



PACIFIC ISLANDS LAW OFFICERS' NETWORK

**CORRUPTION & PROCEEDS OF CRIME
WORKING GROUP**

**GUIDE TO LEGISLATIVE
INTERNATIONAL BEST PRACTICE FOR
ANTI-CORRUPTION AGENCIES**

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GUIDE TO LEGISLATIVE INTERNATIONAL BEST PRACTICE FOR ANTI-CORRUPTION AGENCIES

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A. Executive Summary

Corruption is often cited as one of the key challenges to good governance in the Pacific. Pacific Island Leaders have committed to Principles of Good Leadership, which involve open, fair and honest government which respects the rule of law. The Pacific Plan includes under its good governance strategies support for key anti-corruption institutions such as Audit and Ombudsman offices, Leadership Codes and anti-corruption institutions.

Some Pacific Island countries (eg Australia and Fiji) already have dedicated anti-corruption agencies and others are in the process of establishing or reforming them or are considering doing so (eg PNG, Solomon Islands, Tonga). A table of existing Pacific Island agencies which have at least some anti-corruption focus is set out at [Appendix A](#).

This Guide has been prepared by the Corruption and Proceeds of Crime Working Group of the Pacific Islands Law Officers' Network (PILON) to assist Pacific Island countries which are considering establishing or reforming agencies with an anti-corruption focus, by examining international best practice regarding the legislative framework for anti-corruption agencies (ACAs).

It is unlikely that the smaller Pacific Island countries have the resources or need to create full scale dedicated ACAs. However, many of the principles discussed in this Guide will also be applicable to other bodies that have a partial anti-corruption function, like Ombudsmen, Audit Offices and Prosecution Services.

Reviews of anti-corruption agencies show that most ACAs are ineffective and have failed to live up to expectations.¹ While many countries around the world have established ACAs based on the very successful Hong Kong, Singapore, and New South Wales models, the success of those agencies has usually not been replicated, because of significantly different operating environments in other countries.²

One of the most common reasons why ACAs have failed is that Governments have not undertaken a thorough policy planning process regarding the need for, appropriate model for, and powers of, the

¹ Williams, R and Doig, A, *U4 Brief: Achieving success and avoiding failure in anti-corruption commissions: developing the role of donors*, January 2007, No. 1; Heeks, R, *U4 Brief: Understanding Success and Failure of Anti-Corruption Initiatives*, March 2011:2; Bolongaita, E, *An Exception to the Rule: Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines Ombudsman*, U4 Issue August 2010, No. 4; De Jaegere, Samuel, *Principles for Anti-Corruption Agencies: A Game Changer*, Jindal Journal of Public Policy, Vol. 1, Issue 1, August 2012, p.90; Heilbrunn, John R, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?* World Bank, 2004.

² USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.9.

ACA.³ If countries plan to establish an ACA, they should be aiming to do so based on international best practice – suitably adapted for national conditions – and learning from other countries’ experiences.

This Guide considers international research on why particular ACAs have been successful, and the factors that have led others to fail in their efforts at tackling corruption. In doing so, it considers environmental factors that influence the success of ACAs, as well as design factors that are usually required for ACA success.

While drawing on practical experience from other countries, this Guide also refers to the Principles enunciated in the *Jakarta Statement on Principles for Anti-Corruption Agencies*, which was developed in 2012 by key national anti-corruption agencies, international bodies and anti-corruption experts. It also considers relevant obligations under the *United Nations Convention Against Corruption* (UNCAC).

In summary, the **external factors** that have been found to positively influence ACA success are:

- Genuine political will to address corruption
- Strong civil society and media support to address corruption
- An effective legal system
- Effective financial system governance
- Macroeconomic stability
- Political stability and public order
- Confidence that an attempt to challenge corruption would not lead to violence
- Absence of crippling distortions (such as widespread famine or conflict, recent genocide, large populations of Internally Displaced Persons)
- An environment where corruption is not entrenched in the whole system (though it may be deep in a few sectors), and
- Legislation and practice that supports freedom of expression and decriminalizes defamation.

The **prerequisite structural design principles** that should be met to ensure ACA operational success are that the ACA has:

- A clear legal mandate and mission, with clearly delineated roles and functions
- Structural independence, guaranteed by law (including protection from abolition)
- Operational independence, guaranteed by law
- Measures in place to ensure the high integrity of members and staff
- Flexibility and independence to set own terms and conditions for staff, to attract high quality candidates and retain operational independence
- Measures to ensure continuity in operations

³ Heeks, R, *U4 Brief: Understanding Success and Failure of Anti-Corruption Initiatives*, March 2011:2; Williams, R and Doig, A, *U4 Brief: Achieving success and avoiding failure in anti-corruption commissions: developing the role of donors*, January 2007, No. 1; Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008.

- Adequate legal protections for members and staff
- A strong regime of oversight and accountability
- Proper resourcing, with security of continued levels of funding
- The public's confidence that they can safely report suspected corruption
- Their own strong investigatory tools
- Prosecutorial powers, or rely on separate effective prosecutorial agencies
- Effective inter-agency cooperation at an operational level, both with the judiciary, law enforcement agencies and other public agencies
- Effective informal international cooperation and mutual legal assistance mechanisms available
- The benefit of broad corruption offences, consistent with UNCAC, and
- Powers to investigate unexplained wealth, and possibly unexplained wealth offences.

Each of these factors is explored in more detail in the Guide.

B. Introduction

PILON is a network of senior public law officers from Pacific Island countries, including Australia and New Zealand, which focuses on common legal issues within the Pacific region. Under the PILON *Strategic Plan 2013-2014*,⁴ one of PILON's priority legal policy issues is corruption and proceeds of crime.

As the PILON Strategic Plan notes, corruption is often cited as one of the key challenges to good governance in the Pacific. It is reported to be present in a number of sectors in Pacific island countries. The impacts of corruption in the Pacific are identified as operating at both economic and social levels. These include hindering economic development, undermining State accountability and capacity to provide equitable and responsive public services, fostering an anti-democratic environment, and exacerbating neglect of gender equality and human rights.

In the Biketawa Declaration,⁵ Pacific Island Leaders committed to the Pacific Island Forum Principles of Good Leadership, which includes exercising authority and interactions in a manner that is open, transparent, accountable, participatory, consultative and decisive but fair and equitable, and upholding democratic processes and institutions which reflect national and local circumstances, including the peaceful transfer of power, the rule of law and the independence of the judiciary, and just and honest government. The Pacific Plan⁶ (currently under review) includes good governance as one of its key priorities. Amongst the good governance strategies contained in the Pacific Plan are supporting the Good Leadership Principles and regional support to consolidate commitments to key institutions such as audit and ombudsman offices, leadership codes and anti-corruption institutions.

All Pacific Island countries already have various accountability and integrity frameworks and institutions in place. However previous research has indicated that many of these have struggled to be effective in combating corruption. Barriers identified include capacity and resource constraints for implementation and operation, and unsuitability of the introduced institutions and practices for the local context.⁷ Some Pacific Island countries (eg Australia and Fiji) already have dedicated ACAs and others are in the process of establishing or reforming them or are considering doing so (eg PNG, Solomon Islands, Tonga). A table of existing Pacific Island agencies which have at least partially an anti-corruption focus is set out at [Appendix A](#).

Pacific Island countries are well aware that there is no 'one size fits all' to dealing with corruption and other governance issues, and that any reform initiatives need to be carefully tailored to suit the legal, cultural and resourcing circumstances of the particular country concerned. Nevertheless, Pacific Island

⁴ http://www.pilonsec.org/index.php?option=com_content&view=article&id=120&Itemid=109.

⁵ <http://www.forumsec.org/pages.cfm/political-governance-security/biketawa-declaration/>.

⁶ http://www.forumsec.org/resources/uploads/attachments/documents/Pacific_Plan_Nov_2007_version.pdf.

⁷ Manuhua Barcham, *Corruption in Pacific Island Countries*, UNDP Pacific Centre, 2007.

countries can learn from the experiences of other countries when considering creating or reforming agencies which have an anti-corruption focus.

Hence, the purpose of this Guide is to assist Pacific Island countries in considering how to appropriately legislatively structure and empower ACAs, by examining international best practice. Although it is unlikely that the smaller Pacific Island countries have the resources to create full scale dedicated ACAs, many of the principles will also be applicable to other bodies that have purposes that include combatting corruption, like Ombudsmen, Audit Offices and Prosecution Services.

The Guide considers international research on why particular ACAs have been successful, and the factors that have led others to fail in their efforts at tackling corruption. The focus is particularly on developing countries, which are particularly relevant for most Pacific Island countries' circumstances.

The Guide examines the environmental factors that influence the success of ACAs, as well as design factors that are usually required for ACA success. In doing so, it draws out a number of international best practice principles for ACAs, and looks at what they mean in practice.

While drawing on practical experience from other countries, it also makes use of the Principles enunciated in the *Jakarta Statement on Principles for Anti-Corruption Agencies*, which was developed in 2012 by key national anti-corruption agencies, international bodies and anti-corruption experts. Additionally, it considers relevant obligations under the *United Nations Convention Against Corruption* (UNCAC) and the various United Nations guidance material that has been published regarding the implementation of that Convention.

The principles enunciated here – and the learnings drawn out from international studies – are relevant for countries seeking to establish new ACAs, as well as those looking at improving existing legislative frameworks for ACAs and similar bodies.

C. External factors that influence anti-corruption agency success

C.1. Genuine political will to address anti-corruption and thorough policy planning

The creation of a specialised ACA can have an important symbolic value by giving a strong signal of high level political commitment to the fight against corruption, particularly if this forms part of a comprehensive national anti-corruption strategy.⁸

However, ACAs will not be effective unless there is the genuine political will to fight corruption.⁹ A lack of genuine political commitment (rather than supporting the anticorruption agenda to appease the donor community, international monitoring bodies, foreign investors or domestic public) will hamper either the establishment or the proper functioning of any ACA.¹⁰

As part of this genuine commitment, Governments need to ensure that there is a thorough policy development process based on analysis and strategy, considering the need for, and the roles and powers of, an ACA before it is created, in order for it to have some chance of being effective.¹¹ Many countries have established anti-corruption agencies without proper evaluation or strategy in a context where basic legal, structural and financial prerequisites were not in place.¹²

Many ACAs have failed because there has not been enough time spent analysing the local environment to make sure that the chosen model can work (taking into account factors such as political environment, governance effectiveness, levels of existing corruption, culture and available resources including skilled staff and technology).

⁸ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p.10; Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

⁹ UNDP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, p.27; Bolongaita, E, *An Exception to the Rule: Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines Ombudsman*, U4 Issue August 2010, No. 4, p.20; Heilbrunn, John R, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?* World Bank, 2004, p.2; Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, p.43.

¹⁰ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, pp.10, 33.

¹¹ Heeks, R, *U4 Brief: Understanding Success and Failure of Anti-Corruption Initiatives*, March 2011:2; Williams, R and Doig, A, *U4 Brief: Achieving success and avoiding failure in anti-corruption commissions: developing the role of donors*, January 2007, No. 1; Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008.

¹² Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 36.

Governments should also be cautious of creating too high expectations of the ACA to achieve results in tackling corruption, particularly in highly corrupt, under-performing and dysfunctional governance environments.¹³ Political support has commonly dwindled as soon as the ACA starts investigating high level personalities or becomes a threat to the political establishment. In several countries, successful ACAs have been downgraded or have come under attack from political powers.¹⁴

This reinforces the need for ACAs to have sufficient powers and independence as well as adequate human and financial resources to achieve results.¹⁵ Unless an ACA is given the right functions, powers and degree of independence and financing, any political commitment may be hollow in practice.¹⁶

C.2. Strong public pressure to address corruption

In the instances where anti-corruption agencies have been effective, there has been strong public demand to deal more effectively with corruption.¹⁷ In this respect, it is helpful if there is a robust civil society that can assist the ACA and act as a watchdog in the fight against corruption.¹⁸ Media and civic organisations have helped make a fundamentally open and cooperative approach to corruption control successful in Hong Kong and Australia and have likely been important to modest successes achieved in other countries.¹⁹

In the absence of such public and media support, it is unlikely that any actions to reduce corruption will be sustainable in the longer term, since the ACA becomes vulnerable to political interference and the impairment of its operations.²⁰

C.3. Other supportive environmental factors

An ACA is essentially a response to symptoms. ACAs cannot themselves address macroeconomic distortions, the lack of credible courts and watchdog agencies, incentives for bribery and rent-seeking,

¹³ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

¹⁴ United Nations Development Programme, *South-South Exchange on Effective Anti-Corruption Agencies: Bhutan, Maldives, Timor-L'Este*, 2012, p.35.

¹⁵ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012

¹⁶ Heeks, R, *U4 Brief: Understanding Success and Failure of Anti-Corruption Initiatives*, March 2011:2; Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

¹⁷ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012; Bolongaita, E, *An Exception to the Rule: Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines Ombudsman*, U4 Issue August 2010, No. 4.

¹⁸ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.4.

¹⁹ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.13.

²⁰ United Nations Development Programme, *South-South Exchange on Effective Anti-Corruption Agencies: Bhutan, Maldives, Timor-L'Este*, 2012, p.36.

and other large-scale “drivers” of corruption. Promoters of ACAs need to be aware of their limitations, and adjust expectations accordingly.²¹

Successful ACAs seem to operate in environments characterized by effective laws, procedures, courts, and financial system governance – and ACAs are usually not successful in the absence of these factors.²²

Other positive environmental factors include:²³

- Macroeconomic stability
- Political stability
- Confidence that an attempt to challenge corruption would not lead to violence
- Public order
- Absence of crippling distortions (such as widespread famine or conflict, recent genocide, large populations of Internally Displaced Persons)
- An environment where corruption is not entrenched in the whole system (though it may be deep in a few sectors), and
- Legislation and practice that supports freedom of expression and decriminalizes defamation.

In particular, an ACA is very unlikely to have a positive impact in an endemically corrupt or chronically dysfunctional system, where other governance structures are underdeveloped or underperforming.²⁴

An ACA cannot cure bad governance, but can respond to corrupt areas within an otherwise sound governance system. ACAs generally cannot address the larger forces driving systemic corruption and it is extremely challenging for them to be effective where most other important institutions are compromised.²⁵

Similarly, it has been said that investing resources in an ACA within a context of high corruption may be hopeless, wasteful in terms of higher priority needs going unmet, and indeed dangerous, since these are the situations where ACAs are most likely to be politicized and predatory. Short-term success may be feasible, but this depends on the interests and alignment of a few powerful individuals rather than on institutional design – and a strong ACA may become abusive in the wake of a political shift.²⁶

²¹ Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.73.

²² USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.13; Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.13.

²³ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.13.

²⁴ Johnson, J, Hechler, H, De Sousa, L & Mathieson, H, U4 Issue, *How to Monitor and Evaluate Anti-Corruption Agencies: Guidelines for Agencies, Donors and Evaluators*, September 2011, No. 8, p.2; Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.13.

²⁵ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.7.

²⁶ Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.7.

In a similar vein, the OECD suggests that ACAs are likely to fail in certain circumstances, referred to as the “Seven Deadly Sins”.²⁷

- *Political sins*: A lack of genuine political commitment (rather than supporting the anticorruption agenda to appease the donor community, international monitoring bodies, foreign investors or domestic public) will hamper either the establishment or the proper functioning of any ACA.
- *Economic sins*: These include a variety of factors on the macro- and micro-economic level –the ACA will more likely fail if it is operating in an environment of endemic corruption, in a highly state-controlled economy, or in an environment that lacks basic macro-economic stability and a transparent tax system. Similarly, under-funding the institution thwarts its effectiveness due to lack of adequate resources to fulfill its mandate.
- *Governance sins*: No anti-corruption institution can work in a vacuum. An ACA’s effectiveness is closely linked to the overall performance of other institutions. If other public institutions are highly deficient or defective, the ACA, even when perceived as an “island of integrity” will likely fail to carry its burden.
- *Legal sins*: These include a number of factors related to the general state of the Rule of Law in a particular country, the functioning of the criminal justice system, and in particular the courts – all of which has an indirect impact on the performance of any ACA. Similarly if an ACA’s status, responsibilities and powers are determined by an inadequate legal basis, the institution will be vulnerable to pressure.
- *Organisational sins*: Inappropriate organisational structures (eg. modelled on foreign models without adequate appreciation of local specificities), priorities and focus can significantly contribute to the failure of ACAs. There is no one-size-fits-all solution. Often focus on investigation is detrimental to important preventive, analytical and educational measures.
- *Performance sins*: Anti-corruption institutions often become victims of their own promises and public expectations. The establishment of an ACA raises expectations and links its effectiveness to the questionable short-term perception of the rise or drop in the level of corruption, or is evaluated against unrealistic benchmarks and objectives. The performance is likewise often undermined by the lack of staff with relevant skills and experiences.
- *Public confidence sins*: The public should be aware of the existence, mandate, functions and performance of an ACA. Well-established civil society organisations, free media and a relatively high level of public confidence in the ACA as well as the ACA’s openness to, and co-operation with the civil society, are considered important barriers against improper political attacks.

²⁷ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 34.

D.1. Clear legal mission or mandate, with clearly delineated roles and functions

Principles

MANDATE: “ACAs shall have clear mandates to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies.”²⁸

UNCAC Articles 5 & 6 (fall within Chapter 2 on prevention):

Article 5: Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.
3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.
4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

Article 6: Preventive anti-corruption body or bodies

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate that prevent corruption by such means as:
 - (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
 - (b) Increasing and disseminating knowledge about the prevention of corruption.
2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

²⁸ Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

UNCAC Article 36: Specialized authorities (falls within Chapter 3 on criminalization and law enforcement)

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

Learnings from international studies

Is there a need to establish a new ACA?

Before establishing a new ACA, there should be a careful analysis of existing agencies, including a gap analysis that identifies whether there is the need to create a new agency at all - and why corruption cannot be dealt with by existing agencies or by giving those agencies additional functions or powers.²⁹ The UNCAC self-assessment checklist can also assist in this process. UNODC advises that the creation of a new highly specialised ACA may be counterproductive, if it leads to overlapping of areas of responsibility and inadequate coordination.³⁰

Factors in favour of creating a new ACA body include:

- Its establishment would represent a demonstrated new commitment in the fight against corruption.³¹
- Existing bodies may have lost credibility (because of ineffectiveness or corruption) and the inertia of their existing unsuccessful practices may be difficult to change.³² A new ACA may be desirable where law enforcement agencies are perceived as highly corrupt, lacking credibility and legitimacy. A dedicated independent ACA may be the only body with sufficient independence to ensure successful prosecutions.³³
- Existing bodies may have staff who do not have the required skills. The growing complexity of corruption cases and related financial transactions may require a high level of expertise and a

²⁹ Williams, R and Doig, A, *U4 Brief: Achieving success and avoiding failure in anti-corruption commissions: developing the role of donors*, January 2007, No. 1.

³⁰ UNODC, *Legislative Guide for the Implementation of UNCAC*, p.148; UNODC, *Technical Guide to UNCAC*, pp.8-9.

³¹ UNODC, *Technical Guide to UNCAC*, p.114-115.

³² UNODC, *Technical Guide to UNCAC*, p.114-115; Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p.11; Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

³³ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

specialisation of knowledge that can be best achieved through recruitment, training and centralisation of expertise in a new ACA³⁴

- A new body can be given new powers appropriate to current circumstances
- A new body can be given a strengthened institutional framework to ensure independence³⁵

On the other hand, the following factors are in favour of strengthening existing bodies rather than creating a new ACA:

- A new ACA requires substantial financial investment.³⁶
- Many of the advantages of a separate ACA with a law enforcement mandate, such as specialization, expertise and the necessary degree of autonomy, can be achieved by establishing dedicated units within existing law enforcement agencies with the resources required to improve their capacity.³⁷
- Existing bodies already have premises, trained staff, legal powers, internal procedures etc, all of which would have to be created from the beginning by a new body, thus risking the loss of momentum.
- Creating a new ACA risks diverting resources, attention and responsibilities from existing control institutions, and, particularly small and developing countries, risk a “brain drain” from existing agencies, with experienced law enforcement specialists being drawn from existing agencies to the ACA.³⁸
- There are risks of inter-agency rivalry and competition, as well as jurisdictional conflicts, with existing bodies, and a consequential unwillingness to cooperate effectively.³⁹
- When the country’s governance system is weak and dysfunctional, the establishment of an ACA may only add an additional layer of ineffective bureaucracy.⁴⁰
- The new ACA could be abused as a tool against political opponents.⁴¹

Defining ACA mandate over types of corruption

Another issue to consider is the types of corruption that an ACA is designated to deal with. For example, some ACAs can be mandated to deal exclusively with private sector corruption, public sector corruption, administrative corruption, political corruption, economic crimes or money laundering. Typically, ACAs focus on public sector corruption, but some, such as Hong Kong’s ICAC or Singapore’s Corrupt Practice

³⁴ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

³⁵ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

³⁶ UNODC, *Technical Guide to UNCAC*, p.114-115.

³⁷ UNODC, *Technical Guide to UNCAC*, p.114-115.

³⁸ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012; USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.7; UNODC, *Technical Guide to UNCAC*, p.114-115.

³⁹ UNODC, *Technical Guide to UNCAC*, p.114-115.

⁴⁰ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012; UNODC, *Technical Guide to UNCAC*, p.114-115.

⁴¹ UNODC, *Technical Guide to UNCAC*, p.114-115.

Investigation Bureau (CPIB) have a broader focus and are also concerned with fighting corruption in the private sector. It has been recommended that an ACA's mandate should encompass at least all branches of government – the executive, legislature, and judiciary.⁴²

In order to be effective, an ACA needs to be strategic in defining its focus. No agency can cope with an unlimited mandate (unless massive resources are available, like in Hong Kong), so choices must be made.⁴³ A selective approach then requires clear guidelines to justify selection, and preferably other competent agencies to refer other cases to.⁴⁴

One option is to limit the jurisdiction of the ACA to important and high impact cases, to avoid the ACA being swamped with cases.⁴⁵ For example, NSW's ICAC only takes on matters with the potential to expose significant and/or systemic corruption or which otherwise involve matters of significant public interest.

However, studies of African ACAs suggest that it is doubtful whether an ACA will be effective if it mainly focuses on contemporary, very high level political corruption.⁴⁶ Most high-level investigations and prosecutions are notoriously difficult and complex with a very high failure rate, even in developed countries.⁴⁷ ACAs with inadequate resources, unsophisticated investigative capabilities and operating within an undeveloped institutional infrastructure have often been unrealistically expected to pursue systemic political corruption at the highest levels.⁴⁸

On the other hand, there is little justification for ACAs to focus on low level administrative corruption and maladministration. ACAs with this focus usually fail to use the intelligence gained from individual cases to develop systemic changes in administrative procedures and so achieve little in support of the ACC's strategic objectives. Simple, street level corruption requires no special skills or resources and is better dealt with by police.⁴⁹

⁴² Bolongaita, E, *An Exception to the Rule: Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines Ombudsman*, U4 Issue August 2010, No. 4, p.25.

⁴³ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.9.

⁴⁴ Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.12.

⁴⁵ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 11; Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

⁴⁶ Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, p.7.

⁴⁷ Williams, R and Doig, A, *U4 Brief: Achieving success and avoiding failure in anti-corruption commissions: developing the role of donors*, January 2007, No. 1.

⁴⁸ Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, p.43.

⁴⁹ Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, pp.43, 50.

A discretionary selective approach works best in an environment where the ACA is not vulnerable to charges of partiality. Further, implementing a strategic focus depends critically on the agency's internal management capacities and on appropriate external oversight. An ACA needs the ability to choose a progression of targets over time in order to establish legitimacy through "quick wins," and to avoid high-level battles until such time as they can be won.⁵⁰

Case choice could focus on predefined standards, such as those used by Argentina's ACA, which can select and pursue cases within its jurisdiction. There, three main criteria guide the selection of cases:⁵¹

- involving one million pesos (approximately U.S. \$281,000)
- whose magnitude and gravity prevent a given government institution from accomplishing its institutional mandate and functions, or
- where a corrupt act may affect a significant number of people who are supposed to receive services from an institution under investigation.

Alternatively, ACA jurisdiction could be mainly prospective (by limiting its concern with past cases, as in Hong Kong), or it could deal only with the probity and reputation of the public service (like the U.S. Office of Government Ethics).

Experiences show that the definition of an ACA's jurisdiction requires an important strategic decision. The Hong Kong ICAC and Singapore CPIB models establish jurisdiction over a set of core corruption offenses involving the abuse of public authority, but then also create a broader penumbra of jurisdiction over other corruption-related offenses, including activities of the private sector. The Botswana DCEC expands this to include white-collar crime. In most systems, the latter is hived off and put under the authority of a Serious Frauds Office or other specialized unit. Also, Singapore's CPIB has authority to investigate any crime that comes to light in its corruption investigations – a power that most such agencies do not have. The issue here is one of synergy or economy – i.e. what activities are most efficiently and effectively dealt with together? In relatively small jurisdictions such as Hong Kong, Singapore, and Botswana, the natural tendency would be to group several kinds of offenses together under one investigating body. One risk is that this augmented power might be misused. Another risk is that of overstretch, as in the case of Botswana, where the agency's mandate exceeds its capacity and resources.⁵²

Determining ACA roles and functions

A fundamental question is what roles and functions an ACA should carry out. It is impossible to identify "best models" or blueprints for establishing ACAs. Any new ACA needs to be adjusted to the specific

⁵⁰ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.9.

⁵¹ Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, pp.42-50.

⁵² Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.5.

national context taking into account the varying cultural, legal and administrative circumstances. An ACA's role needs to be clearly delineated from those of other agencies (or the overlap made clear where it exists).⁵³

The most common roles and functions that can be vested in an ACA are:⁵⁴

- Policy coordination
- Research and analysis
- Preventative functions
- Education and awareness raising
- Receiving complaints
- Investigation of corrupt conduct, and
- Prosecution of criminal offences.

There is no need for all these functions to be incorporated into one body, and, indeed, it is probably not possible to do so effectively.⁵⁵

In particular, there has been a tendency in developing countries with perceived widespread corruption to entrust ACAs with corruption prevention, law enforcement, and awareness raising functions, following the successful models of specialised multi-purpose anti-corruption agencies in Hong Kong, Singapore, and Botswana. However, such efforts have usually failed, because of a failure to consider their appropriateness for local conditions.⁵⁶ ACAs hence often find themselves stretched to deliver on overly broad mandates, with limited resources to conduct all their functions.⁵⁷

UNCAC itself recognizes the need for individual country circumstances to be considered, allowing for flexibility in the means of implementation to ensure that it is in accordance with the fundamental principles of a State's legal system.

Policy coordination

Policy development and coordination functions could include including elaboration of anti-corruption strategies and action plans and monitoring and co-ordination of implementation measures, and possibly serving as a focal point for international cooperation.⁵⁸

⁵³ UNCP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, p.29.

⁵⁴ Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.2.

⁵⁵ U4, *Institutional Arrangements for Corruption Prevention*, 2009, p.15.

⁵⁶ U4, *Institutional Arrangements for Corruption Prevention*, 2009, p.23.

⁵⁷ Johnson, J, Hechler, H, De Sousa, L & Mathieson, H, U4 Issue, *How to Monitor and Evaluate Anti-Corruption Agencies: Guidelines for Agencies, Donors and Evaluators*, September 2011, No. 8, p.21; Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, p.42.

⁵⁸ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p.9.

Research and analysis

Research and analysis functions encompass researching trends and levels of corruption, and assessment of the effectiveness of anti-corruption measures. ACAs should have a greater capacity to generate a knowledge-based approach to the fight against corruption through risk assessments and a series of other studies, in comparison to traditional law enforcers.⁵⁹

Research functions could include conducting original empirical research, providing research support for major investigations, monitoring and assessing anti-corruption initiatives, creating databases (eg on reported corruption, corruption trials, corruption related crime statistics, or serving as an interface to other researchers).⁶⁰

However, in practice, very few ACAs have well-developed such in-house research and knowledge-production.⁶¹ Indications are that it is more effective to outsource research due to capacity constraints and expense, as well as the risk that research risks becoming politicized in the ACA, particularly if the ACA is also responsible for corruption investigations.⁶² Hence, it is probably preferable to assign research on corruption to universities, research institutes, think tanks or civil society organisations.⁶³

Preventative functions

Preventative measures to counter corruption can include: developing public sector regulation and codes of conduct (eg prevention of conflicts of interest; assets declaration by public officials, verification of submitted information and public access to declarations), public procurement and management of public finances, reporting of public agencies, strengthening the integrity of the judiciary and prosecution services, promote transparency of public service and public access to information, effective control of political party financing, preventing corruption in the private sector, promoting public participation in the fight against corruption, and preventing money laundering.⁶⁴ Of course, no ACA could carry out all these functions.

It would be possible to create an ACA that focused predominantly on corruption prevention. Corruption prevention does not receive the priority it deserves but, properly resourced and focused, it can close

⁵⁹ Johnson, J, Hechler, H, De Sousa, L & Mathieson, H, U4 Issue, *How to Monitor and Evaluate Anti-Corruption Agencies: Guidelines for Agencies, Donors and Evaluators*, September 2011, No. 8, p.21.

⁶⁰ De Sousa, L, *Anti-Corruption Agencies: Between Empowerment and Irrelevance*, EU Working Papers RSCAS, 2009/08, p.10.

⁶¹ Johnson, J, Hechler, H, De Sousa, L & Mathieson, H, U4 Issue, *How to Monitor and Evaluate Anti-Corruption Agencies: Guidelines for Agencies, Donors and Evaluators*, September 2011, No. 8, p.21.

⁶² Meagher, P (2004) "Anti-corruption agencies: A review of experience" *Paper No. 04/02* College Park: Center for Institutional Reform and the Informal Sector; de Sousa, L (2006) "European Anti-Corruption Agencies: Protecting the Community's financial interests in a knowledge-based, innovative and integrated manner", Lisbon: ISCTE.

⁶³ U4, *Institutional Arrangements for Corruption Prevention*, 2009, p.19.

⁶⁴ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p.9.

loopholes and tighten processes and make a significant impact on reducing corruption, particularly in relation to wider reform objectives.⁶⁵ For example, ACAs could have the legal authority to provide directives to government departments to develop and implement new procedures to reduce corruption risks.⁶⁶

Education and awareness raising

Education and awareness raising functions could include developing and implementing educational programmes for public, academic institutions and civil servants, organising public awareness campaigns, and working with the media, NGOs, businesses and the public at large.⁶⁷

Some governments have assigned a public education and awareness raising function to ACAs, based on the approach of the Hong Kong ICAC's success in public education. However, this success has been backed by considerable resources for education in very small and highly urbanised areas and therefore the experience is not easily transferable.⁶⁸

In particular, it is questionable whether ACAs should engage in *community education* on corruption in large, rural societies. ACAs are usually very small organisations, whose main skill sets are not those of teachers and educators. In these countries, an alternative and more effective strategy may be to build coalitions with civil society and the media for broader outreach.⁶⁹

In that case, however, governments need to ensure that civil society and media have the freedom to perform this function and have access to relevant information. Special emphasis should be given to expanding the awareness-raising beyond corruption and ethics per se, making sure to inform the public about the wide range of corruption prevention measures and their role in making the measures work. This includes the dissemination of knowledge about corruption prevention principles such as transparency, accountability, participation, and access to information.⁷⁰

Disseminating knowledge about corruption prevention is typically undertaken by many state and non-state institutions, so that States could focus on creating an enabling environment for the production, collection, easy access to and free flow of this knowledge, in particular by guaranteeing effective access to public information.

⁶⁵ Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, p.51.

⁶⁶ UNCP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, p29.

⁶⁷ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p.9.

⁶⁸ U4, *Institutional Arrangements for Corruption Prevention*, 2009, pp.19-20.

⁶⁹ Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, p.50.

⁷⁰ U4, *Institutional Arrangements for Corruption Prevention*, 2009, pp.19-20.

However, with regard to the collection of knowledge and its dissemination to the *public sector* in particular, States may consider tasking a single agency with these functions, provided it has sufficient independence and resources.⁷¹

Identification, investigation and prosecution

Investigation functions aim to ensure effective enforcement of anti-corruption legislation, initially through identification and investigation of corruption offences. Some ACAs are also empowered to prosecute offences.

These functions can also include overseeing interagency co-operation and exchange of intelligence, whether in relation to specific criminal investigations or more broadly (among law enforcement bodies and with auditors, tax and customs authorities, the banking sector, the financial intelligence unit, public procurement officials, state security, and others).

Maintaining, analysing and reporting law enforcement statistics on corruption-related offences is another important function.⁷²

D.2. Structural independence, guaranteed by law

Principles

PERMANENCE: “ACAs shall, in accordance with the basic legal principles of their countries, be established by proper and stable legal framework, such as the Constitution or a special law to ensure continuity of the ACA”⁷³

Learnings from international studies

Independence is designed to protect ACAs from political interference, as recognized in UNCAC Article 6(2). Tackling corruption of high-level officials or systemic corruption in a country with poor governance and comparatively weak law enforcement and financial control institutions is destined to fail if efforts are not backed by a sufficiently strong and independent anti-corruption institution.⁷⁴

⁷¹ U4, *Institutional Arrangements for Corruption Prevention*, 2009, pp.19-20.

⁷² Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 10.

⁷³ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

⁷⁴ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 24.

There should be a clear legal basis for the continued existence of the ACA, particularly for those with law enforcement functions.⁷⁵

D.3. Operational independence, guaranteed by law

Principles

APPOINTMENT: “ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence”⁷⁶

REMOVAL: “ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice)”⁷⁷

UNCAC Articles 6 and 36 require that ACAs have the necessary independence, in accordance with the fundamental principles of their legal systems, to enable them to carry out their functions effectively and free from any undue influence.

Learnings from international studies

There are different kinds of independence, and different means of ensuring independence and impartiality.

Financial independence

It is necessary for ACAs to be financially independent, so that they are guaranteed predictable resources to perform their functions, and the government cannot impede or restrict agency activities by reducing its budget.⁷⁸ This is considered in more detail in section 9 below.

Functional or operational independence

ACAs also require a level of functional or operational independence, so that other government bodies cannot unduly interfere with their activities.⁷⁹ While placement of the ACA in the office of the chief of state may bolster its strength, this is likely to compromise its independence and weaken it.⁸⁰

The legislative framework should ensure operational independence of the ACA so that it can determine its own work agenda and how it performs its mandated functions.⁸¹ The legislation should ensure that

⁷⁵ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 10.

⁷⁶ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

⁷⁷ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

⁷⁸ U4, *Institutional Arrangements for Corruption Prevention*, 2009, pp.21-22.

⁷⁹ U4, *Institutional Arrangements for Corruption Prevention*, 2009, p.22.

⁸⁰ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.11.

⁸¹ UNODC, *Technical Guide to UNCAC*, p.11.

the head of the ACA has responsibility for both the recruitment of staff and the operational performance of the ACA's functions. Of particular importance are the provisions which safeguard against undue influence in the operational decisions in a criminal investigation or criminal proceeding.⁸²

The ACA should be entitled to determine the public nature of their work, through public hearings, which can be an important tool in exposing evidence of corruption and educating the community about corruption. At the same time, private hearings can be used to maintain the integrity of the inquiry, protect the identity of a witness or informant, receive information that may be used for further criminal and disciplinary charges, avoid interference with other proceedings, and avoid unnecessary harm to individual reputations. The ACA, however, should have a general policy of publishing its findings and reports to emphasize its role in upholding public integrity.⁸³

The UNODC *Technical Guide to UNCAC* states that operational independence requires consideration of the following issues:⁸⁴

- rules and procedures governing the appointment, tenure and dismissal of the Director and other designated senior personnel
- the composition of the body and/or any supervisory board
- suitable financial resources and remuneration for staff
- an appropriate budget
- suitable recruitment, appointment/election, evaluation and promotion procedures
- periodic reporting obligations to another public body, such as the legislature
- ability to issue regular public reports on their work
- formal paths to allow cooperation and exchange of information with other agencies, and
- arrangements to determine the involvement of civil society and the media.

Appointment and dismissal of key executive staff

The independence of an ACA will be heavily influenced by how its head is appointed or removed. The recruitment, appointment, disciplinary and removal criteria for the senior management should be clearly established in legislation.⁸⁵

The Executive Government alone should not be responsible for appointing or dismissing the ACA head. A flaw in many legislative schemes involves giving a President (or any political figure) too much control over the appointment and operations of an ACA. It is important that the appointment procedure be one which recognises that the task of the ACA head will be to maintain a check on the Executive and, in particular, the political party in power. If the Executive or the ruling party has a free hand in making the

⁸² UNODC, *Technical Guide to UNCAC*, p.116.

⁸³ UNODC, *Technical Guide to UNCAC*, p.11

⁸⁴ UNODC, *Technical Guide to UNCAC*, p.11.

⁸⁵ UNODC, *Technical Guide to UNCAC*, p.116.

appointment, this will damage practical effectiveness and public confidence. At best, appointees would risk being seen as hand-picked supporters who could be relied upon not to rock the boat. At worst, they would be seen as the party's "hatchet men".⁸⁶

The precise appointment procedure will vary from country to country, but it must be transparent and insulated from political interference so that people of integrity are likely to be selected, and protected while in office. It should be made on the basis of high-level consensus among different power-holders.⁸⁷

Some options for appointing the agency head may be:

- A designated multidisciplinary selection committee making a recommendation to the Government (eg members of judiciary, the legislature (including the Opposition), civil society, and other relevant stakeholders)
- A 2/3 or special majority in Parliament.⁸⁸
- A Parliamentary Select Committee on which all major parties are represented in the selection process, together with an oversight role to monitor performance.⁸⁹

The ACA head's tenure in office should be protected by law against unfounded dismissals.⁹⁰ Grounds for dismissal must be set out in legislation. One option is for the ACA head to be afforded the same rights of tenure of office as those enjoyed by a superior court judge.⁹¹ It is undesirable to have a dismissal procedure involving only the judiciary or the executive. Removal from office should never be at the discretion of the powers that be, but only in accordance with a prescribed and open procedure, possibly only on the grounds of incompetence or misbehaviour.⁹²

Interestingly, some international studies have found that women tend to be less susceptible to corruption than men.⁹³ This could be taken into account when recruiting both senior executives and other staff to an ACA, although noting that any candidates would still have to be well qualified for the positions.

⁸⁶ Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007.

⁸⁷ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 26.

⁸⁸ United Nations Development Programme, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.30.

⁸⁹ De Jaegere, Samuel, *Principles for Anti-Corruption Agencies: A Game Changer*, *Jindal Journal of Public Policy*, Vol. 1, Issue 1, August 2012, p.98.

⁹⁰ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 26.

⁹¹ Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007.

⁹² Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007.

⁹³ Transparency International, *Are women less corrupt than men? And other gender/corruption questions*, 7 October 2011, available at <http://blog.transparency.org/2011/10/07/are-women-less-corrupt-than-men-and-other-gendercorruption-questions/>.

D.4. Measures in place to ensure the high integrity of members and staff

Principles

ETHICAL CONDUCT: “ACAs shall adopt codes of conduct requiring the highest standards of ethical conduct from their staff and a strong compliance regime.”⁹⁴

INTERNAL ACCOUNTABILITY: “ACAs shall develop and establish clear rules and standard operating procedures, including monitoring and disciplinary mechanisms, to minimize any misconduct and abuse of power by ACAs.”⁹⁵

Learnings from international studies

Integrity of staff is crucial to the credibility and effectiveness of an ACA. Staff members at all levels should therefore undergo some form of integrity checks, to minimise the risk of staff undermining the ACA's role in curbing corruption. Some ACAs even have their own internal oversight body to investigate breaches of its code of conduct, or a body that monitors and reviews all complaints held against the ACA.⁹⁶

D.5. Flexibility and independence to set own terms and conditions for staff, in order to attract high quality candidates and retain operational independence

Principles

REMUNERATION: “ACA employees shall be remunerated at a level that would allow for the employment of sufficient number of qualified staff.”⁹⁷

AUTHORITY OVER HUMAN RESOURCES: ACAs shall have the power to recruit and dismiss their own staff according to internal clear and transparent procedures.⁹⁸

UNCAC Articles 6 and 36 require that ACAs have the necessary resources and specialised skilled staff to carry out their functions.

Learnings from international studies

It is generally considered important for an ACA to have its own, dedicated non-executive staff, although recommendations concerning their number vary depending on the scope of operations. Size ranges from over 1,300 staff in Hong Kong to around 100 in Botswana and New South Wales.⁹⁹

⁹⁴ Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

⁹⁵ Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

⁹⁶ Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007.

⁹⁷ Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

⁹⁸ Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012.

⁹⁹ Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007.

ACAs should not be reliant on existing officers being seconded from other agencies (particularly if these have bad reputations and suffer from corruption themselves). However, selective secondment of trustworthy staff with the necessary expertise from other agencies or from the international market can be helpful.¹⁰⁰

Control over recruitment and dismissal

The UNODC Technical Guide to UNCAC states that, where possible, ACAs should be able to:¹⁰¹

- conduct their own open and fair recruitment
- determine their own human resources policies
- determine the number and professional qualifications of its staff, and
- identify necessary specializations, as well as training qualifications and requirements.

ACAs should generally not be subject to restrictive public service conditions of service, particularly regarding engagement and dismissal.¹⁰² Not all ACAs recruit civil servants only; for example, the majority of the Hong Kong ICAC's officers are on contract, while Botswana's DCEC recruits its staff through the Public Service Management Department without, however, giving them civil servant status.

The ACA should be able to regulate the appointments and dismissals of its non-executive staff. Lack of control over staffing can lead to political interference in staffing appointments and hence operations.¹⁰³ It also assists independence by helping to protecting of officers from political, economic or personal interference and pressures.¹⁰⁴ It is also important to control staff quality - since managers will be able to dismiss staff if they fail to live up to professional and/or moral expectations.

The experience of Indonesia's successful KPK would suggest that ACAs should not be bound by archaic civil service rules and procedures for managing personnel and operations, but the ACA should be able to recruit on secondment the best investigators in the police and other law enforcement agencies as well as the best prosecutors. It has been argued that fixed term performance contracts for personnel should be used to avoid careerism.¹⁰⁵

¹⁰⁰ Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007.

¹⁰¹ UNODC, *Technical Guide to UNCAC*, pp.12, 116.

¹⁰² De Jaegere, Samuel, *Principles for Anti-Corruption Agencies: A Game Changer*, *Jindal Journal of Public Policy*, Vol. 1, Issue 1, August 2012, p.99.

¹⁰³ De Sousa, L, *Anti-Corruption Agencies: Between Empowerment and Irrelevance*, EU Working Papers RSCAS, 2009/08, p.7.

¹⁰⁴ Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007; USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.12.

¹⁰⁵ Bolongaita, E, *An Exception to the Rule: Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines Ombudsman*, *U4 Issue* August 2010, No. 4, p.26.

Sufficient remuneration to attract highly skilled staff

ACAs should be able to ensure that the remuneration system is sufficient to attract and retain the best available expertise (particularly given need for specific specialized skills).¹⁰⁶ This may require payment above standard public sector rates. Adequate salary levels are also necessary to keep up staff morale and to act as a disincentive to engagement in corrupt activities.¹⁰⁷

Access to specialist training

Special professional training is one of the most crucial requirements for the successful operation of an anti-corruption body.¹⁰⁸ Expertise and continuous training are essential if the highest professional standards of an ACA are to be maintained.¹⁰⁹

Clearly delineated responsibilities

There should be an organizational structure with clear divisions of labour and established reporting lines. Many ACAs fulfill multiple functions and the organisational chart helps everyone navigate who is supposed to do what and report to whom. The more functions an ACA takes on, the more important its organizational chart becomes. This also needs to be linked to clear job descriptions.¹¹⁰ Teamwork of investigators and prosecutors and other specialists, e.g. financial experts, auditors, information technology specialists, may be the most effective use of resources.¹¹¹

D.6. Measures to ensure continuity in operations

Principles

CONTINUITY: "In the event of suspension, dismissal, resignation, retirement or end of tenure, all powers of the ACA head shall be delegated by law to an appropriate official in the ACA within a reasonable period of time until the appointment of the new ACA head."¹¹²

¹⁰⁶ UNODC, *Technical Guide to UNCAC*, p.116; United Nations Development Programme, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.36.

¹⁰⁷ Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007; USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.12.

¹⁰⁸ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, pp. 11, 27.

¹⁰⁹ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.12; Jennett, V, *U4 Expert Answer: Criteria for Appointing Executives of Anti-Corruption Agencies*, 31 January 2007.

¹¹⁰ United Nations Development Programme, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.35.

¹¹¹ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, pp. 11, 27.

¹¹² *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

Learnings from international studies

ACAs are sometimes paralysed in the absence of leadership because the law only grants specific powers to the heads of the ACA. If ACA heads are suspended or dismissed, or they resign or retire, then the law should provide for delegating powers to the highest-ranking official in the ACA. This delegation should enter into force at least after the expiration of a reasonable period of time for the replacement of the leadership (for example 3–6 months).¹¹³

D.7. Adequate legal protections for members and staff

Principles

IMMUNITY: “ACA heads and employees shall have immunity from civil and criminal proceedings for acts committed within the performance of their mandate. ACA heads and employees shall be protected from malicious civil and criminal proceedings.”¹¹⁴

Learnings from international studies

The ACA and its staff should be protected from civil litigation for actions performed within their mandate as long as those actions have been carried out under the authority of the ACA and in good faith. This is designed to protect staff from being intimidated through collateral legal proceedings. However, this protection should not prevent the judicial review of ACA decisions.¹¹⁵

D.8. A strong regime of oversight and accountability

Principles

EXTERNAL ACCOUNTABILITY: “ACAs shall strictly adhere to the rule of law and be accountable to mechanisms established to prevent any abuse of power”¹¹⁶

PUBLIC REPORTING: “ACAs shall formally report at least annually on their activities to the public”¹¹⁷

PUBLIC COMMUNICATION AND ENGAGEMENT: “ACAs shall communicate and engage with the public regularly in order to ensure public confidence in its independence, fairness and effectiveness”¹¹⁸

¹¹³ De Jaegere, Samuel, *Principles for Anti-Corruption Agencies: A Game Changer*, Jindal Journal of Public Policy, Vol. 1, Issue 1, August 2012, p.98.

¹¹⁴ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

¹¹⁵ UNODC, *Technical Guide to UNCAC*, p.11, 116.

¹¹⁶ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

¹¹⁷ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

¹¹⁸ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

Learnings from international studies

It is essential to introduce adequate checks and balances and ensure scrutiny by various other oversight mechanisms to make sure that ACAs are not in a position to abuse their autonomy and that they operate in an unbiased manner.¹¹⁹ Accountability systems help track performance. An effective accountability mechanism should lead to credibility and stronger public support.¹²⁰

Oversight body

ACAs often report to an oversight body, such as Parliament or a Public Council - including representation of civil society, academia, professional associations such as bar associations, employers' associations, or unions, as well as key national authorities. An oversight body with sufficient authority to review and report on the ACA's conduct can enhance the ACA's public credibility and shield it from adverse public opinion.¹²¹ The presence of oversight committees is crucial to the effective organization of an ACA.¹²²

An oversight body may have the powers to:

- review the ACA's decision to cease investigating a complaint or even to provide directives to undertake an investigation - but not the reverse, i.e. to stop an on-going investigation.
- look at the financial and resource needs of the ACA and make recommendations to the government.
- organize public meetings or media conferences to share their views on the ACA's progress and priorities
- review the ACA's annual report and question the ACA's executive on it.

Other means of accountability

ACA accountability can also be enhanced through:¹²³

- Access to judicial review of the ACA's decisions
- Annual reporting (including summaries of ongoing cases where arrests have taken place, decisions taken and results) to the relevant oversight body and to the public
- External audit requirements
- Providing public information on their work

¹¹⁹ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012

¹²⁰ United Nations Development Programme, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.32

¹²¹ United Nations Development Programme, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.32

¹²² Heilbrunn, John R, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?* World Bank, 2004.

¹²³ UNODC, *Technical Guide to UNCAC*, p.11; Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 27; United Nations Development Programme, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.32.

- Clear procedures for case initiation and management, facilitated by case management systems.

Of all the agencies surveyed during one particular study, Australia's NSW ICAC was one that met all accountability criteria, such as judicial review, budget transparency, and citizen oversight. Only the Hong Kong and NSW agencies have citizen oversight committees, and these agencies, along with Malaysia's ACA (and the agencies in the Philippines, Thailand, and Ecuador), report to Parliament. Singapore's CPIB, as well as the agencies in Argentina, Korea, Botswana, and Tanzania, are subject to audit and oversight within government, not outside it. All of these agencies are subject to judicial decisions when their cases are brought to trial, but only Hong Kong, the Philippines, and Australia/NSW appear to exercise effective judicial restraint on investigative methods and detentions.¹²⁴

D.9. Be properly resourced, with security of continued levels of funding

Principles

ADEQUATE AND RELIABLE RESOURCES: "ACAs shall have sufficient financial resources to carry out their tasks, taking into account the country's budgetary resources, population size and land area. ACAs shall be entitled to timely, planned, reliable and adequate resources for the gradual capacity development and improvement of the ACA's operations and fulfillment of the ACA's mandate."¹²⁵

FINANCIAL AUTONOMY: ACAs shall receive a budgetary allocation over which ACAs have full management and control without prejudice to the appropriate accounting standards and auditing requirements.¹²⁶

UNCAC Articles 6 and 36 also require anti-corruption bodies to be adequately resourced.

Learnings from international studies

Many ACAs have failed, or endured periods of decline, due to a lack of resources. The establishment and operation of a successful ACA requires that substantial costs be borne by the government, sometimes at the expense of other items on the national budget. Strong political commitment is required to allocate to an ACA the human and financial resources that it requires.

There is often a discrepancy between the agency's human and financial resources and its broad mandate and competences which undermines the long term sustainability of the institution. ACAs need regular funding, adequate staffing and continuous political support to ensure their viability overtime, with level of funding depending on the scope of their mandate, the country's level of wages and other organisational considerations.¹²⁷

¹²⁴ Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.12.

¹²⁵ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

¹²⁶ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

¹²⁷ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

While full financial independence cannot be achieved, sustainable funding needs to be secured and legislation should prevent unfettered discretion of the executive over the level of funding.¹²⁸

Some options for an ACA's budget are:¹²⁹

- ACA having the ability to propose a budget directly to the parliament (rather than being dependent on the executive), or
- A guarantee of budgetary stability, with the annual budget being guaranteed either by law or by the Constitution, and the ACA being required to submit accounts and be subject to external audit

Where possible, the ACA funding should be set on a multi-year basis, to minimise the possibility for the budget approval process to be used to limit the ACA's independence or to exercise improper influence in relation to specific corruption cases.

A comparative research of ACA budgets in relation to countries' population sizes and global indexes suggests that spending more than US\$ 1 per capita on the ACA may allow it to control corruption effectively. A correlation has been demonstrated between ACA expenditure and performance in global indexes. There is an apparent threshold of US\$ 1 per capita expenditure for scoring above 5 in the Transparency International Corruption Perception Index or above 50 in the World Bank Control of Corruption Index, although this is no guarantee of success.¹³⁰

D.10. The public must have confidence that they can safely report suspected corruption

Principles

COLLABORATION: ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation.

UNCAC Article 32: Protection of witnesses, experts and victims

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

¹²⁸ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 26.

¹²⁹ United Nations Development Programme, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.31; UNODC, *Technical Guide to UNCAC*, p.12.

¹³⁰ De Jaegere, Samuel, *Principles for Anti-Corruption Agencies: A Game Changer*, Jindal Journal of Public Policy, Vol. 1, Issue 1, August 2012, p.99.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

UNCAC Article 33: Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

UNCAC Article 39: Cooperation between national authorities and the private sector

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

UNCAC Article 40: Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

Learnings from international studies

Public reporting

The general public should be able to easily report suspected corruption to ACAs, including anonymously. Information received from ordinary citizens may help identify loopholes in a legal system and procedures or even provide substantial evidence to start an investigation. It also helps raise the awareness that the fight against corruption is an individual responsibility of each of us.¹³¹

¹³¹ European Partners Against Corruption Anti-Corruption Working Group, *Common Standards and Best Practice for Anti-Corruption Agencies*, May 2008, p.18.

Since in some countries, people are afraid to report corruption, ACAs should keep complainants identities confidential, to encourage reporting.¹³²

Whistleblower guarantee of confidentiality and protection from civil suits

Legal persons or senior management and staff who either report to ACAs, or cooperate with requests for information should, where they have acted in good faith and on reasonable grounds, have the assurance of confidentiality and, where the allegations do not lead to an investigation, should further enjoy protection from civil suits and claims for damages from those involved in the allegations.¹³³

Cooperation with private sector

Early notification by relevant private sector bodies or early cooperation with investigative agencies is important to the identification and safeguarding of potential evidence and the initiation of inquiries. The role of the financial institutions – or those institutions involved in high-value commercial activity – is central to the effective prevention, investigation and prosecution of offences.¹³⁴ States should explore means to promote a degree of reciprocity between the investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, in terms of the value of the information provided. It might also be productive to involve the private sector, in particular financial institutions, in developing standards for the format and contents of material provided.¹³⁵

D.11. Have their own strong investigatory tools

Principles

The agency must have the necessary powers to conduct proper investigations. At the minimum, the investigative body must have:

- the ability to commence an inquiry on its own initiative, and
- the power to subpoena witnesses to obtain documentation and information or give testimonies or other evidence.¹³⁶

UNCAC Article 37: Cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide

¹³² De Sousa, L, *Does Performance Matter to Institutional Survival? The Method and Politics of Performance Measurement of Anti-Corruption Agencies*, EU Working Papers RSCAS, 2009/09, p.6.

¹³³ UNODC, *Technical Guide to UNCAC*, pp.123-124.

¹³⁴ UNODC, *Technical Guide to UNCAC*, pp.123-124.

¹³⁵ UNODC, *Technical Guide to UNCAC*, pp.123-124.

¹³⁶ UNODC, *Technical Guide to UNCAC*, p.9.

factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

Learnings from international studies

It is important that an ACA has capacity in financial intelligence, criminal intelligence, criminal investigation, criminal prosecution and asset recovery.¹³⁷ This requires giving the ACA strong, contemporary law enforcement powers, if it is to seriously pursue corruption, particularly in relation to investigations. This includes coercive powers – provided the ACA has the actual ability to exercise these powers in practice.¹³⁸

It has been said that in a world where even very poor countries exhibit high levels of technology and mobility, an ACA without the powers to conduct wiretaps, investigate financial records, pursue asset recovery, and apprehend suspects is a useless entity. An ACA needs to be able to conduct surveillance, follow the money trail, set up sting operations, and make arrests of likely fugitives. Only with standard investigative powers and capacities can an ACA gather the necessary evidence to ensure effective prosecution.¹³⁹

Most ACAs benefit from the powers and immunities of police officers. Other important powers and privileges, including legal immunity and the power to protect witnesses and confidential information, are often included in the statutory powers of ACAs.¹⁴⁰ The power to carry out these functions should be subject to proper checks and balances.

Investigation tools may include a range of the following legislatively based powers:¹⁴¹

¹³⁷ Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, p.51.

¹³⁸ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.12; Doig, Watt & Williams, *Measuring 'success' in five African Anti-Corruption Commissions - the cases of Ghana, Malawi, Tanzania, Uganda & Zambia*, U4, May 2005, p.51.

¹³⁹ Bolongaita, E, *An Exception to the Rule: Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines Ombudsman*, U4 Issue August 2010, No. 4, pp.24, 25.

¹⁴⁰ USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.12.

¹⁴¹ UNODC, *Technical Guide to UNCAC*, p.115; Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 11; USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.10.

- requiring the production of documents
- requiring the giving of evidence
- issuing search warrants
- issuing arrest warrants
- having access to banking and financial records
- being able to monitor financial transactions
- restraining the proceeds of corruption related offences
- having access to financial and criminal intelligence
- obtaining access to information about, and being able to monitor, income and assets
- having the right to access immigration, customs, company registration, land ownership and other necessary government records
- having access to, or be able to undertake, action to restrain and confiscate assets
- carrying out covert surveillance
- intercepting communications
- conducting undercover investigations,
- protecting witnesses, and
- seizing passports.

D.12. There be effective prosecution services, either within or separately from the ACA agencies

Principles

There must be strong and effective prosecution services available, either within or independently of the ACA.¹⁴²

Learnings from international studies

Some international commentators consider that it is preferable to rely on existing prosecutorial agencies, since otherwise the creation of parallel structures undermines the existing prosecutor's office.¹⁴³

However, experience with Indonesia's very successful KPK would indicate that ACAs can be more successful if they have both investigative and prosecutorial capacity, and investigators and prosecutors collaborating closely together to ensure the evidence available helps to mount a successful case.¹⁴⁴

¹⁴² UNDP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.121.

¹⁴³ Jennett, V & Repucci, S, *U4 Expert Answer: Anti-Corruption Prosecutorial Agencies: effectiveness and funding modalities*, December 2006.

¹⁴⁴ Bolongaita, E, *An Exception to the Rule: Why Indonesia's Anti-Corruption Commission succeeds where others don't – a comparison with the Philippines Ombudsman*, U4 Issue August 2010, No. 4, p.26.

One option is to confer prosecutorial powers where the existing prosecutions office is unable or unwilling to prosecute a case.¹⁴⁵

D.13. Effective inter-agency cooperation at an operational level, both with the judiciary, law enforcement agencies and other public agencies

Principles

COLLABORATION: “ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation.”¹⁴⁶

UNCAC Article 38: Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences.

Such cooperation may include:

- (a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or
- (b) Providing, upon request, to the latter authorities all necessary information.

Learnings from international studies

An ACA’s success depends to a great extent on cooperative relationships and collaboration with other government agencies, within a coherent institutional framework with effective coordination mechanisms.¹⁴⁷

Unfortunately, good levels of inter-agency cooperation are rare. As a result, ACAs are regularly frustrated by their inability to secure information, cooperation and prosecutions.¹⁴⁸ Problems range from overlapping jurisdictions, gaps in jurisdiction, territorial disputes and conflicts of competencies to

¹⁴⁵ De Jaegere, Samuel, *Principles for Anti-Corruption Agencies: A Game Changer*, Jindal Journal of Public Policy, Vol. 1, Issue 1, August 2012, p.97.

¹⁴⁶ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

¹⁴⁷ United Nations Development Programme, *Practitioners’ Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.29; USAID, *Anti-Corruption Agencies, Anti-Corruption Program Brief*, June 2006, p.7; Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.73

¹⁴⁸ Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.73.

the lack of competencies (where institutions refuse jurisdiction in sensitive cases and shift responsibilities to other institutions).¹⁴⁹

In most cases, the legal framework for inter-institutional collaboration is not carefully addressed at the outset.¹⁵⁰ If this area is overlooked in the process of designing the legal basis of the ACA, it will likely seriously hinder the performance of the institution and taint its relations with other state institutions in the future.¹⁵¹

Clear jurisdictional mandates

Experience indicates that law enforcement agencies are often poorly integrated and face challenges of institutional confusion, overlapping mandates, competing agendas, lack of coordination and fierce competition over scarce resources. It is therefore important to consider potential jurisdictional conflicts with other agencies involved in the fight against corruption, provide institutional clarity, and make sure that the establishment of an ACA does not undermine other existing structures. This is especially important when several specialized anti-corruption bodies are created to deal with specific corruption issues.¹⁵²

Strong coordination

Coordination issues need to be considered from the design stage of the anti-corruption institutional arrangements and sufficient resources need to be allocated to related activities.

Unless the various relevant agencies have strong links and good levels of cooperation, an ACA is not likely to be effective.¹⁵³ In the absence of effective coordination mechanisms and institutional clarity that promote inter-agency cooperation, the creation of an ACA can lead to redundancy, duplication of efforts and waste of resources, especially in countries with scarce resources, less mature political systems and powerful patronage networks.¹⁵⁴

Legal ability to exchange and obtain information

ACAs must be able to exchange information with appropriate bodies, domestically and internationally, involved in anti-corruption work, including the relevant law enforcement authorities when required.¹⁵⁵

¹⁴⁹ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 28.

¹⁵⁰ Johnson, J, Hechler, H, De Sousa, L & Mathieson, H, U4 Issue, *How to Monitor and Evaluate Anti-Corruption Agencies: Guidelines for Agencies, Donors and Evaluators*, September 2011, No. 8, p.21.

¹⁵¹ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 28.

¹⁵² Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

¹⁵³ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

¹⁵⁴ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012.

¹⁵⁵ UNODC, *Technical Guide to UNCAC*, p.10.

Strong and well-functioning inter-agency co-operation and exchange of information among different state law enforcement bodies and control institutions (e.g. financial control institutions, tax and customs administration, regular police forces, security services, financial intelligence units) are vital.¹⁵⁶

Legal immunities where information exchanged between agencies

There should be an obligatory reporting mechanism to an ACA for other public sector agencies, with protections from civil suits for reporting on reasonable grounds. Staff of other agencies who either report to the relevant agencies, or cooperate with requests for information, where they have acted in good faith and on reasonable grounds, should be assured of no adverse consequences if the information provided does not lead to further action. Any arrangements, legislation or regulations enacted in accordance with this article should spell out “reasonable grounds” that the offences concerned have been committed.¹⁵⁷

D.14. Effective international cooperation

Principles

COLLABORATION: “ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation.”¹⁵⁸

UNCAC Article 43 deals with international cooperation in law enforcement under **Chapter IV** of UNCAC:

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.
2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

The remaining Articles in Chapter IV of UNCAC are:

Article 44: extradition

Article 45: transfer of sentenced prisoners

Article 46: mutual legal assistance

¹⁵⁶ Organisation for Economic Cooperation and Development Anti-Corruption Network for Eastern Europe and Central Asia, *Specialised Anti-Corruption Agencies: Review of Models*, 2008, p. 28.

¹⁵⁷ UNODC, *Technical Guide to UNCAC*, p.123.

¹⁵⁸ *Jakarta Statement on Principles for Anti-Corruption Agencies*, Jakarta, 26-27 November 2012.

Article 47: transfer of criminal proceedings
Article 48: law enforcement cooperation
Article 49: joint investigations
Article 50: special investigative techniques

In addition, **Chapter V of UNCAC** deals with international cooperation in relation to asset recovery, also an essential element to any effective anti-corruption framework.

UNCAC Article 51 provides that the return of assets pursuant to that Chapter is a fundamental principle of the Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

The remaining Articles in Chapter V of UNCAC are:

Article 52: Prevention and detection of transfers of proceeds of crime
Article 53: Measures for direct recovery of property
Article 54: Mechanisms for recovery of property through international cooperation in confiscation
Article 55: International cooperation for purposes of confiscation
Article 56: Special cooperation
Article 57: Return and disposal of assets
Article 58: Financial intelligence unit
Article 59: Bilateral and multilateral agreements and arrangements

Countries need to consider the necessary consequential amendments to existing legislative frameworks when establishing an ACA, to make sure that they comply with the obligations regarding international cooperation under Chapters IV and V of UNCAC.

Learnings from international studies

Ease of travel from country to country provides serious offenders with a way of escaping prosecution and justice. Processes of globalization allow offenders to more easily cross borders, physically or virtually, to break up transactions and obscure investigative trails, to seek a safe haven for their person and to shelter the proceeds of crime. Prevention, investigation, prosecution, punishment, recovery and return of illicit gains cannot be achieved without effective international cooperation.¹⁵⁹

This means ensuring that countries have adequate informal and formal cooperation mechanisms in place, such as mutual legal assistance and extradition.

There is extensive guidance on these Chapters in the UNODC *Technical Guide to UNCAC*, including regarding the creation of a central authority.

¹⁵⁹ UNODC, *Legislative Guide to UNCAC*, 2012, p.143.

D.15. All forms of corruption should be criminalised

Principles

ACAs with law enforcement functions will only be able to undertake effective action against corruption offenders if the law criminalizes all corruption offences.¹⁶⁰

UNCAC Chapter 3 (criminalisation and law enforcement)

Chapter 3 of UNCAC deals with the following crimes and related issues:

- Article 15 - bribery of national public officials
- Article 16 – bribery of foreign public officials and officials of public international organisations
- Article 17 – embezzlement, misappropriation or other diversion of property by a public official
- Article 18 – trading in influence
- Article 19 – abuse of functions
- Article 20 – illicit enrichment
- Article 21 – bribery in the private sector
- Article 22 – embezzlement of property in the private sector
- Article 23 – laundering of proceeds of crime
- Article 24 – concealment
- Article 25 – obstruction of justice
- Article 26 – liability of legal persons
- Article 27 – participation and attempt

Learnings from international studies

To be successful, ACAs require an enabling legal environment, including a solid and comprehensive legal framework that criminalises a wide range of corruption offences and provides for adequate and effective sanctions.¹⁶¹

Reform of the legislative framework in connection with the establishment or empowerment of specialized authorities against corruption and perhaps also other financial crimes would need, as far as practicable, to be planned as part of a comprehensive criminal justice reform effort. Piecemeal reform directed to one specific type of offence can easily lead to a waste of scarce resources, as specific problem areas – such as corruption or money-laundering – are dealt with separately and in an uncoordinated manner.¹⁶²

Chapter 3 of UNCAC sets out the various corruption related conduct that should be criminalised. Consideration also needs to be given as to the jurisdictional reach of existing or new offences, consistent with Article 42 of UNCAC. See commentary in UNODC *Technical Guide to UNCAC* for more details.

¹⁶⁰ UNDP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, p29.

¹⁶¹ Chene, M, *U4 Expert Answer: Centralised versus De-centralised Anti-Corruption Agencies*, 16 March 2012; United Nations Development Programme, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, 2011, p.29.

¹⁶² UNODC, *Technical Guide to UNCAC*, p.115.

D.16. Powers to investigate unexplained wealth and unexplained wealth offences

Principles

Give ACAs the power to investigation unexplained wealth, and consider the criminalisation of illicit enrichment.¹⁶³

UNCAC Article 20: Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Learnings from international studies

According to estimates, developing countries lost between US\$723 billion and US\$844 billion per year on average through illicit flows in the decade ending in 2009. Approximately half of these huge sums were capital transfers likely to be linked to corruption, including illegal enrichment by public officials.¹⁶⁴

An ACA can be given the power to investigate unexplained wealth, or illicit enrichment. An ACA's powers to monitor wealth effectively are considerably enhanced where the law provides for an "illicit enrichment" offence.¹⁶⁵ Such an offence punishes public officials for possessing wealth disproportionate to their known lawful sources of income if they cannot provide a satisfactory explanation for this. Prosecuting authorities must establish the public official's legitimate sources of income, the extent of assets under his or her control, and the discrepancy between the two. Once such a prima facie case of illicit enrichment is made, the defendant can reverse the presumption by making a reasonable case that the excessive wealth originates from legitimate sources.¹⁶⁶ If a conviction is obtained, it would then be possible to pursue and seize that unexplained wealth through proceeds of crime legislation.

Investigation of unexplained wealth

There are no international standards mandating how asset declarations are made and monitored. However, there are core principles that should form the foundation of any legal framework:¹⁶⁷

¹⁶³ UNDP, *Practitioners' Guide: Capacity Assessment of Anti-Corruption Agencies*, p.29.

¹⁶⁴ Perdriel-Vaissiere, Maud, *U4 Brief: The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable*, January 2012:1, p. 1.

¹⁶⁵ Meagher, Patrick, *Anti-Corruption Agencies: A Review Of Experience*, The Iris Discussion Papers on Institutions & Development, March 2004, p.13.

¹⁶⁶ Perdriel-Vaissiere, Maud, *U4 Brief: The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable*, January 2012:1, p. 2.

¹⁶⁷ Transparency International, *Holding Politicians to Account: Assets Declarations*, available at http://www.transparency.org/news/feature/holding_politicians_to_account_asset_declarations

- An asset declaration is a person's balance sheet and should cover assets, from all homes, valuables and financial portfolios, to liabilities, such as debts and mortgages, and all sources of income from directorships and investments to consulting contracts. It should also include gifts and sponsorship deals and any potential conflicts of interest such as unpaid employment contracts and participation in non-governmental organisations.
- The leadership of the three branches of government – executive, legislative and judiciary – and senior career civil servants should be required to file asset declarations before and after taking office as well as periodically (annually or every two years) during office.
- Ideally, the asset declaration records exact values, but some countries opt for ranges of value.
- The administration of an asset disclosure program requires a monitoring and evaluation agency to collect and verify information and investigate, prosecute and sanction those who fail to comply.

Illicit enrichment offence

Illicit enrichment offences make it an offence for a public official to have a significant increase in assets that he or she cannot reasonably explain in relation to his or her lawful income.

Such offences have been helpful in addressing the difficulty faced by the prosecution when it must prove that a criminal offence took place in accumulating the assets in cases where his or her enrichment is so disproportionate to his or her lawful income that a prima facie case of corruption can be made. It also gets around the risk that public officials may use their position to intimidate witnesses or destroy evidence.¹⁶⁸ It is also a useful deterrent to corruption among public officials.¹⁶⁹

The creation of the offence under UNCAC is not obligatory, since under some country's Constitutions, requiring the defendant to provide a reasonable explanation for the significant increase in his or her assets, may be contrary to the right to be presumed innocent until proven guilty under the law. However, the point has also been clearly made that there is no presumption of guilt and that the burden of proof remains on the prosecution, as it has to demonstrate that the enrichment is beyond one's lawful income. It may thus be viewed as a rebuttable presumption. Once such a case is made, the defendant can then offer a reasonable or credible explanation.¹⁷⁰

The OECD considers the existence of illicit enrichment offence to be one of the best practices for combating corruption. In Hong Kong, where the offence has existed for nearly 40 years, the Court of

¹⁶⁸ U4, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*, January 2012, p.2.

¹⁶⁹ UNODC, *Legislative Guide to UNCAC*, 2012, p.85; U4, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*, January 2012, p.2.

¹⁷⁰ UNODC, *Legislative Guide to UNCAC*, 2012, p.85; U4, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*, January 2012, p.2.

Appeal found that it has “proved its effectiveness in the fight against corruption”.¹⁷¹ A recent study by the World Bank/UNODC’s StAR Initiative notes that some jurisdictions were able to recover large sums of money thanks to the offence of illicit enrichment.¹⁷² In the case of conflicts between fundamental rights, both national constitutional courts and supranational jurisdictions have applied a proportionality test to balance the interests at stake. Such a test, which essentially consists of a cost-benefit assessment, is considered to be met as long as the limitations of the accused’s rights implied by the measure are strictly necessary to achieve the contemplated goal.¹⁷³

Legal issues regarding the drafting of such offences

It has been suggested that the offence of illicit enrichment should be seen as a tool of last resort. When enforcement authorities can pursue cases by prosecuting regular corruption offences, the illicit enrichment offence, with its implied limitations of defendants’ rights, should not be considered a proportionate response.

In addition, resort to the offence of illicit enrichment should not preclude the prosecution from also presenting whatever evidence is available that the illicit enrichment was likely the result of conduct also punishable under criminal law.

Such safeguards are important to prevent the illicit enrichment offence from being used in an oppressive manner, such as for the purpose of obtaining incriminating information from the defendant. In addition, following such guidelines may generate evidence that is sufficient to meet the conduct-based test in other jurisdictions that do not recognize the offence of illegal enrichment.¹⁷⁴

¹⁷¹ *Attorney General v. Hui Kin-hong*, 1995

¹⁷² U4, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*, January 2012, p.2.

¹⁷³ U4, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*, January 2012, p.2.

¹⁷⁴ U4, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*, January 2012, p.3.

PILON Member Countries: anti-corruption related agencies

Country	UNCAC	UNTOC	APGAML member	Main anti-corruption/integrity agencies (in addition to police, prosecutions services, Justice or Attorney-General's Office/Department and audit functions)
Australia (population 22,700,000)	2005	2004	1997	A range of anti-corruption and integrity agencies, including Ombudsman, at the Federal, State and Territory level; Australian Commission for Law Enforcement Integrity
Cook Islands (population 13,000)	2011	2004	2001	Office of the Ombudsman
Federated States of Micronesia (population 150,000)	2012	2004	x	Office of the National Public Auditor
Fiji (population 890,000)	2008	x	1998	Independent Commission Against Corruption (established 2007); Ombudsman
Kiribati (population 111,000)	2013	2005	(in progress)	
Nauru (population 10,000)	2012	2012	2007	
New Zealand (population 4,440,000)	Signed 2003 but not ratified	2002	1997	Serious Fraud Office; Ombudsman; State Services Commission
Niue (population 1,500)	2009	2012	2001	Complaints Handling Ombudsman Backed Service
Palau (population 20,000)	2009	x	2002	Office of the Special Prosecutor; Ombudsman

Country	UNCAC	UNTOC	APGAML member	Main anti-corruption/integrity agencies (in addition to police, prosecutions services, Attorney-General's Office and audit functions)
Papua New Guinea (population 7 million)	2007	x	2008	Ombudsman Commission (Leadership Code); in process of establishing an Independent Commission Against Corruption
Pitcairn Islands (British Overseas Territory) (population 50)	-	-	-	Ombudsman
Republic of the Marshall Islands (population 60,000)	2011	2011	2002	
Samoa (population 184,000)	x	x	2000	Ombudsman
Solomon Islands (population 552,000)	2012	x	2007	Ombudsman; Leadership Code Commission; considering establishing an Independent Commission Against Corruption
Tonga (population 106,000)	x	x	2005	Anti-Corruption Commission; Public Relations Commissioner; in process of establishing Good Governance Commission
Tuvalu (population 10,500)	x	x	x	Leadership Code Act to create Ombudsman in force but Ombudsman not yet established
Vanuatu (population 227,000)	2011	2006	1997	Ombudsman Office (Leadership Code)