Fighting Corruption

Promoting Good Governance

COMMONWEALTH SECRETARIAT

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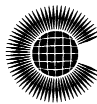

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Foreword

by the Commonwealth Secretary-General

In recent years, there has been a phenomenal growth of interest in issues related to governance and corruption. This reflects, in part, increasing acceptance of the proposition that poor governance and corruption are corrosive of economic and social development. At their meeting in Edinburgh in 1997, Commonwealth Heads of Government underscored the importance of good governance, including increased openness in economic decision-making, and eliminating corruption through greater transparency, accountability and the application of the rule of law. At their request, I established a small group of eminent experts, representative of the Commonwealth's diversity, to undertake a study on these issues and recommend ways in which the Commonwealth could promote good governance and fight corruption.

The Expert Group was chaired initially by Dr Mahbub ul Haq (a former Finance Minister of Pakistan) and, following his tragic death, by Dr Kwesi Botchwey (a former Finance Minister of Ghana). It met three times in 1998-99, receiving guidance during the course of its work from meetings of Commonwealth Finance and Law Ministers respectively. The Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, and the comprehensive Report that accompanies it in this volume, are the fruits of the Group's collective wisdom and dedicated work.

In Durban last year, Commonwealth Heads of Government welcomed the Group's Report and endorsed the Framework for Commonwealth Principles as the basis for an approach of 'zero tolerance' to all types of corruption at national and global levels. They underscored that the Commonwealth's commitment and work in promoting good governance and preventing corruption must be credible, tangible and visible. At their request, the Commonwealth Secretariat is now formulating strategies to facilitate the implementation of the Framework and for progress to be reviewed at regular intervals.

The Expert Group's work has helped to clarify the causes and consequences of poor governance and corruption, as well as to identify the elements of national strategies that countries could adopt to combat corruption effectively. Based on the over-arching principle of 'zero tolerance' of corruption as the bedrock of national anti-corruption strategies, the Group advocates a three-pronged approach: *prevent* corruption; *enforce* laws against it; and *mobilise public opinion* against

corrupt behaviour. It has also broken new ground by examining the global dimensions of corruption and identifying gaps in current international efforts and initiatives to fight it. It recommends a global compact against corruption that could take the form of a universal, legally binding inter-governmental instrument, negotiated under the auspices of the United Nations.

I am pleased to commend the Expert Group's conclusions and recommendations to governments, to the private sector and to civil society generally, both within and beyond the Commonwealth.

Emeka Anyaoku
28 March 2000

Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption

prepared by the Commonwealth Expert Group on
Good Governance and the Elimination of Corruption.

Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption

Preamble

Good governance is not a luxury but a basic requirement for development. Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly.

Corruption is always a two-way transaction with a supply and a demand side. It occurs in poor, emerging and developed nations, regardless of the level of social and economic development and in countries with varying forms of government ranging from dictatorships to established democracies.

Corruption, which is multi-dimensional, generally occurs at the nexus between the public and private sectors, with actors in the private sector interacting with holders of offices of trust in the public sector. Some aspects of corruption, such as fraud and the misappropriation of assets or funds, can occur entirely within the private or public sectors. However, with increasing privatisation of public utilities and services, the distinction between the public and private sectors is becoming less relevant in some areas.

Corruption is generally defined as the abuse office for private gain. As the scope of corruption has widened, this definition has been enlarged to cover the abuse of all offices of trust for private gain[1]. there are many types and levels of corruption including "grand corruption", which involves huge sums paid by major businesses to high-level politicians and/or government officials; widespread systemic corruption which may take the form of substantial bribes to public officials to obtain, for example, licences/permits or to by-pass regulations; and petty corruption which involves modest but recurring payments to avoid delays, jump queues or to obtain goods in controlled markets. All forms of corruption entail high economic and social costs: transaction costs are increased;

1 The term "holders of offices of trust", that is used hereafter in this document, covers the following: politicians (elected and appointed), public/civil servants, judges, officers of the armed forces, officials of bodies providing services (including privatised services) for or on behalf of the government and executive officers of private corporations.

public revenues are reduced; resource allocation is distorted; investment and economic growth is retarded; and the rule of law is weakened.

The Commonwealth should firmly commit itself to the policy of "zero tolerance" of all types of corruption. This policy must permeate national political cultures, governance, legal systems and administration. Where corruption is ingrained and pervasive, especially at the highest political levels, its eradication may require a sustained effort over a protracted period of time. However, the policy of "zero tolerance" should be adopted from the outset, demonstrating a serious commitment to pursue the fight against corruption. The Commonwealth should remain firm in its determination that the high standards and goals enunciated in the 1991 Harare Declaration are upheld and enhanced. Creating an environment which is corruption-free will require vigorous actions at the national and international levels, and within the Commonwealth itself. These actions should encompass the prevention of corruption, the enforcement of laws against it and the mobilisation of public support for anti-corruption strategies.

National Actions

All Commonwealth countries which have not done so should develop their own national strategies to promote good governance and eliminate corruption. These strategies will require strong political will at the highest levels of government if they are to succeed. Furthermore, they cannot be externally imposed: they must be internally driven and domestically owned, based on the specific concerns and circumstances in each country. National strategies need to be comprehensive in engendering transparency and accountability in all sectors, and in covering all the active and passive actors involved in corruption. To be effective, they should be implemented in a timely manner and include principles from the five inter-related platforms described below.

Ethics and integrity in the public and private sectors

High-level corruption

Corruption at the highest level poses perhaps the greatest threat to the stability and wellbeing of societies. Its elimination must therefore be given the highest priority in the implementation of effective anti-corruption strategies. Failure to root out high-level political corruption undermines anti-corruption measures at other levels. It perpetuates double standards inimical to the development of an anti-corruption culture.

Funding of political parties

The funding of political parties has the potential to become a major source of corruption as well as a vehicle for hiding corruption. Clear links can be drawn between inappropriate or inadequate controls on such funding and the prevalence of corruption. Among those countries which have sought to address the issue of transparency in political funding and the maintenance of the integrity of the political system, there is divergence and the different approaches adopted are largely the result of prevailing political and societal norms. Several factors are relevant in tackling the problems associated with money and politics. They include:

- whether or not there are established political parties;
- the capacity of the state to finance political parties and/or election campaigns, and levels of expenditure on political campaigns;
- limits on financial contributions and the integrity of their sources;
- the role of national and international companies in providing funds to political parties;
- the national interest in ensuring that foreign interests do not influence domestic political priorities and decisions.

Although rules on funding for political parties will vary depending upon national circumstances, in general, it is important that these rules should serve to:

- prevent conflicts of interest and the exercise of improper influence;
- preserve the integrity of democratic political structures and processes;
- proscribe the use of funds acquired through illegal and corrupt practices to finance political parties;
- enshrine the concept of transparency in the funding of political parties by requiring the declaration of donations exceeding a specified limit.

Economic and fiscal policies

Opportunities for seeking economic rents are a major cause of corruption. These opportunities are greater when there is a lack of transparency and undue administrative discretion. Policy reforms that can help to maximise transparency and certainty and minimise administrative discretion will reduce rent-seeking as well as eliminate incentives which generate corrupt practices. They will help to improve foreign

investors' perceptions of the investment environment in many countries. Such policy reforms include:

- liberalising trade regimes through the progressive removal of inefficient quantitative restrictions and import/export licences, as well as high tariffs that shield industries from competition and create artificial monopolies;
- reducing foreign exchange controls and increasing transparency in foreign exchange allocation processes;
- eliminating price controls and poorly targeted subsidies which, by lowering the price of goods below their market values, create artificial scarcities and parallel markets;
- simplifying regulations in order to reduce the scope for bureaucratic discretion (e.g. in customs administration);
- increasing transparency in the allocation of land-use permits and in the zoning of land;
- reducing excessive levels of taxation where they create incentives for tax evasion and fraud and eliminating the use of discretionary authority in tax administration and enforcement which encourages corrupt practices;
- ensuring that fiscal and tax rules do not permit bribes or other illicit payments to be treated as deductible expenses for tax purposes.

Management of services provided in the public interest

Improving the management, efficiency and delivery of public services should be an essential element of any national strategy to enhance governance and reduce corruption. When services are provided in an efficient manner, fewer opportunities for corruption arise as citizens are no longer required to compete, often by way of paying bribes, for scarce and inefficient services. In view of the increasing trend towards contracting out and/or privatising services previously provided by the State, measures to improve management and efficiency should encompass all those who have responsibilities for providing goods and services in the public interest.

The main areas to be covered are described below.

The public service and providers of public services

A merit-based, professional and non-partisan civil service which is appropriately sized and well-motivated is of critical importance. Over-

sized public administration systems, with bloated and poorly paid bureaucracies, engender corruption. Down-sizing alone is not enough, but should be complemented with merit-based recruitment and promotion, career growth policies and incentives to retain the better performers within the civil service. Civil servants need to be adequately paid if they are to maintain the probity, professionalism and integrity that should be required of the public service. They should also be free from political interference.

The rule of law should apply to all those involved in the administration and provision of services in the public interest, as it does to the whole of civil society. Those holding offices of trust need to be bound by well publicised Codes of Conduct with appropriate sanctions for breaches that are enforced consistently and vigorously. These Codes should, *inter alia*, cover: standards of integrity, potential conflicts of interest, acceptance of gifts, misuse of information for personal gain, and disclosure of assets and financial interests. Ethical standards should be promoted – through education and training where necessary – which instil pride in the virtues of integrity, professionalism, efficiency, transparency and impartiality in the public service.

Financial management

Sound financial management systems are essential tools of good governance, which enable governments to set macroeconomic targets, to allocate resources and to implement programmes and projects efficiently. Processes for budget preparation, execution and monitoring need to be open and transparent. Clear procedures and criteria should be used for developing public investment programmes and projects, including those by public enterprises, and for allocating recurrent expenditure budgets. There should be rigorous accounting, financial reporting and auditing systems covering all public programmes and investments. Public accounts should be subject to scrutiny by appropriate bodies such as parliamentary committees and Auditors-General. Timely compliance with auditing requirements is important to ensure the legitimacy of public expenditures. Where audits indicate deficiencies or are themselves unsatisfactory, prompt remedial action should be taken. Auditors-General, or other supreme auditing authorities, should be sufficiently independent to allow open criticism of government finances. Countries should be encouraged to adopt codes of fiscal transparency based on the model provided by the "The Code of Good Practices on Fiscal Transparency – Declaration of Principles", adopted by the IMF's Interim Committee in April 1998.

It is also important for countries to have effective regulations for their

financial sectors (including private financial institutions and parastatals), that reduce opportunities for corrupt practices. The key aspects of a sound financial system include transparency of the financial system; competent management; effective risk control systems; adequate capital requirements; prudential regulation; supervisory authorities with sufficient autonomy, authority and capacity; and effective supervision of cross-border banking, which is also important in combating money laundering.

Public procurement

Transparency in government procurement practices is not an established norm in many countries. Corruption is widespread, both in the award of contracts and during their implementation. Governments should be encouraged to review their procurement practices and to develop comprehensive guidelines of their own, with transparent processes to cover contracts for goods, civil works and services, and criteria for using all types of procedures ranging from prudent shopping to national and international competitive bidding. In order to increase efficiency, probity and economy in public procurement, governments should adopt standard bidding documents, establish processes for public bid opening, set objective criteria for bid evaluation, and institute a system for the review of awards. The collection and dissemination of data on public procurement prices of goods and services of similar specifications, which are procured by different agencies regularly in large quantities, can have substantial and prompt effects in reducing corruption. An accountable and reviewable process for the black-listing of contractors guilty of resorting to corrupt practices can be a particularly effective anti-corruption weapon.

The judiciary and the legal system

Countries need effective institutional arrangements to resolve disputes between citizens, corporations and governments; to clarify ambiguities in laws and regulations; and to enforce compliance. The rule of law in a country is of vital importance for economic, social and political development. Inherent in the concept of the rule of law are the notions of impartiality, fairness and equality. Strengthening the rule of law will, *inter alia*, require the following actions.

The judiciary

Entrenching an independent judiciary
An independent and competent judiciary, which is impartial, efficient

and reliable, is of paramount importance. This requires objective criteria for the selection and removal of judges, adequate remuneration, security of tenure, and independence from the executive and legislative branches of government.

However, judicial independence does not imply a lack of accountability. Judges should act properly in accordance with their office and should be subject to the ordinary criminal laws of the land. There should be procedures to discipline or dismiss them if they act improperly or otherwise fail in the performance of their duties to society. These procedures should be transparent and administered by institutions which are themselves independent and impartial.

Strengthening the legal system

Compliance

Vigorous application and enforcement of existing laws and prosecution of offenders is essential if the rule of law is to be respected. Although most countries have at their disposal a wide range of laws which can be used to combat corruption, these laws are often under-utilised and, at times, even ignored. Governments should seek to make effective use of existing criminal and civil laws to obtain the appropriate remedy in each case.

Investigative, policing and prosecutorial services which remain weak in many countries, need to be enhanced to ensure compliance with the law. Independent anti-corruption agencies such as ombudsman offices, inspectors-general, and anti-corruption commissions can be effective if they are genuinely free from being influenced by the executive branch of government and where there is a strong judiciary in place.

Enforcing criminal law

As the nature and prevalence of corruption has grown, laws against corruption may need to be strengthened to provide a meaningful deterrent, and complemented in several ways:

(a) Both active and passive corruption should be made criminal offences, comprehensively covering the holders of all offices of trust.

(b) Criminal law should provide for the seizure and forfeiture of the proceeds of corruption.

(c) There should be legal provisions to protect witnesses and whistle-blowers in cases involving corruption.

(d) Statutes which permit investigators and prosecutors to base criminal proceedings on the discovery of significant increases in the

assets of the holder of an office of trust, which cannot be reasonably attributed to lawful sources of income, can be of great assistance.

(e) The laundering of the proceeds of corruption must be criminalised and laws which provide for the granting of assistance (either extradition or mutual assistance in criminal matters) to other countries investigating or prosecuting money laundering offences must be available to ensure effective international co-operation to combat money laundering.

Civil, administrative and regulatory laws

(a) The civil law is the source of many remedies which can be used to combat corruption. For example, the use of damages awards and the facility to void contracts may be appropriate in many cases.

(b) Administrative action, such as the use of disciplinary procedures, can contribute to the battle against corruption and ease over-burdened court systems by dispensing appropriate sanctions. Relatively minor offences can be dealt with effectively through disciplinary bodies such as public service commissions.

(c) Regulations requiring declarations of assets and financial interests by holders of offices of trust, which might give rise to potential conflicts of interest, can enhance the integrity of service providers and reduce the opportunities for corruption.

(d) Non-criminal laws such as those providing for disqualification of directors guilty of improper conduct in the management of corporations, and the regulation of financial institutions to prevent money laundering, can be useful.

Civil society

Civil society should be seen as an independent and creative partner in the development of effective coalitions to improve governance and combat corruption. Beyond periodic electoral processes, governments that can regularly consult, collaborate with, and listen to, their citizens are better able to develop national ownership of policies and the political will required to pursue anti-corruption programmes. Important factors that enable civil society to play an effective role are:

- **Freedom of association**: Citizens should enjoy the right to establish organisations around particular interests (e.g. professional and business associations, labour unions) to pursue general or specific social, economic or political objectives. Such associations can often act as critical watchdogs of the integrity of service providers.

At the local level, grassroots community organisations, co-operatives and local non-governmental organisations (NGOs) can help the poor and marginalised to get their voices heard in the corridors of power.

- **Freedom of the press and media**: Transparency in any society requires information to be available freely in the public domain. A free and competent press is essential in this process, and is critical to the success of anti-corruption strategies. Freedom of the press and media calls for access to information; the absence of government controls or censorship (except where national security issues are involved); the liberty to express views; and sufficient financial independence to resist control of editorial policy and news coverage. Civil society should promote genuine competition in the media market-place to ensure diversity of ownership, so that alternative outlets can provide a broad range of views on public policy issues. In situations where the media itself may be corrupt or susceptible to corruption, adherence to high standards of integrity in journalism should be promoted, along with the development of professional well-informed media, through self-regulation and training.
- **Information technology**: Advances in information technology help to increase civil society's access to new sources of information and channels of communication, including foreign publications and broadcasts.
- **Research and analysis**: The development by civil society of independent public policy research institutes and think-tanks can provide increased domestic capacity to analyse deficiencies in the system of governance. Such bodies can help to study the particular types of corruption in a country, and identify country-specific remedial options.

International Actions

With the increasing globalisation of corruption, several international fora and agencies including the UN General Assembly, the OECD, the IMF, the World Bank, the OAS, the European Union, the Council of Europe and the International Chamber of Commerce, have mounted initiatives to improve governance and combat corruption. These include conventions to limit corruption in transnational business and stronger anti-corruption programmes by international financial institutions and aid agencies. These efforts are important and have the poten-

tial to lead to significant results. There are, however, gaps in their coverage, and continuing weaknesses in policies and practices, which need to be addressed. In addition, there are some special areas that require further international action.

International initiatives against corruption

At present, there are three international legally binding conventions against corruption: (i) The 1996 Inter-American Convention Against Corruption, a regional OAS initiative, that covers active and passive corruption as well as illicit enrichment; (ii) The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which focuses on active bribery of foreign public officials; (iii) The 1999 Council of Europe's Criminal Law Convention on Corruption, which covers active and passive bribery of domestic and foreign public and private sector officials, as well as judges and members of public assemblies.

Except for the OAS Convention, these initiatives have been promoted by the major developed countries and do not correspond fully to the needs of developing countries. The battle against cross-border corruption should be joined by all nations, both developed and developing, from all parts of the world. This calls for the mobilisation of international support for a global compact against corruption, negotiated under the auspices of the United Nations with universal participation, which builds on the positive elements of existing conventions and other regional and international initiatives.

Programmes of international financial institutions and aid agencies

The IMF, the World Bank, the regional development banks and bilateral aid agencies have for many years been aiding countries in improving governance through policy advice, technical assistance, institutional reform and capacity building. As corruption has become increasingly a part of the debate on aid effectiveness, aid agencies have taken on stronger anti-corruption programmes. The World Bank has adopted new anti-fraud/corruption procurement guidelines, and improved disbursement and financial auditing procedures. The IMF is taking a more pro-active stance and has adopted guidelines for promoting good governance ("A Guidance Note on The Role of the IMF in Governance Issues" was approved by the IMF's Executive Board in July 1998). Both the Bretton Woods institutions are beginning to take corruption explicitly into account in defining their country

assistance programmes. Several bilateral donors are designing programmes to assist nations in their anti-corruption efforts. Areas in development assistance that need added scrutiny and further action include greater transparency and accountability, conditionality, procurement and bilateral aid practices.

Transparency and accountability

International financial institutions need to be more transparent in their operations, objectives and decision-making processes. There has been greater openness in the past few years and the recent discussions on a new international financial architecture may lead to further progress. To increase national ownership and public participation in reform programmes, key documents such as Policy Framework Papers, Letters of Development Policy and Letters of Intent should be more systematically released by borrowing countries and widely disseminated via the Bretton Woods institutions, unless there are valid reasons for non-disclosure.

There should be a more open acknowledgement by donors and international financial institutions of their share in the responsibility for the outcomes of the country programmes they help design and for the policy advice they give. When these outcomes are not satisfactory because of flaws in programme design and policy advice, these deficiencies should be rectified and additional financial assistance should be provided.

The staff of lending agencies should be subjected to greater scrutiny and internal accountability.

Conditionality

Domestic ownership and political will to implement measures to improve governance and reduce corruption are paramount. Measures imposed externally as conditions of financial assistance are rarely effective. However, the availability of external funding (both project and non-project related) has the potential to encourage corrupt practices. Hence, the levels of corruption in recipient countries should be taken into account in determining the quantum and direction of external funding/assistance. Where it is necessary for international financial institutions to take up issues related to governance and corruption in their policy dialogue with countries and in the development of country assistance strategies, this should be done in a manner that is consistent with their mandates. Reforms agreed with the IMF and the World Bank to improve governance and reduce corruption should take account of a country's capacity to implement them within realistic time-frames.

"Floating Tranches", which have been adopted recently in several World Bank structural adjustment loans, should be used more widely to enable governments to sequence reform measures in the light of local circumstances without holding up entire programmes.

To promote local ownership of reforms, foreign donors should agree with governments on the objectives to be achieved, identify alternative paths for meeting these ends, but leave the route to be selected to the government concerned.

The IMF should be even-handed by raising issues related to transparency, governance and corruption in developed countries when exercising its surveillance function, as it does in developing countries when it is financing programmes.

Procurement

All international financial institutions, multilateral development banks and multilateral agencies providing development assistance should be encouraged to strengthen their procurement guidelines along the lines of the anti-fraud/corruption provisions of the World Bank's 1996 guidelines on procurement. These provide strong sanctions against borrowing countries and firms that engage in corrupt practices, including rejection of contract awards or cancellation of loan funds, and making corporations judged to have engaged in fraudulent or corrupt practices ineligible for future Bank-financed projects (i.e. blacklisting). They also require bidders to disclose commissions made to agents.

Practices of agencies providing bilateral development assistance

Bilateral development assistance agencies should be encouraged to adopt the anti-fraud/corruption provisions of the World Bank's 1996 procurement guidelines and to utilise similar standard bidding documents.

Since the tying of aid to procurement from a donor country reduces the scope for competitive bidding and increases the incentives for corrupt practices, tied aid should be reduced.

Supplier credits should be carefully monitored as they often involve projects with little equity by the promoters, which increases the scope for corrupt payments.

As part of the negotiations on the OECD Convention, a separate resolution was adopted in 1996 calling on member countries which allow the tax deductibility of bribes to foreign public officials to re-examine their tax laws, with a view to denying this deductibility. All donor countries that have not already done so should amend their tax laws accordingly.

Special areas requiring further action

Monitoring of corruption

The monitoring of corruption and the ranking of countries based on perceptions of levels of corruption prevailing in them by some NGOs (e.g. Transparency International), has raised awareness of the problem of corruption globally. However, it is important to improve the methodological basis for such quantitative assessments. Moreover, bearing in mind the 'supply/demand' dimension of corruption in international business transactions, it would be useful to rank multinational corporations and their subsidiaries in terms of their track records on corruption, thus providing exposure of those known to be engaging in corrupt practices.

The arms trade

It is difficult to determine how the arms trade is financed, e.g. through military aid, debt creation, compensatory trade offsets or cash transactions. The secrecy that surrounds the international arms trade often encourages corruption in these transactions. There should be much more transparency in the trade. This could be achieved through:

- wider and more detailed reporting of arms trade transactions in the UN arms register;
- a new international code of conduct for the arms trade, requiring the disclosure of far greater information than is currently provided by all the parties involved;
- the inclusion of specific clauses in arms sales contracts that reduce the role of middlemen and ban illegal commissions.

Money laundering

The endorsement by Commonwealth Heads of Government of the 40 Recommendations of the Financial Action Task Force of the OECD, which are designed to combat money laundering through the use of the criminal law and effective regulation of the financial sector, should be replicated globally to ensure that money laundering is tackled on the broadest possible front. As money laundering becomes a global phenomenon, the formation of multi-disciplinary regional groups, such as the Caribbean Financial Action Task Force and the Eastern and Southern African Money Laundering Group, should be encouraged in order to strengthen anti-money laundering measures. The following points should also be considered:

- Additional international efforts are required to pursue illicit funds to numerous offshore financial centres, located in developed and

developing countries, which make corruption less risky since the proceeds can be hidden overseas.

- Stronger mechanisms are required to enable the expeditious repatriation of the proceeds of corruption.
- The extent to which countries with large parallel economies are vulnerable to money laundering should be the subject of studies in order to determine appropriate counter-measures.
- Global efforts to assess the effectiveness of anti-money laundering strategies should be enhanced.

Commonwealth Actions

In addition to actions taken at national levels, the Commonwealth can also act collectively to improve governance and combat corruption in several ways.

(i) The Commonwealth's commitment to promote good governance and fight corruption should be credible, tangible and visible. As a first step, Heads of Government should consider adopting a Declaration that commits the Commonwealth to specific principles, standards and goals. In order to ensure that the momentum of such a high-level political initiative is maintained, the Declaration could provide for the establishment of a mechanism/process to facilitate its implementation as well as periodic reviews of progress (say, biennially, coinciding with CHOGMs).

(ii) At the same time, the Commonwealth should also support the development of a truly global compact against corruption that would fill gaps in existing instruments and be universal in its scope, thus creating a level playing field for all countries. For this purpose, in consultation with other interested parties, it could work for the initiation, under the auspices of the United Nations General Assembly, of time-bound negotiations for a universal, legally binding inter-governmental convention against corruption. Such a convention would require all signatories to abide with minimum standards and rules (in the case of non-state actors these would apply through legislative and other measures adopted by governments) to foster good governance and fight corruption. These standards and rules should be general enough to accommodate diversity in political, economic, socio-cultural and legal systems, but without compromising the basic policy objective of

zero-tolerance for all types of corruption. Pending the adoption of a global convention, countries should be encouraged to become parties to existing anti-corruption conventions that are appropriate to their needs and circumstances.

(iii) The Commonwealth should ensure that maximum use is made by member countries of its existing and proposed Schemes of Co-operation in the Administration of Justice, and that these Schemes are kept under active review in order to meet the needs of countries seeking to combat corrupt practices.

(iv) The Commonwealth should work with other international agencies to develop effective standards to ensure that all offshore financial centres in all parts of the world are not used to launder the proceeds of corrupt practices.

(v) Given the economic, social, and political benefits to be gained through Commonwealth co-operation, the Commonwealth Secretariat should be given additional resources to enable it to:

- assist member countries, when requested, with policy advice and technical support to design their own anti-corruption strategies;
- compile and disseminate information on emerging good practice in combating corruption and improving governance in key areas, such as the funding of political parties, economic reforms and judicial reforms.

Report of the Commonwealth Expert Group on Good Governance and the Elimination of Corruption

Report of the Commonwealth Expert Group on Good Governance and the Elimination of Corruption

Introduction

The main focus of this Report is on corruption in economic management. It provides an overview of the nature of corruption, its different dimensions and appropriate responses to deal with the problems it poses. The Report sets out the actions that are necessary at the national and international level, respectively, to combat corruption. The role of the Commonwealth is also examined.

Corruption: Causes, Costs and Responses

Corruption is generally defined as the abuse of public office for private gain. As the scope of corruption has widened, this definition has been enlarged to cover the abuse of all offices of trust for private gain, whether in the public or private sectors. Corruption manifests itself in various ways and it is useful to distinguish between personal corruption (motivated by personal gain) and political corruption (motivated by political gain). A further distinction can be made between individual corruption and organisational or institutional corruption. In the context of the State, corruption most often refers to criminal or otherwise unlawful conduct by government agencies, or by officials of these organisations acting in the course of their employment.

The significance of institutional corruption can be understood only if it is clearly distinguished from individual corruption. There are tendencies in all cases of corruption to individualise misconduct, and at the same time to institutionalise it. These two tendencies may appear to be opposites, but the latter tendency is also perpetrated by those accused of misconduct, either by excusing misconduct or by justifying it as an institutional privilege.

Corruption has become global in its scope, impact, and possible solutions. It is an increasing threat to the fabric of global society. As with drug trafficking, pollution, international terrorism and other serious crimes, the fight against corruption requires international co-operation.

While the problem of corruption is global, many actions to combat it have to be taken at the national level. There cannot be any effective action against corruption without a clear sense of national ownership of anti-corruption strategies. A new culture must evolve which is intolerant of corruption. Greater information, education, empowerment of people, and above all, strong political leadership committed to effective action are essential to create and sustain such a culture. Smaller and more efficient government, fewer discretionary powers in administration, greater reliance on diversity and private initiative, a free press and other media, well-paid civil servants appointed by merit, democratic processes in political parties and supremacy of the rule of law, are all important factors that serve to promote good governance and reduce corruption.

Forceful national action to combat corruption is possible in all countries. The policy should be "zero tolerance" for all types of corruption. This policy must permeate value systems, current policies and legislative frameworks. While it may be unrealistic to expect an immediate or total elimination of corruption, the policy of "zero tolerance" should be adopted from the outset, demonstrating a serious political commitment to pursue the fight against corruption. The implications of such a commitment are spelt out in this Report and imply, in the final analysis, the development of a general culture of intolerance for all types of corruption, including corruption at the highest levels. National efforts should be reinforced with appropriate support at the international level. Corruption originating within national boundaries and that resulting from international transactions should be fought with equal vigour.

Actions taken should focus not only on corrupt activities, but also address their underlying causes. Since these differ from country to country, national circumstances should be taken into account in combating corruption. It is also important to recognise that corruption is not necessarily associated with any particular type of political/social system, form of government, or level of economic development.

Although the political barriers to change may sometimes seem formidable, governments can often be expected to respond to public concerns and to reasoned argument. However, in extreme cases, where corruption is so pervasive and deeply entrenched, the adoption of a vigorous "zero tolerance" approach will be difficult. In such situations, the achievement of any progress may depend upon fundamental political change brought about by internal democratic forces.

Political commitment is not primarily a matter of the personal character of leaders. It is more an outcome of political culture and the effective-

ness of political institutions. In some cases, corruption has become the primary means of funding political parties, as well as the personal enrichment of political leaders. This is particularly pernicious when there is a failure to differentiate between the wealth of leaders and the funds of political parties. In such cases, major reforms will be needed including the reform of elections, controls over party spending and full disclosure of financial contributions to political parties. This would require political parties to maintain and publish proper accounts and to designate clearly the officials responsible for these accounts.

The costs of poor governance and corruption

Poor governance and corruption are major constraints to the pursuit of economic development:

- bribery increases the costs of government development programmes and spawns projects of little economic merit;
- corruption undermines revenue collection capacity, contributing to fiscal weaknesses and macro-economic difficulties;
- perceptions of high levels of corruption and rent-seeking act as a strong disincentive to genuine foreign investors, while attracting more dubious enterprises[1];
- diversion of resources from their intended purposes distorts the formulation of public policy;
- the use of bribes to gain access to public services undermines stated allocation priorities, benefiting the few at the expense of the many;
- bribery can subvert essential public regulatory systems;
- widespread corruption brings government into disrepute and encourages cynicism about politics and public policy.

One area of special concern is the impact of widespread petty corruption on the poor. The intention of public programmes to provide the poor with access to land, education, health and the legal system will be thwarted if bribery determines the allocation of these resources and services in practice. Petty corruption reinforces existing economic and social inequalities at the local level. Such corruption is politically costly because it undermines the credibility of government and public institutions.

1 The term, "rent-seeking", is used in the Report in the context of corruption and does not mean that all forms of rent-seeking are corrupt, e.g. competitive positioning by businesses in order to gain a temporary source of above-normal profits (or economic rents).

The costs of corruption are particularly high for those poor countries in great need of inflows of productive foreign capital. Widespread corruption provides a poor environment in which to attract foreign investment, discouraging those investors most likely to make a long-term contribution to development, and encouraging those who seek quick profits through dubious ventures. Corruption in aid programmes reduces their benefits to recipients and undermines public support in donor countries for their continued funding. Where programmes are funded through loans, the burden of external debt may be increased without a commensurate social return. There is a strong case for a co-operative international effort to improve the investment environment, thus increasing both the quantity and productivity of resource transfers.

The systemic causes of corruption

While corruption has many causes, it is strongly inter-related to poor governance. Failures in economic policy create rent opportunities, and weaknesses in public administration result in a decline in the probity of public servants and inadequate legislative oversight of government. All of these factors contribute to an environment favourable to the growth of corruption. In turn, corruption erodes the authority and effectiveness of public institutions. It becomes a prime cause of weaknesses in governance and sustains rent-seeking vested interests which act as a barrier to reform. Improvements in the effectiveness and transparency of economic policies and administrative reform can contribute powerfully to the fight against corruption as well as enhance governance. More generally, it is vital to achieve greater transparency and accountability in conducting all government business in order to instil public confidence in public institutions.

Inappropriate controls that encourage the exercise of undue political or administrative discretion create rent-seeking opportunities, as do inappropriate pricing policies which encourage the development of parallel markets. Excessive levels of taxation increase the incentive for tax fraud and the bribing of tax authorities. Poor fiscal management and inadequate government personnel policies (in areas such as recruitment, promotion and remuneration) result in declining efficiency in the public sector. Improvements in economic and fiscal management as well as in personnel management policies are therefore key components of a strategy to enhance government capacity.

However, even when inefficient economic controls are eliminated and excessive tax rates are reduced, governments will still engage in a large number of economic activities involving transactions with the private sector. These range from taxation, government procurement of goods

and services and delivery of public services, to transport, health and environmental regulations. Even if the reduction of rent-seeking opportunities reduces the scope for corruption, the normal range of government business leaves ample scope for the bribery of public servants. Furthermore, the transition to reform may itself pose difficult challenges to governments and create new incentives for corrupt behaviour. The process of privatisation, for example, creates opportunities for illicit gains, if the transfer of assets takes place in a non-transparent fashion. In designing and implementing economic policy reforms, it is also important to encourage transparency in business practices and establish level playing fields for domestic and foreign investors. Corruption in the private sector can cause as much harm to the health of the economy as corruption in the public sector. It must also be recognised that the distinction between the two sectors is becoming increasingly blurred.

The diversity of corruption

In some societies, corruption exists but is not pervasive enough to affect resource allocation decisions significantly. In other societies, corruption has greatly distorted government programmes and undermined the effectiveness of public interventions. Corruption can occur at all levels, from pay-offs at the top of the system, to "petty corruption" by way of bribes to local officials for the delivery of services and to evade regulations. In some cases, the gains from corruption may be siphoned off to foreign bank accounts, while in other cases proceeds are "recycled" in the local economy. However, despite its diversity, corruption always involves social and economic costs, erodes the credibility of public institutions and engenders public cynicism.

Corruption and political systems

While the inter-relationship between corruption and the broader governance agenda must be recognised, any facile conclusions regarding the relationship between corruption and any particular set of political institutions should be avoided. There are many examples of corrupt practices that feed upon multi-party political processes, just as there are authoritarian regimes which have relatively "clean" records of economic management.

The need for national anti-corruption measures

The fight against corruption should go hand in hand with more general efforts to improve economic governance. However, success in more general reform efforts should be seen as neither a necessary nor sufficient

condition for eliminating corruption, nor should the difficulties to be overcome in implementing broad-based reforms be used as an excuse for delay in tackling corruption. Furthermore, even in an otherwise well ordered system of governance, corruption can thrive in the absence of effective vigilance and enforcement. Sustained action is required at two levels to address the root causes of corruption and tackle all its manifestations:

- systemic reforms, which target the underlying weaknesses in policy, administration and politics, and create an environment conducive to the elimination of corruption;
- specific, focused national anti-corruption strategies.

In mounting a serious national anti-corruption programme, the first step of securing a strong commitment at the highest political level to fight corruption is often the most difficult hurdle. When corruption is widespread, particularly where it involves the political establishment, this may involve serious political risks, despite popular support for cleaner government. One solution may be an amnesty for corrupt acts committed in the past, combined with an explicit code of conduct, spelling out minimum standards of universal applicability, which will be enforced vigorously from the start of the new anti-corruption programme.

Popular mobilisation against corruption

The most potent force in the fight against corruption is the widespread resentment of corrupt practices and popular support for firm action. Anti-corruption programmes need to be designed to meet the expectations of citizens and with public participation. They are likely to be more effective when they are built on the foundation of popular empowerment, nationally owned and designed to meet national circumstances.

The private sector and civil society

The concept of good governance extends beyond government. Although an anti-corruption strategy usually focuses initially on preventing the use of public office for private gain, support could be enhanced if the dangers of unethical practices in the private sector and non-governmental institutions are more widely appreciated. Corrupt behaviour (e.g. by corporate purchasing agents, or in job recruitment) can be as destructive of the performance of businesses or of non-governmental organisations (NGOs) as it is of government. Private corporations, NGOs and all other sectors of civil society have a stake in combating a culture of corruption. Moreover, even where governments

are less than enthusiastic in tackling corruption, popular support and the agencies of civil society can still be mobilised in support of an anti-corruption agenda.

The need for an international response

There is a strong case on a number of grounds for international co-operation in fighting corruption:

- countries embarking on an anti-corruption strategy can learn from the experience of those that have already had some success in reducing corruption; furthermore, international co-operation can reinforce national efforts to combat corruption;
- in a globalised economy, transactions across borders are of increasing importance, but are often difficult to monitor by national authorities acting alone;
- international transactions may sometimes provide a conducive environment for corrupt practices, where actors are willing to engage in dubious practices abroad that would be unacceptable at home;
- international financial transactions provide opportunities for the laundering of financial gains from corrupt practices.

Given the global nature of corruption, there should be no double standards. Anti-corruption measures should apply equally to rich and poor countries. They should target those who are directly guilty of corrupt behaviour, as well as those who facilitate corruption (e.g. by providing money laundering opportunities). They should penalise both bribers and bribees (i.e. those who offer, as well as those who accept, bribes).

National Actions

Under the over-arching policy objective of "zero tolerance", specific measures are required to **prevent** corruption, **enforce** laws against it and **mobilise public support**. These should be the sinews of coherent national strategies to achieve good governance and combat corruption. A general approach to the formulation of such strategies is set out below, but specific programmes reflecting national realities and circumstances will be required to translate such a general approach into practice. The Expert Group therefore proposes that each Commonwealth government should develop its own national good governance and anti-corruption strategy, which should identify clear objectives, effective

instruments, realistic timetables and credible implementation and monitoring mechanisms.

The Commonwealth should render technical assistance in the development of such strategies and promote exchange of experience in close collaboration with UN programmes, the Bretton Woods Institutions, the Organisation for Economic Co-operation and Development (OECD), Transparency International and other relevant agencies. In designing national strategies, care should be taken to respect different cultural, moral, political and social environments, provided these are not inconsistent with the objective of achieving "zero tolerance". The initiative for strategy development and the choice of goals should lie with national authorities and not be externally imposed.

National strategies should encompass both the public and private sectors. Corruption in the private sector (e.g. in the operation of financial markets) can be as corrosive to economic performance as public sector corruption. Moreover, public sector corruption typically involves actors from the private sector. A national culture opposed to corruption requires high standards of behaviour from all sections of society, but especially from political leaders.

Effective national campaigns against corruption need support from the highest levels of government and implementation of the strategy requires high-level co-ordination. Hence, an important first step in developing national strategies is for the political leadership to recognise that corruption in both the public and private sectors has heavy economic and political costs and that, no matter how deeply embedded it is, it is possible to adopt effective measures against it, provided there is sufficient political will.

Key Reforms in Governance and the Fight Against Corruption

The main building blocks

While the content of national strategies will vary, depending on national circumstances, there are three main building blocks for effective strategies: prevention, enforcement and the engagement of civil society.

Prevention should address underlying causes of corruption, particularly those arising from failures of public policy and weaknesses in political and administrative institutions. Economic policy reform to reduce rent-seeking opportunities; civil service reform to improve the effectiveness and probity of the public service; reforms in tax policy and administra-

tion; tightening of controls over public expenditure; and reforms in the political system, are all important ingredients of a prevention strategy.

An important contribution to prevention can be made by strengthening transparency in economic management, through:

- full disclosure and examination of government finances, especially by parliamentary scrutiny;
- strengthening of parliamentary public accounts committees;
- the use of open competitive bidding for government contracts;
- publication of full information on the reports of government auditors and evaluations of development projects;
- media access to information on government finances;
- full disclosure of assets by government leaders and their families;
- setting international financial agreements before the legislature (including arms procurement) and establishing clear guidelines for fiscal discipline;
- establishment of mechanisms for public exposure where the above do not occur.

Prevention should concentrate not only on the behaviour of the holders of offices of trust, but also aim to affect the behaviour of those who offer bribes. A code of practice for private business should spell out what is a corrupt practice, and what is legitimate business promotion. Acceptable practices in relation to business sponsorship of public activities (e.g. sports and social events) and to the employment of public officials as consultants or in other capacities, while in office and after retirement, need to be spelt out. As with all regulation, prevention is more likely if lawful behaviour is widely accepted as the norm.

Enforcement involves firm action against corrupt behaviour at all levels. Since effective enforcement is dependent upon the competence and honesty of investigators, prosecutors and the judiciary, it is important to allocate sufficient resources to ensure the probity and effectiveness of these agents. The rule of law should apply to economic transactions, with equality and impartiality in the application of the law and in access to legal remedies. Any ambiguities in laws and regulations that create incentives for corrupt behaviour should be removed. Where the integrity of legal institutions has eroded, action to restore their credibility must come early in the implementation of a national anti-corruption strategy.

Mobilisation of popular support through the engagement of civil society and popular opinion is important in changing public mores, as well as in exerting pressure on governments (at both national and local levels) to take the necessary actions to prepare and implement anti-corruption programmes. Perhaps the greatest potential force for reforms to combat corruption stems from public resentment of corruption and the burdens it places on citizens. This can provide an important basis of political support for anti-corruption actions, and challenge vested interests. Popular pressures can ensure accountability for the management of public resources, including accountability through the appropriate legislative bodies to the general public and, where external resources are concerned, to the international community.

Popular opinion can be activated and focused through the educational impact of the media and through the activities of NGOs; in particular:

- the freedom of the press and of other media contributes to public awareness of corruption and its consequences;
- the commitment of governments to freedom of expression and association is therefore a critical factor in creating conditions which are conducive for improving governance and eliminating corruption;
- in situations where the media itself may be corrupt or susceptible to corruption, adherence to high standards of integrity in journalism should be promoted, along with the development of professional well-informed media, through self-regulation and training.

NGOs concerned with governance and corruption (e.g. Transparency International) should be encouraged in their efforts to create a presence and raise awareness at the national level. Governments should be encouraged to recognise and respect the positive contribution of national NGOs which campaign on corruption issues.

Action against corruption should not await the implementation of other complex reforms. Parallel actions to improve economic management, administration and the political process could greatly improve the prospects of success in combating corruption. Key reforms which would contribute to the fight against corruption include:

- **Economic reforms** which reduce rent-seeking opportunities. Reforms can reduce bureaucratic controls that allow undue scope for the exercise of administrative discretion, as well as simplify economic regulations. They can also remove policy-induced scarcities (which create parallel markets and incentives to bribe

to gain access to scarce goods and amenities). It goes without saying that these reforms in no way imply the abandonment of the regulatory role of the State in conducting the ordinary business of government.

- **Fiscal reforms**, which increase the efficiency of the public sector, thus permitting adequate funding of public services. Privatisation can have beneficial consequences but it should be principally driven by considerations of efficiency.
- **Reform of subsidised public lending programmes** which readily become a vehicle for corruption. This may be achieved through better targeting as well as transparency in the operation of the programmes, by changing and strengthening the criteria for entitlement and reducing reliance on political/administrative discretion in their operation. It is understood, of course, that public policy may dictate subsidised lending programmes in particular circumstances without prejudice to the pursuit of sound fiscal policies.
- **Reforms to improve the management, efficiency and delivery of public services**. In view of the increasing trend towards contracting out and/or privatising services previously provided by the State, measures to improve management and efficiency should encompass all those who have responsibilities for providing goods and services in the public interest.
- **Civil service reform**, which restores the morale and integrity of the public service through merit-based recruitment and promotion, and reduces the size and tasks of public administration to levels consistent with available fiscal resources, thus making it easier to enhance emoluments and reward good performance.
- **Legal reform**, which commits sufficient resources to the judiciary, investigative and prosecution services, ensures the autonomy of the judiciary from political interference, and demands high standards of honesty and commitment in recompense.
- **Local government reforms**, for the purpose of empowering people to combat corruption; ownership of national action would not be complete without the empowerment of people and strengthening of civil society.
- **Monitoring of privatisation** to ensure that the transfer of public assets does not create opportunities for the illicit accumulation of wealth.
- **Opening up** the administrative and political systems to greater public scrutiny through parliamentary enquiries and freedom of

information provisions, with the aim of bringing public pressure to bear on political and economic decision-makers to maintain high standards in public service.

- **Reforms in the funding of political parties**. While rules on funding will vary depending upon national circumstances, in general, it is important that they should serve to prevent conflicts of interest and the exercise of improper influence, preserve the integrity of democratic political structures and processes, and enshrine the concept of transparency in the funding of political parties by requiring the declaration of donations exceeding a specified limit.
- **Capacity building** to enhance the capacity of core economic management institutions (e.g. ministries of finance, revenue collection agencies and auditor-generals' departments).

Some aspects of economic reform, while ultimately having the potential to reduce corruption, can create additional opportunities for misappropriation of public resources during the implementation phase. Thus, privatisation programmes, intended to reduce the scope for public sector rents, have themselves provided opportunities for corrupt public servants to transfer public assets illicitly. Fiscal stabilisation, aimed at reducing disequilibrium in the economy, has often resulted in reductions of the real income of civil servants, consequently increasing pressures on them to seek illicit incomes. The introduction of multi-party politics, intended to promote pluralism and place governments under tighter public scrutiny, also increases the need for politicians to seek funds.

National anti-corruption strategies should define a longer-term programme, with some decisive short-term time-bound actions to ensure that there is credibility and continuity in the process of change. There is a need to move on a number of fronts simultaneously, but at varying speeds, as some reforms are easier to implement than others. In cases where corruption has fed on poor economic policies and fiscal imbalances, progress will be easier when certain basic economic reforms have been put in place, as a prelude to administrative reforms and the launching of an anti-corruption campaign. In other cases, political reform may have to be the first step in order to increase the likelihood of the political leadership finding the political will to sustain a national strategy.

Although the speed with which a meaningful programme can be formulated and implemented will vary, all governments should be encouraged to commit themselves to the policy objective of "zero tolerance" and to institute the first steps to formulate comprehensive and realistic programmes.

Role of the judiciary and legal system

The legal system is central to the effective implementation of a national anti-corruption strategy. The rule of law implies that legally defined procedures govern public economic management, rather than political favouritism or personal connections. The independence and integrity of the judiciary is of vital importance. Most Commonwealth countries formally guarantee the independence of the judiciary from political control, but a key factor is the integrity of the members of the judiciary. Where the judiciary is corrupt, a crucial first step in a national strategy is reform which restores its integrity and efficiency. This may require restructuring, training and committing sufficient funds to compensate members of the judiciary adequately and to provide them with the means of operating effectively. Similarly, the quality and integrity of those public agencies responsible for investigating corruption and prosecuting offenders needs to be ensured. Public prosecution should be supplemented by broadening access to the courts, with individuals and community groups being given the right to take legal action in the public interest.

Critical components of a strategy of legal reform should include:

- **Entrenching an independent judiciary**: Commonwealth Law Ministers, at their 1996 meeting, recognised that the protections enjoyed by judges, including financial independence and security of tenure, were an important defence against improper interference. However, judicial independence does not imply a lack of accountability, as judges should act properly and in accordance with their office, and there should be procedures to discipline or dismiss them if they do not. Such procedures should be transparent and publicly administered by institutions which are themselves independent and impartial.

- **Court systems**: An efficient court system is an essential component of an effective governance and anti-corruption strategy. The courts of all countries are, however, overburdened. A court system which is able to dispense unbiased and corruption-free justice requires the implementation of proper case management systems to minimise delay and ensure equal access to justice. Access to justice ought not to be for sale. Hence, it is important to ensure that court lists are not influenced by payments made to court staff, who should be rigorous in their adherence to anti-corruption codes of conduct.

- **Detecting and dealing with corrupt conduct**: Many countries have enacted laws which permit the investigation of persons whose apparent assets exceed their known lawful sources of

income. This permits relevant authorities (often anti-corruption commissions) to require persons to explain the sources of their assets and where the assets cannot be attributed to lawful acquisition, the person can be charged with a corruption offence. In addition to laws which criminalise corrupt conduct, laws which permit the confiscation of the proceeds of corruption are an essential weapon in the fight against corruption. It is also important to have legal provisions to protect witnesses and whistle-blowers in cases involving corruption.

- **Corporate liability**: Increasingly, Commonwealth countries are introducing the concept of corporate criminal liability, where corporations are involved in particular forms of criminal conduct or are used to facilitate or disguise criminal conduct.
- **Non-criminal legal remedies in corruption cases**: Effective anti-corruption legal strategies cannot rely on the criminal law alone. Civil, administrative and regulatory laws all have a place in a comprehensive strategy:
  - Civil law can provide effective remedies, but the civil law must be accessible and provide adequate protection to citizens' interests. Also, to permit the bringing of a civil law action there must be an identifiable victim or plaintiff[2]. The civil law can also be used, to supplement the criminal law, to facilitate recovery of assets from a public official who has benefited from the wrongful exercise of a public function (e.g. in cases where public officials purchase land in the knowledge of prospective re-zoning proposals which would increase the value of land).
  - In the sphere of regulatory law reform, laws relating to unfair competition and to the control of monopoly trading could be useful to fight corruption. Provisions which incorporate proper processes including the application of the rules of natural justice could permit: the exclusion of persons (natural and legal) from public tenders (blacklisting); withdrawal of licences to conduct business; prohibition of anti-competitive acts; and disqualification of company directors.

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2 Citizens can suffer injury where they: (1) are unjustly excluded from public tendering procedures; (2) lose legitimate earnings; or (3) are forced to pay higher prices as a result of corruption. Among the victims of corruption are unsuccessful competitors and state agencies. Members of associations could also be victims and, hence, class actions may be available in certain cases such as consumer or environmental protection organisations. The damages which may be claimed in an action based on corruption could relate to pecuniary and non-pecuniary loss and may include punitive or exemplary damages in certain cases.

- The Commonwealth principles (adopted by Law Ministers) on Co-operation between Business Regulatory Agencies have the potential to assist in the resolution of cases involving corruption which are dealt with under the laws relating to business regulation (rather than under the criminal laws).

- In cases involving petty corrupt practices, an appropriate remedy (certainly in "first offence" cases) could lie with disciplinary bodies such as public service commissions, rather than action through the courts. The rights of employees could be protected by appropriate appeals procedures. Administrative tribunals with jurisdiction to review decisions made by public officials and to order rectification in appropriate cases could also offer redress in cases involving abuse of office. Their mere existence places moral and professional pressure on public officials to act transparently and in good faith.

International Actions

In many instances, especially where corruption transcends national boundaries, national anti-corruption measures need to be reinforced with support at an international level, including co-operative law-enforcement initiatives against corruption (e.g. in the area of money laundering). There is a need for greater consultation on the international aspects of corruption on a genuinely multilateral basis, involving developed and developing countries, and a careful assessment of the degree to which international anti-corruption conventions designed to meet the needs of developed economies, also correspond to the requirements of developing economies. Most developing countries, with the exceptions of those who are members of the Organisation of American States (OAS), are not parties to the existing conventions. All developing countries should be able to participate effectively in the international campaign against corruption. This is particularly important in view of the increasing proportion of procurement under multilateral assistance which is sourced in developing countries, and the growing volumes of South-South trade and investment.

A number of international agencies have launched initiatives to address corruption and governance issues. In 1996, the United Nations (UN) General Assembly adopted a resolution on corruption, together with a Code of Conduct for Public Officials, which was intended to guide member states in their efforts against corruption. The following year, the OECD Convention on Combating Bribery of Foreign Public

Officials in International Business Transactions (the OECD Convention) was signed. It has since entered into force in many of the countries that have signed it. Other important initiatives include the Inter-American Convention against Corruption[3], the Council of Europe's Criminal Law Convention on Corruption[4], and the programmes for combating corruption adopted by the Bretton Woods institutions as well as by the United Nations Centre for International Crime Prevention, Office for Drug Control and Crime Prevention, and Interregional Crime and Justice Research Institute.

The World Bank has heightened its defences against corruption in its operations through new anti-fraud and corruption provisions in its procurement guidelines, improved disbursement provisions and strengthened financial auditing arrangements. The International Monetary Fund (IMF) is taking a more proactive approach to eliminate the opportunity for fraudulent activity and in 1997 adopted new guidelines for promoting good governance[5]. In addition, both the World Bank and the IMF are providing assistance to national authorities in designing measures to strengthen the financial integrity of government institutions. Initiatives have also been taken in the private sector. For example, in 1996, the International Chamber of Commerce adopted a report that proposed strict rules of conduct for corporate self-regulation. Since its establishment in 1997, the Commonwealth Business Council has, *inter alia*, been developing a Code for Good Corporate Governance.

One of the major goals of existing international instruments on corruption has been to ensure a "level playing field" for international corporations competing for business in developing countries (e.g. through the OECD Convention). There are gaps in the coverage of these initiatives and some continuing weaknesses in the practices of international and national financial institutions which fund aid and trade. Areas in which further effort is required include:

- **Funding of political parties** – the OECD Convention does not cover acts of bribery in relation to foreign political parties and it

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3 Adopted by the Organisation of American States in March 1996.

4 The Council of Europe had earlier developed 20 guiding principles which were adopted by the Council of Ministers in November 1997; in addition to the Criminal Law Convention on Corruption, a monitoring agreement is in place. The Council has also examined the role of the civil law (as opposed to criminal or administrative law) in combating corruption, and drafted a model code of conduct for public officials.

5 "The Role of the IMF in Governance Issues: Guidance Note", was approved by the IMF Executive Board in July 1997.

is not clear to what extent it might cover bribery of political party officials[6].

- **Laundering of the proceeds of corruption** – provisions relating to the laundering of the proceeds of corruption could be strengthened.
- **Offshore financial centres** – safeguards are needed to prevent them from being used to harbour the proceeds of corruption.
- **Balance in accountability** – aid and international lending agencies need to strengthen their procedures and rules in order to increase the internal scrutiny and accountability of their staff.
- **Shared responsibility for outcomes** – there should be a more open acknowledgement by donors and international financial institutions for their share in the responsibility for programmes which they help design and for the policy advice they provide.
- **Lack of balance in exposure** – at present, the main efforts (e.g. Transparency International's corruption index) to rank performance in relation to corruption seek to rank countries. There is no comparable effort to rank international corporations. In general, there is a need to direct the spotlight on the behaviour of these corporations[7].

It should be noted that developments currently underway may fill some of these gaps. The OECD's work on money laundering is at an advanced stage. The IMF and the World Bank are moving towards greater openness in their negotiations with their members. Both institutions and other donors have strengthened their financial and technical assistance in support of national efforts to improve governance and combat corruption.

Further movement in the direction of publishing the details of key international financial negotiations and mission reports by the international financial institutions would be welcome, as part of a process of increasing transparency that generates greater public information about policy issues and programme formulation. Governments should take advantage of the new openness to make maximum public disclosure of the contents of international financial negotiations and agreements.

6 The OECD Working Group on Bribery in International Business Transactions has under consideration five areas in which there may be gaps in relation to the criminalisation of the bribery of foreign public officials: bribery of foreign political parties, payments in anticipation of a person becoming an official, the money laundering of bribes, the role of foreign subsidiaries in bribery and the role of offshore centres.

7 Transparency International is currently developing the methodology for an Active Bribery Index, which would evaluate countries on the basis of their companies' propensity to bribe.

To increase public participation and national ownership of reform programmes, key documents such as Policy Framework Papers, Letters of Intent, and Letters of Development Policy should be published by the borrowing countries and widely disseminated, unless there are valid reasons for non-disclosure.

The results of monitoring and of operational evaluation by aid agencies and national governments should get maximum public exposure. The wider public dissemination of national and international reports on corruption should be encouraged, to increase public knowledge of the extent of corrupt practices and possible avenues for reform.

In line with its 1997 guidelines, the IMF should be even-handed by raising governance and corruption issues in developed countries when exercising its surveillance function, as it does in developing countries when it is financing programmes. Measures to improve governance and reduce corruption should be domestically owned. When they are imposed externally as conditions of financial assistance they are rarely effective. However, since the availability of external funding (both project and non-project related) has the potential to encourage corrupt practices, the levels of corruption in recipient countries should be taken into account in determining the quantum and direction of external funding/assistance. Where it is necessary for international financial institutions to take up issues related to governance and corruption in their policy dialogue with countries and in the development of country assistance strategies, this should be done in a manner that is consistent with their mandates. Reforms agreed with the IMF and the World Bank to improve governance and reduce corruption should take account of a country's capacity to implement them within realistic time-frames. "Floating tranches", which have been recently adopted in several World Bank structural adjustment loans, could be used more widely to achieve more effective timing and sequencing of reform measures without holding up entire programmes. To promote national ownership of reforms, donors should agree with governments on the objectives to be achieved, identify alternative paths to those ends, but leave the route to be selected to the government[8].

The work of Transparency International in monitoring global corruption is to be welcomed. Working with national governments, Transparency International is promoting "integrity workshops" which will help raise consciousness about corruption issues. Its proposals to collect data on public procurement costs of selected generic items also

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8 As recommended in the Report of the Independent Evaluation Group on the IMF's Enhanced Structural Adjustment Facility, January 1998.

warrant support. Transparency International's Corruption Perception Index should be improved by increasing its comprehensiveness, extending the data sources on which it is based, and providing some indication of trends over time. Monitoring should also be extended to include multinational corporations. Other credible international NGOs which are involved in monitoring corruption and campaigning against it also deserve international support.

It is difficult to determine how the international arms trade is financed, e.g. through military aid, debt creation, compensatory trade offsets, or cash transactions. The secrecy that surrounds the trade often encourages corruption in these transactions. Greater efforts are required to increase transparency and reduce corruption in this sphere.

Three actions would help to achieve this:

- a new code of conduct covering the international trade in arms, requiring the disclosure of far greater information than is currently provided by all the parties involved (the recipient government, the arms suppliers and their governments)[9];
- wider and more detailed reporting of arms trade transactions in the UN arms register;
- the inclusion of specific clauses in arms sales contracts that reduce the role of middlemen and ban illegal commissions.

There is also a need to reform aid policies by reducing tied-aid, and by monitoring suppliers' credits. The tying of aid to procurement from the donor country not only increases costs but also reduces the scope for competitive bidding. This increases the incentive for corrupt practices on the part of the suppliers, both in relation to the recipient and the donor agency. Likewise, supplier credits can be used to fund projects with little equity involvement on the part of the promoter, thus generating quick returns which increases the scope for pay-offs. There is also a need for transparency to expose conflicts of interest among those involved in project formulation, appraisal and implementation (e.g. where firms involved in project formulation and appraisal are also contracted to undertake project implementation).

Stronger conditions attached to aid projects which ensure that procurement and disbursement related to the project are shielded from corrup-

9 This should take account of other initiatives which include the Code of Conduct on Arms Exports adopted by the European Union's Council in May 1998 (the Code is to be reviewed annually and may be progressively strengthened); and the draft International Code of Conduct for the arms trade which has been drafted by a group of former Nobel Peace Prize Laureates headed by Dr Arias, former President of Costa Rica.

tion, and blacklisting contractors who engage in corrupt practices, are desirable. All international financial institutions, multilateral development assistance agencies and bilateral donors who have not already done so should adopt anti-fraud and corruption provisions in their procurement guidelines similar to those adopted by the World Bank in 1996.

International support for basic harmonisation of national laws on corruption will facilitate international co-operation in the investigation and prosecution of these offences, particularly in the areas of extradition and mutual assistance in criminal matters. In this regard, the European Criminal Law Convention on Corruption is a good model.

A Role for the Commonwealth

Commonwealth governments should lend support to the international initiatives outlined in the previous section of this Report. In parallel with formal international conventions of the kind being promoted by the OECD, there is an equally important role for less formal co-operation between countries. Given its voluntary and informal nature, its democratic ethos and the common legal traditions shared by its diverse membership (which includes both developed and developing countries), the Commonwealth is particularly well adapted to provide channels of communication and mutual aid in tackling the delicate and controversial political issues which must be confronted in combating corruption.

The Commonwealth can reinforce efforts in some areas which are not susceptible to formal legal compacts or are not the primary concern of the other multilateral organisations which have taken initiatives in this area. In particular, the Commonwealth is in a good position to promote dialogue on the political aspects of reform, and to sponsor initiatives for the strengthening of legal institutions required for effective enforcement of anti-corruption measures. There is a rich and varied experience among Commonwealth countries in efforts to improve governance and combat corruption. This has included notable successes in uprooting deeply entrenched corrupt practices. Although the diversity among Commonwealth countries (e.g. in relation to income levels) may mean that some approaches will need to be carefully adapted to be transferable, the legal and political traditions shared by many Commonwealth countries suggest that there are many useful lessons to be learnt by sharing experiences.

The Expert Group considered the advantages and disadvantages of different instruments through which the Commonwealth's commitment

to promote good governance and combat corruption might be best expressed in tangible terms. One approach would be for the association to have its own legally binding instrument or convention on governance and corruption. Such an instrument would reflect the Commonwealth's specific concerns, values and aspirations and its effectiveness would be subject to Commonwealth control. Because of its legally binding nature, a convention would give 'teeth' to the Commonwealth's commitment and greatly strengthen the enforcement of anti-corruption measures at national levels. It would also help to improve foreign investors' perceptions of the investment environment in many Commonwealth countries.

On the other hand, many Commonwealth members might have strong reservations about the negotiation of a legally binding instrument, as this would be historically unprecedented and constitute a radical departure from the Commonwealth's tradition of articulating collective commitments of the association through morally, but not legally, binding declarations adopted by consensus. Furthermore, the process of negotiating, signing and ratifying a Commonwealth convention could prove to be a protracted as well as a costly enterprise. In addition, in some regions of the Commonwealth, a legal instrument confined exclusively to the Commonwealth might not be effective when the co-operation of neighbouring non-Commonwealth countries is needed to tackle trans-border problems of corruption.

An alternative approach, more consistent with Commonwealth practice, would be for Heads of Government to adopt a morally binding declaration of principles which would provide the foundation for concerted action by the association to promote good governance and combat corruption. Drawing on the analysis and discussion of issues in this Report, the Expert Group has proposed a possible framework for such principles. This could be supplemented by a Commonwealth scheme for the implementation of national and international measures to combat corruption.

Recognising the need for a broader, global campaign against corruption – in which it should play an active role – the Commonwealth could also agree to promote, in consultation with other interested parties, an initiative to launch, under the auspices of the United Nations, negotiations on a global, legally binding intergovernmental compact against corruption. Details of such a possible initiative are elaborated in Annex B.

Another option for consideration is whether Commonwealth governments might become parties to existing international, but not universal, conventions against corruption such as the OECD and OAS

Conventions and the Council of Europe's Criminal Law Convention on Corruption. This would appear to be a relatively simpler way of improving the enforcement of anti-corruption measures in Commonwealth countries. It is likely that Commonwealth countries which wish to join these Conventions would be able to do so, provided they are able to meet membership criteria and related obligations. However, the scope of some of these conventions (e.g. the OECD Convention) might be considered to be too narrow by some Commonwealth governments[10].

The Group believes the Commonwealth's commitment to fight corruption and promote good governance should be credible, tangible and visible. It needs to be articulated at the highest level, which is by Heads of Government. Their meeting in South Africa towards the end of 1999 provides a unique opportunity for the Commonwealth to act sooner rather than later. Commonwealth governments should therefore consider carefully the most appropriate means of evidencing and advancing the Commonwealth's commitment to effective action to combat corruption. At their meeting in Trinidad and Tobago in May 1999, Commonwealth Law Ministers, in giving their full support to the adoption of a concerted programme of Commonwealth action to combat corruption, affirmed that they were unwilling to see any departure from the established Commonwealth practice of using declarations and schemes, rather than legally binding conventions. They felt that work being undertaken on governance and corruption issues in other international fora could be used judiciously to inform the development of a Commonwealth strategy. They also noted that Commonwealth initiatives could include the development of a Commonwealth scheme, accession to existing international conventions or the promotion of initiatives within the United Nations for a global convention against corruption.

There are a number of important practical ways a specific Commonwealth contribution can also be made to improve governance and combat corruption. The Group agreed on the following specific proposals for action:

◆ the Commonwealth Secretariat should assist member countries that request help in designing and implementing their own national strategies to promote good governance and eliminate corruption. Such assistance could take the form of technical assistance and training for capacity building in countries that face

10 A Note by the Commonwealth Secretariat on existing multilateral conventions on corruption and their membership criteria is at Annex C.

serious human resource and institutional constraints. The Secretariat should also compile and disseminate information on emerging good practice in combating corruption and improving governance, and gather information on a regular basis from members on their progress in implementing national strategies.

- the Commonwealth should finalise and adopt its draft Code of Conduct on Integrity in Public Office; and the Commonwealth Code for Good Corporate Governance should be finalised, taking account of the work on similar codes undertaken by the World Bank and the OECD, and disseminated widely.
- the Commonwealth and the international financial institutions should support the implementation of standards that have been agreed to ensure that offshore financial centres (many of which fall within jurisdictions of developed and developing Commonwealth countries) are not used to launder bribes.

The Commonwealth should also offer encouragement and support for the further development of the international initiatives described earlier. Areas where further developments should be encouraged include:

- further work by the OECD to tackle the issues of contributions to political parties and to strengthen measures against the laundering of bribes;
- the extension of the scope of the work of Transparency International to report on the behaviour of international business, along with improved reporting on perceptions of national corruption;
- further work by the IMF related to its Code of Good Practices on Fiscal Transparency[11]; on developing, together with other institutions including the Bank for International Settlements and the World Bank, a Code of Good Practice on Transparency in Monetary and Financial Policies; and on the proposed Transparency Reports which would indicate country performance in these areas;
- support for the work of the Council of Europe on corruption;
- encouragement of other international agencies, including Transparency International, to focus attention on corruption associated with the international arms trade;

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11 "The Code of Good Practices on Fiscal Transparency - Declaration of Principles" was adopted by the Interim Committee of the IMF's Board of Governors in April 1998.

- sponsoring more work on the specific needs of developing economies in relation to international agreements to combat corruption.

As resources at the disposal of the Commonwealth are limited, the Commonwealth Secretariat should seek to help member states in accessing other sources of funding to support national anti-corruption strategies and should identify actions which are additional and complementary to existing national and international initiatives.

The Expert Group believes that, if the Commonwealth is to make a serious contribution to the promotion of good governance and the fight against corruption, there will be a need to commit additional resources to enable the Secretariat to undertake the tasks outlined above. Given the potential economic, social and political gains, there is justification for the commitment of sufficient resources to support this venture.

Annex A
Commonwealth Expert Group on Good Governance and the Elimination of Corruption in Economic Management

Members

Dr K Botchwey[1], Director, Africa Research and Programs, Harvard Institute for International Development, former Finance Minister, Ghana.

Ms Ruth Hubbard, President, Public Service Commission, Canada

Mr Shahid Husain, former Senior Vice-President, World Bank, Pakistan

H E Dr Lal Jayawardena, former High Commissioner to the United Kingdom, Sri Lanka

Mr Lim Siong Guan, Permanent Secretary, The Treasury, Singapore

The Hon Mr Justice Barry S J O'Keefe AM, Supreme Court Judge and former Commissioner, Independent Commission Against Corruption, New South Wales, Australia

Dr K Rattray, Solicitor General, former Attorney-General, Jamaica

Mr Betrand de Speville, Consultant, former Commissioner of the Hong Kong Independent Commission on Corruption, United Kingdom

Mr Brian H Tyler, former Auditor General, New Zealand

Mr J Warioba, former Attorney-General and Prime Minister, and former Chair of a Presidential Commission on corruption, Tanzania

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1 Following the tragic death of Dr Mahbub ul Haq in July 1998, the Commonwealth-Secretary General appointed Dr Kwesi Botchwey as Chairperson, and Mr Shahid Husain (Pakistan) as a member of the Group.

Observers

Mr Shailendra Anjaria, Mr Robert Hagemann,
International Monetary Fund
Mr William Witherell, Ms Enery Quiñones,
Organisation for Economic Co-operation and Development
Mr Ibrahim Shihata, Mr Nick Manning, World Bank
Mr Laurence Cockcroft, Mr Nihal Jayawickrama,
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Consultants

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Mr Rumman Faruqi, Director, Economic Affairs Division

Mr Richard Nzerem, Former Director, Legal and Constitutional Affairs Division

Ms Diannne E Stafford, Director, Legal and Constitutional Affairs Division

Mr Chandrashekhar Krishnan[3], Chief Programme Officer (and Co-ordinator for the Expert Group project), Economic Affairs Division

Ms Janet R Strachan, Programme Officer, Economic Affairs Division

2 Dame Veronica Sutherland assumed office on 1 February 1999. Prior to that, her predecessor, Sir Humphrey Maud, KCMG, led the Secretariat team that serviced the work of the Expert Group.

3 Until June 1998, Dr Kaniz Siddique, Deputy Director, Economic Affairs Division, was Co-ordinator of the Expert Group project.

Annex B
A Global Compact Against Corruption

Why a global compact?

Existing international legally binding conventions against corruption (e.g. the OECD's Convention on Combating Bribery of Foreign Public Officials, the Council of Europe's Criminal Law Convention on Corruption and the Inter-American Convention Against Corruption) are all significant instruments attesting to the growing international commitment to fight corruption with legally enforceable measures. However, these conventions are not universal and vary widely in terms of their scope (e.g. the OECD Convention does not cover acts of bribery in relation to foreign political parties). In terms of geographical coverage, many countries – most of them developing countries in the African, Asian and Pacific regions – are presently not participating in any international arrangements or mechanisms to combat corruption. There is therefore a need to develop, particularly with the active participation of developing countries, a truly global compact against corruption. This would fill gaps in existing instruments and be universal in its scope, thus creating a level playing field for all countries and eliminating any double standards in the campaign against corruption.

What form should it take and what will be its scope?

It is proposed that the global compact should take the form of a universal, legally binding inter-governmental instrument against corruption. It would specify obligations for governments, which would include measures affecting the roles of other key players in international society: multilateral development and finance institutions; the private sector (especially multinational corporations), and the independent sectors (e.g. NGOs). The framework for Commonwealth principles to fight corruption, which the Expert Group has proposed for the consideration of Commonwealth Heads of Government, could provide a basis for shaping the specific content and provisions of the global compact, in addition to existing international conventions and examples of good practice. Based on the fundamental objective of zero-tolerance for corruption, the broad aims of the global compact will be to:

- Require all the key players to abide by minimum standards and rules (in the case of non-state actors, these would apply through

legislative and other measures adopted by governments) which will promote good governance and reduce corruption; these standards and rules should be general enough to accommodate political, social, economic and legal diversity but without compromising the objective of zero-tolerance for corruption.

- Reduce opportunities in international financial transactions for the laundering of financial gains from corruption and strengthen international co-operation for the swift confiscation and repatriation of the proceeds of corruption.
- Reduce the scope for corruption in the international trade in armaments.
- Establish an independent and impartial mechanism to monitor compliance with the global compact, as well as monitor and report regularly on corruption and governance issues.
- Establish an impartial mechanism to arbitrate international disputes on corruption issues.
- Facilitate technical assistance and capacity building to assist countries in need of such help to adopt and enforce effective national anti-corruption strategies.

How would it be promoted and negotiated?

If the Commonwealth sees merit in the idea of a global compact and consultations with key governments, international organisations and non-governmental organisations reveal that there is broad international support for a global compact, as a next step. It could work with other interested parties to promote an initiative at the UN for the establishment of an intergovernmental negotiating committee. This body, under the auspices of the UN, would begin time-bound negotiations on a legally binding global instrument to combat corruption. Although the negotiations will be conducted by governments, adequate provisions should be made to enable representatives of multilateral finance and development institutions, the private sector and the independent sectors (i.e. NGOs) to contribute to the development of the global compact.

Annex C
Note by the Commonwealth Secretariat on Existing Multilateral Conventions on Corruption and their Membership Criteria

Introduction

This Note reviews the various existing conventions on corruption to which Commonwealth countries may become party. It also discusses the possible ways in which the Commonwealth could adopt its own instrument on the subject.

The existing or proposed instruments considered are:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Council of Europe's Criminal Law Convention on Corruption;
- the Inter-American Convention against Corruption;

each of which is open for ratification and/or accession by countries which are not members of the sponsoring international organisation.

In considering whether or not it would be desirable to recommend that Commonwealth countries seek to become parties to instruments concluded in other fora, there is a need to consider issues such as:

- the rationale for the development of these instruments;
- the relevance of non-Commonwealth conventions to the broad range of Commonwealth concerns;
- the ability of Commonwealth countries to influence future developments in these instruments;
- the incidental costs involved in participating in monitoring mechanisms;
- the availability of technical and/or financial assistance to Commonwealth countries to meet the implementation and monitoring costs.

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (The OECD Convention)

The substantive provisions of the OECD Convention require states parties to criminalise the direct or indirect intentional offering, promising or giving of any undue pecuniary or other advantage to a foreign public official to secure either the undertaking of an official act or a refraining from acting in order to obtain or retain business or gain other improper advantage in the conduct of international business. Related inchoate offences (such as attempt or aiding and abetting) must also be criminalised and corporate criminal or similar liability must be established. Extraterritorial jurisdiction should also be established.

Foreign public officials are those holding legislative, administrative or judicial office, or performing public functions and include officials or agents of public international organisations.

The offences created must be punishable by penalties which are capable of triggering the operation of extradition, mutual assistance in criminal matters, proceeds of crime and anti-money laundering statutes. Mutual assistance and extradition obligations are created by the Convention.

Accounting practices which prohibit the making or keeping of books and accounts which facilitate the concealment of the true nature of transactions must be established by law.

Parties are required to participate in a monitoring process designed to follow up systematically national implementation of the Convention. The monitoring process consists of both self-evaluation and mutual evaluation.

Current signatories have accepted a 1997 Recommendation of the Council on Combating Bribery in International Business Transactions which elaborates on certain provisions of the Convention.

Countries entitled to become states parties

Australia, Canada, New Zealand and the United Kingdom are entitled, as OECD members, to become parties to the Convention. All have signed and are in the process of enacting legislation which will permit them to ratify the Convention.

Prior to its entry into force, the Convention may be acceded to by non-members of the OECD who have been invited to become full participants in the OECD Working Group on Bribery in International

Business. The Secretariat understands that the OECD will welcome any country which wishes to join the group. After entry into force, the Convention is open to accession, inter alia, by any state which has become a full participant in the OECD Working Group on Bribery in International Business.

Costs of membership of the Convention

Other than the costs involved in passing the necessary laws to implement the Convention, states parties will incur the costs involved in the monitoring and follow-up procedure established by Article 12. For non-OECD members a system of cost-sharing applies which accords with OECD rules concerning fees for non-member full participants and observer countries.

Additional implementation costs which may be incurred by states parties include:

- participation in the OECD Working Group on Bribery in International Business;
- provision of facilities for extradition and mutual assistance in criminal matters which, under most international treaties and arrangements, including the Commonwealth Schemes, contemplate payment by the requested country of in-country expenses of complying with requests.

Legislative initiatives required by the Convention

The majority of Commonwealth countries will require substantial amendment of national laws to enable participation in the OECD Convention. The following are the principal areas not covered, or inadequately covered, by existing national laws:

- the laws of most, if not all, Commonwealth countries have always criminalised the offence of bribing one of the country's own public servants. However, few, if any, deal with bribing foreign public officials. Equally few deal with the position of agents;
- although the Convention does not absolutely require that jurisdiction be established when the bribery offence is committed wholly outside the enacting country, it does require criminalisation when the offence is committed in part in that country. It also requires that no extensive physical connection with the enacting country be required. States parties are exhorted to extend current bases of jurisdiction where this is necessary to combat corruption

effectively. It would not, for example, be within the spirit of the Convention to fail to deal with a company incorporated in the enacting state which paid bribes to foreign public officials out of funds maintained in offshore accounts;

- exceptions to the privileges and immunities of international organisations are required;
- corporate criminal liability will, in most countries, need to be extended (or, in some countries, created);
- although not mandatory, civil and administrative sanctions for bribery must be considered;
- amendments to companies laws dealing with account keeping, financial statements, audit requirements and empowering the legal "black-listing" of companies;
- pursuant to the 1997 Resolution, amendment of taxation laws to disallow the deductibility of bribes to foreign public officials.

Limitations of the OECD Convention

The benefits of advocating Commonwealth country participation in the OECD Convention can, notwithstanding its limitations, be recognised. The Convention is in existence and the OECD has indicated its willingness to welcome membership by any country. It represents an important first step in global efforts to combat a global problem. The objective of eliminating corruption in international business transactions is one which is worthy of support and which can assist in the processes of development desired, in particular by developing countries and those in transition. By assisting to ensure that development capital is actually used for development, the Convention has the potential to be of economic benefit to all countries.

While dealing with the important issue of bribery and corruption in international commercial transactions, the Convention is very limited in scope. Its implementation in any country will address only one of the plethora of examples of corruption which are of concern to Commonwealth countries.

Membership of the Convention is not automatically open to every country wishing to sign. Non-members of the OECD must first solicit an invitation to join the OECD Working Group and only if that invitation is forthcoming does the opportunity of becoming a party arise. Any state party may propose amendment of the Convention and amendments are considered by all states parties.

Membership of the OECD Convention alone will not achieve the Commonwealth objective of ensuring that there is national political commitment to the eradication of corruption, that comprehensive and effective anti-corruption legislation is put in place, that the issue of ensuring adequate remuneration of public officials is addressed or that the public is empowered to reject corruption and develop a culture opposed to corruption.

The Council of Europe Criminal Law Convention on Corruption

This Convention was adopted by the Council of Ministers in 1998 and was opened for signature in January 1999. By the end of 1999, a complementary Draft Agreement Establishing the Group of States Against Corruption (GRECO) is expected to be in force. Together the two instruments deal with the aspects of corruption to be dealt with under the criminal law. The Group of States against Corruption (GRECO) is established "to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings" to combat corruption. It is important to note that the Council of Europe (CoE) intends to conclude other instruments on the subject, including an important convention on the civil law aspects of corruption.

The CoE Convention deals with:

- active bribery which involves promising, offering or giving, indirectly, any undue advantage to any person, for themselves or for anyone else, for the person to act, or refrain from acting in breach of their duty;
- passive bribery which involves requesting or receiving, directly or indirectly, any undue advantage, for himself, herself or anyone else, to act or refrain from acting in the exercise of functions.

It requires states parties to criminalise both active and passive bribery of:

(i) public officials;

(ii) members of "domestic public assemblies" exercising legislative or administrative powers;

(iii) foreign public officials;

(iv) members of foreign public assemblies;

(v) those involved in business activity in the private sector;

(vi) employees, those under contract to and persons seconded to public international or supranational organisations or bodies of which the state party is a member;

(vii) members of international parliamentary assemblies;

(viii) judges and officials of international courts.

The Convention deals with trading in influence by requiring states parties to criminalise the intentional promising, offering or giving, directly or indirectly, any undue advantage to anyone who asserts or confirms that he or she is able to exert improper influence over the decision-making of any person listed in the sub-paragraphs (i), (ii), (iii), (vi), (vii) and (viii) above.

Related inchoate offences must also be established as must the offence of laundering the proceeds of any offence required to be criminalised. The creation of use of invoices or other accounting documents and the unlawful omission of making a payment record are also to be the subject of criminal provisions and corporate criminal liability must be established.

The subject of the laws required to be enacted are those who commit relevant offences within the territory of the state party, nationals, public officials and members of domestic public assemblies of the party and nationals who work with, or for, or are officials of international organisations, courts or parliamentary assemblies.

Laws facilitating the confiscation or forfeiture of the proceeds of bribery must be enacted. Parties are required to adopt such measures as may be necessary to ensure that specialist independent persons or entities are available and adequately resourced to combat corruption.

Countries must facilitate co-operation by public officials and authorities in detecting and reporting corruption and must provide adequate protection for those who report corruption and for witnesses in proceedings.

To the extent that bank secrecy may inhibit the investigation of corruption offences, it must be overridden and any other required special investigative techniques should be introduced or, if in existence, applied to the investigation of corruption.

National laws must facilitate international co-operation and parties are required to assist other parties in the investigation and prosecution of offences. Mutual assistance and extradition obligations are imposed by the Convention and the international exchange of information is encouraged.

Countries entitled to become states parties

Britain, Cyprus and Malta are entitled, as Council of Europe Members, to become parties to the Convention. Canada is entitled to become a party as a non-member state which participated in its elaboration. Any party may specify territories to which the Convention shall apply.

After entry into force of the Convention, states other than those entitled to become parties, may be invited to accede to the Convention. Invitations are issued by the Committee of Ministers of the Council of Europe, after consulting with the contracting states. Invitation must have the unanimous agreement of contracting states entitled to sit on the Committee of Ministers and be supported by the majority provided in Article 20.d of the Statute of the Council of Europe.

Costs of membership of the Convention

States parties to the Convention which are not already members of GRECO automatically become members of GRECO at the time the Convention enters into force for them. The Enlarged Partial Agreement (EPA) establishing GRECO provides that the Budget of GRECO comprises, *inter alia*, the annual compulsory contributions of each member of the Group. The travel and subsistence costs of one representative of each party in meetings of the Group and the costs of mutual evaluation are met out of the budget of the Group.

In addition to the cost of participation in GRECO, states parties will incur the domestic cost of passing the laws necessary to implement the Convention. Like the OECD Convention, provision of facilities for extradition and mutual assistance in criminal matters are likely to involve some cost to participating countries.

Legislative initiatives required by the Convention

The majority of Commonwealth countries will need to amend existing laws or enact new laws and to establish administrative mechanisms in order to meet obligations imposed by the Convention. The following are the principal areas not covered, or inadequately covered, by existing national laws of many member countries:

- the criminalisation of the offence of bribing foreign public officials; members of foreign public assemblies: those involved in business activity in the private sector; employees, those under contract to and persons seconded to public international or supranational organisations or bodies of which the state party is a

member; members of international parliamentary assemblies; and judges and officials of international courts.

- the criminalisation of trading in influence;
- the scope of predicate offences for money laundering;
- the existence or scope of corporate criminal liability;
- the existence or scope of accounting offences;
- the extent of jurisdiction of courts to deal with offences by nationals including those who work with or for, or are officials of international organisations, courts or parliamentary assemblies;
- the extension of laws relating to the confiscation or forfeiture of the proceeds of bribery;
- the existence of specialist independent persons or entities to combat corruption;
- passage of "whistle-blowing" legislation and witness protection provisions;
- the scope of limitations to bank secrecy laws.

Proposed extension of the Council of Europe Convention regime

The Council of Europe Criminal Law Convention on Corruption is to be supplemented by other conventions including an important instrument on civil law. Ultimately, it is reasonable to assume that the CoE programme of action against corruption will be supported by a comprehensive regime of international instruments designed to address all aspects of corruption as it relates to governance and to commercial activity. It is also expected that the GRECO will exercise functions in respect of subsequent conventions.

Limitations of the Council of Europe Convention

Commonwealth country participation in any of the Council of Europe's proposed conventions on corruption is dependent upon agreement by all states parties to any relevant convention and upon agreement by the Council of Ministers of the Council of Europe. Whilst it is probable that some Commonwealth country participation will be welcomed it is not by any means sure that all Commonwealth countries will find themselves able to become states parties to any of the proposed Conventions.

While participation in the CoE corruption convention regime will undoubtedly ensure that any Commonwealth country has a comprehensive and internationally monitored programme of action against corruption covering criminal, civil and administrative issues and other issues of concern to the Commonwealth such as the establishment of codes of official conduct, the question whether the greater Commonwealth interest in fostering good governance, eliminating corruption and improving economic management will be furthered by the participation of some member countries is a question which remains to be answered.

Without knowing the cost of participating in GRECO (which is mandatory for participation in the criminal law convention and may be mandatory in respect of future conventions) it is difficult to say whether many Commonwealth countries would find it possible, within resource constraints, to participate in the European regime.

Amendments to the Convention may be proposed by any state party and the Committee of Ministers of the Council of Europe must consult with non-member states parties before adopting amendments.

The Inter-American Convention Against Corruption 1996

The Inter-American Convention was concluded in March 1996 and its expressed purposes are to promote and strengthen the development by states parties of mechanisms needed to prevent, detect, punish and eradicate corruption and to promote co-operation among states to ensure the effectiveness of anti-corruption measures. It covers the performance of "public functions" which are widely defined so as to include any temporary or permanent, paid or honorary activity performed in the name of the State or in the service of the State.

The substantive provisions of the Inter-American Convention require states parties to consider measures to maintain and strengthen:

- the introduction and enforcement of standards of conduct designed to prevent conflict of interest and to conserve properly and use the resources entrusted to government officials in the performance of their functions so as to preserve public confidence in the integrity of public servants and government processes;
- public sector ethics;
- the registration of pecuniary interest of persons performing public functions;

- public procurement systems;
- government revenue collection and control systems which deter corruption;
- laws which deny favourable tax treatment to those who violate anti-corruption laws;
- reporting of corruption by public servants and citizens;
- oversight bodies to implement modern anti-corruption strategies;
- deterrents to bribery, including accurate financial records;
- mechanisms to encourage the participation of civil society in anti-corruption efforts;
- the study of further preventive measures such as the relationship between equitable compensation and probity in public service.

Substantively the Convention requires states parties to establish as criminal offences the direct or indirect solicitation or acceptance or offering of any article of monetary value or other benefit by any government official or person (on his or her own behalf or for any other person) who performs a public function in exchange for any act or omission in the performance of a public function.

The fraudulent use or concealment of property derived from corrupt activity is to be criminalised, as are inchoate offences related to corruption and trading in influence.

Jurisdiction must be asserted over offences committed within the territory of a state part and may be asserted where the offence is committed elsewhere by a national or habitual resident. If extradition of an alleged offender is refused, jurisdiction must be assumed.

Bribery of foreign government officials by a national, resident business or habitual resident is to be criminalised in accordance with the Constitutional and fundamental legal principles of states parties.

States parties are also to criminalise certain types of conduct not dealt with by other multilateral conventions including:

- illicit enrichment which cannot be reasonably explained;
- improper use of classified or confidential information and state property;
- diversion of state property.

Extradition, mutual assistance and proceeds of crime laws must support corruption laws, and bank secrecy laws must not inhibit the investigation or prosecution of corruption offences.

Countries entitled to become states parties

All members of the Organization of American States may become parties to the Convention and the Convention is open for accession by *any* other state.

The Commonwealth countries eligible as members of the OAS are Canada, Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines, and Trinidad and Tobago.

Costs of membership of the OAS Convention

Unlike the OECD and Council of Europe Conventions, the OAS Convention does not have a body which monitors its implementation and accordingly there are no costs involved other than those incurred in the development, passage and implementation of legislation to give effect to the Convention.

Legislative initiatives required by the OAS Convention

The following are the principal areas in which Commonwealth countries would need to enact additional or amending legislation to implement the mandatory provisions of the Convention:

- criminalisation of the fraudulent use or concealment of property derived from corrupt activity;
- criminalisation of trading in influence;
- power to prosecute in lieu of extraditing;
- criminalisation of bribery of foreign government officials;
- criminalisation of improper use of classified or confidential information and state property, and diversion of state property;
- criminalisation of illicit enrichment which cannot be reasonably explained;
- amendment or enactment of extradition, mutual assistance and proceeds of crime and bank secrecy laws.

Non-mandatory provisions of the Convention which should be the subject of action by states parties if the full spirit of the Convention is to be achieved relate, inter alia, to :

- standards of conduct designed to prevent conflict of interest and to conserve properly and use the resources entrusted to government officials and the introduction of registers of pecuniary interests by relevant officials;
- public procurement and government revenue collection and control systems which deter corruption;
- the creation or enhancement of oversight bodies to implement modern anti-corruption strategies;
- mechanisms to encourage the participation of civil society in anti-corruption efforts;
- the study of further preventive measures such as the relationship between equitable compensation and probity in public service.

Limitations of the OAS Convention

The OAS Convention addresses many, if not most, of the issues of concern to Commonwealth countries and if it has any limitations these may be that in certain areas it imposes no obligations, but rather exhorts states parties to consider action in areas such as public procurement which are of particular concern to the Commonwealth in its work on economic management. Certainly its reference to public education and participation in anti-corruption strategies and its consideration of the relationship between remuneration and probity reflect issues discussed in Commonwealth fora.

Although any state party may propose draft additional protocols to the Convention these are only considered at meetings of the General Assembly of the OAS.

Possible Development of a Commonwealth Instrument on Corruption

Legal foundations of the Commonwealth

The Commonwealth, unlike the other organisations whose instruments have been considered, is not formed by treaty and no Commonwealth concern has yet been the subject of any agreement enforceable at international law. The Commonwealth's reliance on consensus to achieve

agreement on issues of common concern is a fundamental precept of the organisation. Its reliance on the Secretary-General's Good Offices Role to resolve problems is one of the organisation's strengths. One of the issues which arises for consideration, therefore, is whether the development of a formal Commonwealth mechanism or instrument to combat corruption is consistent with the fundamental nature of the Commonwealth as an organisation.

Commonwealth co-operation

Notwithstanding that the Commonwealth has no agreements enforceable at international law – that is, no treaties or conventions, Commonwealth Law Ministers have, for 32 years, relied on "schemes" to facilitate co-operation between member countries. The first scheme developed in 1966 related to extradition. Subsequent schemes agreed in 1986 and 1993 deal with mutual assistance in criminal matters, the transfer of convicted offenders and the protection of material cultural heritage. These schemes contemplate the enactment of laws in all member countries which permit the granting of assistance to other members in the subject areas. In the area of extradition, the Scheme has enjoyed significant success with the vast majority of member countries governing their extradition relations under the London Scheme on the Rendition of Fugitive Offenders. The other Schemes are being progressively implemented by member countries.

While having no enforceable effect at international law, the Schemes evidence the willingness and ability of the vast majority of Commonwealth members to assume, between themselves, moral obligations which they are prepared to treat as binding and as an essential concomitant of their membership of the Commonwealth.

The Commonwealth is a fully fledged intergovernmental organisation. It enjoys recognition by all other intergovernmental organisations and has, or may exercise, observer rights at many of them. Its standing in the international community is such that the Commonwealth Schemes are recognised as effective contributions to, and often as leading global practice in the areas they cover. The Commonwealth Schemes on extradition and mutual assistance in criminal matters have strongly influenced instruments developed by the United Nations in these areas. There is, therefore, every reason to believe that a Commonwealth instrument evidencing the organisation's commitment to good governance and the elimination of corruption would be accorded status no less than any other developed under the auspices of an intergovernmental organisation.

One particular feature of the Schemes is that they have been devised primarily to address issues relating to international co-operation and have not, other than in this context, addressed issues of internal governance of member countries. The question therefore arises whether a Scheme, in the sense that that word is understood in the Commonwealth family, would or could be an appropriate means of evidencing agreed Commonwealth principles relating to the elimination of corruption.

A possible non-binding Commonwealth instrument

Given the status accorded to Commonwealth Schemes among the international community, member countries could choose to evidence their individual and collective commitment to combating corruption by an instrument of less than treaty status. They could do so in one of two ways:

- by concluding an instrument of less than treaty status which covers all the issues and which contemplates the enactment of national laws to give effect to the commitments outlined in the instrument; or
- by issuing a declaration or adopting a statement of principles, as was done in Singapore in 1971 and in Harare in 1991.

An instrument of less than treaty status (bearing some small resemblance to the existing Commonwealth Schemes, but of far wider application and impacting on domestic governance) may only be possible to conclude in the same way as would a treaty, or indeed the Schemes themselves, by being the subject of negotiation at senior official level before adoption by Ministers. An instrument of this nature would be in accord with Commonwealth practice. It would reflect those issues upon which consensus was reached and would contain no provisions relating to signature, ratification or denunciation.

A Commonwealth Declaration could assume whatever importance was considered appropriate by Heads of Government. Its provisions could be made on a par with declarations of other Commonwealth fundamental principles and observance of the terms of the Declaration could, conceivably, be the subject of pan-Commonwealth concern. Obviously, equally, a statement of principles or declaration could be accorded a status less than that accorded to the Harare Principles. A decision on such an issue is one solely for the sovereign states which are members of the Commonwealth.

Fighting Corruption Promoting Good Governance

In recent years, there has been a phenomenal growth of interest in issues related to governance and corruption, reflecting in part, increasing acceptance of the proposition that poor governance and corruption are corrosive of economic and social development. A Framework of Commonwealth Principles on Promoting Good Governance and Combating Corruption was endorsed by Heads of Government at their Summit in Durban in 1999 as the basis for pursuing concerted strategies based on *'zero tolerance'* for all types of corruption at national and global levels. Developed by an independent Commonwealth Expert Group, it underscores the Commonwealth's commitment to promoting good governance and combating corruption, and is expected to form the basis of a future Commonwealth strategy in this area. This publication also presents the full report of the Expert Group, which helps to clarify the causes and consequences of poor governance and corruption. It identifies the elements of national strategies that countries can adopt to combat corruption effectively, and breaks new ground by examining the global dimensions of corruption and identifying gaps in current international efforts and initiatives to fight it.

Commonwealth Secretariat