
VISITING EXPERTS' PAPERS

EFFECTIVE MEASURES TO DETECT, INVESTIGATE AND PROSECUTE HIGH-PROFILE CORRUPTION IN HONG KONG

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I. INTRODUCTION

This paper will discuss the experience of Hong Kong's Independent Commission Against Corruption (ICAC) in the detection, investigation and prosecution of high-profile corruption. In recent years the ICAC has dealt with several such cases, most notably the cases of Donald TSANG and Rafael HUI. They were respectively the former Chief Executive and former Chief Secretary of Hong Kong, the number one and number two most senior government officials in Hong Kong.

The presentation associated with this paper will cover those two cases in more detail, but this paper focuses on certain general principles that need to be considered when handling such cases, which present a variety of challenges to anti-corruption agencies. The paper will highlight essential requirements of any strategy to effectively weed out high profile corruption, before considering the barriers to successful investigation and prosecution of these offences and how to overcome those barriers.

Although the paper will tackle the issues from the perspective of Hong Kong and the ICAC, it is suggested that it can provide a blueprint for use in any jurisdiction provided the essential requirements are in place.

II. ESSENTIAL REQUIREMENTS

Without certain basic requirements in place, detecting, investigating and prosecuting these high-profile cases is extremely difficult, if not impossible. The essential requirements underpinning these types of investigations are strong legislation, an independent judiciary and an independent Anti-Corruption Agency.

A. Strong Legislation

The strength of any country's anti-corruption legislation is a reflection of the strength of the political will to eradicate corruption in that country. Strong legislation reflects a strong desire to eradicate corruption. Typically, strong legislation confers special powers of investigation on the investigating agency.

In Hong Kong in the late 1960s and early 1970s, corruption was rampant. It was a way of life. Corruption was so widespread to that it had to be destroyed, if not, corruption would have destroyed society. The situation was so bad that the public literally demanded change.

To deal with this situation, the ICAC was given considerable powers of investigation, often described as "draconian" powers, right from the very first day. These were necessary to facilitate investigation and to lighten the burden of proof which ordinarily lies upon the prosecution.

When introducing the anti-corruption legislation, called the Prevention of Bribery Ordinance, or POBO, in 1970, the then Attorney General said:

If any real progress is to be made in the reduction of bribery, those responsible for the detection of these offences must be given the enhanced powers of investigation contained in the POBO unpalatable as some of them may seem. If some infringement

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of traditional liberties and privacy is involved, then I believe it is a price which the community ought to be prepared to pay, if it really wishes to see corruption ousted from our public life. If it is not ready to surrender some of these liberties, then it cannot easily, in the future, complain that the Government is reluctant to tackle the evil with sufficient vigour.

These special powers are discussed in some detail below, because they are relevant when overcoming barriers to investigation, especially in high profile cases.

B. Independent Judiciary

Strong legislation brings with it the fear of abuse by the agency using those powers. Judicial oversight by an independent judiciary, which is free from interference by the government or the investigative agency, can allay those fears. An independent judiciary basically ensures that the anti-corruption agency operates totally under the rule of law. That is to say that neither the agency nor the government itself is above the law. Anti-corruption legislation will not be effective if the government or the investigating agency is operating above the law. Everyone must be equal under the law and judicial authority is required for the exercise of the majority of the ICAC's special powers in Hong Kong.

C. Independent Anti-Corruption Agency

The importance of an independent investigating agency has been covered in some detail in the paper of Mr Simon PEH, Commissioner of the ICAC, and those details will not be repeated here. However, it must be stressed that the ICAC in Hong Kong operates strictly without fear or favour. There is no interference from the government in any operational matters. Having said that, the ICAC is also subject to important checks and balances on its work. The independent judiciary in Hong Kong is one of those checks and balances, but another important body is the Operations Review Committee (ORC).

The ORC is made up of prominent members of the public in Hong Kong and scrutinizes all cases that are investigated by the ICAC. The ICAC may well be the only anti-corruption agency in the world that allows such direct public oversight of its work. The ORC meets eight times a year to monitor ongoing investigations which have already reached the overt stage and also endorses the closure of concluded investigations. This means all investigations are open to scrutiny by persons outside the Commission.

The effect of this is two-fold – the ICAC is held to high standards for each and every investigation and we cannot write off investigations without pursuing each and every reasonable line of inquiry. This is important because it means the public can be confident that every investigation has been properly conducted.

III. OVERCOMING BARRIERS TO INVESTIGATION

Some of the barriers to conducting high-profile investigations are obvious while others are more obscure, but many of these barriers can be overcome through the use of special powers that can be made available to investigators under strong legislation.

Corruption is a secretive crime, with bribes usually paid in hidden, subtle or ambiguous ways. The victims of corruption are not immediately obvious and very often the victim is society in general. Encouraging the reporting of corruption in general is a challenge – and this is especially true when the corrupt are in positions of power and influence.

On the other hand, high-profile corruption cases will attract considerable public attention. High-ranking public officials are vested with powers which, if abused, will undermine the public interest. As such there is often intense interest in the progress and outcomes of such investigations. This can result in political pressure being applied to the law enforcement agency, which might in turn jeopardize the effectiveness of any investigation. And so maintaining confidentiality is the first barrier to investigation that must be overcome.

A. Confidentiality

It is vital that each and every investigation is conducted in the strictest confidence. This is necessary for three reasons:

- (i) to encourage the reporting of corruption;
- (ii) to prevent premature disclosure of information that might undermine the effectiveness of the investigation; and
- (iii) to avoid tarnishing the reputation of innocent subjects of the investigation or people who have been the subject of malicious complaints.

The law in Hong Kong makes it a criminal offence for anyone to disclose details of an investigation to others without lawful authority or reasonable excuse. This even applies to the person who reported the alleged offence to the ICAC.

On the one hand, this provision gives members of the public the confidence to report allegations of corruption, but on the other it also looks after the interests of those against whom malicious allegations of corruption are made. The threat of criminal sanctions also ensures that persons who are interviewed during the course of investigations do not disclose any details of those investigations to others. This can be particularly important when dealing with investigations of high-profile suspects.

In Hong Kong, the population has zero tolerance for corruption and is not afraid to report to ICAC. The ICAC enjoys strong public support and, every year, the ICAC receives two to three thousand complaints alleging corruption or corrupt practices, in both the public and private sectors. Only around 25% of these complaints are anonymous, meaning that the vast majority of complainants are not concerned about revealing their identity to the ICAC. This has meant there is little demand for any legislation to protect whistle-blowers. Instead, people are encouraged to report corruption because of the promise of confidentiality, which is afforded by section 30 of the POBO.

Section 30 prescribes that any person who, knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under the POBO is taking place, without lawful authority or reasonable excuse, discloses to (i) the person who is the subject of the investigation (the Subject Person) the fact that he is so subject or any details of such investigation; or (ii) the public, a section of the public or any particular person the identity of the Subject Person or the fact that the Subject Person is so subject, or any details of such investigation, shall be guilty of an offence.

Under the umbrella of section 30 of the POBO, the corruption investigation undertaken by the ICAC is protected in the sense that suspects do not get the opportunity, if they were so minded, to abscond, tamper with the evidence or otherwise attempt to frustrate the investigation. This means the ICAC can conduct a thorough and effective investigation.

The necessity and proportionality of section 30 of the POBO to achieve its aim of preserving the integrity of investigations into corruption in Hong Kong has been challenged and upheld in the courts. The highest appellate court, in the case of *Ming Pao Newspapers Ltd v Attorney General*¹, commented that in many offences involving dishonesty there will be a party who suffers and who has an obvious interest to report the matter to the authorities with the result that the offender can expect that some investigation into the offence will take place. In cases of bribery, however, neither party to the transaction is likely to have any interest to report the matter – rather the reverse, since both are likely to be satisfied with what has occurred. This means that bribery offences are particularly difficult to detect and the maintenance of secrecy as to an investigation is even more important in order not to put the suspect on his guard.

B. Public and Media Interest

High-profile corruption cases invariably attract attention, and sometimes criticism, from the general public and the media. They are understandably interested in the progress and outcomes of these investigations. Very often there are public concerns over actual, potential and perceived conflicts of interest, undue political influence or interference with such investigations.

These are at odds with the principle of confidentiality mentioned above as being essential to ensuring

¹ [1996] 2 Hong Kong Law Review 239.

effective investigation of such cases. It is therefore important to have corresponding institutional checks and balances.

The investigative power of the ICAC is structured to ensure there will be no abuse. A major part of this system of checks and balances is the ORC, which is discussed above and will be the theme reverberating through this paper. Rigorous review by the ORC helps to enlist and foster support from the general public.

C. Political and Social Sensitivity

Often in high-profile corruption cases, the interests of many stakeholders are involved, in particular those who have a wide sphere of political and/or economic influence. Investigators need to be sensitive to this situation when making key decisions on the direction of an investigation, in order to avoid sending out the wrong message. This is important because it is vital to avoid eroding public confidence in the integrity of the organisation.

There may be bona fide complainants with crucial insider information who are afraid of political retaliation. At the same time, it is not uncommon for there to be malicious complaints made against high ranking officials for political or other hidden agendas. The anti-corruption agency must avoid being used as a political tool by any party. This is another reason why investigations should be conducted in the strictest confidence.

In addition to the safeguards provided by the scrutiny of the ORC, which reassures the public that investigations are being carried out impartially, there also specific provisions in the Hong Kong legislation to protect informants and witnesses, as well as provisions to prosecute anyone making a false report to the ICAC. Some of these are discussed below.

- (i) Protection for informers comes from the POBO and the Witness Protection Ordinance (WPO). Under section 30A of the POBO, no witness in any civil or criminal proceeding shall be obliged to (i) disclose the name or address of any informer who has given information to the Commissioner with respect to an offence under the POBO, or of any person who has assisted the ICAC in any way with respect to such an offence; or (ii) to answer any question if the answer thereto would lead, or would tend to lead, to discovery of the name or address of such informer or person. The significance of section 30A lies in the fact that it is vital that the ICAC has the confidence of the public so that, when they make complaints or give information, their identity will not be disclosed without their consent. From the inception of the ICAC, the confidentiality of reports made to the ICAC has been stressed. The ICAC also takes steps to protect the identity of the complainants and informers for as long as they wish.²
- (ii) Separately, the Witness Protection Ordinance - WPO - has wide ranging provisions for the protection of witnesses and people with close personal relationships to that witness. Under the terms of the WPO, the ICAC has put in place a programme for protecting witnesses under a dedicated Witness Protection Unit. Acknowledging the crucial importance of protecting witnesses, a person shall not, without lawful authority or excuse, disclose information about the identity or location of a person who is or has been a participant or who has been considered for inclusion in the Witness Protection Programme, or compromises the security of that person.
- (iii) Making a false report to the ICAC is also an offence contrary to section 13B of the Independent Commission Against Corruption Ordinance (ICACO), which states that any person who knowingly (i) makes or causes to be made to an officer a false report of the commission of any offence; or (ii) misleads an officer by giving false information or by making false statements or accusations, shall be guilty of an offence.

To discourage offenders from making false report, the appellate court in *HKSAR v Fong Jik Jin Louis*³ commented that it was entitled to equate the circumstances revealed by the evidence in respect of false reports to the ICAC as similar to those inherent in an offence of perverting the course of justice. An immediate custodial sentence was appropriate, and a deterrent component was justified to underline the

² P. 653 of Bribery and Corruption Law in Hong Kong, Third Edition, McWalters (2015).

³ [2003] HKCU 359 (CACC 624/2002, 19 March 2003, unreported).

repugnance with which the courts view offences which affect adversely the course of public justice.

Given the above judicial decision, a clear message has been sent out by the judiciary to the general public that any malicious complaints lodged with the ICAC, including any with an intent to launch a political attack on rivals will be liable to criminal sanction.

Over the years, there have also been some public concerns over perceived malicious prosecutions or the abuse of process to “purge” political figures. Apart from the public oversight of the ORC, it is also worth noting that prosecutorial independence is guaranteed in Hong Kong under Article 63 of the Basic Law, which provides that the Department of Justice (DoJ) will control criminal prosecutions free from any interference.

That Basic Law’s guarantee of independence ensures that prosecutors within the DoJ may act independently without political or other improper or undue influence. Further to the Basic Law, the Prosecution Code governing the independence and role of the prosecutor stipulates that a prosecutor is required to act in the general public interest, and independently as a ‘minister of justice’.

In making decisions and exercising discretion, a prosecutor must act fairly and dispassionately on the basis of the law, the facts provable by the admissible evidence, other relevant information known to the prosecution and any applicable policy or guidelines.

The Prosecution Code also stipulates that a prosecutor must not be influenced by any investigatory, political, media, community or individual interest or representation; the possible political effect on the government, any political party, any group or individual; and possible media or public reaction to the decision. This brings us to another potential obstacle to proper investigation of high-profile corruption.

D. Access to Secret and Sensitive Information

There is a higher threshold of justification when requesting access to sensitive and secretive government information. The evidence taking process with witnesses holding high official rank in the government, either because of their roles or degree of participation in the matters of ICAC’s concern, may raise concerns about possible, albeit remote, criminal involvement on their part. This means that extra caution must be exercised when attending interviews and finalizing witness statements from such persons.

Witnesses may try to delay or resist providing information by claiming that the preservation of official secrets is more important than the detection and prevention of corruption. In this regard, special powers of investigation again become important. The ICAC is armed with a number of powers under the ICACO for the purpose of effective discharge of its duties in this regard:

- (i) Under section 13(1)(b) of the ICACO, authorized officers of the ICAC are empowered to enter any government premises and require any prescribed officer to answer questions concerning the duties of any prescribed officer or public servant and require the production of any standing orders, directions, office manuals or instructions relating to those duties;
- (ii) Section 13(2)(a) of the ICACO authorizes officers of the ICAC, in so far as is necessary for the performance of any of the ICAC’s functions under the ICACO, to access all records, books and other documents relating to the work of any government department in possession or under the control of any prescribed officer; and
- (iii) Further to the above, section 16 of the POBO provides that an investigating officer conducting an investigation into an offence alleged or suspected to have been committed under the POBO, may apply to any public servant for assistance in the exercise of his powers or the discharge of his duties under the POBO. Any public servant who, when requested, without reasonable excuse neglects or fails to render assistance is guilty of an offence.

As the investigation into high-ranking public officials inevitably involves sensitive and secretive government information, the above legal powers are essential tools to enable the ICAC to elicit evidence without undue resistance.

E. Laundering the Proceeds of Corruption

Globalization and electronic banking transactions have heightened difficulties faced by law enforcement agencies in unveiling and detecting the payment and laundering of bribe monies. The use of offshore bank accounts as vehicles to store and dispose of corrupt proceeds is common and these avenues are more accessible to high profile offenders, often because of the very position or high office they hold.

One special investigative power conferred upon the ICAC is the power to access and inspect records, and to require the production of documents and the provision of information under section 13 of the POBO.

Where the Commissioner of the ICAC is satisfied that there is reasonable cause to believe that an offence under the POBO may have been committed by any person and that certain records of or relating to any person named or otherwise identified in writing by the Commissioner of the ICAC are likely to be relevant for the purposes of an investigation of such offence, he may for those purposes authorize in writing any investigating officer on production by him of the authorization if so required, to take certain specified actions;

The net to capture records under this provision can be widely cast to include any share account, purchase account, club account, subscription account, investment account, trust account, mutual or trust fund account, expense account, bank account or other account of whatsoever kind or description, and any banker's books, company books, documents or other article.

This special investigative power is heavily used by the investigators in tracing the flow of funds to identify corrupt payments and to determine a suspect's wealth and the source of it. This power, when combined with the offence in section 30 of the POBO of disclosing details of an investigation, enables the acquisition of the information and documents being sought in secrecy while the investigation is still in a covert stage.

Apart from a proactive record inspection by investigators, the ICAC is armed with another special power to compulsorily obtain information from the suspect in a corruption investigation, any person other than the suspect, the person in charge of a public body and the manager of any bank.

Under section 14(1)(a) of the POBO, the Commissioner of the ICAC, with an order of the court, may require the suspect recipient to furnish to the investigating officer specified in the notice a statutory declaration or, as the Commissioner of the ICAC sees fit, a statement in writing, enumerating (i) the property belonging to or possessed by such person, his agents or trustees; (ii) all expenditures and (iii) liabilities incurred by such person, his agents or trustees.

Under section 14(1)(b) of the POBO, the Commissioner of the ICAC, again with an order of the court, may require the suspect recipient to furnish to the investigating officer specified in the notice a statutory declaration or, as the Commissioner of the ICAC sees fit, a statement in writing of any money or other property sent out of Hong Kong by him or on his behalf during the period specified in the notice.

Under section 14(1)(d) of the POBO, the Commissioner of the ICAC, with an order of the court, may require any person other than the suspect to furnish to the investigating officer all information in his possession or to which he may reasonably have access respecting such matters, and to answer orally on oath or affirmation any questions relevant thereto, and on demand by the investigating officer to produce or deliver or otherwise furnish to him the original or a copy of any document in his possession or under his control or to which he may reasonably have access.

The information so obtained pursuant to section 14(1)(a) and (b) of the POBO can provide the investigators with the picture on the suspect's property, expenditures, liabilities and overseas remittances and from this foundation, to establish the suspect's standard of living and current financial status.

For prosecutors, there is forensic value in that the statements made by an accused in response to a section 14(1)(a) or (b) notice acts to make an accused reveal to the prosecutor, in advance of trial, his explanation for any particular matter encompassed by section 14(1)(a) or (b) and to confine him to that explanation at his trial. That is to say that, although this information cannot be used directly in evidence at trial, it can be used to rebut any different explanation offered at trial by the defendant.

For the ordinary person, rendering assistance to a law enforcement agency in the investigation of crime is a civic duty, but not a legal one. The effect of section 14(1)(d) of the POBO in essence turns an otherwise uncooperative witness into a cooperative one, thereby enabling the ICAC to elicit information that is materially relevant to the investigation. In order that such draconian power is not arbitrarily used, judicial control has been put in place to ensure the employment of such power is reasonable and necessary.

F. Seizure of Assets

Alongside the extensive information that can be obtained pursuant to section 14(1)(a) and (b) of the POBO, investigators might find it necessary to restrain property which may be the proceeds of a corruption offence and preserve it pending the conclusion of the investigation or any prosecution flowing from it, for the purpose of future confiscation / restitution.

Under section 14C of the POBO, upon being satisfied with the conditions either that (i) there is property that is in the possession of or under the control of or is due to a person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under the POBO or against whom a prosecution for such an offence has been instituted, from another person, or (ii) a third party is holding any property for or on behalf of or to the order of a suspected person, then the court may impose any conditions or exempt any property from its operation as it thinks fit but the suspected person and any third party on whom a restraining order is served may not dispose of or otherwise deal with any property specified in the restraining order except in accordance with directions of the court.

G. International Cooperation

In this day and age, when high-profile corruption has a transnational nature and the powerful are able to access safe havens worldwide, the importance of cooperation across national borders and boundaries cannot be stressed enough. Mutual legal assistance agreements between countries are essential for the sharing of evidence and confiscation of ill-gotten gains.

IV. CASE STUDIES

The presentation associated with this paper goes into the detail of two case studies, the cases of the former Chief Secretary of Hong Kong, Mr. Rafael HUI, and the case of the former Chief Executive of Hong Kong, Mr. Donald TSANG. The details are not repeated here, but both cases are real examples that illustrate the essential requirements needed to detect, investigate and prosecute high-profile corruption cases. All of the factors discussed above were issues encountered during the course of those two enquiries.

V. CONCLUSION

This paper has demonstrated how the successful detection, investigation and prosecution of high-profile corruption must be underpinned by the political will to introduce strong legislation, as well as the rule of law overseen by an independent judiciary and anti-corruption agencies that are free from interference by the government.

Those three pillars provide a framework for fighting corruption on a grand scale, but there are still challenges to face. When any anti-corruption agency is given strong powers of investigation, there may be sectors of society questioning their necessity and whether the difficulties that are purported to bedevil the investigation of corruption are sufficient justification for such "draconian" powers. But the story of Hong Kong and the ICAC shows in societies ravaged by corruption, such powers are indeed vital to properly address the problem.

Notwithstanding the above, the social landscape worldwide has transformed into one of heightened protection of civil liberties of citizens. It follows that judicial and public scrutiny will be increasingly rigorous. Apart from the many judicial safeguards which are already in force to limit the exercise of powers, a comprehensive and well-established mechanism of checks and balances can assist in easing public concerns and to provide resistance against political influence. Only if the public can have full confidence in the legislation, the judiciary and the investigating agency, can the battle against high-profile corruption have any chance of success.