

Memorandum for the Reform of the Malaysian Anti-Corruption Commission

Submitted to the Malaysian Anti-Corruption Commission on 28 July 2015, by the Malaysian Bar, in collaboration with the Institute for Democracy and Economic Affairs (“IDEAS”), the Centre to Combat Corruption and Cronyism (“C4”), Citizens’ Network for a Better Malaysia (“CNBM”), and Transparency International Malaysia (“TI-M”).

Preface

1. This memorandum is directed at strengthening the Malaysian Anti-Corruption Commission for it to comprehensively address and deal with corruption.
2. The proposals contained in this memorandum are the result of discussions and deliberations between, and views expressed by, the Malaysian Bar, Institute for Democracy and Economic Affairs (“IDEAS”), Transparency International Malaysia (“TI-M”), Citizens’ Network for a Better Malaysia (“CNBM”), and the Center to Combat Corruption and Cronyism (“C4”).
3. There are four substantive parts in this memorandum:
 - (a) Constitutional amendments to establish a constitutional entity to be called the Independent Anti-Corruption Commission (“IACC”);
 - (b) Amendments to the Malaysian Anti-Corruption Commission Act 2009;
 - (c) Amendments to other related legislation; and
 - (d) Prosecutorial powers.

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Introduction

1. This memorandum contains proposals for the reform of the Malaysian Anti-Corruption Commission (“**MACC**”) to strengthen the fight against corruption in Malaysia.
2. At the heart of these proposals is the initiative to establish a constitutionally mandated Independent Anti-Corruption Commission (“**IACC**”). This newly created entity would operate essentially as an oversight body to the Anti-Corruption Agency (“**ACA**”), the investigation arm of the IACC. Thus, both the constitutionally founded IACC and the statutorily established ACA are to be separate entities.
3. Recent cases of the MACC¹ reflect marginal success in its attempts to eradicate corruption in Malaysia. Corruption in Malaysia has not been handled in a comprehensive and consistent manner. In this regard, the Court of Appeal’s judgment in Teoh Beng Hock’s case² is noteworthy as it raises concerns regarding MACC’s overall structure and operational processes.
4. It is axiomatic that the MACC must function independently and impartially to be a viable and potent entity to eradicate corruption. The target should be the maintenance of an effective and efficient public administration, and a high standard of professional ethics in the public service.³ In order to achieve this purpose, the MACC must have structural protection from governmental control or dictate. This can be achieved by putting the MACC beyond the pale of executive intervention and influence.
5. Upon consultation, we take the view that the scope and ambit of the reform should be wide, and all encompassing. **In this regard, it is proposed that a stand-alone “Part” be introduced in the Federal Constitution to establish the IACC as a constitutional commission in the mould of the Election Commission⁴ but with a unique structure and substance befitting its position as an institution with sufficient powers of oversight and accountability.**

¹ The Star, “A dozen Customs officers among 22 nabbed by MACC” (3 September 2014) accessed at <http://www.thestar.com.my/News/Nation/2014/09/03/Customs-officers-in-MACC-bust/> on 29 January 2015.

² The Star, “Open verdict in Teoh Beng Hock inquest overturned, suicide ruled out” (5 September 2014) accessed at <http://www.thestar.com.my/News/Nation/2014/09/05/Teoh-Beng-Hock-open-verdict-incorrect-Court-of-Appeal/> on 29 January 2015.

³ See Section 196(2) of the Constitution of South Africa 1996 that guarantees the independence of the South African Public Service Commission as an institution that operates without the interference of any other organ of the state.

⁴ Federal Constitution of Malaysia, Part VII on Elections.

6. Thus, this proposal addresses the aforementioned concerns through the following reforms that ought to enhance the existing anti-corruption actions. The proposed amendments to the Federal Constitution should:
 - (a) create a constitutional commission, to be beyond the scope and control of the executive; and
 - (b) ensure the independence of Commissioners serving the commission
 - (c) ensure security of tenure for the Commissioners.

7. We also take the position that there should be consequential amendments to the:
 - (a) MACC Act 2009;
 - (b) Official Secrets Act 1972;
 - (c) Whistleblower Protection Act 2010; and
 - (d) Witness Protection Act 2009.

8. In its sweep, these proposals aim to ensure a holistic treatment of the scourge of corruption through a viable constitutional and legislative framework.

MACC's rationale for reform

9. According to the MACC, on 6 August 2008, the Cabinet agreed in principle that the Federal Constitution should be amended to establish a constitutional commission to be helmed by a Chief Commissioner, which is a position to be created and constitutionally recognized.
10. The MACC has provided its rationale for the proposed constitutional amendments as follows:

“Evolusi jenayah rasuah yang kian kompleks dan sangat memudaratkan semakin membimbangkan masyarakat antarabangsa. Perkaitannya dengan pelbagai bentuk jenayah rumit lain menjadikan tugas pencegahan rasuah satu tanggungjawab kritikal yang menuntut kapasiti, profesionalisme dan integriti yang sangat tinggi di kalangan pelaksanaannya. Bagi memastikan SPRM dilengkapi keupayaan ini, sewajarnya urusan lantikan, pengesahan, perjawatan, kenaikan pangkat, pertukaran dan kawalan tata tertib anggotanya diasingkan daripada mekanisme pengurusan perkhidmatan am Kerajaan yang sedia ada dan dipindahkan kepada SPPPR [Suruhanjaya Perkhidmatan Pegawai Pencegahan Rasuah].

Dengan sifat jenayah rasuah yang memerlukan kemahiran, pengetahuan dan kepakaran dalam bidang-bidang tertentu untuk mengatasi kelicikan pelakunya, SPRM perlu satu mekanisme yang dapat memastikan pasukan kerjanya dianggotai oleh individu yang benar-benar berkebolehan. Penubuhan SPPPR bakal memberikan kelebihan kepada SPRM untuk mengekalkan pegawai yang berkualiti sahaja dalam perkhidmatan ini.

Pengkhususan tanggungjawab SPPPR akan membolehkan urusan pelantikan, penamatan tugas serta hal-ehwal berkenaan perkhidmatan pegawai SPRM dilaksanakan secara eksklusif mengikut acuannya dan tanpa lengah. Mekanisme pengurusan yang cekap ini bukan sahaja memastikan SPRM bakal memperolehi barisan pegawai terbaik, malah komitmen ini bakal memangkin prestasi usaha pencegahan rasuah yang dilaksanakan oleh Kerajaan secara keseluruhannya.”⁵

“One of the desired areas is in the recruitment of officers to serve the Commission, as this will determine the direction the commission takes. Currently officers of the Commission are recruited by the Public Service Commission from its “Database”. With the establishment of the MACC Service commission the recruitment of MACC officers will

⁵ Paper presented by the MACC at “Sesi Perbincangan Mengenai Cadangan Pindaan Perlembagaan Persekutuan” on 9 April 2014 at Dewan Tun Ismail, Akademi Pencegahan Rasuah Malaysia.

be determined by the needs of the commission. It will then be able to recruit professionals in specific areas to tackle cases of corruption in the public and private sector and also in the Commission's preventive activities.

*The Service Commission will also manage all other service matters including promotions, transfers, disciplinary action and be independent of the Public Service Commission. The recruitment exercise will allow the MACC to handle its own affairs and determine the required officers in various field of expertise.'*⁶

11. As regards the creation of the constitutional position of the Chief Commissioner, MACC's reasons are:

"In line with the above and the vision of the MACC being seen as an independent body, the Chief Commissioner must be provided with security of tenure of office. It is with this in mind that it is proposed that the appointment of Chief Commissioner be constitutionalized. This will allow the Chief Commissioner to act independently without fear or favour. It is proposed that his removal from office to be in line with the removal of the judges by a special committee and not at the discretion of the Public Service Commission.

The post of a Chief Commissioner may be held by any person either from the public service of the Federation or from those outside the service. However, unfortunately, from which category he comes from, by the operation of Section 5 subsection (4) of the present MACC Act 2009 (Act 694) he is deemed to be a member of the general public service of the Federation for the purpose of discipline. In short, he will be subjected to the provisions of General Orders Cap. D (GO'D'). There is no security of tenure in his appointment. For the purpose of discipline under GO'D' he merely needs to be served with notice to show cause upon any allegation of misconduct. Failing to exculpate himself over the allegation contained in the show-cause notice will subject him to the various alternatives provided in the GO'D'. To get rid of him from the post he holds is as simple as that provided therein.

On the face of it, under the section 5 MACC Act, he appeared to be very independent in the discharge of his duty. He should act without fear and favour. Under subsection 5 he shall be responsible for the direction, control and supervision of all matters relating to the Commission. But alas, under subsection (4) he is easily put under the influence of the power (sic) that be. In certain circumstances, he has to toe the line to safeguard his position.

⁶ MACC's Position Statement submitted on 18 June 2014, p. 1. ("**MACC Position Statement**")

The spirit behind the formation of the MACC is to curb or reduce the evil of bribery and corruption. The Chief Commissioner should deter the commission of bribery and corruption through successful investigation and prosecution. It is also the objective of the establishment of the MACC to recover ill-gotten assets, to raise public confidence in the MACC and to encourage a culture of self-reporting by corporate bodies and individuals of acts of bribery and corruption.

On the whole, the MACC Act has conferred wide investigative powers on the Chief Commissioner and the officers of the MACC. The Act does not prevent the arrest of a suspected person for an offence or the remand in custody or release on bail of a person charged with an offence but it cannot be done without getting the consent of the Public Prosecutor. On the whole, the MACC has become but a government department being superintended by the Public Prosecutor.

Another aspect is by the operation of section 41 of the MACC Act and Sec. 56 of the Anti-money Laundering and Terrorism Financing Act, the MACC is being given additional power of civil recovery of ill-gotten property by search and seizure in cases where there is no sufficient evidence to prosecute an accused person criminally. This will involve investigation not for the purpose of charging the accused person for an offence under the Acts but for purpose of forfeiture of property. All these investigations conducted by the MACC under the Acts are all undertaken on the instructions and guidance of the Chief Commissioner either directly or indirectly. He is held responsible and accountable on the investigations carried out.

With the present framework of the Federal Constitution nothing very much can be done to confer absolute independence on the MACC, its Chief Commissioner and officers.”⁷

12. The MACC’s proposals for the constitutionally created entity and the Chief Commissioner are as follows:

“Armed with the wide powers of investigations and the increasingly complex nature of corruption, there is a dire need for the MACC to recruit qualified officers to achieve the aims to check corruption. It is only the MACC which will be able to identify and recruit officers for a more effective fight against corruption in the public and private sector.

To constitutionalize the setting up of the SPPPR, Article 132 of the Federal Constitution need to be amended by inserting in clause (a) thereof a service called the Anti-Corruption Service. There should be inserted a new Article 138A or 141B under the heading of Anti-

⁷ Ibid, pp. 1-4.

Corruption Commission following the pattern laid out under Article 138 or 141A for the Judicial and Legal Service Commission or the Education Service Commission.

As of now, the MACC is a government department and its Chief Commissioner is a Grade Turus II officer which is a Senior Administration appointment in the public service. With this position the Chief Commissioner is subject to be transferred out or removed from the MACC to any other government agency at the discretion of the government of the day. It is clear he does not enjoy the security of tenure of office.

Be that as it may, with a view to achieve the objective. The institution and its officers, in particular the Chief Commissioner holding the reign must be equipped with a seemingly independent power within the ambit of the law to act without fear and favour. There should not be and should not appear to be any outside force to influence the institution and its officers, in particular the Chief Commissioner, from independently carrying out their duties to achieve the spirit intended. On solution to it is by placing the MACC as an institution and its Chief Commissioner in the category of constitutionalized appointment provided for in the Federal Constitution analogous with that of the Judges, the Auditor General and the Attorney General. Further the constitutionalized appointment of The Chief Commissioner will be in confirming (sic) with article 36 of the United Nations Convention Against Corruption.

The wisdom lies with the Attorney General Chambers in drafting the necessary amendment to the Federal Constitution to achieve the intended purpose.”⁸

13. With regard to the proposals made by the MACC, it may be noted that the Rubber Research Institute of Malaysia (RRIM) used to have an independent board that was responsible for the appointment of all research officers. Board members included nominees from both the estate and smallholder sectors as well as representatives from the public sector including the Department of Agriculture. The Director of the RRIM was accorded to a person with a proven scientific track record. Heads of Divisions likewise were stringently screened. The RRIM drew the best science graduates with attractive compensation packages. The end result was a dynamic and highly effective research organization in the 1980s.

⁸ Ibid, pp. 4-6.

14. Next, it is to be noted that in the *Laporan Tahunan Jawatan Kuasa Khas Mengenai Rasuah 2013* the following was observed by the Parliamentary Special Committee on Corruption:

“Cadangan Pindaan Perlembagaan berkaitan pelantikan Ketua Pesuruhjaya SPRM dan penubuhan Suruhanjaya Perkhidmatan Pencegahan Rasuah (SPPR) bagi memantapkan keberkesanan SPRM dalam melaksanakan tanggungjawabnya.

JKMR dimaklumkan bahawa proses ini sedang dilaksanakan termasuklah engagement yang berterusan oleh pihak Kerajaan dengan semua pihak bagi mendapatkan maklum balas. JKMR memberi jaminan akan tetap bersama-sama menyokong cadangan pindaan ini dengan tanpa berbelah bagi. Ini selaras dengan kehendak artikel 36, United Nations Convention Against Corruption (UNCAC)⁹ yang menghendaki suatu entiti pencegahan rasuah bebas dilaksanakan...”

Selain dari itu, United Nations Development Programme (UNDP) dan United Nations Office On Drugs And Crime (UNODC) melalui Jakarta Statement pada tahun 2012 menegaskan bahawa satu entiti pencegahan rasuah hendaklah mempunyai kuasa untuk mengambil dan memecat anggota sendiri melalui prosedur dalaman yang telus bagi menjamin kebebasan dan kecekapan entiti tersebut.”¹⁰

15. Moreover, the *Jakarta Statement*¹¹ that was referred to in the abovementioned report, by the Parliamentary Special Committee on Corruption, made the following recommendations as regards the independence and the effectiveness of anti-corruption agencies:

“MANDATE: ACAs [Anti-Corruption Agencies] shall have clear mandates to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies;

COLLABORATION: ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation;

PERMANENCE: ACAs shall, in accordance with the basic legal principles of their countries, be established by proper and stable legal

⁹ See para [45], *infra*.

¹⁰ Parliamentary Special Committee on Corruption, “Annual Report 2013”, p. 9-10, prepared pursuant to the MACC Act 2009, below n 50, Section 14(5).

¹¹ Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012. (“**Jakarta Statement**”)

framework, such as the Constitution or a special law to ensure continuity of the ACA;

APPOINTMENT: ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence;

...
...

REMOVAL: ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice);

...
...

ADEQUATE AND RELIABLE RESOURCES: ACAs shall have sufficient financial resources to carry out their tasks, taking into account the country's budgetary resources, population size and land area. ACAs shall be entitled to timely, planned, reliable and adequate resources for the gradual capacity development and improvement of the ACA's operations and fulfillment of the ACA's mandate;

FINANCIAL AUTONOMY: ACAs shall receive a budgetary allocation over which ACAs have full management and control without prejudice to the appropriate accounting standards and auditing requirements;

...
...

EXTERNAL ACCOUNTABILITY: ACAs shall strictly adhere to the rule of law and be accountable to mechanisms established to prevent any abuse of power;

PUBLIC REPORTING: ACAs shall formally report at least annually on their activities to the public.

PUBLIC COMMUNICATION AND ENGAGEMENT: ACAs shall communicate and engage with the public regularly in order to ensure public confidence in its independence, fairness and effectiveness.

...
..."

16. In summary, the MACC proposes amendments to the Federal Constitution to provide for:
- (a) an independent service commission for recruitment purposes;
 - (b) the service commission to appoint its own Chief Commissioner, who will not be answerable to the executive;
 - (c) the above-mentioned objectives to be realised by amendments to the Federal Constitution as well as consequential amendments to the MACC Act 2009.
17. Recently, Senator Datuk Paul Low, Minister in the Prime Minister’s Department is reported to have said that the “*Cabinet has approved a proposed amendment to the Federal Constitution to make the Malaysian Anti-Corruption Commission (MACC) autonomous and independent of the civil service*”¹² and the “*the proposal, which the Cabinet endorsed three weeks ago, was for the MACC to be made a Public Service Commission under the Constitution*”.¹³ Further, Senator Datuk Paul Low is reported to have also said that “[t]he proposal will secure the tenure of the chief commissioner for a certain number of years (to protect him from political blowback should he choose to investigate high ranking officials)” and that “it will also give the commission the exclusive right to hire and fire its own staff.”¹⁴

Differences between the MACC’s proposal and our proposals.

MACC’s Proposals	Our Proposals
Amendments to the: <ul style="list-style-type: none"> • Federal Constitution; and • MACC Act 2009. 	Amendments to the: <ul style="list-style-type: none"> • Federal Constitution; • MACC Act 2009; • Official Secrets Act 1972; • Whistleblower Protection Act 2010; and • Witness Protection Act 2009.

¹² The Star, “Take politics out of MACC, says Low” (10 December 2014), accessed at <http://www.thestar.com.my/News/Nation/2014/12/10/Take-politics-out-of-MACC-says-Low-Cabinet-approves-proposal-to-make-commission-independent-of-civil/> on 29 January 2015.

¹³ Ibid.

¹⁴ Ibid.

The MACC and the weakness in enforcement: Why the proposals made by MACC are insufficient

18. It has been noted that *“Public confidence is important to the smooth functioning of a government. A government cannot function effectively if the public believes that its officials are corrupt, even if they are not. There are increasing expectations from the public that government should promote good governance and high standards of integrity in the public service. Every government is therefore obliged to put mechanisms in place that would promote an understanding that it is functioning with integrity”*.¹⁵
19. In this regard, it has also been observed that *“The causes of corruption can be linked to socio-economic conditions, whilst political approaches influence the way in which corruption is perceived. The problem of corruption cannot be left unresolved, particularly because it is intolerable and harmful to the entire society”*.¹⁶
20. In the foreword to the United Nations Convention Against Corruption,¹⁷ Secretary General Kofi A. Annan presciently said: *“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.*

The evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and major obstacle to poverty alleviation and development.

I am therefore very happy that we now have a new instrument to address this scourge at the global level. The adoption of the United Nations Convention against Corruption will send a clear message that the international community is determined to prevent and control corruption. It will warn the corrupt that betrayal of the public trust will no longer be tolerated. And it will reaffirm the importance of core values such as honesty, respect for the rule of law, accountability and

¹⁵ National Anti-Corruption Hotline Toolkit, Public Service Commission 2006 (South Africa), p. 2.

¹⁶ Ibid, p. 26.

¹⁷ *United Nations Convention Against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005) (“**UNCAC**”).

transparency in promoting development and making the world a better place for all.”

21. As we shall demonstrate shortly, we have had post-colonial anti-corruption laws in place since 1950.¹⁸ It has been noted that “*Malaysia is one of the first countries in the Global South to have established [an] Anti-Corruption Agency and anti-corruption law[s] ...Malaysia signed [the] UN Convention against Corruption in 2003 and ratified it in 2008.*”¹⁹ In this relation, it has also been noted that “*A number of significant measures have been implemented since 2004, inter-alia, the establishment of 14 special anti-corruption courts with the mandate to adjudicate all corruption cases within 12 months; the enactment of the Whistleblower Act; the signing of Corporate Integrity Pledges and Integrity Pacts; and acceptance of open tenders publicised through the media for procurement exercise thus enhancing transparency and accountability.*”²⁰
22. The Malaysian Anti-Corruption Commission’s main objective is “to incessantly eradicate all forms of corruption, abuse of power and malpractice”.²¹ This objective can be readily agreed upon by all parties as corruption is a matter of national interest, given its adverse impact on poverty, economic growth²² and the general public’s confidence towards the Government. The Government furthermore, has consistently pledged to tackle corruption seen in the development of the National Key Recovery Area on Corruption²³ signifying a serious commitment to the eradication of corruption.
23. However, data shows that corruption and the perception of corruption remains a problem in Malaysia. The Global Competitiveness Report 2014-2015 by the World Economic Forum (WEF) highlights vast improvements to Malaysia’s institutions yet notes that corruption remains a key barrier to business.

¹⁸ See paras [37] to [42], *infra*.

¹⁹ Lynda Lim, “Crimes without criminals: Fighting Corruption in Malaysia”, Center For Public Policy Studies, 2014, p. 1.

²⁰ C. Muzaffar, (2013) Washington seeks regime change in Malaysia: US back Opposition Complicit in Corruption and Dirty Tricks, Global Research, Malaysia.

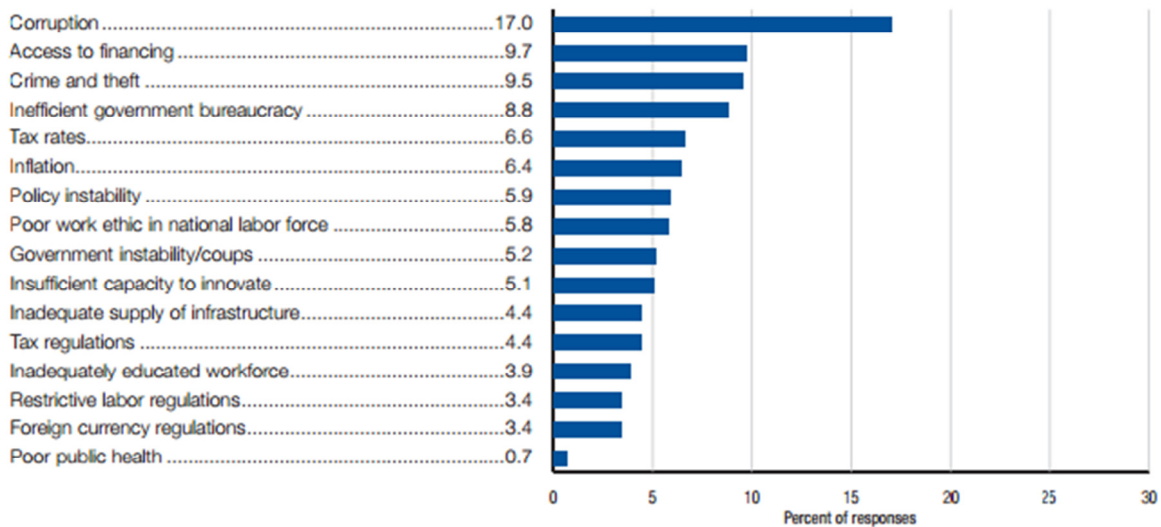
²¹ Malaysian Anti-Corruption Commission, “About” at <http://www.sprm.gov.my/about-macc.html?&lang=en#e1>, accessed on 14 July 2014

²² V. Negin, (2013) Effects of Corruption on Poverty and Economic Growth. *Published Doctoral Dissertation: Universiti Putra Malaysia*, accessed at <http://psasir.upm.edu.my/19485/> on 7 September 2014.

²³ National Key Result Areas Against Corruption, accessed at <http://www.nkracorruption.gov.my/> on 7 September 2014.

Country Study Malaysia: The Most Problematic Factors to Doing Business²⁴

The most problematic factors for doing business



24. Furthermore, in a study of about 170 countries, Transparency International has found that since 2003 Malaysia's ranking in the Corruption Perceptions Index ("CPI")²⁵ has dropped 14 places, a fall from 36th to 50th place in the overall ranking.

Malaysia's ranking in the CPI as at June 2015

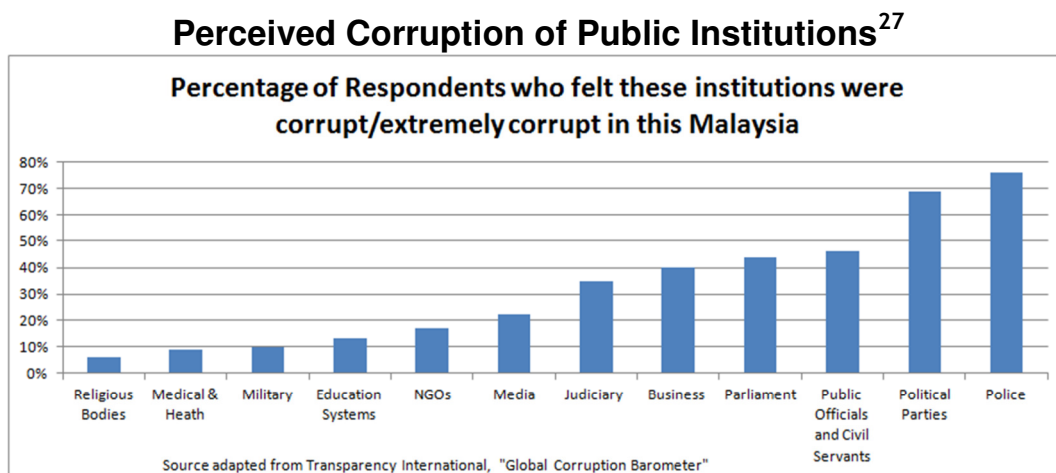
Year	Ranking	Score
2001	36	5.0/10
2002	33	4.9/10
2003	37	5.2/10
2004	39	5.0/10
2005	39	5.1/10
2006	44	5.0/10
2007	43	5.1/10
2008	47	5.1/10
2009	56	4.5/10
2010	56	4.4/10
2011	60	4.3/10
2012	54	49/100 ²⁶
2013	53	50/100
2014	50	52/100

²⁴ Source: Global Competitiveness Report 2014-2015, accessed at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf, on 28 January 2015.

²⁵ Transparency International "Corruption Perceptions Index 2014", accessed at <https://www.transparency.org/cpi2014/results>, on 29 June 2015.

²⁶ The CPI scores before 2012 are not comparable with those post-2012 because the methodology used has been updated. Taken from CPI 2013: Frequently Asked Questions; taken from Transparency International "Corruption Perceptions Index 2013", accessed at <http://cpi.transparency.org/cpi2013/results/>, on 5 August 2014.

25. An examination of the score reveals that Malaysia's position diminished even with the formation of the MACC on 1st January 2009. This means that the public perception is that there has been no improvement in the levels of integrity and transparency in the public sector.
26. The general public's perception on the level of corruption in public institutions show a great mistrust towards the police, political parties, and members of the civil service, reflecting unresolved issues with political financing and the opacity in public institutions



27. In this regard, Transparency International Malaysia has called:

"... for the Malaysian Government to take note of and implement the following recommendations immediately in order to eliminate corruption completely...

...

3. Malaysian Anti-Corruption Commission (MACC):

- *Grant more autonomy and independence without undue pressure or interference.*
- *Provide the necessary resources for enhanced productivity and professionalism.*
- *As a law enforcement agency, MACC should improve and increase enforcement, intelligence and evidence-gathering in order to boost public support and deter potential corruption.*

4. Amend Malaysian Anti-Corruption Commission (MACC) Act 2009 to close loopholes:

²⁷ Transparency International, "Global Corruption Barometer: Malaysia" accessed at <http://www.transparency.org/gcb2013/country/?country=malaysia> on 28 January 2015.

- *Section 23 – an administration member can award contracts, tenders and procurement to a relative or associate merely with a declaration of interest.*
- *Section 36 – no power to require a declaration of assets without initiating a corruption investigation.*
- *Include power to require explanation of “unusual wealth” that is not commensurate with income. (Already applicable to public officers)...”.²⁸*

28. Furthermore, it was noted in a report on Malaysia’s implementation of the United Nations Convention Against Corruption (UNCAC) by the Implementation Review Group in 2013 that the Malaysian Anti-Corruption Commission Act “did not address the replacement or dismissal of the Chief Commissioner of MACC, which could pose a risk to independence. This gap is reportedly being addressed through a Constitutional amendment”. However, as of July 2015, the findings have remained unchanged.
29. There is then the various reports of the Auditor General that have highlighted the extent of the increased cases of corruption, over-spending and wastage by public servants, government linked companies, and ministries.
30. Thus, it has been also observed that *“Like many of the global south countries, there remains a vexing problem of fighting corruption at the individual, business and political levels in Malaysia. In this respect, the Auditor General Report 2012 has implicitly highlighted the extent of the increased cases of corruption, over-spending and wastages by public servants, government linked companies and ministries Indeed, over the past few decades increasing importance has been given to the development of anti-corruption mechanisms, policies and strategies. While this is warranted, however, if insufficient emphasis is being paid to strengthen the enforcement and prosecution, with specific reference to high level corruption, then the pendulum might have swung a bit too far. There is widespread consensus that a combination of a disproportionate emphasis on the establishment of more anti-corruption commissions, integrity agency at the expense of a stronger focus on prosecution, has reduced the effectiveness of anti-corruption initiatives in Malaysia.*

First, a review into alleged cases of corruption among high ranking officials and ministers found in general, that successful prosecution of powerful individuals had only been effective in a minority of cases. As

²⁸ Press release by Transparency International on 3 December 2013 when launching the results of the 2013 Corruption Perception Index in Kuala Lumpur. <http://transparency.org.my/what-we-do/indexes/corruption-perceptions-index/tis-2013-corruption-perceptions-index-cpi-results/>

Performance Management & Delivery Unit (PEMANDU, 2009) puts it, “a lack of transparency and openness on the action taken against these high profiles has led many to believe that the government is protective of politicians as well as politically linked individuals”.

Turning to the (PEMANDU) findings, there is some evidence that that the largest proportion of offenders who were charged but not convicted are the politicians (91%) and this is followed by the local authorities (80%). The correlation to charge and convict seems to be significantly higher for the general public and the private sector (54%). This appears that the gap between the ability to charge and convict decreases with the local authorities and politicians. This suggests that to the extent that these correlations are causal effects, they do not seem to carry over to an increased number of political appointees being convicted; despite the fact that political parties are perceived as one of the most corrupted institutions as indicated in the 2013 Global Corruption Barometer (GCB) by Transparency International”.²⁹

31. While the MACC’s proposals give it autonomy on recruitment (and therefore enhances the possibility of efficient and effective discharge of the existing functions of the MACC) and further the proposals offer a measure of institutional independence, they do not holistically address the concerns alluded to above. In particular, the lack of independence from the executive is seemingly the proverbial elephant in the room that has been ignored.
32. The MACC currently comes under the jurisdiction of the Prime Ministers Department where it also receives funding for operations.³⁰ It is therefore perceived as an “...*unattractive model to fight corruption.*” and raises serious questions on the “*political will to curb high level corruption*”.³¹ Moreover, the capacity of parliamentary oversight on the executive branch, under our Westminster constitutional scheme, is compromised by the overarching powers in the hands of the executive arm of government that enables it to dominate and influence the legislature and judiciary.
33. Studies on anti-corruption commissions worldwide in this regard have highlighted that critical to the success of established anti-corruption commissions is their independence from executive interference, a clear reporting hierarchy comprising of executive officials, parliamentary authorities, and oversight committees as well as a

²⁹ Lynda Lim, above n 19, pp. 1-2.

³⁰ IDEAS, “Policy Ideas: Boosting MACC Independence for Greater Public Confidence” (July 2012) accessed at <http://ideas.org.my/wp-content/uploads/2012/07/anti-corruption-cs3.pdf> on 28 January 2015.

³¹ Lynda Lim, above n 19, p. 4.

strong commitment from government to enact reforms that ensure accountability and enhance transparency. Otherwise, such commissions remain ineffective and just serve as a means for the executive to delay politically difficult reforms without actually adopting effective measures and legislation to combat corruption.³²

34. In this regard, it has been observed that *“Politically, it is very difficult to face up to the fact that the Malaysia’s Parliamentary System provides very limited space for a stronger and more immediate monitoring of the executive branch. In this regard, the parliament, being an institution of accountability, has no direct powers to sanction corruption; rather, it recommends sanction that is the responsibility of the Attorney General (AG). The issue at stake here is an important one as the AG is sometimes perceived as deferring towards the Executive branch. The judicial process is often criticized for being unduly influenced by the government. In other words, the parliament is weak to hold the government accountable.”*³³
35. It is also to be noted that one of the resolutions in the Jakarta Statement is that Anti-Corruption Agencies should strictly adhere to the rule of law and be accountable to mechanisms established to prevent any abuse of power.³⁴ Currently, the oversight mechanism that is available under the MACC Act 2009 is in the five oversight committees.³⁵
36. As such it remains crucial that legal reforms to the MACC be made so as to ensure its complete independence from political interference and to create a more systematic and wide reaching approach to the eradication of corruption.

³² John R., H. (2006). Anti-Corruption Commissions: Panacea or Real medicine to Fight Corruption? *World Bank Institute Working Paper*, accessed at <http://wbi.worldbank.org/wbi/document/anti-corruption-commissions-panacea-or-real-medicine-fight-corruption> on 7 September 2014.

³³ Lynda Lim, above n 19, p. 3.

³⁴ Jakarta Statement, above n 11.

³⁵ See para [42], *infra*.

Legislation dealing with corruption (1950-2009)

37. The recognition of the need for a unified effort to combat corruption in Malaya arose with the introduction of the Prevention of Corruption Ordinance of 1950³⁶ (“**1950 Ordinance**”) The 1950 Ordinance sought to provide for more effectual prevention of corruption by replacing a range of piecemeal provisions in various legislation.
38. The 1950 Ordinance was repealed by the Prevention of Corruption Act of 1961³⁷ (“**1961 Act**”) that provided for investigation and prevention of corruption to be carried out by the Special Crimes Unit of the Criminal Investigation Department of the Royal Malaysian Police.³⁸ Powers of prosecution were placed under the purview of the Attorney-General’s Chambers.³⁹
39. As anti-corruption efforts were carried out by three different agencies, the Government decided to consolidate the task of investigation, prevention and prosecution by setting-up the Anti-Corruption Agency (“**ACA**”) which began operations formally on 1 October 1967 under the Ministry of Home Affairs.⁴⁰ This was done via an amendment to the 1961 Act⁴¹ which increased the power of the Public Prosecutor and placed legal responsibility on members of the legislative body and public officers to report corrupt practices, abuses of power and maladministration.⁴²
40. In 1973, the ACA changed its name to the National Bureau of Investigations (“**NBI**”) in accordance with the passing of the *Biro Siasatan Negara Act* of 1973 (“**1973 Act**”),⁴³ becoming a full department under the Ministry of Home Affairs.⁴⁴ Subsequently, in a move to specialise the anti-corruption body in terms of its role and functions, the NBI was re-named as the ACA following the repeal of the 1973⁴⁵ Act and by the enactment of the Anti-Corruption Agency Act

³⁶ Prevention of Crime Ordinance 1950 [Act 5 of 1950] (“**1950 Ordinance**”), with effect from 6 March 1950.

³⁷ Prevention of Corruption Act 1961 [Act 57] (“**1961 Act**”), with effect in West Malaysia from 16 November 1961.

³⁸ To be authorised by either the Magistrate under Section 21 or the Public Prosecutor under Part V of the 1961 Act.

³⁹ Malaysian Anti-Corruption Commission, “About” accessed at <http://www.sprm.gov.my/about-macc.html?&lang=en#e1>, on 14 July 2014.

⁴⁰ Malaysian Anti-Corruption Commission, “About” accessed at <http://www.sprm.gov.my/about-macc.html?&lang=en#e1>, on 14 July 2014.

⁴¹ Prevention of Corruption (Amendment) Act 1967 [Act 29/1967] (“**1967 Amendment**”), with effect from 3 August 1967.

⁴² Anis Yusai Yusoff, *Combating Corruption: Understanding Anti-Corruption Initiatives in Malaysia*

⁴³ *Biro Siasatan Negara Act* 1973 [Act 123] (“**1973 Act**”), with effect from 1 September 1973.

⁴⁴ Malaysian Anti-Corruption Commission, “About” accessed at <http://www.sprm.gov.my/about-macc.html?&lang=en#e1>, on 14 July 2014.

⁴⁵ Repealed by Section 11 of the 1982 Act.

of 1982 (“**1982 Act**”),⁴⁶ making it the single special entity combating corruption in Malaysia. The 1982 Act provided greater powers to investigate corruption cases including those that concerned national interest. The ACA was entrusted with the responsibility of preventing and eradicating all forms of corruption, abuse of power, and maladministration.

41. The Government then introduced the Anti-Corruption Act of 1997 (“**1997 Act**”)⁴⁷ which repealed the 1961 Act and the 1982 Act,⁴⁸ giving the ACA power to investigate, interrogate, and arrest offenders for both private and public sector corruption.⁴⁹ The ACA, under Section 7 of the 1997 Act, was also given extensive powers to access witnesses, freeze assets, seize passports, monitor income and assets, and propose administrative and legal reforms.
42. The MACC is a creature of the MACC Act of 2009⁵⁰ which repealed the 1997 Act. The MACC was established as an independent, transparent and professional body to effectively and efficiently manage the nation’s anti-corruption efforts as well as to improve the perception of independence and transparency of the functions of the Commission.⁵¹ The MACC’s activities are monitored by five oversight external bodies namely, the Parliamentary Special Committee on Corruption, the Complaints Committee, the Consultation and Corruption Prevention Panel, the Anti-Corruption Advisory Board, and the Operations Review Panel. Members of these bodies represent the general public and comprise of senior ex-government officials, politicians (government and opposition), professionals from the business and corporate sector, academics, lawyers and well respected individuals.⁵²

⁴⁶ Anti-Corruption Agency Act 1982 [Act 271] (“**1982 Act**”), with effect from 14 May 1982.

⁴⁷ Anti-Corruption Act 1997 [Act 575] (“**1997 Act**”), with effect from 8 January 1998 via PU(B) 12/98.

⁴⁸ Repealed by Section 61 of the 1997 Act.

⁴⁹ Anis Yusal Yusoff, *Combating Corruption: Understanding Anti-Corruption Initiatives in Malaysia (IDEAS, 2014)*

⁵⁰ Malaysian Anti-Corruption Commission Act 2009 [Act 694] (“**MACC Act 2009**”), with effect from 1 January 2009.

⁵¹ MACC Annual Report (2009); Mohamad Radzwill bin Abdullah, *A Study on the Jurisdiction and Efficiency of the Malaysian Anti-Corruption Commission (MACC) in Combating Corruption* (2012) Abstract.

⁵² Official Portal of the MACC, “Organisation”, accessed at <http://www.sprm.gov.my/about-macc.html?&lang=en#e1>, on 13 July 2014.



Part I: The Independent Anti-Corruption Commission (“IACC”) as a Constitutional Commission

43. It was found upon consultation that the request from the MACC that a service commission relating to the MACC be established was insufficient to holistically address the various hurdles in the battle against corruption here in Malaysia. It was instead proposed that an independent, stand-alone constitutional commission be established, one with a unique structure and substance befitting its position as an institution with sufficient powers of oversight and accountability.
44. By way of analogy, the legal framework of the Election Commission, as established under Part VIII of the Federal Constitution, is an appropriate example of the structure we have in mind. As noted earlier, the Federal Constitution currently provides for an Election Commission, as a stand-alone, constitutionally mandated commission with its constitution, functions, powers, and objects expressly provided for – the closest constitutional body, in form and function, as will be proposed here.
45. This proposal for a constitutionally founded IACC is consonant with Article 36 of the UNCAC which reads:
- “Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.”⁵³*
46. The following are also some examples in other jurisdictions where the anti-corruption agency has been given a constitutional standing; the Independent Commission Against Corruption (Fiji),⁵⁴ Ethics and Anti-Corruption Commission (Kenya),⁵⁵ Commission on Human Rights and Public Administration (Integrity Commission)(Swaziland),⁵⁶ Anti-Corruption Commission (Zambia),⁵⁷ Anti-Corruption Commission (Maldives),⁵⁸ and Commission Against Corruption (Hong Kong).⁵⁹

⁵³ UNCAC, above n 17, Article 36.

⁵⁴ Constitution of Fiji, Article 115 (“**Constitution (Fiji)**”).

⁵⁵ Constitution of Kenya, Articles 79, 248-254 (“**Constitution (Kenya)**”).

⁵⁶ Constitution of Swaziland, Sections 163-171 and 243 (“**Constitution (Swaziland)**”).

⁵⁷ Constitution of Zambia, Articles 277-281 (“**Constitution (Zambia)**”).

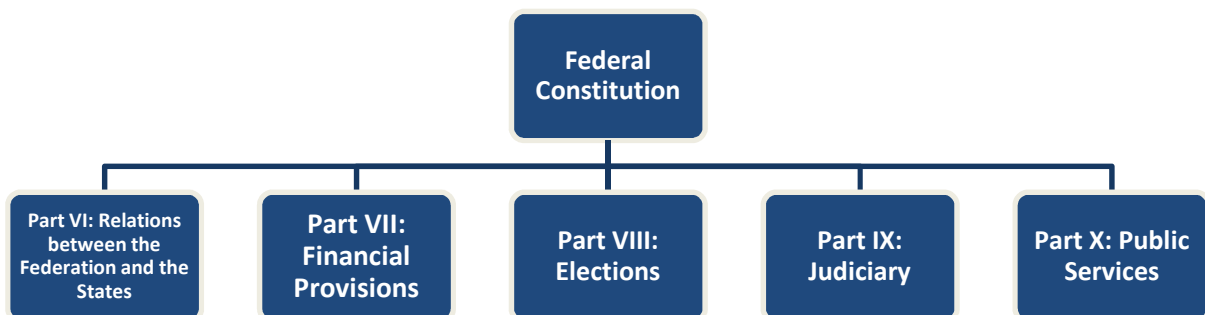
⁵⁸ Constitution of Maldives, Articles 199-208 (“**Constitution (Maldives)**”).

47. An example of a provision establishing an anti-corruption agency as a constitutional body is found in Article 199 of the Maldives Constitution that reads as follows:

“(a) There shall be an Anti-Corruption Commission of the Maldives

(b) The Anti-Corruption Commission is an independent and impartial institution. It shall perform its duties and responsibilities in accordance with the Constitution and any laws enacted by the People’s Majlis. The Anti-Corruption Commission shall work to prevent and combat corruption within all activities of the State without fear.”

Parts VI to X of the Federal Constitution as it stands



48. Part VIII of the Federal Constitution on Elections is extracted in its entirety in **Annex 1**. Part VIII covers the Malaysian electoral system from first establishing the Election Commission, to setting out entirely the constitution, scope, and jurisdiction of the commission and electoral process.⁶⁰

49. The Election Commission is responsible for conducting elections to the Dewan Rakyat and the Legislative Assemblies of the States by preparing and revising electoral rolls.⁶¹ The various circumstances which trigger a review are set out in Article 113, read together with the Thirteenth Schedule of the Federal Constitution.

50. In considering the establishment of such a constitutional commission, it is important to be cognisant of and pay heed to the intentions of the framers of our Federal Constitution in providing for the various constitutional bodies within our constitutional scheme.

⁵⁹ The Basic Law of the Hong Kong Special Administrative Region, Article 57 (“**Basic Law (Hong Kong)**”).

⁶⁰ Federal Constitution of Malaysia, above n 4, Articles 113 – 120.

⁶¹ Ibid, Article 113(1).

51. Prime examples of such constitutional bodies are the various service commissions in Part X of the Federal Constitution. The framers of our Constitution envisaged that the constitutional service commissions in Part X should be independent service commissions. They are there to ensure that the civil service is apolitical and professional.⁶²
52. In this regard, the rationale for the first three service commissions, namely, Public Services Commission, Judicial and Legal Services Commission and Police Force Commission may be culled from our constitutional document.⁶³ The Constitutional Conference⁶⁴ had recommended that these three independent commissions with executive authority be set up.
53. Our Constitutional Commission⁶⁵ accepted the recommendations and noted, *“Accordingly, we have made provision in Part X of the draft Constitution for the permanent existence of these three Commissions. If the Commissions are to perform their functions in the manner contemplated by the Report, we think that it is essential that they should be completely free from Government influence and direction of any kind. The members should either hold office ex-officio, or be appointed on a full time basis for not less than five years, and should not be subject to removal from office by the Government. We recommend (Art. 133) that members who do not hold office ex-officio should only be removable by Parliament, in accordance with the same procedure as is applicable to a Judge of the Supreme Court.”*⁶⁶

The Reid Commission then summarized its recommendations as follows:

*“The Public Services Commission, the Judicial and Legal Service Commission and the Police Service Commission should be independent of Government control and be responsible for appointments, promotions and discipline in these services subject to the Government having the right to require reconsideration of any recommendations for appointment to the higher positions in the Public Services”*⁶⁷

54. With regard to the establishment and control of the Public Services Commission, the following observations were made at the Constitutional Conference:

⁶² Abdul Aziz Bari, *Malaysian Constitution –A Critical Introduction* (2003), p. 115.

⁶³ Report of the Federation of Malaya Constitutional Commission 1957. (“**The Reid Commission Report**”)

⁶⁴ Held in London in January and February 1956.

⁶⁵ The Reid Commission.

⁶⁶ The Reid Commission Report, above n 63, p. 66.

⁶⁷ *Ibid*, para [67].

- “40. *The first essential for ensuring an efficient administration is that the political impartiality of the public service should be recognized and safeguarded. Experience has shown that this is best secured by recognizing the service as a corporate body owing its allegiance to the Head of State and so retaining its continuous existence irrespective of changes in the political complexion of the government of the day. The public service is necessarily and rightly subject to ministerial direction and control in the determination and execution of government policy, but in order to do their job effectively public servants must feel free to tender advice to Ministers, without fear or favour, according to their conscience and to their view of the merits of a case.*
41. *One of the most essential ingredients of a contented and efficient service is that promotions policy should be regulated in accordance with publicly recognized professional principles. The service must feel confident that promotions will be determined impartially on the basis of official qualifications, experience and merit.*
42. *Similarly, a reasonable security of tenure and an absolute freedom from the arbitrary application of disciplinary provisions are essential foundations of a public service.*
43. *The most generally accepted method of ensuring the observance of the foregoing principles is by the establishment of an independent Public Service Commission.”⁶⁸*
55. It is also noteworthy that we once had a Railway Service Commission⁶⁹ and it is interesting to note the following observations made in the White Paper in response to the Reid Commission’s recommendations:

“In the first place the service is of such size as to require special arrangements. Secondly, it is desirable that the Commission responsible for the appointment, promotion and discipline of members of such a highly technical service should have among its members persons with experience in railway service or railway administration. It would be difficult to provide for this special experience in the membership of the Public Services Commission.”⁷⁰

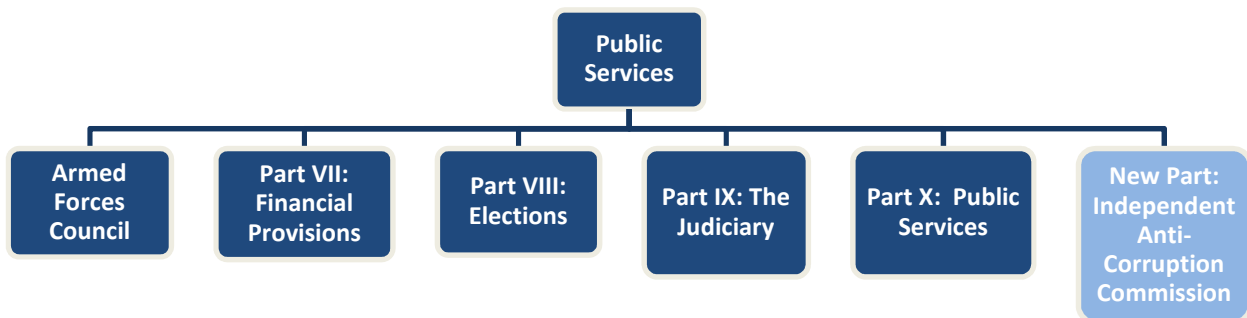
⁶⁸ Ibid, p. 66.

⁶⁹ Abolished on 24 June 1994.

⁷⁰ White Paper.

56. It is clear from the above that the Federal Constitution recognises the importance of an independent service commission that should be responsible for civil servants. Nevertheless, the independence of the service commissions that presently exist in the Constitution is somewhat impaired by the presence of members of the executive, civil servants or retired civil servants. For example, the Public Services Commission is currently headed by the former Secretary General of the Home Ministry⁷¹ and his deputy is the former Secretary General of the Human Resources Ministry.⁷²
57. Extrapolating the rationale of the framers of our Federal Constitution set out above, it is evident that establishing a constitutional commission lends a weight that is not available to the MACC operating under the MACC Act 2009. It is therefore proposed that the IACC operates as a constitutional oversight and supervisory body to strengthen the fight against corruption in Malaysian. This will be addressed in greater detail below.⁷³

The proposed tier of the IACC as part of the Federal Constitution.



58. The independence and inviolability of the intended IACC can only be guaranteed by giving it a constitutional foundation. This can only be achieved by giving it a head and a composition of commissioners that are divorced from influence, whether over or otherwise, by the other branches of government, particularly the executive. As the IACC is intended to oversee the objectives, powers, and functions of its investigative arm, the Anti Corruption Agency (ACA), formerly MACC, this would ensure that the ACA discharges its duties without fear, favour or prejudice. It should have objectives, powers, and functions that are benchmarked against international standards and practices.

⁷¹ Tan Sri Mahmood bin Adam.

⁷² Dato' Segarajah Ratnalingam.

⁷³ See section on “Current safeguard mechanisms within MACC and oversight mechanisms in Other Jurisdictions” at para [64] – [69].

59. Thus, it is abundantly clear that structural reform is necessary to ensure effective enforcement by an anti-corruption agency. A constitutional standing for the IACC will go a long way towards such structural reform. In this connection, it is again noteworthy that the Jakarta Statement recommends that the “*ACA shall, in accordance with the basic legal principles of their countries, be established by proper and stable legal framework, such as the Constitution or a special law to ensure continuity of the ACA ...*”⁷⁴
60. **It is therefore proposed that the Federal Constitution be amended to create and provide for a new constitutional commission, the IACC, with distinct objectives, powers and functions and with a composition that includes a group of independent Commissioners, one of whom shall be appointed as the Chair of the IACC.**

⁷⁴ Jakarta Statement, above n 11, “Permanence”.

The objectives

61. The objectives of the new IACC must be guided by the standards enshrined in the UNCAC.⁷⁵ Thus, the constitutional amendment should have a provision similar to Article 115(6) and (7) of the Constitution of Fiji that reads:

“(6) In the performance of its functions or the exercise of its authority and powers, the Commission shall be independent and shall not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law.

(7) In exercising its powers and performing its functions and duties, the Commission shall be guided by the standards established under the United Nations Convention Against Corruption.”⁷⁶

62. The principal objects of the MACC Act 2009 are set out in Section 2 as follows:

“The principal objects of this Act are –

- (a) to promote the integrity and accountability of public and private sector administration by constituting an independent and accountable anti-corruption body; and*
- (b) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public and private sector administration and on the community.”*

63. **It is proposed that both the provisions provided in the Fiji Constitution and Section 2 of the MACC Act 2009 be reproduced in the proposed constitutional amendment as the principal objectives of the new IACC in the Federal Constitution.**

⁷⁵ UNCAC, above n 17.

⁷⁶ Constitution (Fiji), above n 54, Article 115(6) and Article 115(7); see also Constitution (Swaziland), above n 56, Article 166 which states: *“The Commission [Commission on Human Rights and Public Administration] shall be independent in the performance of its functions and shall not be subject to the direction or control of any person of authority.”*

Current safeguard mechanisms within MACC and oversight mechanisms in Other Jurisdictions

64. Currently, the MACC's activities are monitored by five oversight external bodies. It is noteworthy that these mechanisms have not been effective in increasing confidence, which means that there has been no improvement in the levels of integrity and transparency in the public sector.⁷⁷
65. With the advent of the newly created IACC, the objectives and functions of these committees may be absorbed and discharged by the IACC barring the Parliamentary Special Committee on Corruption which will be retained and renamed as **the Parliamentary Select Committee on Corruption**. The Parliamentary Select Committee on Corruption will be tasked with the nomination of commissioners to the IACC as well as to monitor the performance of the IACC commissioners. This Select Committee shall continue to comprise of members of the Dewan Negara and Dewan Rakyat from both Government and the Opposition. The other panels can be absorbed into the IACC as working or standing committees.
66. The IACC will have an overall oversight function over its investigative agency, the ACA. The IACC may establish working committees as it sees fit.
67. Further, the IACC, as a measure of external oversight, will have to report to Parliament. The Parliamentary Select Committee on Corruption, which is the replacement for the Parliamentary Special Committee on Corruption, shall be tasked with monitoring the performance of the commissioners in the IACC. While the Election Commission need only submit a report to the Prime Minister upon completion of a review, it should be noted that, as regards the existing service commissions,⁷⁸ Article 146 of the Federal Constitution sets the appropriate standard by providing:
- “(1) Each of the Commissions to which this Part applies shall make an annual report on its activities to the Yang di-Pertuan Agong and copies of those reports shall be laid before both Houses of Parliament.*
- (2) The Public Services Commission shall send a copy of every report made under this Article to the Ruler or Yang di-Pertua*

⁷⁷ See paras [23]-[26], supra.

⁷⁸ The Federal Constitution provides for the following public service commissions: the Armed Forces Council, Judicial and Legal Service Commission, Public Services Commission, Police Force Commission, and Education Service Commission.

Negeri of each State to members of whose public service their jurisdiction extends, and to the Ruler or Yang di-Pertua Negeri shall lay it before the Legislative Assembly.”

68. Moreover, there should be oversight mechanisms akin to those that exist in other jurisdictions. These are as follows:

- (a) In Indonesia, the anti-corruption agency is known as Komisi Pemberantasan Korupsi (“**KPK**”) or the Corruption Eradication Commission. It is required to report annually to the President, Parliament and the state auditor and to “convey reports transparently and regularly” to each of them.⁷⁹ KPK’s budget is also controlled by Parliament and its commissioners chosen from a pool of 10 nominated by the President based on the work of a selection committee under the justice ministry “composed of government and private individuals.”⁸⁰ If Parliament takes the view that none of the President’s nominees are sufficiently “fit and proper,” it could call for new nominations. Once confirmed, commissioners serve four-year terms without any possibility of impeachment or removal unless subject to a criminal charge.”⁸¹
- (b) In Hong Kong, staff members of the Independent Commission Against Corruption (“**ICAC**”) are independent of the Hong Kong Government. Officers join the ICAC through a special examination and cannot enter the Hong Kong Government after they leave the ICAC. Further employment contracts for ICAC staff members are independent of civil service rules and made on the basis of mutual consent. The ICAC has three oversight committees namely, the Operations Review Committee, the Corruption Prevention Advisory Committee, and the Citizen Advisory Committee on Community Relations, which provide oversight of the ICAC. The ICAC’s reporting hierarchy includes the Special Regional Administrator, the ICAC Director, and three oversight committees. This system requires that the ICAC submits regular reports that follow clear procedural guidelines for investigations, seizures of property, and the duration of inquiries. Members of the oversight committees are nominated in recognition of their

⁷⁹ Laws of the Republic of Indonesia, Law No. 30 Year 2002, on the Commission for the Eradication of Criminal Acts of Corruption, Article 15(c) and Article 20. (“**Laws of the Republic of Indonesia, Law No. 30 Year 2002**”) Article 20 reads: (1) The KPK is held responsible to the public to perform its duties. The KPK is also obliged to convey reports transparently and regularly to the President, the Parliament, and the State Auditor.(2) Responsibility to the public as outlined in the previous sub-article (1) is to be expressed in these manners: (a) an obligation to audit KPK’s own synergy and financial responsibility, in accordance to the KPK’s work program; (b) provide annual reports; (c) open access to information.”

⁸⁰ Ibid, Article 30(3).

⁸¹ “Gabriel Kuris, “*Inviting a Tiger into Your Home*”: *Indonesia creates an Anti-Corruption Commission with Teeth, 2002-2007*”, *Innovations for Successful Societies* (2011) p.6.

distinguished reputation in community and meet at regular intervals to review the ICAC's activities and issue a report to the Hong Kong Special Administrator. These reports are published and disseminated on the Internet. Further, each oversight committee responds to the competencies of the three ICAC departments. The Operations Review Committee ("**ORC**") examines reports on current investigations, cases over 12 months old, cases involving individuals on bail for more than 6 months, and searches authorized under Section 17 of the Prevention of Bribery Ordinance. The other two committees examine and approve outreach strategies to increase public awareness of the costs of corruption and what may be done to combat it. The Corruption Prevention Advisory Committee receives reports on strategies to demonstrate the costs of corruption to private sector actors.⁸²

- (c) In Australia, the anti-corruption agency in New South Wales known as the NSW ICAC must submit annual reports and prepare internal and external audits on its operations. It is recognized that effective oversight is crucial if the commission is to be accountable for its actions. The NSW ICAC operates under the supervision of a Parliamentary Joint Committee and the Inspector of the Independent Commission Against Corruption. Responsibilities of the Parliamentary Joint Committee include supervision and review of NSW ICAC activities.⁸³ Members of the Parliamentary Joint Committee represent the parties in Parliament and are selected from either House of Parliament. As part of its responsibilities, the Parliamentary Joint Committee submits regular reports on specific issues or sometimes in response to questions from either House. The Inspector on the other hand oversees the NSW ICAC's use of investigative powers, investigates complaints against the employees of the NSW ICAC and monitors compliance with the law. The Inspector also monitors delays in investigations and any unreasonable invasions of privacy. Further, the Inspector has powers to investigate any aspect of the NSW ICAC's operations or any conduct of its officers.⁸⁴ Other methods to enforce accountability include term limits for the Commissioner, budgetary accountability to the Treasury, privacy laws, and freedom of information laws. In addition, the Ombudsman inspects telephone intercepts and records of investigations to prevent any abuses of power. The

⁸² John E. Heilbrunn, World Bank Institute, "Anti-Corruption Commissions 'Panacea or Real Medicine to Fight Corruption?'" (2004) pp.4-5.

⁸³ More information available at the New South Wales Independent Commission Against Corruption ("**NSW ICAC**") Official website, accessed at www.icac.nsw.gov.au on 27 January 2015.

⁸⁴ NSW ICAC, "Accountability Mechanisms" accessed at <http://www.icac.nsw.gov.au/about-the-icac/independence-accountability/accountability> on 27 January 2015.

effect is an agency operating in “the context of a vibrant Westminster-style democratic system” that ensures a high degree of integrity for New South Wales.⁸⁵ Although the NSW ICAC has had a mixed record of successful prosecutions, its major contribution has been as a prevention agency that changed the norms of how business is conducted in New South Wales.⁸⁶

69. **With regard to safeguards and oversight mechanisms, it is proposed that there be introduced provisions to provide for appropriate measures, in particular the tabling and debate of the IACC’s report in Parliament on an annual basis to counter instances of perceived selective investigations and ensure neutrality in the process of eradicating corruption.**

The composition of the IACC and appointment of the Commissioners of the IACC

70. **It is proposed that the composition and appointment process of the IACC be provided expressly in the proposed constitutional amendment.**
71. An initial examination shows that the constitution of the Election Commission is provided for in Article 114 of the Federal Constitution. It states that the Election Commission shall consist of a chairman, deputy chairman and five other members, duly appointed by the Yang di-Pertuan Agong upon consultation with the Conference of Rulers.⁸⁷
72. Likewise, each service commission has a Chairman.⁸⁸ The Armed Forces Council and Police Force Commission are helmed by a Minister.⁸⁹ The Chairman of the Judicial and Legal Service Commission is the Chairman of the Public Services Commission.⁹⁰ As for the Public Services Commission and Education Service Commission, the Chairman is appointed by “the *Yang Di-Pertuan Agong in his discretion but after considering the advice of the Prime Minister and after consultation with the Conference of Rulers*”.⁹¹
73. The appointment to, and the composition of, each service commission is also provided for in the Federal Constitution.⁹² Further, Article 142(2) of the Federal Constitution stipulates that a person may not be

⁸⁵ Larmour and Grabosky, *Corruption in Australia* (2001) p. 187.

⁸⁶ John E. Heilbrunn, above n 82, pp. 7-8.

⁸⁷ Federal Constitution of Malaysia, above n 4, Article 114(1).

⁸⁸ *Ibid*, Articles 137(3)(a), 138(2)(a), 139(4), 140(3)(a) and 141A(2).

⁸⁹ *Ibid*, Articles 137(3)(a) and 140(3)(a).

⁹⁰ *Ibid*, Article 138(2)(a).

⁹¹ *Ibid*, Articles 139(4) and 141A(2).

⁹² *Ibid*, Articles 137(3), 138(2), 139(4), 140(3) and 141A(2).

appointed to a service commission, and is to be removed from the service commission by the order of the Yang Di-Pertuan Agong, if he becomes:

- “(a) a member of any of the public services;*
- (b) an officer or employee of any local authority, or of any body, whether corporate or otherwise, or of any body or authority established by law for public purposes;*
- (c) a member of a trade union or of a body or association affiliated to a trade union.”*

74. As to conditions of service of all members of the current Election Commission shall cease to hold office on attaining the age of 66 years or on becoming disqualified. It is noteworthy that members of the Election Commission cannot be removed from office except as in the manner of a judge of the Federal Court.⁹³ Instead, a member of the Election Commission will be disqualified if such member is an undischarged bankrupt; or engages in any paid office or employment outside the duties of his office; or is a member of either House of Parliament or of the Legislative Assembly of a State.⁹⁴

75. Similarly, in relation to service commissions, Article 143 states as follows:

“(1) Save as provide under Clause (2) of Article 142, a member of a Commission to which this Part applies, other than an ex officio member –

- (a) shall be appointed for a term of five years or, if the Yang di-Pertuan Agong, acting in his discretion but after considering the Advice of the Prime Minister, in a particular case so determines, for such shorter term as he may so determine;*
- (b) may, unless disqualified, be reappointed from time to time; and*
- (c) may at any time resign his office but shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court.*

(2) Parliament shall by law provide for the remuneration of any member of the said Commission other than a member for whose remuneration as holder of any other office provision is made by

⁹³ Ibid, Article 114(3).

⁹⁴ Ibid, Article 114(4).

federal law; and the remuneration so provided shall be charged on the Consolidated Fund.

(3) The remuneration and other terms of office of a member of a Commission to which this Part applies shall be not altered to his disadvantage after his appointment.”

76. Attention is drawn to Article 143(1)(c) which, akin to the provision of the Election Commission, expressly provides that persons appointed to these service commissions cannot be removed from office except as in the manner of a judge of the Federal Court.
77. It is submitted that the IACC be composed in a manner significantly different from any existing constitutional commission. It should consist of a cross-section of society including representatives with at least 40% from civil society who have the relevant experience to support the MACC’s fight against corruption. The names of all commissioners should be proposed by the Parliamentary Select Committee on Corruption following a set of criteria for nomination, which will then be proposed and voted for by both the Dewan Rakyat and the Dewan Negara (Parliament) by way of simple majority. The names of the approved candidates will then be submitted by the Prime Minister to the Yang di-Pertuan Agong for official appointment.
78. As regard to tenure, the term of office of each commissioner should not exceed three (3) years with the commissioners being eligible for reappointment for a second term of three (3) years. Each commissioner may only serve for a maximum of two terms. This is in the like manner of commissioners appointed to the Human Rights Commission (SUHAKAM). Article 5 Section 4 of the Human Rights Commission Act 1999 specifies “A member of the Commission shall hold office for a period of three years and is eligible for reappointment once for another period of three years.”⁹⁵
79. At the inception of the IACC, there will be a need to stagger the appointment of the commissioners so as to ensure that there is continuity and to obviate the complete replacement of all commissioners at the end of their tenure. In this connection, it is proposed that the first set of commissioners (for example, eight persons) is to be appointed in the first year of the establishment of the IACC. The initial eight appointees would constitute the minimum number of commissioners required for the IACC. Next, the second group of commissioners (for example, seven persons) is to be appointed in the second year of the establishment of the IACC. The second appointment would bring the composition to the maximum

⁹⁵ Human Rights Commission Act 1999, Article 5, Section 4.

number of members of the IACC. **In this way, all members of the IACC will not retire or be replaced at the same time.** A broad parallel envisaged here is that of the retirement of the members of Congress of the United States of America.⁹⁶

80. It is further submitted that the IACC commissioners will elect a Chairperson among them who will serve his or her term in office for a period of six (6) years and is eligible for reappointment for a second term for a period of six (6) years with a maximum of two terms. Where the Chairperson of the commission is for any reason unable to perform the functions, or during any period of vacancy in the office of the Chairperson, the functions of the Chairperson shall be performed by one commissioner elected by the other commissioners. Alternatively, there can be provision for the election of a Vice Chairperson to perform the functions of the Chairperson in the circumstances set out above.
81. The extended tenure of the Chairperson (as opposed to that of individual commissioners) is again in recognition of the need for continuity and to enable the officeholder to discharge his or her functions uninterrupted by any change in government.
82. It is noteworthy that the composition of the IACC, which is to be based on parliamentary consensus and the security of tenure that is to be enjoyed by the IACC commissioners as well as the IACC Chairperson would ensure a higher level of independence and transparency, and further boost public confidence in the MACC. This is critical to overcome the current difficulty faced by the MACC when investigating members of the executive and those in the government sector.
83. With regard to commissioners comprising of representatives from civil society, it is noteworthy that Section 13(3) of the MACC Act 2009 currently provides that members of the Anti-Corruption Advisory Board appointed by the Yang di-Pertuan Agong “*shall be persons of integrity who have rendered distinguished public service or have achieved distinction in the professions.*” This provision enables the appointment of members of civil society to a current organ of the MACC. There should therefore be no impediment to the participation of civil society members in the newly created constitutional body.
84. For example, in the course of appointing the members of the Human Rights Commission of Malaysia, it is provided for in Section 5(2) of the Human Rights Commission Act 1999⁹⁷ that a “*committee*” is to be consulted. This committee, as provided for in Section 11A(1)(c), shall

⁹⁶ Elections in the United States in which Senators are elected on a staggered basis over six year terms, accessed at http://photos.state.gov/libraries/amgov/30145/publications-english/USA_Elections_InBrief.pdf, on 29 June 2015.

⁹⁷ Human Rights Commission Act 1999 [Act 597].

consist *inter alia* of “three other members, from amongst eminent persons, to be appointed by the Prime Minister.” Thus, the importance of civil society participation is therefore already recognized and should be replicated for the present purposes.

85. There is precedent and practice for the participation of civil society in anti-corruption agencies, as well as parliamentary involvement in the appointment process:

- (a) In Indonesia, members of the selection committee for the commissioners of Indonesia’s KPK include representatives from academia, community leaders, religious leaders, non-governmental organisations (“**NGOs**”), and the government.⁹⁸ This is a requirement⁹⁹ which provides for membership of the committee to be composed of government and private individuals. In terms of recruitment of its commissioners the KPK has a robust and transparent process in which a special committee, the “Panitia Seleksi Calon Pimpinan KPK”, made up of prominent individuals from the public and the private sector, who review applications and consult the public for feedback on candidates proposed for the position of commissioner. The special committee then recommends 10 names to Parliament which in turn selects 5 candidates as commissioners¹⁰⁰.

⁹⁸ Komisi Pemberantasan Korupsi was established in 2003 and the first-term commissioners spent more than a year building its capacity before launching a series of investigations of dozens of high-level officials and politicians, with a 100% conviction rate. The second-term commissioners continued with high-profile arrests, including dozens of members of Parliament, high-level officials and a close relative of the president. (<http://www.princeton.edu/successfulsocieties/countries/asia-pacific/country.xml?id=19>) The main functions of KPK are investigation and prosecution of corruption, review of the Wealth Reports of State Officials, conduct of anti-corruption education and socialization programs and guidance and suggestions to improve the administrative management system.

⁹⁹ (<http://www.aca-forum.org/board.do?command=searchDetail&menuId=0803>)
Indonesia: Laws of the Republic of Indonesia, Law No. 30 Year 2002, above n 79, Article 30(3). The structural independence of KPK is bolstered by public sector participation in the selection of the commissioners. Article 30 provides for the selection committee to invite the public for feedback after it publishes the list of candidates, and before the list is presented to the president and Parliament. Once the commissioners are confirmed, they serve four-year-terms without any possibility of impeachment or removal unless subject to a criminal charge. The current composition of KPK includes a former prosecutor, former lawyers, academics and a former chairman of an NGO coalition.

¹⁰⁰ *Ibid*, Article 29 – Article 31

The process of parliamentary approval in the election of commissioners is set out in Law No. 30 of 2002 of Indonesia:

“Article 30

- (1) *KPK commissioners as outlined in Article 21 (1-a) shall be selected by the parliament from a pool of candidates offered by the president.*
 - (2) In order to ensure the smoothness of the selection and appointment processes of the KPK Commissioners, the government appoints a selection committee to implement the rules of this law.
 - (3) The membership of this committee outlined in the previous sub-article (2) shall be composed of government and private individuals.
 - (4) The selection committee shall invite the public for feedback concerning the candidates outlined in (4)
- (b) In Brazil, the Council on Public Transparency and Combating Corruption, which aids the Office of the Comptroller General (“**CGU**”) ¹⁰¹ in formulating anti-corruption policies and laws is composed equally of representatives from both State bodies and civil society. These are ten public entities including the CGU, Federal Prosecutor’s Office and the Brazilian Court of Audit and ten civil society organisations, including the Brazilian BAR Association, the Brazilian Press Association, and the National Conference of Bishops of Brazil, the NGO TransparênciaBrasil and the Ethos Institute. ¹⁰²
- (c) In the Republic of Korea, the 15 members of the Anti-Corruption and Civil Rights Commission includes those from civil society such as academics, certified professions (architects, accountants, engineers), and other *“persons of high social reputation who have*

¹⁰¹ The Office of the Comptroller General works as the public body responsible for overseeing the implementation of the International Conventions against Corruption ratified by Brazil (OAS, OECD and UNCAC), as well as the central body for Brazilian internal control, disciplinary, transparency and ombudsman systems.

¹⁰² The Council for Public Transparency and the Fight against Corruption (“**the Council**”) serves as an advisory entity with no executive or enforcement power. Instead, it debates and recommends measures to strengthen activities aimed at public financial resources, promoting the transparency of the public administration. Several initiatives formalized as decrees as well as new laws have been developed by the CGU, often aided by the Council. For example, in 2006, the government submitted to Congress a new bill drafted by the GCU and the Council designed to regulate conflicts of interest and post-public employment at the Federal Executive level. <http://www.cmi.no/publications/file/2935-collaboration-on-anti-corruption-norway-and-brazil.pdf>) Anti-corruption strategies are boosted by a strong legal framework in Brazil but implementation and enforcement deficits of the legal and institutional framework are cited as the main challenges facing the fight against corruption in Brazil.

knowledge and experience on administration and who are recommended” by NGOs.¹⁰³ Commissioners are appointed by several parties. Chair and vice-chairperson is appointed by the President upon the recommendation of the Prime Minister. The standing commissioner is appointed by the president upon the Chairman’s recommendation. Of non-standing commissioners, three are appointed by the National Assembly (Korea’s legislative assembly) with another three appointed upon the recommendation of the Chief Justice of the Supreme Court.¹⁰⁴

86. The example of an anti-corruption commission which has civil society participation is seen in the Republic of Korea’s Act on Anti-Corruption and the Foundation of the Anti-Corruption and Civil Rights Commission which sets out:

“Article 13: Composition of the Commission

- (1) The Commission shall be composed of 15 members (including three vice chairpersons and three standing commissioners), including one Chairperson. In this case, the three vice chairpersons assist the Chairperson by taking charge of complaints and grievances, anti-corruption, and the Prime Minister Administrative Appeals Commission. However, the Administrative Appeals Act applies to the composition of the Prime Minister Administrative Appeals Commission.*

¹⁰³ The Anti-Corruption and Civil Rights Commission (“**ACRC**”) was established on 29 February 2008. Its major functions are establishing and coordinating anti-corruption policies, and evaluating the levels of integrity and anti-corruption practices of public-sector organizations. It lacks investigative powers but collects corruption reports and requests investigations by the Public Prosecutors’ Office or the Board Audit and Inspection. “The ACRC has created measures to track the acceptance of its recommendation and the level of corruption in the public sector and society, specifically by conducting annual Corruption Perception and Integrity Assessment surveys, and Anti-corruption Initiative Assessment measures. Given that the ACRC does not have enforcement power, in terms of the implementation of its recommendations, the publication of the results of these instruments pressure public organizations to accept and carry out the corrective measures it suggests.... In addition, the ACRC has the ability to report noncompliance to the Civil Grievances Mediation Meetings of the Office of the President, and also disseminates information about non-compliance cases through government publications and the major national press. The acceptance rates of the ACRC’s anti-corruption policy recommendations are relatively high; 70 percent of the Commission’s recommendations are adopted.” (<http://www.acauthorities.org/country/kr>) Despite an overall strong performance, some cases reveal that corruption is still a problem in South Korea. Challenges include the merger of the Korean Independent Commission Against Corruption (“**KICAC**”) with two other government institutions to form the new ACRC has raised concerns about the ACRC’s ability to focus on corruption issues and its independence from the government. (<http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/republic-of-korea/snapshot.aspx>)

¹⁰⁴ Act on Anti-Corruption and the Foundation of the Anti-Corruption and Civil Rights Commission (Republic of Korea), above n 103, accessed at http://www.acrc.go.kr/eng_index.html, on 29 June 2015.

(2) *The Chairperson, vice chairpersons and other commissioners of the Commission shall be appointed or commissioned from among the following persons who are deemed capable of fairly and independently performing duties with respect to complaints and anti-corruption:-*

1. *Persons whose term of service as associate professor (or corresponding position thereto) or higher either at college or at an authorized research institute is eight years or more;*
2. *Persons whose term of service as judge, public prosecutor or attorney-at-law is ten years or more;*
3. *Persons who were or are in office as Grade III public official or higher;*
4. *Persons whose term of service as certified architect, certified tax accountant, certified public accountant, professional engineer or patent attorney is ten years or more;*
5. *Persons whose term of service as member of any Local Ombudsman under Article 33 (1) is four years or more; and*
6. *Other persons of high social reputation who have knowledge and experience on administration and who are recommended by (a) non-governmental organization(s);”¹⁰⁵*

87. **We therefore propose that the amendment to create the new IACC provides for the composition of the commission of the IACC in the manner suggested above. The amendment should clearly specify that 40 percent of the IACC commissioners are to be from civil society and that the parliament is to elect persons based on the nominations of the Parliamentary Select Committee on Corruption. The elected commissioners would then be proposed for appointment by the Prime Minister to the Yang di-Pertuan Agong. The elected IACC commissioners would be no more than 15 members, including the Chairperson.**

88. There should also be criteria specified in the Federal Constitution as regards the appointment of members of the Commission. Thus, within

¹⁰⁵ Ibid, on 20 August 2014.

the proposed membership, with at least 40% of its members from civil society, members of the Commission should possess “*the educational qualifications, experience and recognized competence necessary to discharge the functions of the Anti-Corruption Commission...*”¹⁰⁶

89. **Next, It is further proposed that the position of Chairman of the IACC be a constitutional position as in the case of the other constitutional commissions. Thus, provisions relating to the conditions of service such as Articles 142(2) and 143 of the Federal Constitution should be introduced in the constitutional amendment, akin to Article 114(4) of the Federal Constitution.**
90. **Leaving aside the issue of appointment and remuneration for the moment, it is critical that all the commissioners of the IACC must have security from dismissal similar to a Judge of the Federal Court.**¹⁰⁷
91. Thus, the removal of commissioners should be equally stringent as the removal of a Judge of the Federal Court. **It is proposed that there be a special tribunal drawn from the Parliamentary Select Committee on Corruption.** There must be due process in that the right to be heard and other aspects of natural justice must be strictly complied with prior to any decision by the special tribunal. In the event a decision is made that the commissioner is to be removed, the special tribunal will have to make recommendations for the removal to Parliament. The removal must be confirmed by a 2/3rd majority of the total number of Members of Parliament.
92. **It is further proposed that the members of the IACC also be charged with the function of identifying and appointing a suitable candidate for the position of Director General of the Anti-Corruption Agency. Article 281 of the Constitution of the Republic of Zambia, provides for the appointment of the Chief Executive of its Anti-Corruption Commission as follows: “*the Commission established under this part shall have a Chief Executive who shall be appointed by the respective Commission*”.**
93. Members employed or who are Commissioners of the IACC will be characterised as public servants akin to the scheme under the service commissions within the Federal Constitution. Employees so engaged are public servants under Article 132(1) of the Federal Constitution.

¹⁰⁶ Constitution (Fiji), above n 54, Article 201.

¹⁰⁷ Federal Constitution of Malaysia, above n 4, Articles 114(3) (in relation to the Election Commission under Part VIII of the Federal Constitution) and 143(1) (in relation to the Service Commissions under Part X of the Federal Constitution).

However, their conditions of service are to be governed by the relevant service commission per Article 144(1) of the Federal Constitution.¹⁰⁸

94. The constitutionally mandated IACC should therefore also be responsible for the appointment, promotion and discipline of the employees of the ACA including the Director General. This would enable the recruitment of employees with the requisite skills, knowledge and experience required for the investigations agency, ACA, to discharge its functions. The proposed amendment should clearly stipulate that these recruitment powers are to be exercised by the IACC, independent of the Public Services Commission.
95. A final aspect on the new constitutional position the members of the newly created IACC is their remuneration. While it is noted that Article 143(3) expressly provides that "*The remuneration and other terms of office of a member of a commission to which this Part [Part X] applies shall not be altered to its disadvantage after his appointment*", the source of remuneration must also be independent of the executive or the civil service.
96. Thus, there should be a separate fund that Parliament would annually determine and designate for the purposes of the IACC and ACA. A similar provision is found in the Maldives Constitution, where Article 206 provides that "*the members of the Anti-Corruption Commission shall be paid such salary and allowances as determined by the People's Majlis*".¹⁰⁹
97. The other option is to rely on the Service Commissions Act 1957. It is to be noted that the remuneration for the members of the current service commissions is contained in the Service Commissions Act 1957.¹¹⁰ Section 10 states that

"(1) The remuneration of members of the Commissions specified in the Schedule shall consist of the salary or fixed allowance, allowances and privileges prescribed therein.

(2) The salary or fixed allowance of each member of such Commission shall—

¹⁰⁸ It reads "*Subject to the provisions of any existing law, and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends.*"

¹⁰⁹ Constitution (Fiji), above n 54, Article 115(14) which provides "*Parliament shall ensure that adequate funding and resources are made available to the Commission, [the Fiji Independent Commission Against Corruption] to enable it to independently and effectively exercise its powers and perform its functions and duties.*"

¹¹⁰ See Part VI of the Service Commissions Act 1957 [Act 393].

- (a) commence from the date of his appointment;
- (b) accrue from day to day; and
- (c) be payable monthly on the last day of each month, or on such other day as the Minister of Finance may from time to time determine.”

98. Next, Section 12 of the Service Commissions Act 1957 provides:

“(1) *The sum required for the remuneration payable under this Act shall be charged on the Consolidated Fund.*

(2) *Until the coming into operation of Part VII of the Federal Constitution the sum charged by subsection (1) on the Consolidated Fund shall be charged on and paid out of the revenues of Malaysia.*”

99. It follows therefore that the remuneration for the commissioners of the IACC could also be charged on the Consolidated Fund.¹¹¹ This appears to be the approach adopted in Indonesia too.¹¹²

The functions of the IACC.

100. Section 7 of the MACC Act 2009 provides that the officers of the Commission shall have the following functions:

“(a) *to receive and consider any report of the commission of an offence under this Act and investigate such of the reports as the Chief Commissioner or the officers consider practicable;*

(b) *to detect and investigate –*

(i) *any suspected offence under this Act;*

(ii) *any suspected attempt to commit any offence under this Act;*
and

(iii) *any suspected conspiracy to commit any offence under this Act;*

(c) *to examine the practices, systems and procedures of public bodies in order to facilitate the discovery of offences under this Act and to secure the revision of such practices, systems or*

¹¹¹ See Federal Constitution of Malaysia, above n 4, *inter alia* Articles 114(5) in relation to the Election Commission, 125(6) in relation to Judges of the Federal Court, and 143(2) in relation to service commissions.

¹¹² Laws of the Republic of Indonesia, Law No. 30 Year 2002, above n 79, Article 64.

procedures as in the opinion of the Chief Commissioner may be conducive to corruption;

- (d) to instruct, advise and assist any person, on the latter's request, on ways in which corruption may be eliminated by such person;*
- (e) to advise heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies as the Chief Commissioner thinks necessary to reduce the likelihood of the occurrence of corruption.*
- (f) to educate the public against corruption; and*
- (g) to enlist and foster public support against corruption."*

101. In order to effectively and efficiently perform these functions, the MACC has established five main departments namely: Investigations; Legal and Prosecutions; Corruption Prevention; Community Education, and; Finance and Administration. It would seem that the functions afforded to the Commission's investigators do not solely apply to solving/dealing with the issue of corruption but rather also the prevention of corruption and including public education.

102. There should be also general functions given to the IACC such as:¹¹³

- (a) To promote values of honesty and integrity in the operations of the State.¹¹⁴ This should be constitutionally entrenched as one of the IACC's principal functions. The IACC as an independent commission must promote these values and hold the relevant persons accountable in the fight against corruption.
- (b) The bringing of proceedings to restrain the enforcement of any legislation or regulation by challenging the validity of the legislation or regulation where the offending action or conduct is sought to be justified by reference to that legislation or regulation.¹¹⁵ This allows the enforcement agencies to look at laws that militate against the fight on corruption.
- (c) To identify the sources of the different types of corruption existing against the backdrop of the country's socio-economic conditions

¹¹³ Constitution (Kenya), above n 55, Article 252(1)(d); Constitution (Maldives), above n 58, Articles 199(c) and 202(e); Constitution (Zambia), above n 57, Article 280(1).

¹¹⁴ Constitution (Maldives), above n 58, Article 202(d).

¹¹⁵ Constitution (Swaziland), above n 56, Article 164(1)(d)(v).

and propose recommendations for appropriate action.¹¹⁶ This provision is provided for expressly in the Bangladeshi anti-corruption legislation and provides that the Enforcement Agency is to provide the President with any recommendations for the appropriate action.

- (d) To carry out research on the prevention of corruption and to submit its recommendations for improvement to the relevant authorities.¹¹⁷ This is similar to Section 7(3) of the MACC Act 2009 which, however, does not contain the word “research”.
- (e) To provide annual reports to the Parliament on its performance,¹¹⁸
- (f) To provide annual updates and advice to the Attorney-General on any matter relating to its functions and responsibilities;¹¹⁹
- (g) To craft appropriate mechanisms to investigate complaints concerning the functioning of any public, service, service commission, administrative organ of the Government, the Armed Forces insofar as the complaints relate to the failure to achieve acceptable delivery of services or equitable access by all in the recruitment to those services or fair administration by those service.¹²⁰ Due to the varying hues of corruption that exist, it is prudent to also provide the IACC with the relevant functional ambit to eradicate corruption in all its forms.
- (h) To refer matters to the Attorney-General for appropriate action to secure the termination of the offending action or conduct, or the abandonment or alteration of the offending procedures.¹²¹

¹¹⁶ Anti-Corruption Act 2004 (Bangladesh), Section 17(i).

¹¹⁷ Constitution (Maldives), above n 58, Article 202(c); Anti-Corruption Act 2004 (Bangladesh), Section 17(f).

¹¹⁸ Constitution (Fiji), above n 54, Article 115(9); Constitution (Swaziland), above n 56, Article 168(8) which states, “The Commissioner shall make annual reports to Parliament on the performance of the Commission which reports shall include statistics in such form and in such detail as may be prescribed of the complaints received by the Commission and the results of any investigation.”

¹¹⁹ Constitution (Fiji), above n 54, Article 115(9).

¹²⁰ Constitution (Swaziland), above n 56, Section 164(1)(c).

¹²¹ *Ibid*, Section 164(1)(d)(iv).

The powers of the IACC

103. The current powers of the officers of the MACC are found in Section 10 of the MACC Act 2009¹²² which provide:

“(1) In addition, and without prejudice, to the powers, duties and functions conferred under this Act –

- (a) An officer of the Commission shall have, for the purposes of this Act, all the powers and immunities of a police officer appointed under the Police Act 1967 [Act 344]; and*
 - (b) A junior officer of the Commission shall have, for the purposes of this Act, all the powers and immunities of a prison officer of the rank of a sergeant and below under the Prison Act 1995 [Act 537] when escorting and guarding persons in custody of the Commission and those of a police officer of the rank of sergeant and below appointed under the Police Act 1967.*
- (2) Without prejudice to the generality of subsection (1) –*
- (a) An officer of the Commission of the rank of Superintendent and above shall have all the powers of a police officer of the rank of Assistant Superintendent of Police and above; and*
 - (b) A Chief Senior Assistant Superintendent, a Senior Assistant Superintendent and an Assistant Superintendent of the Commission shall have all the powers of a police officer of the rank of Inspector and above.*
- (3) Where in the course of any investigation or proceedings in court in respect of the commission of an offence under this Act by any person, there is disclosed an offence under any other written law, not being an offence under this Act, regardless whether the offence is committed by the same person or any other person, the officer of the Commission responsible for the investigation or proceedings, as the case may be, shall notify the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above who may issue such directions as he thinks fit.*
- (4) For the purposes of this Act –*

¹²² MACC Act 2009, above n 50, Section 6 which provides for the appointment of the officers of the MACC.

- (a) *Where an order, a certificate or any other act is required to be given, issued or done by an officer in charge of a Police District under any written law, such order, certificate or act may be given, issued or done by a senior officer of the Commission, and for such purpose, the place where the order, certificate or act was given, issued or done shall be deemed to be a Police District under his charge;*
- (b) *An officer of the Commission shall have all the powers conferred on an officer in charge of a police station under any written law, and for such purpose the office of such officer shall be deemed to be a police station.*
- (5) *For the avoidance of doubt, it is declared that for the purposes of this Act an officer of the Commission shall have all the powers of a police officer of whatever rank as provided for under the Criminal Procedure Code [Act 593] and the Registration of Criminals and Undesirable Persons Act 1969 [Act 7], and such powers shall be in addition to the powers provided for under this Act and not in derogation thereof, but in the event of any inconsistency or conflict between the provisions of this Act and those of the Criminal Procedure Code, the provisions of this Act shall prevail.”*

104. The above powers can be adopted for the IACC, and where suitable the IACC should delegate them to the ACA.

105. An examination of the powers of constitutionally entrenched anti-corruption agencies in other jurisdictions reveals that powers conferred differ quite significantly, as most of the jurisdictions examined provide for powers that go beyond merely “policing” powers.

106. The following are possible powers that could be afforded to the new IACC as taken from the Constitutions of other jurisdictions:

- (a) To recruit ACA staff including the Director General of the ACA and to terminate the services of the recruited staff.¹²³ As this was one of the principal powers expressly requested by the MACC in their request, it is clear that several other jurisdictions have also provided for this in their constitutions.
- (b) To provide for the process of conciliation, mediation and negotiation.¹²⁴ This would be beneficial where corrupt practices

¹²³ Constitution (Kenya), above n 55, Article 252(1)(c); Constitution (Zambia), above n 57, Article 280(3)(a).

¹²⁴ Constitution (Kenya), above n 55, Article 252(1)(b); Constitution (Swaziland), above n 56, Section 164(1)(d)(ii).

have been so deeply ingrained in the culture of the people/parties involved that prosecution may not be the best solution.

- (c) To craft mechanisms for investigation, where a member of Parliament requests, the matter on the ground that a person or body of persons specified in the request has or may have sustained an injustice.¹²⁵
- (d) To authorize investigation, in any other circumstances in which the IACC, in good faith, considers that the matter on the ground that some person or body of persons has or may have sustained an injustice.¹²⁶
- (e) To issue subpoenas requiring the attendance of any person before the Commission and the production of any document, record or thing required for the investigation by the Commission.¹²⁷
- (f) To fine any person for contempt of any subpoena or order, or cause that person to be brought by a competent court for the enforcement of the subpoena or order for the Commission.¹²⁸
- (g) To question any person in respect of any subject matter under investigation before the Commission.¹²⁹
- (h) To require any person to disclose truthfully and frankly any information within the knowledge of that person relevant to any investigation by the Commission.¹³⁰
- (i) To make such orders and give such directions as are necessary and appropriate in the circumstances during the course of its proceedings or as a consequence of its findings.¹³¹

¹²⁵ Constitution (Swaziland), above n 56, Section 164(2)(b).

¹²⁶ *Ibid*, Section 164(2)(c).

¹²⁷ *Ibid*, Section 165(1)(a).

¹²⁸ *Ibid*, Section 165(1)(b).

¹²⁹ *Ibid*, Section 165(1)(c).

¹³⁰ *Ibid*, Section 165(1)(d).

¹³¹ *Ibid*, Section 165(2).

Other provisions for the IACC

107. For the proposed IACC to operate effectively, the following matters should also be considered and included:

(a) The power to regulate its own procedure and make such rules and regulations as it deems fit for regulating and facilitating the performance of its functions.¹³²

(b) A provision for the tenure of service of members. The provision in the Constitution of Maldives reads as follows:

*“A member of the Anti-Corruption Commission shall be appointed for one term of five years. The People’s Majlis can approve the renewal of the appointment for an additional term of not more than five years.”*¹³³

(c) Resignation of members. The provision in the Constitution of Maldives reads as follows:

*“A member of the Anti-Corruption Commission may resign from office by writing under his hand addressed to the President, and the office shall become vacant when the resignation is received by the President.”*¹³⁴

(d) Quorum and voting. The provision in the Constitution of Maldives reads as follows:

*“A majority of the members of the Anti-Corruption Commission shall constitute a quorum at a meeting of the Anti-Corruption Commission, and any decision of the Anti-Corruption Commission shall be taken by a majority of votes of the members present and voting.”*¹³⁵

(e) Removal from office. The provision in the Constitution of Maldives provides:

“A member of the Anti-Corruption Commission shall be removed from office only for the reasons specified in article (a) and in the manner specified in article (b):

(a) on the ground of misconduct, incapacity or incompetence;

¹³² Constitution (Fiji), above n 54, Article 115(8).

¹³³ Constitution (Maldives), above n 58, Article 203.

¹³⁴ Ibid, Article 204.

¹³⁵ Ibid, Article 205.

and

(b) *a finding to that effect by a committee of the People's Majlis pursuant to article (a), and upon the approval of such finding by the People's Majlis by a majority of those present and voting, calling for the member's removal from office, such member shall be deemed removed from office.*¹³⁶

(f) Vacation of office and immunity of the Commissioners. The provision in the Constitution of Swaziland provides:

“(1) The provision of this Constitution relating to the removal of judges of the superior courts from office shall, subject to any necessary modifications and adaptations, apply to the removal from office of the Commissioner or Deputy Commissioner

*(2) A member of the Commission shall have such and like protection and privilege in the case of any action or suit brought against the Commission for any act done or omitted to be done in the honest execution of the duties of the Commission as is by law given to acts done or words spoken by a judge of the superior courts in exercise of the judicial office.*¹³⁷

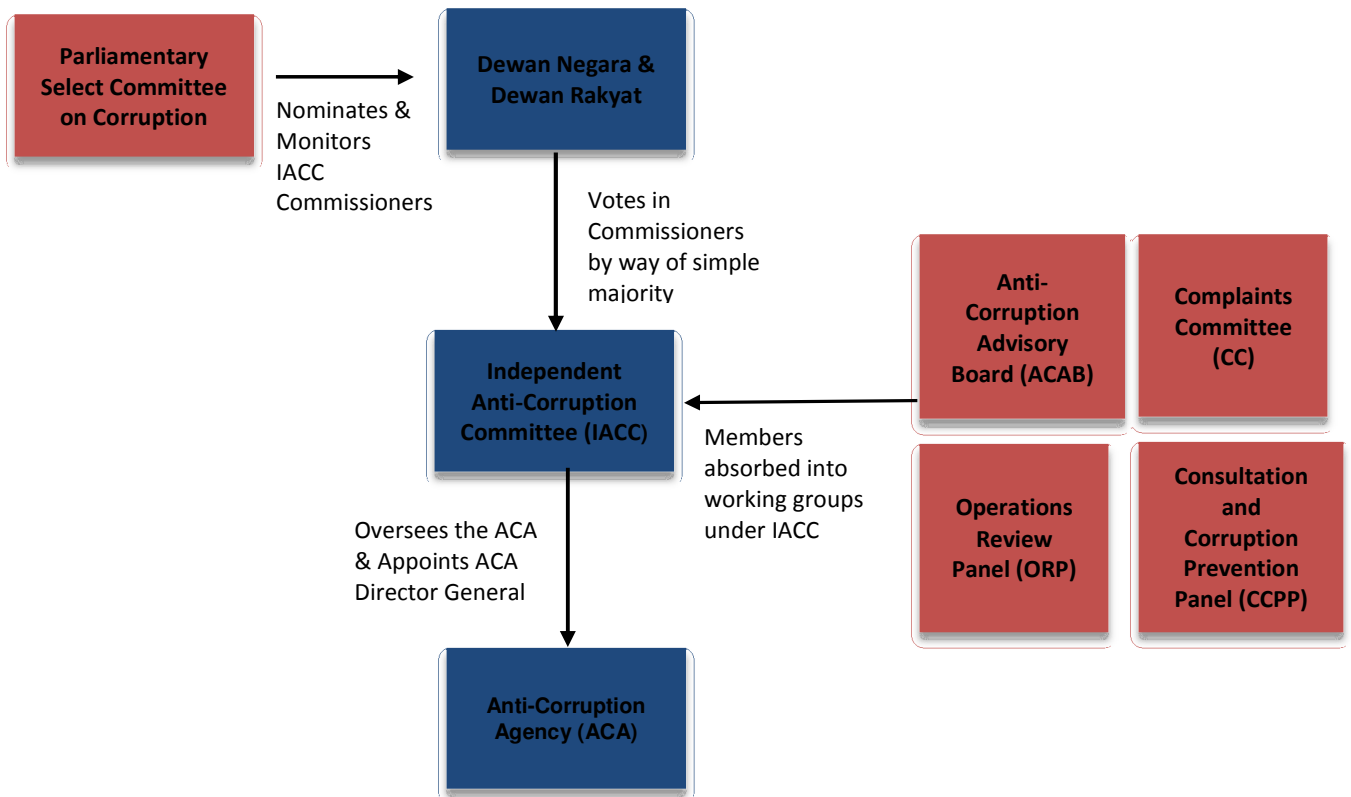
¹³⁶ Ibid, Article 207.

¹³⁷ Constitution (Swaziland), above n 56, Article 170.

Differences between the MACC's proposal and our proposals

MACC's Proposals	Our Proposals
<ul style="list-style-type: none"> The establishment of a constitutionally mandated, independent Service Commission for recruitment purposes 	<ul style="list-style-type: none"> That the IACC will have the power to determine strategy, policy, recruit staff, resourcing, setting directions and policies, along with more extensive powers and functions.
<ul style="list-style-type: none"> The abovementioned Service Commission to appoint its own Chief Commissioner (not answerable to the Executive). No mention of commissioners. 	<ul style="list-style-type: none"> To ensure security of tenure for the Commissioners, who sit in the IACC. The nomination of IACC Commissioners by the Parliamentary Select Committee on Corruption and subsequent voting in by simple majority in parliament The IACC will appoint the Director General of the ACA
<ul style="list-style-type: none"> That the abovementioned Service Commission will sit above the MACC. 	<ul style="list-style-type: none"> The IACC has the full powers and independence of a body tasked with fighting corruption in Malaysia The ACA is the investigative arm of the IACC

The Proposed Structure of the Independent Anti-Corruption Commission (IACC)



Part II: Amendments to the MACC Act 2009

108. It is also proposed that the following provisions of the MACC Act 2009 be amended to strengthen the functions of the MACC.

Section 23, MACC Act 2009.

109. Section 23 provides that it is an offence for any officer of a public body to use his office or position for any “*gratification*”. It is therefore corrupt practice to receive “*gratification*”. It may be implicit here that “*gratification*” connotes various forms of pecuniary corruption. However, an act of corruption may well go beyond the “*gratification*” envisaged by Section 23. It could involve abuse of office, advancement of one’s aim, status, promotional aspects, getting appointed to a job/position or transfer. These examples are illustrative of various misconducts in public office that may not come within the strict confines of “*gratification*” in Section 23.

110. **It is therefore proposed that Section 23 be amended. One option is to adopt Section 13 of the Prevention of Corruption Act 1988 of India,¹³⁸ that reads as follows:**

“(1) A public servant is said to commit the offence of criminal misconduct,-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

¹³⁸ Prevention of Corruption Act 1988 (No. 49 of 1988) (India).

(d) if he,-

(i) *by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or*

(ii) *by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or*

(iii) *while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or*

(e) *if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.*

Explanation: For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine."

111. In considering the Indian provision, it is proposed that instead of limiting the ambit of the amendment to "pecuniary advantage", the words "any valuable thing, pecuniary advantage or advantage" be inserted. This would cover using corrupt means for promotion, obtaining favour and the other examples set out above.

112. Section 23(4) of the MACC Act 2009¹³⁹ should be deleted.

¹³⁹ MACC Act 2009, above n 50.

Misconduct in Public Office

113. **It is also proposed that provision be made in the MACC Act 2009 for the common law offence of misconduct in public office.** The essence of the offence was described by the Court of Final Appeal of the Hong Kong SAR in the case of *Shum Kwok Sher v HKSAR*¹⁴⁰ as follows “...an officer who has been entrusted with powers and duties for the public benefit has abused them or his official position. Abuse of such powers and duties may take various forms, ranging from fraudulent conduct, through nonfeasance of a duty, misfeasance in the performance of a duty or exercise of a power with a dishonest, corrupt or malicious motive, acting in excess of power or authority with a similar motive, to oppression. In all these instances, the conduct complained of by the public officer takes place in or in relation to, or under colour of exercising, the office.”
114. Thus, the elements of the offence are:
- (a) a public official
 - (b) who in the course of or in relation to his public office
 - (c) willfully and intentionally; culpably misconducts himself;
 - (d) culpably misconducts himself.
115. It has been said that the elements of the offence alerted the public officer to the risk he ran by engaging in misconduct. It targeted misconduct as the relevant act or omission to be avoided, thereby providing the necessary guidance in conduct.¹⁴¹

¹⁴⁰ *Shum Kwok Sher v HKSAR* [2002] FACC at [81] per Sir Anthony Mason NPJ.

¹⁴¹ Department of Justice (Hong Kong), “At the Courts: Major and Interesting Cases” (2002) p. 55.

Section 36, MACC Act 2009

116. This provision deals with the power to obtain information by the MACC. The words “*in connection with an offence under this Act*” is limited in its reach in as much as the incidence of a public official living beyond his known source of income is not an offence under the MACC Act 2009. This severely restricts the powers of the investigation of the MACC under Section 36.

117. **It is proposed that Section 10 of the Prevention of Bribery Ordinance of Hong Kong¹⁴² be considered.** It reads as follows:

“(1) Any person who, being or having been the Chief Executive or a prescribed officer-

(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.

(1A) If the accused in any proceedings for an offence under subsection (1) is or has been the Chief Executive, the court, in determining whether the accused has given a satisfactory explanation as provided in that subsection, shall take into account assets that he declared to the Chief Justice pursuant to Paragraph 2, Article 47 of the Basic Law.

(1B) The Chief Justice shall disclose to a court information about assets declared to him pursuant to Paragraph 2, Article 47 of the Basic Law if the disclosure is required by an order made by the court for the purposes of subsection (1A).

(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

¹⁴² Prevention of Bribery Ordinance (Hong Kong) (Cap 201), Section 10.

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 payable under the Pensions Ordinance (Cap 89), the Pension Benefits Ordinance (Cap 99) or the Pension Benefits (Judicial Officers) Ordinance (Cap 401)."

118. The Hong Kong provision makes it clear that the inability to explain wealth that is not commensurate with ones known source of income is itself an offence. It would provide the predicate "*offence*" that is required under Section 36 for the purposes of commencing investigations.
119. Now, it may not be necessary to go as far as the Hong Kong provision. The amendment to Section 36 could deal with the "*offence*" of living beyond ones known source of income as a trigger for an investigation and it need not be treated as presumption of the commission of an offence.
120. **It is also proposed that the opening words to Section 36(1) "*Notwithstanding any written law or rule of law to the contrary*" be amended to read "*Notwithstanding any written law*". The rule of law is the fount and touch-stone of all our laws and it would be repugnant to the Act to exclude it.**

Corporate Liability

121. There should also be provision in the MACC Act 2009 for corporate liability for corrupt practices. In this regard, companies may be found liable for bribes and violations by their employees, unless they can prove that they have taken adequate measures to prevent it.¹⁴³
122. Thus, companies would be encouraged to put into place adequate preventive systems, and further to conduct training as a measure of education to prohibit bribery. It is hoped this will help change business ethics and culture. For example, this would incentivize companies to sign the Corporate Integrity Pledge, a programme introduced in 2012 that is aimed at combating corruption in the corporate sector.¹⁴⁴
123. Presently, employees who commit bribery would be prosecuted if they were found guilty while their employer (companies) would not be held liable for corruption. By virtue of corporate liability for corruption, companies may face hefty fines for their employees' corrupt practices. Companies are therefore obliged to have adequate measures in place to prevent corruption. This will also cultivate a 'clean' environment for foreign direct investments in this country.
124. The corporate liability provision would be made applicable to the entity (company) but not ordinarily against its directors (as individual liability). However, if the company did not put in adequate anti-corruption procedures then the Board would be liable. If they had procedures and the corrupt act occurs, only then is the company liable.
125. The provision for corporate liability in anti-corruption legislation is also found in other jurisdictions. For example, the United Kingdom passed the Bribery Act that came into force in 2011. Here, companies may be prosecuted for failing to prevent bribery and fined an unlimited amount.¹⁴⁵ Thus, Section 7 of the Act provides that an offence can be committed by commercial organizations which fail to prevent persons associated with them from bribing another person on their behalf. An organisation that can prove it has adequate procedures¹⁴⁶ in place to

¹⁴³ The Malaysian Insider, "MACC Act to be amended to include corporate liability provision – Bernama" (22 April 2014) accessed at <http://www.themalaysianinsider.com/malaysia/article/macc-act-to-be-amended-to-include-corporate-liability-provision-bernama>, on 27 January 2015.

¹⁴⁴ Ibid.

¹⁴⁵ UK Government, "Bribery Act 2010 Guidance" accessed at <https://www.gov.uk/government/publications/bribery-act-2010-guidance> on 27 January 2015.

¹⁴⁶ "Thus far, the U.K. government has articulated six principles on which compliance programs should be based to satisfy the "adequate procedures" defense, but what actually constitutes "adequate procedures" will remain at the discretion of the courts. The six principles largely mirror those of the U.S. Federal Sentencing Guidelines for effective internal controls and the OECD's Good Practice Guidance on Internal Controls, Ethics and Compliance. They are: (1) Risk

prevent persons associated with it from bribing will have a defence to this Section 7 offence.¹⁴⁷ In early 2014, the UK introduced US-style deferred prosecution agreements¹⁴⁸ where the company agrees to pay a hefty fine and overhaul its compliance checks in exchange for a suspension to a prosecution, which can cost jobs and bar companies from government tenders.¹⁴⁹

126. It is also noted that the MACC Act 2009 has extra-territorial application insofar as Malaysian permanent residents or citizens are involved in corrupt activities outside of Malaysia.¹⁵⁰ This should be extended to the intended corporate liability provision. It is noteworthy that under the United Kingdom's Bribery Act, jurisdiction is conferred when the relevant act or omission: (1) takes place in the United Kingdom; or (2) takes place anywhere in the world when committed by a person closely connected with the United Kingdom.¹⁵¹
127. There are also other provisions of the MACC Act 2009 that should be considered for amendment. These are set out in Table 5 in the Appendix.

Assessment, which varies based on, among other things, the size of the company, its business sectors, the markets in which it operates, the use of third-party agents, and the volume of government business; (2) Top-Level Responsibility, particularly at the board of directors level, for fostering a culture of compliance, integrity, and zero-tolerance of corruption; (3) Due Diligence, vetting, and monitoring of third parties; (4) Clear, Comprehensive, Practical, and Accessible policies and procedures regarding anti-corruption issues; (5) Effective Implementation of the Compliance Program, including training of personnel and third parties and mechanisms for reporting concerns; and (6) Monitoring and Review of the policies, procedures, and conduct.”

From <http://www.paulhastings.com/assets/publications/1750.pdf>.

¹⁴⁷ Bribery Act 2010 (UK), Section 7.

¹⁴⁸ See for example the settlement between IBM and Securities and Exchange Commission in the U.S. where IBM agreed to a two-year reporting requirement on accounting fraud or bribery as well as federal investigations, in addition to being fined USD\$10 million. See <http://www.reuters.com/article/2013/07/25/us-ibm-sec-idUSBRE96O1FB20130725> , published on 25 July 2013.

¹⁴⁹ Financial Times, “UK to widen corporate criminal liability” (2 September 2014), accessed at <http://www.ft.com/cms/s/0/6f8baae2-32af-11e4-a5a2-00144feabdc0.html#axzz3QH6iwbal> on 27 January 2015.

¹⁵⁰ MACC Act 2009, above n 50, Section 66(1).

¹⁵¹ “Non-U.K. entities may be held liable under the Bribery Act if conduct in furtherance of the offense occurs in the U.K. Moreover, a foreign corporation that did some business in the U.K., but does not have a U.K. office, may be criminally liable if an agent, employee or subsidiary offered or accepted a bribe anywhere in the world, regardless of whether the misconduct involved the U.K. business or occurred in the U.K., and even if the company had only limited contacts with the U.K. In addition, the person who is associated with the entity and who committed the offense need not be closely connected to the U.K. to confer jurisdiction upon the U.K.’s Serious Fraud Office (“SFO”) under the corporate offense.”

From <http://www.paulhastings.com/assets/publications/1750.pdf>.

Part III: Amendments to Other Related Legislation

Whistleblower Protection Act 2010

128. The preamble to the Whistleblower Protection Act 2010 (“**WPA 2010**”) states that it is an Act to “*combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct...*”. The Act defines a whistleblower as “*any person who makes a disclosure of improper conduct to the enforcement agency under section 6.*”¹⁵² Improper conduct, that is the subject matter of the disclosure, is defined as “*any conduct which if proved, constitutes a disciplinary offence or a criminal offence.*”¹⁵³
129. As most corrupt practices and serious criminal activity are not easily discernable or discoverable, any disclosure would therefore be highly dependent on information and reporting by whistleblowers. Amendments are therefore required to bolster the effectiveness of the WPA 2010. These amendments should be based on the premise that one recognises the natural reluctance to whistleblow in the first place. The whistleblower should be assured that there is a proper framework and channel for his or her disclosure. It is crucial therefore that the whistleblower is assured that he would be treated seriously and with respect, and that he will enjoy protection before, during and after the disclosure.¹⁵⁴
130. **First, to encourage whistleblowing, it is proposed that disclosure can be made through other means apart from through an enforcement agency.**¹⁵⁵ For example, the United Kingdom’s Public Interest Disclosure Act 1988 allows for disclosure to an employer or other responsible person, to his counsel, Minister of the Crown, and to a person prescribed by an order made by the Secretary of State under Employment Rights Act 1996 (“**ERA**”).¹⁵⁶

¹⁵² Whistleblower Protection Act 2010 (“**WPA 2010**”), Section 2. Section 6 (1) of the WPA 2010 states that, “A person may make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct, provided that such disclosure is not specifically prohibited by any written law. (emphasis added).

¹⁵³ WPA 2010, above n 152, Section 2.

¹⁵⁴ A whistleblower shall, upon receipt of the disclosure of improper conduct by any enforcement agency under Section 6, be conferred with whistleblower protection under this act as follows – Section 7(1): protection of confidential information, immunity from civil and criminal action, and protection against detrimental action (i.e. reprisal). This protection is not limited or affected in the event disclosure of improper conduct does not lead to disciplinary action or prosecution. However, Section 11(1) lists several circumstances in which the whistleblower protection can be revoked.

¹⁵⁵ WPA 2010, above n 152, Sections 2 and 6. The enforcement agencies are the police force, MACC, Royal Malaysian Customs Department, Immigration Department, Road Transport Department, Companies Commission of Malaysia and the Securities Commission Malaysia.

¹⁵⁶ Employment Rights Act 1996, Sections 43C-43F; see also footnote 160, *infra*.

131. Similarly, in the Australian states of South Australia and New South Wales, whistleblowers protection legislation does not limit the disclosure solely to enforcement agencies.¹⁵⁷ There is good sense in this as a whistleblower may not feel safe to make a disclosure if the improper conduct involves one of the enforcement agencies or high-ranking government officials. As such, they should be allowed to disclose the information through the media, the Internet, or as the United Kingdom's ERA provides - through employers, lawyer or other responsible person.
132. Alternatively, the WPA 2010 could be amended to allow the whistleblower to disclose to other people and not lose protection in certain situations only, where if:¹⁵⁸
- (a) disclosed information is substantially the same;
 - (b) identity of whistleblower is not made public;
 - (c) enforcement agency either decided not to investigate or did not complete investigation within 6 months or such other reasonable time;
 - (d) enforcement agency has investigated but not recommended any action; or
 - (e) enforcement agency has failed to reasonably update whistleblower of status of investigation or inform whistleblower within 6 months as to whether matter is being investigated.
133. **Further, it is proposed that the law should be amended to have a whistleblower protection independent statutory body (like SUHAKAM) that will evaluate the information and decide whether or not to give protection to the whistleblower.** In other countries, there are also independent authorities that are given the investigatory and educative powers to send out the message of political commitment, whether in public or private sector.¹⁵⁹
134. **Within enforcement agencies such as the MACC, it is proposed that identifiable and dedicated units or departments be established to deal with whistleblowers.** At the moment, it is unclear how one would make a disclosure to the enforcement agency (such as the MACC and which department within MACC to go to). Conversely, under the United Kingdom's PIDA, public authorities have a duty to designate an authorised person to whom such disclosures should be

¹⁵⁷ The Whistleblowers Protection Act 1993 ("WPA 1993") came into force on 20 September 1993 in South Australia. Section 5(3) of the WPA 1993 states that, "*the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure.*" Similarly in the New South Wales Protected Disclosures Act 1994.

¹⁵⁸ See Protected Disclosures Act 1994 in NSW, Australia for similar provisions

¹⁵⁹ In Australia, it is the office of Ombudsman, and in the United States there is the Special Counsel.

made.¹⁶⁰

135. Further, information of these procedures for reporting and/or disclosure by a whistleblower must be clearly set out to include the entire process from disclosure of information until potential prosecution. This must be explained and widely disseminated to the public in order to ensure that members of the public know from the start what to expect and to build confidence in them.
136. **Next, it is proposed that a provision be included in the WPA 2010 to provide for whistleblowers to be continuously updated on the status of the investigation.** At present, the whistleblower is only informed after completion of investigation and if no action is to be taken.¹⁶¹ This proposed reform is to minimize anxiety of whistleblowers that they have not been taken seriously and/or to dispel notion of cover-up as well as to maintain cooperation of whistleblower throughout the process. The status updates can be general in nature without details to preserve the integrity of investigation.
137. **Now, for the WPA 2010 to be fully effective, it is also proposed that section 6 should be amended. Section 6 provides that any disclosure of improper conduct made must “not [be] specifically prohibited by any written law”.** Thus, this provision weakens the efficacy of the WPA 2010. **It is proposed that immunity should be extended to whistleblowers who may be at risk violating the Official Secrets Act 1972 (“OSA”), Financial Services Act 2013 (“FSA”) or other secrecy laws.** It must be remembered that the objective of the WPA is to help people expose wrongdoings.
138. Further, the act of classification of a piece of information as “official secret” under the OSA cannot be questioned in any court of law.¹⁶² This leads to the insulation of *“high level officials from accountability and to be held responsible for their corrupt practices.”*¹⁶³ It is to be noted that the public perception of OSA is that it has been misused by the executive to protect excesses and mismanagement in the

¹⁶⁰ The English Parliament enacted PIDA which inserted new sections and amended the existing sections in the Employment Rights Act 1996 (“**ERA**”) to introduce whistleblower protection in England. Section 43F of ERA 1996 states that disclosure can be made to person prescribed by an order made by the Secretary of State and where the person reasonably believes: “... (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and (ii) that the information disclosed, and any allegation contained in it, are substantially true. ...

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.”

¹⁶¹ WPA 2010, above n 152, Sections 13(1) and 13(4).

¹⁶² Official Secrets Act 1972 (“**OSA**”), Section 16A.

¹⁶³ Lynda Lim, above n 19.

government. If good governance is not practiced, there is “*no amount of institutional building, capacity building as valuable as they may be, nor the best trained or best motivated public service [that] will be able to withstand the withering effects of corruption or resists the developmentally pulls of special interests*”.¹⁶⁴

139. The purpose of the WPA 2010 is therefore defeated if the threat of OSA and other secrecy laws hang over potential whistleblowers. Alternatively, there should be defences in law available in the WPA 2010 for the whistleblower if the disclosure contravenes any written law.
140. **It is further proposed that the definition of “confidential information” in Section 2 of the WPA 2010 excludes the identity of persons against whom the disclosure of improper conduct has been made, that is, the wrongdoer.** If the whistleblower discloses any of the confidential information, it will result in revocation of the protection accorded under Sections 7 and 9 of the WPA 2010.¹⁶⁵ Furthermore, there is liability viz. conviction for a criminal charge under the WPA 2010. This in itself defeats the purpose of the Act, which is to protect the whistleblower. **It is therefore proposed that Sections 8(1) and (4) of the WPA 2010 be amended to permit disclosure of information regarding improper conduct and the identity of the alleged wrongdoer to third parties, as set out above.**¹⁶⁶
141. Further, Section 11(1)(a) of the WPA 2010 should be amended to provide that a whistleblower may still enjoy protection even if he was a participant in the improper conduct so long as he is not the mastermind or person most guilty. It is to be noted that, more often than not, a corrupt practice or criminal activity is brought to light by a person who is peripherally involved or was involved, but since then, is seeking to make amends or repent.
142. Lastly, in order to enforce the independence of enforcement agencies such as the MACC, Section 4 of the WPA 2010, (which allows the Minister to issue directions to the enforcement agency), should be deleted as a Minister should not have power to direct, interfere, or intervene in any manner whatsoever with the work of the enforcement agency or the investigation with respect to a disclosure of improper conduct.
143. Section 11(1)(e) of the WPA 2010 should also be amended. The

¹⁶⁴ Leftwich, A., *States of Development: On the Primacy of Politics in Development* (2000) as quoted in Lynda Lim, above n 19.

¹⁶⁵ WPA 2010, above n 152, Section 11.

¹⁶⁶ See paras [130]-[132], supra.

motive for making a disclosure of information should not be ordinarily relevant to revoke the protection. The main consideration should be whether the disclosure of the misconduct reveals an actionable wrongdoing. If so, protection should remain.

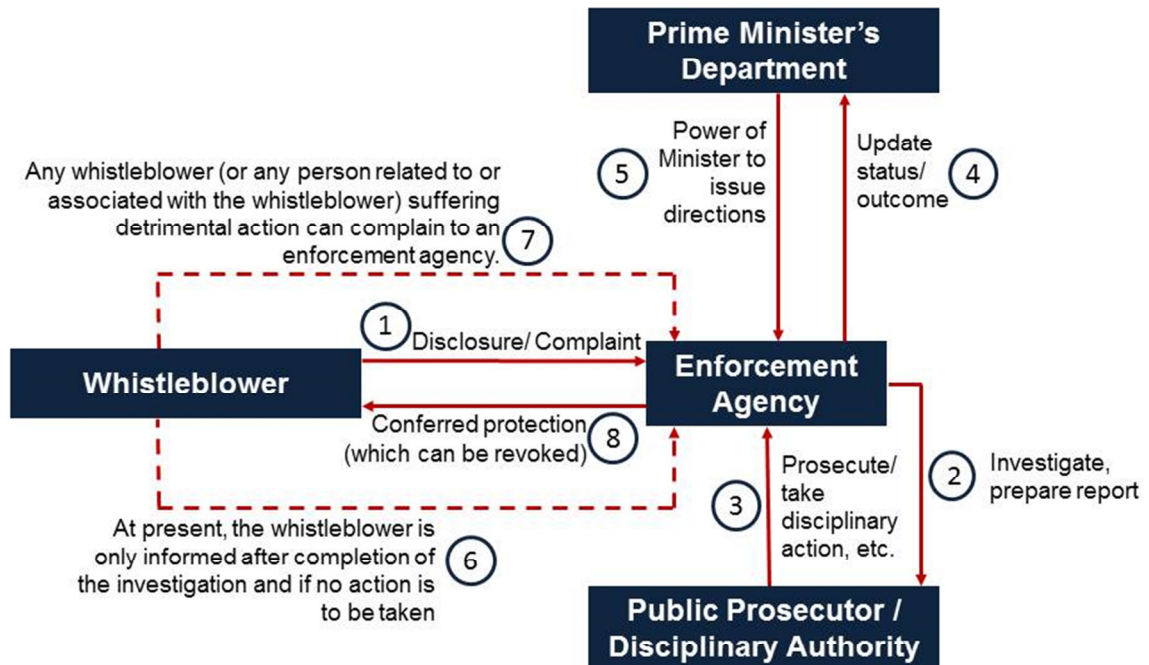


Image adapted from: Prime Minister's Department

Notes

- (1) A person may only make a disclosure that is not specifically prohibited by any written law e.g. OSA.
- (2) The enforcement agency will investigate and prepare a report.
- (3) The report will be forwarded to the public prosecutor or appropriate disciplinary authority for further action. The result of the action taken will be revealed to the enforcement agency.
- (4) If the action taken is deemed insufficient, the enforcement agency may report to the Minister in the Prime Minister's Department.
- (5) The Minister may give directions to the enforcement agency as to the exercise of its powers, discretions and duties which the agency has to comply with.
- (6) The enforcement agency is to continue to update the whistleblower on actions taken.
- (7) The whistleblower's confidential information will also be protected and he/she will also be afforded immunity from civil and criminal action. (Section 7)
- (8) The enforcement agency can revoke the whistleblower's protection under the categories listed in Section 11.

The OSA and Freedom of Information legislation

144. Freedom of information is central to democratic participation and further, to promote culture of transparency, accountability and good governance. While freedom of information can be limited, under international law freedom of opinion and expression is a universal right.¹⁶⁷
145. The OSA does not meet international law standards and instead imposes a blanket prohibition on any information deemed an “official secret” by the government. This can be an insidious device to hide corruption or corrupt practices. Thus, there must be a mechanism in the OSA to allow for the declassification of what has been regarded as “official secret” to expose corruption. **It is therefore proposed that the OSA be amended to provide for declassification that would facilitate this exposure.** Thus, in tandem with the removal of the “official secret” label in the circumstances described, it would also be propitious to have Freedom of Information legislation to complement the WPA 2010 and the MACC Act 2009.
146. In the United Kingdom, the Freedom of Information 2000 introduces the “right to know” in relation to public bodies. Since the introduction of the Act, a number of scandals have come to light.
147. At the moment, Section 2C of the OSA, provides that a Minister or a public officer or the Menteri Besar or the Chief Minister of a State may, at any time declassify any document under their purview. **However, it is rare that this occurs.**¹⁶⁸ **In addition to mandating declassification as suggested above, it is proposed that the application of the OSA should in general be restricted for use on matters concerning national security, defence of the realm and foreign relations.**¹⁶⁹ The general approach should be for citizens to

¹⁶⁷ Under Article 19 of the Universal Declaration of Human Rights, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Countries that recognize the freedom of information as one’s protected right, includes Sweden which has recognized the right since 1766, the United States since 1967, Australia, Canada and New Zealand since 1982, India in 2005 and Indonesia in 2008

Article 10 of the Federal Constitution states that subject to certain conditions, “every citizen has the right to freedom of speech and expression”.

¹⁶⁸ Recent examples of these rare occasions were the declassification of the air pollution index readings during environmental haze after long-criticised opposition to its classification under the OSA, and the names of holders of approved permits for foreign luxury car imports.

¹⁶⁹ The United Kingdom’s Official Secrets Act 1989 (“**OSA 1989**”) sets a different test or tests of damage for each of the 6 categories of information. For an offence to be committed under the OSA 1989, the disclosure of information must in general have damaged the national interest in the particular way, or ways, specified in the OSA 1989 for the category of official information in question. It is ultimately for the jury to decide, when the case comes to trial, whether damage has

have maximum access to information, especially information related to public interest, with exceptions to be clearly articulated.

Witness Protection Act 2009

148. The Witness Protection Act 2009¹⁷⁰ legislation was enacted to give protection to a threatened witness, before, during and after a trial, by a specially formed Witness Protection Unit, an agency under Prime Minister's Department. Protection for a threatened witness is crucial because the police and courts rely on witnesses coming forward to provide information that could, in many instances, put their lives and the lives of their families in jeopardy.
149. Section 3 establishes a Witness Protection Programme ("**the Programme**") is to be administered by a Director General. The Director General and his subordinates are appointed by the Minister in charge of the Programme.¹⁷¹
150. Every recommendation for a witness to be included in the Programme is made by the Director General to the Attorney General with any appeal of the Attorney General's decision to be made to the Minister.¹⁷² This process also applies for the Director General's recommendation to terminate protection and assistance to a participant under the Programme.¹⁷³ Thus, where whistleblowing has uncovered corruption within the executive, these provisions would not guarantee the safety of the whistleblower. The credibility and independence of the Programme are therefore compromised. This inherent conflict of interest can be resolved by an establishment of an oversight body that is independent from the executive that could hear the appeal from the Attorney General's decision and/or conduct a review of the same. It is further crucial that those responsible for the investigation (operational police, or officers from enforcement agencies

in fact occurred. Taken from "Nationality Instructions: Procedural section – The Official Secrets Act 1989" accessed at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264795/officialsecretsact.pdf on 26 August 2014.

For example, see Section 2 (2) of the OSA 1989 on definition of damaging disclosure in the area of defence: "*For the purposes of subsection (1) above a disclosure is damaging if - (a)it damages the capability of, or of any part of, the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those forces or serious damage to the equipment or installations of those forces; or(b)otherwise than as mentioned in paragraph (a) above, it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad; or(c)it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects.*"

¹⁷⁰ Witness Protection Act 2009 [Act 696].

¹⁷¹ Ibid, Section 4.

¹⁷² Ibid, Section 10.

¹⁷³ Ibid, Section 16.

such as the MACC) be kept separate from the officers managing the Programme. **It is proposed that the management of the Programme include decision makers who are not just police but individuals who have an “arm’s length” relationship to police, such as retired judges, prosecutors, justice officials and lawyers.**¹⁷⁴

Further, the Programme does not provide for a comprehensive definition of a “*witness*.” **It is proposed that the definition of “*witness*” under Section 2 should include “*whistleblower*” as defined under the WPA 2010.** In Australia, Canada, and the United Kingdom, whistleblowers may be admitted to witness protection programmes.

151. Under Section 65 of the MACC Act 2009, there is a provision that provides for protection of informers and information. However, the protection of a whistleblower would be better achieved under the Witness Protection Act 2009. Alternatively, Section 65 may be amended to provide that an informer may also be protected under the Witness Protection Act 2009.
152. It is also recommended that the government and NGOs raise awareness of the existence of the Programme, as it is under-utilised, especially in cases of vulnerable migrant workers/trafficked persons who are fearful of testifying against their former employees/traffickers.¹⁷⁵
153. Moreover, it is unclear what the source of the funding of the Programme is. It is suggested that this comes from the Consolidated Fund as well as the witness protection programme can be very expensive.

¹⁷⁴ National Post, “RCMP considering changes to secretive witness protection program” (13 April 2012) accessed at <http://news.nationalpost.com/2012/04/13/rcmp-considering-changes-to-secretive-witness-protection-program/> on 26 August 2014.

¹⁷⁵ New Straits Times, “Informants have nothing to fear” (24 November 2011) accessed at <http://www2.nst.com.my/streets/northern/informants-have-nothing-to-fear-1.10061> on 26 August 2014.

Asset Declaration

154. It is also recommended that there should be a law that governs the declaration of assets by public officials.
155. At present, ministers and high ranking Government officials are required to declare their assets solely to the Prime Minister on a yearly basis¹⁷⁶ via statutory declaration.¹⁷⁷

Conversely, asset declaration requirements for members of the civil service is regulated,¹⁷⁸ requiring members of the civil service and their immediate family declare all moveable and immovable assets in written form to their respective Heads of Departments in a period of not more than five years of the date of the declaration.¹⁷⁹ Officers are required to make declarations when they: (i) are elected into office; (ii) are required by government; (iii) obtain additional assets; and (iv) dispose of assets.¹⁸⁰

156. For example, in Indonesia Article 5 of Law No. 28 1999¹⁸¹ requires civil servants to declare assets before entering and leaving office. Further, under the Procedures for the Registration, Publication and Examination of Asset Reports of Government Officials, the “*assets of a PN [government official], his wife and dependent children, including movable assets, immovable assets, and other rights that can be evaluated in money, which have been obtained by the PN before, during and after his tenure*” must be declared.¹⁸²
157. Although there are no laws in place for asset declaration, it is to be noted that in Penang and Selangor, state assemblymen and excos have voluntarily declared their assets. Copies of the declaration of assets can be found on the Penang and Selangor state government

¹⁷⁶ MACC, *On the Road to a Corruption-Free Nation: Anti-Corruption Initiatives in Malaysia* (2012) accessed at http://www.sprm.gov.my/files/Iniatif_Book.pdf on 9 February 2015.

¹⁷⁷ Bernama, “Initiative to Control Political Financing Under GTP – PM”, accessed at http://www.pmo.gov.my/home.php?menu=newslist&news_id=9298&news_cat=13&cl=1&page=1731&sort_year=2012&sort_month= on 9 February 2015.

¹⁷⁸ Public Officers Regulations (Conduct and Discipline) (Amendment) 2002, Rule 10; described in *Pekeliling Perkhidmatan Bilangan 3 Tahun 2002, Pemilikan dan Pengisytiharan Harta oleh Pegawai Awam (“Circular No. 3, 2002”)*

¹⁷⁹ Circular No. 3, 2002, above n 178, Item 3.

¹⁸⁰ Ibid, Item 4.

¹⁸¹ Laws of the Republic of Indonesia, Law No. 28 Year 1999 on Government Executives who are Clean and Free from Corruption, Collusion, and Nepotism.

¹⁸² Directive of the Corruption Eradication Commission of The Republic of Indonesia (Number KEP.07/IKPK/02/2005) “Procedures for the Registration, Publication, and Examination of Asset Reports of Government Officials”, Article 1(3), accessed at http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Indonesia_Regulation%20on%20Asset%20Declaration_2005_EN.pdf on 29 January 2015.

portals.¹⁸³ The declaration includes details of properties, investments, and motor vehicles.¹⁸⁴

158. The IACC in this regard should be given the mandate to review assets declared by members of the executive, legislative and judicial body which includes public servants.

¹⁸³ Penang: www.penang.gov.my; Selangor: www.selangor.gov.my.

¹⁸⁴ The Malaysian Insider, "Penang CM, state exco and PR Aduns declare assets as promised" (7 August 2013), accessed at <http://www.themalaysianinsider.com/malaysia/article/penang-cm-state-exco-and-pr-aduns-declare-assets-as-promised> on 26 January 2015.

Part IV: Prosecutorial Powers: Should prosecutorial powers be given to the MACC?

159. Article 145(3) of the Federal Constitution provides that the Attorney General has absolute power to institute, conduct or discontinue any proceedings for an offence. In this regard, Section 376(i) of CPC provides that: “*The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions under this Code*”.¹⁸⁵
160. In the administration of criminal justice in Malaysia, the investigation of crimes is primarily the responsibility of the police.
161. The MACC is also empowered under the MACC Act 2009 to investigate the commission of any corruption offence and to apprehend suspect(s). The preliminary investigation of any offence is carried out by officer of the commission. Such investigation may commence as a consequence of a complaint received for an offence alleged to have been committed, or in certain circumstances as a result of information obtained by the Commission. Upon completion of investigation, the relevant investigation papers will be sent to the Attorney General’s Chambers. If the Attorney General is satisfied that sufficient evidence is available to prosecute a person for a particular offence, then he will sanction the prosecution.
162. In Malaysia, prosecutors are not investigators. They are not involved in criminal investigation. Nevertheless, the discretion by the Attorney General can only be exercise based on the outcome of the investigation undertaken by the relevant enforcement agency. Moreover, the sole purpose of prosecution is not to obtain a conviction; it is to lay before a judge all credible evidence in support of the charge for the judge to decide whether an offence has been committed and if so, the commensurate punishment.
163. The Public Prosecutor therefore acts as a check and balance in deciding whether there is sufficient evidence to prosecute. The Prosecutor will consider whether it is in the public interest to prosecute, depending on the seriousness and circumstances of the offence.
164. The Office of the Attorney General and the Office of the Public Prosecutor are fused. In this regard, there is an inherent conflict of interest as the Attorney General is also the chief legal advisor to the

¹⁸⁵ See *Public Prosecutor V Manager, MBF Building Services Sdn. Bhd.* [1998] 1 MLJ 690.

Government as well as a civil servant. Thus, the same person is the repository of the public trust in terms of prosecution for offences. This is unlike Hong Kong, where the office of the Attorney General is distinct from that of the Public Prosecutor. The former is a political appointee charged with the duties of the first legal officer to the crown. The latter is independent of the former and is solely responsible in deciding whether a prosecution should be brought in the public interest. Thus, the Public Prosecutor is the repository of public interest and not the Attorney General.

165. The ICAC of Hong Kong is directly accountable to the Chief Executive and the ICAC Commissioner reports to the Executive Council on major policy issues. The Council holds the authority of conferring and repealing the powers of the ICAC. The ICAC Commissioner is required to answer to the Council on policy and funding matters. After completion of investigations, the power to prosecute is vested with the Secretary for Justice, and the separation of powers ensures that no case is brought to the courts solely on the judgment of the ICAC. An independent judiciary ensures that the ICAC does not step out of line. The ICAC is required to seek prior court approval for exercising certain powers, and will carefully consider comments from the court and conduct reviews on operational procedures to avoid misuse of power.
166. The KPK of Indonesia *“could investigate and prosecute corruption cases itself or refer them to the office of the attorney general.”*¹⁸⁶ *The commission also had discretion to take over investigations and prosecutions begun by the attorney general. To prevent case brokering, the law compelled the KPK to bring to trial every case it investigated. To limit interagency rivalries between the KPK, the attorney general’s office, and the recently demilitarized Indonesian National Police, the KPK law required the KPK to second its investigators and prosecutors from the police and attorney general’s office on four-year contracts (later made renewable for one more term). The KPK could recruit the rest of its staff independently.”*¹⁸⁷
167. In Brazil, the public prosecutor’s office is independent of the executive, legislative and judicial branch at the Federal and state level. The Prosecutor General, who heads the office, brings cases to the Federal Supreme Court to handle cases involving judicial reviews and criminal offences committed by legislators at the federal level, members of cabinet and the President of Brazil.¹⁸⁸
168. We take the stand that it would be difficult to give the MACC

¹⁸⁶ Laws of the Republic of Indonesia, Law No. 30 Year 2002, above n 79, Article 21(4).

¹⁸⁷ Gabriel Kuris, above n 81.

¹⁸⁸ Public Prosecutor’s Office (Brazil), <http://www.mpf.mp.br/>

prosecutorial powers. First, it will require an amendment to Article 145(3) of the Federal Constitution and provisions of the Criminal Procedure Code that vest the power to prosecute solely in the hands of the Attorney General as Public Prosecutor. Secondly, it would lead to an overlap of prosecutorial and investigation functions that are currently separately conferred on the Attorney General as Public Prosecutor and the MACC respectively. The MACC should focus on its investigative functions that should include detection and investigation. Thirdly, there will be no basis in granting one enforcement agency prosecutorial powers and denying others such as the Police. This would result in a fragmentation of prosecutorial powers without any valid justification.

169. We therefore recommend that it may be time to consider creating a separate office for the Attorney General and a Public Prosecutor with the public prosecutor being granted the mandate to act autonomously in accordance with public interest, to improve perceptions on the impartiality of the prosecution of cases given the aforementioned report by PEMANDU on the high incidence of offenders charged but not convicted in terms of politicians (91%) and local authorities (80%). This would obviate the inherent conflict of interest alluded to above.

Part V: Case Study – HK ICAC

Case Study: Hong Kong Independent Commission Against Corruption ¹⁸⁹	
Introduction	The ICAC is an independent dedicated agency tasked to tackle corruption in Hong Kong. Today, Hong Kong is an international financial and service centre with world-class facilities and infrastructure. One of the pillars of its success is a corruption-free government and a level playing field for business.
History	<p>Corruption was a big problem in 1974, the year when the ICAC was born. Indeed, corruption tales could easily be traced back to the middle of the last century, if not earlier. Before World War II the triads (criminal gangs) in Hong Kong were already collecting protection money from the wealthy, with the assent of the police. There were then some 65,000 triad members under the control of five families; this amounted to well over ten times the size of the police force. During the War, the triads profited from collaborating with the invaders. After liberation, they continued to run vice, drug and gambling rackets. More than two million people arrived in Hong Kong between 1944 and 1950 and “the crowded Colony was chaotic.”¹⁹⁰</p> <p>The fateful blend of chaos and bloom resulted in some economic miracles, but also runaway corruption. Often the management systems would find themselves unable to cope up with the exploding demands. Bribes were seen by the unscrupulous as the key to a short-cut. By the 1960s, graft was widespread in the public sector. Vivid examples included:</p> <ul style="list-style-type: none"> • firemen negotiating for ‘water money’ before they would turn on the hose at a fire site; • ambulance attendants demanding ‘tea money’ before picking up sick persons; • even a hospital ‘amah’ would stretch out her hand for tips before bringing a patient a bedpan or a glass of water.
Result	Now Hong Kong has transformed itself from a graft-plagued city into a place distinguished by its strong anti-corruption regime. To quote the Secretary General of Interpol, Mr Ronald Noble, Hong Kong has become “the anti-corruption capital” of the world.

¹⁸⁹ The entire case study is reproduced from Steven Lam, *Tackling Corruption: The Hong Kong Experience*, accessed at http://www.unafei.or.jp/english/pdf/RS_No83/No83_16VE_Lam.pdf, p. 107, on 3 August 2014, unless indicated otherwise.

¹⁹⁰ Attributed to Kevin Sinclair, a New Zealand reporter who worked in Hong Kong for many years, including for The Star, Hong Kong Standard and the South China Morning Post; taken from Steven Lam, above n 189.

According to Heritage Foundation's 2010 Index of Economic Freedom, Hong Kong is rated as the world's freest economy for the 16th consecutive year, out of 179 economies assessed. The assessment is based on various factors, including business freedom and freedom from corruption. The Corruption Perceptions Index released by Transparency International in November 2009 shows that Hong Kong remains the 12th least corrupt place, among 180 places polled.

Syndicated corruption in government departments has long been eradicated. The percentage of reports alleging government corruption had substantially dropped from 86% in 1974 to about 37% in 2009. The proportion of reports against police corruption also drastically decreased from almost 50% in the early years to slightly over 10% nowadays.

Due to a growing awareness of the damaging effect of corruption on business, the private sector has become more forthcoming in referring suspected cases to us. The proportion of private sector corruption reports increased from about 13% of the total in 1974 to over 60% in recent years. Nowadays, as a place which provides a fair business environment, Hong Kong attracts investors.

More importantly, the collective attitude towards corruption has fundamentally changed. As the first ICAC Commissioner Sir Jack Cater said: "there can be no real victory in our fight against corruption unless there are changes of attitude throughout the community."

Method

In the space of three decades, a new culture – a culture of probity – has evolved and taken root in our community. The following indicators may illustrate the magnitude of changes in the social values and culture of our society:

- (a) Low public tolerance of corruption
- (b) The increase in non-anonymous reports
- (c) Close partnership fostered between the anti-corruption agency and the community
- (d) Public support
- (e) "Quiet revolution" through a holistic approach.

How have these miraculous changes come about? In the words of the former Governor who founded the ICAC, it took nothing short of a "Quiet Revolution" to bring about these changes in the society.

To achieve this quiet revolution, the ICAC has from the beginning adopted a three pronged strategy of attacking

corruption on all fronts. When the agency was first set up in 1974, it embraced a holistic approach in the fight against graft: rigorous law enforcement goes hand-in-hand with preventive measures in plugging corruption loopholes in policies and systems and community education aimed at changing people's attitude towards corruption.

This comprehensive strategy has been hailed by Transparency International (TI)'s Global Corruption Report as an effective world model in fighting corruption.

- (a) Rigorous law enforcement
- (b) Corruption prevention
- (c) The power of education
- (d) The laws

Given its Commonwealth heritage, bribery has been an offence in Hong Kong from as early as 1898, with the enactment of the Misdemeanours Punishment Ordinance (MPO).¹⁹¹ The MPO was replaced in 1948, to cope with the increase in corruption after the Second World War, by the Prevention of Corruption Ordinance (POCO). It adopted the same method of corruption control employed in Singapore in Hong Kong by forming the ACB as a special unit of the Criminal Investigation Division (CID) of the Royal Hong Kong Police Force (RHKPF) to deal with the investigation and prosecution of corruption cases.¹⁹² The ACB was separated from the CID in 1952 but it still remained within the RHKPF. However, the ACB was not effective as its prosecution of corruption offences resulted in between two to 20 court convictions per year.¹⁹³

The ACB initiated a review of the POCO in 1968 and sent a study team to Singapore and Sri Lanka during the same year to examine how their anti-corruption laws worked in practice. The study team was impressed with the independence of their ACAs and attributed Singapore's success in curbing corruption to the CPIB's independence from the police.¹⁹⁴ However, the RHKPF rejected the recommendation to separate the ACB by upgrading it into an Anti-Corruption Office (ACO) in May 1971.¹⁹⁵ In 1971, the POCO became the Prevention of Bribery

¹⁹¹ Steven Lam, above n 189.

¹⁹² H.C. Kuan, *Anti-corruption legislation in Hong Kong—a history* (1981). In R. P. L. Lee (Ed.), *Corruption and its control in Hong Kong: Situations up to the late seventies*.

¹⁹³ J. K. H. Wong, *The ICAC and its anti-corruption measures* (1981). In R. P. L. Lee (Ed.), *Corruption and its control in Hong Kong: Situations up to the late seventies*.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.; Jon S. T. Quah, *Curbing corruption in Asia: A comparative study of six countries* (2003).

Ordinance (POBO), with new offences, heavier penalties and stronger investigative powers written into its provisions.

The POBO is not bad law, **but any law is only as good as it is enforced.** Before the establishment of ICAC in 1974, fighting graft was the sole responsibility of the Anti-Corruption Branch (ACB) of the Hong Kong Police Force. The Head of ACB was an official three substantive ranks below the Commissioner of Police.

The ACO was given more manpower but its credibility was undermined on 8 June 1973, when a corruption suspect, Chief Superintendent Peter F. Godber, escaped to the United Kingdom. Godber's escape angered the public and the government reacted by appointing a Commission of Inquiry to investigate the circumstances contributing to his escape. Consequently, the Governor, Sir Murray MacLehose, was forced by public criticism to accept the Blair Commission's recommendation to establish an independent agency, separate from the RHKPF, to fight corruption.¹⁹⁶

The total strength of the ACB was no more than 200 (actual strength 178 against an establishment of 217), relative to the total police strength of 16,500 in 1974. Furthermore, the most notorious corruption suspects were found from within the police force at that time. No surprise, therefore, that the ACB's performance was less than effective.

In Hong Kong, the anti-corruption horizons changed definitely with the enactment of the "Independent Commission Against Corruption Ordinance" in February 1974. Notably:

- the ICAC Ordinance would have a Commissioner appointed, who, one of the non-politically appointed Principal Officers, would carry as much authority and be of a status equivalent to that of a full-fledged Policy Secretary or the Commissioner of Police;
- the ICAC was to operate independently. Independence means, as prescribed in the law, that the Commissioner of the ICAC "shall not be subject to the direction or control of any person other than the Chief Executive (the Governor of Hong Kong at that time)"; and
- right at its inception, the ICAC was given the legal powers, the policy support, and the resources it needed to pursue its tasks.

¹⁹⁶ Jon S. T. Quah, above n 195.

	<p>Initially the ICAC had 682 officers (actual strength 369); three times that of the Police Anti-Corruption Branch. As of today, the Commission comprises 1,360 officers, operating on a budget of HK\$701 million, approximately 0.3% of the Government's total expenditure.</p>
<p>Success Factors</p>	<p>Inter alia the ICAC's noteworthy reasons for success include:</p> <p>I. Equal Emphasis on Public & Private Sector Corruption¹⁹⁷</p> <p>Hong Kong is amongst one of the earliest jurisdictions to criminalize private sector corruption. The ICAC places equal emphasis on public and private sector corruption. The rationale is that there should not be double standards in society. Private sector corruption can cause as much damage to society, if not more so than public sector corruption. Serious corruption in financial institutions can cause market instability; corruption in the construction sector can result in dangerous structures. Effective enforcement against private sector corruption can be seen as a safeguard for foreign investment and ensures Hong Kong maintains a level playing field in its business environment.</p> <p>II. Partnership Approach¹⁹⁸</p> <p>You cannot rely on one single agency to fight corruption. Everyone in the community and every institution has a role to play. The ICAC adopts a partnership approach to mobilize all sectors to fight corruption together. The key strategic partners of ICAC include:</p> <ol style="list-style-type: none"> 1. Civil Service Commission 2. All government departments 3. Business community 4. Professional bodies 5. Civic societies & community organizations 6. Educational institutions 7. Mass media 8. International networking <p>If there is a measure of success in the anti-corruption work of the ICAC, it should be attributed to the persistent and concerted efforts of the community as a whole.¹⁹⁹</p>

¹⁹⁷ Tony Kwok Man Wai, "Formulating an Effective Anti-Corruption Strategy – the Experience of Hong Kong ICAC", at http://www.unafei.or.jp/english/pdf/PDF_rms/no69/16_P196-201.pdf accessed on 3 August 2014.

¹⁹⁸ Ibid.

¹⁹⁹ Steven Lam, above n 189.

APPENDIX

Table 1: Membership of the various Service Commissions in Malaysia

Commission	Total Number	Ex-Officio Members	Appointed Members	Appointment Stipulations
<p align="center">Armed Forces Council (Article 137)</p>	<p align="center">8+2 if any</p>	<ol style="list-style-type: none"> 1. Defence Minister to be Chairman 2. Secretary General for Defence (civilian member) to act as Secretary to the Council 	<ol style="list-style-type: none"> 1. Representative of Their Royal Highnesses appointed by the Conference of Rulers 2. Chief of Defence Forces appointed by the Yang di-Pertuan Agong 3. Senior staff officers of the Federation Armed Forces appointed by the Yang di-Pertuan Agong 4. Senior officer of the Federation Navy appointed by the Yang di-Pertuan Agong 5. Senior officer of the Federation Air Force appointed by the Yang di-Pertuan Agong 6. Military or civilian members appointed by the Yang di-Pertuan Agong 	

<p>Judicial and Legal Service Commission (Article 138)</p>	<p>2+1 or more</p>	<ol style="list-style-type: none"> 1. Chairman of the Public Services Commission to be Chairman 2. Attorney-General (or Solicitor General) 3. Secretary to the Public Services Commission to be secretary also to the Judicial and Legal Service Commission 	<ol style="list-style-type: none"> 1. One or more other members (who are or have been or are qualified to be a judge) appointed by the Yang di-Pertuan Agong 	
<p>Public Services Commission (Article 139)</p>	<p>Min 6 Max 30</p>	<p>(All appointed)</p>	<ol style="list-style-type: none"> 1. To be appointed by the Yang di-Pertuan Agong upon consultation with the Prime Minister and the Conference of Rulers: 2. Chairman 3. Deputy Chairman <p>Not less than four members but not to exceed 30</p>	<ul style="list-style-type: none"> • Either the chairman or the deputy chairman shall be, and both may be, appointed from among persons who are, or have at any time within the period of five years immediately preceding the date of their first appointment been, members of any of the public services. • A member of any of the public services appointed to be chairman or deputy chairman shall not be eligible for any further appointment in the service of the Federation other

				than as a member of a Commission under Part X of the Federal Constitution.
Police Force Commission (Article 140)	Min 6 Max 10	<ol style="list-style-type: none"> 1. Minister responsible for the police: Chairman 2. Officer of police in general command of the force 3. Secretary General to the Ministry under the Minister 	<ol style="list-style-type: none"> 1. Member of the Public Services Commission appointed by the Yang di-Pertuan Agong 2. Not less than two nor more than six other members appointed by the Yang di-Pertuan Agong 	<ul style="list-style-type: none"> • The Yang di-Pertuan Agong may designate as special posts the posts of inspector General of Police, Deputy Inspector General of Police, and any other posts which in his opinion are of similar or superior status on the recommendation of the Police Force Commission and shall consider the advice of the Prime Minister.
Education Service Commission (Article 141A)	Min 6 Max 16	(All appointed)	<ol style="list-style-type: none"> 1. Chairman 2. Deputy Chairman 3. Not less than four other members <p>Appointed by the Yang di-Pertuan Agong after considering the advice of the Prime Minister and after consultation with the Conference of Rulers.</p>	A member of any of the public services appointed to be Chairman or Deputy Chairman shall not be eligible for any further appointment in the service of the Federation other than as a member of a Commission under Part X of the Federal Constitution.

Table 2: Characteristics of the Service Commissions under Part X of the Federal Constitution

	Armed Forces Council (Art 137)	Judicial and Legal Service Commission (Art 138)	Public Services Commission (Art 139)	Police Force Commission (Art 140)	Education Service Commission (Art141A)
Objective	For the command, discipline and administration of, and all other matters relating to, the armed forces, other than matters relating to their operational use.				
Jurisdiction		Jurisdiction shall extend to all members of the judicial and legal service	Shall extend, subject to Article 144, to all persons who are members of the services mentioned. Does not apply to the Auditor-General, and members of the public services of the State of Malacca and the State of Penang.	Jurisdiction shall extend to all persons who are members of the police force and which shall be responsible for the appointment, confirmation, emplacement, on the permanent or pensionable establishment,	Jurisdiction shall extend to all persons who are members of the service.

			<p>Jurisdiction shall extend to:</p> <p>Members of the general public service of the Federation who are employed in a federal department, or who are seconded to the general public service of the Federation, or in federal posts, or posts which have become federal in the State of Sabah or Sarawak.</p> <p>The Legislature of any State other than Malacca and Penang may extend the jurisdiction.</p>	<p>promotion, transfer and exercise of disciplinary control over the police force: Provided that Parliament provides by law for the exercise of such disciplinary control over all or any of the members of the police force.</p>	
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<p>Functions</p>	<p>The Armed Forces Council may act notwithstanding a vacancy in its membership and may, subject to this Constitution and to federal law, provide for all or any of the following matters:</p> <ul style="list-style-type: none"> • The organization of its work and the manner in which its functions are to be performed, and the keeping of records and minutes; • The duties and responsibilities of the several members of the Council, including the delegation to any member of the Council of any of its powers or duties; 			<p>Federal law may provide for the exercise of other functions.</p> <p>For all or any of the following matters:</p> <ul style="list-style-type: none"> • The organization of its work and the manner in which its functions are to be performed, and the keeping of records and minutes; • The duties and responsibilities of the several members of the Commission, including the delegation to any member of the Commission or police force or board of officers of such force or a committee 	
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	<ul style="list-style-type: none"> • The consultation by the Council with persons other than its members; • The procedure to be followed by the Council in conducting its business (including the fixing of a quorum), the appointment, at its option, of a vice-chairman from among its members, and the functions of the vice-chairman; • Any other matters for which the Council considers its necessary or expedient to provide for the better 			<p>consisting of members of the Commission and of the force of its powers or duties;</p> <ul style="list-style-type: none"> • The consultation by the Commission with persons other than its members; • The procedure to be followed by the Commission in conducting its business (including the fixing of a quorum), the appointment, at its option, or a vice chairman from among its members, and the functions of the vice-chairman; • Any other matters for which 	
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	performance of its functions.			the Commission considers it necessary or expedient to provide for the better performance of its functions.	
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Table 3: MACC hierarchy at the Federal level.

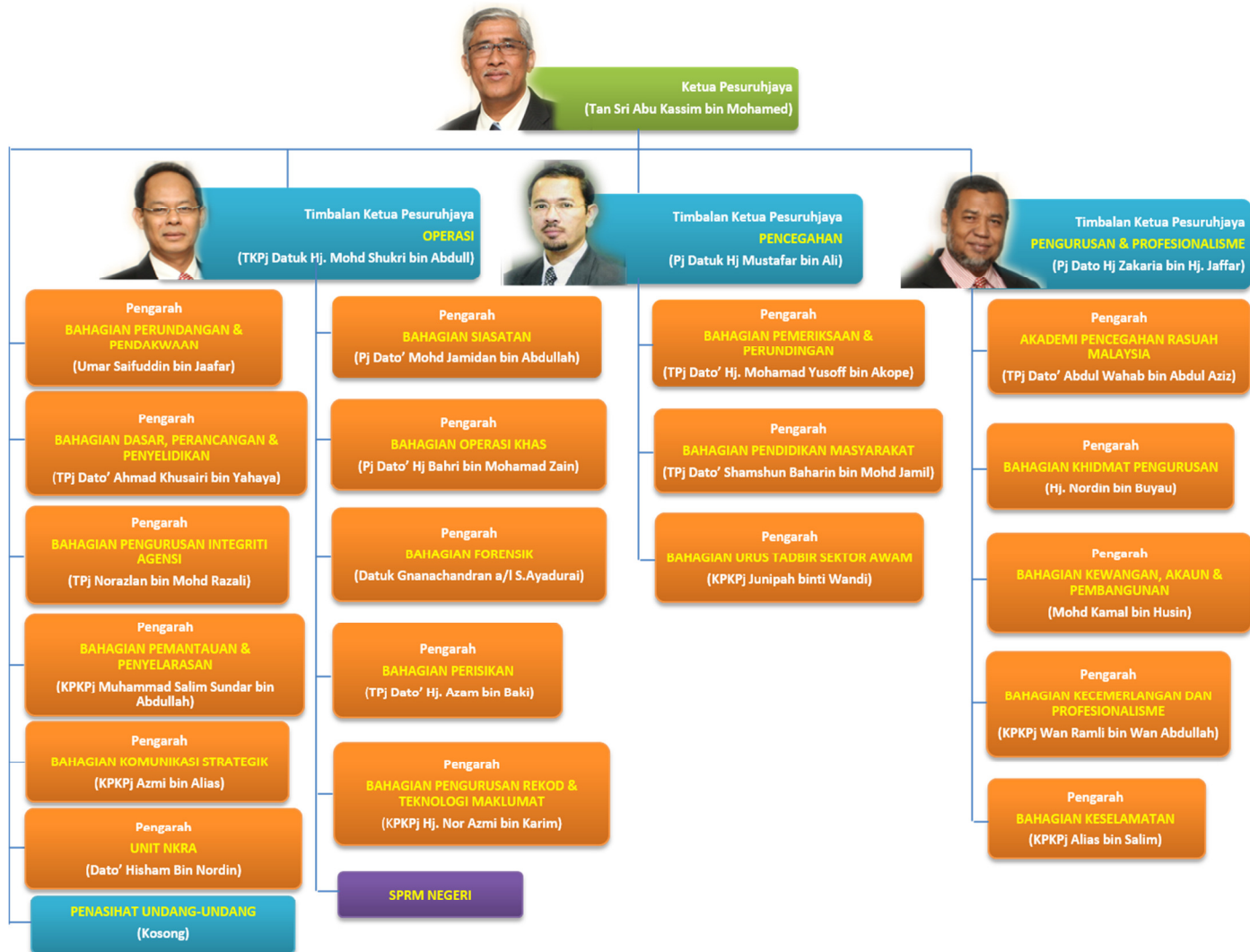


Table 4: MACC hierarchy at the State level

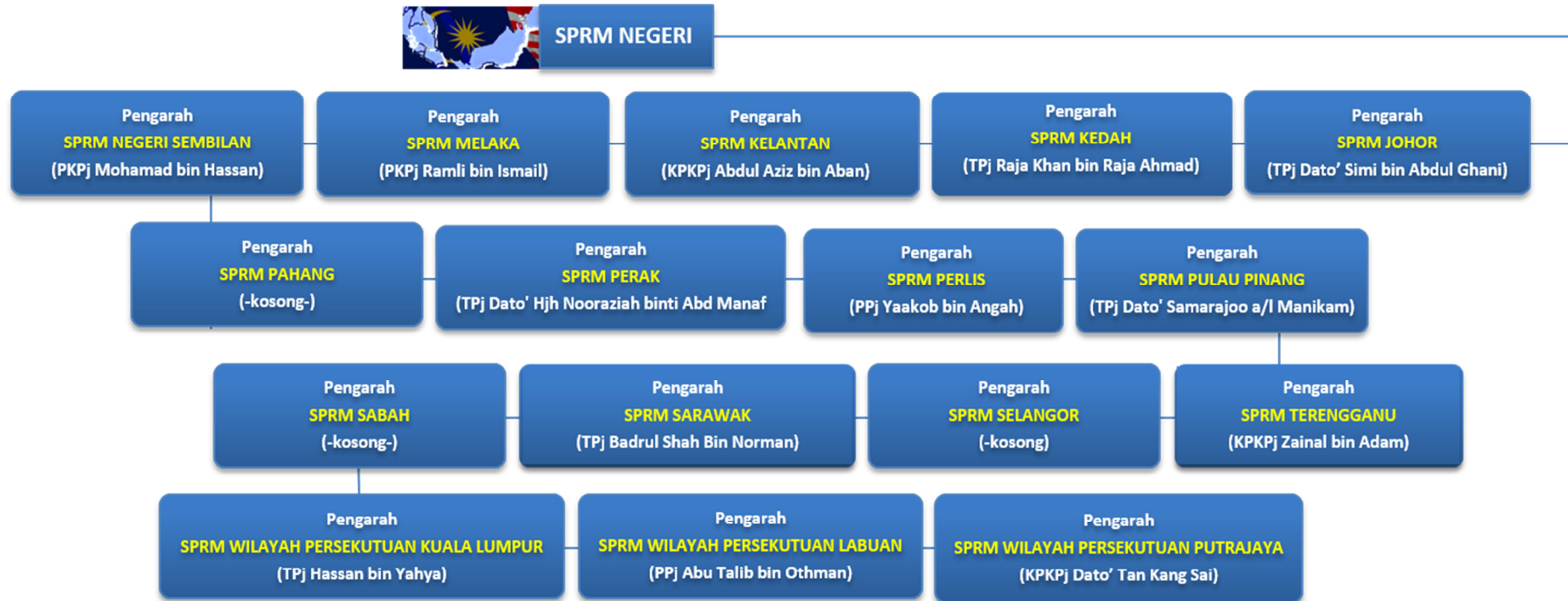


Table 5: Other provisions of the MACC Act 2009 that should be considered for amendment

Section 23: Offence of using office or position for gratification	
(1)	Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.
(2)	For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.
(3)	For the avoidance of doubt, it is declared that, for the purposes of subsection (1), any member of the administration of a State shall be deemed to use his office or position for gratification when he acts contrary to subsection 2(8) of the Eighth Schedule to the Federal Constitution or the equivalent provision in the Constitution or Laws of the Constitution of that State.
(4)	This section shall not apply to an officer who holds office in a public body as a representative of another public body which has the control or partial control over the first-mentioned public body in respect of any matter or thing done in his capacity as such representative for the interest or advantage of that other public body.

Section 36: Powers to obtain information	
(1)	Notwithstanding any written law or rule of law to the contrary, an officer of the Commission of the rank of Commissioner and above, if he has reasonable ground to believe, based on the investigation carried out by an officer of the Commission, that any property is held or acquired by any person as a result of or in connection with an offence under this Act, may by written notice: <ul style="list-style-type: none">(a) Require that person to furnish a statement in writing on oath or affirmation; ...(b) Require any relative or associate of the person referred to in paragraph (1)(a) or any other person whom the officer of the Commission of the rank of Commissioner and above has reasonable grounds to believe is able to assist in the investigation, to furnish a statement in writing on oath or affirmation; ... Require any officer of any bank or financial institution, or any person who is in any manner or to any extent responsible for the management and control of the affairs of any bank or any financial institution, to furnish copies of any or all accounts, documents and records relating to any person to whom a notice may be issued under paragraph (a) or (b).

Section 50: Presumption in certain offences

- (1) Where in any proceedings against any person for an offence under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.
- (2) Where in any proceedings against any person for an offence under section 161, 162, 163 or 164 of the Penal Code, it is proved that such person has accepted or agreed to accept, or obtained or attempted to obtain any gratification, such person shall be presumed to have done so as a motive or reward for the matters set out in the particulars of the offence, unless the contrary is proved.
- (3) Where in any proceedings against any person for an offence under section 165 of the Penal Code it is proved that such person has accepted or attempted to obtain any valuable thing without consideration or for a consideration which such person knows to be inadequate, such person shall be presumed to have done so with such knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved.
- (4) Where in any proceedings against any person for an offence under paragraph 137(1)(b) of the Customs Act 1967, it is proved that any officer of customs or other person duly employed for the prevention of smuggling has accepted, agreed to accept or attempted to obtain any bribe, gratuity, recompense, or reward, such officer or person shall be presumed to have done so for the neglect or non-performance of his duty as set out in the particulars of the offence, unless the contrary is proved.

Section 53: Admissibility of statements by accused persons

- (1) In any trial or inquiry by a court into an offence under this Act, any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of an investigation or not and whether or not wholly or partly in answer to question, by an accused person to or in the hearing of any officer of the Commission, whether or not interpreted to him by any other officer of the Commission or any other person, whether concerned or not in the arrest of that person, shall, notwithstanding any written law or rule of law to the contrary, be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.
- (2) No statement made under subsection (1) shall be admissible or used as provided for in that subsection if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the person, proceeding from a person in authority and sufficient in the opinion of the court to give that person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
- (3) Where any person is arrested or is informed that he may be prosecuted for any offence under this Act, he shall be served with a notice in writing, which shall be explained to him, to the following effect:

“You have been arrested/informed that you may be prosecuted for ... (the possible offence under this Act). Do you wish to say anything? If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.”
- (4) Notwithstanding subsection (3), a statement by any person accused of any offence under this Act made before there is time to serve a notice under that subsection shall not be rendered inadmissible in evidence merely by reason of no such notice having been served on him if such notice has been served on him as soon as is reasonably possible thereafter.
- (5) No statement made by an accused person in answer to a written notice served on him pursuant to subsection (3) shall be construed as a statement caused by any inducement, threat or promise as is described in subsection (2), if it is otherwise voluntary.
- (6) Where in any criminal proceedings against a person for an offence under

this Act, evidence is given that the accused, on being informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so informed, the court, in determining whether the prosecution has made out a *prima facie* case against the accused and in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

- (7) Nothing in subsection (6) shall in any criminal proceedings –
- (a) Prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from that subsection; or
- Be taken to preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from that subsection.

Section 54: Admissibility of statements and documents of persons who are dead or cannot be traced, etc.

Notwithstanding any written law to the contrary, in any proceedings against any person for an offence under this Act –

- (a) any statement made by any person to an officer of the Commission in the course of an investigation under this Act; and
- (b) any document, or copy of any document, seized from any person by an officer of the Commission in the exercise of his powers under this Act or by virtue of his powers under this Act or by virtue of this Act,

shall be admissible in evidence in any proceedings under this act before any court, where the person who made the statement or the document or the copy of the document is dead, or cannot be traced or found, or has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which appears to the court unreasonable.

Section 72: Immunity

No action, suit, prosecution or other proceedings whatsoever shall lie or be brought, instituted, or maintained in any court or before any other authority against –

- (a) The Government of Malaysia;
- (b) Any officer or employee of the Government of Malaysia or of the Commission;
- (c) Any member of the Advisory Board or the Special Committee or any other committee established under or for the purposes of this Act; or
- (d) Any person lawfully acting on behalf of the Government of Malaysia, Commission, officer or employee of the Government of Malaysia or Commission,

For or on account of, or in respect of, any act done or statement made or omitted to be done or made, or purporting to be done or made or omitted to be done or made, in pursuance or in execution of, or intended pursuance or execution of this Act, or in any order in writing, direction, instruction, notice or other thing whatsoever issued under this Act:

Provided that such act or such statement was done or made, or was omitted to be done or made, in good faith.