

La'ó Hamutuk

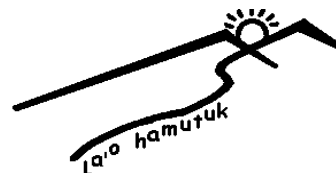
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The Proposed Anti-Corruption Commission Law

Submission to RDTL National Parliament Commissions A and C

From La'ó Hamutuk, 11 February 2009

Introduction

La'ó Hamutuk thanks the National Parliament for the opportunity to share our perspectives on the proposed Anti-Corruption Commission law, and we hope that you find them helpful in your deliberations.

As a civil society organization which has worked in Timor-Leste for more than eight years, La'ó Hamutuk has monitored the activities of Timor-Leste's government as well as international organizations. Although we do not investigate individual incidents of corruption, we have participated in many public consultations about the proposed structures and powers of public agencies, especially those relating to the petroleum sector, and our submissions discuss ways to reduce the danger of corruption.

Around the world, countries which depend on revenues from non-renewable resources often experience high levels of corruption. In Timor-Leste, petroleum revenues currently pay more than 90% of the State's expenditures. For the next decade or so, these revenues will continue to come in from converting our natural resource wealth (oil and gas reserves) into dollars, without much effort by the State or its citizens. The imbalance between the tremendous needs of our impoverished people and the ease with which the State obtains money leads, in many countries, to a "resource curse" which actually increases poverty and conflict. One of the principal components of this curse is corruption in both government and the corporate sector, and we hope that the Anti-Corruption Commission will be effective in controlling and deterring the misuse of public wealth for private gain.

Sadly, we believe that in its present form, this law would make Timor-Leste even more vulnerable to corruption than it is today. The proposed Anti-Corruption Commission (ACC) is so weak that we fear that it will be ineffective. At the same time, the draft ACC law prohibits existing agencies from continuing to work against corruption. Furthermore, creating this Commission before enacting a comprehensive law to prevent corrupt actions before they are committed creates a mechanism without a mandate. How can corruptors be investigated and punished when we do not yet have clear laws defining what is corrupt?

One of the reasons to form this Anti-Corruption Commission is to persuade the United States Millennium Challenge Corporation that Timor-Leste is committed to controlling corruption. If the U.S. is convinced, they could give us hundreds of millions of dollars for essential infrastructure. If this law is passed in its present form, without making the changes we and others suggest, it may have the opposite effect – demonstrating that Timor-Leste's Government and Parliament are not really serious about addressing this critical problem.

Our analysis below discusses weaknesses in specific articles of the law, and suggests how Parliament can repair them. However, we would like to highlight a few important general points:

1. **A Commission requires more than one person.** We believe that having only one Commissioner, with deputies who serve at his direction and pleasure, undercuts the strength, effectiveness and accountability of the ACC. It would be better to have, for example, five Commissioners, appointed by diverse authorities, and then have them elect a President.
2. **Prevention is a prerequisite to accountability.** Before this Commission is created, there must be legally-established, government-wide rules and policies to prevent corruption. These should establish transparency, accountability and checks and balances; define and prohibit conflicts of interest, soliciting, receiving or accepting bribes; require open and public tender processes; and protect journalists, sources and whistleblowers.
3. **The Prosecutor must continue what ACC starts.** Since the ACC's only outlet for its findings is through the Public Prosecutor, the Prosecutor should be required to act within a specified time on cases presented by the ACC and to report back to the ACC on the results of its actions.
4. **Citizens should be encouraged to bring information to the ACC,** which should initiate cases if people provide compelling evidence. These voluntary sources, especially public servants, should be protected against retaliation, and the ACC should report back to them about the results of its investigations. In addition, since the ACC fulfills an important public trust, it should periodically publish reports on its activities.
5. **The Provedor should be allowed to continue its work against corruption,** although this work will have to be coordinated with the ACC. Furthermore, there should be a transition period to allow the ACC to become established before curtailing other anti-corruption activities.

Section-by-section commentary

Section 2.1 defining "corruption" should include conduct by public officials which encourages or enables others to circumvent the law. For example, public officials should not be allowed to sign MOUs with private companies promising a contract, land or other public resources without going through normal tender processes; project implementers should not be told that they can proceed without following environmental or labor laws.

Section 2.3 defining "public agency" should include the four autonomous agencies listed in the State Budget,¹ and should explicitly include other public agencies by name, such as the Banking and Payments Authority, the National Petroleum Authority, and other such agencies which may be established in the future. A more problematic issue is how to include ACC and the Public Prosecutor in an anti-corruption regime; we hope Parliament will consider establishing a separate mechanism for this as the ACC cannot effectively investigate itself, and the Prosecutor will not bring itself to court.

Section 2.5 defining "facilities" should include offshore petroleum platforms in Timor-Leste's sovereign territory and Joint Petroleum Development Area.

¹ EDTL, APORTIL, IGE and Administração Aeroportos e Navegação Aérea TL.

Section 3.3 assigning “maximum priority to the investigation of more serious or more complex cases” could be a way to divert ACC’s limited resources away from clear-cut cases involving a lot of money or high-ranking public officials. It would be better to delete “or more complex” from this clause, so that the ACC can focus on the cases which have the largest impact on the people and the state.

Section 4.1 lists the competencies of the ACC, but subsections **(f)**, **(g)** and **(i)** are the only ones which refer to preventing corruption, and these are not very strong. We suggest adding a new subsection **(j)** “provide leadership and guidance to the process of developing laws, practices and regulations to prevent corruption in each and every public agency in Timor-Leste.” Although the responsibility to enact such laws lies with the Parliament and the Council of Ministers, the ACC could provide expertise, leadership and focus in helping Parliament enact an Anti-Corruption Law.

Some of the points below are mentioned in the future Civil or Penal Codes, but a comprehensive anti-corruption law can make reference to those statutes. It will also clarify what conduct is considered corrupt, and establish procedures to make corruption more difficult. Ideally, such a law should have been enacted before the ACC was created, and La'o Hamutuk repeats our request that it be done expeditiously, as we have urged in past submissions.²

1. A government-wide **conflict of interest law**, applied to all officials with decision-making authority. This should ensure an open and fair tender process, prohibiting Government from doing business with companies owned or managed by public officials or their families, and prohibiting public officials from being employed by companies with government contracts during or within a reasonable time period after leaving office.
2. Public officials with decision-making responsibility should be required to **publicly declare their assets** before beginning their service, annually thereafter and when their service is completed. These declarations should be made public, and not kept secret by a court. Public officials should have to declare any gifts or considerations received by themselves or their families from any person or company soliciting or doing business with the Government. If someone deserves the public trust and powers which come with high public office, they must share information about their personal finances.
3. **Outlawing all bribery and kickbacks**, with penalties for bribe-askers, bribe-givers and bribe-takers. Companies which engage in such behavior should be banned from future government contracts. In extreme cases, criminal penalties should be applied to those who commit such crimes, as well as to managers of the companies involved.
4. A comprehensive, government-wide, legally-binding policy of **public information** based on the principle that everything should be public unless there is a compelling reason for it to be kept secret.
5. **Transparency and accountability of tender, contracting and other processes** regarding the use of state resources, income received by the state or its agencies, etc. In particular, no significant contract should be signed until an open, multi-source bidding process has been conducted. The decision making process and text of the contract should be published when the contract is awarded.

² La'o Hamutuk gave testimony to public consultations on the Petroleum Fund Act (2004 and 2005), the Petroleum Act (2005), the proposed petroleum regime (2007), and the NPA decree-law (2008) which discussed ways to prevent corruption. They are all on our website www.laohamutuk.org, and we can provide printed copies if they would be helpful.

6. **Oversight and accountability of decision-making**, including checks and balances; published, regular, independent audits; and distribution of power. No individual person should have authority to make significant decisions without being overseen, and potentially overruled, by another, independently selected, body.
7. **Protection of journalists and sources** (whistleblowers) who bring attention to cases or give evidence to the ACC, the media, the Public Prosecutor or the Provedor regarding corruption or malfeasance by public officials. This includes protecting their jobs, as well as protecting them from physical harm as partially implemented in Section 24 of the draft ACC law.
8. **Autonomous agencies** should be required to follow the same corruption measures as other state institutions, which could require revision to existing laws and decree-laws.

Section 6.2 places far too much power and discretion in the single Commissioner. As discussed above, we suggest replacing the Deputy Commissioners discussed in Sections 12-14 with Commissioners equal in power to the one described in Section 6, with the same qualifications as Sections 7-9. Every Commissioner could be appointed as per Section 6.1 (although staggered terms would be preferable), but representing different sectors in Timor-Leste (such as one chosen by the Council of Ministers, one by Parliament, one by the President, one by Civil Society, etc.) would give the Commission more legitimacy, independence and integrity.

Major decisions, such as those in Section 6.2(c) and the approval of reports and recommendations in 6.2(d) should be done by majority vote of the Commissioners. The Commission (which could have three, five or seven members) could elect one of its members as President to fulfill the functions which must be done by a single individual.

Section 10 requires the President of the Republic and 75% of the Parliament to agree to dismiss a Commissioner even if he or she has been convicted of a crime, violates his/her oath, or is incapable of performing his/her functions. It should be easier to replace a Commissioner who is manifestly unqualified.

Section 11 requires 1/5 of Parliament to make a motion to remove a Commissioner, but does not say how many Parliamentarians must vote to approve or reject the findings of the inquiry committee (Section 11.5).

Sections 12-14 discuss Deputy Commissioners, who are appointed by, removed by, and granted powers (Section 5.2) by the single Commissioner. We suggest eliminating this position, and replacing it with additional Commissioners who are independent of the single Commissioner and strengthening the integrity of the Anti-Corruption Commission.

Section 16 implies no public right to know about the Commission's actions, which violates Article 40 of the RDTL Constitution. Although we understand the need for secrecy while an investigation is underway, the outcome of the Commission's work should be made public, to clear the names of those wrongfully accused as well as to inform people about officials who have violated their trust.

Sections 18-23 provide for evidence collected or demanded by ACC, but there is no provision for an individual to voluntarily bring information or evidence to the ACC's attention, whether or not a case has already been initiated. This is an essential element of the function of the Provedor, which the ACC is intended to partially replace.³ The ACC will not be effective unless it

³ Articles 2, 28(a), 36 and 37 of Law No. 7/2004, the statute of the Provedor for Human Rights and Justice.

encourages people with knowledge of corruption to share information with it, and then follows up on such information with its own investigation. People who share such evidence need to be shielded; see the following paragraph.

Section 24 protects those who provide evidence to the ACC only from physical harm. People who voluntarily give evidence or bring cases to the commission's attention, such as whistleblowers or journalists, should be protected against retaliation (firing, blocked promotions, etc.) or threats. This intimidation is itself a form of corruption, and this law should ensure that ACC's effectiveness cannot be undermined by it.

Section 26 describes the only non-investigative power the Commission has: to report to the Public Prosecutor. However, if the Prosecutor chooses to ignore the ACC's report, nothing can be done. We suggest changing this statute (and if necessary, Law No. 14/2005 on the Public Prosecution Service) to require the Prosecutor to act, in a timely manner, on cases referred by the Anti-Corruption Commission. If the Prosecutor decides not to pursue a case from ACC, the Prosecutor should explain to the ACC why this was decided. Such accountability can help improve the functioning of both bodies, and reduce the likelihood of cases being stopped as a result of political influence or corruption.

Section 29 requires public bodies to provide information when the ACC requests it. We suggest expanding this to include international agencies which are present in Timor-Leste – the United Nations, World Bank, IMF, ADB, etc. These institutions may have Status of Mission Agreements which prevent the Public Prosecutor from bringing charges against their international staff, but these institutions should be obligated to share information relevant to the ACC's investigations.

Section 32.4 provides for an Annual Report to Parliament. This report should also be made public and accessible. In addition, the ACC should be empowered to provide other information to the media and the public, and should be required to report back to complainants or those providing evidence about the outcome of the investigations they helped with.⁴

Section 34 strips the office of the Provedor of its powers to investigate corruption. As a result, the only avenue to punish corruption passes through just two individuals (the Anti-Corruption Commissioner and the Prosecutor-General), either of whom can subvert the process. Timor-Leste will be stronger if multiple institutions have the mandate to monitor and work against corruption, provided they cooperate to avoid duplicating work on specific cases. This is already covered by Article 33 of the Provedor statute, and a similar article should be included in the ACC law.

Section 35 cancels the anti-corruption mandates of other institutions immediately upon promulgation of this law. Although we believe this would be a mistake at any time (see previous paragraph), it is even more grievous if done instantly. After the ACC law is promulgated, it will take several months to appoint the Commissioner(s), establish internal regulations and procedures, set up an office, hire and train staff, develop relations with other bodies, etc. Instant termination of the mandates of the Provedor and the Inspector-General creates a "window of opportunity" for corruptors. It would be better to have a transition period, giving the ACC six months or a year to establish itself, and allowing other organs to continue their work until it can be handed over to an effective Commission.

⁴ Article 34 in Provedor Law No. 7/2004 is a useful illustration:

2. *Where circumstances so require, the Ombudsman for Human Rights and Justice may decide to address the public directly or to issue communiqués or publish information on his or her opinions, recommendations and reports on specific cases or on his or her activity.*
3. *Any publicity issued by the Ombudsman for Human Rights and Justice shall be balanced, fair and true.*