



Study on Measures to Safeguard the Constitutional Role of the
Anti-Corruption Commission of Bhutan

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The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the Royal Kingdom of Bhutan or of the Bhutanese Anti-Corruption Commission.

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List of Abbrev

AA 2006	Audit Act 2006
ACA 2011	Anti-Corruption Act, 2011
ACC	Anti-Corruption Commission of Bhutan
AGB	Autonomous Grievance Body
BCSR 2012	Bhutan Civil Service Rules and Regulations, 2012
BPKP	Financial and Development Supervisory Board of Indonesia
CEC	Complaints Evaluation Committee
CFS	Complaints and Follow-up Section
CSA 2010	Civil Service Act, 2010
DIC	Disciplinary Inquiry Commission
ECB	Election Commission of Bhutan
ESCA 2010	Entitlement and Service Conditions Act for the Holders, Members and Commissioners of the Constitutional Offices of Bhutan, 2010
HK ICAC	Hong Kong Independent Commission Against Corruption
HK SAR	Hong Kong Special Administrative Region
ICACO 1997	Hong Kong Independent Commission Against Corruption Ordinance, 1997
IDR	Indonesian Rupiah
KPK	Indonesian Corruption Eradication Commission (<i>Komisi Pemberantasan Korupsi</i>)
NACS 2004	National Assembly Committees Act, 2004
NCA 2008	National Council Act, 2008
NSW	New South Wales
NSW ICAC	New South Wales Independent Commission Against Corruption
OAG	Office of the Attorney General
OECD	Organisation for Economic Co-operation and Development
RAA	Royal Audit Agency
RAA	Royal Audit Authority
RCSC	Royal Civil Service Commission
RGoB	Royal Government of Bhutan
UN	United Nations
UNCAC	United Nations Convention Against Corruption
USD	United States Dollar

Executive Summary

The Anti-Corruption Commission of Bhutan (ACC) is tasked with undertaking preventive and educational anti-corruption measures and with investigating and, under certain circumstances, prosecuting cases of corruption as defined in the Anti-Corruption Act of 2011 (ACA 2011). It thus fully meets the standard set forth by articles 6 and 36 of the United Nations Convention Against Corruption (UNCAC) in relation to the existence of one or more dedicated anti-corruption body/ies. Equally in line with these articles of UNCAC and thus in accordance to good international practice, the ACC is set up as an independent institution as per its status as constitutional body. The independence of anti-corruption bodies is indeed prescribed in relevant international treaties and considered by leading international standards and policy makers as a critical prerequisite for the effectiveness of anti-corruption agencies.

In the context of this report, independence is to be understood as having structural and operational autonomy while having a clear legal mandate. International standards notably proclaim that independence for anti-corruption agencies must consist of three critical elements, namely a) freedom from undue political influence, b) freedom to determine its own operations and independently handle the related resources, and c) the existence of adequate checks and balances.

This report has analysed the three main points above and comes to the conclusion that while the broad principle of independence is provided for in the Constitution, there are six areas that may cause limitations to the independence of the ACC:

With a view to ensuring that the institution is free from undue political influence the

report, in relation to (i) the processes for the appointment and the early removal of the Chairperson of the ACC, this report identifies the need to enhance transparency and clarify procedures and to clarify, through the enactment of an appropriate legislation and the establishment of adequate parliamentary procedures, the impeachment process applicable to holders of constitutional offices. Another important aspect in this respect is (ii) the ACC's autonomy to decide on operational and organisational structure, where the report identifies restrictions emanating from article 8(1) ACA 2011 which needs to be amended.

The ACC is further found to be somewhat curtailed in its independence when it comes to its resource management. In relation to (iii) the management of financial resources, the report strongly recommends to introduce binding provisions regarding the budget allocation for ACC, to consider options to enable quick access to additional funds as may be required in complex or high-profile cases, and to review and if applicable further strengthen internal financial procedures and policies. As relates to (iv) the management of human resources by the ACC, the authors of this report urge for the delinking of the ACA from the Royal Civil Service Commission (RCSC), while acknowledging that the ACC, in partnership with other key stakeholders, needs to take a number of organisational and regulatory steps to prepare for this delinking.

Finally the report acknowledges the need to balance independence with adequate checks and balances. These on the one hand must complement existing (v) internal control mechanisms, in particular by establishing strong oversight over the ACC's investigative practice and its (then delinked) human resources management, and on the other hand

must further strengthen (vi) external oversight, in particular by clarifying and enhancing the Parliament's external oversight function, and by agreeing on appropriate audit procedures with the RAA.

The authors of this report encourage the concerned bodies to carefully consider these recommendations and proceed with their implementation. It is the view of the authors of this report that, in line with international standards and the intention of the Constitution of Bhutan, guaranteeing the ACC's full independence through these measures will be essential in ensuring that the ACC can fully exercise its mandate and thereby make an important contribution to achieving the national goal of a vibrant democracy for a stable, secure, prosperous, and happy nation.

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1. Introduction

1.1. Purpose and function of Anti-Corruption Agencies

The role of anti-corruption agencies in combating corruption is widely recognised. With their mandate to prevent and combat corruption, they are seen to play a vital role in continuously improving the quality of a country's governance system, strengthening the rule of law, fostering citizens' trust in public institutions and thereby contributing to enhance economic and social development. Consequently, a growing number of countries in particular in Africa and Asia have over the past decade introduced anti-corruption agencies of various types.

Results, however, have been mixed. While acknowledging their potential, studies and international policy making bodies have recently debated the effectiveness of dedicated anti-corruption agencies, what their scope of work should be, and how they should ideally interact with other agencies involved in fighting corruption. What is common across the various contributions to this debate, however, is that anti-corruption agencies' effectiveness is to a large degree depending on two main factors, namely on the one hand how well they have been adapted to local socio-economic and legal contexts, and on the other hand the level and quality of independence with which they can operate.

To take into account the need to adapt anti-corruption agencies to local context, most international standards are, therefore, not highly prescriptive when it comes to the agencies' operational structures. The UN Convention against Corruption (UNCAC) for example provides for the existence of specialised bodies in two articles and is consciously open

as to whether one specialised institution or a range of (ideally well-coordinated) institutions should fulfil the task of combating corruption. Article 6 obliges states parties to ensure the existence of "a body or bodies" tasked with the prevention of corruption; article 36 mandates the establishment of "a body or bodies" (or even persons) specialised in combating corruption and responsible for anti-corruption law enforcement.

1.2. The Principle of Independence

On the other hand, and in stark contrast to this non-prescriptive approach in relation to agencies' organisational and operational structure and their exact mandate, studies generally concur on the fact that the independence of anti-corruption agencies is a quintessential and non-negotiable prerequisite for their effective functioning. Articles 6 and 36 UNCAC each require that the state parties "shall grant the body or bodies [...] the necessary independence, [...], to enable the body or bodies to carry out its or their functions effectively and free from any undue influence". To guarantee this independence is the responsibility of the state and essentially consists of a duty of the state to protect the body or bodies from undue actions of any third party, and a duty of the state itself to abstain from undue interference with the body or bodies (Husmann et al. 2009, 12).

The apolitical nature of the institution is thus a first essential prerequisite to ensure its independence. How can this be achieved? The independence of an anti-corruption body should, according to the technical guide to the UNCAC, be enshrined in law rather than executive decrees, and ideally constitutional guarantees of independence should be given

to protect the agency from “undue” (political or other) influence (UNODC 2009, 10). Another important safeguard against undue influence identified by the technical guide relates to the appointment, tenure and dismissal of the heads and senior personnel of the institution. The OECD puts much emphasis on the need for a “structural and operational autonomy”, together with a “clear legal basis and mandate” as additional guarantees against undue political influence (OECD 2008, 6). Finally, the UNCAC technical guide strongly recommends the protection of the organisation and its staff from civil litigation for actions performed within their mandate if carried out under the authority of the organisation and in good faith, this again with a view to safeguarding the agency from undue influence (UNODC 2009, 11).

A second important and internationally recognised safeguard of the institution’s independence relates to the availability of and independent use of adequate resources, both financial and human. UNCAC in article 36 mandates state parties to ensure that the anti-corruption body or bodies have appropriate training and resources to carry out their tasks. UNODC in the technical guide interprets this as meaning that agencies have to have an appropriate budget at their disposal as well as suitable financial resources to remunerate staff; and that they should be operating under suitable recruitment, appointment evaluation and promotion procedures (UNODC 2009, 11).

Finally, whilst the need for independence of an anti-corruption agency is widely recognised, it is also clear in literature and international standards that independence cannot mean total autonomy. Even an anti-corruption agency with investigative and prosecutorial powers that may be working on politically sensitive cases has to be subject to a degree of checks and balances. This is essential to ensure that

the agency operates within the fundamental legal framework and the principle of the rule of law on the one hand, and to maintain and nurture public trust and credibility. The OECD in this regard makes it clear that “independence should not amount to a lack of accountability” (OECD 2008, 6) and de Sousa (2010, 13) makes the same point when stating “independence does not mean free will or absence of reporting or external control”. Taking this into account, the technical guide strongly recommends the establishment of checks and balances, such as periodic reporting obligations to another public body, such as the legislature (UNODC 2009, 11).

In summary, international standards and good practice has identified three key components of independence for anti-corruption bodies, which in turn are essential for the effectiveness of such agencies. These include:

- Measures to safeguard the institution from undue political influence;
- Adequate financial and human resources and related procedures; and
- Internal and external checks and balances.

1.3. Anti-Corruption Commission of Bhutan

The Anti-Corruption Agency of Bhutan (ACC) follows the so-called “single-agency” approach as per the mandate prescribed in the Anti-Corruption Act (ACA) 2011, which includes preventive and educational functions in line with Article 6 UNCAC and investigative and prosecutorial powers in line with Article 36.

It is a constitutional body with independent authority (article 27(1) Constitution and article 5(1) ACA 2011), and whose operational independence and financial stability is ensured through articles 6 and 7 ACA 2011. The ACC is not subject to the direction or control of any person or authority while exercising its powers or functions (article 6(2) ACA 2011).

The agency is composed of a Chairperson, two Commissioners (article 27(1) Constitution and article 11(1) ACA 2011) and a Secretariat (article 26 ACA 2011). The Chairperson and Commissioners are not civil servants – pursuant to article 5(b) of the Civil Service Act of Bhutan 2010 (CSA 2010) – and are thus not subject to the Royal Civil Service Commission (RCSC). Their terms of service are contained in the Entitlement and Service Conditions Act for the Holders, Members and Commissioners of the Constitutional Offices of Bhutan 2010 (ESCA 2010). The staff of the Secretariat, on the other hand, are all subject to the RCSC and in particular the CSA 2010 and the Bhutan Civil Service Rules and Regulations (BCSR) 2012. The powers of the ACC to regulate appointments, management and dismissal of staff are to be in accordance with these regulations (articles 8(2) and 28(1) ACA 2011).

The Chairperson and Commissioners (article 34(1) ACA 2011 and article 8 ESCA 2010) as well as the Secretariat of the ACC (article 34(1) ACA 2011) retain functional immunity when their acts have been discharged in good faith in the administration of its responsibilities and duties under relevant laws. The functional immunity shall not cover corrupt acts (article 8 second figure ESCA 2010).

Despite clear provisions in the Constitution, the analysis of subsequent laws would seem to indicate that a number of contradictory or unclear provisions could impede the ACC from enjoying the full scope of the constitutionally guaranteed independence.

1.4. Purpose of this study

Chapters 2 to 4 aim at benchmarking the status quo of the ACC, with a focus on its constitutionally guaranteed independence, against the international standards and good practices identified in relation to the three

components of independence identified in 1.2 above. The purpose of this analysis is to identify measures that may be necessary to fully implement the constitutionally guaranteed independence with a view to further strengthen the effectiveness of the ACC in preventing and combating corruption in Bhutan.



With their mandate to prevent and combat corruption, they are seen to play a vital role in continuously improving the quality of a country's governance system, strengthening the rule of law, fostering citizens' trust in public institutions and thereby contributing to enhance economic and social development.



2. Undue political influence

2.1. Appointment and removal of the Chairperson and Commissioners

a) International standards and good practice

The Chairperson of the ACC is to be regarded as the pillar of the national integrity system of Bhutan. As such, his or her selection and appointment should be transparent, enabling the appointment of a person of integrity on the basis of high-level consensus among different power-holders (OECD 2008, 18). Likewise, the tenure of the Chairperson should also be protected against unfounded dismissals (OECD 2008, 18), with clear and unambiguous criteria and rules for early dismissal.

b) Status quo and gap analysis

The Chairperson of the ACC is a holder of Constitutional Office (article 31(2)(f) Constitution and article 23(1) ACA 2011), who must not have a political affiliation (article 31(3) Constitution and article 12(e) ACA 2011) and is not eligible for re-election (article 31(4) Constitution). The King of Bhutan (*DrukGyalpo*) appoints the Chairperson and Commissioners of the ACC from a list of names recommended jointly by the Prime Minister, the Chief Justice of Bhutan, the Speaker, the Chairperson of the National Council and the Leader of the Opposition Party (article 31(2) ACA 2011).

As mentioned above, international good practice requires two main elements to be taken into consideration when considering the independence of the Chairperson and Commissioners of the ACC: the appointment process and the process for the removal from office (OECD 2008, 18).

While the *DrukGyalpo* appoints the Chairperson and Commissioners based on the list of names

recommended to Him, the names included on the list must meet the eligibility and qualification criteria contained in article 12 ACA 2011. These criteria for the inclusion of persons in the list are vague and do not directly relate to the capacities these persons may have for the prevention and combating of corruption. Some checks-and-balances are in place as the list of names must be jointly recommended to the *DrukGyalpo* by members of the Executive, Legislative and Judiciary branches, from both the government and opposition. The possibility for political interference or favouritism in the indication of names thus seems reduced. However, the procedures used by the nomination committee for the inclusion of names onto the list is not clear. For example, it is not clear whether the names are included based on a majority vote or a unanimous decision. Similarly, it is not clear whether the group of individuals charged with preparing this list have given themselves clear procedures on conflicts of interest and on basic qualifications of potential candidates in preventing and combating of corruption as a criterion for being included in the list. Together these weaknesses in the current system of appointing the Chairperson and Commissioners represents a potential avenue for trying to unduly influence the ACC, and thus a potential threat to the independence of the Commission.

There is a twofold process for the early dismissal of the Chairperson and members of the ACC: (i) the impeachment procedure for the Chairperson, and (ii) the removal process of the members.

The Chairperson can only be removed through the process of impeachment (article 32 Constitution, article 19(1) ACA 2011 and article 17 ECSA 2010). The impeachment process

would be carried out by the Chief Justice of Bhutan, who would preside the proceedings with the members of Parliament, which in turn must concur in two-thirds majority. Some criteria for impeachment can be found in article 32 of the Constitution, namely “incapacity, incompetency or serious misconduct.” However the three criteria lack objectivity, in particular because the capacity and competence are not objectively defined in the Constitution and also because these are not statutory criteria for the selection of the Chairperson. Other than this, the current legal framework of Bhutan does not have legislation or regulation determining the procedures for the impeachment process. Another element of concern is the fact that the Attorney General is to submit a written report on the articles of impeachment. In this regard, it should be noted that the Attorney General is not independent but only autonomous, and appointed by the *DrukGyalpo* by recommendation of the Prime Minister. The Attorney General is the chief legal officer and is the legal advisor and representative of the Government. Thus, in an impeachment process, the Attorney General may be in a conflict situation due to his partial position as the legal advisor and representative of the Government.

With regards to the removal from Office of the two members of the ACC, the rules are contained in article 20 ACA 2011 and article 18 ESCA 2010. The criteria contained therein are clearer than those for the impeachment of the Chairperson, as article 20 ACA 2011 objectively identify the reasons for incapacity (physical, mental or other) and sets out other objective criteria. However, some of the criteria, e.g., incompetence to perform the functions, lack objectivity.

c) Recommendations

Bhutan has put in place solid constitutional guarantees and legislation with a view to

ensuring the independence of the ACC. These include rules for the appointment, term in office and early dismissal. Notwithstanding, the current framework would benefit from further legislation or procedures to ensure greater transparency and strengthen the apolitical nature of the appointment process.

→ There is need to further enhance the transparency and clarify procedures applicable to the selection process of the Chairperson and Commissioners of the ACC. In particular, the selection committee should work under clear and written procedures relating to the selection of individuals for inclusion in the list, conflicts of interest and voting rights and procedures.

→ To ensure that the impeachment proceedings are fully impartial and cannot be misused to unduly influence the ACC, objective regulation for the early dismissal is required to prevent undue political influence. As such the adoption of the impeachment legislation will be important. Amongst others, this legislation should provide clear and objective interpretation to the criteria for impeachment prescribed in article 32(2) Constitution, and provide for additional checks and balances with regard to the procedure of presenting the impeachment in Parliament (e.g., persons with legal standing; analysis, review and investigation of the allegations by both chambers of Parliament), with a view to ensuring due process and protecting the Attorney General from a potential conflict of interest in his role in the impeaAdopt comprehensive impeachment law containing objective rules for the impeachment process of holders of Constitutional offices and establishing adequate procedures for presenting

impeachment in Parliament.

2.2. Autonomous decision making in operational matters

a) International standards and good practice

Within the context and understanding of independence lies also the need for the anti-corruption agency to retain its autonomous decision-making with regard to its organisational structure and the discharge of its operational functions (OECD 2008, 18).

d) Status quo and gap analysis

The ACC, composed of the Chairperson and its Commissioners are constitutionally independent (article 27(1) Constitution), having the duty to act independently, impartially, fairly and in the public interest (article 6(2) ACA 2011) and not being subject to the direction or control of any person or authority (article 6(3) ACA 2011).

The three members of the ACC are supported by the Secretariat of the Commission (article 26 ACA 2011), which is to be comprised of its Head and such staff as required by the ACC (article 26(1) ACA 2011). Unlike the Chairperson and Commissioners, the Secretariat is subject to the rules and conditions of service of the RCSC (article 28 ACA 2011). The ACC also falls under the remit of the RCSC when it comes to determining its organisational structure of its Secretariat which, according to article 8(1) ACA 2011, the ACC may determine only “in consultation with the RCSC” and then administer independently. Chapter 3.2 below is concerned with the independence in relation to human resource management matters. In relation to the organisational aspect of operational independence, the need to consult with RCSC on the organisational structure, as per article 8(1) ACA 2011 is potentially problematic. The

vagueness of the provision on “consulting with RCSC” leaves much room for interpretation, and for the RCSC to potentially obstruct or unduly influence the operational independence of the ACC through this provision.

e) Recommendations

The independence of the ACC is potentially hindered due to the need, as per article 8(1) ACA 2011, to consult with RCSC on the operational structure of the Commission.

➔ Revise article 8(1) ACA 2011 to ensure that the ACC can determine its organisational structure autonomously, without need to consult RCSC or a similar other institution.

3. Resources management

3.1. Financial resources

a) International standards and good practices

As noted earlier, UNCAC in Articles 6 and 36 foresees that anti-corruption agencies should be provided with appropriate resources to carry out their tasks. According to UNODC this includes, inter alia, that agencies have an appropriate budget at their disposal as well as suitable financial resources to remunerate staff (UNODC 2009, 11). Both articles explicitly link the guarantee of independence and the provision by state parties of adequate resources with a view to highlight that the availability of adequate (financial and human) resources are an essential prerequisite for agencies' independence.

Other studies further highlight the need for continuity and sustainability of funding of anti-corruption agencies. In particular OECD (2008) clearly points to the need for legal regulations aimed at preventing unfettered discretion of the executive over the level of funding.

b) Status quo and gap analysis

The ACC receives funding from the regular annual national budget to cover its running costs, i.e. the staff and operational costs. In addition, the ACC can accept funding from development partners.¹ The ACC's budget, including budget as allocated by the Royal Government of Bhutan (Government or RGoB)

and donor funds, for the financial year 2011 corresponded to 0.006% of the total RGoB budget (ACC Institutional Development Plan 2011-20). This is low when compared to the Independent Commission against Corruption of Hong Kong (HK ICAC), considered the world's best-resourced anti-corruption agency with an allocation of 0.3% of the total annual national budget (Kwok 2011, 117) and also among the most successful of such agencies.

The funding from the national budget is regulated in Article 7 ACA (2011), which mandates the state to make adequate financial provisions to the ACC. It is worth noting that, in line with UNCAC and other international standards, Article 7(1) ACA 2011 explicitly links the availability of adequate financial resources to the independence of the ACC. This reiterates the intention of the legislature to effectively guarantee the ACC's independence as per the Constitution, and provides for a strong argument in the event that a future Parliament might be reluctant to allocate adequate resources to the ACA in an attempt to limit its operational effectiveness. On the other hand, the notion of "adequate" is sufficiently vague to make it subject to interpretation and thus dependent on the political will of governments and parliaments to support ACC's work. To reduce the level of discretion by governments and parliaments in allocating budgets to their anti-corruption agencies, other countries have chosen the allocation of a fixed percentage of the annual government budget to their anti-corruption agencies as illustrated above at the example of the ICAC Hong Kong. Experts view this as best practice to guarantee that matters of financial resources do not impede the commissions' independence.

Article 7(2) ACA 2011 is also aimed at ensuring that the ACC is adequately funded

1 In the context of the 10th five-year plan which comes to an end in June 2013, such contributions from development partners included support from the Swiss Agency for Development and Cooperation (SDC) for human resource development and a range of specified operational activities, from the Government of India for the construction of the new ACC headquarters, from Danida, the Asian Development Bank (ADB) the United Nations Development Programme (UNDP), and the Anti-Corruption & Human Rights Commission of the Republic of South Korea.

and not subject to operational insecurity and dependency due to inadequate financing by enabling funding to be provided to the ACC in the event that the national budget related decision-making process in Parliament is delayed. In other countries even stronger provisions have been enacted. For example in Mongolia, any reduction of the budget of the anti-corruption agency compared with the year before is prohibited (Kwok 2011, 117).

Article 7(3) ACA 2011 foresees the provision of additional funding “for ad hoc cases and for complex investigation in accordance with the budgetary process if there is a deficit in the approved budget”. Such provisions on additional, ad hoc funding are not uncommon also in other countries; however they are often comparatively vague, and that is indeed the case also for said provision of ACA 2011, they are often comparatively vague. This is of concern because complex investigations, for which such additional funding may be required, are mostly related to large-scale corruption, which in turn potentially involve senior level bureaucrats or politicians. The regular budgetary process is not only likely to be too slow to enable the ACC to react with adequate speed to the emergence of a large-scale case, but is also likely to provide a number of potential avenues to unduly block or delay the provision of such extra funds, thereby interfering with the ACCs independence and operational effectiveness.

Finally, article 7(4) ACA 2011 gives the Commission “independence to decide and spend the allocated funds within the broad principles of the Financial Rules”. This provision would seem to provide the Commission with relative autonomy in allocating funds while safeguarding the integrity and accountability by requiring them to follow the applicable financial rules also valid for other state funded institutions. However, the autonomy

in allocating resources is only partially true at the moment and does not practically apply to the Commission’s use of resources for human resource related expenditures such as salaries, promotion, training and other allowances. This will be further discussed in chapter 3.2 below.

f) Recommendations

While at the time of this study the funding situation of the ACC is considered adequate, the phasing-out of Bhutan of a number of the ACC’s past development partners combined with the increased workload of the ACC means that additional resources are needed over the coming years. An increase in budget should also be considered in view of the recommendation by leading anti-corruption agency experts that ideally around 0.3% of the total national budget should be allocated to the country’s anti-corruption agency. Related to that the vagueness of the term “adequate” in relation to financial resources exposes the ACC to potential future variations in political will to support the ACC’s work. A more binding provision would be adequate, following the example by ICAC Hong Kong, possibly combined with a safeguard against severe reductions in periods of economic slow-down.

- ➔ The ACC budget should be tied to RGoB budget, with a gradual upward trend over the coming 10 years to between 0.1 and 0.3% of the total RGoB budget. A qualified prohibition of future reductions of ACC budget below a certain absolute level should be considered.

The dependency of the ACC on budgetary processes for extra funding to deal with complex investigations can potentially hinder the capacity of ACC to deal with such important cases. These processes may be exposed to potential undue influence, and they may also be too slow, which is a problem when highly

skilled criminals can cross borders and move their illicitly acquired funds to overseas bank accounts within minimal time. This risk should be mitigated through the long-term increase of funding as suggested above as well as through short-term measures to secure extra funding under specific circumstances.

- ➔ The ACC budget should be increased gradually – see above. In addition, the establishment of an escrow account or another special fund should be considered, ring-fenced for the type of situations as currently described in Article 7(3) ACA 2011 and surrounded by adequate checks and balances. It is suggested that this escrow account be fed with a percentage (suggestion: 15%) of the assets recovered through cases investigated by ACC.

The ACC is given relative autonomy in deciding on the allocation of funds, at the exception of the (important in volume) area of human resources. At the same time, and quite rightly so, these processes need to follow strict rules and procedures, as currently provided by the applicable financial rules. The ACC should take adequate measures to ensure that the ACC is adequately safeguarded against any allegation of misuse of funding or misuse of its independence with regard to financial management and accounting.

- ➔ The ACC should carefully and regularly review its internal policies and procedures that aim at complying with the applicable financial rules, if necessary in cooperation with the Ministry of Finance, the Royal Audit Authority of Bhutan (RAA), the Public Finance Committee of the National Assembly or external experts.

3.2. Human resources

a) International standards and good practices

Studies on the effectiveness of anti-corruption agencies have found the following four HR related factors to be essential in securing an agency's independence and determining the probability of success or failure of anti-corruption authorities (U4 2011):

- Regulations applicable to appointments, promotions and dismissals;
- Integrity of staff;
- Expertise and continuous training; and
- Adequate salary levels.

The selection of staff should be based on an objective, transparent and merit-based system, and they should enjoy an appropriate level of job security in their positions (OECD 2008, 18).

b) Status quo and gap analysis

The Chairperson, Commissioners and staff of the ACC have functional immunity in respect to the official duties done in good faith or intended to be done pursuant to the provisions of the ACA 2011 (article 34(1) first figure ACA 2011). The immunity, however, shall not cover acts of corruption (article 34(1) second figure ACA 2011).

Since the enforcement of the Civil Service Act (CSA) 2010 and the revised ACA 2011, the staff of the Secretariat of the ACC is put explicitly under the rules and regulations of the RCSC, namely the CSA 2010 and the BCSR 2012. The Secretariat, comprising the head of the Secretariat (article 26(1) ACA 2011) and its staff, have the responsibility to, among others and upon delegation of the Commissioners (article 26(2) ACA 2011), plan human resources of the ACC, administer appointments and management and dismissal of staff of the

ACC, but are restricted to doing so within the rules of the CSA 2010 and, consequently, the BCSR 2012. This has brought with it significant challenges to the independence of the ACC in its human resources management and development practices. When considering the four criteria for independence as identified above, this in particular limits the ACC's independence in defining regulations for appointments, promotions and dismissals, its ability to offer training and continuous learning opportunities to its staff that fully meet the ACC's requirements, and severely reduces its ability to offer performance-based, competitive salaries.

The ACC's Institutional Development Plan 2011-20 has identified the following particular restrictions it is currently experiences in relation to its independence as deriving from the status of its staff under the CSA 2010 and the BCSR 2012:

- Limited ability to adjust staffing pattern to changing needs;
- Limited potential pool of recruits;
- Deputation arrangements (no objection certificate from current employer and RCSC approval) reduce likelihood of attracting highly qualified staff for deputation;
- No authority to determine pay scales or allowances (except indirectly through regular, not performance based promotions);
- Limitations in defining the performance appraisal procedures reduce the ability of introducing a modern, strongly performance-based HR management system;
- For out of term promotions RCSC approval is needed, which has in the past caused considerable delays; approval has not systematically been granted by RCSC;
- Recruitment is only against posts previously

approved by RCSC;

- ACC can only contract non-civil servants for positions previously approved by RCSC;
- Non-civil servants are non-eligible for formal training, which seriously restricts the professional development prospects of such direct recruits, which in turn makes such recruitment unattractive.

Therefore, the Secretariat of the ACC cannot be seen as independent, as it must subject itself, for human resource related matters, to the RCSC. The interests of the RCSC may not converge with those of the ACC. While the ACC may indicate the promotion or indication of staff to hold executive positions within the Secretariat, this decision may be overridden by the RCSC. Furthermore, it should be noted that this double-headed system undermines the ability to hold staff of the ACC accountable for their actions. Under the current system, staff must abide (i) by the decision-making process of the Commissioners of the ACC in relation to the activities it performs, and (ii) by the rules, regulations and decision-making process of the RCSC in regards to their performance appraisal, pay grade, promotion, etc. This generates uncertainty for the staff themselves, hindering the effectiveness and autonomy of the actions of the Secretariat.

In this context, it should also be noted that the four constitutional bodies, i.e. the ACC, the Election Commission of Bhutan (ECB), the RAA and the RCSC, whilst their respective provisions in the Constitution are word by word the same, are not dealt with in the same way on this matter. Notably the ECB for example is operating outside the remit of the RCSC.

g) Recommendations

The fact that the staff of the ACC's Secretariat fall under the remit of the RCSC, the CSA 2010 and the BCSR 2012 considerably reduces and

puts at risk the independence of the ACC in exercising its functions as per its constitutional mandate. This has not only been proven through past practice, but has also been observed by a range of international experts that have analysed the independence features of ACC (e.g. Crown Services, UNDP and others). The unequal treatment in this regard of the four constitutional bodies in Bhutan is another indication that clarity in this regard is required. A clear delinking from the civil service clearly would more appropriately reflect the intention of the Constitution which has granted the ACC independence.

- ➔ Articles 8(2) and 28 ACA 2011 need to be revised so as to reflect the status of the ACC under the civil service rules of pre-2011 ACA revisions. The new provisions need to make the ACC's independence in relation to the hiring, promotion and dismissal of staff very explicit.

When the ACC is delinked from the RCSC, it also loses a number of benefits and services as well as crucial oversight functions previously exercised by the RCSC. In line with the important principle that independence cannot mean absolute powers, these control functions and administrative procedures need to be newly developed for the ACC, along the line of best international standards and practice.

- ➔ The ACC needs to aim to complete the current process of defining job profiles and defining training needs (under the new organisational structure), ideally before the end of 2013, with a view to preparing short-term training and long-term development plans for current and future staff.
- ➔ ACC needs to draft service rules for ACC staff (in line with Bhutanese Labour laws and regulations).

- ➔ ACC needs to carefully review its HRM capacity and consider outsourcing aspects of its HR functions. In this regard, and with a view to reducing work load on the commission while ensuring that it maintains lean processes and adequate controls, the administrative processes related to recruitment may be outsourced, while the promotion and dismissal of staff should be handled internally.
- ➔ ACC needs to review whether its current staff will lose any entitlements upon being de-linked from the RCSC and make up for them.
- ➔ To maintain and strengthen its competitiveness on the job market in Bhutan, the ACC further needs to review the current remuneration levels and consider introducing elements of performance based remuneration or extra-remuneration reward packages.
- ➔ The ACC will need to actively reach out to the Royal University of Bhutan, the Bhutan Law College and the Royal Institute for Management with a view to regularly presenting ACC at these institutions and presenting its employment and career opportunities.

4. Checks and Balances

4.1. Internal

a) International standards and good practices

An independent government agency must ensure and preserve accountability for and transparency of its actions, as it needs to be integrated to the system of checks and balances essential for democratic governance (OECD 2008, 19). Independence does not mean free will or absence of reporting or external control, but merely autonomy to act without political interference (De Sousa 2010, 13).

Thus, while discharging its functions, the ACC must ensure that it adheres to the rule of law by, e.g., submitting regular performance reports to high-level executive and legislative bodies, facilitating public access to information, and be subject to court supervision (OECD 2008, 19).

Accountability and independence reinforce each other. The integrity and transparency of the ACC conditions the support of the public – critical in the event of politically motivated attacks (OECD 2008, 19).

h) Status quo and gap analysis

The ACC has within several internal mechanisms for checks and balances. The first of these are the Code of Conduct under article 16 ACA 2011 and the ACC 2008 Ethical Code of Conduct. These provide clear guidance of how the Commission and the Secretariat are to discharge their duties. The rules contained in the Code of Conduct are public and provide clear objective guidance to the Commissioners and staff of the ACC.

The second layer for the internal control is the

oversight by the Commission on the activities carried out by the Secretariat throughout their investigations. Article 17(2) and (3) ACA 2011 establishes that a quorum of two-thirds of the Commission needs to be present in a meeting, and that the Chairperson shall have the cComplaints against any natural or legal person who allegedly committed an offence under Chapter 4 ACA 2011 are to be lodged in accordance to article 77 ACA 2011. This mechanism is also used for complaints made against staff of the ACC. The complaint shall be received by the ACC in accordance to articles 25(f), 77(4) and 78 ACA 2011. Furthermore, in accordance to the Executive Order ACC/SECTT-01/175 of 13 February 2013, the complaints – including those against officials of the ACC – shall be received and registered by the Complaints and Follow-up Section (CFS). The CFS then forwards the complaints to the Complaints Evaluation Committee (CEC), who has the responsibility of evaluating the complaints and recommending appropriate action to the Commission. Therefore, the same mechanism is utilised by the ACC whether it is receiving and processing complaints in relation to corruption-related offences as established by Chapter 4 ACA 2011, or whether it is for actions undertaken by the Staff.

The risk of this approach is that the grievance mechanism against staff of the ACC is handled by the peers of the person(s) against which a complaint may have been filed; this may hinder the impartiality of the analysis of the complaints received. Moreover, the complaints, while processed by the CFS and reviewed by the CEC, are still forwarded to the Commissioners for final decision-making. The Commissioners, however, also have the final responsibility for the actions undertaken by the ACC while discharging its activities. Therefore, if a complaint relates

to ACC staff while discharging its activities, neither the Secretariat or the Commissioners can objectively and impartially assess actions which may refer to their own decision-making process, as per the rules contained in article 17 ACA 2011.

Thus, in order to strengthen the activities of the ACC while ensuring accountability for its actions, an impartial entity should be able to (i) assess any complaints or grievances in relation to actions undertaken by the ACC, (ii) carry out oversight functions on the use of the investigative powers of the ACC, on investigative complaints against ACC employees, (iii) monitor compliance with the law, and (iv) investigate delays in investigations and any unreasonable invasion of privacy. In ensuring that an autonomous entity is able to conduct this oversight function while an investigation is taking place, greater transparency and accountability is to be achieved for the actions undertaken by the ACC as well as to enhance the checks and balances within. As such, and taking into consideration the current institutions in place in Bhutan, the Judicial system of Bhutan is

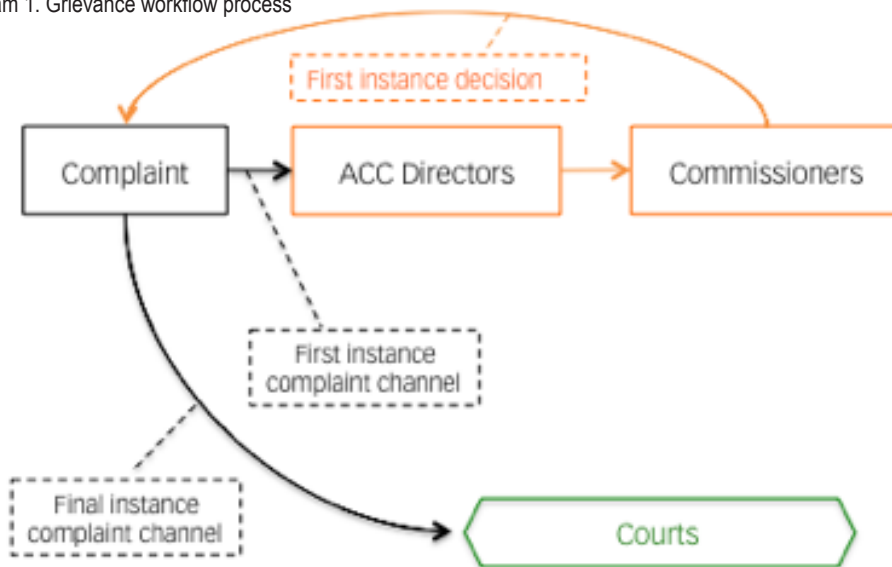
best placed to undertake such actions.

Courts should have the powers to receive complaints regarding activities undertaken by staff of the ACC while it is discharging its activities, and to conduct an appropriate enquiry in relation to the activities that relates to the complaint.

As illustrated in Diagram 1 below, Courts should ideally serve as a second instance complaints handling mechanism, and only become active if the first instance complaints channel (ACC internal) have been fully exhausted and the complainant wishes to appeal against the decision taken by ACC in response to his/her complaint.

Courts become active upon receipt of a complaint. When the complaint comes directly to the Courts without having gone through the first instance complaints channel (see diagram above), Courts can consider transferring the complaint back to ACC for processing through the first instance complaints channel; this transfer may however only happen upon having

Diagram 1. Grievance workflow process



informed the complainant about this decision taken by the Courts. Consideration should be given to empower Courts to, upon pre-defined criteria, temporarily suspend the person(s) concerned by the appeals from further activities in the ACC, pending its final decision.

The findings from the Courts, in relation to complaints received, should be forwarded to the Commission (or to the appropriate body when in relation to one of the Commissioners or the Chairperson) and the complainant.

Another function that will be lacking once the ACC is delinked is a human resources grievance mechanism. As mentioned in the preceding section of this report, the ACC currently retains the authority to determine its organisational structure and to regulate appointments, management and dismissal of its staff (article 8 ACA 2011) within the remit of the CSA 2010. Currently, therefore, the human resource grievance mechanisms of the RCSC applies. As it is the recommendation of this report to delink ACC from the CSA 2010 and the BCSR 2012, a corresponding mechanism needs to be set up to ensure adequate checks and balances in relation to human resource management matters.

Consequently, relevant regulation and

institutional arrangements should be set up within the ACC to ensure that any complaints in relation to the management of human resources, including hiring, promotion and dismissal, is received and reviewed impartially. In this regard, a three-pronged approach is proposed. In the first moment, a complaint would be lodged directly with the Commission, who would forward it to an internal human resource panel. This panel would be composed by a body of peers tasked with revising and analysing the complaint, and would also issue recommendations to assist the Commission in taking its decision on the matter. The decision would be informed to the complainant, who could appeal the decision to an Autonomous HR Appeals Body (HRAB). The work undertaken by the HRAB on this matter would be autonomous, and its decision would be binding. The decision rendered by the HRAB would ultimately be subject to a judicial review – to civil courts or possibly the Administrative Tribunal, once established. This has been illustrated in diagram 2 below.

i) Recommendations

The ACC has a comprehensive set of internal checks and balances that reduce the risk of abuse by the Commissioners and staff. However, and in particular with regards to the de-linking from the RCSC, the ACC should

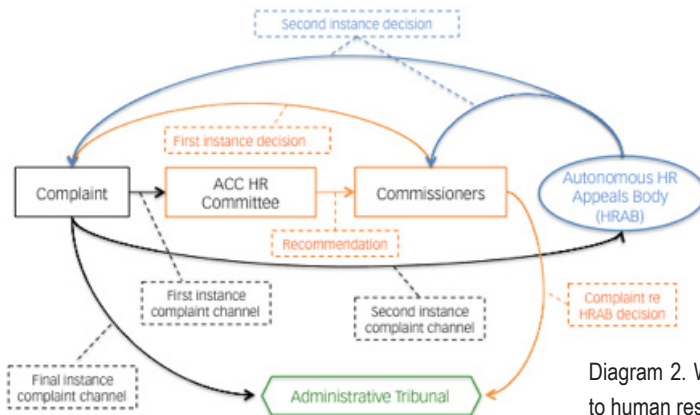


Diagram 2. Workflow of the complaints relating to human resource management of the ACC

consider establishing further mechanisms to ensure full accountability and transparency in the actions undertaken by the ACC.

On the one hand, the ACC is currently lacking an autonomous mechanism to redress grievances related to the activities carried out by the Commission and its staff. The ACC in this regard is utilising the complaint mechanism for corruption-related offences under the ACA 2011 also for complaints made against staff of the ACC. In this regard, the ACC should take reasonable steps to ensure an autonomous grievance mechanism that would allow the review and verification of the actions taken by ACC staff while discharging its activities. The Commission should furthermore subject itself to the decisions taken by this grievance mechanism in order to ensure accountability of its actions. Notwithstanding, the decisions taken by such grievance mechanism should be subject to judicial review, where applicable. The ACA 2011 does not currently foresee such autonomous grievance mechanism. Nevertheless, the rules set forth for the DIC, under article 20(2) ACA 2011, could be applied in the short term.

- ➔ Establishment of an autonomous grievance body for real-time review of actions taken by the ACC during its investigations.

Once de-linked from the RCSC, the ACC will no longer be in a position to utilise those grievance mechanisms provided through the CSA 2010 and the BCSR 2012. As such, the ACC will need to establish sound mechanisms to redress human resource related grievances, including for hiring, promotion and dismissal related issues. This mechanism should be impartial, autonomous and should ensure a favourable working environment. The mechanism should include a human resource grievance mechanism, which

should review the complaints by staff and issue opinions and recommendations that would be forwarded to the Commissioners for final review and decision-making.

- ➔ Establishment of a human resources grievance mechanism to substitute those currently provided by the RCSC.

4.2. External

a) International standards and good practices

Hussmann et al (2009, 15) indicate that oversight is essential in the activities carried out by an anti-corruption agency as it helps strengthen the effectiveness of implementation by providing feedback on the intended outputs and outcomes and by identifying remedial action if the intended objectives are side tracked. External oversight is an integral part of checks and balances, as it enhances accountability of the actions carried out by the ACC.

b) Status quo and gap analysis

The *Druk Gyalpo*, the Prime Minister and Parliament² are responsible for conducting external oversight of the activities carried out by the ACC (article 27(4) Constitution and article 169 ACA 2011). This external oversight is done through the submission by the ACC of its annual report to both chambers of Parliament – the National Council and the National Assembly³.

2 Article 10(1) Constitution indicates that Parliament consists of the *Druk Gyalpo*, the National Council and the National Assembly. The Prime Minister, while the head of Government (article 20(2) Constitution), shall be the leader of the majority party in Parliament (article 17(1) Constitution). It can be concluded that all the oversight activities of the ACC are carried out by the Legislative.

3 The Good Governance Commission of the National Council, and the Ethics and Credentials Committee, and the Public Accounts Committee of the National Assembly review the annual report. These produce reports that are then submitted to their respective chambers in Parliament for approval.

These review the contents of the annual report and, where applicable, invite the ACC to respond to any queries they may have. The chambers of Parliament may issue resolutions⁸ with regards to the annual report for action to be undertaken by the ACC⁹. This mechanism for external verification of the ACC's performance enhances transparency and accountability for the actions undertaken by the ACC.

As regards the National Council, the annual report of the ACC is submitted to its Good Governance Committee and the Ethics and Credentials Committee of the National Assembly. The Public Accounts Committee of the National Assembly shall review the accounts and expenditures of the ACC, pursuant to the report provided by the Royal Audit Authority (RAA), pursuant to Chapter 6 of the Audit Act 2006 (AA 2006). Such procedure ensure the financial transparency of the accounts of the ACC and enable the Public Accounts Committee of the National Assembly to hold the ACC accountable for its expenditures (article 6(b) of the National Assembly Committees Act (NACS) 2004).

Special attention should also be given to article 66 AA 2006, which allows for a separate audit report for confidential information, which cannot be divulged without prior clearance of the Auditor General. This is of particular importance for the investigative work undertaken by the ACC, as divulging financial information pertaining to on going investigations may hamper the effectiveness of such investigations and consequently curtail the independence of the ACC.

The third mechanism of external oversight of the ACC is the possibility to ascertain judicial review for the actions taken by the ACC. Any action undertaken by the ACC during an investigation – or potentially a prosecution

under article 128(3) ACA 2011 – may be subject to judicial scrutiny from any of the parties involved.

j) Recommendations

The current mechanisms for oversight of the activities of the ACC, carried out by Parliament, are adequate and provide accountability for the actions undertaken by the ACC. It strikes an appropriate balance between the independence of the ACC and the need for adequate checks and balances.

Both the National Assembly and the National Council have laws that indicate the rules and responsibilities that Commissions have, as well as their rules and procedures. However, it is unclear what outcomes and outputs should be obtained by the respective Committees, and which decisions need to be taken by both chambers of Parliament. Furthermore, as was indicated during the interviews, it is unclear whether the Resolutions issued by the National Council or the National Assembly are binding. Therefore, and to the extent possible, clarification should be sought in these matters with Parliament, with a view to ensuring objectivity in the decision making process.

➔ Clarification of the rules and functions of the external oversight by Parliament.

The investigative activities carried out by the ACC require discretion in order to prevent any kind of undue influence. Audit reports, however, may allow unwarranted persons to gain access to information on on-going investigative activities. While the expenses incurred by the ACC should be held transparent in order to ensure accountability, it should also have the ability to shield its on-going investigations from unwarranted review to ensure that no sensitive information may be leaked, willingly or unwillingly. Steps should thus be taken by

the ACC to establish, together with the RAA, the conditions and criteria under which the ACC should be in a position to invoke article 66 AA 2006 and request a separate report for confidential information, and a limited circle of people from within the RAA to be authorised to audit these operations of the ACC. The audit report should further remain confidential while the established conditions and criteria are in place, and should be widely disseminated to all relevant institutions once these conditions and criteria are overcome.

- ➔ The ACC should establish and agree upon with the RAA appropriate audit procedures to ensure full compliance and financial accountability of the ACC's financial management while also taking into full consideration the sensitive nature of some of the work undertaken by the ACC.

5. Conclusion

This report has proposed several measures that will enhance and safeguard the constitutional role of the ACC. An analysis has been conducted with a view to ensuring the independence of the ACC while taking into account appropriate checks and balances so as not to allow for any abuse of its powers.

As such, the Secretariat of the ACC should be delinked from the RCSC in order to ensure that the ACC retains full control of the human resource management, including the hiring, promotion and dismissal of staff. In order to do so, the ACC will need to define the current job profiles of the Secretariat, as well as create the necessary rules and regulations in relation to human resource management and development in line with applicable Bhutanese Labour laws and regulations. In order to take this into account, the ACC should also liaise with the Royal University of Bhutan and other institutions that have been delinked from the RCSC, to learn from their experiences. Finally, appropriate and autonomous grievance mechanisms should be put in place by the ACC so that it can absorb the work currently undertaken by the RCSC.

Also on the resource management front, the ACC should strive to obtain a fixed percentage of the RGoB annual budget for funding its activities. This mechanism would ensure that the ACC's activities are not hampered by undue influence on its annual budget. Moreover, adequate audit processes should be put in place to ensure accountability for the expenses and transparency of the expenditures of the ACC.

By safeguarding the constitutional role of the ACC and ensuring its independence, there must also be mechanisms in place to provide for internal and external checks and

balances. In the preceding paragraph checks and balances on expenses have been brought to the attention. However, other grievance mechanisms should be added to the existing ones, in order for ACC to be fully accountable for its investigative actions. An equally important accountability mechanism in existence is the external review of activities of the ACC by the Bhutanese Parliament. As such, this procedure should further be clarified and regulated, possibly also with internal guidance, so as to ensure appropriate checks into the activities of the ACC.

Finally, seeking to shield on the one hand the ACC from undue political influence, and to prevent any conflict of interest from external agents on the other, this reports recommends a revision of the current regulation and practices for the appointment of persons to hold Constitutional Offices, such as the Chairperson of the ACC, as well as the appropriate legislation determining the actual impeachment procedure.

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Annex I – Jurisdictional models

a) New South Wales Independent Commission Against Corruption

Independence and organisational structure

Established in 1989, the New South Wales Independent Commission Against Corruption (NSW ICAC) seeks to ensure integrity in the public administration in New South Wales (NSW). It has jurisdiction over all public sector agencies of NSW to (section 2A Independent Commission Against Corruption Act (ICACA) 1988 No 35):

- Investigate and expose corrupt conduct;
- Actively prevent corruption through advice and assistance; and
- Educate the NSW community and public sector about corruption and its effects.

As can be seen, the NSW ICAC model is similar to the Bhutanese ACC. The main difference, however, is the fact that the NSW ICAC does not have prosecutorial powers, in the event that the Office of the Attorney General (OAG) decides not to prosecute.

The NSW ICAC may initiate its own investigation into serious or systemic corruption, and to investigate any matter referred to it by both houses of Parliament (sections 12A and 13(1) (a) and (b) ICACA 1988).

Human Resources

The ICAC has over 110 employees working in a range of highly specialised operational and corporate support roles. Employees have expertise in areas such as investigation, law, public administration, finance, business management, governance, education, and information technology, including computer forensics.

The NSW ICAC is responsible for hiring, managing, promoting and firing its staff. Appointment to a position at the NSW ICAC is done through a competitive merit based selection process alongside a security vetting process.

Accountability and Structure Mechanisms

The NSW ICAC is not subject to any Government Minister. Notwithstanding its independence accountability for the actions undertaken by the NSW are done through two external and two internal oversight mechanisms:

- The NSW Parliamentary Committee on the ICAC, which monitors the performance of the NSW ICAC and its reports. This Committee consists of 13 members from both houses of Parliament;
- The Inspector of the ICAC, responsible for overseeing the investigative powers of the ICAC. The Inspector further investigates complaints against ICAC employees and monitors their compliance with the law. The Inspector, autonomous from the NSW ICAC, was established in 2005 in order to ensure greater accountability for the actions undertaken by the NSW ICAC.
- An eight-headed internal committee that oversees investigations and the use of the powers conferred oA Code of Conduct for all members of the ICAC, applicable to the internal mechanism of checks and balances of the NSW ICAC.

b) Hong Kong Independent Commission Against Corruption

Independence and Organisational structure

Established in 1974 as an independent body, the Hong Kong Independent Commission Against Corruption (HK ICAC) has three main roles (OECD 2008, 33):

- To pursue corruption through effective detection and investigation;
- To eliminate opportunities for corruption by introducing corruption-resistant practices; and
- To educate the public on the harms of corruption and foster their support in fighting corruption.

In accordance to article 57 of the Basic Law of Hong Kong, the HK ICAC is independent to and accountable to the Chief Executive⁴, and has the power to nominate the Commissioner of the HK ICAC (section 48(5) Basic Law). The Commissioner of the HK ICAC further reports to the Executive Council⁵ on policy issues, and to the Legislative Council⁶ on policy and funding matters.

The Commissioner of the HK ICAC is to submit an annual report to the Chief Executive on the activities of the HK ICAC (section 17(1) Independent Commission Against Corruption Ordinance (ICACO) 1997. The Chief Executive must further forward the annual report to the Legislative Council (section 17(2) ICACO 1997).

Similarly to the Bhutanese ACC, the HK ICAC

4 The Chief Executive of the Hong Kong Special Administrative Region (HK SAR) is the head of the HK SAR (article 43 Basic Law).

5 The Executive Council is an organ responsible for assisting the Chief Executive in policy-making (article 54 Basic Law)

6 The Legislative Council is the legislature of the HK SAR (article 66 Basic Law)

enquires and investigates corruption offences – it does not, however, have prosecutorial powers. In the case of the HK ICAC, the power to prosecute after completion of investigations is vested in the Attorney General.

There are four Advisory Committees within the HK ICAC, each assisting in certain components of the Commission's operation and providing monitoring. Moreover, the HK ICAC has a Complaints Committee, which receives complaints from the public about the officials or the procedures of the Commission, advising it on suitable punishments, changes of practices, etc.

Human Resource

The HK ICAC is granted substantial operational autonomy as well. It has, among others, freedom from the direction or control of any organisation or person, as well as freedom to manage its staff and its resources. Employment contracts for ICAC staff members are independent of civil service rules and made on the basis of mutual consent. Given the relatively high salaries for staff, the ICAC benefits from low turnover; over half of its officers have been with the agency for over ten years, and a stable employee base has significantly contributed to the development of internal expertise in fighting corruption (Heilbrunn, 2004, p. 4). Moreover, as mentioned in section 3.1(b) of this report, the HK ICAC has an allocation of 0.3% of the total annual national budget (Kwok 2011, 117)

Staff are recruited from all sources and appointed to renewable contract terms of two to three years. Special qualifications, screening procedures, and remuneration packages are in place – separate and distinct from the civil service system – to ensure recruitment on merit grounds. HK ICAC staff are given a “gratuity” of 25% of gross salary, on the condition of

“satisfactory performance,” at the end of their employment contracts (Speville 1997, Meagher 2002).

Accountability Structures and Mechanisms

Prominent citizens are appointed by the Chief Executive to oversee the work of the HK ICAC, and compose its four Advisory Committees. Civilian members chair these Committees, which meet at regular intervals to review the activities of the HK ICAC and issue a report to the Chief Executive. This system requires that the HK ICAC submits regular reports that follow clear procedural guidelines for investigations, seizures of property, and the duration of inquiries (Heilbrunn, 2004). The four Advisory Committees⁷ are:

- The Advisory Committee on Corruption, which is tasked to oversee the general work direction of the HK ICAC, advising it on policy matters;
- The Operations Review Committee, which oversees all investigations conducted by the Commission;
- The Corruption Prevention Advisory Committee, responsible for prioritising elements of corruption prevention;
- The Citizens Advisory Committee on Community Relations, which advises the Commission on the strategies of public education.

There is also a separate and independent HK ICAC Complaints Committee, which monitors and reviews all non-criminal complaints against the Commission or its staff. The Committee includes members of the Legislative Council and prominent members of the community appointed by the Chief Executive. In addition, an Internal Monitoring Unit has been established

⁷ http://www.icac.org.hk/en/checks_and_balances/ac/index.html

to investigate all allegations of corruption and related offences made against the ICAC staff. All criminal complaints against staff are brought to the attention of the Secretary for Justice, who will decide whether they should be investigated by the ICAC or another law enforcement agency. All completed investigations are reported to the Secretary for Justice and the Operations Review Committee.⁸

c) Indonesian Corruption Eradication Commission

Independence and Organisational Structure

Established in 2003, the Corruption Eradication Commission (KPK, *Komisi Pemberantasan Korupsi*) of Indonesia is tasked with the combating corruption in Indonesia. Article 6 of Law No. 30/2002 lays down the duties of the KPK.

- To co-ordinate with institutions authorized to combat acts of corruption;
- To supervise institutions authorized to combat acts of corruption;
- To conduct preliminary investigations, investigations and prosecutions against acts of corruption;
- To conduct corruption prevention activities; and
- To conduct monitoring of state governance.

It conducts investigations and prosecutions against corruption when the case: (i) involves public officials and other individuals connected to corruption-related acts; (ii) generates significant public concern, and have lost the

⁸ http://www.icac.org.hk/en/checks_and_balances/bf/index.html

state at least IDR 1 billion⁹ (Jasin 2011, 149).

The KPK is comprised of a Board of Commissioners, an Advisory Team, Deputies and the Secretariat-General, Directors, and Head of Bureaus. The Board of Commissioners is comprised of five individuals – a Chairperson and four vice-chairpersons. The five KPK commissioners are state officials originating from the government and general public. Pursuant to Law No 30/2002, KPK Commissioners are submitted to the Parliament by the President, elected by the Parliament and sworn in by the President, as the Head of State, to a four-year term and they can be re-elected for one additional term. The KPK is an independent body.

Human Resource

To avoid the distortive incentives set by the existing civil service system in Indonesia, the first KPK leadership negotiated with the Government for two years before there was an agreement on the autonomous management of KPK's human resources, in 2005 (Schütte 2012, 46). By the end of 2011, the KPK had over 730 staff (Jasin 2011, 149), consisting of KPK officers and seconded civil servants from other agencies.

All staff is subject to the same human resources and performance management system. Staff get paid a monthly base salary considerably higher than in the civil service, a fixed transport allowance, and possibly bonuses based on the previous year's performance. KPK staff is not allowed to have other sources of income. Seconded civil servants get a topping up if their civil servant salary is below the KPK levels. Compensation, competencies enhancement, and training programmes, as well as key performance indicators, have set

9 Approximately USD 100,000.00 at the time of writing of this report.

clear incentives to work toward organisational goals and raised the opportunity costs to be discharged. Internal oversight mechanisms and increased criminal punishment for KPK staff (by law) have set strong disincentives to engage in common corrupt and extortive practices (Schütte2012, 46).

The investigators and prosecutors of the KPK are chosen mainly from applicants from the Indonesian National Police and the OAG. Other applicants for investigators come from the Ministry of Finance and the Financial and Development Supervisory Board (BPKP).¹⁰ Following their selection, investigators and prosecutors are engaged on fixed-term contracts; if the contracts are not renewed, the officials are expected to return to their home agencies.

KPK recruitment is not mainly done by the KPK but is managed by a private human resource management firm that is competitively procured by the KPK. The firm assesses and shortlists the applicants for the consideration of and decision by KPK management. The KPK claims that this manner of recruitment ensures a very high level of integrity and professionalism in the process.

Accountability Structures and Mechanism

As mentioned previously, a five-person commission that operates as a collegial body, with commissioners appointed to serve a maximum of two four-year terms, leads the KPK. The KPK Board of Commissioners oversees four

10 It should be noted that this approach is the opposite of what some anti-corruption analysts recommend, in part due to fears that the law enforcement agencies in the executive branch are involved in corruption themselves. To guard against this risk, the KPK's recruitment of investigators and prosecutors is highly selective, with the applicants undergoing thorough background checks as well as a battery of technical and psychological tests.

areas of work: (i) prevention, (ii) enforcement, (iii) information and data, and (iv) internal compliance and public complaints.

Financially, the KPK is audited by the Indonesian Supreme Audit Board and should be responsible to the public. In doing its tasks, the KPK has the authority to supervise and co-ordinate with the OAG, as well as the National Police in handling corruption cases.

Annex II – Work plan ACC

Stage 1 – July-September 2013

- Review ACA to assess whether all changes are captured / other captures should be included
- Prepare submission to Cabinet/ Parliament (now to December)
- Provide input to impeachment legislation
- Finalise job descriptions and TNA under new organisational structure

Stage 2 –September 2013 – June 2014

- Prepare service rules and remuneration scheme
- Review financial administration procedures
- Clarify audit arrangements with RAA
- Consider in- vs. outsourcing of HR functions
- Establish HR grievance procedure
- Start implementing recommendations of TNA
- Outreach activities to key recruitment partners such as RUB, RIM and Law college
- Establish mechanism for review of complaints (against ACC investigative practice)

Stage 3 –July 2014 onwards

- Establish escrow account
- Continuous outreach to RUB, RIM and law colleges in the NSW ICAC.
- Casting vote in the event of a tie.

