

Is the Establishment of ICAC Constitutional?

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Introduction

In 2021, the Ombudsman Commission took out a Supreme Court Reference challenging the Constitutionality of various provisions of the *Organic Law on the Independent Commission Against Corruption* (OLICAC), in the case titled *SC Ref No.2 of 2021; Special Reference by the Ombudsman Commission pursuant to Constitution, Section 19(1) re the Organic Law on the Independent Commission Against Corruption* (2022) SC2292. The case was heard by a five men Supreme Court bench. The State team from the Solicitor General's Office opposed the application by the Ombudsman Commission.

As the Attorney General of Papua New Guinea (PNG) at that time, my instruction to the Solicitor General was to firmly oppose the Ombudsman Commission's propositions because the establishment of the Independent Commission Against Corruption (ICAC) was a critical agenda for the Government and the country. The establishment of ICAC as a strong pillar of good governance, would send a positive signal to our people and our international friends that PNG was serious about combating corruption in the country.

In 2022, on the Corruption Perception Index (CPI), Transparency International (TI) scored PNG 31 out of 100 points, and of the 180 countries, it was ranked 127 least corrupt country.¹ PNG has carried this negative tag for quite a long time. Its neighbouring Melanesia countries (Fiji, Vanuatu and Solomon Islands) have performed much better on the CPI. Fiji was ranked 53, Vanuatu was ranked 48 and Solomon Islands was ranked 42. TI observed that since 2012 PNG made very little progress in improving its rankings.

Corruption in PNG has been a major concern for many people both within and outside of the country.² The enactment of the OLICAC and the establishment of the ICAC is a testament of PNG's strong commitment to fighting corruption in the country.

This paper provides a brief analysis of the Supreme Court decision in *SC Ref No.2 of 2021* that fortunately declared that key provisions of the OLICAC were valid. The paper begins with a short genesis of PNG's efforts in providing the legal framework for ICAC, followed by a brief discussion on the main powers and functions ICAC. The paper then ends with the findings of the Supreme Court.

Journey to establish an Anti-Corruption Institution

Papua New Guineans, particularly its leaders have long recognized that the country needed a specialized anti-corruption agency to identify and address the problem of corruption in the country. Papua New Guineans had acknowledged that the Ombudsman Commission alone is

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¹ See generally Transparency International at [transparency.org](https://www.transparency.org).

² Aiyus A and May, R; *Corruption in Papua New Guinea: Towards an Understanding of the Issue (Special Publication No.47)* (Port Moresby: National Research Institute, 2007); Ezebilo, E, Odhuno, F, "Papua New Guinea's Drive to Promote Micro, Small and Medium Enterprises: Corruption in the Public Sector Must be Tackled" (Spotlight, October 2019) (Port Moresby: NRI, 2019); Walton, G, Dinnen, S, "Crime and Corruption in Papua New Guinea" (March 2022) (Researchgate, at https://www.researchgate.net/publication/359351077_Crime_and_corruption_in_Papua_New_Guinea/link/62368b94d1e27a083bbc7e8e/download?_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19)

not capable of fighting corruption. Even then it was realized that the role of the Ombudsman Commission was restricted to the conduct of leaders that did not necessarily encompass corruption which is an indictable offence under the *Criminal Code Act 1974*.

The previous and the current government took a concerted effort, although sometimes with some trepidation, to establish the ICAC. The table below summarises PNG's progress in setting up the ICAC.³

Year	Significant Event
2010	The first ever National Anti-Corruption Strategy 2010 – 2030 (PNG NACS) endorsed and launched by government for implementation. The strategy brought together the whole of government to collectively address corruption and set out priority areas that the government needed to focus on over the 20 years period.
2012 – 2015	A National Anti-Corruption Plan of Action (NACPA) was adopted in 2012. It was a three-year plan that was adopted as an implementing priority focus for the PNG NACS. After 2015, it lapsed and no new implementation guide developed until 2020 when NACPA 2020 – 2025 was endorsed.
19 th February 2014	The Constitutional Amendment to establish the ICAC was passed unanimously by Parliament.
29 th August 2014	The Constitutional Amendment commenced operation.
3 rd November 2015	The proposed Organic Law on the Independent Commission Against Corruption (OLICAC) was tabled for First Reading: Following from the <i>Constitutional Amendment</i> , a proposed OLICAC was tabled in Parliament for its first reading. The Bill was referred to the Parliamentary Committee and was still there when Parliament rose in 2017. It must be noted that after the proposed law was received from the Department of Justice and Attorney General (DJAG), the then Chief of Staff raised a number of issues with the then late Chief Secretary resulting in changes being made by the PMNEC to the Bill that was presented. These changes included: <ul style="list-style-type: none"> ▪ Appointment criteria for ICAC Commissioner be broadened so it's not restricted solely to persons with legal qualifications; ▪ ICAC should not have powers to arrest alleged offenders in relation to indictable corrupt conduct; ▪ ICAC should not have powers to commence criminal proceedings and conduct committal proceedings for indictable offences relating to corrupt conduct; ▪ ICAC should not have the power to prosecute indictable offences relating to corrupt conduct in the National Court.
2018	In 2018, an Interim ICAC Office was established. The NEC appointed Mr. Thomas Eluh, as Chairman. The initial establishment of the interim ICAC office was to look into high profile corruption cases left behind by the Corruption Taskforce, chaired by Mr. Sam Koim and provide way forward in dealing with them. Its mandate quickly changed when it started collaborating with the Legal Technical Working Group (TWG) that was focusing on the OLICAC and the establishment of foundational work towards the progressive realization of an ICAC once OLICAC was enacted.
2016 – 2019 (4 years)	Other Anti-Corruption agenda pursued: Priorities changed and the proposed OLICAC was never pursued until the appointment of the Deputy Prime Minister and Minister for Justice and Attorney General, Hon. Davis Steven, LLB, MP. Directives were given for DJAG to commence work on the proposed OLICAC and bring it to Parliament. At the political leadership level, strategic interventions were made and led by Deputy Prime Minister, Davies Steven, whilst at the bureaucratic level, leadership was provided by Secretary, Dr. Eric Kwa, PhD. This combination paved the way for the re-introduction

³ A special thanks to Mrs. Josephine Pitmur, Deputy Secretary (Justice Administration) of the Department of Justice and Attorney General, for providing useful and relevant information on the progress of ICAC in PNG which are used here. She is our most experienced and knowledgeable lawyer in the field of anti-corruption law in PNG.

	of the proposed OLICAC, which successfully led to the passage and eventual commencement of the OLICAC. ⁴
2019	The TWG concentrated on reviewing the proposed OLICAC provision by provision, word by word and redrafting the Drafting Instructions and facilitate approvals through the various legislative processes.
28 th February 2020	The First Reading - Deputy Prime Minister, Hon. Davis Steven, introduced in Parliament the OLICAC. The OLICAC was then referred to the Parliamentary Committee on Constitutional Laws and Acts of Parliament, chaired by Sir. Peter Ipatas, the Governor for Enga Province, for wider consultations and scrutiny. The Committee was to report back to Parliament for the second reading.
Parliamentary Committee stage 2020	The Parliamentary Committee examined the proposed OLICAC through a briefing by the ICAC's TWG comprising DJAG, Office of First Legislative Counsel, Department of Prime Minister and National Executive Council and Interim ICAC Office. The Ombudsman Commission also responded in writing on 13 th July 2020 to the Chairman of the Committee as well as to the Deputy Prime Minister, alleging duplication of the Ombudsman Commission's functions in their examination of the proposed OLICAC. They also provided a written submission to the Committee during the hearing, arguing duplication and opposing the passage and adoption of the proposed OLICAC. After considering all the issues, the Committee found that after many years of preparing for the proposed OLICAC through consultations, and after few attempts to bring the legislation to Parliament, the proposed OLICAC was finally before Parliament. The Committee further noted that if PNG was serious about fighting corruption, it must embrace the passage of the proposed OLICAC. The Committee supported the proposed OLICAC.
3 rd June 2020	In the Second Reading of the proposed OLICAC, it required two thirds absolute majority of 74 members as specified in the <i>Constitution</i> . Absolute majority voted yes with zero for no. The draft OLICAC was now ready for the Third Reading and second vote subject to opportunity for more debate, thus, the matter was adjourned for two months that day as required by the <i>Constitution</i> .
26 th October 2020	DJAG invited three independent legal experts to provide independent legal opinions in relation to the observations and examinations made by the Ombudsman Commission on the 13 th July, 2020, regarding the proposed OLICAC. Only two responded with their independent views. Both legal opinions were of the same view as the advice from the TWG that the assertion by the Ombudsman Commission that the ICAC should confine its investigation to high profile criminal conduct of public officials is unconstitutional and defeats the whole purpose of the proposed OLICAC is incorrect. The distinction is immaterial if an investigation of corrupt conduct by a public official amounted to a criminal offence, or a disciplinary offence or a misconduct in office as all of these offences or wrongs constitute corrupt conduct. Conversely, the vesting of wide investigation powers within ICAC does not offend, limit, diminish or erode the investigative jurisdiction of the Ombudsman Commission at all, but enhances the role to combat corruption. With regard to prosecution powers, the independent views provided was that ICAC is vested with prosecution powers to prosecute any corrupt conduct of a public official in high profile criminal and fraud cases to complement and enhance the role of the Public Prosecutor given the peculiar circumstances and limitations of the financial and technical capability, and capacity issues experienced under the existing legal framework. The whole tenor of the OLICAC ensures that the ICAC functions in collaboration and cooperation with all relevant agencies both local and international agencies. Furthermore, with the legal mandate to collaborate and cooperate with international agencies, ICAC would have an edge over the Public Prosecutor in

⁴ Although we had both the political and bureaucratic support, it was a very difficult process as we had to listen to and address many of the issues that were raised by the different political groupings in government and Parliament. This was played out in the many meetings we had, at different times, with both the Government and Opposition Caucuses. I can recall at times I was very frustrated when we had to explain again and again to different Members of Parliament on the implications of the OLICAC on leaders. In hindsight I realize that they were concerned and to some degree afraid of this new institution that would scrutinize their official and even private dealings. They were therefore genuinely concerned with the new Organic Law.

	prosecuting particular cross-border indictable offences or transnational crime involving a public official which otherwise would not be prosecuted.
12 th November 2020	OLICAC passed by Parliament: The OLICAC was finally passed by Parliament on 12 th November 2020 and certified on 14 th January 2021. According to the commencement clause of the OLICAC, for the law to come into operation, it must be published in the National Gazette by the Head of State, acting with and in accordance with the advice of National Executive Council (NEC). On 20 th January 2021, the law was gazetted and commenced.

There was much applause throughout the country when the Parliament finally enacted the OLICAC in November 2020. The Marape Government was highly praised for pushing this law through after the last attempt in 2014.

Constitutional Amendment on ICAC

As noted above, the *Constitution* was amended in 2014 to establish the ICAC. This was made possible with *Constitutional Amendment No.40* which inserted a new Division VIII.3 in the *Constitution*. This new Division contained Sections 220A, 220B, 220C, 220D, 220E, 220F, 220G and 220H. These provisions established and provided the powers and functions of the ICAC.

The ICAC is established by Section 220B. This provision also provides the general framework for the ICAC. The purposes of ICAC, according to Section 220C, are “to contribute, in cooperation with agencies, to preventing, reducing and combating corrupt conduct.” The functions of the ICAC are clearly set out in Section 220D and its powers are outlined in Section 220E.

The independence of the ICAC is spelt out in Section 220F. Section 220G provides for the establishment of an Oversight Committee whose role is to “monitor, review and report on the Commission’s functions, operations and exercise of powers.” The ICAC is required by Section 220H to provide annual reports of its operations to Parliament.

The constitutional amendment in 2014 stipulated that an Organic Law would provide detailed provisions on the administration and workings of the ICAC. The Organic Law envisioned by *Constitutional Amendment 40* was finally birthed in November, 2020.

The *Organic Law on the Independent Commission Against Corruption (OLICAC) 2020* sets out in great detail the work of the ICAC. It clarifies the powers and functions of the ICAC and outlines the structure of the Commission.

The Challenge to OLICAC by the Ombudsman Commission

When the OLICAC was brought into effect, the Ombudsman Commission mounted proceedings in the Supreme Court challenging the constitutionality of certain provisions of the OLICAC. The Ombudsman Commission raised 28 Questions for the Supreme Court to determine.

At the initial hearing, the Attorney General requested the Supreme Court to allow him to be an Intervener in the proceedings. The Supreme Court agreed and allowed the Attorney General as an Intervener. When the Speaker, Hon. Job Pomat, MP; the Public Prosecutor, Mr. Pondros Kaluwin; and the Opposition Leader, Hon. Belden Namah, MP applied to also intervene in the proceedings, the Attorney General opposed their applications. As the Attorney General, I instructed our lawyers to oppose these three parties because I did not want these parties to confuse the Supreme Court with unnecessary and irrelevant arguments as they were not

involved in the promulgation of the OLICAC. I was therefore pleased that the single bench Supreme Court (Harston J) ruled in favour of the Attorney General and prevented these three parties from joining the court proceedings.⁵

When the matter came for substantive hearing, the Supreme Court resolved to answer the 28 Questions under five categories. These were:

A. Purpose of the ICAC:

This covered Questions 1-3.

B. Qualified Rights. Whether the OLICAC makes appropriate provision for the exercise of the right to stand and vote for elective public office and whether Section 6 of the OLICAC is unconstitutional.

This covered Questions 4-7.

C. Duplication of Functions: Whether there is apparent duplication of functions of the ICAC with functions of existing constitutional institutions such as the Ombudsman Commission, the Police Force, the Public Prosecutor and the courts.

These covered Questions 8-17.

D. Independence of Constitutional institutions: Whether some of the provisions of OLICAC offends against the independence of constitutional institutions.

Questions 18-22 fell into this category.

E. Breach of Human Rights: Whether specified provisions in the OLICAC infringed on rights guaranteed by the human rights provisions of the *Constitution*.

The remaining questions (23-28) were dealt with under this category.

The answers and reasons for the decision of the Supreme Court are set out below.

1. Whether Section 3 of the OLICAC exclusively provides for the ICAC to contribute and cooperate in matters under the *Criminal Code Act*?

The Supreme Court declined to answer this question because it was trivial and vague.

2. Whether the intent of the establishment of the ICAC pursuant to Section 220C of the *Constitution* is to complement the functions of existing law enforcement agencies, which includes the law enforcement and integrity agencies listed under Section 4 of the OLICAC?

The Supreme Court again declined to answer Question 2 as it was trivial and hypothetical.

3. Whether Sections 5, 6,7,8 and 9 of the OLICAC define the ‘scope’ or ‘extent’ of the purpose of the establishment of the ICAC as provided under Section 220C of the *Constitution*?

The Supreme Court also declined to answer this Question. It explained that “[T]o ask whether the above provisions of the Organic Law define the scope or extent of the purpose of establishment of the ICAC is an academic exercise”⁶

4. Whether Section 6 of the OLICAC particularly Subsections (1) and (2) in effect restricts the exercise of the right to vote and stand for public office as provided under Section 50 of the *Constitution*?

The Supreme Court flatly answered the question in the negative. It stated that “We fail to appreciate how it restricts the exercise of the right to vote and stand for public office under s 50 of the *Constitution*.”⁷

⁵ *Special Reference pursuant to Section 19(1) Constitution, Special Reference by the Ombudsman Commission* (2021) SC2144.

⁶ (2022) SC2292 at paragraph 20.

⁷ *Id*, paragraph 23.

5. **If the answer to Question 4 is Yes, then should the OLICAC ought to have qualified this right pursuant to Section 38 of the *Constitution*?**

The Supreme Court declined to answer the question because it had answered Question 4 in the negative.

6. **If the answer to Question 4 is Yes, then whether Section 6 of the OLICAC is reasonably justifiable in a democratic society having proper regard for the rights and dignity of mankind as required pursuant to Section 38 of the *Constitution*?**

The Supreme Court stated that it had answered in the negative for Question 4, hence, it considered Question 6 as superfluous.

7. **If the answer to Question 4 is Yes, then whether Section 6 of the OLICAC is reasonably justifiable in a democratic society having proper regard for the rights and dignity of mankind as required pursuant to Section 38 of the *Constitution*?**

The Court answered this question in the negative. It stated that nothing had been put before the Court to show that Section 6 of OLICAC was unconstitutional.

8. **Whether Sections 5, 8 and 9 of the OLICAC in so far as it purports to provide the functions for the ICAC to conduct investigations and make referrals on matters outside the *Criminal Code Act* is consistent with Sections 220C and 220D of the *Constitution* with particular reference to Section 220D(b), (f) and (g)?**

The Court agreed with the State that there was no inconsistency between Sections 5, 8 and 9 of the OLICAC and Section 220D(b), (f) and (g) of the *Constitution*.

9. **Whether the application of ‘Public Official’ on proper interpretation under Sections 5 and 9 of the OLICAC duplicates Section 26 and 219(1) of the *Constitution*?**

The Court considered the meaning of ‘public official’ and stated that “We agree with the referrer’s proposition that a person referred to in Section 26(1) or 219(1) of the *Constitution* would be a public official as defined in s 9 of the Organic Law. However, it does not follow that s 9 of the Organic Law is a duplication of those constitutional provisions.”⁸ It answered the question in the negative.

10. **Whether Sections 5, 8, 9, 32, 34, 45 and 53(1) of the OLICAC are inconsistent with Sections 218 and 219 of the *Constitution*, where it purports to give the ICAC powers to investigate corrupt conduct under the Leadership Code?**

The Court examined this question in some detail and answered in the negative. It stated its position on the issue as follows:

We agree that there is an overlap between the investigative powers of the ICAC and the investigative powers of the Ombudsman Commission. However, we do not agree that there is an inconsistency between the Organic Law and ss 218 and 219 of the *Constitution*.

Sections 218 and 219 do not purport to confer exclusive jurisdiction on the Ombudsman Commission to investigate all conduct falling within the definition of alleged or suspected misconduct in office. Such conduct can already be investigated by other law enforcement or integrity agencies such as the Police and the Auditor-General.⁹

11. **In the alternative whether Sections 5, 8, 9, 32, 34, 45 and 53(1) of the OLICAC are inconsistent with Sections 220C and 220D of the *Constitution* to the extent that it purports to perform the functions and duties of the Ombudsman Commission as the enforcer and supervisor of the Leadership Code and therefore unconstitutional and invalid?**

Given its answer in Question 10, the Court stated no in answer to this question.

⁸ Id, paragraph 44.

⁹ Id, paragraph 50 and 51.

12. Whether Sections 5, 8, 9, 34 and 99 of OLICAC are inconsistent with Section 197 of the Constitution, where it purports to give the ICAC the powers to investigate under the Criminal Code Act?

The Court stated that there was no inconsistency between the above provisions of the OLICAC and Section 197 of the *Constitution*. It observed that the OLICAC did give the ICAC investigative powers, including the power to arrest, similar to the investigative powers of the Police, but that such power did not fall exclusively to the Police. The Court found that “there is nothing in the *Constitution* to suggest that powers of arrest cannot be conferred on other law enforcement agencies, such as the ICAC.”¹⁰

13. In the alternative whether Sections 5, 8, 9, 34 and 99 of the OLICAC are inconsistent with Sections 220C and 220D of the Constitution to the extent that it purports to perform the functions and duties of the RPNGC and are therefore unconstitutional and invalid?

The Court stated, “With respect, we consider that argument to be fallacious. Section 220D of the *Constitution* foreshadows that the ICAC would have such independent powers. For example, the functions of the ICAC include:

- investigating alleged or suspected corrupt conduct (s 220D(b));
- referring alleged corrupt conduct to the Public Prosecutor or the Police (s 220D(f));
- exercising such prosecution powers concerning or relating to corrupt conduct as may be prescribed by or under an Organic Law (s 220D(g)).”¹¹

At paragraph 65 of the judgement, the Court stated that “[T]here is no inconsistency between ss 5, 8, 9, 34 and 99 of the Organic Law and ss 220C and 220D of the *Constitution*.”

14. Whether Sections 5, 8, 9, 34(1)(b), 101 and 102 of the OLICAC are inconsistent with Section 177 of the Constitution where it purports to give the ICAC powers to prosecute corrupt conduct under the Criminal Code Act and the Leadership Code?

The Court found that there was no inconsistency between the provisions of the OLICAC and Section 177 of the *Constitution*. At paragraph 72, the Court held that:

The question remains whether by giving the ICAC power to prosecute corrupt conduct under the *Criminal Code*, the Organic Law is inconsistent with s 177(1)(a) of the *Constitution*. The answer is no because s 101 of the Organic Law is a substantial qualification of the prosecution function of the ICAC: it cannot prosecute without the consent of the Public Prosecutor. This is consistent with the control of the exercise and performance of the prosecution function that vests in the Public Prosecutor under s 177(1)(a) of the *Constitution*.

15. In the alternative whether Sections 5, 8, 9, 34(1)(b), 101 and 102 of the OLICAC are inconsistent with Sections 220C and 220D of the Constitution to the extent that it purports to perform the functions and duties of the Public Prosecutor as the constitutional authority vested with the powers of prosecution and are therefore unconstitutional and invalid?

The Court stated that Question 15 was a rehash of Question 14. It answered the question in the negative.

16. Whether Sections 5, 8, 9, 63, 67, 68, 74, and 168 of the OLICAC are inconsistent with Section 159(3) of the Constitution where it purports to give the ICAC powers to conduct hearings and exercise quasi-judicial functions under the Criminal Code Act and the Leadership Code?

The Court did agree with the Ombudsman Commission that the OLICAC does authorize the ICAC to conduct hearings relating to alleged or suspected corrupt conduct. Some of these conducts may fall under the *Criminal Code Act* and misconduct under the Leadership Code. However, the Court found that because the OLICAC does not allow the ICAC to impose

¹⁰ Id, paragraph 61.

¹¹ Id, paragraph 64.

anything of a penalty for a criminal offence, there was no conflict in these provisions of the OLICAC and the *Constitution*.

- 17. In the alternative whether Sections 5, 8, 9, 63, 67, 68, 74 and 168 of the OLICAC are inconsistent with Sections 220C and 220D of the *Constitution* to the extent that the ICAC purports to perform the functions and duties of the National Judiciary as the constitutional authority vested with the powers to make decisions in criminal matters and are therefore unconstitutional and invalid?**

The Court answered the question in the negative. It stated at paragraph 89 that, “This question is based on a false premise: that the Organic Law authorises the ICAC to perform judicial functions. We concluded in question 16 that, that is not the case.”

- 18. Whether Section 8 of the OLICAC in so far as it binds constitutional institutions created under Section 221 of the *Constitution* which are creatures of constitutional laws can only be done through constitutional amendment in compliance with Section 12 and 13 of the *Constitution*?**

The Court found that this question was misconceived in four respects. First, Section 8 of the OLICAC is merely a definition provision and does not bind any person or institution. Second, Section 221 of the *Constitution* does not create constitutional institutions but defines them. Third, Section 8 of the OLICAC does not amend any provision of the *Constitution* or an Organic Law. Fourth, the procedure for amending the *Constitution* or an Organic Law is set out in Sections 12-17 of the *Constitution*. It is not limited to Sections 12-13 of the *Constitution*. The answer to the question was, no.

- 19. Question 19. Withdrawn.**

- 20. Whether Section 8(1)(a) of the OLICAC offends the independence of the following constitutional institutions:**

- (i) Ombudsman Commission of Papua New Guinea, Section 217(5) and (6) of the *Constitution*;
- (ii) Public Prosecutor, Section 176(3) of the *Constitution*;
- (iii) Public Solicitor, Section 176(5) of the *Constitution*;
- (iv) Chief Magistrate, Section 175(4) of the *Constitution*;
- (v) Electoral Commission, Section 126(6) of the *Constitution*;
- (vi) Parliamentary Services, Section 132(2) of the *Constitution*;
- (vii) Public Service Commission, Section 192 of the *Constitution*;
- (viii) Auditor General, Section 213(3) of the *Constitution*; and
- (ix) National Judicial System, Section 157 of the *Constitution*?

The Court ruled at paragraph 105 of its decision that Section 8 is “a definition provision. It is not self-executing. It does not bind any person, office-holder or institution. It does not offend the independence of any of the constitutional office-holders or constitutional institutions referred to.” It therefore answered the question in the negative.

- 21. In the alternative, the broad interpretation of Section 8 of the OLICAC in so far as ‘public bodies’ is concerned, binds the National Parliament and the National Judiciary and is therefore inconsistent with Sections 100 and 155 of the *Constitution* respectively?**

The Court stated that because it had ruled that Section 8 of OLICAC is merely a definition provision and not self-executing, therefore the provision is not inconsistent with Sections 100 and 155 of the *Constitution*.

- 22. If the answer to Question 21 is yes, then does Section 8 of the OLICAC infringe on the separation of powers provided under Sections 99 and 100 of the *Constitution* and therefore unconstitutional and invalid?**

Based on the answer in Question 21, the Court answered this question in the negative.

- 23. Question 23 was withdrawn.**

- 24. Whether Sections 52, 56, 60, 65, 71(2) and 84 of OLICAC are in effect harsh and oppressive whereby the penalties are not proportional to the offences and in breach of Sections 7, 41 and 59 of the *Constitution*?**

After discussing the power of the Court to interfere in the law-making power of the Parliament to impose minimum or maximum penalties through legislation, the Court found that the penalties under Sections 56, 60, 71 and 84 are not harsh or oppressive and not in breach of Sections 7, 41 and 59 of the *Constitution*.

- 25. Whether Sections 55, 59, and 70 of OLICAC infringe on the guaranteed right to the full protection of the law and the principles of natural justice as provided by Sections 37 and 59 of the *Constitution*?**

The Court declared that there was no conflict in the law.

- 26. Whether Section 65 of OLICAC, whereby rules of evidence will not apply in the ICAC's investigation on corrupt conduct, in its operation restricts a person's guaranteed right to a fair hearing and full protection of the law by virtue of Sections 37 and 59 of the *Constitution*?**

In determining this question, the Court thoroughly reviewed the application of the rules of evidence in different settings and held at paragraph 149 that "Section 65 of the Organic Law is not an unusual provision and does not restrict rights to the full protection of the law or natural justice."

- 27. Whether Sections 70, 73, 78, 80, 83, 90 of OLICAC infringe on the guaranteed right to the full protection of the law and the principles of natural justice as provided by Section 37 and 59 of the *Constitution*?**

In relation to this question, the Court stated at paragraph 163 that, "We consider, overall, that the qualifications in the Organic Law on the exercise of the powers of investigation conferred by ss 70, 73, 78, 80, 83 and 90 of the Organic Law, are sufficient. Those provisions have the effect of affording the protection of the law to all persons who are affected by the exercise of those powers of investigation." The Court continued at paragraph 164, "As for the argument implied in the question that the self-incrimination provisions offend against the principles of natural justice, it was not pursued in oral or written submissions. In any event, we fail to see any merit in the argument."

- 28. If the above questions (Questions 23-27) are answered in the affirmative, then are Sections 55, 59 and 70 of OLICAC unconstitutional and invalid?**

The Court declined to answer this question.

Generally, the Supreme Court held that:

1. Questions regarding the purposes of the ICAC were vague and hypothetical and the Court declined to give an opinion on them.
2. The Organic Law did not have to comply with the requirements of Section 38 of the *Constitution*.
3. The investigative and prosecutorial powers and functions of the Independent Commission Against Corruption are conferred by Division VIII.3 of the *Constitution*. Though there is a duplication of some powers and functions of existing constitutional institutions, that does not render the *Organic Law on the Independent Commission Against Corruption* invalid or ineffective.
4. There is no infringement in the manner alleged of the independence of existing constitutional institutions.
5. There is no infringement in the manner alleged of the human rights of persons whose conduct is investigated as alleged corrupt conduct."

The Supreme Court concluded that:

In summary, none of the questions were answered in the manner contended for by the referrer. None of the provisions of the *Organic Law on the Independent Commission Against Corruption* were found to be

invalid or ineffective or otherwise unconstitutional.¹²

It must be noted that the constitutional challenge by the Ombudsman Commission was not unexpected. On 13 July 2020, at the hearing before the Parliamentary Committee on Constitutional Laws and Acts and Regulations headed by Chairman, Sir Pita Ipatas, the Ombudsman Commission had made a very strong case against the enactment of the OLICAC. The Parliamentary Committee, after hearing from other stakeholders and being mindful of the country's desire for an anti-corruption agency, rejected the submissions by the Ombudsman Commission.

It was therefore not surprising that the Ombudsman Commission initiated the constitutional challenge to the OLICAC. The government being aware of the position of the Ombudsman Commission was also prepared to fight any legal battles relating to the OLICAC and did successfully oppose the Ombudsman Commission in the Supreme Court, preserving the sanctity of the ICAC.

Future of ICAC

It is important to note that if the Supreme Court had ruled in favour of the Ombudsman Commission, the OLICAC could have been rendered, in a large measure, ineffectual. An example of this is the case *Special Reference By Fly River Provincial Executive Council; Re Organic Law on Integrity of Political Parties and Candidates*.¹³ When the Supreme Court struck down critical provisions of the *Organic Law on the Integrity of Political Parties and Candidates*, the Organic Law has become almost ineffective.

The outcome of SC2292 is good for the country and the ICAC. The ICAC can confidently carry out its powers and functions, knowing that its position in law has been reinforced by the Supreme Court.

Conclusion

The decision of the Supreme Court in SC2292 reaffirms PNG's efforts in combating and tackling corruption in the country. The persistent ratings of PNG on the Corruption Perception Index will hopefully be lowered in time as PNG begins the process of establishing the ICAC and supporting the work of the institution in the long term. In the medium to the long term, the enactment of OLICAC and its preservation by the Supreme Court sends a very positive signal to the people of PNG and others who are strong advocates for good governance, transparency and accountability.

As the ICAC is fully established and becomes operational in the next three to five years, it can finally tackle the corruption pandemic head on and provide a safe environment for the future of Papua New Guinea. The challenge for everyone including the government is to ensure that ICAC is fully funded and given the necessary personnel and tools to effectively exercise its powers and functions.

¹² Id at p1.

¹³ (2010) SC1057. See also the effects of the Supreme Court decision in *Reference by the Ombudsman Commission Pursuant to Constitution, Section 19(1), Re Public Money Management Regularisation Act 2017* (2020) SC1944, striking down significant provisions of the Act and making it redundant.