
INFORMATION NOTE

Independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government in selected places

1. Introduction

1.1 The Bills Committee on Prevention of Bribery (Amendment) Bill 2007, at its meeting on 19 March 2008, requested the Research and Library Services Division to provide information on whether overseas anti-corruption agencies which are accountable to the head of state or head of government have mechanisms safeguarding their independence in investigating corruption complaints against the head of state or head of government.

1.2 This information note focuses on three overseas places, namely Singapore, the United States (US) and the State of New South Wales (NSW) of Australia. Singapore is comparable to Hong Kong in that it has an anti-corruption agency empowered to investigate the head of government to whom it is accountable. The US and NSW are selected because they have arrangements with distinctive features for safeguarding the independence of their anti-corruption agencies in investigating corruption complaints against the head of state or head of government. The findings of this information note are presented in the **Table** in the following aspects:

- (a) accountability of anti-corruption agencies;
- (b) whether anti-corruption agencies can investigate corruption complaints against the head of state or head of government;
- (c) whether mechanisms independent of anti-corruption agencies are in place to investigate such corruption complaints; and, if not, whether safeguards are in place for the independence of those agencies in investigating such corruption complaints; and
- (d) whether anti-corruption agencies' investigations of corruption complaints are subject to external monitoring.

Table – Independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government in selected places

	Hong Kong	Singapore	United States	New South Wales of Australia
Anti-corruption agencies	The Independent Commission Against Corruption (ICAC) is a statutory body established by the Independent Commission Against Corruption Ordinance (Cap. 204) (the ICAC Ordinance).	The Corrupt Practices Investigation Bureau (CPIB) is considered by the Singapore government as an "independent body" ¹ mainly empowered by the Prevention of Corruption Act (PCA) to investigate corruption.	The Department of Justice (DOJ) is an executive department of the US federal government, which has primary jurisdiction for enforcement of federal laws, including the investigation of corruption.	The Independent Commission Against Corruption (the Commission) is a statutory body established by the Independent Commission Against Corruption Act 1988 (the ICAC Act).
Whether anti-corruption agencies are accountable to the head of state or head of government	Yes, ICAC is accountable to the Chief Executive (CE) ² of the Hong Kong Special Administrative Region, who nominates and reports to the Central People's Government for appointment the Commissioner of ICAC. The ICAC Ordinance states that ICAC "shall not be subject to the direction or control of any person other than" CE. ³	Yes, CPIB is accountable to the Prime Minister (the head of government) ⁴ , although its Director is appointed by the President of Singapore (the head of state) ⁵ with the advice or recommendation of the Cabinet or a Minister acting under the general authority of the Cabinet. ⁶	Yes, DOJ is accountable to the US President who serves as both the head of state and the head of government. The head of DOJ, the Attorney General, is nominated by the President and confirmed by the Senate of the US Congress.	No, the Commission is not accountable to the NSW Premier (the head of government) or the NSW Governor (the head of NSW), although the Commissioner is appointed by the Governor. ⁷ The Commission is accountable to the NSW Parliament through the Parliamentary Joint Committee on the Independent Commission Against Corruption (PJCC), the membership of which must not include any Minister. ⁸

¹ *Corrupt Practices Investigation Bureau* (2006).

² Article 57, the Basic Law.

³ Section 5(2), the ICAC Ordinance.

⁴ Section 3, PCA and Prime Minister's Office (2008) p.3.

⁵ Under Clauses 17 and 19 of the Constitution of the Republic of Singapore, the President is directly elected by Singapore citizens and must not be a Member of Parliament or a member of any political party.

⁶ Under Clauses 21 and 37(B) of the Constitution of the Republic of Singapore, the President exercises the appointment power in consultation with the Council of Presidential Advisers, which comprises six members, of whom two are appointed by the President at his or her discretion, two are appointed by the President on the Prime Minister's advice, one is appointed by the President on the advice of the Chairman of the Public Service Commission, and one is appointed by the President on the Chief Justice's advice. The President acting in his or her discretion may refuse to appoint or revoke the appointment of the Director of CPIB if he or she does not concur with the advice or recommendation of the Cabinet or a Minister acting under the general authority of the Cabinet.

⁷ Section 5, the ICAC Act, and sections 4 (1) and (2), the Independent Commission Against Corruption (Commissioner) Act 1994. The NSW Parliament can veto the proposed appointment of the Commissioner. NSW is the only selected place where only a Judge of the Supreme Court of NSW (the highest court in NSW) is eligible to be appointed as the head of the anti-corruption agency.

⁸ Section 65(3), the ICAC Act.

Table – Independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government in selected places (cont'd)

	Hong Kong	Singapore	United States	New South Wales of Australia
Whether anti-corruption agencies can investigate corruption complaints against the head of state or head of government	While the ICAC Ordinance does not have a specific provision on ICAC's investigation of corruption complaints against CE, it empowers ICAC to receive and consider complaints alleging corrupt practices and investigate such complaints as it considers practicable. ⁹ The Government therefore considers that ICAC can investigate corruption complaints against CE. ¹⁰	PCA does not have a specific provision on CPIB's investigation of corruption complaints against the President or the Prime Minister, but CPIB can investigate any case relating to the commission of corruption offences under PCA, ¹¹ including those relating to the bribery of Members of Parliament, ¹² from whom the Prime Minister is selected.	DOJ can investigate corruption complaints against the President.	The ICAC Act does not have a specific provision on the Commission's investigation of corruption complaints against the Governor or the Premier, but the Commission's jurisdiction covers all public officials, including any Minister and the Governor. ¹³

⁹ Section 12, the ICAC Ordinance.

¹⁰ Legislative Council Secretariat (2007) pp. 12-13.

¹¹ Section 17, PCA.

¹² Section 11 of PCA states that "[a]ny person (a) who offers any gratification to a Member of Parliament as an inducement or reward for such Member's doing or forbearing to do any act in his capacity as such Member; or (b) who being a Member of Parliament solicits or accepts any gratification as an inducement or a reward for his doing or forbearing to do any act in his capacity as such Member shall be guilty of an offence".

¹³ Greiner, K.R.G. (1988).

Table – Independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government in selected places (cont'd)

	Hong Kong	Singapore	United States	New South Wales of Australia
Whether mechanisms independent of anti-corruption agencies are in place to investigate corruption complaints against the head of state or head of government	No, ICAC is responsible for investigating corruption complaints against CE, if any.	Yes, the Constitution provides that with the support of Parliament, the Chief Justice can appoint a tribunal to inquire into corruption complaints against the President. ¹⁴ The tribunal comprises not less than five Judges of the Supreme Court of whom the Chief Justice must be one, unless he or she decides otherwise. Meanwhile, no mechanism other than CPIB or independent of CPIB is in place to investigate corruption complaints against the Prime Minister.	No.	No, but both Houses of Parliament, the Legislative Assembly (Lower House) and the Legislative Council (Upper House) may, by resolution of each House, refer any matter, including allegations of corruption, to the Commission for investigation. ¹⁵ The Commission must report to Parliament on the investigation. ¹⁶

¹⁴ Clauses 22L (3), (4) and (5), the Constitution of the Republic of Singapore. The Constitution provides that either the Prime Minister or not less than 25% of the total number of the elected Members of Parliament can move a motion to seek an inquiry into allegations made against the President's "misconduct or corruption involving the abuse of the powers of his office" or "offence involving fraud, dishonesty or moral turpitude". If the motion is adopted by not less than half of the total number of the elected Members of Parliament, the Chief Justice can appoint a tribunal to inquire into such allegations.

¹⁵ Sections 13(1)(b) and 73, the ICAC Act. For example, in 1992, both Houses of Parliament requested the Commission to investigate, among others, whether the conduct of the Premier had been corrupt within the meaning of the ICAC Act.

¹⁶ Section 74 (A), the ICAC Act. The Commission's report must include, on each "affected" person, a statement on whether the Commission is of the opinion that consideration should be given to the following: (a) obtaining the advice of the Director of Public Prosecutions concerning the prosecution of the person for a specified criminal offence; and (b) the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official. An "affected" person means a person described in the reference made by Parliament or against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned. The report can also include statements on any of the Commission's findings, opinions and recommendations and the Commission's reasons for any of those findings, opinions and recommendations.

Table – Independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government in selected places (cont'd)

	Hong Kong	Singapore	United States	New South Wales of Australia
Whether safeguards are in place to maintain the independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government	The Basic Law states that ICAC "shall function independently". ¹⁷ In addition, ICAC is empowered to protect confidentiality of an investigation. It is an offence for any person to disclose the identity of any person being investigated or details of the investigation when the investigation is still in a covert stage. ¹⁸ The Government considers that this non-disclosure requirement applies to ICAC. If CE directs the Commissioner to brief him on any investigation findings involving himself, this could constitute misconduct in public office. ¹⁹	PCA does not provide for any safeguards of the independence of CPIB in investigating corruption complaints against the Prime Minister or the President. However, the Constitution provides that if the Prime Minister refuses to give his or her consent to the Director of CPIB to investigate any information received by the Director touching upon the conduct of any person (including the Prime Minister), ²⁰ or any allegation or complaint against any person, the President may order the Director to proceed with the investigation. ²¹	The Attorney General has a statutory power to appoint a Special Counsel (SC) to conduct an investigation of a person or matter, ²² when determining that the investigation "would present a conflict of interest" for DOJ and "would be in the public interest". ²³ SC must be a lawyer "selected from outside the US Government", with a reputation for "integrity and impartial decision-making" and "appropriate experience" to ensure the investigation to be conducted "ably, expeditiously and thoroughly". ²⁴	To safeguard witnesses or the integrity of investigations, the ICAC Act allows the Commission to conduct its investigations in public as public inquiries, in private as compulsory examinations, or a combination of both. When considering whether to hold public inquiries and/or compulsory examinations, the Commission must take into account "the public interest", which is not defined in the Act. ²⁵ With the Commissioner's concurrence, an Assistant Commissioner may determine to conduct a public inquiry, but concurrence is not required if the Commissioner "would or might have a conflict of interest in relation to the inquiry". ²⁶

¹⁷ Article 57, the Basic Law.

¹⁸ Sections 30(1) and (2), the Prevention of Bribery Ordinance.

¹⁹ Department of Justice (2007b) pp.1-3.

²⁰ Lee Kuan Yew (2005) p.3.

²¹ Clause 22G, Constitution of the Republic of Singapore.

²² §600.4 (a) and (b), Title 28, Code of Federal Regulations. The jurisdiction of SC is established by the Attorney General. If SC considers that additional jurisdiction is necessary so as to fully investigate and resolve the matters assigned or to investigate new matters that arise during his or her investigation, SC must consult the Attorney General, who determines whether to include the additional matters within SC's jurisdiction.

²³ §600.1, Title 28, Code of Federal Regulations, under which the terms "conflict of interest" and "public interest" are not defined.

²⁴ §600.3, Title 28, Code of Federal Regulations. Under clause (b), §600.3, Title 28 of Code of Federal Regulations, SC is required to undergo an "appropriate background investigation" and a "detailed review of ethics and conflicts of interest issues".

²⁵ Sections 30 and 31, the ICAC Act. In determining whether it is in the public interest to conduct a public inquiry, the Commission must consider: (a) the benefit of exposing to the public, and making it aware, of the corrupt conduct; (b) the seriousness of the allegation or complaint being investigated; (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry); and (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned. A public inquiry or a compulsory examination may be conducted by the Commissioner or an Assistant Commissioner (who may be appointed by the Governor, with the Commissioner's concurrence), as determined by the Commissioner. The Commission may (but is not required to) advise a person required to attend a compulsory examination of any findings it has made or opinions it has formed as a result of the compulsory examination.

²⁶ Section 31(3), the ICAC Act. The term "conflict of interest" is not defined in the Act.

Table – Independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government in selected places (cont'd)

	Hong Kong	Singapore	United States	New South Wales of Australia
Whether safeguards are in place to maintain the independence of anti-corruption agencies in investigating corruption complaints against the head of state or head of government (cont'd)			<p>SC can exercise, within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any US Attorney²⁷, and is not "subject to the day-to-day supervision of any official" of DOJ.²⁸</p> <p>Nevertheless, the Attorney General may review any of SC's investigative or prosecutorial action, and conclude that the action is inappropriate or unwarranted and should not be pursued. When making such a conclusion, the Attorney General must notify Congress.²⁹</p>	<p>While the Commission is accountable to Parliament through PJC, PJC is prohibited from:³⁰</p> <p>(a) investigating a matter relating to a particular conduct;</p> <p>(b) reconsidering a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; and</p> <p>(c) reconsidering the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.</p>

²⁷ §600.6 and 600.5, Title 28, Code of Federal Regulations. SC may request the assignment of appropriate DOJ employees to assist his or her work. All personnel in DOJ must "co-operate to the fullest extent possible" with SC. If necessary, SC may request additional personnel to be hired or assigned from outside DOJ. SC may also release information about matters handled by him or her, but such release must be governed by relevant law and the generally applicable DOJ guidelines on public comment on any criminal investigation.

²⁸ §600.7(b), Title 28, Code of Federal Regulations.

²⁹ Ibid.

³⁰ Section 64, the ICAC Act.

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	Hong Kong	Singapore	United States	New South Wales of Australia
Whether anti-corruption agencies' investigations of corruption complaints against the head of state or head of government are subject to external monitoring	<p>Yes, the investigations of ICAC are subject to monitoring by an advisory committee of ICAC called the Operations Review Committee (ORC), which currently has 17 members, who are all appointed by CE. Of the 17 members, two are Members of the Legislative Council and four are ex-officio members, including the ICAC Commissioner and the Secretary for Justice or his or her representative.³¹</p> <p>ORC is required to submit annual reports to CE and those reports are published to the public.</p>	<p>Yes, the Constitution provides that after due inquiry, the tribunal must make a report to the Speaker of Parliament³² on its determination relating to the allegations made against the President and the reasons for it.</p> <p>Neither PCA nor the Constitution provides for an external monitoring mechanism on CPIB's investigations.</p>	<p>Yes, the Attorney General must notify the Chairman and the Ranking Minority Member of the Judiciary Committees of each House of Congress, with reports explaining each action upon appointing and removing any SC and upon conclusion of SC's investigations, including a description and explanation of instances (if any) in which the Attorney General concluded that a proposed action by SC was so inappropriate or unwarranted under established DOJ practices that it should not be pursued.³³</p> <p>The Attorney General may determine to publicly release these reports if such release would be in the public interest, subject to relevant legal restrictions.</p>	<p>Yes, the Commission's investigations are subject to monitoring by the statutory Inspector of the Independent Commission Against Corruption (the Inspector),³⁴ who is appointed by the Governor and must not be a Member of the NSW Parliament or any other legislature in Australia.³⁵</p> <p>The Inspector is "not subject to the Commission in any respect", and may exercise his or her functions on his or her own initiative, at the request of the Minister, or in response to a complaint made to the Inspector or a reference by PJC, any public authority or public official.³⁶</p> <p>The Inspector submits his or her annual reports to Parliament, and can make, at any time, a special report to the Presiding Officer of each House of Parliament on any matter affecting the Commission or any administrative or general policy matter relating to the Inspector's functions.</p>

³¹ ORC's terms of reference include: (a) receiving from the Commissioner information about all corruption complaints made to ICAC and how ICAC deals with them; and (b) receiving reports on the investigations ICAC has completed and advising on how those cases, which on legal advice are not being subject to prosecution or caution, should be pursued.

³² Clauses 22L(6) and (7), the Constitution of the Republic of Singapore. If the tribunal's report considers that the allegation made against the President has been valid, Parliament may by a resolution passed by not less than 75% of the total number of the elected Members remove the President from office.

³³ §600.9(a), Title 28, Code of Federal Regulations.

³⁴ Section 57(C), the ICAC Act. The Inspector's powers include: (a) investigating any aspect of the Commission's operations, any conduct of the Commission's officers, and complaints about the Commission or its officers; (b) having full access to the Commission's records, and requiring officers of the Commission to supply information, produce documents or attend before the Inspector to answer questions about any matter relating to the Commission's operations or any conduct of officers of the Commission; and (c) recommending disciplinary action or criminal prosecution against the Commission's officers.

³⁵ Section 10, Schedule 1A, the ICAC Act.

³⁶ Sections 57(A) and (B), the ICAC Act.

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