Law Society

By Sir Kina Bona KBE

The Papua New Guinea Law Society (PNGLS) was established by the *Lawyers Act 1986* and currently has a membership base of more than 1086 lawyers in the country.

The bulk of these legal practitioners are based in the main centres of Port Moresby, Lae, and Mount Hagen, though they are located at other provincial centres such as Goroka, Kokopo, Madang, Wewak, Mendi, Alotau and Kimbe.


The PNGLS is governed by a nine-member Council headed by the President, while a Secretary administers the day-to-day functions of the Society with a small team of 10 staff. Council elections are held every two years.

The current Council members comprise Sir Kina Bona as President, and Councillors – Allan Mana (Allens), Robert Lindsay (Gadens Lawyers), Robert Bradshaw (Bradshaw Lawyers), Royale Thompson (Young & Williams), Peter Kuman (Kuman Lawyers), Melvin Yalapan (Petromin PNG), Vincent Mirupasi (Mirupasi Lawyers) and Alfred Manase (Manase Lawyers).

While the Society's main function is to promote the interests of lawyers and the rule of law, it is the only mandated body that issues Unrestricted and Restricted Practising Certificates to its members to practise law.

There is also a disciplinary body, the Lawyers' Statutory Committee (Stat Com), which deals with professional conduct complaints against its members. Though the Stat Com is a separate body altogether, it is administered by the Society. The Stat Com is administered by a lawyer – a staff member of PNGLS – who has been allocated duties with the Stat Com. The Stat Com itself comprises the Attorney General (ex-officio), a member of the Society's Council as Chairman, three

practising lawyers and two lay persons. All except the Attorney-General are appointed by the Chief Justice for a term of three years – in the case of the Chairman, upon the nomination of the Council, and in the cases of the lawyers and lay members, upon recommendation of the Council.

The Society has a number of committees, namely Continuing Professional Development (CPD), Publications, Practising Certificate, Admissions, Building, Social, Insurance and the President's Consultative Committee. These committees undertake work given to them by the Council. The Society also produces two publications for its members, its bi-monthly newsletter *Obiter Dicta*, and its bi-annual law journal *Lawtok*. 



In brief...

FIJI LAW SOCIETY WELCOMES NEW PRESIDENT AND EXECUTIVE

The Fiji Law Society held its first AGM in six years at a Sigatoka resort on 14 June 2014, electing a new President and Executive.

Suva-based lawyer Mr Peter Knight replaced Mr Dorsami Naidu as President. One of the founding members of the South Pacific Lawyers' Association, Mr Naidu will now be re-entering politics as one of the 19 candidates for the National Federation Party in the upcoming 2014 elections.

The other Executive members were elected as follows:

Vice-President: Laurel Vaurasi

Executive Committee members: Richard Naidu, Nancy Chute, Volau Paumau, William Wylie Clarke, Pita Katia and Ritesh Naidu.

An AGM for further discussion is anticipated for September this year.

The SPLA would like to extend a warm welcome to the new Executive of the Fiji Law Society and wishes to commend the diligence and fortitude of outgoing President Mr Naidu and his Executive Committee.

AUSTRALIAN "AID-FOR-TRADE" TARGETS INDO-PACIFIC

Australia will refocus its development policy and framework with 90 per cent of the 2014-2015 aid budget to be directed to the Indo-Pacific region, announced Minister for Foreign Affairs the Hon. Julie Bishop MP on 18 June 2014.

Following May's federal budget announcement of an AU\$10 billion aid program over two years, the focus for Australia's Aid program will be on sustainable economic growth as a means to reducing poverty and enhancing regional stability. This will be achieved through supporting private sector development and strengthening human development through improved education, health and gender equality.

"The aid program is not a charity," wrote Minister Bishop in her foreword to the aid

policy document. "It represents an investment in the future of the Indo-Pacific region. An effective aid program will contribute to greater prosperity and reduced poverty. Well-targeted Australian aid complements our diplomatic and security efforts to promote regional stability."

The emphasis of the "new aid paradigm" on private sector development is based on the premise that the private sector fuels economic growth. The Australian Government will be supporting partner countries to improve their business enabling environments as well as harness the capabilities of the private sector to support and achieve development outcomes. The private sector will be engaged through:

- the design and delivery of investments;
- new approaches to project financing;
- public-private partnerships;
- improving the regulatory environment; and
- addressing constraints to economic growth.

The Australian Aid program's private sector development is underpinned by a strong "aid-for-trade" focus. The World Trade Organisation estimated that for every dollar invested in aid-for-trade, exports increase in recipient countries US\$8.¹ As such, the Australian Government aims to increase aid for trade to at least 20 per cent of Australia's annual aid spend by 2020 through investments in infrastructure, trade facilitation and international competitiveness. The Minister argues that better infrastructure reduces the cost of doing business, while trade facilitation ensures that businesses can take advantage of international opportunities. The private sector, multilateral development banks and other donors will be important partners in the delivery of aid for trade outcomes.

Minister Bishop's "bold and dramatic" new development policy and framework was met with criticism by the opposition foreign affairs spokeswoman, the Hon. Tanya Plibersek MP, who expressed concern that Australia's overseas aid program was being "corporatised"

¹ OECD/World Trade Organization (WTO), *Aid for Trade at a Glance 2013: Connecting to Value Chains*, OECD/WTO, 2013, p.145.

and outsourced to the private sector. Non-government organisations such as World Vision Australia and the Australian Council for International Development have supported the new program's focus on enabling economic growth. However, they caution that the new program must take place in the context of equality to ensure the benefits of economic growth are distributed to the most needy.²

Despite significant cuts to Australia's aid program, Aid to PNG will actually increase by nearly \$60m in 2014/15. "A more prosperous Papua New Guinea will improve the quality of life of its own people and have economic and security benefits for the whole region," Minister Bishop said. In an interview following the federal budget announcement, Papua New Guinea Prime Minister the Hon. Peter O'Neill welcomed the new aid program, which will allocate \$577 million to PNG over

2014-2015, largely focused on infrastructure development.³ Through its partnership with PNG Australia will:

- support private sector-led growth;
- support for effective governance;
- education and health to raise living standards for those who have not yet benefited from PNG's economic growth; and
- women's economic empowerment.

For more information on Australian aid in the law and justice sector, visit the Department of Foreign Affairs webpage, where further details can be found on the following partnerships programs in the South Pacific region:

- ▶ PNG Australia Law and Justice Partnership
- ▶ Samoa Law and Justice Sector Program
- ▶ Timor-Leste Justice Sector Support Facility
- ▶ Vanuatu Law and Justice Partnership
- ▶ Vanuatu-Australia Police Project

2 "NGOs back new aid focus" The Australian, 19 June 2014.

3 "PNG PM welcomes new approach to Australian Aid" ABC Radio's RN Drive, 21 May 2014

10 key targets - Australian Aid program

1. Promoting prosperity

Promote economic development by increasing Australia's aid-for-trade investments to 20 per cent of the aid budget by 2020.

2. Engaging the private sector

All new investments will explore innovative ways to promote private sector growth or engage the private sector in achieving development outcomes.

3. Reducing poverty

By July 2015, all country and regional programs have Aid Investment Plans that describe how Australia's aid will promote economic growth in ways that provide pathways out of poverty.

4. Empowering women and girls

More than 80 per cent of investments, regardless of their objectives, will effectively address gender issues in their implementation.

5. Focusing on the Indo-Pacific region

Increase the proportion of country program aid that is spent in the Indo-Pacific region to at least 90 per cent from 2014-15.

6. Delivering on commitments

From July 2015, progress against mutual obligations agreed between Australia and its key partner governments and organisations will form part of program performance assessments.

7. Working with the most effective partners

By July 2015, design and apply new systems to assess the performance of the aid program's key delivery partners and ensure stronger links between performance and funding.

8. Ensuring value-for-money

Deliver high standards of value-for-money in at least 85 per cent of aid investments. Where standards are not met and improvements are not achieved within a year, investments will be cancelled.

9. Increasing consolidation

Reduce the number of individual investments by 20 per cent by 2016-17 to focus efforts and reduce transaction costs.

10. Combatting corruption

Develop and implement new fraud control and anti-corruption strategies for all major country and regional programs by July 2015. ▶

In brief...

MODEL CONDUCT RULES REPORT DUE OUT SOON

A proposal to develop model legal professional conduct rules for South Pacific countries was first discussed by members of the SPLA at the inaugural South Pacific Roundtable in 2007. At a meeting of the SPLA Executive in Fiji in July 2008, it was resolved that the SPLA should develop non-binding rules setting out what it believes to be the 'minimum standards' for the professional conduct of lawyers and to make these 'minimum standards' available to member countries. The SPLA Executive viewed this as a useful step towards raising awareness of professional ethical obligations and the creation and/or simplification of codes for legal professional conduct in South Pacific countries. It was decided that the SPLA should liaise with the Pacific Islands Law Officers' Network (PILON) in respect of such a study.


At its meeting on 5-9 December 2008 in Vanuatu, PILON gave its 'in principle' support to a project to "develop model legal professional rules for South Pacific countries" and "invite the SPLA to submit its developed rules to the PILON Secretariat for distribution and consideration."

The objectives of the South Pacific Model Rules Project are to:

- undertake an analysis of existing rules, legislation and regulations governing the legal profession in the South Pacific region; and
- develop draft model rules, legislation and regulations which could be adopted with appropriate discussion and modification by South Pacific countries.

The first phase of the project is now nearing completion. Phase I of the Pacific Model Rules Project is to:

- Prepare a Report on the development of model legal professional rules and complaints and discipline handling procedures for South Pacific countries.
- Prepare draft model legal professional conduct rules which can be adopted with appropriate debate and modification to regulate the legal profession in South Pacific countries.

- 
- Prepare model complaints and discipline handling procedures for use by legal profession regulators and the courts.
 - Seek endorsement of the Report, model rules and model complaints and discipline handling procedures from PILON and peak legal professional associations in the South Pacific region.

The Report, which will be released in September 2014, will examine the legal profession legislation and regulations in each jurisdiction. In particular, the Report will examine how the legal profession acts and regulation in each jurisdiction deal with:

1. the admission of lawyers to legal practice;
2. regulations regarding trust accounts;
3. costs disclosures and cost agreements;
4. the relationship of costs to disciplinary processes and governance of the conduct of the legal profession; and
5. the processes for dealing with professional misconduct and discipline of lawyers.

The focus of the Report is on the legislative approaches to the topics mentioned above (and, if any, their short-comings). Jurisdictions included in the Report are Cook Islands, Federated States of Micronesia, Kingdom of Tonga, Kiribati, Nauru, Norfolk Island, Marshall Islands, Palau, Papua New Guinea, Pitcairn Islands, Republic of the Fiji Islands, Samoa, Solomon Islands, Tokelau, Tuvalu and Vanuatu.

The SPLA is grateful to its member associations for their assistance in preparing the Report and acknowledges the support of the Australian Attorney-General's Department and the Law Council of Australia.

The Review Team comprises:

- Mr Ross Ray QC, Chair of the South Pacific Lawyers' Association;
- Ms Radhika Withana, Barrister, New South Wales Bar Association;
- Mr David Naylor, Administrator, South Pacific Lawyers' Association and Senior Policy Lawyer, International Division, Law Council of Australia.

If you have any queries or questions regarding the Report, please contact the SPLA Secretariat info@southpacificlawyers.org.

PACIFIC LEGAL PROFESSION SURVEY 2014

To assist in the establishment of a data series on the demographics of the legal profession in the region, the SPLA will conduct the Pacific Legal Profession 2014. The Survey seeks to:

- collect information on legal practice in SPLA member countries including information on the variety of work performed in the Pacific, experience and accessibility of flexible working arrangements, mentoring services provided by employers and bar associations and equal opportunities in the law;
- collect information on the structure and function of legal professional bodies in SPLA member countries;
- collect demographic data on Pacific legal professionals (including statistics of women in the legal profession);
- collect data on CLE, complaints and discipline and pro bono culture; and
- identify and monitor trends and divergences in the legal profession across SPLA member countries.

The data collected will be used to prepare a report on the state of the profession in the South Pacific region, noting key demographic trends since the previous surveys.

This information will have significant value to law societies and bar associations in the region to identify developments within their jurisdiction and for comparative research

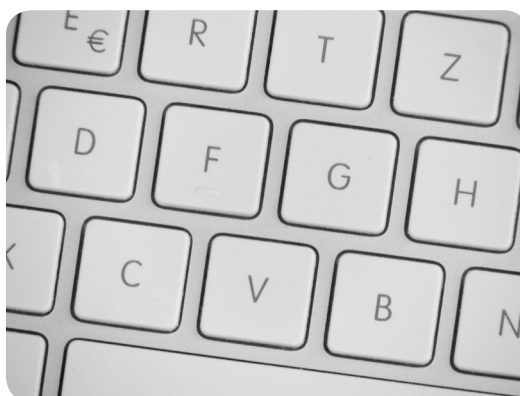
purposes. It is anticipated that the report will also be useful to government bodies and other relevant agencies in developing policies affecting the legal profession and the law and justice sector generally.

The Pacific Legal Profession Survey 2014 will soon be made available online to SPLA members. A copy will also be emailed to members upon request.

The South Pacific region's first ever needs survey of legal professional bodies was conducted by the SPLA in 2011. The Needs Survey was a pivotal step towards strengthening legal professional bodies and improving the services they provide to members and the general community.

The Survey incorporates questions from the 2011 Needs Survey and the Women in Law Survey. The 2011 Survey Report made a number of recommendations, including the need for a comprehensive review of the legal profession legislation in all jurisdictions, the need for improved access to CLE, basic infrastructure for law societies (premises, facilities and human resources) and improved communication resources.

For more information, please email info@southpacificlawyers.org.



In brief...

Asia-Pacific pro bono work continues through CAPPB

The Centre for Asia-Pacific Pro Bono (CAPPB), which is housed within the Law Council of Australia Secretariat, will continue to match requests for legal assistance from the Asia-Pacific region with pro bono providers in Australia until 30 June 2015.

An initiative of the Law Council and the Australian Government in 2011, the funding agreement for the CAPPB was originally due to end on 30 June 2014. However, a one-year extension has been granted by the Attorney-General's Department.

The CAPPB has facilitated more than 18 projects since its launch in July 2012, generating more than \$1.3 million worth of pro bono work for organisations in 12 Asia-Pacific countries. Projects have included legislative drafting assistance, legal advice on human rights and other matters, capacity-building and legal professional development.

For more information on how to request or provide pro bono in the Asia-Pacific, visit cappb.org.

A more detailed article on CAPPB-supported projects is available in the next edition of the Law Council of Australia magazine *The Law Council Review*.

Administrative law training in Samoa

Fulfilling a request made by the Samoan Attorney-General's Department for training on administrative law for its lawyers and private practitioners, the CAPPB facilitated three trainers to deliver the workshop on 23-24 July 2014.

Mr David Fintan, In-house Counsel, National Disability Insurance Agency, Mr Lenny Leerdam, Partner, DLA Piper and Ms Katherine Hooper, Special Counsel, DLA Piper developed and presented the two-day program covering topics such as:


- What is administrative law?
- Administrative decision-making: reasons.
- Avenues of review of administrative decisions.

- Statutory interpretation.
- Judicial review: grounds and remedies.
- Drafting pleadings in administrative law litigation.

Key issues and hot topics

Approximately 40 participants attended the training from the Attorney-General's Department as well as other Ministries and private practice. Initial feedback from the workshop was overwhelmingly positive. The participants particularly appreciated the research and preparatory work conducted by the trainers, which included a thorough study of relevant Samoan authorities and legislation, including the Constitution of Samoa. This enabled the trainers to discuss relevant Samoan authority and principles, together with Australian and international jurisprudence applicable to the Samoan context. The second day's workshop also saw a successful whole-group advocacy exercise, in which the participants applied the concepts learned to a hypothetical example, as well as impressing the trainers with their Court room advocacy skills.

One of the participants had the following feedback to provide: 'The presentations were based on presenters' actual practice and experience, which lends credibility to their opinion. It was greatly appreciated that presenters took the time to read and familiarise themselves with Samoan case law. Overall a great learning experience, very valuable insights gained.'

The CAPPB wishes to extend its gratitude to DLA Piper for coordinating and providing its valuable resources on a pro bono basis, and also thanks the Samoan Attorney-General's Department for organising the logistics for the training. A particular thank you is extended to Dominic Talouli, for his invaluable assistance. The trainers cannot wait to return to the Pacific Island region, including to Samoa, to build on the framework laid and deliver further sessions, including more advanced training targeted to specific areas of administrative law. 



Centre for Asia-Pacific Pro Bono

Make your mark

Whether you want to provide or request pro bono legal assistance, you can make your mark in strengthening the region's law and justice sector.

The Centre for Asia-Pacific Pro Bono (CAPPB) matches requests for assistance from the Asia-Pacific with pro bono providers in Australia.

We have now facilitated projects in more than 12 countries, providing pro bono legal assistance worth more than \$1.3million.

Bangladesh

Myanmar

Vietnam

The CAPPB has facilitated projects in...

Kiribati

Nauru

Papua New
Guinea

Solomon Islands

Cook Islands

Niue

Samoa

Fiji

Vanuatu

For more information
on providing pro bono
in the Asia-Pacific or to
request assistance,
please visit

cappb.org

In depth...

A "fight to the very last breath" – a review of court decisions in the case of the PNG PM's corruption allegations

*By Bal Kama, ANU College of Law**

Papua New Guinea currently faces one of the toughest challenges yet, again in the fight against corruption, after an arrest warrant¹ was issued against the country's Prime Minister Peter O'Neill on allegations of official corruption. What resulted was the sacking and suspension of high-ranking government officials including Attorney-General Kerenga Kua (albeit for other reasons²) and Assistant Police Commissioner Simon Kauba, as the Prime Minister appeared determined to "fight to the very last breath."³

1 "PNG Prime Minister Peter O'Neill served with arrest warrant related to fraud allegations", *Sydney Morning Herald*, 16 June 2014

2 See this edition's Profile on the Hon. Kerengy Kua MP on pages 18-19)

3 "PNG PM O'Neil vow to fight court battle to last breath, Acting Solicitor General removed," *PINA News*, 1 July 2014

The Prime Minister also disbanded the Task Force Sweep (TFS), an anti-corruption body he created when he first took office in 2011. The TFS had played a major role in fighting corruption in the country since its inception. One of its momentous successes was the conviction of Paul Tiensten,⁴ a sitting member of the current Parliament and a former government minister. The TFS has also recouped more than \$30million⁵ so far from corrupt dealings.

The acting Solicitor-General Jubilee Tindiwi⁶ was the latest official to be sacked. Miss Tindiwi was sacked on the basis that she did

4 "A victory over corruption in PNG," *The Interpreter*, 24 April 2014

5 "Interview: Sam Koim of anti-corruption agency, Task Force Sweep," *Business Advantage PNG*, 23 April 2013

6 "PNG PM loses fight on arrest warrant," *The Australian*, 2 July 2014



not oppose the Prime Minister's arrest warrant in court. Miss Tindimi responded⁷ to her sacking stating: "I'm proud of upholding the rule of law in this country regardless of political intervention." A similar sentiment was shared by many of the sacked officials.⁸

Arrest warrant 'politically motivated'

The main justification for these chains of events was that the arrest warrant obtained against the Prime Minister was 'politically motivated'⁹ and that these government officials, including the court, were compromised. According to the Prime Minister Peter O'Neill, this is the reason for inviting Australian judges Graham Ellis (retired) and Andrew Warwick to head the Interim Office for Anti-Corruption (IOAC)¹⁰ and a Commission of Inquiry (COI)¹¹ respectively – to maintain the impartiality of the investigations.

The Prime Minister created the IOAC as a temporary replacement for the disbanded Task Force Sweep (TFS) and initiated the COI to make findings on the allegations against the Prime Minister's office. However, their full terms of references are yet to be published.

The challenge for the IOAC is whether it will continue from the successes of its predecessor, the TFS, and face the tasks of uncovering the complex web of institutionalised corruption from the highest echelons of the country's socio-political order. For now, the TFS has successfully sought a judicial review and an permanent stay on its abolition.¹²

As for the COI, the ultimate question is whether its findings will ever get published. The National Executive Council, chaired by the Prime Minister, who is the subject of the Inquiry, has the discretion to publish the findings. As it stands, many Commissioner of Inquiry reports never make it to publication.¹³

Whether the investigation against the Prime Minister was 'politically motivated' has been

raised in the National Court, allowing it to give its opinion.

National Court's decision and its implications

The Prime Minister appealed¹⁴ to the PNG National Court to seek a restraining order against the police in exercising the warrant.

The Court made its ruling¹⁵ on Tuesday 1 July, 2014. It provided answers to four of the most important questions underlying the current events:

1. Was the arrest warrant against the Prime Minister valid?
2. Should the court restrain the police from exercising the arrest warrant?
3. Were the government officials and investigators 'politically motivated'?
4. Will the Prime Minister be free from any criminal liability if the legal bills are deemed to be valid?

1. Was the arrest warrant against the Prime Minister valid?

This was the main submission by the lawyers representing the Prime Minister and consented to by the Police. They argued that "the warrant was wrongly issued because no arrest can be made until after a formal interview, to accord with the rules of natural justice" (para 53). The Court, however, dismissed this argument stating:

"This is a misconceived submission. The Police are entitled to arrest a suspect based on evidence they possess. This evidence may or may not include any statement from the suspect by way of a record of interview or otherwise. If the law requires that an alleged offender cannot be arrested without a warrant such as pursuant to section 87(2) *Criminal Code*, the Police must obtain the warrant before arresting the suspect..." (para 53).

Section 87(2) of the *Criminal Code*¹⁶ (PNG) states that in cases of 'official corruption,' 'a person shall not be arrested without warrant.' That warrant is to be obtained from a court after a court is satisfied by the evidence that there is a substantive case against the alleged offender.

7 "PNG PM Peter O'Neill says he'll respect court decision to allow police to pursue arrest warrant," *Australia News Network*, 2 July 2014

8 "Peter O'Neill asks police to investigate sacked anti-corruption boss Sam Koim," *ABC News*, 21 June 2014

9 "Papua New Guinea Prime Minister Peter O'Neill pursued by Australian investigators and judge," *News.com.au*, 17 June 2014

10 "PNG court to rule on Peter O'Neill arrest warrant case," *Australia News Network*, 27 June 2014

11 "Papua New Guinea Prime Minister Peter O'Neill announces new inquiry into corruption charge," *Australia News Network*, 17 June 2014

12 "PNG Sweep team court victory," *PINA News*, 29 July 2014

13 *Act Now PNG*

14 See footnote 9

15 See footnote 6

16 Available [here](#) on PACLI website

In depth...

A "fight to the very last breath" (continued)

It is an exception made for suspects of official corruption, in that 'a formal interview is not a pre-condition to effecting an arrest of such a suspect' (para 34). A similar warrant was issued against the former Speaker of the National Parliament Jeffery Nape¹⁷ and he complied.

Regarding the defence of natural justice, the Court's ruling is supported by section 59 of the *PNG Constitution*,¹⁸ which states that the "principles of natural justice" are "subject to this Constitution and to any statute..." One such 'statute' is the *Criminal Code* to which the Constitution gives power to the police to enforce.

2. Should the court restrain the police from exercising the arrest warrant?

The Prime Minister argued that the Court has inherent powers to ensure justice and in light of the circumstances, it is in the interest of justice that the arrest warrant be restrained. However, according to the Court, although it does have the power to stay a warrant, that power is to be exercised "only in the clearest case of abuse of power by the Police" (para 51). Justice Kariko found no such abuse and was reluctant to interfere with police functions (para 54).

3. Were the police officers and the Task Force Sweep "politically compromised"?

The allegation that the investigation was "politically motivated" was presented in Court in the form of an affidavit from the Prime Minister.

The National Court, however, refused this submission. Justice Kariko was adamant:

"Is there any clear abuse in this case? I find no such evidence of this abuse. There is in fact no evidence that the current criminal investigations of the plaintiffs are the work of

rogue policemen or that the investigations are politically-motivated as described by the Prime Minister in his affidavit" (para 52).

His Honour went on to conclude: "In my opinion therefore, there is a prima facie case, that in the interests of justice or the public interest, the balance of convenience favours the refusal of the interim restraining order sought..."(para 55).

4. Will the Prime Minister be free from any criminal liability if the legal bills are deemed to be valid?

The Finance Minister, James Marape¹⁹, is currently suing Paul Paraka Lawyers in the National Court, arguing that the legal bills needed to be taxed. Paul Paraka Lawyers is the recipient of the payment now alleged to be authorised by the Prime Minister.

Mr O'Neill's lawyers argued that 'taxation is the only way the validity of the bills can be determined' and if the bills are determined to be valid, then 'there can be no criminality in the payment of the bills' (para 29, 34). They therefore submitted that the Court should stay the arrest warrant until that determination is made. This argument meant that if the legal bills were to be declared by the Court in Marape's case as valid, then whoever that had authorised the bills, purportedly authorised the bills, or who had facilitated the payment, should not be criminally liable in any way.

However, the Court refused these arguments. First, on whether taxation should determine the validity of the bills, Justice Kariko stated:

"In my view, taxation of costs is an exercise to assess whether items have been properly charged on a bill of costs and whether the cost for each item is reasonable..." It is "not to determine whether a bill of costs is valid" (para 34).

¹⁷ "Former PNG Speaker Jeffery Nape arrested," *The National*, 2012.

¹⁸ Available [here](#) on the PACLI website

¹⁹ "Legal battle over the arrest of Papua New Guinea's prime minister Peter O'Neill," *ABC News*, 4 July 2014



PNG PM O'Neill (photo courtesy of the Commonwealth Youth Ministers Meeting)

Second, on whether the validity of the bills would exonerate any acts of criminality, His Honour stated:

"I am not persuaded by the submissions that the validity of the bills would mean that there could be no criminality in the payment of legitimate bills... At this point in time, the only possible offence alleged is against Mr O'Neill for an offence under s.87 (1) *Criminal Code*. That offence concerns official corruption... In my view, the validity of the legal bills may or may not be material for a charge to be constituted under this section" (para 38).

His Honour was careful in his response but clearly articulated that whether or not the bills are legal may not have any bearing on the current case and on whoever is criminally implicated with its transactions.

Implicit in Justice Kariko's response is the understanding that the taxation of bills is a civil matter and may be resolved administratively, but the issue before him concerning the Prime Minister was one of a criminal nature.

District Court's decision

Although the National Court was of the opinion that "there is a *prima facie* case in the interest of justice," against the Prime Minister, it recognised the Police Commissioner as

having the "ultimate control" of the proceedings (para 56).

Police Commissioner Vaki refused to effect the warrant, insisting that there was a need for a review of the investigation files.²⁰ However, the Fraud office was reluctant²¹ to release the files to the Commissioner in fear of its evidence being compromised.

Commissioner Vaki was appointed a day after the issuance of the warrant and Tom Kulunga, the former Commissioner who approved the arrest warrant, was subsequently retired by the Cabinet.

Commissioner Vaki applied to the District Court to set aside the warrant, claiming that the National Court had recognised him as having the "ultimate control" of the proceedings against the Prime Minister. The warrant was initially issued by the District Court.

However, Chief Magistrate Eliakim rejected this argument:

"the duty, if any, of the Office of the Police Commissioner to review the same investigation file is *functus officio* and therefore cannot be reviewed by the same authority...In other words, the duty to assess whether or not a *prima facie* case is

²⁰ "Papua New Guinea police commissioner Geoffrey Vaki won't arrest PM Peter O'Neill anytime soon," *Australia Network News*, 4 July 2014

²¹ "Eluh: Paraka files won't be handed to Vaki," *EMTV*, 29 June 2014

In depth...

A "fight to the very last breath" (continued)

established has been executed by former Commissioner Kulunga." (para 25, 26).

It appeared all possible legal avenues have been explored. As the Prime Minister stated, it could be a "fight to the very last breath."²² Or will it?

Implications going forward

Three implications are worth noting from these judicial decisions. First, the allegation that the warrant against the Prime Minister was 'politically motivated'²³ is now dismissed by the Court. This is a 'temporary relief' to the investigators. It does restore some credibility to their investigations and personal integrity.

The Prime Minister set up the Interim Office for Anti-Corruption (IOAC)²⁴ and initiated a Commission of Inquiry (COI)²⁵ on the premises that the police, courts and the Task Force Sweep were all politically compromised.²⁶ Would that position change now that the Court ruled otherwise? What would the Australian judges who have been invited to head the IOA and COI do?²⁷ Their involvement, in light of the Court's decision, may raise some questions.²⁸

The second implication is the rule of law. Many commentators raised fears²⁹ on the rule of law in the country and the need for its preservation. Former Prime Minister of Australia Malcolm Fraser urged Prime Minister Tony Abbott to respond.³⁰ The Court's ruling provided some reassurance despite allegations against it being 'compromised'.³¹ Given the experiences of the 2011 constitutional

impasse,³² the judiciary is wary of the situation. It even appeared to take notice of the recent speculation of house arrest against Justice Kariko as reported on social media.³³

Third, the situation has already cast doubts on PNG's relationship with its international partners and corporate investors. It had overshadowed the meeting of the Melanesian Spearhead Group (MSG) which was held in Port Moresby from 20 – 21 July 2014. Although the official visit by Japan's Prime Minister Shinzo Abe and the planned visit of former United States President Bill Clinton provided some reassurance, the PNG government cannot deny the existence of internal instability and uncertainty.³⁴

Ombudsman Commission

Although the PNG Ombudsman Commission has appeared to signal possible breaches of the Leadership Code against the Prime Minister and the Police Commissioner, it has been relatively quiet. Any investigation undertaken by the Ombudsman may run parallel with that of the Police.

The country is also waiting for the Ombudsman to publish its investigations into the \$1.2 billion controversial loan taken early this year from the Union Bank of Switzerland (UBS) to purchase a 10.1% stake for the state in Oil Search Ltd.³⁵ The Prime Minister is one of the subjects of the investigation. Prominent commentators including the former National Court judge Nemo Yalo, has been critical of the Ombudsman's tendency for complacency.³⁶

A long road ahead

Whether the National Court decision can be followed through by the Police Commissioner remains to be seen. Prime Minister O'Neil

22 See footnote 2

23 "PNG Prime Minister Peter O'Neill says political motivation behind arrest warrant from anti-corruption body," *Australia Network News*, 17 June 2014

24 See footnote 9

25 "Papua New Guinea Prime Minister Peter O'Neill announces new inquiry into corruption charge," *Australia Network News*, 17 June 2014

26 See footnote 8

27 See footnote 8

28 "Sacked PNG corruption fighter considers options," *Radio Australia*, 3 July 2014

29 "PNG: O'Neill survives, rule-of-law suffers," *Lowy Interpreter*, 19 June 2014 and

"Rule of Law at risk in PNG: analyst," *Radio Australia*, 24 June 2014

30 "Abbott should act on PNG," *news.com.au*, 30 June 2014

31 See footnote 8

32 "PNG chief justice charged with sedition," *ABC News*, 25 May 2012

33 Bryan Kramer, "Judge Kariko is not under house arrest"

34 "Thousands greet Japanese Prime Minister Shinzo Abe as he visits a World War II battlefield in PNG," *Australia Network News*, 11 July 2014

35 "PNG Ombudsman Commission: can the watchdog bite?," *Dev Policy Blog*, 17 June 2014

36 "Ombudsman fast asleep," *The National*, 30 December 2011

withdrew his appeal to the Supreme Court and pledged:

"I will respect the decisions of the Police Commissioner in the handling of any investigation."³⁷

Mr O'Neill's pardon might not last long as the court hearing³⁸ against the Police Commissioner draws near. Commissioner Vaki has been charged with perverting the course of justice and abuse of office.³⁹ The Fraud officers have indicated that he may also be liable for contempt of court.⁴⁰

With these pending charges against the Commissioner, it is useful to note that the PNG Supreme Court has clearly indicated, in the sentencing of the former Police Commissioner Tom Kulunga,⁴¹ their dislike for offences⁴² committed by high-ranking police officers. If that precedent is applied to Commissioner Vaki in the coming weeks, this may have implications for the Prime Minister.

Despite these uncertainties however, the National Fraud Office appeared determined, warning 'more people' are 'expected to be arrested and charged.'⁴³ Paul Paraka, the principle of Paul Paraka Lawyers was the latest to be charged with 32 counts of criminal offences including stealing by false pretence, conspiring to defraud, money-laundering and misappropriation of public funds.⁴⁴ According to the Fraud Office, the charges were related to a payment of \$70 million (K162 million) from the State to the law firm. The 'net' may widen now with the reinstatement of Task Force Sweep.

The National Court decision was helpful in replacing some of the confusion and allegations with some clarity, in particular, that the arrest warrant against the Prime Minister is not politically motivated, and should be allowed to stand. Nevertheless, in this "fight to the last breath," there is still a very long way to go. ▀

³⁷ See footnote 6

³⁸ "Vaki charged and released," *EMTV*, 19 June 2014

³⁹ See footnote 37

⁴⁰ "Eluh to take suspension to Court," *Papua New Guinea Today*, 22 June 2014

⁴¹ "PNG Police Commissioner given jail sentence," *Radio New Zealand International*, 14 June 2014

⁴² See footnote 37

⁴³ "Paraka arrested," *EMTV*, 25 July 2014

⁴⁴ See footnote 42

***About the author**



Bal earned a Bachelor of Law with Honours (LLB. Hons) and Bachelor of Arts (BA), majoring in International Relations and International Studies, from the University of Canberra, Australia. His Honours

thesis was on the 2011-2012 PNG Constitutional Crisis. Being the first major academic paper on the historic crisis, it was presented with the Second Prize in Best Thesis Presentation at the Pacific Island Research Colloquium at the Australian National University in January 2013.

Bal actively engages in commentary on social-political and legal issues and participates in discussions at the Australian National University Development Policy Centre (DevPolicy) and the institute of State, Society and Governance in Melanesia (SSGM).

Bal is the Founder and Director of Kama Scholars Foundation, a community-based scholarship and mentoring program for village students and youths in the Highlands of Papua New Guinea.

Bal is currently doing his PhD at the College of Law, Australian National University, and working at the University of Canberra as a tutor with the School of Law in the Faculty of Government, Business and Law. Legal experiences include working with the United Nations Women as a consultant and Ashurst Australia in Sydney and the Aboriginal Legal Services in Canberra.

In depth...

How does your country score on corruption?

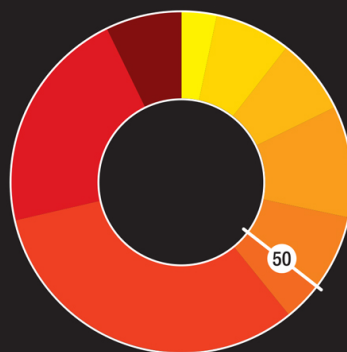
Each year, anti-corruption watchdog Transparency International releases its Corruption Perception Index (CPI) to measure the perceived levels of public sector corruption. In 2013, the CPI measured 177 countries and territories on a scale of 0 (highly corrupt) to 100 (very little corruption). The results showed that corruption is far more common than not, with more than two-thirds of countries

scoring below 50. Regionally and globally, New Zealand topped the list, while North Korea and Afghanistan ranked 175th at the bottom of the list both regionally and globally.

For more information, visit transparency.org.



CORRUPTION PERCEPTIONS INDEX 2013: ASIA PACIFIC

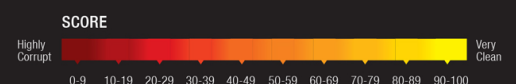


The perceived levels of public sector corruption.

64% score below 50

Top: New Zealand

Bottom: Afghanistan, Korea (North)



RANK	COUNTRY/TERRITORY	SCORE
1	New Zealand	91
5	Singapore	86
9	Australia	81
15	Hong Kong	75
18	Japan	74
31	Bhutan	63
36	Taiwan	61
38	Brunei	60
46	Korea (South)	55

53	Malaysia	50
80	China	40
83	Mongolia	38
91	Sri Lanka	37
94	India	36
94	Philippines	36
102	Thailand	35
114	Indonesia	32
116	Nepal	31
116	Vietnam	31

RANK	COUNTRY/TERRITORY	SCORE
119	Timor-Leste	30
127	Pakistan	28
136	Bangladesh	27
140	Laos	26
144	Papua New Guinea	25
157	Myanmar	21
160	Cambodia	20
175	Afghanistan	8
175	Korea (North)	8

The 2013 Corruption Perceptions Index measures the perceived levels of public sector corruption in 177 countries/territories around the world. To see the full results go to:

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In profile...

The Hon. Kerenga Kua MP, former Attorney-General and Minister for Justice , PNG



In December 2011, at a small gathering in his home village of Mogl, Mr Kua announced that he would be standing for the 2012 elections. Mr Kua had declined previous requests to stand in the past three elections. However, this time he felt ready.

"This time, I considered the request but the people of Sinasina-Yongumugl district must help me decide. Therefore, they staged a public gathering where leaders of clans and tribal groups came out to speak their minds.

Mr Kua went on to say, "I have been sent by my people to get an education, a career to gain necessary experiences needed to be ready in case one day they ask me to serve them in this (political) capacity.

"By the end of this 2012, I was substantially ready, having acquired all the necessary education and experiences in the legal profession, private, public sectors and international arena."

Mr Kua told the gathering that if he won, there would be no free cash handouts from the public fund, there would be no campaign houses, slaughtering of pigs, sharing of food and no compensation demands for projects coming to the district.

"If you fail to consider these conditions, to make my work hard, I will resign and you will go for a by-election," Mr Kua said.

Before being elected, Mr Kua was the President of the PNG Law Society for 10 years and a Councillor for 19 years. He was a senior partner with Posman Kua Aisi Lawyers based in Port Moresby.

Mr Kua has had a distinguished career in law, having been a founding partner in a successful commercial law practice in Port Moresby for 19 years after five years with the Australian firm Blake Dawson Waldron (mpw Ashurst). His goal was to establish a sound financial footing for himself and his family so he would not be vulnerable to the notorious corruption which infects PNG politics.

The 2012 elections were an interesting time in PNG. The elections were conducted under difficult circumstances and the people of PNG were forced to live under the same laws. At the time, Mr Kua said that it was a very dangerous trend for the country, which was supposed to enjoy democracy instilled in the Constitution.

"This election is conducted under Martial Law which is simply dictatorship. I say this because this is the Government that's been installed and propped up by the barrel of a gun. Its leaders are being escorted throughout the country under heavy security forces heavily armed. It's

happening,” he said.

“My solution for all of this is that once this election is completed, a government must be called to be formed without the use of disciplinary forces,” Mr Kua stressed

In his time as Attorney-General, Mr Kua was involved in many controversial matters. In May 2013, the PNG Parliament passed law changes enacting tough new sentences designed to counter violent crime, including the repeal of the controversial 1971 Sorcery Act. This follows a string of high-profile murders of people accused of being sorcerers and the reinstatement of the death penalty, which had been dormant in PNG since the 1950s.

“Sorcery-related killings have to be brought to an end because if they are not, then they themselves would have to be brought to the same fate. So we’re going to do a lot of campaigning to develop a high level of awareness throughout the country that it simply does not pay to entertain that belief and then take it to the extreme of taking another person’s life on account of that misplaced belief system,” Mr Kua said.

Mr Kua also led the extension of the death penalty to additional offences, which had been dormant in PNG since the 1950s, saying that expanding the use of the death penalty was a necessary step that has to be taken in the country’s development. Mr Kua said support for the death penalty was overwhelming, but insisted the Bill was robustly debated, and that all arguments were examined.

“At the end of the day, it is an agenda that has to be driven by the feel of the majority of the people in our own country. We initiated debate last year and I encouraged people to

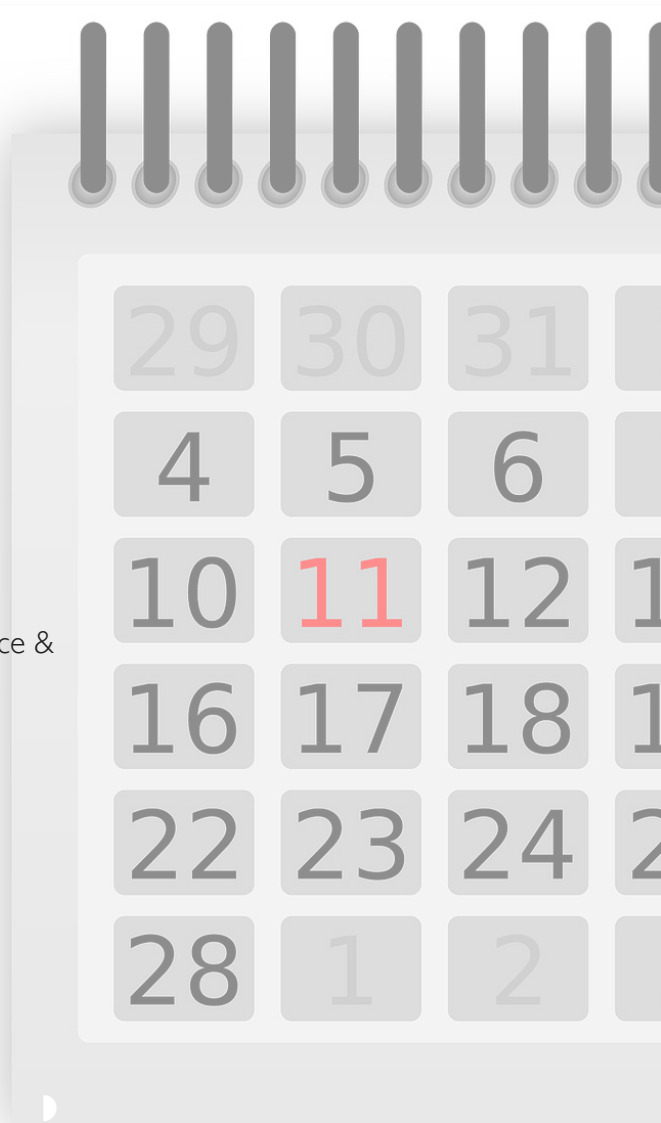
talk about it then. If you’ve been monitoring the discussions, the overwhelming majority of our people here say it is now time to take these kinds of measures.”

Mr Kua’s term as Attorney-General and Minister for Justice came to an end on 17 June 2014 following a cabinet reshuffle by Prime Minister Peter O’Neill. His removal is said to stem from legal advice he gave to the Prime Minister in effect discouraging further restrictions on motions of no confidence against the Prime Minister or the Government on the floor of Parliament. Mr Kua advised that further restrictions would in effect lead to a total prohibition (as opposed to regulation). Such a position, he advised, would lead to the demise of the Opposition on the floor of Parliament (including smaller parties), and therefore lead to the demise of democracy itself. Mr Kua remains the Member for the Sinasina-Yongumugl District. ▶



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- ▶ International Arbitration Conference 2014
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