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The road ahead in the fight against corruption

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Introduction

Like the road before, the road ahead in the fight against corruption will not be easy. Corruption will never go away. Unfortunately, that is as certain as night follows day. There are fundamentally two reasons for this. First, the insidious nature of corruption makes it difficult to detect and investigate. Secondly, corruption derives its nourishment and encouragement from the human frailties of greed and self-interest.

2. As part of a global initiative, the social evil of corruption must be tackled on a domestic level by the three-pronged approach of enforcement, education and prevention. This needs to be done through a specialist and well resourced anti-corruption agency in each state throughout the world in order to maintain a global grip on the problem.

3. The major obstacle ahead is making sure that the fight against corruption does not get the better of the law enforcement officers. This is something that we seriously need to watch out for. There are both external and internal forces acting against an anti-corruption agency or its imperative. The external forces emerge as the fight against corruption escalates and law enforcement becomes more effective and successful. In response, the corrupt become more ingenious and devious in avoiding detection and culpability for their corrupt conduct. But significantly, the corrupt and those on their behalf will invariably embark upon a campaign to discredit and undermine the anti-corruption initiative in an effort to reduce its effectiveness and bring law

enforcement into disrepute. The internal forces emerge when the expectation for success grows; when standards or skills diminish; and when legal obligations and requirements tighten. There is a tendency for some law enforcement officers not to abide by the rules and to take short cuts or even break the rules or more worryingly break the law. Both these forces can have far reaching and deleterious consequences to the law enforcement imperative against corruption and need to be recognized and addressed.

The evil of corruption

4. There are various forms and degrees of corruption but it essentially involves the misuse or abuse of position or power for private gain or benefit¹. Such is the nature of corruption that a society infected with it operates unfairly - the corrupt gain unfairly and the honest lose unfairly. It therefore undermines the essence of a fair and just society by weakening the rule of law, damaging social order and economic development.

5. In the foreword to the United Nations Convention Against Corruption (the UNCAC), the then Secretary General of the United Nations, Mr Kofi Annan probably best summed up the destructive and deleterious effects of corruption on the individual and society by this description of it.

“Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and it allows organised crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries, big and small, rich and poor – but it is in the developing world that its effects are more destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining the government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic

¹ There are various definitions of corruption. Transparency International defines corruption as the abuse of entrusted power for private gain.

underperformance and the major obstacle to poverty alleviation and development.”

The domestic fight

6. It is essential in this modern age that there is in place appropriate measures to combat corruption both domestically and internationally, which are effective and efficient. This requires individual states first to tackle the problem of corruption domestically in order to prevent it from operating globally.

7. It is therefore imperative that individual states have a full range of anti-corruption measures in place dedicated and committed to tackle this social evil on all fronts and at all levels. In my view, one of the best models for combating corruption is the Hong Kong Independent Commission Against Corruption (the ICAC). It seeks to prevent and eradicate corruption by way of a comprehensive and multidisciplinary approach, striking at both the crime and the social problem of corruption².

8. Excellent guidance is provided by the UNCAC on how states should fight corruption. It mandates signatories to adopt measures to prevent corruption such as creating anti-corruption bodies, maintaining an independent judiciary and establishing transparent procurement systems, criminalizing bribery and the embezzlement of public funds, and providing for the freezing and confiscation of the proceeds of those crimes; cooperating with other countries to enforce anti-corruption laws and to return looted assets to their country of origin; and implementing rules to protect the financial system from the proceeds of corruption.

(a) Offence regime

9. It is absolutely vital that domestic laws include a range of offence provisions which prohibit both public sector and private sector corruption.

² There are three major anti-corruption laws in Hong Kong :
(1) The Prevention of Bribery Ordinance, Cap. 201 (1971) (POBO)
(2) The Independent Commission Against Corruption Ordinance, Cap. 204 (1974) (ICACO)
(3) The Elections (Corrupt and Illegal Conduct) Ordinance, Cap. 554 (2000)

You cannot tackle one, without tackling the other. There is a tendency in some states to only focus on public sector corruption. That is a serious mistake because the two go hand in hand, and to tackle one and not the other, defeats the purpose of seeking to eradicate the culture of corruption in all its forms.

10. The nature and structure of the anti-corruption law in Hong Kong is to define separate offences for public sector corruption and private sector corruption in respect of the general principle of prohibiting the offering to or solicitation or acceptance by a person of a particular defined status (that is, prescribed officer³, public servant⁴ or agent⁵) of unauthorized advantages. All these status groups have a common element that their members work in a principal/agent relationship and the proscription against the offering to or solicitation or acceptance by these persons of advantages is intended to protect the integrity of this principal/agent relationship⁶.

11. It has been held that the bribery offences are committed immediately upon there being an offer, solicitation or acceptance⁷. It is not necessary that the recipient of a corrupt offer was actually induced to conduct

³ Prescribed officer is a person holding office under Government : section 2(1) of the POBO.

⁴ Public servant means any prescribed officer or an employee of a public body and other specified persons : section 2(1) of the POBO.

⁵ Agent includes a public servant and any person employed by or acting for another : section 2(1) of the POBO.

⁶ The key offences are found under Part II of the POBO and are composed of a number of common elements. They are :

- (a) the offer, solicitation or acceptance (see section 2(2) of the POBO for definition of offers, solicits or accepts);
- (b) without lawful authority or reasonable excuse;
- (c) of an advantage (advantage is broadly defined and in essence covers any benefit);
- (d) by or to a prescribed officer (section 3, section 8(1)), public servant (section 4, section 5, section 8(2)), or agent (section 9);
- (e) as an inducement to, reward for or otherwise on account of;
- (f) the doing or omission of an act;
 - (i) by the public servant in his capacity as a public servant (section 4) (“capacity” is defined broadly: “Would the gift have been given or could it have been effectively solicited if the person in question were not the kind of public servant he in fact was?” See *Kong Kam-piu & Anor v R* [1973] HKLR 120 and *AG v Ip Chiu & Anor* [1980] HKLR 11(PC));
 - (ii) by the agent in relation to his principal’s affairs or business (section 9)(“in relation to his principal’s affair or business”: act done or not done aimed at the principal and intended to influence or affect his affairs. See *Commissioner of the ICAC v Ch’ng Poh* [1997] HKLRD 652(PC))

There is also an offence under section 10 against a prescribed officer of maintaining a lifestyle above his or her official emoluments. See *R v Mok Wei-tak* [1990] HKLR 631(PC) 3 “outward signs ... of corruption ... but ... impossible to prove acceptance of a bribe.”

⁷ Sections 4 and 9 of the POBO.

himself corruptly or even knew of the corrupt purpose of the offer. Evidence of the performance of a corrupt act by the acceptor is evidence which would go towards supporting the proof of the offer or corrupt purpose, but the prosecution do not have to show that the object of the corrupt purpose had in fact been attained. The only relevant state of mind in corruption offences is that of the person charged. Consequently, in an accepting case, the prosecution do not have to show why the advantage was offered to the accused. An advantage is defined very widely under the legislation and includes any gift, loan, fee, reward or commission⁸. The penalties upon conviction of corruption offences are severe and the sentencing policy in Hong Kong has been to treat corruption very seriously with the imposition of substantial terms of imprisonment and/or fines.

12. It should be noted that the public sector bribery offences are extraterritorial in nature in that the soliciting, offering or accepting can take place in Hong Kong or elsewhere⁹. However this does not apply to private sector bribery offences although conduct outside the jurisdiction can sometimes be covered by the charge or dealt with by charging the offence as a conspiracy. Making corruption offences extraterritorial is a key requirement but it must be done in a way that is both realistic and effective¹⁰.

13. As a supplement to public sector bribery offences is the common law offence of Misconduct in Public Office¹¹. This is an important offence in

⁸ Section 2(1) of the POBO.

⁹ See section 4 of the POBO. In *HKSAR v Loi Hong Quan* [2004] 3 HKC 497, the Hong Kong Court of Appeal stated that :

“... s.4 offences were intended to encompass all forms of extraterritorial breaches as a reflection of a legitimate policy of the legislature to impose stricter controls over the conduct of public servants. So far as other agents are concerned, the reach of the bribery offence in s.9 extends only to those cases where the commission of the actus reus of the offence flows from a pre-existing meeting of minds within Hong Kong’s jurisdiction.”

¹⁰ It should be noted that the Criminal Jurisdiction Ordinance, Cap. 461 does not include corruption offences. The offence provisions of overseas bribery under the Bribery Act 2010 of the United Kingdom will be difficult to prove due to the qualifications and requirements in relation to them. See section 6 (Bribery of foreign public officials) and section 7 (Failure of commercial organisations to prevent bribery). See also section 12 which deals with the territorial application of the offences.

¹¹ See *HKSAR v Shum Kwok-she* [2001] 3 HKLRD 399; *HKSAR v Sin Kam-wah* (2005) 8 HKCFAR 192. See also *Attorney General’s Reference (No. 3 of 2003)* [2004] 2 Cr App R 23.

The offence is committed where :

- (1) a public official;
- (2) in the course of or in relation to his public office;
- (3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;

dealing with misfeasance in public office which may not be bribery related. It covers official misconduct when a public official commits a serious abuse of any power, duty or responsibility exercisable for the public good.¹²

(b) Investigatory regime

14. The ICAC is armed with a wide range of special powers. This is essential in order to detect and investigate corruption given its insidious nature. Against suspects there is the power to require the production of documents which includes the production of Inland Revenue Department records¹³ and the power to require the provision of information¹⁴. There is also the power to obtain information and documents from third parties¹⁵, including the holders of confidential records such as bank and financial institutions.¹⁶

15. ICAC officers have power of arrest¹⁷ as well as powers of search and seizure¹⁸. The ICAC has in addition the unique power of being able to require a suspect to surrender his or her travel documents for a period of 6 months which can be extended in certain circumstances¹⁹ thus preventing a suspect from leaving the jurisdiction whilst the matter is being investigated. The ICAC also has powers of restraint and forfeiture²⁰.

16. The powers and measures of the ICAC are draconian but they are nevertheless necessary. There is in place appropriate checks and balances as seen by the need for judicial approval in the exercise of compulsory powers and the consent of the Secretary for Justice to institute prosecution action

(4) without reasonable excuse or justification; and

(5) where such misconduct is 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.

¹² *HKSAR v Wong Lin Kay*, FACC No. 3 of 2011.

¹³ Section 13 of the POBO.

¹⁴ Section 14 of the POBO. See *P v Commissioner of ICAC* (2007) 10 HKCFAR 293; *HKSAR v Ng Po On* (2008) 11 HKCFAR 91.

¹⁵ Section 14(1B) of the POBO.

¹⁶ Section 13 of the POBO.

¹⁷ Section 10 of the ICACO.

¹⁸ Section 17 of the POBO and sections 10B and 10C of the ICACO.

¹⁹ Sections 17A, 17B and 17BA of the POBO.

²⁰ Sections 12 and 14C to 14E of the POBO and the provisions of the Organized and Serious Crimes Ordinance, Cap. 455 and section 102 of the Criminal Procedure Ordinance, Cap. 221.

under the POBO²¹. There is also an oversight body which includes members of the community that reviews the operations of the ICAC.²²

(c) Disgorging the proceeds

17. A key feature in combating corruption and other economic crime is to remove the incentive to commit the crime by taking the profit out of it and by derailing the criminal enterprise through prosecution action against those involved in the underlying criminal conduct and in the dealing of the proceeds of it. Anti-money laundering measures provide two highly effective means in combating crime. First, by prosecuting those involved in the crime with the offence of money laundering as they will inevitably be dealing with the proceeds of crime. For example, those involved in corruption will be dealing with the proceeds of their corrupt dealings and should be prosecuted for money laundering as well as for corruption. A successful prosecution for this offence will normally attract a substantial term of imprisonment which will act as a specific as well as a general deterrent. Secondly, by restraining and confiscating the proceeds of crime. This acts as a positive disincentive to criminals by taking the profit out of crime but it also has the added advantage of preventing them from using the illicit profits to further and expand their criminal enterprise.

(d) Key features

18. To fight corruption, there needs to be :
- (a) A specialist independent body free from interference to tackle the social evil of corruption by a three-pronged attack through enforcement, education and prevention.
 - (b) A comprehensive regime of offences and investigatory powers.
 - (c) Offence provisions with international reach and provisions that disgorge the proceeds and profits of corruption.

²¹ Failure to obtain the Secretary for Justice's consent will render any criminal proceedings a nullity : sections 31 and 32 of the POBO.

²² Operations Review Committee consists of 16 members made up of 12 non-official members and 4 ex-officio members (Commissioner of the ICAC, the Secretary for Justice, the Commissioner of Police and the Director of Administration).

- (d) Extensive international links and appropriate mutual legal assistance legislation.

The forces against fighting corruption

19. Since its inception the ICAC has had its highs and lows. The investigation and prosecution of a corruption case is hard work. It is invariably time consuming and protracted. Searching for and uncovering information and material is never easy when the hallmarks of corruption are subterfuge and secrecy. It requires persistence and patience as well as a high level of professional competency to gather evidence in order to prove a case of corruption.

(a) External forces

20. People who are investigated or brought to justice for corrupt wrongdoing will sometimes use whatever is available to them or within their power to discredit, undermine or prevent action being taken against them. Allegations may be made against the authorities claiming abuse or misuse of power. Generally these allegations are false, but there are occasions when they are not. Whichever the case, this hurts and undermines the reputation and standing of an anti-corruption agency and can have a damaging impact on public confidence and support.

21. Justifiable criticism is always something that should be taken seriously and addressed. What is particularly frustrating and difficult to deal with is unfounded and malevolent criticism which normally takes the form of gossip or rumour. It is when it becomes the perceived truth that problems arise. What I call the “whispering campaign” can be very harmful and is propagated by those persons that have a vested interest in seeing the demise of the law enforcement initiative against corruption. It needs to be countered by being corrected and exposed for what it is. Constructive and good relations with the media is one way of dealing with it but the most effective way is to do things properly.

(b) Internal forces

22. The officers of an anti-corruption agency must maintain at all times the highest of standards. Whilst being responsive and responsible in the fight against corruption, officers must know the rules of enforcement and stick to them. Taking short cuts or seeking to circumvent or break the rules can have deleterious consequences both to the case under investigation and to the body conducting the investigation. The key to an effective anti-corruption agency is having the right people and making sure they stay on the right path.

23. It can sometimes occur that in the noble quest of enforcing the law, law enforcement officers lose sight of their objective and get overwhelmed by their own importance. This can be a bad thing. It should never be forgotten that no one is above the law, and that no one is beneath it either.

24. The recent conviction and sentence of imprisonment of three ICAC officers for perverting and misconduct in public office is a timely reminder of the importance for law enforcement officers to maintain high professional standards and to stick by the rules. A failure to do so can have serious consequences both to the officer and to the organization. This case concerned certain ICAC officers coaching an immunized witness who was covertly recording his conversations with them. The officers had been reminded by internal directions and recent cases of the impropriety of coaching a witness and the unlawfulness of such conduct.²³ It was an unfortunate event but it highlights the need for an anti-corruption agency to guard against forces from within that may hinder or prevent its fight against corruption.

Effective enforcement by global effort

25. As we have learnt from bitter experience, corruption is not confined by domestic requirements and boundaries. It takes optimum

²³ See *HKSAR v Lee Wing-kan* [2007] 3 HKC 368; *Lee Wing-kan v HKSAR FAMC* No. 28 of 2007. See also *R v Momodou and Anor* [2005] 2 All ER 571.

advantage of jurisdictional limits and different legal systems. The challenge ahead will definitely require greater effort in tackling transnational corruption. Sadly, as a global community we have not fared well in this regard. In a typical case, it may be due to the following reasons.

26. First, it will be difficult to get all the relevant information and evidence relating to the crime and this will mean that you will not have a complete picture or understand the full extent as to what has happened or be able to prove the entirety of it. That will be because of the enormity of it, the different jurisdictions that are involved and the people who can provide the information and material will most likely be associated with the major miscreants. The nature of the information and material may also create difficulties especially when it is in electronic form or unable to be sourced or obtained.

27. Secondly, the persons and entities involved in the crime can be many and diverse. This will spread and diffuse participation in and responsibility for the corrupt conduct and thereby make it difficult to shoot home liability for the crime. It may involve persons and entities with established reputations and influence, so it will be harder to break through perceptions of respectability and regularity. It may involve a corporation or corporations with an extensive network of subsidiary and associated entities operating worldwide making it hard to trace the persons involved and follow what happened and how.

28. Thirdly, the resources available to persons accused of transnational corruption is generally substantial and they will take issue with or seek to challenge matters that can frustrate or prevent access to information or hamper, impede or delay an investigation or prosecution. These diversionary tactics drain resources of, and extensively occupy, the investigatory and prosecuting authorities involved.

29. Fourthly, the time it sometimes takes to investigate and prosecute due to the nature of the crime and the tactics employed can have an adverse impact on the gathering of evidence and the availability and presentation of it

at trial.

30. Finally, the lack of or inadequate response from another jurisdiction or other jurisdictions. This may be due to a lack of provisions or resources to attend to overseas requests; or to a lack of desire or priority to do so; or to issues and problems associated with a different legal system.

31. How can we more effectively deal with transnational corruption? Whilst domestic legislation is essential to deal with corruption, it requires to be underpinned by appropriate levels of international cooperation and mutual legal assistance. This is particularly important bearing in mind that globalization and modern technology have had a significant impact on the way we live as well as a profound effect on white collar crime including corruption.

32. As stated in the Preamble to the UNCAC :

“corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.”

33. The only effective way to deal with transnational corruption is for a global enforcement initiative. This requires each state to have extensive international links and appropriate mutual legal assistance legislation to assist and to be assisted in a collective international fight against corruption. In Hong Kong, international cooperation is facilitated by formal and informal arrangements²⁴.

34. There needs to be in place in every state a specialist mutual legal assistance body dedicated to make and receive requests for the obtaining and gathering of information. This body should be able to ensure the prompt and effective response to a request by directing and overseeing the relevant law enforcement agency in relation to it. There also needs to be in place provisions for the taking of evidence in an appropriate way and form to meet

²⁴ The Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 provides a wide range of assistance and cooperation. Hong Kong also has an extradition regime governed by the Fugitive Offenders Ordinance, Cap. 503.

the requirements of the requesting state. The use and facilitation of video link for the taking of evidence is an effective means of easing through domestic requirements. The sourcing and verification of documents and records is of particular concern when dealing with transnational crime and provisions should be enacted to more readily facilitate the reception of such evidence in domestic jurisdictions²⁵.

35. **Corruption itself prevents us from fighting corruption.** In states where corruption is not subject to effective enforcement, the chances are that the personnel and institutions that are being relied upon to assist in securing information or evidence of corruption in that jurisdiction are themselves susceptible to corruption and may result in a failure to act or assist or worse still undermine the investigation. That is singularly one of the most difficult and frustrating problems when tackling corruption with an international dimension. The answer is that greater regional and international pressure needs to be asserted on such states to tackle corruption domestically. However, even with cooperative and committed states the time and effort required to secure overseas information or evidence is slow and cumbersome and sometimes not in a form or manner acceptable to the requesting jurisdiction. These are problems we need to overcome in order to tackle transnational corruption. The model of the Financial Action Task Force (FATF) in the global effort to combat money laundering and terrorist financing is a proven method of dealing with transnational crime. Stringent and comprehensive requirements are imposed to deal with money laundering domestically. In addition to having in place an offence and investigatory regime, there is an obligation on banking and financial institutions and related professional and other bodies to report suspicious transactions of money laundering and making it an offence for failing to do so. It also extends to making it obligatory to conduct customer due diligence with legal sanctions for failure to comply. Published standards, and mutual evaluations among members provide a continuous motivation to avoid an international blacklist and being a haven for illicit assets; and to have and maintain a respected and stable financial system. A similar approach should be implemented in the global fight against corruption.

²⁵ See sections 77E-F of the Evidence Ordinance, Cap. 8.

Conclusion

36. We live in a rapidly changing and challenging world and we must be ever vigilant and responsive in our fight against corruption. This includes prosecuting wrongdoers for corruption and money laundering, restraining and confiscating the proceeds of corruption and related crime. The more individual states do about corruption, the less likely it will be for it to operate on an international level. This cannot be done in isolation. It is important for individual states to work together and form an internet of cooperation which will create a powerful force of regional and international action against corruption.

37. As Justice La Forest of the Supreme Court of Canada stated²⁶:

“...we should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brothers’ keepers.”

38. The road ahead in the fight against corruption will not be easy but it need not be more difficult than it has to be. An anti-corruption agency must always maintain high standards and strive to get things right. This will make it difficult for mischievous and unfair criticism being levelled against the agency and allow it to keep its focus on fighting corruption.

²⁶ *Libman v R* 21CCC (3d) 206 at 233.