

INTELLIGENCE BASED INVESTIGATION AND PROACTIVE INVESTIGATION: A WAY FORWARD

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I. INTRODUCTION

Malaysian Anti-Corruption Commission (MACC) has operated as an independent agency since 2009 and the year 2012 earmarked as the year of transformation. The entire MACC workforce has absorbed and accustomed themselves with the various transformation implemented in aspects concerning operations, human capital management and prevention activities. However, the MACC has a long history in which the agency was established in October 1967. Working in the small units of the **Anti-Corruption Agency (ACA)** until it became **National Bureau of Investigation (NBI)** in 1982 involving national interest cases, and it was assigned back to **ACA** till 2009 to tackle corruption cases.

In its efforts to raise the level of confidence of the public and international fraternity as to the effectiveness of the MACC, investigation was one of the most important duties of the MACC that needed to be focused on. Due to the complex and involved cross boundary investigations, MACC has adopted a new approach, which is Intelligence based Investigation (IBI), through intelligence fact gathering.

Intelligence based Investigation (IBI) is a methodology which is essential in producing efficient and effective intelligence for the purposes of open investigations. The IBI approach not only shortens the completion time of an investigation but also enables effective pooling of various expertise needed in dealing with complex investigations to yield positive outcomes in every investigation. With advanced technology equipment, networking facilities and complete one-stop office facilities. Outlining of new SOPs and assembly of operational toolkits are currently in their pilot stages of implementation and development of structured training modules.

Fighting corruption is the priority agenda of the government. Nonetheless, the government alone would not be able to successfully eradicate corruption. The establishment of MACC is only a part of the official mechanism to fight corruption but the commission, however effective it is, would not be able to fully eradicate the scourge without the support and trust by all parties concerned.

Our Commission's logo "**Fairness, Firmness and Trustworthy**" is to ensure that all the Commission's actions are done fairly without any prejudice and discrimination in accordance with the law at all times. Besides firmness, the Commission will also investigate all the corruption cases objectively and impartially, and we keep our promise to discharge our duty with full responsibility at all times. Besides that, our client charter has promised to act on complaints on any form of corruption within 24 hours after receiving a complaint and a complainant will be informed upon request on the status of the complaint after 28 working days from the date of the report which he/she had made. I must stress here that only the legitimate complainants will be notified by the commission on the minimal status of the investigation without disclosing all the material evidence in order not to jeopardize the case.

For MACC, having a strong capability is easier said than done; the current success does not guarantee future success. In a way, it is a race against the corrupt and the criminal minded as they resort to use of technology and more sophisticated *modus operandi* to commit corruption. In order to secure the relevant evidence which builds corruption cases, right-minded officers trained by MACA must be prepared to cope with the spirit of the Commission and to combat the corruptors, regardless of his/her position in society or political parties.

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In order to complete the basic training, the new cadets must undergo six (6) months basic training in various aspects and tools before they are posted for the on-job training. These enable them to be ready to fight corruption and carry out the agenda of the Commissions.

II. UNCAC RATIFICATION: OVERVIEW OF THE LEGAL AND INSTITUTIONAL FRAMEWORK AGAINST CORRUPTION OF MALAYSIA IN THE CONTEXT OF IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

Malaysia is a constitutional monarchy based on the British Westminster model. The power to enact laws is vested in Parliament at the federal and state levels. According to article 160 of the Federal Constitution, laws include written laws, the common law, and any custom or usage having the force of law. English law has been adapted to local circumstances. Following the common law tradition, laws are constantly developed through case law. Islamic law is applicable only to Muslims and is administered by state *Syariah* courts in matters not related to corruption.

Malaysia signed the Convention on 9 December 2003 and ratified it on 24 September 2008. The Convention entered into force for Malaysia on 24 October 2008. Among the relevant institutions in Malaysia that contribute towards the fight against corruption are the Malaysian Anti-Corruption Commission (MACC), the Attorney General's Chambers (AGC), the Royal Malaysia Police (RMP), the Royal Customs and Excise Department, the Financial Intelligence Unit of the Central Bank of Malaysia (FIU), the Ministry of Foreign Affairs, the Public Service Department (PSD), and the Judiciary.¹

Malaysia is a member of the *ADB/OECD* Anti-Corruption Initiative for Asia and the Pacific, the South East Asia Parties Against Corruption (SEA-PAC) mechanism, the Asia Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Working Group, the Asia Pacific Group (APG) on Money Laundering, the Offshore Group of Banking Supervisors, the Egmont Group of Financial Intelligence Units, the International Association of Anti-Corruption Authorities (IAACA), the International Anti-Corruption Academy (IACA), INTERPOL, and ASEANAPOL. Malaysia has fulfilled the requirements of the Convention.

III. CRIMINALIZATION AND LAW ENFORCEMENT — OBSERVATIONS ON THE IMPLEMENTATION OF THE ARTICLES UNDER REVIEW

MACCA 2009 addresses the following important issues:

- *Bribery and trading in influence (articles 15, 16, 18, 21)*
Sections 16, 17 and 21 of the Malaysian Anti-Corruption Commission Act of 2009 (MACCA) criminalize active and passive bribery. In all cases the penalty is imprisonment for up to 20 years and a fine, as defined in section 24 of MACCA.
- *Participation and attempt (article 27)*
Section 28 of MACCA regulates all forms of participation. Section 107 of the Penal Code On abetment is also relevant. The interpretative notes in the Penal Code clarify that acts Page 6 of 502 of instigating, aiding or facilitating an offence can also be subsumed under the term abetting. The same interpretation is applicable for abetting under section 28 of MACCA.
- Criminal attempts are legislatively covered in section 28 of MACCA, section 4 (1) (a) of AMLATFA, and section 511 of the Penal Code. Section 28 of MACCA also covers “*any act preparatory to or in furtherance of the commission of any offence*”.

A. What? — History of Intelligence Based Investigation

Today's achievement may go in vain if the investigation methods and strategies remain the same towards corruptors as yesterday. As we race against the corruptors somehow new counter forces need

¹Malaysian Anti-Corruption Commission website: <<http://www.sprm.gov.my/>>.

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to be designed in order to prepare the minds and *esprit de corps* of the fellow officers to win the war against corruption. Once a corrupter has been brought forward to the court, all the methods and operation strategies of the commission have been exposed in the court, the potential corrupter changes his *modus operandi* to the new methods which are beyond the imagination of the enforcement agencies, thus creating new challenge for the commission to track down the *modus operandi*.

Early forms of Intelligence Based Investigation were introduced in Great Britain in the early 1990s and is based on the “Kent Policing Model”.² This investigation focuses on the local crimes depending on the seriousness of the crime and carried out entirely by the intelligence unit. After the completion of the intelligence investigation, all the criminals will be handed over to the open investigation unit to be prosecuted. The “Kent Policing Model” was then upgraded to the new USA model. This new USA model is the combination of intelligence information center and multiple agencies.

Because of misuse, the word “intelligence” means different things to different people. The most common mistake is to consider “intelligence” as synonymous with “information.” Information is not intelligence. Misuse also has led to the phrase “collecting intelligence” instead of “collecting information.” Although intelligence may be collected by and shared with intelligence agencies and bureaus, field operations generally collect information (or data). Despite many definitions of “intelligence” that have been promulgated over the years, the simplest and clearest of these is “information plus analysis equals intelligence”.³

1. Strategies of Intelligence

Intelligence is divided into strategic and operational intelligence. Strategic intelligence provides MACC policy makers with the information needed to make national policy or decisions of long-lasting importance. Strategic intelligence collection often requires integrating information concerning politics, economics, societal interactions, and technologies developments which focus less on the big scale. It typically evolves over a long period of time and results in the development of intelligence studies and estimates. Operational intelligence is concerned with current or near-term events. It is used to determine the current and projected capability of a program or operation on an ongoing basis and does not result in long-term projections. Most intelligence activities support the development of operational intelligence.⁴

Intelligence-based investigations are carried out by: collecting databases from public and private to analyze the information, creating a new intelligence product which covers the ways to handle the criminals and targeted groups, analyze the crime’s trend to reduce it and setting up multiple objectives strategies.

2. Proactive Based Investigation from MACC’s Perspective

Intelligence has been used in the past for the political motivated; however, it was the intelligence policing that sparked most controversy. Undercover policing within the MACC 2009 framework now has been widely used by its officers. On the contrary, it was widely accepted, as long as the MACC officers did not provoke the commission of crimes by those involved in the corrupt practices. Previously, Malaysian anti-corruption laws scholars of the time, similar to our counterparts elsewhere in some of the countries which did not focus on the anti-corruption works, were full of the academics, lawyers and considered these MACC works to fall outside of the framework of enacted legislation.

3. Legal Framework of Undercover Operations

In 2009, under the MACC act by the virtue of *Section 52*, in which the evidence of accomplice and agent provocateur. . . . (a)⁵ no witness shall be regarded as an accomplice by reason only of such witness. . . . (b) . . . shall be presumed to be unworthy of credit by reason only of his having attempted

²United Nation convention against Corruption, signature and ratification status as of 27 September 2003. <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>.

³*Intelligence-Led Policing: The New Intelligence*, Bureau of Justice Assistance, Marilyn Peterson, 2003.

⁴*Intelligence Collection Activities and Disciplines*, Greenbelt, MD: IOSS, April 1991.

⁵*Intelligence Collection Activities and Disciplines*, Interagency OPSEC Support Staff, Compendium of OPSEC Terms, Greenbelt, MD: IOSS, April 1991.

to commit, or abet, having abetted or having been engaged in a criminal conspiracy to commit. . . . And such evidence against such person. . . . (c) Any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial. The Anti-Corruption action candidly stress that the successful use of the ruses to apprehend wrongdoers reflected the professional qualities of the MACC concerned. Action against wrongdoers without fear or favor to this evolution by issuing secret guidelines on the use of the so-called “*special investigative methods*”, had entrusted to the most risky ones to specially trained and equipped special division within MACC also known as the special intelligence division which was led by a director. However, they accepted some of the proactive policing as a means to reach the targets of official investigation in the stricter, lawful, sense of the word.

B. Why?

1. Purpose of Intelligence Gathering

Due to effective intelligence operation conducted jointly by MACC and other relevant agencies, local government agencies combating “Sand” stealing, which is under the purview of the state government, the state officers are vulnerable to all kinds of threats while “on the beat” collecting information, these intelligence operation can be applied. However, the intelligence operations of the state and local law enforcement agencies often are plagued by a lack of policies and procedures.

To neutralize the problem, basic changes are required in the way information is gathered, assessed, and redistributed. All the traditional intelligence functions need to be overhauled and replaced with the cooperative, fluid structures that can collect accurate information for the end users faster.

- Syndicated crimes/organized crimes are alarming and naturally reduce the income of the nation’s economy.
- Witnesses afraid of self-security due to threats and less patriotism
- Most of these syndicated crimes are against the public interest and the nation’s security, and also the state’s natural resources have been taken away without following the proper channels.
- Other relevant authorities, such as local enforcement not capable to encounter the threats of rings which need federal enforcement assistant to crackdown all illegal activities i.e Sand stealing, illegal mining, etc.

The ultimate purpose of proactive investigation is to assist open investigation by:

- Improving in the overall intelligence operation
- Solving issues or problems as a good planning techniques
- Giving quality data analysis
- Having better development techniques in operation and training

C. How?

The center nerve of intelligence is based on analysis of the collected data; intelligence always requires huge amounts of data and information. Traditionally, collecting data from various sources such as overt and covert, it has aspects of intelligence, with law enforcement and supporting teams dedicating significant resources to gathering data. Current trends should focus on the crime analysis methods which analyze the crime pattern, time-series, behavioral analysis and so forth.

One way to reevaluate intelligence is to include a feedback form with each product that is disseminated. To ensure that the comments made are valuable, the form should focus on the questions which need to be more specific, and it will be useful for intelligence purposes.

Identifying syndicated crime using the relevant approach, finished intelligence products contain

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information that are compared, analyzed and weighted to allow the development of conclusions. Finished intelligence is produced through analytical review in the intelligence process. The intelligence process confirms a fact or set of facts through a multiplicity of sources to reduce the chance of erroneous conclusions and susceptibility to deception.

1. Tools

(a) Informants

An informant normally is a person who knows better about the crimes which are going to be investigated. Informants can help the intelligence in high profile cases which are hard to penetrate through normal investigation, by providing a better way for the investigation to start. If someone had been assigned, he or she may be limited to certain information, so all those involved should establish information-sharing databases and receive intelligence awareness training to be able to interpret information using analytical methods.

(b) Deep cover

The deep cover officers task would be to penetrate organized crime circles and collect and gather information which would be used as a strong starting point for open investigation; later they aim to arrest all those perpetrators and seize all the offence-related material to be used as evidence in the trials.

(c) Usage of UCA/UCO

The top management of the MACC would be justified in the withholding of this UCA status by pointing out that the UCA members would gather information and basically they would not be involved in the methods of open investigation. They would have to hand over the collected information to the investigation unit which was created within the intelligence division to established investigation units either in headquarters or zone for further investigation process.

(d) Law, SOP & Guidelines

Create proper SOP and guidelines, regardless of the size and scope of its intelligence operations. Every agency should have mission statements plus policies that can help define the support of command staff for intelligence purposes.

2. Process

The process of proactive based investigation involved:

Step 1 - Focus of the operations

- This IBI method only will be used for syndicated cases which are complex and involve a middle man, and the enforcement agency does not have a forthcoming witness which may lead to the open investigation. It will be carried out through few levels of operation which include intelligence work, undercover operations, spying and investigation.

Step 2 - Facilities in collecting data and information

- This strategy is very important in IBI and the basic technical aid for recording, interception and tapping is a must as a part of the evidence collecting method. Other facilities needed like transportation with a fake licence plate number, a safe house in a hidden place and fake identities for the undercover officers to ensure smooth intelligence operations.

Step 3 - Proactive measurements

- Proactive measurements should be always given a priority in IBI. The systematic working procedures are very important to make sure the operation's success. This method can be achieved by giving important priority to the project paper, using of the undercover officers and undercover agents, fixing the technical aids and zoning system in daily intelligence work.

Step 4 - Usage of informants

- Informant normally is a person who knows better about the crimes which are going to be investigated. Informants can help the intelligence in the high profile cases which are hard to penetrate, by providing a better way for the investigation to start.

Step 5 - Centralized information

- The final strategy in IBI is a centralized information system. By having this type of information system, the investigation can be accomplished in a short period of time, effectively and secretly. Normally a centralized system will be used to profile and intercept the suspects.

3. Training Aspects — Intelligence Based Investigation Course

As a training provider MACA, acting as the key to change within the organization, the recent emphasis on intelligence reveals that many MACC staff involved in intelligence do not fully understand the concepts of intelligence. Its purpose is to establish an awareness program for the young officers to know more about the Intelligence Based Investigation.

Training is basically 40 hours in length and should encompass the intelligence process, the importance of the adopting the IBI concepts, proper handling of information and intelligence, the analytical process, the development and implementation of the collection and plans; and also other ethical issues relating to intelligence.

The course focuses on:

- i) Explaining the principle of the intelligence model at all levels and the roles of intelligence-led investigation
- ii) Explaining how the intelligence requirement is necessary to intelligence-led criminal investigation
- iii) Summarizing security issues in relation to integrity of systems and procedure in an intelligence environment
- iv) Demonstrating a thorough understanding of the role of analysts and the need to manage the input of data

In this course would be shared the best practices and effective strategies, not just focusing on the offenders but the right and safe path for all agencies that combat organized crime. The main aim is to enhance the strategies and operational focus of organizations, federal, states and local entities.

The course contents focus on;

- **National Intelligence model** — This model was designed to focus on the collectively national agenda which involves local issues, cross border issues and serious and organized crimes.
- **Intelligence cycle** — Intelligence requires a leader to understand the basis for planning and conducting tactical operations, as to whether to use local operations or otherwise depending on the situation, particularly with the environment and potential threat. The leaders roles in identifying and understanding the key intelligence needs.
- **Information management** — The know how to handle the source person, and integrated intelligence approaches that bring together many different methods using intelligence as a threads to bind them.
- **Adopting a Proactive Approach** — This program uses proactive intelligence gathering, technology and teamwork to ferret out offenders in the community and uses that information to begin with surveillance ahead of the commission of the offence.
- **Intelligence Product** — The development of intelligence products requires the same responsibilities and resources based on four products, i.e. strategic assessments, tactical assessments, target profiles and problem profiles.

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- **Analytical Investigation Methods**⁶ — To share the very basic investigative analysis techniques using information collected in databases. Further, one will understand and know how to use link analysis by various nationwide and regional databases, analyze the data processing and techniques used by investigators for investigation purposes. Develop and analyze flow charts to enhance the investigation.
- **Operational Order and Briefing** — Operational order, how the operational manner needs to be executed in applying all the intelligence methods. What a brief should consist of is important, but it is also important to know how to give and prepare a brief; above all it must be good, accurate, brief, and clear, and these should be kept in mind during the brief preparation and execution.

MACA has conducted this IBI course and it is designed to provide the intelligence analysis skills to the participants and focuses more on in intelligence process, critical thinking and undercover approaches and techniques. From the course, it develops knowledge, understanding, skills, attitudes, behavior and application on all aspects of the intelligence-based investigation, theoretically and practically. It is also to equip participants with the basic skills and expertise which are fundamental in the undercover operations. The duration of the course in five days and the methodologies include lectures, practical training on undercover operations, presentations and case studies. Since 2011, MACA received 35 participants from 11 countries from all over the world; Sri Lanka, Fiji, Cambodia, Indonesia, Brunei, Taiwan, Palestine, Swaziland, Maldives, Yemen and Nigeria.

4. Success Stories

(a) *Operation "Compact"*

- 47 runners and staff of the Computerized Vehicle Inspection Centre (PUSPAKOM) were busted during the operations. The staff and runners giving the "all clear" sign for faulty vehicles and approving inspections without the presence of the vehicles by taking bribes. Each of the staff members and runners were receiving up to RM15,000 monthly as a bribe. — Intelligence Division, MACC

(b) *Operation "Kawal"*

- Malaysian Custom Officer at Malaysia-Indonesia border checkpoint received corrupt money from gas cylinder smugglers for allowing them to transport prohibited items to Indonesia. Gas cylinders are controlled items in Malaysia under the Control of Supplies Act 1961. They were caught and investigated under Section 16 & 17 of the MACC Act 2009. The outcome from this operation:
 - 8 persons were arrested including one customs officer
 - 5 accused were charged in court for smuggling controlled goods
 - 4 accused pled guilty and one withdrawn charge
 - 1st Accused - Fine RM135,000.
 - 2nd Accused - Fine RM5,000 and one year imprisonment
 - 3rd Accused - Fine RM5,000 and one year imprisonment
 - 4th Accused - Fine RM35,000
 - Total Fine = RM180,000

5. Challenges

From the beginning, legal scholars and even prominent members of the prosecution, quietly protested against the renewal of the undercover policing. First of all the argument is that there was no adequate legal basis for the systematic use of the undercover methods, which could easily infringe in the private lives of the citizens. The other argument is that, it is fundamentally wrong if there is a separation of the "intelligence investigation unit" from the "investigation action unit" in the corruption investigations cases, simply because they are two sides of the same coin.

⁶Malaysian Anti-Corruption Commission Act 2009.

Due to uncertainty in the law and less development law in the area of undercover operations in this country, the courts cannot set binding precedent, but case law nevertheless is important for the interpretation of the law. It has filled the vacuum to some extent.

IV. CONCLUSION

Currently, the Malaysian government must use all resources to eradicate corruption in all sectors, thus, the IBI mechanism will be a catalyst for other enforcement departments to follow in the journey to fight corruption. As for MACC, we would like to actively strengthen exchanges of ideas with others departments, be it from local government agencies or federal organizations, those who seek to join hands to fight corruption in the name of prosperity, mutual respect, and efficiency so as to make a contribution to the national economic prosperity.

Lately, among the local government agencies and federal departments, awareness has grown that a structured intelligence investigation mechanism has become indispensable. The label “proactive”, in our view indicating that law enforcement is taking the initiative which should enable it to prevent crime from occurring or to be present when there are crimes committed, is therefore often used as a synonym for either “*undercover MACC activities*” or for “*special investigation methods*”. Further MACC will use all the resources that have been vested to it to further enhance the capabilities of its officers to the maximum.

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