COUNTRY REPORT: SAMOA

*Clarence Joseph Nelson**

I. INTRODUCTION

Corrupt: dishonest, crooked, dishonourable, unscrupulous, untrustworthy. Can also mean: decadent, degenerate, depraved, dissolute, immoral or perverse and wicked.

There are numerous forms of corruption that have arisen in this jurisdiction. This paper only proposes to examine the more common and prevalent types drawing upon examples where possible.

II. RELEVANT LEGAL PROVISIONS

A. Crimes Ordinance Part V

Like most jurisdictions, there are extensive provisions under Samoan law making corruption in its various forms a criminal offence and subject to the sanctions of the criminal law. Thus the Crimes Ordinance 1961 Part V deals with crimes affecting the administration of law and justice and public administration, and Part VIII with crimes against rights or property. Part V provides for the offences of official corruption (s. 35), perjury (s. 36), fabricating evidence (s. 37) and conspiring to defeat justice (s. 38). Of these, the most significant would be s. 35 and s. 38. Section 35 creates the offence of official corruption and provides that "everyone commits the offence of official corruption and is liable to imprisonment for a term not exceeding five years who (a) being the holder of any office, whether judicial or otherwise, in the service of the Independent State of Samoa, corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself or any other person any bribe, that is to say, any money or valuable consideration whatever, on account of anything done or to be afterwards done by him in his official capacity; or (b) corruptly gives or offers to any person holding any such office or to any other person any such bribe as aforesaid on account of any such act."

The section, although modeled on equivalent New Zealand legislation (New Zealand having been the administering power in Samoa from 1914 until self-governing independence in 1962), in fact departs from its colonial predecessor in that it seeks to amalgamate bribery and attempts to bribe judicial officers with bribery and attempts to bribe holders of other public offices: "the holder of any office, whether judicial or otherwise, in the service of the Independent State of Samoa". *"Holder of any office in the service of the Independent State of Samoa"* is not defined by the legislation and as such should be given its ordinary and natural meaning, which would seem clear enough and wide enough to encompass all office holders in the public service.

Of lesser import but arguably having greater flexibility and of more significance in the field of the public administration of law and justice is s. 38 which creates the offence of conspiracy/attempt to obstruct, prevent, pervert, or defeat the course of justice. That section provides that "everyone is liable to imprisonment for a term not exceeding three years who conspires or attempts to obstruct, prevent, pervert, or defeat the course of justice in any cause or matter civil or criminal."

This section is derived almost word for word from its New Zealand counterpart and the decisions of the New Zealand courts as to its interpretation, meaning and scope would no doubt be of highly persuasive value in any Samoan court.

A glaring omission in the legislative provisions in this area is a provision specifically protecting juries (in our system known as assessors) from jury tampering and bribing or attempts to bribe or influence or intimidate jurors whether by threats of force or otherwise, such as is found in the laws of other jurisdictions.

Also missing is a provision requiring the consent of the Attorney General to any prosecution of official corruption under s. 35 against judicial officers, to protect the holders of such office from the danger of frivolous prosecutions instigated by disgruntled but properly unsuccessful litigants. Such a provision would

* Senior Judge, Samoa District Court, Samoa.

customarily require the Attorney General's consent to be given after conducting "such inquiries as he or she thought fit." This would ensure that only proper and serious allegations of official corruption are made the subject of criminal charges against the appropriate party before the appropriate court. A case could well be made for extending such protection beyond judicial officers to, for example, law enforcement personnel and ministers of Government: see for example s. 106, Crimes Act 1961 (NZ).

B. Crimes Ordinance Part VIII

Part VIII provides for crimes affecting property and has provisions dealing with:

- theft (s. 85 to s. 88)
- obtaining by false pretence (s. 89)
- breach of trust (s. 93)
- obtaining credit by fraud (s. 96)
- conspiracy to defraud the public or any person (s. 97)
- falsifying accounts relating to public funds (s. 98)
- false accounting by an employee (s. 99)
- false statement by public officers in relation to public revenue (s. 100)
- blackmail and extortion (s. 101)
- forgery (s. 107)
- uttering forged documents (s. 108).

Of all these corruption related offences, the most significant and the one most commonly used against public officials and Government employees in this jurisdiction are the provisions relating to theft as a servant (s. 85 - definition of theft; s. 86(1)(g),(h) & (i) - penalty for theft; and s. 88 – extended definition of theft), forgery under s. 107, and false accounting under s. 99. Pursuant to s. 86(1) of the Act, everyone who commits theft within the terms of the definition of theft under s. 85 is liable to imprisonment for a term not exceeding (g) seven years if the property stolen is anything stolen by a clerk or servant which belongs to or is the possession of his employer; (h) seven years if the property stolen is anything in the possession of the offender as a clerk or servant, or as an officer of the Government of Samoa or of any local authority or public body, or as a constable; (i) seven years if the theft is one within the extended definition contained in s. 88 of this Ordinance." Otherwise, the punishment for theft is up to five years' imprisonment "if the value of the property stolen exceeds $400"; lesser terms if its value is less than $400 – s. 86(1)(a),(b),(c) and (d).

After drug offending and sexual crimes, theft as a servant is by far and large the most common type of offending in Samoa. It certainly is the most prevalent form of white collar crime and generally the offending falls into one of three categories:

- theft of Government money or stores or property by employees;
- theft by employees of money or property belonging to Government corporations or other statutory bodies or quasi-government corporations;
- theft by employees of money or property of private corporations and organizations, primarily lending establishments such as banks and other financial institutions.

It is a significant problem in Samoa and has effects that ripple beyond pure economic loss. Thus for example, it can affect investor confidence in an institution or organization and in some cases, bring borderline operation institutions and organizations to their knees or even drive them beyond the point of no return. To describe such offending as pandemic would not be an overstatement.

In comparison, prosecutions for forgery, false accounting and other offences under Part VIII of the Act are minimal, although that is not to say such offending is not prevalent. It is only to say that such prosecutions are not as commonly brought as those for theft by servants.

III. CASE STUDIES: CRIMINAL CASES

The scope of this paper and time constraints do not permit a detailed examination of all cases falling under the categories referred to above. But I will cite a few examples, outlined below.

A. Police v. F.E.

This case involved prosecution of official corruption under s. 35 of the Crimes Ordinance against a Senior Sergeant of the Criminal Investigation Branch of the Police Service and his team for accepting a substantial

bribe (although I was the trial judge it was a few years ago and I cannot recall the amount) from a drug suspect to facilitate the suspect's release from police custody prior to trial. The Sergeant's team was given immunity from prosecution in exchange for testifying against their leader, who had kept most of the bribe money. Subsequently, most if not all, of the team 'resigned' and gracefully exited law enforcement. The prosecution was successful and the defendant was sentenced to three years' imprisonment, reduced from four years for various mitigating factors. The suspect was never seen or heard of again and although a warrant for his arrest was issued for failure to appear at trial, it is extremely unlikely he will ever be brought to justice. It is a good reflection on the Samoa Police Service that this is the only such prosecution against one of their members in recent memory; I certainly know of no other in the past thirty years. It is also to their credit that they themselves initiated the investigation and brought charges against one of their own. They were most pleased at the outcome and quite satisfied with the sentence.

B. Police v. I.U.

This case involved prosecution against a schoolteacher under s. 35(b) of the Crimes Ordinance 1961 for attempting to bribe two judges of the Samoan courts before whom the defendant was appearing on charges of burglary and theft (in the District Court) and unlawful sexual connection (before the Supreme Court). The allegation is he tried to bribe each judge by enclosing SAT$1,000 in a letter to each requesting favourable treatment in his court cases. The defendant initially pleaded guilty to all charges but after engaging legal counsel and with leave of the court has entered not guilty pleas. Charges are awaiting hearing before me in the District Court as both the judges involved are naturally disqualified from dealing with the matter. The other charges facing him will probably now have to be dealt with by the Chief Justice.

C. Police v. Ale and Others

A good example of a 'theft by servants' case is that of *Police v. Ale and others*, a case involving four employees of Telecom Samoa Limited, a quasi-government cellular telephone company, at that time responsible for all cellular telecommunications in Samoa. The defendants were jointly charged and convicted of the theft of SAT$366,397.50 in cash, monies belonging to their employer which they had received and which they were obliged to credit to their employer's account but which instead they fraudulently misappropriated. The information was brought under the theft provisions, sections 85 & 88, of the Crimes Ordinance. Following sentence, the tea-lady defendant, Sifaga Tagata, appealed to the Court of Appeal against her conviction and sentence. The Court dismissed the appeal and re-affirmed her sentence.

This is unfortunately an all too common scenario in this country and even though defendants rarely receive a sentence other than imprisonment, wrongdoers remain undeterred. There is much to be said about the significance of social and family pressures that are brought to bear, even on well-educated but low income earning defendants. There is a familial, perhaps even a cultural, expectation that if you are employed you are required to contribute, even disproportionately and at whatever personal cost to yourself, to meet family, church and village obligations.

Attach this to a workplace with poor internal controls and ready access to money and other valuable property and the end result is the sort of theft by servants evidenced in the instant case. This is an ongoing problem which the imposition of deterrent sentences seems unable to cure.

D. Other Corruption Cases

Corruption type cases are not confined to the criminal justice sector. The scourge has raised its head in at least three other areas which merit some consideration and comment.

1. Public Service Disciplinary Proceedings before the Public Service Board of Appeal

These cases involve disciplinary proceedings taken by the employing arm of government (the Public Service Commission) against its employees for misconduct or misbehaviour in the course of employment. Sometimes it leads to criminal charges, but in many cases not, because of a lack of follow through from the disciplinary proceedings' stage to a criminal investigation phase. It is also not helped by the perception that public disgrace and loss of employment are sufficient penalty for the wrongdoer.

(i) Penaia Penaia v. Public Service Commission

A good case study of the insidious effects of corruption in a government organization is to be found in *Penaia Penaia v. Public Service Commission*, a proceeding that came before the Public Service Board of

Appeal after the appellant Mr. Penaia was dismissed from employment in the Government Public Trust Office for financial misconduct and financial mismanagement. At the time, the appellant was Chief Accountant for the Public Trust Office, responsible directly to the Chief Executive Officer, the Public Trustee. The case highlights a number of things, not the least of which is the importance of independent audits, which is how the mismanagement and misconduct of the appellant and his respective superiors were ultimately revealed.

The Board concluded (see page 19 of the decision) that the appellant in his capacity as Chief Accountant saw "an opportunity to profit from the disorganized chaos that was the Public Trust Office and he readily and without hesitation joined his superiors in periodic raids of pillage and plunder of the office coffers...". Although the scope of the Board's inquiry was limited to the charges against the appellant, clearly it found there existed sufficient evidence to justify the finding that both the head of the office and its chief financial officer were engaged in systematic financial mismanagement and manipulation for personal gain. It is fortunate for both parties the matter was not pursued further by way of criminal charges because there is no question there was sufficient evidence of corrupt activities being undertaken on a large scale by senior public service officials. It is not uncommon that Public Service Board of Appeal proceedings result in such activities coming to light but it is a sad state of affairs that they are not advanced to the next level by the appropriate authorities.

2. Commissions of Inquiry

It sometimes happens that allegations of wide-spread corruption in a particular department or sector of Government prompt Government to institute a Commission of Inquiry to investigate and report upon such allegations. Such Commissions are given substantial legal powers by the Commissions of Inquiry Act 1964 including power to summons witnesses, subpoena documents, punish for contempt, etc.

This has occurred at various times since independence in 1962. The earliest the writer can recall was one in the 1970s into what was then the Lands & Survey Department to investigate irregularities relating to *inter alia* the sale of certain government lands for less than true market value and the practice of fraudulent registration of conveyances and deeds of sale within the department. Allegations there were directed not only at the administrative head of the department but also at its political head, the Minister of Lands and Survey. Unfortunately I have been unable to unearth a copy of the Inquiry report and cannot accurately testify as to its conclusions other than to say the commission of inquiry mechanism proved to be a valuable tool that led to the government instituting reforms within that department. There have been similar outcomes with various other inquiries into government departments over the years.

A favourite target of commissions has been the Health Services Department which has been the subject of a number of inquiries, admittedly not all involving allegations of corruption and financial abuse. In the time available it has not proven possible to obtain copies of relevant reports but certainly the ongoing financial irregularities within the department have prompted at least one Supreme Court judge recently while hearing criminal charges against department employees to publicly comment about his amazement that there still seems to have been no improvement or resolution to the financial woes of the department after 20-odd years of inquiries and investigations into defalcations and mismanagement.

A recent case study within the writer's knowledge from this department is that of *Matatumua v. Public Service Commission*, a case that again emerged as a result of an appeal from disciplinary proceedings taken by the Public Service Commission against the appellant, the charges there being that the appellant acted improperly in separately billing cruise-ship patients that he treated in the course of his employment as a Port Health Officer. The Board found such conduct was contrary to certain provisions of the Public Service Act 1977 which prohibit public servants from accepting any "money, fee, gratuity or reward of any kind" for services without the prior approval of the Public Service Commission, and prohibits them from receiving or retaining any "fee, reward or remuneration of any kind whatsoever..... for the performance of any service for the government".

Again, while this matter did not proceed to criminal charges, there is a strong case for corruption in the appellant's misuse of his position as Port Health Officer to obtain personal gain over and above his contracted salary. And the amounts involved were not insignificant, in one instance, at issue was a bill for

NZD$18,500 which the patient had actually paid over to the cruise-vessel shipping agent. It is perhaps fortunate the matter was, as with many others, not taken further as the appellant's actions carried the unmistakable odour of dishonest, dishonourable and unscrupulous behaviour.

As an ancillary point in relation to commissions of inquiry generally, the above decision is also helpful in its identification (refer to paragraphs 6.4, 6.5 and 6.6) of the importance of the composition and procedures followed by such commissions, points applicable to all commissions of inquiry convened.

3. Electoral Corruption

A further category of corruption would be corrupt practices committed by candidates and electors at election time. Under this heading falls bribery, whether by way of payment of money or other gifts, or by way of promises; treating either before, during, or after an election by way of paying for, providing, or giving of food, drinks or other entertainment; and undue influence whether by threat of violence or otherwise, all designed to force or persuade an elector to vote or refrain from voting a particular way. Such behaviour constitutes offences against Part IX of the Electoral Act 1963 s. 96 (bribery), s. 97 (treating) and s. 98 (undue influence). Those who commit such corrupt practices are liable to criminal prosecution under s. 101 to s. 103 of the Act and on conviction can be subject to penalties of up to 12 months' imprisonment or a fine not exceeding $2000.

Electoral corruption is extremely common in the period preceding the general elections but the matters usually come before the courts not by way of criminal prosecutions but out of election petitions challenging the validity of a candidate's election, because by virtue of s. 112 of the Act: "where a candidate who has been elected at any election is proved at the trial of an election petition to have been guilty of any corrupt practice at the election his election shall be void."

There is also provision for the challenged candidate to file an answering petition against his challenger (called a cross-petition) likewise claiming the commission of corrupt practices by the challenger. With the result that in some cases, both the challenger petitioner and the challenged respondent can be found guilty of corrupt practices, rendering the election void and by virtue of s. 5(5)(b) of the Act, rendering both parties disqualified from competing as candidates in the resultant by-election because s. 5(5)(b) provides that "a person shall be disqualified for being a candidate or being elected as a Member of Parliament if he has been convicted in Samoa of a corrupt practice." (Such a result is quite common – a further example is *Leanapapa Laki v. Letoa Sefo Pa'u* a decision arising out of the 2006 general elections.)

While these cases do not necessarily involve corrupt activities by public officials, they do illustrate the long existing phenomenon and problem in Samoan politics of persons engaging in such activities at election time, in some cases the corrupt activities being carried out by successfully elected ministers of the Government. They also highlight the difficulty in distinguishing between bona-fide gift-giving in accordance with appropriate cultural norms and traditions and bribery and treating under the guise of same.

Despite an approximately 50% success rate in election petitions, candidates remain undeterred and it is the usual for election petitions involving allegations of corrupt practices to surface in large numbers after each and every general election. Thankfully for the courts, this occurs only once every five years as election petitions are by law accorded priority over all other business of the court and can occupy a significant amount of court time and resources.

Again the trend is that it is rare for successful bribery and treating petitions to be followed by prosecution in the criminal courts. This is probably also due to a lack of follow through by the appropriate authorities and the preference to speedily resolve such matters using the election petition process. There have however been some successful criminal prosecutions resulting in monetary sentences.

E. A Recent Infamous Case

It would be remiss to complete this perspective without visiting what remains a dark area of our recent national past. Arguably the most controversial Commission of Inquiry was one that was convened in 1994 to investigate allegations of wholesale political corruption, abuse and malfeasance. It arose out of a report from the Controller and Chief Auditor of Government tabled before the Samoan Parliament in July 1994 which

contained serious and widespread allegations of financial irregularities and corruption, especially at a political level, within a number of Government Departments and in relation to certain Government corporations, in particular, the fully owned national airline, Polynesian Airlines.

The Commission of Inquiry's findings, which were issued in October 1994, were the subject of a court challenge by the Controller and Chief Auditor and the full background and findings are referred to in the early part of the Court of Appeal decision on the matter.

In the time-frame given to produce this paper, I have been unable to locate a copy of the Audit or the Commission of Inquiry report but the Commission of Inquiry findings, in particular paragraph 6 thereof (refer to page nine of the decision), suggests some form of corrupt activities were proven to be existent in a number of Government Departments and agencies. It is however to be noted that paragraph 7 highlights these were not as widespread as alleged by the Controller and Chief Auditor and recommends the taking of appropriate measures "aimed at discouraging misconduct while developing public confidence in the institutions of central Government." Some of these measures are specified in paragraphs 9 to 12 by the Commission itself and as noted on page 12 by the Court of Appeal: "On 11 January 1995 Cabinet resolved to direct all Government Departments and all public servants involved for the immediate effective implementation of recommendations in the report of the Commission as well as in the report of the Chief Auditor. Ten specific directions were set out. Follow-up action was contemplated. To that degree the Chief Auditor has been vindicated. In combination his report and the Commission's report have evidently had a salutary impact."

On a more disturbing note is what is contained further down on page 12 reciting the fate of the Chief Auditor who authored the 1994 report to Parliament. Subsequently his services were terminated by the Government and proceedings for his unlawful dismissal remain pending before the Samoan courts. The Government went further and amended the Constitution placing the appointment of a Controller and Chief Auditor on a fixed term contractual basis (three years) holding office at the pleasure of Cabinet as opposed to Parliament as was previously the case. A constitutional challenge on the validity of that amendment by the former Auditor is, as far as I am aware, still also pending. The prophetic words of the Court of Appeal (page 13) have come to pass: "unless an amicable settlement is reached – which is surely much to be desired in the public interest – litigation and bitterness may be long drawn out."

The final act of the 1994 Chief Auditor's report was played out in 1999 when Leafa Vitale, one of the Government ministers alleged in the report to have been guilty of corruption, was charged together with a Cabinet colleague with the murder of another Cabinet minister who was allegedly thwarting their schemes and threatening to reveal their corrupt activities. The executioner was the son of Mr. Vitale and all were convicted and are presently serving life sentences for murder. The assassination sent shock waves through the Samoan and indeed the Pacific community and it is a widely held belief that the killing was part retribution and partly an effort to remove an obstacle to the defendants' illegal and corrupt activities. Typical news reports on the matter seem to indicate corruption, at least at that time, was very much alive and well, albeit deeply buried, in this island paradise.

The current thinking is that the 1999 assassination marked a highpoint (or low point, depending on your perspective) in an era dogged by allegations of abuse and corruption and that the present HRPP Government administration under the stewardship of Prime Minister Tuilaepa Sailele has done much by way of institutional and other reforms to remove the stigma from Samoan institutions and society, thereby restoring a large measure of public confidence. But more still can be and remains to be done. One of the aims in participating in courses such as the present one would be to gain a better understanding of the subject and pointers towards reforms and improvements to systems that can yet be made.

IV. CONCLUSION

There is a clear need for a few fundamentals that can serve to better equip the national legal system and its courts to deal with problems of official corruption:

1. Legislative reform to update criminal legislation passed 45 years ago;
2. Such reform should include measures to fill the gaps of the current legislation;

3. Better procedures for detection and prosecution especially among law enforcement bodies and agencies;
4. Greater recognition of the seriousness of such offending and the need to prosecute wrongdoers to the limit prescribed by law;
5. Taking of preventive initiatives such as training, educational and other programmes aimed at discouraging employee offending at all levels;
6. Encouraging dialogue between nations as no doubt such offending is not unique to any particular jurisdiction – the forms may vary but the essentials remain the same;
7. Facilitate international co-operation in transnational cases;
8. Introduce codes of employee conduct for the public and private sector and promote stricter internal disciplinary measures and controls;
9. Review and monitor rules of evidence and practice to effectively deal with any peculiarities unique to official corruption offences and offending.