INTEGRITY IN PUBLIC OFFICE: PROPOSED MINISTERIAL STATEMENT AND DRAFT CODE

A Paper by the Commonwealth Secretariat

INTRODUCTION

OUTLINE OF PAPER

1. This paper:

- explains why this topic is included on the agenda and notes briefly some of the issues raised by it (paragraphs 3-10);
- proposes for discussion a Ministerial Draft Statement on Prevention of Corruption (paragraphs 11-20); and
- notes the ongoing work of the Secretariat in this area (paragraphs 21-23).

2. In addition, an extensive amount of material has been placed for reference in three Appendices. These are referred to where relevant in the main text. They contain:

- the Ministerial Draft Statement (Appendix I)
- a previous Secretariat paper which proposes a Commonwealth Draft Integrity Code (Appendix II)
- a list of relevant materials (laws, codes, cases, other documents) held by the Secretariat (Appendix III)

BACKGROUND

3. Integrity in public office was first considered by Law Ministers at the 1990 Meeting in Christchurch, New Zealand, and then at the 1993 Meeting in Mauritius. In light of subsequent major developments in relation to other multinational organisations, the issue was raised again at the Meeting of Senior Officials of Commonwealth Law Ministries (May-June 1995). That meeting drafted an outline ministerial statement on the topic for finalisation by the Secretariat and submission to Senior Officials prior to the 1996 Meeting of Commonwealth Law Ministers. The draft statement is the subject of paragraphs 11-20 below.

4. The Secretariat was also requested to collect and disseminate examples of national laws and experiences in combating misuse of public office. Further, in line with international developments, the Secretariat prepared a draft "Integrity Code" for Commonwealth states. This Draft Code was considered by the Fifth Meeting of Law Officers of Small Commonwealth Jurisdictions (September 1995). Both of these projects are referred to again in paragraphs 21-23, below.

EXTENT AND NATURE OF THE PROBLEM

5. The growing threat presented by corruption to economic development and to democratic institutions - particularly in developing countries - is well documented and has resulted in a rising chorus of international alarm. To take one example of the scope of corruption in just one area, a recent United Nations study estimates that between 1988 and 1992 the top ten arms exporters sold US$20 billion of arms a year to ten developing countries. It assumes that at least 15 per cent of this value was paid to politicians and military chiefs as bribes and questions the necessity of much of this hardware to the countries concerned - possibly a diversion of much needed finance.

6. It does not follow, however, that the focus ought solely to be on the conduct of officials in developing countries, who are often poorly paid and thus highly vulnerable. The view has been expressed that the problem lies at least equally with those who offer the bribes. Often these people are nationals of rich countries, many of which not only approach the problem in a complacent manner (it is claimed), but even, in many cases, offer substantial tax concessions in respect of the payment of business-related "inducements".

SCOPE AND MEANING OF "INTEGRITY IN PUBLIC OFFICE"

7. "Integrity in public office" is a potentially huge subject. It could require consideration of ministerial responsibility, of every aspect of the proper conduct of all public officials, and of all relevant fields of law (constitutional, commercial and criminal). However, the critical issue which has motivated concern has been corruption, sometimes defined as the misuse of public power for private gain. The two terms are not always simply two sides of the same coin. "Integrity in public office" covers a wider range of official good conduct than that which is eroded by corruption, yet corruption, without narrower definition, can describe the actions of people in the public *and* private sectors. It is

suggested that corruption should continue to be the main focus of the inquiry. This is reflected in the Draft Ministerial Statement which continues to be headed "Prevention of Corruption" (see Appendix I to this paper). However, this more precise focus should be accompanied by an openness to any measures - to whomever they apply - which can prevent and overcome corrupt practices. Clearly, most measures which strengthen integrity in public office will be relevant and beneficial.

ANALYSIS OF ISSUES

8. Corruption raises many complex issues for analysis. These include the definition of corruption, the causes and effects of corruption, and a consideration of appropriate measures to combat corruption and their effective enforcement. The discussion of these and other issues in recent Secretariat papers (see next heading) and in the Transparency International paper which has been prepared for this Meeting, "Strengthening Integrity in Commonwealth Countries", is not repeated here.

RECENT SECRETARIAT PAPERS

9. These comprise *Integrity in Public Office: A Role for the Commonwealth?* (SOLM(95)10 and SOLM(95)10 (Supplement)), and *Integrity in Public Office: Consideration of Proposal for a Possible "Integrity Code"* (LOSJ(95)9). These were prepared, respectively, for the Meeting of Senior Officials of Commonwealth Law Ministries (Malta, May-June 1995) and for the Fifth Meeting of Law Officers of Small Commonwealth Jurisdictions (Namibia, September 1995).

10. The first paper (SOLM(95)10 and SOLM(95)10 (Supplement)), is reprinted at page 244 of the published proceedings of the meeting which considered it, *Meeting of Senior Officials of Commonwealth Law Ministries, Malta 29 May - 1 June 1995* (Commonwealth Secretariat, January 1996) and the discussion of it is recorded at pages 92-110 of that publication. For ease of reference, the second paper (LOSJ(95)9) is reproduced (with minor modifications and without most of the documents which were attached to the original as background material) as Appendix II. The Draft Integrity Code itself can be found near the end of that paper.

MINISTERIAL DRAFT STATEMENT ON PREVENTION OF CORRUPTION

WHY THE NEED FOR A MINISTERIAL STATEMENT?

11. It is suggested that an unequivocal statement by Law Ministers which opposes corruption and proposes a concrete programme of action would signal to the international community that the Commonwealth takes this problem very seriously, is committed to change, and desires to lend its considerable collective resources to a co-ordinated international campaign.

12. Further, it is felt that a *Commonwealth* programme of action is merited by the special contribution which Commonwealth members can offer to work being undertaken by other international bodies. There is a need for more in-depth analysis of the measures which can help to create an anti-corruption culture. Also, much can be achieved through the sharing and dissemination of Commonwealth national laws and experiences. This point was made repeatedly by Senior Officials at their 1995 meeting. Several delegates outlined schemes undertaken in their own jurisdiction to combat corruption. A number of these schemes appear to have been highly effective.

THE TEXT

Background and sources

13. The Draft Ministerial Statement is attached as Appendix I. The original draft statement - annexed to Appendix I for comparison - has been revised and (to a modest extent) expanded by the Secretariat, as requested by Senior Officials at their meeting in 1995.

14. The revision continues to reflect the issues and concerns expressed by Senior Officials at that meeting and takes into account that part of the Communiqué issued by them which is reproduced here:

> "INTEGRITY AND CORRUPTION
>
> 27. ... Senior Officials recognised the great importance of this topic, for corruption was a constant threat, if not a present reality, in almost every jurisdiction.
>
> 28. Senior Officials were unanimously of the view that the mere establishment of legal and administrative mechanisms for combating corruption was not enough and that it was also important to examine the socio-economic causes of corruption. They further believed that concrete steps needed to be taken, specifically in the field of public education.
>
> 29. Some delegates were also of the opinion that the network of mechanisms for combating

corruption needed to be widened to cover the private sector, particularly in view of the increasing trend towards privatisation of services previously performed by government entities.

30. The meeting invited the Commonwealth Secretariat to undertake a programme of work in this area, taking into account the activities of the [other international] organisations. It was hoped that the outcome of this work which should be given the widest possible publicity would be a study of best practice in terms of legal provisions and organisational structures, a study which would provide an assessment of the relative success of various approaches as a basis for the further development of national and international strategies ..."

15. Other sources are:

- the Entebbe Communiqué, issued following the Conference on Corruption, Democracy and Human Rights in East Central Africa held in December 1994;

- the Final Communiqué of the Ministerial Forum Against Corruption which met in Pretoria in November 1994.

Form of statement

16. A matter left for discussion by Ministers is in what form the statement will be issued. It could comprise a stand-alone declaration to be issued with the Communiqué. A stylistic precedent is the Lusaka Statement on Government under the Law, endorsed by the 1993 Meeting of Commonwealth Law Ministers in Mauritius. Alternatively the statement could be used as the basis for the relevant text of the communiqué itself. Both approaches appear to meet the immediate needs outlined above (at paragraphs 11 and 12).

Key revisions

Elaboration and style

17. As requested, the revised version elaborates upon the outline statement provided by Senior Officials. In doing so, it adopts a different style which resembles more a narrative than the "resolution" format of the outline. It was felt that this fitted better with past practice, although there is nothing to prevent Ministers from adopting a new style if they wish.

Allocation of functions

18. The original draft called upon the Secretariat and a "self-funding working group" to undertake certain overlapping tasks. As a practical measure, a number of tasks are now conferred upon the Secretariat only, which must however convene, and consult with, an advisory working group. The wording of the Draft Statement is intended to be broad enough to permit work on measures proposed in the paper prepared for this meeting by Transparency International (referred to above at paragraph 8), to the extent that these measures are considered appropriate.

International co-operation in the investigation and prosecution of offences, etc.

19. The call upon member governments to enact national laws to ensure international co-operation in the criminal field is inserted because a number of member states have not yet abolished the list approach to extraditable crimes. The inclusion of this statement emphasises the practical importance of implementing reforms in this area which have been promoted by the Secretariat.

Omission of references to "causes of corruption"

20. The original draft calls upon the Secretariat to identify the causes of corruption but this has been omitted in the revision. Of course, no measure aimed to combat corruption can ignore its causes and this is an inquiry which must continually be held at the forefront of the mind. However, a focus on this as a distinct and preliminary area for specialised research and analysis may divert resources away from a consideration of concrete and specific strategies achievable by Law Ministries in the immediate future.

ONGOING WORK OF THE SECRETARIAT

21. Paragraphs 22-23 outline two initiatives which the Secretariat has developed since the 1995 Senior Officials meeting, and which will be continued if appropriate following Ministerial discussion of this topic.

DATABASE OF NATIONAL LAWS AND EXPERIENCES

22. In August 1995 the Secretariat requested member states to supply copies of national laws, codes and case law relevant to combating the misuse of public office. Drawing on materials received in response and on materials already held by the Secretariat, work has continued on the development of a database. The content of this database is

recorded in Appendix III and members are requested to supply relevant materials not held by the Secretariat. There is much still to be done on the analysis and more precise classification of this material, which will be essential to its accessibility and usefulness.

DRAFT INTEGRITY CODE

23. The purpose of a Draft Integrity Code is to provide a set of clearly articulated standards against which member states could measure national legislation and practice. The main reason for formulating a Draft Code at this stage has been to prompt a discussion on the many issues which a Code raises - it should be viewed as a first draft which has drawn on limited sources. These issues include the following:

- *Is a Code a useful approach?* A Code may provide the Commonwealth with an opportunity to identify, articulate and promote shared values and clear standards in an area of considerable international concern. At the same time, it would be of limited use and essentially cosmetic if, for example, compliance and enforcement were neglected and root causes of corruption left unaddressed.

- *What activities should the Code regulate?* Should the Code require, for example, that public office holders keep confidential information confidential and refrain from participation in political activity (clauses 6 and 8 of the Draft Code), or does this go too wide?

- *To whom should a Code apply?* The Draft Code applies to "holders of public office". However, it does not attempt to define this term.

- *Should a Code require mandatory reporting and specify appropriate disciplinary action?*

- *How should a Code be implemented and enforced?* The criminal, electoral, civil, administrative and constitutional law of most Commonwealth states will already provide sanctions against many if not most breaches of the proposed Draft Code. Some states have enacted specialised legislation and have created bodies with specialist enforcement powers. In addition, the promotion of good government - in particular through public sector auditing, public education, and the fair remuneration of officials - comprises a non-legislative measure of prime importance. Finally, the transborder aspects of breaches of the Draft Code make participation in international initiatives essential (for example in regard to mutual assistance in criminal matters and extradition).

March 1996

DRAFT MINISTERIAL STATEMENT ON PREVENTION OF CORRUPTION

Prevention of Corruption

Commonwealth Law Ministers, meeting in Kuala Lumpur from 15 to 19 April 1996, acknowledged the existence of corruption as a serious multidimensional national and international problem which inhibits development, creates poverty, and undermines good government.

In terms of the threat represented by corruption to democratic institutions and good government, Ministers recognised that it was necessary to combat corruption effectively in order to achieve the goals set out in the Harare Declaration, as elaborated upon by the Millbrook Commonwealth Action Programme.

It was considered of primary importance in this context that national leaders demonstrate by their personal conduct a commitment to integrity and that they support those officially responsible for preventing and combating corruption. Further, no measure which might nurture the evolution of a democratic society - characterised by an independent judiciary, an adequately-remunerated public service, open government and a democratically elected parliament operating by way of transparent procedures - should be neglected.

In terms of the economic effects of corruption, it was noted that corruption in international transactions can contribute to the initiation of unnecessary projects and to the diversion of funds and resources from projects which are vitally necessary. Ministers expressed particular disapproval of the fact that bribes paid by foreign businesses from industrialised countries are often tax deductible in their home countries.

The links between corruption, drug trafficking, and organised crime were recognised and the need for continuing and improved mutual legal assistance in investigations and prosecutions in relation to criminal offences emphasised.

Ministers noted the diversity of national laws and experiences of Commonwealth jurisdictions in the field of preventing and combating corruption and stressed the need to share knowledge of these. They were encouraged by those strategies which have achieved some success, and identified the need for an "holistic" approach which combines a number of strategies rather than pursues one or two in isolation. Key strategies to be applied in combination might include a political commitment to the eradication of corruption, independently enforced and effective anti-corruption legislation, adequate remuneration of public officials, and the creation through education of a culture hostile to corruption.

The initiatives of other international bodies were also noted with interest and the need emphasised for the Commonwealth to co-ordinate and liaise with them. In particular, the efforts of the OECD to end the tax deductibility of bribes and to criminalise the cross-border corruption of officials should be supported.

Ministers therefore:

1. Express their collective commitment to work on both the domestic and international fronts to combat corruption;

2. Undertake to implement strategies to prevent and combat corruption, to the extent that they have not already done so, and to keep the Secretariat fully informed of relevant developments;

3. Call upon the Secretariat, in consultation with member governments, to examine all aspects of the problem, to advise Ministers on developments and initiatives in the field, to propose courses of action which may assist member jurisdictions to address and to resolve the problems of corruption more effectively, and in particular to:

   (a) collect and disseminate examples of national laws and experiences in combating corruption, and advise on developments and initiatives in the international field;

   (b) identify those strategies which have been effective in changing national and international standards, especially those strategies which have helped to promote an "anti-corruption" culture; and

   (c) develop model legal strategies for combating corruption. This will include the development of minimum standards for Commonwealth members in the form of an "Integrity Code".

4. Request the Secretariat to co-operate with other intergovernmental and non-governmental organisations working to combat corruption;

5. Commit themselves to enacting national laws, to the extent that they have not already done so, to ensure that international co-operation in the investigation and prosecution of offences, and in the surrender of fugitives, is available in respect of corruption offences;

6. Agree to establish an advisory working group which shall be convened by the Secretariat and which shall advise and assist the Secretariat in the performance of its tasks.

DRAFT MINISTERIAL STATEMENT PREPARED BY SENIOR OFFICIALS MALTA, 1995

INTEGRITY AND CORRUPTION

REPORT OF THE DRAFTING GROUP

The Group appointed to draft a proposed statement by Law Ministers on Integrity and Corruption, having taken into account the views expressed by delegations during the debate on this subject, determined that it would be unable to produce a final draft in the time available. Accordingly the Group recommends that Senior Officials:

(a) endorse the outline statement set out below; and

(b) ask the Secretariat to produce from this outline a full draft statement for Law Ministers and to circulate it to members of the Group for settling before submission to Senior Officials at their April 1996 meeting with a view to approval and final submission to Ministers for consideration at their Kuala Lumpur Meeting.

PREVENTION OF CORRUPTION

Commonwealth Law Ministers, meeting in Kuala Lumpur from 15 to 20 April 1996,

Acknowledged the existence of corruption as a serious multidimensional national and international problem which affects development, the economic well-being of countries and the effective operation of society;

Noted existing efforts by Commonwealth jurisdictions to address the issue and that such efforts had achieved some success;

Committed their governments to continue to work to combat corruption;

Recognised the need to effectively combat corruption at both the public and private levels in order to achieve the goals set out in the Harare Declaration;

Expressed their collective commitment to work on both the domestic and international fronts to combat corruption;

Called for support from the Secretariat to undertake work which, with the assistance of member governments, will:

(a) identify the causes of corruption;

(b) collect and disseminate examples of national laws and experiences in combating corruption;

(c) identify those strategies which have been effective in changing national standards so as to promote an "anti-corruption culture";

Expressed the wish that the Secretariat co-operate with other intergovernmental and non-governmental organisations working to combat corruption;

Called upon the Secretary-General of the Commonwealth to facilitate a Secretariat-wide approach to the issue which will involve not only the Legal and Constitutional Affairs Division but all other relevant areas of the Secretariat;

Agreed to establish a self-funding working group, convened by the Secretariat, to examine all aspects of the problem, advise Ministers on developments and initiatives in the field and to propose courses of action to assist member jurisdictions to better address and resolve the problems of corruption.

FIFTH MEETING OF LAW OFFICERS OF SMALL COMMONWEALTH JURISDICTIONS WINDHOEK, NAMIBIA, 4-8 SEPTEMBER 1995

INTEGRITY IN PUBLIC OFFICE: CONSIDERATION OF PROPOSAL FOR A POSSIBLE "INTEGRITY CODE"

A memorandum by the Commonwealth Secretariat

I. INTRODUCTION

Outline of paper

1. The purposes of this paper are to suggest the possible form which an Integrity Code might take and to give some preliminary idea of the steps necessary to implement it.

2. Thus the paper considers:

(a) the possible content and application of an Integrity Code (Part II); and

(b) implementation from two perspectives: (i) legislative and non-legislative change, and (ii) participation in international initiatives (Part III).

Commonwealth Secretariat Initiatives: Update

3. Three papers on "Integrity in Public Office" were presented at the 1993 Meeting of Commonwealth Law Ministers, and the Meeting of Senior Officials of Commonwealth Law Ministries (May-June 1995) endorsed an outline statement on the topic for finalisation by the Secretariat and submission to Senior Officials before the Meeting of Commonwealth Law Ministers in April 1996. Further, the Secretariat was requested to collect and disseminate examples of national laws and experiences in combating misuse of public office. Work is continuing on this project.

Meaning of "integrity" and "public office"

4. This paper focuses on "*the wrongful exercise of public duty for direct or personal gain*" (background paper para 1) or, more succinctly still, "*the misuse of public power for private profit*". Thus it was not thought relevant to include in the Code suggested in Part II a provision requiring a senior public servant to give a Minister impartial advice or requiring a public servant to treat the public with courtesy (as is contained in some Codes regulating integrity in public office). At the same time, para 4 of the background paper acknowledges the obvious benefit, in the fight against abuse of the defined type, of many measures which strengthen democratic institutions and the rule of law. This is reflected in several of the Integrity Code provisions suggested in Part II of this paper which may err on the side of going too wide.

5. What comprises "wrongful exercise of public duty" may differ according to cultural norms. Unambiguous examples might be the payment of a bribe to a public official or politician to win a defence contract, to procure public services which should be available to all but are not, to influence an election or to affect the outcome of a judicial process. Greyer cases might comprise a politician's grant of public money to a group in a marginal constituency, the grant of a ceremonial gift to a minister of state by the successful tenderer for a capital works project, or the donation of large sums by a corporation to a campaign fund. Differing norms might be reflected in an Integrity Code by specifying those provisions which are optional.

6. Yet Commonwealth countries should scrutinise critically any plea for exemption on the basis of culture. For example, Dr Kamal Hossain, Minister of Foreign Affairs and Justice for Bangladesh, insisted recently that bribery impoverishes the poor and rejected the thesis that it is part of the culture of that country.

7. The scope of "public office" is addressed in Part II, which discusses the holders of public office to whom a Code, or Codes, might apply.

Scope of problem

8. The background paper analyses the great harm caused by the wrongful exercise of public duties, particularly to developing countries (paras 2-3). To take one example, a recent UN paper estimates that between 1988 and 1992 the top ten arms exporters sold US$20 billion of arms a year to ten developing countries, assumes that not less than 15% of this value was paid to politicians and military chiefs as bribes, and questions the necessity of much of this hardware to the countries concerned - possibly a massive diversion of much needed finance. The Council of Europe has added its voice to the rising

international chorus of alarm, noting in particular the undermining effect of corruption on the efforts to build up democratic institutions and to promote the rule of law in Central and Eastern Europe.

II. CONTENT AND APPLICATION OF INTEGRITY CODE

CONTENT: KEY ELEMENTS

9. The proposed Draft Integrity Code is contained in the Appendix. It is based largely on the United Nations Draft International Code of Conduct for Public Officials (April 1995) as a starting point. However, it also draws on:

- the Leadership Code, a code of ethics entrenched under s 27 of the Constitution of Papua New Guinea, and complemented by the Organic Law on the Duties and Responsibilities of Leadership;

- Standards in Public Life (UK, May 1995), the First Report of the Committee and bearing that name, chaired by Lord Nolan, which proposes sets of guidelines targeted respectively at ministers, MPs, senior civil servants and executives of non-departmental public bodies; and

- several Council of Europe working documents (March-May 1995).

10. The following narrative restricts itself to a few brief points about each clause and should be read together with the Draft Code. The intention is that most discussion will focus on the Draft Code itself.

Clause 1: Statement of general principles

11. The outline of general principles at the start of the Code stresses the overriding duty to act in the public interest; openness and accountability; and the duty to avoid conflict of interest. Primary sources are the "seven principles of public life" outlined in the Nolan Report and the "general principles" section of the Draft International Code of Conduct for Public Officials (United Nations).

12. The purpose of the statement is educative, and there is likely to be considerable debate as to the specific measures which would be necessary to give effect to them. For example, the requirements of "accountability to the public" (1(f)) may differ greatly depending on jurisdiction and office-holder. Some of the principles are of more limited application than others, a point true of most of the clauses below and addressed below in the discussion of to whom the Code might apply.

Clause 2: General duties of holders of public office

13. This clause derives from section 27 of the Leadership Code in the Constitution of Papua New Guinea. While breach of those general duties can in themselves comprise "misconduct in office" under the Constitution, they are supplemented by more specific provisions (under the Organic Law, noted above) of the type found in clauses 3-5 of the Code. Arguably they form a useful measuring stick for a range of behaviour, some of which may fall outside the more specific provisions.

Clause 3: Conflicts of interest and disqualification
Clause 4: Disclosure of assets and financial accounting
Clause 5: Acceptance of benefits

14. These clauses derive from a wide range of the sources noted above at para 9 and form the core of the provisions aimed at the misuse of public office for private gain.

15. Some of these provisions, though generally phrased, could require quite strict regulation in order to implement them. For example the requirement to observe restrictions imposed on the holding of private interests (clause 3) might be thought to require provisions similar to those found in the Organic Law of Papua New Guinea. These provisions restrict the holding of shares and directorships. More specifically, no person to whom it applies (among others politicians, constitutional office holders and heads of public service departments) may hold an investment in a foreign enterprise without the Ombudsman Commission's approval, or in any profit-seeking organisation which could place that person in a conflict of interest.

Clause 6: Confidentiality
Clause 8: Political activity

16. These clauses may not be strictly necessary in a Code of this nature. Further, the misuse of confidential information is caught already by clause 3(c). However, the provisions derive from the United Nations Draft International Code, a direct response to corruption, and are retained here for the moment.

Clause 7: Appointment to public office

17. This provision stems from the Nolan Report. It

could provide a useful counter to the use of appointment, particularly to senior public office positions, as a reward for services rendered or expected.

Clause 9: Reporting

18. Mandatory reporting would be a contentious measure. Reporting should perhaps remain optional.

Clause 10: Disciplinary action

19. While strong sanctions seem appropriate in light of the harm caused by corruption, care would be needed to observe human rights fundamentals. This point is touched on again under Part III, in the section which discusses non-legislative implementation measures.

TO WHOM SHOULD THE CODE APPLY?

20. This section attempts merely to outline some of the issues which will need to be addressed in tackling this question. As with issues concerning the content and implementation of the Code, much careful and detailed work is likely to be required.

How to define "Holders of Public Office"?

21. "Holders of public office" is intended in the Draft Code to include:

* heads of state, including a prime minister or president and their staffs
* ministers of state
* elected representatives in general
* officers appointed under the constitution, if any (including judicial and legal officers)
* heads of department and other senior public servants
* heads of non-departmental public bodies (for example state owned corporations)
* public servants in general, at all levels

22. Yet even this basic list is incomplete and problematic. It does not mention, for instance, the staff of a Governor-General or of a leader or deputy-leader of the opposition; not all countries have a written constitution; senior military, diplomatic and law enforcement staff do not fall easily into any of the categories; and so on.

23. Further, it is obvious that provisions of the Draft Code will have to be applied to different groups selectively; none of the Codes reviewed apply in their entirety to all of the classes of public office listed above. Thus, clauses 1(i),(j), 3(h), 4(e), 5(c) can only apply to elected representatives and/or ministers of state. However, other cases are not so clear: should middle ranking public servants be subject to clause 4 disclosure requirements?

24. Other Codes do not provide a ready made answer to the definition problem. The UN Draft Code does not define "Public Official", while the Papua New Guinean Leadership Code defines "Leader" by carefully listing a wide selection of public offices by title. However, some definition is needed and the approach of listing office holders by title runs the risk, in the context of an international code, of omitting important functionaries and of using nomenclature which does not fit all jurisdictions.

25. Perhaps the best approach for present purposes lies in defining *types* of office by describing the nature and extent of the particular decision making powers and of the official's control over resources. Also relevant is the effect of the correct performance of particular functions on the perception of the government's integrity: as pointed out by several commentators, only when corruption at the highest levels has been eliminated are lower ranking officials likely to follow suit. Finally, an appreciation of to whom the duties of the office are owed will assist consideration of appropriate accountability mechanisms.

26. One result of this exercise may be the drafting of a number of Codes tailored to different groups.

Further points

27. Further miscellaneous points to consider are:

* The Codes reviewed are also notable for whom they do not specifically apply to, namely those persons who offer corrupting inducements. Nor does the Code apply to private corruption. This approach is continued here; whether it should requires careful thought.
* One Code reviewed applies to the conduct of leaders holding public office in both their public *and private* lives .
* Provisions of the Code regulating the holding and disclosure of certain property interests should apply also to the spouses and dependants of the holder of public office.

III. IMPLEMENTATION OF CODE BY COMMONWEALTH MEMBER STATES

28. This section outlines some of the legislative and non-legislative measures which may be necessary to implement the Code. Depending on the particular country, some of these measures will already exist, some will exist but need to be improved, and some will need to be introduced. This is a brief overview only: the material which the Secretariat has undertaken to provide (para 3 refers, above) will cover the same areas in more depth at a later date.

LEGISLATIVE AND NON-LEGISLATIVE MEASURES AT THE DOMESTIC LEVEL

Legislative Measures

29. The criminal, electoral, civil, administrative and constitutional law of most Commonwealth states will already provide sanctions against many if not most breaches of an Integrity Code similar to the one proposed above, with appropriate jurisdiction being granted to the courts. These laws will also often contain sanctions against the conduct of the person offering the corrupt inducement (though this conduct may not come within the Code proposed here).

Criminal

30. The criminal codes of many countries contain provisions which criminalise aspects of corrupt behaviour. However, improvements can still be made in the area of transnational corruption (see below at para 55). Attached as Annex A is an indicative list of corruption offences.

Evidence

31. Most corruption offences are consensual and may not involve an obvious victim, meaning it can be rare to obtain confessions and witness testimony and thus legally reliable evidence which will stand up in court, or provide the "reasonable grounds" frequently prerequisite to investigative and enforcement action. Data held by financial institutions may be protected by confidentiality. This can also be problematic in civil proceedings.

Electoral

32. Again, the law of many countries will allow a challenge to the result of an election where corrupt influence is alleged.

Employment

33. In many countries, breach of the Code could lead to a civil claim in damages under an employment contract, and certainly provide grounds under the same for dismissal.

Civil and commercial

34. Several points arise:

* Claimants for damages caused by corruption might include the government and the competitor not awarded the contract. A recent Council of Europe paper advocates the civil liability of an administration to a private person for damage caused by corruption. Procedural remedies such as injunctive relief may be important.

* In the USA, the Securities Exchange Commission helps with the civil enforcement of FCPA, and failure to make proper disclosure leaves top management open to civil liability.

* In terms of reform, legislation could provide, where this does not already flow from the general law, that a contract obtained by means of a bribe is voidable with damages obtainable by a third party who suffered loss from missing out on the original contract award.

* Stringent public sector and corporate auditing regulations would be an essential handmaiden to laws prohibiting the corrupt practices themselves, greatly enhancing chances of detection and thereby increasing deterrence.

Tax

35. Many developed countries offer tax incentives for offering "commissions" to procure foreign contracts. Clearly this is unacceptable. Simultaneous and collective action by countries is required so that those acting sooner are not placed at a competitive disadvantage.

Constitutional and Administrative

36. Misuse of public office for private gain is often the subject of specific constitutional provisions, as for example under s 27 of the Constitution of Papua New Guinea (noted above, and also below in the context of enforcement). Core administrative law principles allow for the judicial review of decisions taken mala fides.

37. The legal position in regard to members of parliament can be less clear in the absence of

express legal provisions. Thus in the United Kingdom, pursuant to the jealously guarded doctrine of parliamentary privilege, the House formulates and enforces its own rules regulating, among many other things, members' interests. A recent report has investigated whether enforcement under current procedures suffers from political bias and makes a case for investigation by an independent Commissioner appointed by the House. It also suggests, in respect of bribery, that there is a case for altering the traditional boundary between courts and parliament.

Specialised legislation

38. Hong Kong (the Prevention of Bribery Ordinance 1971, Corrupt and Illegal Practices Ordinance 1955, Independent Commission against Corruption Ordinance 1976) and Singapore (the Prevention of Corruption Act) are among several countries which have introduced legislation targeted at misuse of public power for private profit. Papua New Guinea has already been mentioned. Aspects of this legislation are considered further under the next heading.

Enforcement

39. President Musevini of Uganda recently stated that, "The real problem is that the guards in Africa have themselves got to be guarded and this is clearly a vicious circle. Without moral authority in our top leadership it is very difficult to eliminate corruption ... moral suasion is not enough. We need legal sanctions and we need the enforcement of the laws that govern corruption ..."

40. Australia (at a state level), Hong Kong, Singapore and Zambia are four Commonwealth countries which have attempted to address this problem by setting up independent Anti-Corruption enforcement bodies, with some notable successes. These bodies have a selection of investigation, arrest, prosecution (with the consent of the prosecuting authority), prevention and community education functions.

41. Papua New Guinea has also adopted this broad approach, and in a distinct and innovative way. An "Ombudsman Commission" has wide powers to investigate alleged breaches of the Leadership Code and the Organic Law on the Duties and Responsibilities of Leadership which. If these appear substantiated, the Commission must refer them to the Public Prosecutor which decides independently whether to initiate proceedings before the Leadership Tribunal. This Tribunal's mandate is to investigate and determine allegations of misconduct and can recommend dismissal (or a lesser penalty) to the Governor-General, who is constitutionally obliged to implement it.

42. As an alternative to referring the matter for prosecution, the Ombudsman Commission can in appropriate cases publish the benefits or interests which a particular leader or group of leaders are prohibited from holding. If, following an investigation by the Commission, it is found that the leader or leaders hold that interest etc., then the Commission can make an order as to the restitution or forfeiture of the property in question.

43. Finally, the Commission also has the power to give directions as to the distribution of discretionary "slush funds" available to individual members of Parliament for disbursement to the electorate. The Commission also carries out the functions normally associated with an Ombudsman, as defined elsewhere in the Constitution.

44. Clearly, a specialised anti-corruption body may be impractical and even unnecessary for small states with few resources. The same may apply to closely policed disclosure requirements and "registers of interests". Further ideas are sought for appropriate enforcement mechanisms.

Non-Legislative Measures

Public administration

45. Close and independent administrative auditing is an essential tool for detecting misuse of public office. Negligent failure to detect could be a ground for civil liability (see above).

46. Disciplinary procedures within the administration may require attention. Tough disciplinary sanctions may be inappropriate in the absence of fair trial procedures and may lead to multiple sanctioning, if liability also exists under penal and civil law. Post-employment sanctions are important given that the new position may owe itself to corrupt inducement while in public office. Administrative sanctions might also apply to private persons, for example blacklisting a corporation.

47. Public procurement is the most important domain of corruption, given the usually substantial sums involved. Attribution procedures can render it far more difficult, for example by sharing the decision between several persons, fair and equal tendering, detailed itemisation of quotes, and transparency at every stage.

Changing public attitudes and prevention

48. Several commentators note the limited effect that any system of rules can have in this area unless they are accompanied by an appropriate change in attitudes and behaviour by those to whom the Code will apply, preferably beginning at the highest levels.

49. In this context it is worth noting the public education and prevention functions of the Hong Kong Independent Commission Against Corruption ("ICAC") and of the New South Wales body of the same name. Thus, both Commissions are responsible for educating the public against the evils of corruption and for examining public bodies to identify opportunities for corruption in order advise on prevention.

Economic Fundamentals

50. Clearly, fairly remunerated officials are likely to be less vulnerable to corrupting inducements.

Fundamental values

51. Advances in promoting democratic government, a free press and the rule of law will help to provide the framework in which public office holders are actually accountable, and in which breaches are actually detected and punished by an independent and incorruptible prosecution authority and judiciary respectively. President Musevini noted an even more basic obstacle:

"The problem sometimes is that the corrupt leaders, who are also the law makers, do not make laws to curb corruption because they would, by so doing, be creating problems for themselves."

Participation in International Initiatives

52. The transborder aspects of breaches of an Integrity Code must be addressed if the Code is to operate successfully against relevant types of international economic crime, for example the taking of bribes in international trade transactions. Several detailed studies undertaken by international bodies stress that it will not be possible to combat international economic crime of this nature without comprehensive international co-operation, both in enforcement and the harmonisation of laws. Commonwealth countries will need to pay particular attention to the areas outlined in the following.

Mutual Assistance in Criminal Matters and Extradition

53. In a recent paper, the acting Chief Ombudsman of Papua New Guinea noted that it would be able to exercise its powers much more effectively if it received more assistance from other jurisdictions in some of its transnational enquiries.

Money Laundering

54. International co-operation is necessary to combat the laundering of the proceeds of corruption.

Criminal offences and extraterritoriality

55. Two approaches are possible to combat transnational corruption. One approach is that taken under the Foreign Corrupt Practices Act 1977 (USA) ("the FCPA") , which criminalises the payment of bribes to foreign officials, political parties or candidates for public office, which are made in order to secure foreign orders. Another approach is to facilitate, by means for example of improved extradition procedures, the prosecution of a foreign national by and in the country where the offence took place.

Civil actions

56. Where the parties come from two or more states, questions may arise as to jurisdiction, applicable law, and the enforcement of judgments. These issues require further consideration.

August 1995

DRAFT "INTEGRITY IN PUBLIC OFFICE" CODE

1. Statement of general principles

Holders of public office shall:

(a) take decisions solely in terms of the public interest

(b) administer resources in the most effective and efficient manner

(c) not place themselves under financial or other obligation that might influence the performance of their official duties

(d) make choices on the basis of merit when carrying out public business

(e) be attentive, fair and impartial in the performance of their functions

(f) be accountable for their actions to the public through appropriate mechanisms

(g) be as open as possible about all actions, giving reasons for decisions unless the public interest requires otherwise

(h) declare any private interests relevant to their exercise of public duties

(i) be accountable to parliament

(j) not mislead parliament

2. General duties of holders of public office

Holders of public office shall not behave in a way that:

(a) demeans their office;

(b) diminishes their official or personal integrity;

(c) leads to doubt as to whether they are complying with the duties of their office; or

(d) diminishes respect for and confidence in the integrity of government

3. Conflicts of interest and disqualification

Holders of public office shall:

(a) not use their authority for the improper advancement of their own interest, or have any function or interest incompatible with their office

(b) disqualify themselves from decision making when any conflict of interest arises between private interest and public duty

(c) not use public property, services or information, acquired or available in the course of their public duties, for activities unrelated to those duties

(d) observe restrictions on the holding of interests which lead, or could lead, to a conflict of interest

(e) not hold an interest in a government contract

(f) not engage in paid employment which is additional to the public office held, without approval from the appropriate authority

(g) for an appropriate period after leaving public office, obtain governmental permission

  (i) prior to accepting employment or consultancy assignments from concerns that are or were in a financial relationship with the agency which employed the official; or

  (ii) prior to engaging in a business activity related to their previous position

(h) keep their role as minister and constituency Member separate

4. Disclosure of interests and financial accounting

Holders of Public Office shall:

(a) on request from the appropriate authority on reasonable grounds, disclose all personal property, assets and liabilities

(b) on entering public office, declare any interest or activities undertaken for financial gain which are relevant to the exercise of their public duties

(c) on request from the appropriate authority on reasonable grounds, provide detailed

information on the source of an acquisition made after their appointment

(d) lodge annual financial statements, providing those financial details prescribed by the appropriate authority

(e) declare financial interests in the approved manner when taking part in House business or approaching the executive on a matter concerned with that business

5. **Acceptance of benefits**

Holders of public office shall:

(a) not place themselves in the position of being under a moral obligation to give special treatment to any person, for example by accepting any benefit above a certain value

(b) not ask for benefits

(c) where appropriate, not promote any matter in Parliament in return for payment

6. **Confidentiality**

Holders of public office shall keep confidential matters confidential, unless disclosure is necessary in the performance of that officer's duty or in the needs of justice.

7. **Public appointments**

Public Office positions are to be widely advertised, and appointments should be on the basis of merit and publicly announced.

8. **Political activity**

Holders of Public Office shall not undertake any political activity, being activity external to the usual functions and duties of their office, which harms or may harm confidence in the impartial performance of their official functions.

9. **Reporting**

Holders of Public Office shall be under a duty to report violations of the Code to the relevant authorities.

10. **Disciplinary action**

(a) Knowing, deliberate or reckless disregard of the Code is to be subject to appropriate disciplinary measures

(b) Serious violations may be punishable by criminal sanctions, including forfeiture and confiscation, with compensation to the injured party in appropriate cases

(c) Breach of the Code will lead to dismissal from office in serious cases

A. NATIONAL LAWS

Australia

Crimes (Offences Against the Government) Act 1989 - Sections 14-16, 20 (Australian Capital Territory)

Crimes (Superannuation Benefits) Act 1989

Crimes Act 1914 - (Commonwealth) Sections 73 and 73A

Crimes Act 1958 - Extract (Victoria)

Crimes Act 1990 No. 40 - Part 4A (New South Wales)

Criminal Code - Chapter XIII (Western Australia)

Criminal Code - Sections 199, 257-261 (Queensland)

Criminal Code Act - Sections 83-85 (Tasmania)

Criminal Justice Act 1989 (Queensland)

Criminal Justice Amendment Act (No. 2) 1992 (Queensland)

Criminal Justice Amendment Act 1992 (Queensland)

Criminal Justice Amendment Act 1993 (Queensland)

Criminal Law Consolidation Act 1935 - Sections 249, 251-253 (South Australia)

Independent Commission Against Corruption (Amendment) Act 1994 (New South Wales)

Independent Commission Against Corruption Act 1988 (New South Wales)

Public Interest Disclosure Act 1994 (Australian Capital Territory)

Secret Commissions Act 1905 (Commonwealth)

Secret Commissions Prohibition Act 1920 (South Australia)

Whistleblowers Protection Bill 1992 (No. 2) (New South Wales) (lapsed)

Whistleblowers Protection Act 1994 (Queensland)

Belize

Prevention of Corruption in Public Life Act 1994

Prevention of Corruption in Public Life Bill 1993

Botswana

Corruption and Economic Crime Act 1994

Penal Code - Sections 99-110

Bulgaria

Criminal Code (Extracts)

Canada

Criminal Code (Extracts)

Cyprus

Criminal Code - Sections 100-107

Denmark

Criminal Code - Sections 100-107

The Gambia

Evaluation of Assets and Properties and the Prevention of Corrupt Practices Act No. 17 of 1982

Ireland

Ethics in Public Office Bill 1994

Hong Kong

Acceptance of Advantages (Governor's Permission) Notice 1992

Corrupt and Illegal Practices Ordinance 1987

Heung Yee Kuk Election Expenses Order 1993

Independent Commission Against Corruption Ordinance 1992

Independent Commission Against Corruption (Treatment of Detained Persons) Order 1987

Independent Commission Against Corruption (Treatment of Detained Persons) Order 1992

Independent Commission Against Corruption Ordinance 1987

Legislative Council Election Expenses Order

Prevention of Bribery (Appeal Against Confiscation Order) Rules 1987

Prevention of Bribery (Exclusion of Bodies and Members of Bodies of Educational Institutions) Notice 1992

Prevention of Bribery Ordinance

Prevention of Bribery Ordinance 1987

Prevention of Bribery Ordinance 1992

Resolution of the Legislative Council 1993

Theft Ordinance 1986

Urban Council, Regional Council and District Boards Election Expenses Order 1993

Hungary

Criminal Code (Extracts)

Italy

Criminal Code (Extracts)

Jamaica

Contractor-General Act 1983

Kenya

Penal Code, Chapter X

Malawi

Corrupt Practices Act 1995

Forfeiture Act 1969

Malaysia

Anti-Corruption Agency Act 1982

Emergency (Essential Powers) Ordinance No. 22 1970

Prevention of Corruption Act 1961

Malta

Permanent Commission Against Corruption Act 1988

Namibia

Privileges and Immunities of Parliament Act 1995

Portugal

Penal Code (Extracts)

Singapore

Constitution of Singapore - Sections 17-220

Corruption (Confiscation of Benefits) Act 1989

Penal Code - Sections 21, 161-171, 216B-222, 228

Prevention of Corruption Act 1960

Prevention of Corruption Act 1993 (Revised Edition - 1993)

Sri Lanka

Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994

Special Presidential Commissions of Inquiry (Amendment) Act No. 38 of 1986

St Christopher and Nevis

Integrity in Public Life Act 1994

Trinidad and Tobago

Integrity in Public Life Act 1987

Prevention of Corruption Act 1987

Vanuatu

Constitution of Vanuatu - Chapter 10

Ombudsman Act No. 14 of 1995 - Section 23

Zambia

Corrupt Practices Act 1980

Zimbabwe

Prevention of Corruption Act 1985

Public Service (Officers) (General) Regulations 1979

B. CODES OF CONDUCT

Australia

Code of Conduct for Public Employees in South Australia 1994

Code of Conduct for Officers of the Queensland Public Service (date not known)

Guidelines on Official Conduct of Commonwealth Public Servants (Public Service Commission, Canberra 1995; 1979 and 1987 editions also held)

Commonwealth Procurement Guidelines (Australian Department of Administrative Services 1989)

Canada

Conflict of Interest and Post-Employment Code for Public Office Holders (Office of the Ethics Counsellor, Ottawa 1994)

Hong Kong

Conflict of Interest (Civil Service Branch Circular 19/92, 1992)

Revised Rules on Investments and Declaration of Investments by Civil Servants (Civil Service Branch Circular 6/95, 1995)

Namibia

Guidelines for Political Office Bearers: Reconciliation of Public Duty and Private Interests 1993

New Zealand

Public Service Code of Conduct 1990

Singapore

Instruction Manual for Public Servants (extract)

United Kingdom

Open Government: Code of Practice on Access to Government Information (Citizen's Charter)

Code of Best Practice for Board Members of Public Bodies (HM Treasury, 1994)

The Civil Service Code

C. Reports and Other Material

Produced by States

Australia

Report of the Public Servants Ethical Conduct Committee on Conflict of Interest (Victoria, 1976)

Codes of Conduct for Public Officials - Issues Paper No.15 (Electoral and Administrative Review Commission, Queensland 1991)

Report on Protection of Whistleblowers (Electoral and Administrative Review Commission, Queensland 1991)

Defending the Fundamental Political Values of the Commonwealth Against Corruption - Paper presented at LMM 1993 (Independent Commission Against Corruption, New South Wales)

Conflict of Interest and Local Government (Independent Commission Against Corruption, New South Wales 1991)

Canada

Conflict of Interest in Canada: Comparative Tables, 1994 (Office of the Ethics Counsellor, Ottawa)

Hong Kong

Corporate Code of Conduct (Independent Commission Against Corruption)

Serving the Community with Integrity (Independent Commission Against Corruption)

Independent Commission Against Corruption: Annual Report (1986 and 1987)

Papua New Guinea

Serious Economic Crime - the Threat to Us All (on investigation of crimes under the Leadership Code, Sir Charles Maino)

Trinidad and Tobago

Report of the Integrity Symposium 1993 (Trinidad & Tobago)

United Kingdom

Report of the Royal Commission on Standards of Conduct in Public Life 1974-1976 (Salmon Report) (Cmnd 6524, 1976)

Standards in Public Life: First Report of the Committee on Standards in Public Life (Nolan Report) (Cmnd 2850-I, 1995)

The Government's Response to the First Report from the Committee on Standards in Public Life (Cmnd 2931, 1995)

Review of Guidance on Public Appointments: Report by the Public Appointments Unit (Cabinet Office, 1995)

Produced by International Organisations

Conflict of Interest: A Commonwealth Study of Members of Parliament (Gerard Carney for the Commonwealth Secretariat, 1992)

Corruption: The Abuse of Public Office for Personal Benefit (Transparency International)

D. CASE LAW

Abd Khalid bin Abd Hamid v Public Prosecutor [1995] 1 MLJ 692

Amerasekere v Mitsui & Co Ltd & Ors [1992] LRC (Comm) 636 (Sri Lanka)

Felix Njagimarete v AG [1987] Nairobi Law Monthly 38

Frank Roncarelli v The Hon. Maurice Duplessis [1958] SCR 121 (Canada)

Greiner v ICAC/Moore v ICAC (1992) 28 NSWLR 125

Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor [1981] 2 MLJ 230

Herscu v R [1992] LRC (Crim) 606 (Australia)

Ibrahim Helmi bin Mohd. Liki v Public Prosecutor [1984] 2 CLJ 46

Mohamed Mokhtar v Public Prosecutor [1972] 1 MLJ 122

Public Prosecutor v Abdul Malik bin Maharaji & Anor [1994] 2 MLJ 430

Public Prosecutor v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166

Public Prosecutor v Kang Hwi Wah [1994] 2 Singapore Law Reports 420

Public Prosecutor v Rahman [1993] 3 LRC 695 (Brunei)

Public Prosecutor v Tiw Ah Boon [1995] 1 Singapore Law Reports 333

Public Prosecutor v Yuvaraj [1969] 2 MLJ 89 (Privy Council)

R v Allen (1992) 27 NSWLR 398

R v Boston & Ors (1923) 33 CLR 386 (Australia)

R v Cobcraft (1966) 85 WN (Pt I) (NSW) 608

R v Dillon & Riach [1982] VR 434 (Victoria)

R v Gallagher [1986] VR 219 (Victoria)

R v Jamieson [1988] VR 879 (Victoria)

R v Scott [1907] VLR 471 (Victoria)

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Yeo See Koon Jimmy v Public Prosecutor [1994] 3 Singapore Law Reports 539

Wanyiri Kihoro v AG (1993) 49 Nairobi Law Monthly 34