

## CHAPTER 3 JURISDICTION AND OPERATIONS OF THE ICAC

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*“I think the situation calls for an organisation, led by men of high rank and status, which can devote its whole time to the eradication of this evil.”*

Sir Murray MacLehose,  
Governor of Hong Kong, 1971–81

[3-1] The previous chapter traced the history of anti-corruption law enforcement in Hong Kong from the post-World War II era to the present day. The events leading to the creation of the Independent Commission Against Corruption (ICAC), its structure and the work of its various departments are there set out. This chapter examines the statutory foundation for the ICAC and discusses some of the legal issues surrounding its investigatory jurisdiction and its operations. The chapter concludes with a discussion of section 30 of the Prevention of Bribery Ordinance, (Cap 201) (POBO) and of the other summary offences which are intended to protect and enhance the work of the ICAC.

### 1. ESTABLISHMENT OF THE ICAC AND APPOINTMENT OF THE COMMISSIONER

[3-2] The Basic Law provides that a Commission Against Corruption shall be established and that it shall function independently and be accountable to the Chief Executive.<sup>1</sup> In *HKSAR v Lew Mon Hung* the Court of Appeal held that the purpose of Article 57 of the Basic Law is:<sup>2</sup>

- (1) to affirm that the establishment, existence and function of the ICAC shall be protected by the Basic Law and shall not be arbitrarily changed by local legislation or other means,
- (2) to confer the ICAC with independence, and providing that its regime of only being accountable to the Chief Executive and not subject to any control, instructions or interference of any other person is also protected by the Basic Law, and shall not be arbitrarily changed by local legislation or other means.

[3-3] In that case, the Court of Appeal observed that Article 57 of the Basic Law is a constitutional provision in general terms and, of necessity does not specify how the Commission maintains its independence. The Court held that this was done through the Independent Commission against Corruption Ordinance. In this regard, section 5 of that Ordinance provides:

- (1) The Commissioner, subject to the orders and control of the Chief Executive, shall be responsible for the direction and administration of the Commission.
- (2) The Commissioner shall not be subject to the direction or control of any person other than the Chief Executive.

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1 Basic Law, Article 57.

2 [2018] 4 HKC 119, [2019] 2 HKLRD 1004 at §105.

- (3) The Commissioner shall hold office on such terms and conditions as the Chief Executive may think fit.
- (4) The Commissioner shall not, while he holds the office of the Commissioner, discharge the duties of any other prescribed officer.

**[3-4]** In *HKSAR v Lew Mon Hung* the Court of Appeal held that the proper construction of section 5(1) is:<sup>3</sup>

- (1) being the head of the Independent Commission Against Corruption, shall be responsible for the direction and administration of the Commission;
- (2) in performing these duties, must be subject to the orders (if any) and control of the Chief Executive.

Section 5(1) does not confine the orders to or the scope of control on the Commissioner by the Chief Executive to direction and administration of the Commission. This is consistent with the purpose of section 5(2).

**[3-5]** The Court added that the proper construction of section 5(2) was that the Commissioner shall only be subject to the instructions and control of the Chief Executive. Section 5(2) does not impose any restrictions on the instructions or control the Chief Executive may have on the Commissioner.<sup>4</sup> The Court held that despite the terms of section 5, it does not imply that the Chief Executive can give orders or instructions to exercise control over the Commissioner in a wanton, unrestricted manner. The Court held that the law itself provided checks and balances in this regard.<sup>5</sup>

**[3-6]** The ICAC is established by section 5 of the Independent Commission Against Corruption Ordinance (Cap 204) (ICACO) and it consists of the Commissioner, the Deputy Commissioner and all other officers as may be appointed under section 8(1) of the ICACO. The Commissioner is appointed by the Chief Executive and is, subject to his orders and control, responsible for the direction and administration of the ICAC. But, other than the Chief Executive, he is not subject to the direction or control of any person.<sup>6</sup> It has been said that the effect of this section is “the Commissioner is appointed by the Governor, is independent of any body but the Governor, and answerable only to the Governor”.<sup>7</sup> The only public occasion of the Governor or Chief Executive making use of this provision was in respect of the 1977 ‘amnesty’. This was a controversial use of the section as it is questionable whether the power of direction and control would extend to ordering the Commissioner to, in effect, not discharge the mandatory duties imposed upon him by section 12 of the ICACO. This direction, however, was subsequently legitimised by the Legislative Council amending the ICACO.<sup>8</sup>

<sup>3</sup> [2018] 4 HKC 119, [2019] 2 HKLRD 1004 at §109.

<sup>4</sup> [2018] 4 HKC 119, [2019] 2 HKLRD 1004 at §110.

<sup>5</sup> [2018] 4 HKC 119, [2019] 2 HKLRD 1004 at §111.

<sup>6</sup> ICACO, section 5.

<sup>7</sup> Per Hunter J in *Khan v O’Dea* [1987] HKCU 111, [1987] HKLR 150 at 154B–C. In *HKSAR v Lew Mon Hung* [2018] 4 HKC 119, [2019] 2 HKLRD 1004 at §111, the Court of Appeal held that:

Although sections 5(1) and (2) both use general terms and do not impose express restrictions as to how the Chief Executive should act, that does not mean that the Chief Executive can give orders or instructions to or exercise control over the Commissioner in a wanton, unrestricted manner. The law applies checks and balances in various aspects regarding the Chief Executive’s conduct so as to prevent an abuse of power by the Chief Executive.

<sup>8</sup> The amendment became section 18A of the ICACO. The ‘amnesty’ is more fully discussed in Chapter 2 above.

[3-7] While he holds his appointment, the Commissioner may not discharge the duties of any other paid government office.<sup>9</sup>

[3-8] At the time of its creation, the independence of the ICAC was seen as vital to persuading the public both that the Government was genuine and determined in its efforts to rid Hong Kong of corruption; and also that it, the public, could have confidence in, and should therefore lend its support to, this new body. It was not enough that the responsibility for investigating corruption should be given to a government organisation separate from the police; it was considered necessary that this new organisation should be separate from the rest of government. It is crucial not only to the public perception of the ICAC's effectiveness, but also to its actual effectiveness, that the Commissioner must be separate from, and not accountable to, the people he might be called upon to investigate in the course of performing his statutory duties. The independence of the ICAC is reaffirmed by Article 57 of the Basic Law of the Hong Kong Special Administrative Region which provides:

A Commission Against Corruption shall be established in the Hong Kong Special Administrative Region. It shall function independently and be accountable to the Chief Executive.

## 1.1 Appointment of other commission officers

[3-9] The Chief Executive may appoint a Deputy Commissioner on such terms and conditions as he thinks fit;<sup>10</sup> and this position is in fact filled, *ex officio*, by the Head of Operations who is the second most senior officer of the Commission. This appointment reflects the primacy of the Operations Department within the ICAC.

[3-10] If the office of the Commissioner is vacant or the Commissioner is absent from duty, the Deputy Commissioner acts as Commissioner unless the Chief Executive directs otherwise. If both the Commissioner and the Deputy Commissioner are absent from duty, then the Chief Executive may appoint another person to act as Commissioner during their absence.<sup>11</sup>

[3-11] In addition to these statutory office holders, the ICACO provides for the appointment, by the Commissioner, of all other officers of the ICAC as the Chief Executive thinks is necessary to assist the Commissioner in the performance of his functions under the ICACO.<sup>12</sup>

[3-12] The Commissioner and his officers are employed subject to government regulations and administrative rules as apply generally to public officers, except insofar as the application of these regulations or rules is modified by standing orders made by the Commissioner under section 11(2) of the ICACO. The terms and conditions of employment of officers are subject to the approval of the Chief Executive, who has the power to vary them.<sup>13</sup> In order to allow the Commissioner greater flexibility with his staff, all new appointees to the ICAC are engaged on renewable contract terms of employment.

9 ICACO, section 5(4).

10 ICACO, section 6.

11 ICACO, section 7.

12 ICACO, section 8(1).

13 ICACO, section 8(3) and (4).

## 1.2 Removal from office

[3-13] When first passed, the ICACO contained an important administrative power whose full significance would not be appreciated by the community until its use in controversial circumstances some 20 years later.<sup>14</sup> It was contained in section 8 and it allowed the Commissioner to terminate the services of any officer without giving any reason. In moving the second reading of the Independent Commission Against Corruption Bill the Colonial Secretary explained its purpose as follows:<sup>15</sup>

The Commissioner must be able, if there is any suspicion of the loyalty or the integrity of an officer, or any doubts as to his energy and efficiency, to remove him from the Commission immediately.

[3-14] However, as a result of the recommendations of the ICAC Review Committee<sup>16</sup> this provision was replaced with one which allowed the officer of the ICAC a right to be heard. Now the Commissioner may only terminate the appointment of an officer if, after consulting the Advisory Committee on Corruption, he is satisfied that it is in the interests of the ICAC to do so.<sup>17</sup> However, before terminating an officer's appointment the Commissioner must, by notice in writing, inform the officer concerned that the termination of his appointment is under consideration and the reasons why.

[3-15] In the notice the officer must be given a period of not less than seven days within which to make written representations to the Commissioner in regard to these reasons and/or as to why his appointment should not be terminated.<sup>18</sup>

[3-16] Where an appointment is terminated under this power, the Commissioner must notify the officer in writing of the termination and the officer may, within the period of 21 days beginning on the date of this notification, appeal to the Chief Executive against the termination.<sup>19</sup> On such an appeal the Chief Executive may confirm or set aside the termination.<sup>20</sup> Where an officer's appointment is terminated under these provisions the termination takes immediate effect, but if on an appeal to the Chief Executive the termination is set aside, the officer concerned is treated in all respects as if the Commissioner had not terminated his appointment.<sup>21</sup>

[3-17] The decision of the Commissioner is judicially reviewable and such a decision was challenged in this way in *Yu Chee Yin v Commissioner of the ICAC (No 2)*.<sup>22</sup> The challenge was based upon an alleged failure by the Commissioner to reveal all the materials on which he relied in coming to his decision, a reliance on materials that were said to be of no probative value and a failure by the Commissioner to conduct adequate enquiries thereby leading him to reach an unreasonable conclusion. It was accepted that if the Commissioner had reached his decision lawfully then he

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14    Ie when the Commissioner terminated the appointment of Alex Tsui, his Deputy Director of Operations. For a discussion of this incident, see Chapter 1 above.

15    Hong Kong Hansard 30 January 1974.

16    The work of the Committee is discussed in Chapter 1 above.

17    ICACO, section 8(2)(a).

18    ICACO, section 8(2)(b).

19    ICACO, section 8(2)(c).

20    ICACO, section 8(2)(d).

21    ICACO, section 8(2)(e).

22    [2001] 4 HKC 532.