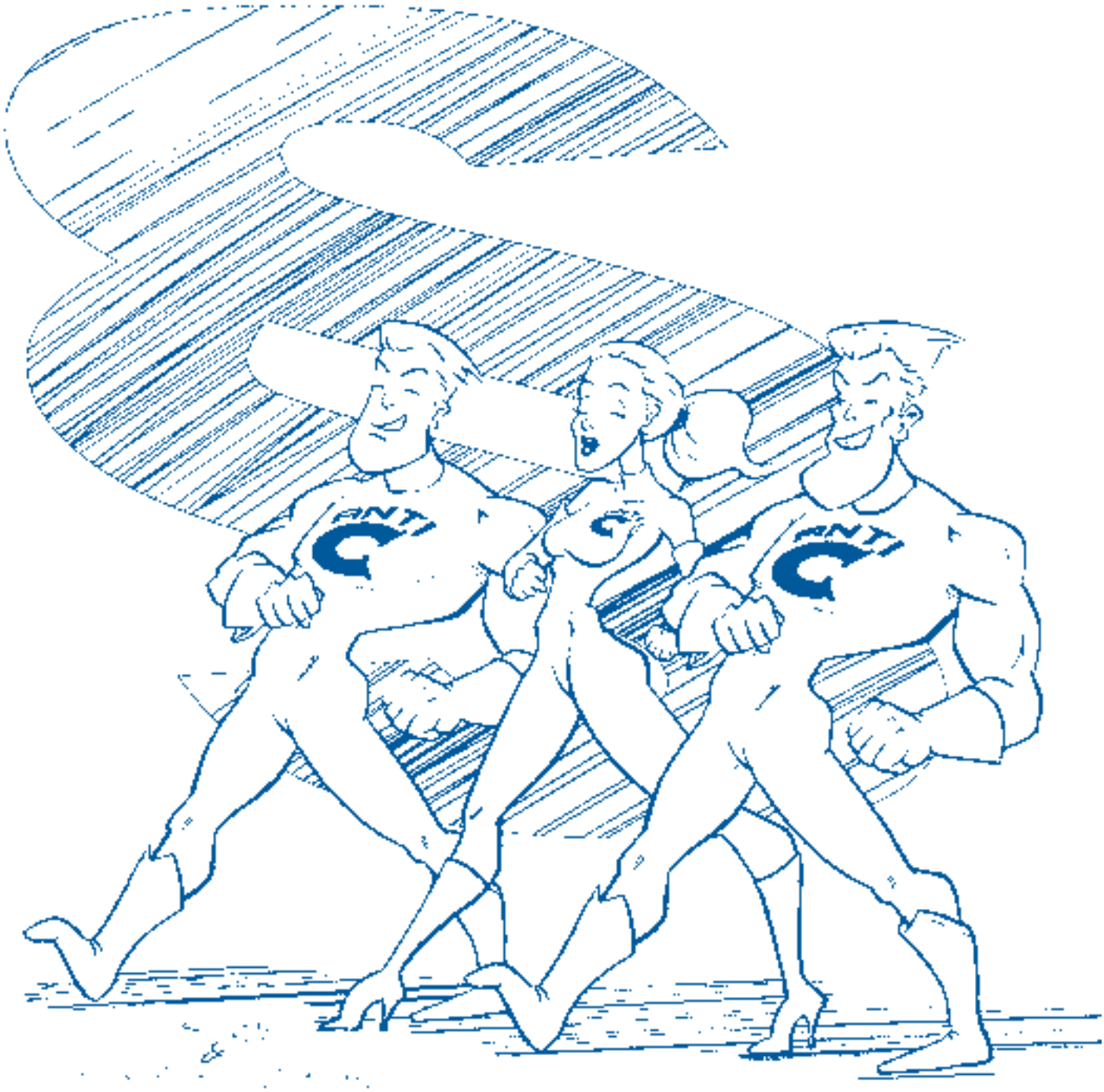

As the corrupt grow more sophisticated, conventional law enforcement agencies become progressively less able to detect and prosecute complex corruption cases. Matters are made worse when corruption is endemic and when conventional law enforcement mechanisms themselves harbor corrupt officials.

In recent years, governments have sought to bolster enforcement and prevention efforts by creating specialized anti-corruption agencies.[1]

CAN ANTI-CORRUPTION COMMISSIONS BE EFFECTIVE?

The usual model for anti-corruption agencies or commissions is the Hong Kong Independent Commission against Corruption (ICAC)[2] This Commission, established by the Independent Commission against Corruption Ordinance 1974[3] serves not only to investigate (but not prosecute) allegations of corruption, but also to run public awareness campaigns and to audit the management systems of individual government departments and agencies from an anti-corruption perspective. It has proved to be one of the relatively few outstanding successes in the fight against corruption anywhere in the world. It was also set up against a background of systemic and widespread corruption, as graphically related on its website.[4] Since its inception, the Commission has adopted a three-pronged approach of prevention, investigation and public education to fight corruption.[5] It has won the support of the community, and Hong Kong is now one of the least corrupt places in the world.

Surveys of the public in Hong Kong over the years have confirmed a confidence rating in the ICAC of between 98 and 99 per cent – well above that of any other agency of the administration. There could be no greater endorsement of their success in winning public support.

Hong Kong takes as its starting points the following principles:

- *Corruption occurs when an individual abuses his authority for personal gain at the expense of other people.*
- *Corruption brings injustice and, in its more serious manifestations, puts the lives and properties of the community at risk.*
- *The spirit of the Prevention of Bribery Ordinance (POBO)[6] enforced by the ICAC is to maintain a fair and just society.*
- *The law protects the interests of institutions and employers and inflicts punishments on unscrupulous and corrupt staff.*

Government officials are subject to Sections 3, 4 and 10 of the Prevention of Bribery Ordinance and staff of public bodies (who may not technically be "government officials") are subject to Section 4.[7]

Section 3 reinforces the spirit to uphold a high standard of integrity within the civil service by:

- *restricting civil servants from soliciting or accepting any advantage without the general or special permission of the head of government*
- *waiving the requirement of proof of an actual corrupt act or undertaking*

Section 4 deals with corruption of public officials. Under this section:

- *It is an offense for a public servant to solicit or accept any advantage offered as an inducement to or reward in connection with the performance of his official duty.*
- *Any person offering such an advantage (the "giver") also commits an offense.*

Section 10 tackles seriously corrupt civil servants and brings to book those who receive bribes over a period of time even when the assets they possess cannot be linked to any specific corrupt deal. It stipulates that, in the absence of a credible explanation, it is an offense for a civil servant to maintain a standard of living or to possess or to control assets not commensurate with his official salary and benefits.

The Hong Kong model does not allow the ICAC itself to prosecute cases, leaving the conventional prosecution service to decide whether or not the

facts warrant court proceedings. The separation of powers ensures that no case is brought to the courts solely on the judgment of the ICAC.

The Hong Kong model has proved effective not just because of the quality and determination of its staff coupled with the excellent legal framework within which they work. Rather, it is because the concepts of prevention and prosecution have both been functions of the Commission. Prevention (and the community education that goes with it) has been a core activity of the Hong Kong example, often informed by the revelations of investigators working on the enforcement side. This has enabled the Commission to develop a coherent and coordinated set of strategies, with results that are the envy of many. Those who have tried to copy the model have largely failed because they have lacked both this coherent approach and the resources necessary to carry it through. More recently, promising starts have been made in Botswana and Malawi. There is also the well-established New South Wales ICAC in Australia, whose website is a unique source of information on corruption prevention and investigation.[8]

Another major feature has been that, from the outset, Hong Kong had a judiciary of integrity, which meant that cases were properly heard and processed. In the absence of the rule of law, the experiment would almost certainly have had very different results. This provides the caution that a country intending to follow the Hong Kong path needs also to focus very sharply on the integrity needs of its judiciary.

If a judiciary is suspect, then the emphasis from the outset would need to be on the preventive and awareness-raising aspects of a Commission's mandate, rather than centered on prosecutions. However, given that corrupt civil servants can be dismissed administratively, without a court case, and that a head of government generally has it within his or her power to dismiss ministers, the agency could still make a considerable impact. The creation of specialized "anti-corruption courts" or "integrity courts" would be another possibility. Judges and support staff carefully selected for their integrity would be selected for such courts.

In a different model, the responsibilities of an anti-corruption agency are combined with the office of the ombudsman. The ombudsman, in this case, has the power to prosecute. This has been done with some success in a number of countries, including the Philippines.[9]

Others argue that there should be a clear distinction between the two roles: that the ombudsman's office serves to promote administrative fairness, and that this is best achieved by winning the confidence of the bureaucracy. (Even so, the South African experience suggests that the conventional Ombudsman is still able to make his mark in the fight to contain corruption.)[10] An agency or commission which is also charged with enforcement is more likely to be feared than trusted.

In 2000, to strengthen anti-corruption efforts, the Lithuanian legislature, the Seimas, adopted a law on the Special Investigations Service (SIS) and converted a body previously accountable to the government, into an agency accountable to the president and the Seimas.

The Lithuanian law provides for the independence of both the SIS as an agency and for its investigations. The main functions of the SIS are:

- *to carry out operational activities in detecting and preventing crimes involving corruption*
- *to conduct an inquiry and preliminary investigation*
- *to collect, store, analyze and sum up information about corruption and related social and economic phenomena*
- *to prepare and implement corruption prevention measures*
- *to report to the President of the Republic and the Seimas on the results of the activity of the service*
- *to submit its proposal on how to make anti-corruption activities more effective*

In performing some of their functions, the SIS officers have the right to carry out all operational activities provided for by the Code of Criminal Procedure and the Law on Operational Activity. In certain cases, the

activities must be sanctioned by a prosecutor or a judge. This last is an important safeguard against possible abuse of otherwise wide-ranging powers.

WHY SOME ANTI-CORRUPTION AGENCIES FAIL AND WHY SOME SUCCEED

It is likewise important to understand some of the reasons why anti-corruption agencies have failed and to ensure that these pitfalls are avoided. These include:

- *Weak political will – Vested interests and other pressing concerns overwhelm the leadership*
- *Lack of resources – There is a lack of appreciation for the cost-benefits of a "clean" administration and of the fact that an effective agency needs proper funding.*
- *Political interference – The agency is not allowed to do its job independently, least of all to investigate officials at the higher and highest levels of government.*
- *Fear of the consequences – A lack of commitment and a readiness to accommodate the status quo lead to agencies losing independence, resources, or both.*
- *Unrealistic expectations – Fighting systemic corruption is a long-term exercise.*
- *Excessive reliance on enforcement – The effective preventive capacities of the agencies are not fostered.*
- *Ignoring the elimination of opportunities for corruption to occur – Relying on enforcement after the event, corruption levels continue unabated.*
- *Inadequate laws – Without enforceable and effective laws, an agency is hamstrung.*
- *Being overwhelmed by the past – A new agency, usually small and needing to settle in, can be overwhelmed by inheriting a vast backlog of unfinished business from other enforcement agencies.*
- *Failure to win the involvement of the community – Lack of public awareness campaigns, etc.*
- *Insufficient accountability – If the agency is not itself accountable in appropriate ways, it can become an agency for persecuting government critics.*
- *Loss of morale – As people lose confidence in the agency, its staff lose morale.*
- *The agency itself becomes corrupt.*[11]

From this, it is apparent that to succeed an agency needs:

- *To be an element within a wider, tailor-made national strategy*
- *Government commitment and political will*
- *Concerted action with all other stakeholders*
- *Adequate laws with clearly-defined offenses and enforcement provisions*
- *Impartiality and independence from political influences*
- *Transparency and effective accountability mechanisms*
- *Credibility and public trust*
- *Consultation with civil society*
- *Appropriate expertise and specialization*
- *Adequate resources and funding*
- *A high level of ethics embodied in effective codes of conduct*

In deciding whether or not to establish an anti-corruption agency, the words of Alan Doig, a professor of fraud management at the University of Teesside in the UK, should be heeded.[12] In a major study, he notes that many countries have established anti-corruption agencies without proper evaluation and in contexts where the appropriate organizational

features are absent. This adversely affects their development and operational effectiveness.

Doig suggests that the following questions be taken into account:

- *What is the problem to be addressed, and how should it be addressed?*
- *Is the corruption high-volume (such as traffic police or license clerks) or high-value (such as procurement contracts) or politically sensitive (involving government ministers) or sophisticated (such as money laundering with overseas and organized crime dimensions) or a combination of all of these?*
- *What are the strengths and weaknesses of existing institutions and should or could they be resolved by a new institution, a merger, interagency co-ordination or co-operation, or segmented responsibilities?*

CAN A PROPOSED AGENCY BE PROPERLY RESOURCED?

From the outset, it is important to assess whether any such new body is necessary, and in particular, whether the costs of running a properly funded commission can be assured. An under-funded exercise will be doomed to failure, although few will be able to afford the well-funded operation in Hong Kong. There the funding approach was built on the conviction that the resources invested in corruption prevention in fact return large dividends to the public purse, both directly and indirectly. Some administrations provide their agencies with a share of what they recover, although this approach can lead to over zealousness and abuse. However, notwithstanding its relatively modest resources, the Lithuanian agency has earned a good reputation in a comparatively short period of time.

WHERE SHOULD SUCH AN AGENCY BE POSITIONED?

Having decided that an agency is needed, where should it be positioned? Should it be independent of other government agencies? In Hong Kong, the agency is placed administratively within the office of the head of government, but reports independently to the legislature. Its separateness from the public service and its autonomy of operation is reflected in law and practice. Alternatively, should an agency be placed within a ministry of the interior or ministry of justice? This model was recently rejected in Lithuania.

An agency can itself be used corruptly, in that it can be turned – with its formidable array of special powers – against political opponents. The introduction of any agency must guard against this possibility. Placing it under a minister in a government agency is to tempt fate. The administration creating it may be above suspicion, but in democracies institutions have a longer life span than do governments, and none can predict the future. Continuing integrity at the highest levels of government should not be assumed.

More than this, the worst excesses of "grand corruption" can take place in and around the office of the president. An anti-corruption agency placed in such an office is hardly in a position to tackle superiors in the office hierarchy unless it is supported by other accountability mechanisms. Thus, an agency should be responsible to the legislature and to the courts, in much the same way as is an ombudsman. By monitoring the daily work of the Hong Kong Independent Commission against Corruption (ICAC), citizens' advisory committees build additional public confidence in the institution.

By contrast, when a commission has been placed wholly under the office of president (without the support of other separate accountability mechanisms), and reports only to the president, it has generally been conspicuously unsuccessful in tackling high-level corruption.[13]

APPOINTING THE HEAD OF THE AGENCY

The effectiveness of the agency may well be determined by how the officeholder is appointed or removed. If the appointing mechanism ensures consensus support for an appointee through the legislature, rather than government, and an account-

ability mechanism exists outside government (e.g., a legislative committee on which all major parties are represented), the space for abuse or non-partisan activities can be minimized.

A flaw in many legislative schemes involves giving a president (or any political figure) too much control over the appointment and operations of an anti-corruption agency. The president is the head of the executive branch of government, and members of the executive can also succumb to temptation. This could place the president in the impossible position of deciding whether or not to prosecute close political colleagues.

Precise appointment procedures will vary from country to country, but each should address the issue of whether the proposed mechanism sufficiently insulates the appointment process. It must be one that ensures that an independent person of integrity is likely to be appointed, and that such a person is adequately protected while in office. The office-holder should also be afforded the same rights of tenure of office as those enjoyed by a superior court judge. Removal from office should never be at the discretion of existing powers, but only in accordance with a prescribed and open procedure, and only on the grounds of incompetence or misbehavior.

In several countries, attempts have been made to appoint serving judges as head of an anti-corruption commission. However, these have invited successful court challenges on the grounds that a judge is, by virtue of his or her post, constitutionally disqualified from serving at the same time in a position within the executive government by virtue of the doctrine of separation of powers.

THE POSITION OF THE HEAD OF STATE AND GOVERNMENT

The framework must necessarily provide for a procedure to deal with the theoretical situation of the anti-corruption agency or commission finding evidence that a president may have acted corruptly. However remote the likelihood of this happening may be, lawmakers must look ahead to unpredictable eventualities. They must also reflect on the issue of public distrust if the president is seen as being outside the scope of the agency's effective jurisdiction. Even more significantly, a special provision will send the very important signal to the public that the government and the legislature are serious about countering corruption and that no one is exempt from the rule of law. The public relations aspect of this provision alone warrants its inclusion.

The head of an anti-corruption agency cannot generally bring charges against a president while in office, as he or she is usually immune from suit or legal process under a country's constitution. Impeachment proceedings will generally follow per orders from the legislature. The legislature speaker presides over the proceedings. This immunity gap can be closed if the anti-corruption legislation allows the head of the anti-corruption agency to report the matter in full to the speaker of the legislature when:

- *There are reasonable grounds to believe that the President has committed an offense against the Act.*
- *There is prima facie evidence which would be admissible in a court of law.*

Thereafter, it would be the responsibility of the speaker to proceed in accordance with the legislature's orders. An alternative is to provide for a special prosecutor, as occurs under US law.

KEEPING THE ANTI-CORRUPTION AGENCY CORRUPTION-FREE

Such an agency is obviously a ripe target for corrupt interests and for the attention of organized crime. Robust steps have to be taken to prevent it from becoming a victim of corruption itself. Hong Kong has achieved this through augmenting its accountability to the head of government and to the legislature with a series of advisory committees.

There are four of these, made up of some 40 prominent citizens who are appointed by the head of government to oversee the work of the ICAC. The Advisory Committee on Corruption oversees the general direction of the ICAC and advises on policy matters; the Operations Review Committee

oversees the work of the ICAC's investigative arm; the Corruption Prevention Advisory Committee advises on the priority of the corruption prevention studies and examines all the study reports; and the Citizens Advisory Committee on Community Relations advises the ICAC on the strategy to educate the public and enlist their support.[14]

Particularly critical is the role played by the Operations Review Committee, which is positioned to detect any serious malfunctioning and abuse within the organization. The terms of reference for this committee include:

1. *To receive from the Commissioner information about all complaints of corruption made to the Commission and the manner in which the Commission is dealing with them.*

2. *To receive from the Commissioner progress reports on all investigations lasting over a year or requiring substantial resources.*

3. *To receive from the Commissioner reports on the number of, and justifications for, search warrants authorized by the Commissioner, and explanations as to the need for urgency, as soon afterwards as practical.*

4. *To receive from the Commissioner reports on all cases where suspects have been set free on bail by ICAC for more than six months.*

5. *To receive from the Commissioner reports on the investigations the Commission has completed and to advise on how those cases that, per legal advice, are not being subject to prosecution or caution, should be pursued.*

6. *To receive from the Commissioner reports on the results of prosecutions of offenses within the Commission's jurisdiction and of any subsequent appeals.*

7. *To advise the Commissioner on what information revealed by investigations into offenses within its jurisdiction shall be passed to government departments or public bodies, or other organizations and individuals; or, where in exceptional cases, it has been necessary to pass such information in advance of a Committee meeting, to review such action at the first meeting thereafter.*

8. *To advise on such other matters as the Commissioner may refer to the Committee or on which the Committee may wish to advise.*

9. *To draw to the Chief Executive's (head of government's) attention any aspect of the work of the Operations Department or any problems encountered by the Committee.*

10. *To submit annual reports to the Chief Executive which should be published.*

From the outset, an internal investigation and monitoring unit was established to investigate all allegations of corruption made against ICAC staff. All completed investigations are reported to the Operations Review Committee for resolution.

An additional safeguard is an independent ICAC Complaints Committee, chaired by an Executive Council member (member of the Cabinet), that monitors all complaints against the ICAC. Those wishing to lodge a complaint against the conduct of an ICAC officer or ICAC practices and procedures are directed to the Committee through the ICAC's website.

Should there be reasonable grounds for believing that officials have been behaving improperly, the exercise of powers of suspension become necessary while investigations are taking place. However, these powers of suspension, too, can easily be abused. One can imagine a scenario in which the head of an anti-corruption agency might be suspended by a future president, simply because he or she was investigating allegations which might be politically embarrassing. There must always be an appropriate independent check on the power of suspension.

The relationship between an anti-corruption agency and a director of public prosecutions is also a critical one. What use is evidence if the suspect cannot be prosecuted? Generally, under a constitution, such a director is given sole oversight for all prosecutions and is empowered to intervene in any criminal proceedings initiated by any other person or authority.

However, in assessing the independence and the likely effectiveness of an anti-corruption agency, the question arises whether, under the constitution, the director enjoys sufficient independence in exercising the discretion to prosecute. A guarantee is needed to ensure that there will be little scope for political interference after investigations by the agency have been completed.

ARRANGEMENTS TO CONSULT WITH THE PUBLIC

The agency's relationship with the public is also critical to its success. Some agencies, such as the highly successful Hong Kong ICAC, have established formal arrangements whereby public participation in policy formulation is ensured through the Committees discussed above. By providing for such an arrangement, which can take the form of a committee chaired by the Minister of Justice, the anti-corruption framework encourages public accountability.

The relationship with the public is also important in laying the foundation for the preventative functions of an anti-corruption agency. The framework must provide for the involvement of a wide range of people and interests in the formulation of prevention policies and their execution. In this way, various stakeholders become involved in the prevention process, and their own institutions – both within government and in the private sector – can be mobilized in support of the agency's efforts.

RECOMMENDATIONS TO OTHER GOVERNMENT AGENCIES

It would be misleading to think that every anti-corruption recommendation from an agency will be relevant and practical. It can be counterproductive to give an agency the power to require that specific changes be made. Rather, it is better for the head of the administration to direct departments to cooperate with the agency, and for the agency to sit down with a department's management and work out practical and acceptable changes to the system under review. The department should implement the solutions thus identified. If not, the department should give an explanation to both the head of the administration and to the agency. There may be, for example, compelling factors that render recommended reforms inappropriate.

Nevertheless, some countries have found that a public service can ignore an anti-corruption body's recommendations. In such cases, the legislature, through the agency's annual report, a special oversight committee or otherwise, may be able to be used as a forum in which departments which fail to cooperate can be held to account for failures to revise bad practices.

THE LEGAL AND ADMINISTRATIVE FRAMEWORK

To operate successfully, an anti-corruption agency must have:

- *guaranteed access to information*
- *power to freeze assets and bank accounts*
- *power to seize travel documents*
- *power to protect informers*
- *power to blacklist or debar corrupt foreign and domestic companies from public contracting*
- *the criminalization of "illicit enrichment"*

In addition, there can be special provisions relating to disclosures by bidders when tendering for public contracts (see below).

It is also important that any special powers conferred on an anti-corruption agency conform to international human rights norms, and that the agency itself operates under the law and is accountable to the courts. In setting the parameters for the establishment of an anti-corruption agency, a government must ask itself if it is creating something that would be acceptable if it were an opposition party. Very often the answer changes with perspective. The search should be for a formula which seems fair and workable to everyone, whether in or out of government. Above all, it should allot appropriate powers of investigation, prosecution and, sometimes most importantly, prevention. Arrangements must be

such that the agency not only can, but will survive changes in power.

Further elaboration of the requirements for a successful anti-corruption agency follows:

(a) Access to information

An important factor to be considered in establishing the legal framework for an anti-corruption agency or commission is that adequate powers be given to access documentation (including bank accounts) and to question witnesses. In some countries, efforts are made to restrict the access of an agency to information. However, there is no reason, in theory or in practice, why an agency ought not to enjoy, as an ombudsman does, all the rights of law enforcement officers, and full access to government documents and public servants.

(b) Special powers to seize assets, freeze bank accounts

The anti-corruption agency or commission must have the power to freeze those assets that it reasonably suspects may be held on behalf of people under investigation.

When speed is of the essence, it should be able to do so prior to getting a court order. Without this power, bankers can simply transfer money electronically in a matter of minutes. There should also be a corresponding right of application to a superior court when a third party feels aggrieved.

(c) Seizing travel documents

It is also usual for an agency to have the power to seize and impound travel documents to prevent a person from fleeing the country; perhaps in emergency cases, even to do so temporarily without having to wait for a court order. This is a necessity, as an agency's power of arrest generally arises only when there is reasonable cause to believe that an offense has been committed.

(d) Protecting informers

It is also customary for an agency to have the power to protect informers. In some cases, informers may be junior government officials who complain about the corrupt activities of their supervisors. (They cannot be expected to complain if they risk losing their jobs or other forms of harassment.) Not only should there be legislative protection for informers, but physical protection should also be available – extending, where necessary, to safe houses and, in exceptional cases, sanctuaries in other countries.

In the context of protecting all informants, the relevant provisions in Botswana's legislation read as follows:

45 (1) In any trial in respect of an offence under Part IV, a witness shall not be obliged to disclose the name or address of any informer, or state any matter which might lead to his discovery.

(2) Where any books, documents or papers which are in evidence (contain his name, etc.) the court ... shall cause all such passages to be concealed from view or to be obliterated so far as may be necessary...

(3) If in any such proceedings ... the court, after full inquiry into the case, is satisfied that

the informer willfully made a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceedings a court is of the opinion that justice cannot be fully done between the parties thereto without disclosure of the name of the informer … the court may permit inquiry and require full disclosure[16]

Legislation should also ensure that legal practitioners, accountants and auditors can all be required to disclose certain information about their clients' affairs notwithstanding professional privilege.

(e) Debarment of corrupt foreign companies from bids on public procurement contracts

Knowing that they are beyond the reach of authorities and free to breach the criminal law by paying bribes to public officials, foreign suppliers often regard themselves as exempt from local laws. This situation can be resolved, at least in part, by adding a remedying provision to the act creating an anti-corruption agency. Such a provision may state that when the agency has evidence which establishes, on the balance of probabilities, that such a company or its subsidiary has committed an offense against the act, the agency can apply to the court for an order excluding that firm or its directors and all other companies associated with it, from undertaking any business with the government for a period of time decided by the courts.

(f) The offense of unexplained wealth

In a number of countries, the law requires that persons in possession of unexplained wealth be called upon to give a credible explanation as to how they came by it or risk being charged with "living beyond one's known means." The Hong Kong ICAC has found Section 10 of its Ordinance to be particularly effective:

(1) Any person who, being or having been a prescribed officer (i.e. public servant):

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

(2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused.

(3)-(4) (Repealed 56 of 1973 s. 2)
(5) In this section, "official emoluments" includes a pension or gratuity…[15]

Mandatory disclosure of commissions paid in public procurement bids

The use of "commissions" (which are paid to local agents and are often the cover for bribes) is the most frequent source of corruption in international transactions. Not only does this practice threaten sound decision-making, but also adds to the national debt. Little or no income tax is paid by those receiving the payments. The public loses out in all three respects.

Therefore, legislation establishing an anti-corruption agency or commission could oblige those tendering for public contracts – and their local and other agents – to make full disclosure of all commissions and performance bonuses paid in respect to their bid. It can also require that tenderers provide, on request, full details of the services rendered for those commissions. Such disclosures should be made at the time of the bidding and again within six months of the completion or abandonment of a contract. A good example of dealing with secret commissions is New Zealand's Secret Commissions Act of 1910.[17]

SHOULD NEW LAWS AND OFFENSES BE RETROSPECTIVE?

A new anti-corruption agency is usually established in a situation where corruption has become out of control. There will be a large number of outstanding cases requiring attention, and at the same time, urgently needed reforms in official practices and procedures. There will also be a skeptical public, unsure as to whether the anti-corruption efforts are genuine. In such circumstances, it is easy for a new agency to be swamped by old cases, and quickly take on the appearance of being just another ineffectual body. How can these dangers be avoided?

It is usually best for the legislative framework to provide that a new agency or commission focus on the future, rather than be forced to deal with outstanding and perhaps crippling caseloads inherited from the police. Such a burdensome state of affairs could quickly overwhelm the new agency with enforcement obligations at the expense of other essential tasks of prevention and containment. The Hong Kong ICAC overcame this through the legislation referred to above, which states that:

Notwithstanding section 12 (jurisdiction), the Commissioner shall not act as required by paragraphs (a), (b) and (c) of that section in respect of alleged or suspected offences committed before 1 January 1977 except in relation to:

(a) persons not in Hong Kong or against whom a warrant of arrest was outstanding on 5 November 1977; (b) any person who before 5 November 1977 had been interviewed by an officer and to whom allegations had been put that he had committed an offence; and (c) an offence which the Governor considers sufficiently heinous to warrant action.

Such legislation leaves existing offenses to be dealt with in the ordinary way (by the police) and under the existing law. However, it also allows flexibility with respect to those cases which occurred in the past, but which a Head of Government deems in the public interest to be important enough to be investigated by the commission. Including this kind of provision in the legislative framework helps a commission begin on a fresh footing and allays any possible fears about witch-hunts over past events. It also makes the whole idea of putting the past aside more palatable.

ASSETS FORFEITURE UNITS — THE SOUTH AFRICAN EXPERIENCE WITH CIVIL ASSET FORFEITURE

A highly successful initiative in South Africa has been not to establish an anti -corruption commission as such, but to embark on a strategy of civil asset forfeiture.[18]

South Africa's Asset Forfeiture Unit is a unit within the Office of the National Director of Public Prosecutions. When property is tainted by criminal activity, the Unit can commence court proceedings for its forfeiture to the state.

Under the Prevention of Organised Crime Act 1998[19], property tainted by criminal activity is liable to be forfeited to the state by way of a civil action. Civil asset forfeiture enables the state to confiscate suspected criminals' assets purely through a civil action against the property, without the need to obtain a criminal conviction against the owner of the property.

On application by the National Director of Public Prosecutions, the High Court can make an order forfeiting property to the state which the court, on a balance of probabilities, finds to be "an instrumentality" of a crime (i.e. was used in the crime, such as a vehicle, or a building used to store stolen property), or that it is the "proceeds of unlawful activities." The validity of such an order is not affected by the outcome of criminal proceedings. Even if a suspected criminal is acquitted in a criminal court (where the state has to prove its case beyond a reasonable doubt – a higher burden of proof than a 'balance of probabilities'), he or she can still have property forfeited to the state.

Assets forfeited are used to assist law enforcement agencies in combating organized crime, money laundering, criminal gang activity and crime in general, as well as to compensate victims of crime. In the United States, where similar civil asset forfeiture legislation has been in existence since 1970, forfeiture actions raise about $500 million for the federal government per year.

In South Africa, a specialist multi-disciplinary unit comprising lawyers (criminal and civil), accountants and financial investigators was established in 1999 to ensure that forfeiture was used effectively.

Experience in the United States had shown that civil asset forfeiture legislation was often implemented poorly because the police and prosecutors tended to focus their activities on achieving convictions rather than also gathering evidence to support civil forfeiture proceedings. Forfeiture involved a relatively complex and novel civil law about which most police officers and prosecutors knew very little. It was only after Congress had passed a special budget to employ forfeiture specialists in each of the US Attorney General offices nationwide that civil asset forfeiture legislation started to be used effectively.

The South African unit was warned to expect litigation from rich and powerful criminals, desperate to retain their ill-gotten gains and able to afford the best legal brains in the country to raise every imaginable technicality. This has proven to be the case, notwithstanding the fact that in the US another experience has prevailed. American courts have consistently upheld civil asset forfeiture legislation against countless technical objections. The US courts have held that proceeds forfeiture is a simple restitution, and represents neither a fine nor a punishment. They have also rejected arguments that the assets in question should be available to pay for a defendant's lawyers on the basis that a defendant has no right to spend another person's money.

There were, however, initial difficulties in South Africa on the issue of whether the forfeiture law should cover assets acquired before the Act came in to force. The Act has since been amended to remove the various points of difficulty, and it now appears to be working effectively.[20] By the beginning of June 2000, the unit had initiated 28 cases and had been successful in 23. Assets seized as of June 2003 exceeded 11 million US dollars.

PUBLIC HEARINGS

The ICAC in New South Wales, Australia, another leading anti-corruption agency, has for some years been empowered to hold public hearings.[21] On these occasions, witnesses are summoned to give evidence and, although their evidence cannot be used against them in criminal proceedings, the hearings provide an opportunity to enlighten the public as to precisely what has been taking place. Once illegal and highly questionable patterns of behavior have been exposed in this way, it is reasonable to expect that those involved are likely to be shamed into changing their ways. In particular, an inquiry into abuses of travel privileges by elected members of the New South Wales State legislature led to greater clarity in procedures and higher standards of conduct by those concerned.

However, such public hearings have sparked an intense debate and led to a re-examination of the way in which the Agency is to work in the future. Public hearings outside the criminal justice system can leave allegations unresolved and, worse, prevent the trial of suspects who, justifiably, say that they could not now have a fair trial. Although the practice may well be abolished in New South Wales, in a state gripped by systemic corruption and anxious to put the past behind it, the approach may have value as a way of closing down corrupt practices by exposing them to public view. If there are to be no subsequent court proceedings (provided, of course, that a full and honest disclosure has been made), it would serve as a way of shaming those from the past, and as a means of highlighting practices which were unacceptable and so must be changed.

Some argue for versions of truth and reconciliation commissions as a way of breaking with the past. However, this gives rise to difficulties. It is one thing to forgive and pardon a human rights abuser – quite another to do so leaving the offender in possession of illicitly acquired wealth.

EXPECTATIONS

It is true to say that anti-corruption agencies have met with mixed results. For reasons not yet wholly apparent, they have tended to be much more successful in East Asia – in countries such as Singapore, Malaysia, Taiwan and Hong Kong – than they have been elsewhere. One factor is clear: in each of those countries the agencies have enjoyed high levels of

ENDNOTES

1 Hong Kong ICAC: http://www.icac.org.hk/eng/main/

2 Hong Kong Bilingual Laws Information System: http://www.justice.gov.hk/home.htm

3 About the Hong Kong ICAC: http://www.icac.org.hk/eng/abou/index.html

4 For a discussion of the Hong Kong ICAC's experience in prevention, see: http://www.unafei.or.jp/pdf/56-26.pdf

5 http://www.csb.gov.hk/hkgcsb/rcim/pdf/english/central/aan_e.pdf

6 The complete legislation may be accessed at http://www.justice.gov.hk/blis.nsf/D2769881999F47B3482564840019D2F9?OpenView.

7 New South Wales ICAC: http://www.icac.nsw.gov.au

8 The Ombudsman "shall act promptly on complaints filed in any form or manner against officers or employees of the Government, or of any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and enforce their administrative, civil and criminal liability in every case where the evidence warrants in order to promote efficient service by the Government to the people (Section 13, R.A. No. 6770; see also Section 12 Article XI of the 1987 Constitution). The Ombudsman shall give priority to complaints filed against high ranking government officials and/or those occupying supervisory positions, complaints involving grave offenses as well as complaints involving large sums of money and/or properties (Sec. 15, R.A. No. 6770)." http://www.ombudsman.gov.ph/about/mandate.html

9 See http://www.transparency.org/iacc/9th_iacc/papers/day3/ws3/d3ws3_gpienaar.html.

10 Adapted from Bertrand de Speville, Why do anti-corruption agencies fail, UNGOPAC, Vienna, Austria, April, 2000. To obtain a copy, please email: bdes@compuserve.com

11 Doig, A, Moran, J, and Watt, D. (2001) Working paper: Business Planning for Anti-Corruption Agencies; To obtain a copy, please email: r.a.doig@tees.ac.uk

12 In South Africa, where the Heath Commission required the approval of the Minister of Justice before it could act on a particular complaint, the working relationship collapsed on a change of Minister.

13 See http://www.icac.org.hk/eng/power/powe_acct_1.html

14 The Corruption and Economic Crime Act, 1994

15 Hong Kong Prevention of Bribery Ordinance (Cap 201)

16 Secret Commissions Act 1910: http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes

17 See: http://www.iss.co.za/PUBS/CRIMEINDEX/00VOL4NO3/Assetforfeiture.html

18 Republic of South Africa, Prevention of Organised Crime Act, 1998: http://www.gov.za/acts/1998/a121-98.pdf

19 For a discussion of constitutionality issues, see Deepak Gupta, Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis: http://www.law.harvard.edu/studnets/orgs/crcl/v.37/gupta.pdf

20 New South Wales ICAC: http://www.icac.nsw.gov.au/

political and public support. They have also had adequate research abilities, and have adopted both rigorous investigative methods and innovative programs of prevention and public education.

One may suspect that some other anti-corruption agencies have been established with perhaps no real expectation of their ever tackling difficult cases at senior levels of government. They have been staffed and resourced accordingly. Some have done good work in attacking defects in integrity systems, but only at junior levels; however, most have had a negligible impact on tackling grand corruption.

Even when agencies or commissions are well-resourced and established under model legislation, to be wholly successful they will still have to rely on other institutions. If the judicial system is weak and unpredictable, then efforts to provide remedies through the courts will be problematic. So when corruption is widespread, an agency alone will not provide a complete answer, but it will be an important part of a broader national plan of action.