

## ICAC AND THE COMMUNITY

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There seems to exist some necessary relationship between the specifics of particular communities, and the institutional mechanics created towards the control of their corruption:

The acceptability, appropriateness and potency of any institutional response to corruption depends on a recognition that such a response will be bound to the community out of which it emerged.<sup>1</sup>

Perhaps that statement should be qualified by the rider that such a dependency must be appreciated in actual 'success' terms (at least as defined by the control agency itself), rather than merely at the level of appearances. In this regard anti-corruption initiatives are little different from other aspects of state-based crime control.

Recently the language of 'community' has been widely used in the official discourse of criminal justice administration in Australia, in an obvious effort to legitimate new developments away from more traditional crime control. Commentators are now asking, why all this 'community speak' about policing, mediation, and corrections?<sup>2</sup> As regards the 'community' perspective of anti-corruption initiatives, it is an attempt to transfer to the new institutions and processes some of the more positive implications which are assumed to flow from community allegiance:

- consensus
- shared responsibility and implication
- democratic authority
- mutual accountability
- regeneration

In Hong Kong this ascription to community symbolism is at the heart of the ICAC's public profile. For instance, when describing the operations of the Community Relations Section, official governmental literature emphasises its responsibility "for enhancing public awareness of the evils of corruption, and harnessing community support for the Commission's efforts".<sup>3</sup> The language of ICAC publications talks in just such terms; "the community will reap the benefits in years to come, when students of today become leaders of tomorrow - young men and women to whom corruption is an unacceptable way of life".<sup>4</sup> Infused with the spirit of such

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1 Findlay, M., "Institutional Responses to Corruption: Some Critical Reflections on the ICAC" [1988] *Criminal Law Journal* 271

2 See Hogg, R. & Findlay, M., "Police and the Community; Some Issues Raised by Recent Overseas Research" in Freckelton and Selby, eds, *Police in Our Society* (1988)

3 *Hong Kong: The Facts - ICAC* (1987) 2

4 *An Introduction to the Independent Commission Against Corruption* (2nd ed. 1987) 37

dogma the Hong Kong ICAC has been able to orchestrate, during the past fifteen years, what proponents have hailed as a 'value revolution' in a society where the tolerance and adaptation of corruption was fabled.

The same community nexus, at least in a symbolic sense, has not been a feature of the genesis of the ICAC in New South Wales. This paper speculates on some of the reasons for this apparent divergence through a detailed comparison with the Hong Kong experience. Further, I will comment on the consequences for corruption control when its institutional manifestations are distanced from the community.

So as to order the initial comparative analysis it is useful to focus on features which at first glance seem common to corruption control initiatives. These then can be particularised in terms of the more established Hong Kong experience. Against this, the differences in the NSW experiment will be highlighted. Commonality generally might be assumed in the following;

- the advent of the corruption control institutions
- their mandate
- their powers to discharge this mandate
- their institutional structure
- relations with other agencies of the criminal justice process
- accountability

From the Hong Kong vantage point alone, each of these merit a somewhat more detailed examination.

## ADVENT

The socio-political background behind establishing the ICAC in Hong Kong saw the convergence of a variety of quite potent influences. The sensational public disclosures concerning endemic police corruption in the early seventies whipped up a universal appreciation of the extent of corruption at all levels of commerce and administration in the Territory. The attitude of the community changed from reluctant acceptance to widespread moral panic as the disclosures gave substance to the long held and universal suspicions about police graft, with the flight of Chief Superintendent Godber.<sup>5</sup> A detailed recognition of the consequences for the community, which are the broader result of such fundamental corruption, was broadcast across Hong Kong for the first time in any official sense, through the hearings of the Bain Commission of Enquiry into the Godber case. The Royal Hong Kong Police were so demoralised and divided at this time that they could not advance any credible opposition to the Commission's findings, nor could they hope to regain any semblance of limited public credibility without the anguish of a full purge at all ranks. The Governor of the day, Sir Murray MacLehose, was reformist

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5 See Downey, B. "Combatting Corruption: The Hong Kong Solution" (1976) 6 *Hong Kong Law Journal* 27

and did not shy away from the challenge of just such a reorganisation. Finally, the enacting Ordinance was preceded by necessary supportive legislation (for example, the Prevention of Bribery Ordinance 1971) which established the offence types and associated powers of investigation so essential for the ICAC's initial and immediate successes. Community interest groups were primed and ripe in 1974 to accept the dramatic impact of these initiatives.

## **MANDATE**

With the enactment of the Independent Commission Against Corruption Ordinance in 1974 the new body was charged (under section 12) with the control of 'corrupt practices' in all their many public and private sector manifestations. However the drafters of the Ordinance chose not to present within the bounds of the Ordinance any comprehensive definition of corrupt practices. This was left for the Commissioner to determine bearing in mind the scope and spirit of his powers and duties. The decision not to limit the province of the ICAC in Hong Kong through some artificial distinction over the origins of corruption, was a realistic recognition that in modern capitalist economies the division between public and private 'sectors' is at best both flexible and blurred. Further, the progress of corruption itself is rarely impeded by any such conceptual nicety. Having said this, the initial thrust of the ICAC's attack on corruption was, not surprisingly, against the public service. In recent years this interest has gradually been replaced by significant private practice targetting.

In Hong Kong, as with the traditional recognition of influence, the ICAC's focus on corruption is directed against the offering and accepting of 'advantages'. As such this touched almost everyone in the Territory and gave common meaning to the offence of bribery.

In all its operations the Hong Kong ICAC says that it strives to give effect to its mandate both as a client centred and complaints initiated process.

## **POWERS**

The Hong Kong ICAC has concentrated its operational concerns on an offence based process of initiation. The Prevention of Bribery Ordinance is the principal legislative basis for these endeavours, with its concise offence structure. This is supplemented by the Anti-Corruption Ordinance, concentrating as it does on fraudulent electoral practices.

The powers specifically conferred on the Commissioner of the ICAC are a significant expansion of police investigation practices, although in form they are modelled on these. Only the powers of confiscation, inferential evidence, and compulsory interrogation are novel in themselves.

ICAC investigation and evidence accumulation practices are not tied to formal or public hearings. If anything, they are 'in house' and rely heavily on covert facilitation.

In principal the exercise of the ICAC's investigation powers is controlled at the output level, by the Attorney General's fiat over the lodgement of prosecutions. The Commission might be very much the master of the pre-trial stage of corruption prosecution, but whether their's is a sufficient case to enter open court is a decision for the first law officer of the Territory. In this regard the reward for their operational efforts might be seen as confronted by the final guarantees of due process.

## **STRUCTURE**

The institutional entity which is the Hong Kong ICAC is built on three equally important commitments to corruption control;

- the identification, prosecution and punishment of corrupt practices
- corruption prevention
- education against corruption

The structure of this ICAC has evolved inextricably out of these three concerns.

### **a) Operations**

The Operations Department is the investigative arm of the Hong Kong ICAC, and comprises over 60% of its establishment. It reviews and considers complaints and information, and investigates alleged offences under the various anti-corruption Ordinances.

From 1974 to 1986, 77,729 complaints and reports were received through this branch of the Commission, and 29,880 were deemed to be corruption related. For the same period the Operations Department carried out 14,109 investigations, resulting in 4,021 prosecutions. There was a fairly even mix between public and private 'sector' corruption prosecutions (1,130 to 977 respectively). On average these figures indicate the following turnover for this Department;

- Four completed investigations per week
- Thirty five prosecutions filed each year

### **b) Corruption Prevention**

The Commissioner has a statutory duty to secure the revision of methods of work which may provide opportunities for corruption in government departments and public bodies, and to advise any organisation or person on the elimination of corrupt practices on request. To do this the Corruption Prevention Department carries out detailed studies in consultation with the organisation concerned. As a follow up the Department monitors the implementation and efficacy of its recommendations.

The Department also provides training in corruption prevention methods. By the conclusion of 1986, 31,271 participants from 31 government departments and eighteen organisations outside the government had attended such sessions.

### **c) Community Relations**

This Department endeavours to increase public awareness of corruption, as well as stimulating and co-ordinating public support for the Commission's initiatives. To achieve these aims the Department works on two fronts: public education through the mass media; and face to face contact with the community. Liaison with the community is conducted either through a central co-ordination office, or at a district level through local offices. The latter serve as focal points for establishing and maintaining contact with the local community, and for launching anti-corruption programs which vary from shop front visits to organising youth camps and forums.

The operations of these three structural units consume a massive budget of over \$20 million (Aust) per annum. This has grown to over three times that of the budget for the ICAC's initial year of operation.

The ICAC is not entirely organisationally unique in terms of Hong Kong administrative experience. The requirement that it independently reports directly to the Governor is not unusual in a form of government where major policy is the province of the Governor's Executive Council. The audit function of the ICAC is common in both the private and public spheres of administration, as in government where legislative control is developed through exercises of compromise. The ICAC, after its initial period of confrontation and isolation, has been integrated into the wider operations of the criminal justice process while at the same time maintaining its exclusivity in corruption regulation. Finally, the public education commitment of the ICAC, with its unashamedly moralist tone, is not far removed from other Hong Kong community education campaigns such as the successful "Keep Hong Kong Clean" program.

## **RELATIONS WITH OTHER CRIMINAL JUSTICE AGENCIES**

The initial confrontations between the ICAC and the Royal Hong Kong Police Force were just that. A police strike greeted the ICAC's early efforts against police corruption, and a significant number of the Commission's operatives were harassed with constant police intimidation and arrests. Also the Prosecutions Division of the Legal Department had to be convinced that the ICAC could mount winnable cases.

With the police now appreciative of the consequence that the ICAC's efforts against law enforcement corruption have allowed them to regain a significant degree of public legitimacy, and with the anti-corruption focus swinging away from the Royal Hong Kong Police Force, relations between the two bodies are cordial both on an institutional and individual level. This has been supported further by the return to the police of control over almost all aspects of their own internal affairs. Also the police have been reassured that through the careful operations of the ICAC there has been

little incursion by them into traditional areas of police concern. Police involved in criminal investigations benefitted from the transfer of intelligence and the offence 'spinoffs' which were generated as a result of ICAC enquiries. Through joint training, secondments, joint operations, and the exchange of information and expertise, the co-operation between the ICAC and the police in Hong Kong has been sealed.

The Legal Department established its own commercial crime unit which specialises in handling the more major ICAC investigations.

In these respects the integration of the ICAC within the wider criminal justice process has been relatively swift, and a mixture of that which came through complementary compromise, a minimisation of misinformation and resultant suspicion, as well as that which has been imposed on the not too willing.

## ACCOUNTABILITY

By Hong Kong standards, community involvement in the supervision and monitoring of the ICAC is not insignificant. The ICAC would have us believe that the independent mechanisms for "watching the watchdog" are sufficient to ensure that "it does not step out of line".<sup>6</sup> The combination of the ICAC Complaints Committee, the Advisory Committee on Corruption, the Corruption Prevention Advisory Committee, the Citizen's Advisory Committee on Community Relations, and the complaints function of the Office of the Unofficial Members of the Legislative Council, is said to keep the ICAC beyond reproach. But as a continuous stream of cases where the ICAC has overstepped its powers simply in the prosecutions arena bears testimony, this may not be enough.

## THE NEW SOUTH WALES EXPERIENCE

If we test the identical features against the recent NSW experience we come up with a very different scenario. The advent of the ICAC in this State occurred within a highly politicised environment. A change of government was at hand and both contesting political parties were raising the spectre of a corruption control agency for their respective electoral motives. The potency of this as a political card was fortified by recent general public moral panics over the corruption and incompetence of each major arm of criminal justice within the State. The widespread community cynicism about the morality of public officials had tainted these political parties as well. The media relentlessly 'beat up' community fears over the extent and depth of corruption at all levels of public administration. The shocking revelations of the Fitzgerald Royal Commission in Queensland created an associated atmosphere of expectation about corruption and its control, throughout the neighbouring State of NSW. Again the press fed off the public enquiry approach to exposing corruption, and orchestrated

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6 *op. cit. supra* n.4

calls for a similar effort in NSW. The simple commitment to the open public investigation of corruption caused a significant degree of legitimation to rub off onto its proponents (and alternatively flee its detractors).

The mandate for the NSW ICAC is far more open ended, and at the same time particularly constrained than that which is the concern of its Hong Kong counterpart. No handle is given on the notion of corrupt practices. A false distinction between public and private 'sector' corruption is applied in the enabling legislation so as to limit the interests of the new body to the vagueries of the former. By implication the legislators have set up and accepted the inference that the community cost of public practice corruption is both more immediate and significant. It is within this arena that the new government hoped that the ICAC would give affect to its unstated political agenda. This then was interpreted for the ICAC from its inception by the media. The community on the other hand was heavily reliant on such media interpretation because, except at the level of suspicion, its members had little personal, individual contact with, or appreciation of obvious instances of corruption. Against all these developments there was an active and influential opposition, representing a wide cross-section of community views and reservations.

The powers of the new body were significantly restrictive by comparison with Hong Kong. The powers given to the NSW body are somewhat overbalanced in their heavy reliance on public enquiries as an information gathering technique. Such public hearings sometimes strive towards contradictory and opposing purposes. As a fact finding facility one might question the nature, quality and utility of the 'facts' which they disclose. What is the purpose of such information gathering? It could not be alleged, as is the case with the operations side of the Hong Kong ICAC, that such was entirely prosecution oriented. In fact the value of the information arising out of such public inquisitions is of strictly limited application in any eventual criminal court proceedings. If the hearings of the NSW ICAC are not simply directed towards the generation of admissible evidence alone, then why is it deemed necessary for the hearings to operate within a quasi court structure? While functioning under many of the general rules of evidence which govern the elicitation of facts in criminal trials, such hearings may not only give rise to inadmissible evidence but they may unwittingly cut across the efforts of associated criminal investigations which have as their sole purpose the prosecution of offenders. In this regard the public hearing function may tend to alienate the ICAC from the more traditional modems of criminal justice. Further, they may be criticised for diverting resources from less expensive and more direct, covert techniques. Bearing in mind the experience of the recent ICAC public hearings, there can be no doubt that these are being used as an opportunity for trial by media and the punitive public ransom of reputation. Rather than helping to feed an insatiable community appetite for disclosures on corruption, the threat of public shaming might tend eventually to distance the ICAC from sources of community based information which are so strenuously protected in the privacy provisions of the Hong Kong complaints function. Additionally the Prevention of Bribery Ordinance contains detailed and stringent restrictions on public disclosure during ICAC investigations. This should not imply that the Hong Kong body eschews the application of shaming. To the contrary, it extensively utilises images of public disgrace (in de-identified forms) as part of its prevention and

education functions. But these are kept strictly separate from ICAC investigatory operations. The only period throughout the latter where shaming might be witnessed is if the ICAC chooses some delay between the occurrence of arrest, and charge.

As for the structure of the NSW ICAC it would appear that lipservice is paid to community education and corruption prevention, while to date the bulk of its public profile has concentrated on the operations front. There exists none of the infrastructure in the NSW body which ensures for Hong Kong some protective balance between these sometimes competing commitments.

It is too early in the operation of the NSW ICAC to make useful comments on its degree of integration within the State criminal justice machine, nor on its accountability. One can merely observe that the State police were largely critical of its creation, and that the ultimate oversight of its operations rests with parliament.

### **PROBLEMS ARISING FROM ISOLATION WITHIN THE COMMUNITY**

The indications are that while the Hong Kong ICAC has always attempted to locate the legitimacy for its existence in both a symbolic and practical sense, well within the community, the ICAC in NSW operates inside the structural limitations of a quasi court and extra-policing paradigm. To be fair this difference might say more about the respective communities within which both organisations function, than it does about their own organizational predispositions. Even so the result is that the NSW body will have the appearance of being somewhat removed from the community. And for corruption prevention mechanisms in particular, what might be the adverse consequences of such isolation?

On the level of the obvious, isolation from within the community for any agency of social control will present problems for the credibility and effectiveness of their prevention and education initiatives. In addition there is the danger of a reluctance on the part of community members to 'get involved' with the workings of an organisation which they fear, may not fully understand, or may not trust. This is a particular source of frustration for more traditional crime control agencies in Australia as they face a community which is averse to communicating with authority at large. How much more will it be confronted by a new body with an as yet unspecified field of interest?

With a largely open-ended mandate, which relies on discretionary interpretation from the Commission and its parliamentary overseers, definitions and targeting of corruption should reflect, amongst other things, community expectations. How are these to be distilled if the Commission is isolated within a community which itself seems too heavily dependent on media interpretation for formulating its preoccupations with corruption?

Further, on media reliance, the NSW ICAC can be largely thankful to a sympathetic media, and the explosive publicity surrounding the hearings of the Fitzgerald



enquiry, for its creation. However the debt will remain ongoing, and as the continued legitimacy of the ICAC is dependent on good press, so too its operations and focii of interest might be effected by media distortion.

The heavily political birth of the ICAC, and the distinctly political interests of its earliest enquiries run the danger of injecting a partisan image, fairly or unfairly, into its public presentation. This can only lead to a further division of its community support, and an increase in its isolation.

Alienation from other agencies of criminal justice in this State is also a worrying possibility. If the history of the Australian Bureau of Criminal Intelligence and the National Crime Authority are anything to go by, another organisation which is seen as challenging police independence, and perhaps poaching their traditional functions and powers, will not be supported by that agency at least. This lack of co-operation will fundamentally effect the crime control potential of a new and relatively small operation. Unless the ICAC can present itself and its investigations as being of benefit to other criminal justice agencies, then its rehabilitation from the realm of initial distrust is unlikely.

As was well demonstrated by the last days of the Costigan Royal Commission, any crime control initiative which is forced to turn in on itself will be far more likely to fall foul of the artificiality of its internal stereotypes and obsessions, than organisations which daily face the changing realities of community expectations.

## CONCLUSION

The victim of corruption is portrayed usually as the community at large. The responsibility for its eradication is also said to rest finally with the community. Therefore any institutional response to corruption within liberal democratic traditions must enlist the validity of community symbolism. The ICAC in Hong Kong has been sensitive to this since its inception, and now claims its ultimate success, not in terms of uncovering the corrupt, but rather as the orchestrator of a re-orientation in community consciousness.

Even from such a cursory comparative analysis as presented above, it is obvious that the NSW experience fails to reflect this understanding. And despite the general alienation of criminal justice agencies from the public in this State, the ICAC risks exaggerating its exclusion through the nature of its organisation and operations. The likely consequences of this are all too clear, as the failures of previous institutional approaches to corruption control in NSW testify. Accepting that on such a fundamental measure as community integration the two ICACs are worlds apart, it might prove true that in many other important respects similarity may extend no further than their title.