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Learning from the Past.
Challenges Ahead.

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Introduction

This Conference has brought together officials, professionals and leading experts in the field of public sector corruption. I am indeed grateful for this opportunity to share with you the past experiences of the ICAC in Hong Kong; how our anti-corruption model has stood the test of time to fight corruption and how we believe it will continue to do so as we face the challenges ahead.

2. For any anti-corruption agency to function I think it should first recognise the nature or form that corruption takes and how it manifests itself within their society. Equally it must ensure that it is equipped with the necessary statutory support and possess, in due proportionality, sufficient powers under which to act.

Pre ICAC Corruption Environment - The strong public demand

3. Before 1974 Hong Kong was plagued with corruption. It was rampant within the police and other disciplined services. It permeated all walks of life in the community of Hong Kong. It strangled free enterprise and made a mockery of government.

4. The last straw came in 1973 when a senior police officer, Chief Superintendent Peter Fitzroy Godber, fled Hong Kong while under investigation by the then Anti-Corruption Office of the Police. Public demand for action against corruption turned hostile as thousands of citizens took to the streets to openly protest against the corrupt regimes they were forced to endure. The government had no choice. It had to act.

Government Response

5. A Commission of Inquiry was established under the chairmanship of a senior judge who was tasked to investigate the Godber incident and to make recommendations on how to stem the tide of corruption.

6. The Commission of Inquiry described the corruption scene, especially within the then Royal Hong Kong Police as likened to a bus –

“Some got on the bus, others ran alongside it yet very few stood in front of it”.

It would probably start with an officer finding some cash inside his personal locker. Then it was up to him. He could quietly accept it and tacitly get on the bus of corruption, or he could refuse to accept the money, mind his own business and quietly run alongside the bus. But worst of all he could stand in front of the bus, that is to stand up and report corruption. It was simply suicidal in job terms for him to do that.

7. This Commission of Inquiry recognised the seriousness of the corruption problem in Hong Kong and the inability of the police to deal with it. It recommended that the task of investigating corruption be removed from the police and placed under the control of an independent agency. The Independent Commission Against Corruption (ICAC) was formed as a consequence.

The Hong Kong Anti-Corruption Model –Strategies

Political Will

8. For an organization such as the ICAC to function and to be effective, the political will of the government to eradicate corruption is of crucial importance. In the early days there was strong opposition from those who regarded the ICAC as a second police force. Such sentiment was most prevalent within the police. The hostility which was generated from ICAC's early vigorous enforcement action subsequently led to a 'revolt' by hundreds of policemen who after rallying against ICAC chose to attack the ICAC headquarters. This led to a partial amnesty announced by the Government in November 1977. Those were the darker days of the early ICAC as this amnesty created a public perception that the government's determination to fight corruption was faltering. This was reflected by the significant drop in corruption reports made to the ICAC and dealt a severe blow to the morale of those members of staff who devoted themselves to combating corruption.

9. It took some time for the ICAC to regain momentum which was only possible as a direct result of government and public support, and the continued operational effectiveness of ICAC as evidenced by a number of major prosecutions.

Legislation

10. The ICAC was established on 15 February 1974 with the enactment of the Independent Commission Against Corruption Ordinance. Being a statutory body, it was given an independent status in that the Commissioner, ICAC is answerable to the Chief Executive only. The Commissioner has the statutory responsibility to fight corruption through investigation, prevention and education. This holistic approach, or the 'three-pronged' strategy entails the work of the three functional departments namely the Operations Department, the Corruption Prevention Department and the Community Relations Department.

Investigative Law

11. The ICAC Ordinance and the Prevention of Bribery Ordinance provide the necessary powers of investigation into corruption and related offences. Our law tackles corrupt practices both within the public and private sectors. This comprehensive approach is accepted as most effective and necessary in line with the public's expectation of a clean government and a level playing field in the conduct of business. In dealing with bribery, our law criminalises both the act of the giver and the acceptor with equal punishment. This is absolutely essential if we are to inculcate a culture of probity within our community. In investigations, the Commissioner is obliged by law to receive complaints alleging corrupt practices and investigate those which are practicable to pursue. He is expected to fight corruption without fear or favour regardless of the background, nationality or social standing of the alleged corrupt.

12. In view of the secretive and conspiratorial nature of corruption and bribery, the law gives us special powers of investigation which include, among other things, compelling a suspect or a third person to provide information under certain conditions. In recognition of the difficulty in bringing the corrupt to justice and to ensure public confidence in the ICAC, there are provisions which include legal presumptions and protection of confidentiality including the identity of a subject of investigation and the details of investigation.

The Changing face of corruption - Techniques

13. Corruption has always been an insidious and difficult crime to detect. Under the POBO when ICAC was first established most of those powers came from the Commissioner of the ICAC himself. He could authorise warrants to search premises, and issue notices to suspects to produce details of bank accounts. In those times the hard won confidence in ICAC allowed society to tolerate our activities with little interference. This was because they eventually came to see that ICAC

was genuine in its mission to eradicate corruption and consequently began to have confidence that ICAC could stand firm against the corrupt. One such example was that the interception of communications could be arranged in direct consultation with the previous Governor of Hong Kong and later the Chief Executive.

14. Also the bribery offences then were predominantly the straight quid pro quo scenarios. For many of those who were corrupt, even for many years after ICAC was established, had a naivety that such overt quid pro quo payments in exchange for advantages could still be kept secret. Also corruption rarely strayed outside the boundaries of Hong Kong. As such the need to develop international connections and seek for a global understanding of corruption was considered not such a high priority.

15. However with the passing of time and the increasing awareness of the rights of the individuals, Hong Kong like many other jurisdictions passed a Bill of Rights Ordinance. This heralded in a period of shifting attitudes and values. The ICAC still continued to receive the overwhelming support of the community but now the community began to expect much greater transparency. As a consequence the powers once held by the Commissioner to issue search warrants and to authorise the service of notices on suspects to declare information of income, expenditure and sources of capital and other assets were transferred to the Court.

16. In the area of interception of communications again the legislature understood that this is an essential weapon in the fight against corruption and other serious crimes. However again the legislature also needed to ensure that such investigative methods were properly prescribed by law and as a consequence in 2006 the Interception of Communication and Surveillance Ordinance was enacted. This legislation established a panel of judges who are empowered to authorise interception and covert surveillance. A Commission on Interception and Covert Surveillance has been appointed to monitor and review interception operations and

use of intrusive or technically assisted surveillance to ensure that such activities are necessary and proportionate to the circumstances.

Changing Face of Corruption- Modus Vivendi

17. Not only have ICAC's techniques and operational laws become more transparent and regulated, but also the means whereby corruption is perpetrated has shifted. In tackling police syndicated corruption in the seventies we relied almost entirely on the evidence of accomplices. Accomplices are tainted in nature as they have effectively agreed to turn prosecution witnesses in exchange for reduction of sentence or immunity from prosecution. They bring with them credibility problems and personal motives for giving evidence. In the early years, the ICAC experienced the collapse of several trials because of unreliable witnesses.

18. In the public sector there has recently been a shift away from the quid pro quo bribery as corrupt public servants are increasingly aware that this form of corruption has become too high risk. Also there has been a shift of structure within the civil service in that hitherto before many government sector services that were especially susceptible to corruption were outsourced to the private sector. With this tendency to go for outsourcing we are experiencing an increase in private sector complaints especially in the award of contracts and procurement of services. Examples can be found in the building and construction sectors of services and public utilities.

19. At the more serious end of public sector corruption we have experienced cases where senior officials actually generate their own financial benefits from abuse of their public office without the need to involve themselves in a direct quid pro quo bribery scenario. This has been seen in cases where substantial government contracts have been awarded to family members. There is no evidence of a kickback to the official concerned which could be caught by the bribery legislation.

20. A particular case which was landmark in the development of this corrupt phenomenon was the case of SHUM Kwok-cher. SHUM was a Chief Property Manager of the Government Property Agency responsible for awarding government property management contracts to private enterprises. Through his position he was able to influence the awarding of contracts to two different companies that were owned by his brother in law. Through abuse of his position SHUM managed to usurp the regulations on the qualifications for tenders. He also exerted his influence in ensuring that the two companies operated by his brother-in-law were selected and consequently they were awarded contracts worth over HK\$157 million (A\$25.12 million). There was no proof of SHUM actually accepting any bribes and in fact there was no real evidence that he personally financially benefited in any way for favouring his family members. On legal advice, SHUM was charged with the common law offence of misconduct in public office. SHUM was convicted of this offence at the District Court and sentenced to nine months imprisonment.

21. However he took his appeals all the way to the Court of Final Appeal (CFA). In upholding the conviction the CFA sought to define Misconduct in Public Office as:-

- A Public Official;
- Who in the course of or in relation to his public office;
- Willfully and intentionally;
- Culpably misconducts himself;

22. Later in another case this definition was further refined. The case involved a senior police officer of the Hong Kong Police, named SIN Kam-wah, who befriended the proprietress of a nightclub where hostess girls were employed to give sexual services to customers for payment. The proprietress arranged for SIN to be given sexual services by no less than five hostesses free of charge, with free hotel accommodation and after lavish dinners were also provided at the proprietress' expense. His defence to the charge of misconduct in public office was that he did

not extend any favours in return for the services, that is, they were given to him completely pro bono and accepted whilst he was off duty with no promise of any favour in return. The District Court held that SIN as a police officer was on duty at all times and that accepting such services could only imply that the proprietress of the establishment would expect some form of favourable assistance from him in the conduct of her business at some time in the future. Again as in the case of SHUM this case went up to the CFA where the main challenge was that SIN, acting as he did off duty was his own business and he was not at the time acting as a public official. Therefore any interference with his basic right to freedom of movement and association was a breach of his rights guaranteed under the Hong Kong Bill of Rights Ordinance.

23. The CFA in upholding the conviction clearly stated that for a person in such a position to accept free services of this nature he deliberately exposed himself to the risk that he might at some time in the future be asked to intervene in policing matters concerning the conduct and activities of the establishment in question. Lord Mason in his CFA Judgment clarified SIN's situation in a refined definition of the common law offence of misconduct in public office which he expressed thus.

"The elements of the offence now as I see it is that:-

- A public official
- In the course of or in relation to his public duties
- Willfully misconducts himself; by act or omission.- The misconduct being deliberate rather than accidental.
- And is culpable in the sense that the conduct is without reasonable excuse or justification,

- The Misconduct being serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities. “

24. Another form of advantage which has been recognised is through what we call in Hong Kong the “old boy network” where government servants have given favours to private sector individuals in the expectation of securing later employment. There are also cases where past government servants who have obtained employment within the private sector have called upon ex-colleagues for favours or preferential treatment even though no systems of reward have been detected.

25. In both the private and public sector we are increasingly experiencing cases where the substantial part of the corrupt arrangement is executed across the border in Mainland China and in foreign jurisdictions in an attempt to avoid detection and criminal prosecution within the jurisdiction of Hong Kong.

26. ICAC has also experienced a revolution in the sophistication used by the corrupt. In this regard accountancy techniques have become much more elaborate so as to hide the trail of corruption, especially with those private enterprises that have had government officials on their payrolls. The use of computers and the increasing means whereby transfers of money can be made to anywhere in the world almost instantaneously have increased our investigative workload considerably in the past years.

27. Another challenge that has faced ICAC is the ever increasing standards set by the courts in the production and continuity of evidence. Even when there are full confessions from the suspects, the ICAC still found itself constantly challenged over issues such as whether the confession was made voluntarily or whether the admission of the confession would have a prejudicial effect which outweighs its probative value. In the early nineties, the ICAC introduced a system of video-recorded interviews with suspects in an effort to increase transparency and accountability. Nowadays, the evidence of video-interviewing a suspect is generally favourably received by the court but we still experience challenges of inducement and unfairness prior to the recorded interview..

28. In the international arena, on 12th January 2006 the PRC ratified the United Nations Convention Against Corruption (UNCAC), which was extended to Hong Kong one month later on 12th February 2006. In compliance with the UNCAC we have amended our laws to extend Mutual Legal Assistance (MLA) to all member states of the UNCAC so that we can stand together with the international effort of ensuring that jurisdictional boundaries and differing legal systems do not allow the corrupt to escape justice by spreading their activities across jurisdictional divides.

29. The UNCAC allows for formal MLA in the form of evidence collecting between jurisdictions and agency to agency contacts to assist in seeking investigative assistance. Since January 2008 under our agreements founded on the UNCAC, ICAC has received 7 incoming requests for formal evidence gathering and 29 agency to agency requests for investigative assistance. Conversely ICAC has requested formal assistance in 5 MLA requests for evidence gathering and has made some 142 agency to agency requests.

Investigative Techniques

30. As regards our own investigative techniques, because of the secrecy of corruption we have, in recent years taken a more proactive approach by using surveillance, informers and conducting undercover operations. I mentioned earlier about telecommunications interception (TI) and surveillance being now placed under a legislative regime. Over the years, intelligence gleaned from TI, complemented by covert monitoring operations has generated invaluable information to assist in targeting and steering the investigation towards overt action. When coupled with the use of undercover operations, they provide the most useful and effective tool in cracking down on corruption and serious crime syndicates.

31. Our TI operations were previously based on a provision under the Telecommunications Ordinance which permitted lawful interception with the approval of the CE. Covert monitoring operations were conducted under the concept of common law, i.e. a course of conduct is deemed to be lawful unless declared otherwise by law. About four years ago, for the first time in Hong Kong, our covert operations were challenged as being unconstitutional under the Basic Law, which permits intrusion of a person's privacy only in accordance with a set of procedures prescribed by law. As a result, the whole regime of covert monitoring was changed in August 2006 with the enactment of the Interception of Communications and Covert Surveillance Ordinance (ICSO). The new law provides a clear and comprehensive framework for law enforcement agencies to follow in the conduct of covert surveillance as well as TI. It also provides judicial supervision on the issue of authorization and a set of stringent safeguards to prevent possible abuse at all stages of the process when these powers are invoked. It establishes a Commissioner for ICSO as an external oversight authority.

32. To prepare the ICAC for the new regulatory regime, we have conducted training sessions and promulgated instruction manuals for our investigators. We stand ready to assist the Commissioner, ICSO in conducting reviews of our ICSO operations.

Ethical Consideration in Covert Operations

33. However as I draw to a close I would like to allude to some other aspects of the ever changing nature of our investigation techniques. ICAC only recruits investigators that can pass very high standards of integrity. Any doubt in that regard would cause the application to be rejected and even if the officer is employed any such doubt that arises thereafter could prevent his or her confirmation in the appointment. It is quite an obvious statement that only staff who possess high degrees of integrity can be trusted to spearhead investigations designed at arresting those who have forsaken integrity in pursuit of a corrupt advantage.

34. However this can create some what of a paradox because some of those officers, in attempting to detect those very offences, might themselves have to carry out duties which involve subterfuge, deceit and could border on criminal behaviour. With agreement from the Department of Justice, they may need to play a minor role in the commission of an offence or could frequent places and come close to engaging in inappropriate activities in the pursuit of evidence of corruption. The undercover officer is a vital weapon in the arsenal of the ICAC. Corruption by its very nature is a secretive and conspiratorial crime with satisfied customers on each part of the offence. Nonetheless, it also begs the question whether there is a contradiction in standards between what ICAC professes to stand up for and the techniques it occasionally employs to detect breaches of those standards. This could be regarded as a moral question for which there is no easy answer.

35. ICAC recognise all these risks and have developed training and support systems which not only assist the officer but also his controller in being able to identify any danger signs. ICAC will, as of principle, pull an officer from an undercover task if there is any suggestion or indication that he is in an uncertain state of mind or he is becoming unduly stressed by his duty. In fact in this regard we will always put the interests of the officer above the interests of the task.

36. However it still leaves open the question of the ethics of an organization such as ICAC using such techniques in the detection of crime. As I said earlier there is no easy answer. It can be explained I believe in that this form of investigation is only used for serious crimes. Many of our more significant cases involved some form of undercover work to a greater or lesser extent. We believe with our experience in undercover operations we have now struck that balance whereby the personal integrity of ICAC officers can comfortably sit side by side with the subterfuge and role playing of an undercover operation.

Professional Staff

37. It is impossible to spell out here with certainty what the challenges that lie ahead will be. However what we know for certain is that the only sure way to be able to stand against the ever changing face of corruption is to ensure that we train and nurture that most important of our resources; our staff. Over the years, the ICAC has developed a comprehensive system of training for its officers at different levels from the three departments. In response to new demands on our investigators, specialised training is provided to them such as computer forensics and forensic accountancy. As a progressive agency, we treasure the opportunity for experience sharing with our counterparts in other jurisdictions, through organizing international command courses and hosting international conferences. In general investigation we regularly send investigators on courses run by international law enforcement academies in Australia, Canada, United Kingdom and United States of America.

Conclusion

38. We have indeed come a long way since our birth in 1974. Our holistic approach or the 'three-pronged' strategy is now internationally recognised as a successful and effective model for combating corruption. The strategy is enshrined in the UN Convention Against Corruption which up to now 133 countries have ratified. It was also recognised by Dr Huguette Labelle, the Chairlady of Transparency International who commended ICAC for its holistic approach to fighting corruption in Hong Kong. Last year Hong Kong was ranked the 12th least corrupt amongst 180 countries on the corruption perception index published by Transparency International.

39. As I said earlier, the strength of the ICAC lies in the professionalism and integrity of its staff members. With those two prime attributes and support from the public, I have every confidence that we will be able to meet and respond to the challenges of the future.

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