

KONVENSYEN SURUHANJAYA INTEGRITI AGENSI PENGUATKUASAAN 2013
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ENFORCEMENT AGENCY INTEGRITY COMMISSION – A CRITICAL ANALYSIS

By
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Let me begin by stating a few general principles that I believe would be of relevance to our discussion. Of course, these are general principles and subject to qualifications and adjustments in their application.

First, I believe in professionalism. Just as a brain surgery should be done by a neurology surgeon, investigations, prosecution, including decision to investigate or to prosecute or not, should be done by professionals qualified, trained and experienced in the matter.

Secondly, duplication of duties and powers of government agencies adversely affect the performances of the agencies and, as far as possible, should be avoided.

Thirdly, if an agency suffers from lack of integrity, we should improve the agency whether by improving the system and/or the people, even by replacing the top management. Creating another agency will create other problems while not solving the problems of the earlier mentioned agency.

Fourthly, complaints against a government agency should not be taken at face value as the proof that the agency is seriously suffering from an integrity problem. We should first find out who the complainants are and what their motives are. As an example, take the case of Teoh Beng Hock and compare it with a very similar case involving a Senior Customs Officer by the name of Ahmad Sarbani Bin Mohamed. For detailed discussion, see my lecture titled "Integrity: you know it but do you have it?" (3rd. February 2012)(www.tunabdulhamid.my)

Fifthly, it is wrong to establish a new agency "for political reasons" or in an attempt to silence criticism on existing agencies by opposition politicians. Neither should it be established just because some other countries have it.

Sixthly, while integrity has to be ingrained in an individual from birth to death, at organisational level, the examples has to come from the top. There must be political will, not mere rhetoric, campaigns, talks, seminars but actual practice.

Now let me state some facts about the Commission to form the basis of my discussion.

Section 4 of the Act lists down eight functions of the Commission. I'll mention only one, and that is:

“(a) to receive complaints of misconduct from the public against an enforcement officer or against an enforcement agency in general and to investigate into and conduct hearings on such complaints;”

There are 19 agencies under the purview of the Commission. The Royal Malaysian Police (RMP) is under the Commission’s Jurisdiction but Malaysian Anti-Corruption Commission (MACC) is not.

I am unable to get the total number of personnel of the 19 agencies. However, the number in four of them (i.e. RMP, Malaysian Road Transport Department (JPJ), Royal Malaysia Customs Department and Department of Immigration Malaysia. Total: [122,000 + 8,581 + 12,365 + 11,923 = 154,869]

The Commission has a total of 29 posts. Out of 29 posts:

- 1 post is JUSA C (Setiausaha/Ketua Pegawai Eksekutif) – on secondment from AGC;
- 15 posts are of Management & Professional level, out of which, 10 posts require expertise and experience in investigation and law. Out of the 10 last-mentioned posts:
 - 4 posts are filled up by officers seconded from AGC (1-L54, 1-L52, 1-L48 and 1-L44/41)
 - 6 posts were filled up by officers seconded from MACC (1-P52, 4-P44 and 1-P41), however, since 16th May 2013 (4 days ago) there is only ONE left as the others had been pulled back by MACC. The Commission is in the process of recruiting new officers.

The commission has a budget of RM7 million a year for 2011 and 2012.

Since its establishment in April 2011 until the end of 2012, the Commission received a total of 347 complaints. After **preliminary** investigations were carried out:

- 110 (31.7%) were rejected
- 9 (2.5%) were referred to MACC
- 15 (4.3%) were referred to appropriate disciplinary authorities
- 4 (1.1%) were referred to appropriate disciplinary authority and MACC
- 60 (17.2%) were directed for full investigation.
- 149 (42.9%) required further preliminary investigation.

We see that the Commission has directed 60 complaints to be referred for full investigations, which, under the Act, should be done by the Task Force. However the Commission has not established any Task Force yet. Full investigations were done by the investigators. So far, only 3 cases have been fully investigated. From the 3 completed full investigations:

- 1 was referred to the Disciplinary Authority of the RMP.
- 2 cases were closed on reason of double jeopardy as the complaint was heard and punishment was imposed on the enforcement officers by the appropriate enforcement agency (1 RELA & 1 JPJ)

So, after two years and in spite of the fact that the complaints, so far, were only disciplinary in nature and that the public is generally still not aware of the existence

of Commission, there is already a backlog of 57 cases = 95% (57/60x100)). At this rate, it will take another 38 years just to clear the backlog. That is not taking into account another 149 complaints which require further preliminary investigation.

The Commission did decide for a Task force to be formed to investigate a complaint that arose from the Bersih rally. However, no action has been carried out because contact made with SUHAKAM revealed that SUHAKAM was conducting inquiries on similar complains. The next course of action will depend on the report to be issued by SUHAKAM. (Is this another example of duplication?)

Under section 27(3) of the Act, when the Commission refers a complaint to the appropriate disciplinary committee or the MACC, the committee or the MACC shall conduct its own investigation and communicate its findings to the Commission within thirty days from the date of receipt of the complaints from the Commission. In reality, of the total 32 complaints that were referred for investigation to the appropriate Disciplinary Committee or the MACC, not even one finding of the investigation was communicated to the Commission within the stipulated period of 30 days. Indeed only 12 (37.5%) were completed within six months and I must note that ALL are from the RMP (Does it mean that the Disciplinary Committee of RMP is more efficient?). 20 (62.5%) are still "pending findings" by the agencies. It shows that the time frame given is not realistic.

What is the outcome so far? Of the 12 cases completed by the RMP it was found that in 9 of them the misconduct complained of was not substantiated. Only in one case (8.3%) that the disciplinary action was taken against the officer and in two cases (18.6%) warnings were given to the officers complained against.

The bottom line is, since its establishment in April 2011 until the end of 2012, only one disciplinary action and two warnings had been handed down. For a budget of RM14 million for the two years, they are very costly indeed.

What is wrong? Due to lack of time, I shall focus on the function of the Commission regarding complaints of criminal nature committed by the members of the 19 agencies. Please note that, so far, there has NOT been a single complaint of criminal nature.

First, when you establish a new agency, you recruit new officers. They lack experience and the expertise. To overcome that problem, you either recruit officers from other agencies or you borrow them. How senior are they? It depends on the grades of the post you have. Do you think those agencies will give their best officers? Do you think that officers who think that they have the potential to go very high up in their service would want to apply to be a permanent officer of the Commission where the chances of promotion is very limited. He would not even want to be seconded. It is better to remain in his original service where he will be seen and recognised. A seconded officer usually serves for a period of three years unless extended. In the first year, he tries to familiarise himself with the new job. In the second year he tries to do something substantive. In the third year he is thinking of going back unless he thinks it is better for him to stay on. When a new officer takes over from him the new cycle begins. In fact, he will have to read all the files from the beginning again before deciding from where to continue.

Secondly, the misconduct covered by the Act includes all criminal offences under the law alleged to be committed by the members of the 19 agencies, four of which alone totalled almost 160,000 personnel. Further, we should bear in mind that:

1. The Commission has 6 posts of Investigation Officers but only ONE officer since 16th of May 2013.
2. The Investigation Officers, even if there are, are all based in Putrajaya but the complaints and the witnesses could be from all over the country.
3. Reading section 26(2) and 27(2) together, if the complaint discloses an offence under the Part IV of MACC Act 2009 (i.e. corruption cases), the Commission may refer to MACC. Upon receiving the report from MACC the Commission may decide to take over the investigation and upon notification to the MACC, the MACC must cease further investigation.
4. The Commission has no power to refer complaints of the commission of criminal offences under laws other than the MACC Act 2009 e.g. Penal Code to RMP which means that all such complaints will have to be investigated by the Commission.
5. Besides the Chairperson who was a Solicitor General, only one Commissioner has experience in scrutinizing Investigation Papers and making decision on thereon

The following questions arise:

1. With 6 investigation officers (now ONE), do you think the Commission could handle complaints of disciplinary and criminal nature that could be made against about 160,000 personnel?
2. If, instead of lodging Police Reports, the public decides to lodge complaints to the Commission, could the six Investigation Officers and the Commissioners handle them? The Commission has been lucky so far because the public, due to ignorance or otherwise, choose to lodge Police Reports instead of complaining to the Commission.
3. Do the Investigation Officers have the expertise, experience, facilities and equipments to carry out investigation of offences under all laws? For example, a complaint is made that:
 - some Police Officers had raped a suspect in the lock up; or
 - some Rela members had robbed a group of illegal immigrants; or
 - some Police personnel involved in Operasi Daulat in Lahat Datu had shot and killed innocent civilians; or
 - opposition leaders have held illegal assemblies attended by thousands of people causing disturbance to peace and harmony and the Police have not taken any action against them,
 do you think that the Commission's Investigation officers (even if all 6 posts are filled), could carry out the investigation satisfactorily?
4. While the Investigation Officers are all based in Putrajaya, offences could be committed anywhere in Malaysia and witnesses, even if they are in Malaysia, may not be easily traced for the purpose of recording their statements. Even if they could be traced, to arrange a meeting with them for the purpose, not once but may be repeatedly, would be difficult, time consuming and expensive.
5. Where the Commission refers a complaint to the MACC and the MACC submits its report to the Commission, the Commission may decide to carry out

full investigation by itself and, upon notification, the MACC shall cease its investigation. Do you think that the investigators in the Commission are more capable and are better equipped than their counterparts in the MACC to investigate corruption-related cases?

6. Whether a complaint of criminal nature is referred to the MACC for investigation or is investigated by the Commission, finally, if an offence is disclosed, the Investigation Papers would have to be forwarded as usual, to the Public Prosecutor (the Attorney General) as he is the sole Public Prosecutor in Malaysia. To determine whether a prosecution should or should not be instituted, he might direct further investigation on certain aspects of the evidence. I think that he and his Deputies are in a better position to assess the case than the Commissioners. What is the need for the intervention of the Commission, which at the very least will delay the process?

Based on the facts and the arguments that I have put forward, I would like to pose the following questions:

1. Whether the scope of the Commission's functions should include complaints of criminal offences alleged to be committed by the members of the agencies?
2. Is it not better to leave it to the agencies entrusted with the responsibility to handle criminal investigations and if improvement is needed, those agencies should be improved?
3. Whether the Commission should continue to function in respect of complaints of disciplinary nature?
4. Is it not better for the relevant agencies' Disciplinary Committees to handle them?
5. Can we not rely on the Police Force Commission established under Article 140 of the Constitution, the Public Service Division (JPA), the Chief Secretary to the Government (KSN), and others, over disciplinary matters?
6. Have we forgotten that judicial review is very much alive in Malaysia?

I shall leave it to you to decide. Today you are the Judges.

Thank you.

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